



Australian Government
Department of Immigration
and Citizenship

Reform of Employer Sanctions (Howells Review)

Regulation Impact Statement

2011



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Reform of Employer Sanctions (Howells Review)

Regulation Impact Statement

Introduction

1. This regulation impact statement has been prepared by the Department of Immigration and Citizenship (DIAC). Its purpose is to assist the Government to make decisions regarding the reduction of illegal work in Australia by non-citizens who work when they do not have a visa with permission to work or who work in breach of their visa conditions.
2. This issue has arisen following the 2010 Review of the Migration Amendment (Employer Sanctions) Act 2007 conducted by independent legal expert Mr Stephen Howells ('the Howells Review').¹ The Howells Review found that the existing employer sanctions framework has not proved to be an effective deterrent against the small number of employers and labour suppliers who persist in allowing or referring for work non-citizens who do not have the required permission. It is estimated that these types of workers represent less than one per cent of the Australian workforce although the proportion is higher in low skilled occupations and certain industry sectors such as agriculture, forestry and fishing, construction and accommodation and food services. While this number may be relatively small compared to the overall Australian labour force (currently in the region of 12 million), it is a serious issue as it can undermine the perceived integrity of Australia's migration program, reduce work opportunities for Australians and non-citizens with permission to work, may put at a competitive disadvantage businesses that comply with the law (by checking the work permission of non-citizens whom they employ or refer for work) and can contribute to the exploitation of vulnerable workers.
3. The existing employer sanctions framework seeks to deter illegal work hire practices through criminal sanctions for the offences of allowing or referring an unlawful non-citizen for work or allowing or referring a non-citizen to work in breach of a visa condition. In addition to these criminal offences, the framework includes administrative warning notices and an awareness campaign that informs businesses who employ or refer of their responsibilities under the employer sanctions legislation.

Objective

1. The objective of this proposal is to minimise illegal work hire practices in Australia whilst limiting the regulatory impact on compliant businesses.

¹ The full text of the Howells Review is available via the Department of Immigration and Citizenship's website through the following link:

<http://www.immi.gov.au/media/publications/compliance/review-employer-sanctions/>

The existing employer sanctions framework

1. Under the *Migration Act 1958* (Migration Act), it is a criminal offence to 'allow to work' or 'refer for work' an unlawful non-citizen or a non-citizen who would therefore be in breach of a visa condition.² These offences were introduced in 2007 by the Migration Amendment (Employer Sanctions) Act 2007. The offences are fault based meaning the prosecution must prove both physical and fault elements beyond reasonable doubt. The physical element is that the employer or referrer allowed or referred for work the unlawful non-citizen or the non-citizen who worked in breach of their visa conditions. The fault element is that the employer or referrer either knew that the worker did not have the required permission to work or was reckless to that fact. These criminal offences attract maximum penalties of two years imprisonment and/or fines of up to \$13 200 for individuals, and fines of up to \$66 000 for companies. The provisions also include aggravated offences where the employer or referrer knows that, or is reckless to whether, the worker is working in a situation of forced labour, sexual servitude or slavery. The penalties for an aggravated offence are up to five years imprisonment and/or \$33 000 for individuals and \$165 000 for companies.
2. The employer sanctions provisions were recommended by the 1999 Review of Illegal Workers in Australia (RIWA). The review recommended three tiers of sanctions: fault based criminal offences; non-fault civil penalty provisions and an infringement notice scheme. The non-fault civil penalty provisions and the infringement notice scheme were deferred in favour of the enactment of the fault-based criminal sanctions (which, as noted above, are the only sanctions in place against allowing or referring non-citizens to work without the required permission).
3. Since the introduction of this sanctions regime was announced, DIAC has conducted an ongoing employer awareness campaign. This campaign is targeted at businesses in high risk industries, and includes visits to businesses during which departmental officers explain employer responsibilities and how employers can check the work entitlements of prospective non-citizen employees using DIAC's free Visa Entitlement Verification Online (VEVO) service. Visits may be generated in a number of ways: from referrals from other government agencies, allegations or dob-ins, DIAC's monitoring activity, analysis targeting high risk industries and from ad-hoc visits.
4. The department regularly visits employers providing advice on employer sanctions and the need to check visa work status. It also continues to educate the broader business community about its responsibilities through various industry outreach programs, providing technical support and practical information on DIAC's website and through the operation of the employer hotline.

² See s.245AA to AK of the Act, see provisions ('Offences in relation to persons who allow non-citizens to work, or refer non-citizens for work, in certain circumstances') available at: http://www.austlii.edu.au/au/legis/cth/num_act/masa2007404/sch1.html

5. Employers and labour suppliers who have previously received an employer awareness visit may be issued with an Illegal Worker Warning Notice (IWWN) to educate and caution them about their responsibilities under the employer sanctions provisions. The warning notices advise employers that they have employed a non-citizen without the required permission to work and warn of the possibility of criminal prosecution. The warning notices are administrative actions only and in themselves pose no actual threat of prosecution. Mr Howells reported that anecdotal evidence indicates that IWWNs rarely create a deterrent. Thus, despite these initiatives, there remain a number of deliberately non-compliant employers and labour suppliers.
6. Experience has shown that the current criminal offences are difficult to prosecute due to the evidential burden to prove 'knowledge or recklessness' to the criminal standard of proof and the requirements of the prosecution policy of the Commonwealth (which requires sufficient evidence to prosecute the case and that it must be evident from the facts of the case, and all surrounding circumstances, that the prosecution would be in the public interest). This difficulty is a key finding by Mr Howells in his review of the effectiveness of the current criminal provisions.
7. Over the past four years DIAC has located some 6000 non-citizens working without the required permission, however, only some one hundred related cases of suspected illegal work have been investigated. One impediment is the lack of clear authority for DIAC officers to gather documentary evidence of the employment relationship or referral for work. Such evidence can only be gathered under specific warrants issued to the Australian Federal Police for use in criminal cases. In addition, evidence establishing 'knowledge or recklessness' to the criminal standard of proof is often lacking or difficult to obtain. Only the strongest of the one hundred cases investigated were referred to the Commonwealth Director of Public Prosecutions as the others were assessed as unlikely to be proven to the standard of 'beyond reasonable doubt' as required in criminal matters. In fact only two cases have been prosecuted (with neither case testing the key elements as facts were conceded or a guilty plea entered).

The problem

1. The problem is composed of two parts; firstly that illegal work hire practices persist in Australia; and secondly that the current legislation and associated enforcement activity which is aimed at deterring businesses from hiring or referring these workers is ineffective.
2. Despite the success of individual departmental compliance actions, the number of non-citizens working without permission has not been seen to decrease. It is not possible to accurately calculate the number of working non-citizens who do not have lawful permission to work or who work in breach of their visa conditions. As at 30 June 2011, DIAC estimates the number of non-citizens working without permission ranges from a lower limit of around 40 000 to an upper limit of around 93 800.

Table 1 - List of activities over 3 years for Illegal Workers

ACTIVITY	2008-09	2009-10	2010-11
Employer Awareness Visits	2228	1423	1097
Illegal Worker Warning Notices	597	609	515
Illegal Workers Located	1231*	1669	1788
Estimate of non-citizens working	(range 40 000 to 93 800) 87 200		

* As a result of updates to departmental systems, this figure differs from what was provided in the 2008-09 annual report

3. There is a substantial case for more effective enforcement and deterrent measures. Particularly in light of Mr Howells' findings that the failure to curb the problem of illegal work invites exploitation of vulnerable people and encourages abusive employment practices. It can also be associated with organised crime, abuses of welfare and tax systems and with fraud. The conduct has impacts on the labour market. It is unfair to those who wait for authorised entry and access to the labour market and it may mean that Australian citizens do not access employment. The situation is more pronounced where work is unskilled and/or requires minimal English language proficiency.
4. The presence of non-citizens who work when they do not have permission distorts the labour market and it gives an unfair competitive advantage to employers who use those workers if they are underpaid. Mr Howells reported that there is substantial evidence that a small number of employers, labour suppliers and intermediaries are conducting organised rackets in which numbers of non-citizens that do not have permission to work are being brought to Australia, used as a cheaper source of labour and are being exploited. Mr Howells found that the existing criminal sanctions do not work. Despite two convictions, key criminal provisions remain untested in the courts. The provisions do not educate nor deter the relevant group of employers and labour suppliers.
5. As discussed above, in DIAC's experience, compiling evidence of 'knowledge and/or recklessness' to satisfy the burden of proof for the criminal offences has been a significant barrier to successful prosecution. Additionally, the existence of fault-based offences coupled with the fact that there is no other sanction apart from an administrative warning, has had the tendency to encourage some employers to remain deliberately ignorant of the visa and work permission status of their employees.
6. In his report, Mr Howells has recommended legislative amendments to address weaknesses of the current sanctions framework through the introduction of non-fault civil penalty provisions and an infringement scheme, with necessary evidence gathering powers to investigate and sanction these types of penalties, to enable DIAC to escalate its response to employer non-compliance. The approach recommended by Mr Howells is detailed below in option two.

Other policies in place to reduce illegal work in Australia

1. The problem of illegal work hire practices is currently addressed in three ways. Firstly, through policies enabling non-citizens to work lawfully. Secondly, through policies aimed at encouraging non-citizens themselves to comply with the conditions attached to their visa, including work conditions. Thirdly, through policies aimed at encouraging businesses from employing or referring non-citizens who do not have lawful permission to work or who work in breach of their visa conditions as described above.
2. The department enables lawful work by non-citizens in Australia temporarily through the provision of a range of visas with work entitlements attached (for example: the 457 business; student; working holiday visa subclasses; and Pacific Seasonal Worker Pilot Scheme). Information is available to prospective visa holders through information to applicants and online fact sheets providing details regarding the range of visas with work entitlements, the conditions of grant and of cancellation. Registered migration agents also provide immigration information and assistance to visa applicants.
3. The policies in place that are focussed on non-citizens aim to encourage voluntary compliance by assisting non-citizens to resolve their immigration status. Where non-citizens are deliberately non-compliant, DIAC has the capacity to enforce compliance through, for example, visa cancellation, detention and removal from Australia. Non-citizens may also be subject to civil sanctions as set out in section 235 of the Migration Act which provides for a maximum penalty of \$10 000 for a non-citizen who works without permission. This sanction is used rarely, as while the non-citizen may have contravened a civil penalty provision, prosecutions are costly and less effective than removing the non-citizen from Australia.

Options

1. The options discussed below include both regulatory and non-regulatory options. Although each option can stand alone, it is also possible to combine a regulatory option with the non-regulatory options to better meet the policy objective.
2. To illustrate the main components of the regulatory options below are diagrams accompanying each option description, based on applying compliance and responsive regulation theory. Membership of the categories in the diagrams is fluid, and businesses will change categories due to factors such as: the availability of information; compliance ease; perceived risk or actual sanction; and severity of sanction.
3. In these diagrams, the 'compliers by default' are businesses that do not need to do anything to comply with the legislation. This may be for a number of reasons, for instance, they may be in low risk industries; only employ family members or people who they know to have work entitlements such as people who have grown up in their local community. Rather than this being their active or discriminatory recruitment strategy, it is reflective of a set of circumstances that occur naturally for many businesses in Australia. The majority of businesses in Australia are compliers by default.

4. The 'voluntary compliers' are businesses that will do the right thing once they know of the requirement and how to comply (i.e. by checking the visa entitlements of prospective or ongoing non-citizen employees). They will absorb compliance costs into their business practices and ensure that they meet their obligations.
5. The 'non-compliers' are businesses that choose not to comply because they lack incentive or encounter difficulties or may accidentally not comply because they are unaware of their obligations. To become compliant, some members of this group would respond to education and awareness campaigns, while others would need to perceive the threat of sanction as a cost that the business would seek to avoid.
6. Finally, at the peak of the triangle, the 'repeat non-compliers' are aware of their obligations and are reluctant to comply because they perceive that the effort or cost of complying or the benefits of not-complying outweigh the perceived threat of sanction. They may only comply following imposition of or threat of a sanction, and if the sanction represents a cost that the business would seek to avoid.

Regulatory options

Option 1: Continuation of the status quo.

Option 2: The Howells approach: reform the employer sanctions framework by supplementing the existing criminal offences with non-fault based civil penalties and an infringement notice scheme.

Option 3: Alternative to the Howells approach: reform the employer sanctions framework by supplementing the existing criminal offences with 'fault-based' civil penalty provisions and a statutory warning notice scheme.

Non-regulatory options

Option 4: Enhancements to the Employer Awareness Campaign (EAC).

Option 5: Enhancements to the Visa Entitlement Verification Online (VEVO) service.

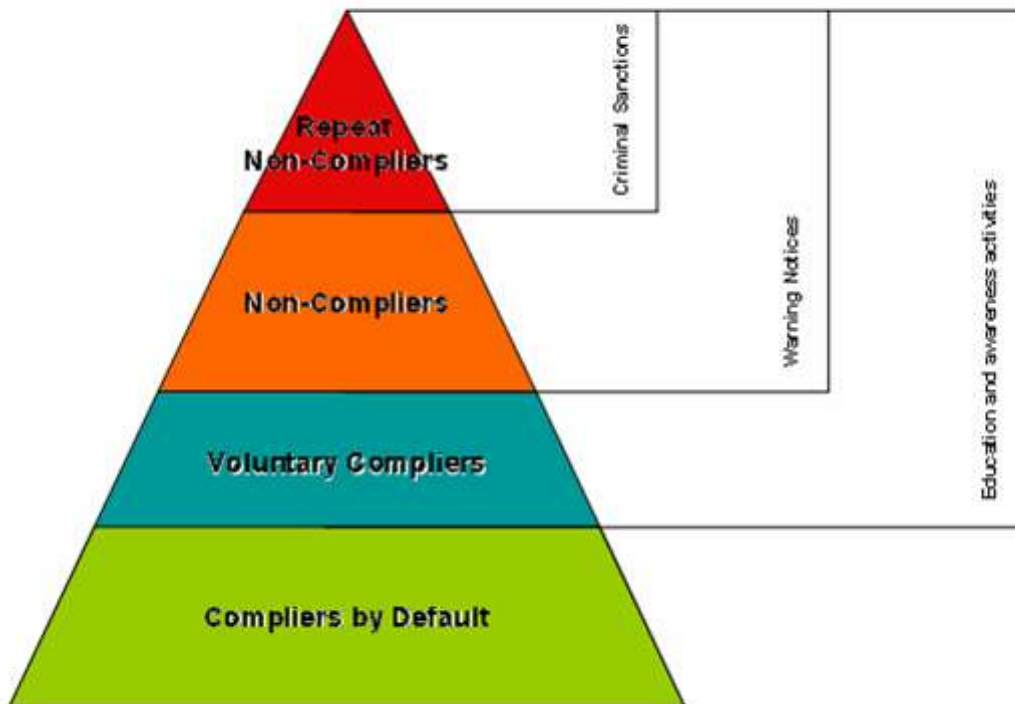
Option 6: Enhanced education campaign for non-citizens about work entitlements.

Option 1: Continuation of the status quo (not recommended)

1. This option proposes to continue the status quo as outlined above in paragraphs 1-6, and as discussed in the Howells Review. Without an effective deterrent mechanism, illegal work hire practices are expected to increase, resulting in more non-citizens working without the required permission.

2. The conduct is expected to increase rather than continue at current levels as the Howells Review has brought illegal work hire practices into public focus and made an explicit finding that the existing framework is inadequate. This accords with the department's experience in dealing with employers on this issue. The motivators or drivers for illegal workers will remain, or will increase, with an aging population. Action to change the behaviour of employers of illegal workers is necessary. Failure to take action upon the findings of the review could suggest that the government is implicitly accepting the conduct. As employers are aware that the offences have proved generally unenforceable, opportunistic employers may view illegal work hire practices as more attractive.
3. The chart below shows that under the status quo, the compliance tool kit is limited to education and awareness and warnings for all non-compliers, and criminal sanctions for repeat non-compliers. With the existing framework being ineffective, and with no additional compliance tools, the non-compliers and repeat non-compliers will remain undeterred. When compared to either option two or option three, the status quo presents as the least effective option to achieve the objective.

Compliance Tools under Option 1 (Status Quo)



IMPACT ANALYSIS— Option 1: Continuation of the status quo

Impact groups	Costs	Benefits
Government	<p>The integrity of the government’s migration program would be undermined (by lack of public confidence).</p> <p>DIAC would experience continued, possibly escalating, compliance effort associated with removal or regularisation of visa status as a result of likely increase in the number of non-citizens working without permission.</p> <p>Failure to address the problem of illegal work now may make it harder to address the problem in the future when it is more entrenched.</p> <p>Continued illegal work could impact the government through non-payment of taxes.</p> <p>Inability for government to accurately identify (and then address) all areas of labour shortages due to use of illegal workers which mask the problem.</p>	<p>Limited Benefits</p> <p>A continuation of the current system would require no additional resourcing for DIAC activities to promote education and awareness, or maintenance of the VEVO system; litigation costs remain low due to small number of criminal prosecutions.</p>
Community	<p>A continuation of the status quo would encourage a rise in the levels of illegal work, potentially encouraging people trafficking and other unlawful immigration by providing job prospects for non-citizens without work permission.</p> <p>A continuation would undermine the voluntary compliance messaging for existing visa holders/over-stayers.</p>	<p>The price of some goods and services may be lower, although this is a result of illegal activity (indirectly through employment of illegal workers).</p>
Job seekers (with valid work entitlements)	<p>Australian, permanent resident and temporary visa holders with unlimited work rights’ employment opportunities would be undermined by the continued instance of illegal work, as market forces favour the employment of non-citizens who do not have work permission who may be paid lower wages.</p>	<p>Job seekers with valid work entitlements may not have to provide this documentation to employers.</p> <p>Less likely to be subjected to discriminatory labour hire practices (as employers are less likely to check work permission).</p>

<p>Non-citizens (who do not have permission to work or who work in breach of their visa conditions)</p>	<p>Continued likelihood of non-citizens who do not have a visa with permission to work or who work in breach of their visa conditions being exploited through low wages and poor working conditions.</p>	<p>Only foreseeable benefits are resulting from illegal activity.</p> <p>This group would continue to work (without permission) in the community, thus providing income to themselves and their families.</p>
<p>Business Repeat non-compliers</p>	<p>Nil costs.</p>	<p>Only foreseeable benefits are resulting from illegal activity.</p> <p>Without any new evidence gathering powers, successful prosecutions would be unlikely as knowledge or recklessness would need to be proven (beyond reasonable doubt). This would provide no incentive to change behaviour. They would continue to avoid compliance costs.</p> <p>Non-compliant employers can undercut compliant businesses by using cheaper labour (by not paying award rates to non-citizens working without permission) enabling these businesses to charge less for their goods or services.</p>
<p>Non-compliers</p>	<p>Nil costs.</p>	<p>Benefits as above.</p>
<p>Voluntary compliers</p>	<p>Compliance costs are the time taken to undertake a work entitlements check, and the time to read employer awareness material.</p> <p>Businesses that employ workers at award rates of pay and conditions will continue to experience a competitive disadvantage to those employing and exploiting illegal workers.</p>	<p>Employers using VEVO to check work permission of non-citizen employees will minimise liability for criminal prosecution under existing sanctions.</p>
<p>Compliers by default</p>	<p>No compliance costs</p> <p>Businesses that employ workers at award rates of pay and conditions will continue to experience a competitive disadvantage to those employing and exploiting illegal workers.</p>	<p>By default, minimise liability for criminal prosecution under existing sanctions.</p>
<p>Small business</p>	<p>Compliant small businesses may experience the impacts of competitive disadvantage more than larger businesses. This may also have a disproportionate impact on regional small businesses.</p>	<p>No additional time costs for undertaking work entitlements checks on VEVO.</p>

1. The foreseeable impact on labour market and wages through the continued use of illegal workers is expected to be low as illegal workers comprise less than one per cent of the Australian workforce, although the impact may be higher in some areas due to localised conditions.

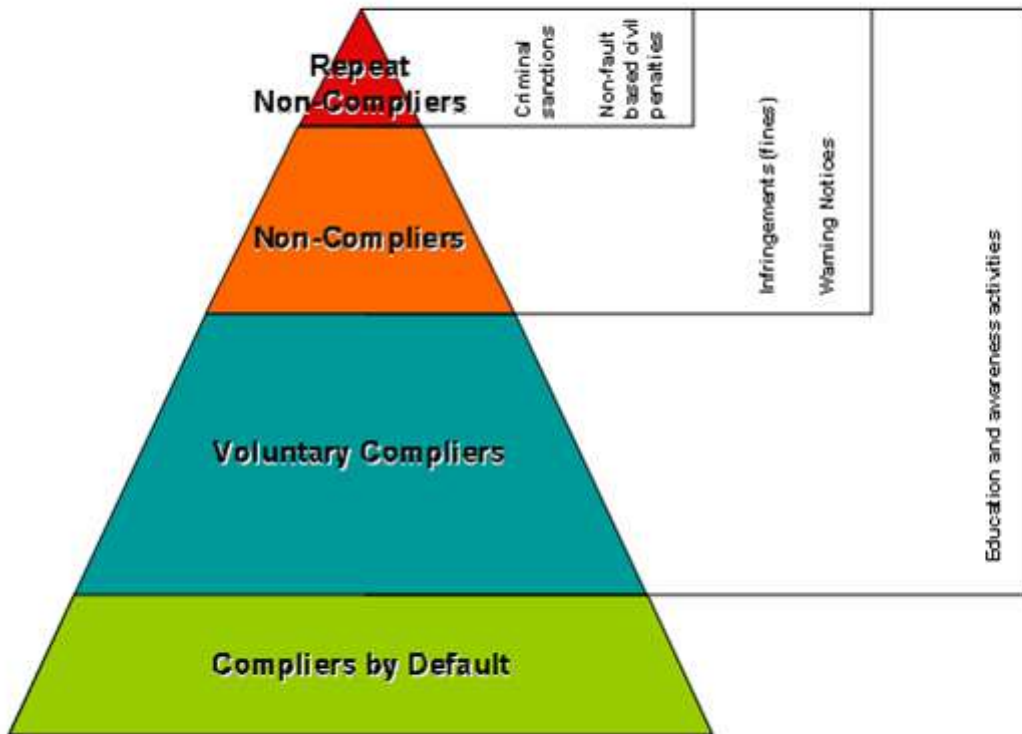
Option 2: The Howells approach – reform the employer sanctions framework by supplementing the existing offences with non-fault based civil penalty provisions, and an infringement notice scheme

1. This option is based on the recommendations of the Howells Review. The proposed framework is designed to deter non-compliant behaviour by implementing enforceable graduated responses. It commences with employer education and awareness and can escalate to administrative warnings, low-level financial infringements or, in selected cases, to courts through the non-fault based civil penalties scheme and the criminal penalties remain available to address the most serious cases.
2. The existing criminal offences and associated penalties will remain in place. The current criminal offence provisions will be amended to clarify the scope of employment relationships that come within the employer sanctions law to address problems identified by Mr Howells where contractors, sub-contractors or sub-sub-contractors are used which has made it difficult to identify the legally responsible party. This element would also apply to the proposed non-fault based civil penalty and infringement notice provisions with appropriate defences being available to those who took reasonable steps to ensure that the non-citizen allowed or referred for work has the required work permission.
3. The new non-fault based civil penalty provisions would be contravened in circumstances where a person:
 - allows a non-citizen to work when that non-citizen does not have current permission to work in Australia
 - refers a non-citizen for work when that non-citizen does not have current permission to work in Australia
 - allows a non-citizen to work in breach of a visa condition that limits or restricts work but only where the breach exclusively occurs as a consequence of that action, or
 - refers a non-citizen for work where that non-citizen would breach a visa condition that limits or restricts work but only where the breach would exclusively occur as a consequence of that action.

4. The civil penalties will be able to be made out on the balance of probabilities. The maximum penalty that a court could impose will be less than the maximum that can be imposed under the criminal offences. There will be statutory defences where the employer or referrer took reasonable steps to confirm or verify a non-citizen held a visa with the required permission to work, thus limiting the impact this proposal has on compliant businesses. Such steps may include viewing evidence of citizenship or permanent residence; viewing a visa label indicating permission to work; or conducting a work rights check via the VEVO system. Note: the expectation is that not all prospective employees would have work permission checks done, only those of non-citizens temporarily in Australia. As now, businesses will continue to need to make judgements about whether it would be appropriate to check the visa and work status of a prospective or ongoing employee. Such steps may include viewing evidence of citizenship or permanent residence; viewing a visa label indicating permission to work; or conducting a work rights check via VEVO.
5. An infringement notice scheme will be created as an alternative to commencing court proceedings for contraventions of these civil penalty provisions. The infringement notice scheme would enable the department to issue an infringement notice in respect of a contravention of a civil penalty provision. The business receiving the infringement notice would have the option of avoiding court action in the first instance by paying the amount specified. The amount of the fine would not exceed one-fifth of the maximum penalty that the court could otherwise impose for the civil penalty.
6. Current powers under the Migration Act do not allow for gathering evidence for civil penalty provisions (and DIAC can not rely on Crimes Act warrants executed by the Australian Federal Police to gather relevant evidence for civil penalty contraventions). New evidence gathering powers will be created to allow authorised DIAC officers to enter premises, inspect any work, interview any person, require documentation, seize documentation, and require information from any person in relation to establishing a breach of the new civil penalty regime and to obtain a search warrant if required. These powers are necessary for DIAC to investigate and sanction employers under the civil penalty and infringement schemes. The powers would be similar to those already provided in the Migration Act for other enforcement and monitoring activity such as those established by the *Migration Legislation Amendment (Worker Protection) Act 2009*.
7. The new employer sanctions provisions will be supplemented by the existing administrative Illegal Worker Warning Notice (IWWN) and reinvigorated and targeted employer education and awareness activities already undertaken by departmental officers.
8. An enforcement strategy will be developed that is focused on encouraging voluntary compliance by informing businesses of the new penalties, how they can comply and pursuing only as many breaches as is necessary to enhance the deterrence message.
9. The proposal will establish an employer sanctions framework designed to maximise voluntary compliance and a graduated series of sanctions where the response can be tailored to the level of non compliance—from education and information, warnings, infringements and civil penalties to criminal prosecution for the most serious of breaches.

- 10.** Enforcement may be escalated (through the new sanctions framework, as demonstrated in the triangle below) when those who know what to do to comply instead chose non-compliance. This approach to enforcement will only work when there is a capacity to escalate deterrents – the existence of an effective infringements and civil penalty provisions regime has value in shaping employer behaviour, even if prosecution activity is relatively low. The DIAC compliance focus will be on information, education and warnings and selective use of infringements and civil penalty provisions where the deterrent impact can be maximised. This will mean a small number of infringements and civil penalties that are carefully assessed to gain the most positive outcome in the courts and maximising our promotion of such wins.
- 11.** An effective campaign aimed at employers and industry groups to raise awareness of the new offences and how to comply, including where it would be prudent to check work entitlements is key for successful implementation. That campaign will focus efforts on high risk industries where employer non-compliance has already been identified. The campaign is detailed in the non-regulatory options below at option four. Providing employers with enhancements and referrers to the VEVO service would also be beneficial. This would be achieved through implementation of option five.
- 12.** The chart below shows the majority of businesses remaining as or becoming compliant through this option. The infringements scheme is designed to deter the non-compliers, as this tool ensures that the risk of detection of non-compliance is real, and the infringements represent a cost that businesses would seek to avoid. To avoid the cost of a fine, businesses need to move further towards the base of the triangle (ie voluntary compliers). Taking into account that some businesses would not seek to avoid a fine of this scale, and may not be deterred, this option provides two higher sanction options (civil and criminal penalties).

Compliance Tools under Option 2



13. With a greater number of more appropriate, and enforceable tools (compared to option one and option three), this option is expected to function as the most effective deterrent. The triangle demonstrates that the majority of businesses will remain or become compliant through this option. The infringements scheme is designed to deter the non-compliers, as this tool ensures that the risk of detection of non-compliance is real, and the infringements represent a cost that businesses would seek to avoid. To avoid the cost of a fine, businesses need to move further towards the base (ie voluntarily complying) of the triangle. Taking into account that some businesses would not seek to avoid a fine of this scale, and may not be deterred, this option provides two higher sanction options (civil and criminal).
14. In this option, the non-fault civil penalty provisions can be proven more easily than the fault based offences provided in option three. When compared to option three, this option would secure more civil convictions, and create a greater deterrent effect, whilst not presenting any significant additional compliance burden on business. Similarly, the infringements scheme presents a cost that businesses would seek to avoid, whereas the statutory warning notice presented in option three does not represent any cost to business and would therefore be unlikely to deter non-compliance.

IMPACT ANALYSIS—Option 2: The Howells approach: reform the employer sanctions framework by introducing strict liability civil penalty and infringement notice schemes.

Impact groups	Costs	Benefits
<p>Government</p>	<p>Legislation is required to amend the Migration Act to impose new strict liability civil penalties and infringement scheme. The amendments would not affect other regulatory authorities.</p> <p>The introduction of the new sanctions regime would require resources to implement (DIAC training, IT systems changes, public awareness and information, etc).</p> <p>Litigation costs may increase, due to the inclusion of civil penalty provisions.</p>	<p>As a non-fault based civil penalties, proving breaches will be easier (as ‘knowledge or recklessness’ does not need to be proven) making the sanction more effective.</p> <p>With the expected deterrent effect of the reforms, there would be fewer opportunities and instances of illegal work, particularly when compared to the likely deterrent effect of option three.</p> <p>The integrity of the visa system controlling the entry of non-citizens would benefit from fewer non-citizens working without permission and supports and reinforces the use of legitimate methods for entering and working in Australia.</p> <p>There would be more effective use of compliance and investigative resources associated with the sanctioning of employers, as the three tiers of sanctions will allow more graduated options to targeted and sanction for the severity of the offence.</p>
		<p>The government will receive increased revenue by legal workers paying taxes, and employers/referrers paying penalties.</p> <p>The government may be able to better identify areas of labour shortages, as less illegal work is undertaken.</p>

Community	Potentially, the price of some goods and services may not be as low as the labour input will not be using illegal workers.	Increased public confidence in the immigration program due to more effective compliance with visa rules. Potentially discourages exploitation, people trafficking and other unlawful immigration by reducing job prospects for non-citizens without work permission.
Job seekers (with valid work entitlements)	Non-citizen job seekers may need to provide proof of entitlement to work in Australia. There is the possibility that job seekers may experience discrimination when seeking work, if they cannot easily verify their identity/work entitlements. This could be avoided through the in-tandem adoption of the employer awareness option.	Improved access to employment opportunities for those non-citizens with permission to work and Australian citizens.
Non-citizens (who do not have lawful permission to work or who work in breach of their visa conditions)	Non-citizens may not be able to obtain work (irrespective that this is the policy objective) and therefore not be able to support their families.	It is likely that there will be less exploitation of this group.
Business Repeat non-compliers	Will be at risk of being issued an infringement or incurring civil or criminal penalties Employers will not be able to use illegal labour to gain competitive advantage.	Nil benefits
Non-compliers	Will be at risk of being issued an infringement or incurring civil penalties Employers may not be able to access illegal labour to gain competitive advantage.	Nil benefits

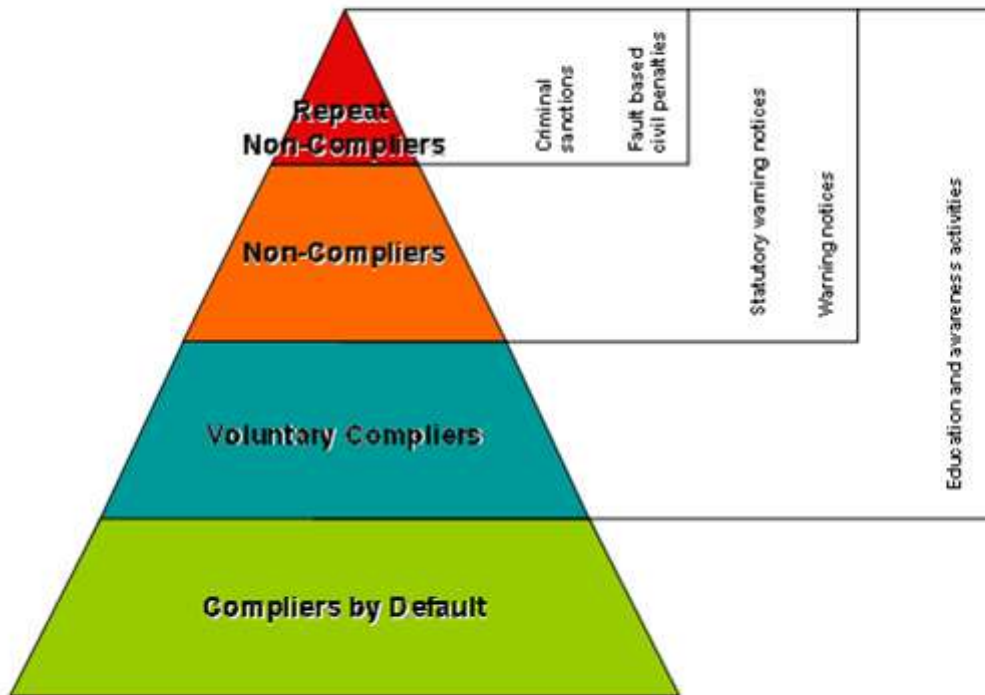
<p>Voluntary compliers</p>	<p>The department currently advises businesses to take a risk based approach to checking the work entitlements of non-citizens they are seeking to employ. In the case of businesses that do not currently undertake such checks, new low level compliance costs may be incurred. The impact may be greater across industries that traditionally employ higher numbers of unskilled or low skilled or itinerant workers, such as the agriculture, construction and accommodation/food service industries.</p> <p>Businesses may risk taking a discriminatory approach towards hiring of workers, and this could lead to litigation.</p> <p>Businesses that choose to use VEVO would incur small cost to connect to the internet and in the time taken to check VEVO (of a few minutes only).</p> <p>VEVO usage is expected to increase as more business become compliant. This is likely to result in an overall increase in time costs to businesses; however, it is not possible to precisely quantify this across all Australian businesses.</p> <p>There may be a proportionally higher impact on businesses in regional areas or particular sectors, which are more reliant on illegal workers</p>	<p>Due to their compliance by checking work permission, these businesses would avoid liability under the new civil penalties and infringements. This would provide incentive to non-compliant businesses to change behaviour, and thereby lead to increased compliance.</p> <p>Increased employer compliance will create greater market competition, as there will be fewer businesses operating with a competitive advantage due to the lower overheads associated with employing illegal workers.</p> <p>Greater market competition will enable more success for compliant businesses, and encourage those businesses to remain compliant.</p>
<p>Compliers by default</p>	<p>The vast majority of businesses fall into this category. They do not employ non-citizens without permission to work. There are no costs to these businesses.</p>	<p>Benefits as above</p>
<p>Small business</p>	<p>Actively compliant small business would likely experience slightly higher time cost when undertaking work entitlements checks.</p>	<p>Compliant small businesses would experience the same benefits as noted above for business generally.</p> <p>Improved competition may more positively impact compliant small businesses, particularly in certain industries or regions.</p>

1. The foreseeable impact on labour market and wages through the reduced use of illegal workers is expected to be low as illegal workers comprise less than one per cent of the Australian workforce (and this number is expected to decrease), although the impact may be higher in some areas due to localised conditions. Similarly, the impact on business in general may differ in some areas due to regional or sectorial conditions, such as greater reliance on itinerant or seasonal non-citizen labour. It is not possible to calculate this with any accuracy, however, the impact is not significant overall given the size of the Australian workforce and identifiable sources of alternative (legal) labour. This impact can be minimised through alternative sources of labour (for example, non-citizens with work permission such as working holiday makers or entrants under the Pacific Seasonal Workers Pilot Scheme or other government measures to address labour shortages).

Option 3: Alternative to the Howells approach—reform the employer sanctions framework by supplementing the existing criminal offences with ‘fault based’ civil penalty provisions and a statutory warning notice scheme (Not recommended)

1. This option is an adapted version of the three tiers recommended by Mr Howells and has been developed as a result of stakeholder consultations. While Mr Howells recommended strict liability civil penalties, some key stakeholders have criticised his approach as untargeted and creating undue burden on businesses who do not seek to do the wrong thing.
2. Option three proposes fault-based civil penalties that could be made out on the balance of probabilities. Under this model the burden of proof remains with the prosecution (whereas it shifts to the defendant under the non-fault based provisions in option two).
3. The third tier in this option is a statutory warning notice rather than the infringement notice which is available in option two as it would not be consistent with Australian Government policy to attach an infringement scheme to a fault-based offence.
4. All other aspects described in option two, that is, modifications to the definitions associated with the criminal offences, their application to the civil penalty provisions; and the additional powers to gather documentary evidence are also elements of this option.
5. The deterrent effect of option three is shown in the chart below in which the proportion of non-compliers has decreased in comparison to the status quo, however, this reduction is not as pronounced as the reduction shown in option two. The chart also shows an increase in the proportion of ‘active compliers’ compared to the status quo. This group has absorbed a proportion of the non-complier group, who are expected to actively comply due to the deterrent effect of the new civil sanctions and infringements
6. The deterrent effect of option three is demonstrated in the triangle whereby there has been a decrease in the numbers of non-compliers when compared to the status quo, but this reduction is not as pronounced as the reduction expected for option two. As illustrated below, the number of ‘active compliers’ will increase compared to the status quo. This group will absorb some members of the non-complier groups, who will now actively comply due to the deterrent effect of the new civil sanctions.

Compliance Tools under Option 3



7. In this option, proving the fault-based element of the civil penalty provision, the same evidentiary difficulties would be encountered as are currently encountered with the existing criminal offences. Comparatively, the fault-based civil penalty provisions would not have the same deterrent effect as the non-fault based civil penalty provisions provided in option two.
8. In general, some non-compliers may be deterred from non-compliance through the statutory warning notice, however, this deterrent effect would be markedly less than that of an infringement scheme which would represent a cost that business would seek to avoid. In order for a penalty to deter, it needs to be recognised and experienced as a cost that the business wants to avoid, and the statutory warning notice does not present any cost to a business. Further, this option does not provide sufficiently graduated penalties to encourage wider compliance by employers. An effective sanctions system will need to facilitate voluntary compliance and this will require a demonstrated capacity to escalate deterrents.

IMPACT ANALYSIS— Option 3: Alternative to the Howells approach— reform the employer sanctions framework by supplementing the existing criminal offences with three ‘fault based’ civil penalty provisions and a statutory warning notice scheme

Impact groups	Costs	Benefits
Government	<p>Legislation is required to amend the Migration Act to impose new fault-based civil penalty provisions and statutory warning notices. The amendments would not affect other regulatory authorities.</p> <p>The introduction of the new sanctions regime would require resources to implement (DIAC training, IT systems changes, public awareness and information, etc).</p> <p>Litigation costs may increase, as instances of civil penalty litigation may increase.</p> <p>Prosecution would need to prove knowledge or recklessness, before a conviction can be achieved, because all the penalties would be fault based. This may provide no incentive to non-compliant businesses to change behaviour as they can plead ignorance as an excuse. This would mean that this model is not as effective a deterrent as option two.</p>	<p>With the expected deterrent effect of the reforms, there would be fewer opportunities and instances of illegal work – but not to the same degree as in option 2 due to lesser deterrent value of this option.</p> <p>The integrity of the visa system controlling the entry of non-citizens, will benefit from fewer non-citizens working without permission and reinforces the use of legitimate methods for entering and working in Australia.</p> <p>There would be more effective use of compliance and investigative resources associated with the sanctioning of employers, as the three tiers of sanctions will allow more options for targeted and appropriate sanctioning for the level of the offence.</p> <p>The government will receive increased revenue by legal workers paying taxes.</p> <p>The government may be able to better identify areas of labour shortages, as less illegal work is undertaken.</p>
Community		<p>Increased public confidence in the immigration program due to more effective compliance with visa rules.</p> <p>The price of some goods and services may be lower, although this is a result of illegal activity (indirectly through employment of illegal workers).</p>

<p>Job seekers (with valid work entitlements)</p>	<p>Non-citizen job seekers may need to provide proof of entitlement to work in Australia.</p> <p>There is the possibility that non-citizen job seekers may experience discrimination when seeking work, if they cannot easily verify their identity/work entitlements.</p>	<p>Improved access to employment opportunities for those with a right to work and Australian citizens.</p>
<p>Non-citizens (who do not have lawful permission to work or who work in breach of their visa conditions)</p>	<p>Non-citizens may not be able to obtain work and therefore not be able to support their families (though not to the same degree as option two).</p>	<p>It is likely that there will be less exploitation of this group.</p>
<p>Business Repeat non-compliers</p>	<p>Will be at risk of being issued a statutory warning notice or incurring civil or criminal penalties</p> <p>Reduced opportunities for employers to access illegal labour to gain competitive advantage.</p> <p>Will be at risk of incurring civil penalties or being issued a statutory warning notice.</p>	<p>Only foreseeable benefits are resulting from illegal activity.</p> <p>Despite the new evidence gathering powers, successful prosecutions would be less likely than under option two as knowledge or recklessness would need to be proven (albeit on the balance of probabilities). This would provide less incentive to these businesses to change behaviour, and therefore avoid compliance costs.</p>
<p>Non-compliers</p>	<p>Have reduced opportunities to access illegal workers to gain competitive advantage.</p> <p>Will be at risk of incurring civil penalties or being issued a statutory warning notice.</p>	<p>Benefits as above.</p>
<p>Voluntary compliers</p>	<p>The vast majority of businesses in Australia do not employ non-citizens without permission to work. The impact on most businesses is estimated to be low.</p> <p>The department currently advises businesses to take a risk based approach to checking the work entitlements of non-citizens whom they are seeking to employ. In the case of businesses that do not currently undertake such checks, low level compliance costs may be incurred. The impact may be greater across industries that</p>	<p>Businesses may choose to deliberately ignore requirement to check work permission to avoid liability under fault-based sanctions.</p> <p>Increased employer compliance will create greater market competition, as there will be fewer businesses operating with a competitive advantage due to the lower overheads associated with employing illegal workers – but not to the same degree as in option 2 due to lesser deterrent</p>

	<p>traditionally employ higher numbers of unskilled or low skilled or itinerant workers, such as the agriculture, construction and accommodation/food service industries.</p> <p>Businesses may risk taking a discriminatory approach towards hiring of workers, and this could lead to litigation.</p> <p>Businesses that choose to use VEVO would incur small cost to connect to the internet and in the time taken to check VEVO (of a few minutes only).</p> <p>VEVO usage is expected to increase as more business become compliant. This is likely to result in an overall increase in time costs to businesses; however, it is not possible to precisely quantify this across all Australian businesses.</p> <p>There may be a proportionally higher impact on businesses in regional areas or particular sectors, which are more reliant on illegal workers</p>	<p>value of this option.</p> <p>Greater market competition will enable more success for compliant businesses, and encourage those businesses to remain compliant, but not to the same degree as in option 2 due to lesser deterrent value of this option.</p> <p>Employers using VEVO to check work permission of non-citizen employees will minimise liability for criminal prosecution under existing sanctions.</p>
Compliers by default	Nil compliance cost	Benefits as above
Small business	Actively compliant small business would likely experience slightly higher time cost when undertaking work entitlements checks.	<p>Compliant small businesses would experience the same benefits as noted above.</p> <p>Improved competition may more positively impact compliant small businesses, particularly in certain industries or regions.</p>

1. The foreseeable impact on labour market and wages through the reduced use of illegal workers is expected to be low as illegal workers comprise less than one per cent of the Australian workforce (and this number is expected to decrease), although the impact may be higher in some areas due to localised conditions. Similarly, the impact on business in general may differ in some areas due to regional or sectorial conditions, such as greater reliance on seasonal non-citizen labour. It is not possible to calculate this with any accuracy; however, the impact is not significant overall, and less than that in option two, given the size of the Australian workforce. This impact can be minimised through alternative sources of labour (for example, non-citizens with work permission such as working holiday makers or entrants under the Pacific Seasonal Workers Pilot Scheme; or other Government measures to address labour shortages).

Option 4: Enhancements to the Employer Awareness Campaign (EAC)

1. The department has had an existing national communication strategy and employer awareness campaign for a number of years (predating the 2007 criminal sanctions). As a part of the strategy and campaign, DIAC has provided information via DIAC's website and through a range of printed materials distributed through industry stakeholders and networks of departmental outreach officers.
2. This option provides a reinvigorated awareness campaign and ongoing, targeted employer education activities. The strategy comprises four phases: enhance awareness of requirements for employing non-citizens; inform employers of new infringements/penalties for employing non-citizens who do not have lawful permission to work or who work in breach of their visa conditions; motivate employers to check work rights and immigration status; and generate support for the government's policy among employers and stakeholders. Through generating awareness and public support for the policy, it is expected that allegations made through DIAC's dob-in hotline will increase. While every Australian employer is a target for receiving information about the changes, the strategy will seek to focus on key industries where non-compliance has been identified. We will also work with industry associations, unions, peak bodies and chambers of commerce in disseminating key messages.
3. As employers, visa holders and members of the general public become more familiar with the restrictions against employing non-citizens who do not have the required permission to work and the sanctions involved, it is likely that the employment opportunities for non-citizens who do not have the required permission to work would decrease.
4. In order to achieve these objectives, the campaign will seek to focus on key industries where employer non-compliance has already been identified. The first area of attention would be employers of low-skilled/unskilled, casual/shift workers in targeted high risk industries where, in DIAC's experience, illegal work commonly occurs. The second focus of the program will be industry associations, unions, peak bodies and chambers of commerce. Finally, the campaign would be directed at general employers, outside of the identified high-risk industries.
5. The awareness campaign is designed to work with either of the two regulatory reform options, as education and awareness are critical to achieving voluntary compliance and the campaign has received strong and wide-spread support in stakeholder consultations to date.

IMPACT ANALYSIS – Option 4: Enhancements to the Employer Awareness Campaign (EAC)

Impact groups	Costs	Benefits
Government	This option will result in financial outlay for the government	This option will be a reasonably cost effective way for government to encourage voluntary compliance.

<p>Community</p> <p>Non-citizens who do not have lawful permission to work or who work in breach of their visa conditions</p>	<p>As employers become more familiar with the restrictions against employing this group and the sanctions involved, it is likely that the employment opportunities for this group would decrease.</p>	<p>Members of this group who may not have been aware of their visa entitlements, or work standards in Australia could become aware and consequently voluntarily cease working illegally.</p>
<p>Business</p> <p>Repeat non-compliers</p>	<p>These businesses may or may not take the time to read or listen to the provided information material.</p>	<p>Employers will become more familiar with the restrictions against employing non-citizens who do not permission to work, the sanctions and the work entitlements verification tools available.</p> <p>Greater awareness of penalties and ease of checking non-citizens' work status may lead to increased voluntary compliance by business. If members of this group become voluntarily compliant, they will avoid sanctions.</p> <p>The voluntary compliance of businesses will lead to increased market competition, which will benefit business.</p>
<p>Non-compliers</p>	<p>Costs as above.</p>	<p>Benefits as above.</p>
<p>Voluntary compliers</p>	<p>There are no costs for business under this option other than the time taken to read or listen to the provided information material.</p>	<p>This group may benefit from the refreshed campaign, particularly if the campaign provided more information about the introduction of either option two or three.</p>
<p>Compliers by default</p>	<p>These businesses may or may not take the time to read or listen to the provided information material.</p>	<p>Nil benefits</p>
<p>Small business</p>	<p>Some small businesses may not have the time to read the information material distributed as a part of the campaign.</p>	<p>Compliant small businesses may become aware, if they are not already aware, of cost efficient ways to verify work entitlements.</p> <p>If work entitlements checks are undertaken they will avoid the risk of sanction.</p>

Option 5: Enhancements to the Visa Entitlement Verification Online (VEVO) service

1. VEVO is a free online facility run by DIAC that allows registered users to check a non-citizen's visa status and visa conditions.³ It has been available since 2004 and operates 24 hours seven days a week. Organisations and non-citizen clients need to register to access VEVO. There are no costs associated with registering for and using the VEVO tool apart from connection to the internet. Work condition checks on VEVO generally take only a few minutes with an immediate response.
2. The department currently recommends employers take a risk-based approach to work entitlements checking for new employees. This recommendation would remain if option two or three were implemented. As a part of the risk based approach, if employers suspect a person is a non-citizen they should undertake a work entitlements check (via VEVO or the fax back facility) to establish whether the person has work entitlements. Given that visa and work entitlement status for a non-citizen may change over time, the 'allower' or 'referrer' should also take reasonable checks to ascertain the non-citizen holds a visa with current work permission.
3. The Australia Bureau of Statistics estimates that between 87 per cent and 93 per cent of small businesses have internet access and around 97 per cent of these businesses have broadband access.⁴ Internet access for larger businesses was estimated at between 98–99 per cent, and of these 98-99 per cent were using broadband internet. With the majority of businesses using broadband internet, the costs for most businesses to access VEVO are minimal.
4. Checking visa details using VEVO is less susceptible to fraud (through people altering or counterfeiting paper visa labels), and provides more accurate and up-to-date information than checking visa labels. As DIAC has a label-free strategy which aims to reduce the number of visa labels issued, many non-citizens looking for work may not have a physical visa label in their passport as evidence of their work status. VEVO also enables the visa holder to check their visa details online.
5. A recent survey of VEVO users, commissioned by DIAC, found that more than two-thirds (64 per cent) of users found VEVO easy to use. Although, compared to other users, light users, small businesses and suspended account holders found the VEVO service relatively less easy to use. A number of recommendations were provided by those surveyed, and these recommendations have been salient to forming this option.
6. To address identified problems from VEVO users, this option seeks to increase the time period before passwords expire, from 28 days to three months or a longer period of time.

³ This online facility was an enhancement to the fax back process which was the only work entitlements checking facility available at that time. Although the fax back process remains today, responses are not immediate, with fax back responses usually provided within a five day period.

⁴ Information was from 2008-2009, and sourced from the following website:
[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/8491DFEFA6684E2ACA25774B0017880D/\\$File/81660do001_200809.xls](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/8491DFEFA6684E2ACA25774B0017880D/$File/81660do001_200809.xls)

7. Once a business has registered to use VEVO, their passwords will expire if they have not logged in to VEVO within 28 days, and this will require their password to be reset⁵. This is problematic for businesses which seasonally hire employees, such as seasonal fruit farmers who would use VEVO over their fruit picking period, and then would be unlikely to use VEVO for several weeks. If they have not used VEVO in 28 days, they would be required to reset their password via a phone call to DIAC's service centre. While the user's VEVO password is reset during the phone call to the service centre, the process is not user-friendly for businesses. To bypass this process, some businesses routinely create new VEVO accounts for their business. These duplications of businesses' VEVO registrations are an indication that systems improvements are necessary to make the system more user-friendly.
8. To streamline password resets, the VEVO system will allow users to reset their password themselves via a secure web-based self service tool. The service would prompt users through the automated online password reset process, without the need for a live operator at DIAC's call centre. Users will still have the option to have their passwords reset through DIAC's phone based service centre.
9. A further aspect of this option is a 'smart phone' based service available to employers. This service would enable access to VEVO service via internet enabled mobile or smart phones, so the service can be used outside a traditional office (and computer-based) format.
10. Together, the three aspects of this option would reduce the barriers and consequent delays, and provide convenient mobile access for employers, to check work entitlements of prospective employees. By extending the time window before inactive VEVO users' passwords expire, DIAC will be making VEVO more user-friendly. Similarly, employers would experience cost and time savings, when they do need to reset their password, through the new automated online password reset service. The smart phone based service will facilitate greater and more convenient access outside a traditional office environment. These enhancements are likely to increase the levels of voluntary compliance on the part of employers, as the process would become more user-friendly.
11. As a standalone option, it is unlikely that enhancements to VEVO would reduce the instance of illegal work in Australia, nor would it function as a deterrent to non-compliant employer behaviour. Use of the VEVO system has been increasing significantly every year. In 2007-08 there were some 243 700 checks made which increased to over 1 146 700 checks in 2010-11. Despite this increase there has been no commensurate decrease in illegal workers. VEVO improvements implemented with either option two or three, however, this option would facilitate greater ease for employers to comply with work entitlements checking requirements, and thereby assist with employers' voluntary compliance.

⁵ In the 2010-11 financial year, there were an estimated 93,000 password resets (through either phone calls or emails to DIAC's service centre).

IMPACT ANALYSIS – Option 5: Enhancements to the Visa Entitlement Verification Online (VEVO) service

Impact groups	Costs	Benefits
Government	Financial costs involved in enhancing, maintaining and advertising the online system, above those for the existing needs of the system (business as usual).	<p>The likely resulting increased take up by business would lower the number of businesses using DIAC's fax back facility.</p> <p>This option may improve the community's perception of government as being responsive to stakeholders' needs.</p> <p>The increased user-friendliness of the tool may encourage greater use and therefore more compliance from business and individual visa holders, reducing government compliance activity costs.</p>
Community	There are no costs to the community arising out of this option.	
Job seekers (with valid work entitlements)		Greater take up by business would result in increased opportunities for legal workers.
Non-citizens who do not have lawful permission to work or who work in breach of their visa conditions		The benefits would include better information for visitors to Australia, and a decreased likelihood that they work under the misconception that they have work rights.
Business Repeated non-compliers	Nil costs.	The user-friendliness of VEVO may encourage increased take up by businesses, which would minimise these businesses' risk of employing non-citizens who do not have permission to work.
Non-compliers	Nil costs.	The user-friendliness of VEVO may encourage increased take up by businesses, which would minimise these businesses' risk of employing non-citizens who do not have permission to work.

Voluntary compliers	<p>There are no costs envisaged for businesses.</p> <p>Financial costs associated with using VEVO are minimal - Businesses that choose to use VEVO would incur small cost to connect to the internet and in the time taken to check VEVO (of a few minutes only).</p> <p>VEVO usage is expected to increase as more business become compliant. This is likely to result in an overall increase in time costs to businesses; however, it is not possible to precisely quantify this across all Australian businesses.</p>	<p>The user-friendliness of VEVO would encourage increased take up by businesses, which would minimise business's risk of employing non-citizens who do not have permission to work.</p> <p>It would reduce the delays in checking work entitlements of prospective employees, saving businesses time.</p> <p>It would improve access for non-office based businesses to undertake work entitlements checks</p>
Compliers by default	Nil costs.	Nil benefits.
Small business	<p>Nil costs</p> <p>For voluntary complying small business, same as above.</p>	<p>These types of businesses may find it easier to become/remain compliant through the increased user-friendliness of the VEVO service.</p> <p>Small business would likely experience the same benefits as those listed for other business.</p>

Option 6: Enhanced education campaign for non-citizens on work entitlements

1. The previous options in this impact statement have focussed on minimising and deterring the demand for the workers with initiatives targeted towards employers and referral agencies. This option seeks to minimise the supply of these workers by enhancing the education of non-citizens about their visa conditions, particularly any work entitlements.
2. The department already provides education about work entitlements. For example, Working Holiday Visa holders receive information regarding working entitlements and visa conditions upon receipt of their visa grant notification letter. Visa holders are informed that they can check the employment conditions on their visas using the VEVO system at any point. Extensive information on work entitlements and visa conditions is available on DIAC's webpage. Further educational material could be provided to non-citizens prior to, or on their arrival in Australia. There could also be a benefit from further developing these resources in languages other than English.

3. The issue of illegal work is driven by both supply (availability of workers) and demand (need/desire for workers). As indicated earlier, those who are working without permission, are either non-citizens who do not hold a visa, or visa holders who work in breach of a condition which prohibits or limits the work they can do. The group who do not hold a visa are generally over-stayers. Recent research commissioned by DIAC and conducted by Hall & Partners-Open Mind indicates that intentional over-stayers are motivated by the workings of the illegal labour market, and its internal forces of supply and demand, and exploitation.⁶ The research does however suggest that accidental visa over-stayers may not be motivated by the demand for this kind of work. Those non-citizens who work in breach of a condition which prohibits or limits the work they can do, will generally have already received clear information on their work entitlements.
4. Educating non-citizens as to their work entitlements may encourage their voluntary compliance, and thus this option may have some effect on deterring the supply of these types of workers, but would do nothing to curb the problem of the demand for these workers. The recent research by Hall & Partners-Open Mind indicates that law enforcement relating to illegal work hire practices would be more effective than investing heavily in communications targeting those working without permission. Supply of this type of worker will likely continue while there is a sustained demand for illegal work.
5. This option would be unlikely to achieve the objective of this RIS, unless it is introduced with one of the regulatory options. This option could work in tandem with any or all of the other options presented, to enhance the effectiveness of the employer sanctions framework.

IMPACT ANALYSIS – Option 6: Enhanced education campaign for non-citizens on work entitlements

Impact groups	Costs	Benefits
Government	<p>The expected costs to government are minimal, but would include the costs of additional educational products (above the business as usual costs) to enhance existing schemes.</p> <p>Those who intentionally work in breach of their visa work conditions would continue to work, and the lack of action by the government could be seen implicitly to accept this conduct.</p>	<p>The integrity of the visa system controlling the entry of non-citizens, will benefit from increased understanding by non-citizens who do not have permission to work.</p>

⁶ Hall & Partners—Open Mind Research to Evaluate Community Status Resolution Communications 22 August 2011 page 6.

<p>Community</p> <p>Job seekers (with valid work entitlements)</p>		<p>Increased awareness amongst employees may result in fewer non-citizens becoming employed without permission creating more opportunities for legal workers.</p>
<p>Non-citizens who do not have lawful permission to work or who work in breach of their visa conditions</p>	<p>Those who claim they were unaware of limitations on their working rights can no longer claim this excuse. Whilst this may be seen as a cost to those workers, they do have permission to work and the conduct was illegal, so this cost to this group will actually constitute a benefit to government and compliant groups.</p>	<p>Members of this group who may not have been aware of their visa entitlements, or work standards in Australia would become aware and may voluntarily cease working illegally.</p>
<p>Business</p> <p>Repeatedly non-compliers</p>	<p>There may be fewer employees willing to work in breach of their working rights reducing the potential workforce available. Whilst this may be seen as a cost to these businesses, the conduct was illegal and so this cost to this group will actually constitute a benefit to government and compliant groups.</p>	<p>Nil benefits</p>
<p>Non-compliers</p>	<p>There may be fewer employees willing to work in breach of their working rights reducing the potential workforce available. Whilst this may be seen as a cost to these businesses, the conduct was illegal and so this cost to this group will actually constitute a benefit to government and compliant groups.</p>	<p>Nil Benefits</p>
<p>Voluntary compliers</p>	<p>Will continue to suffer from unfair competition from those with lower overheads as this option does not discourage employers from illegal work hire practices.</p>	<p>Nil benefits</p>
<p>Compliers by default</p>	<p>Will continue to suffer from unfair competition from those with lower overheads as this option does not discourage employers from illegal work hire practices.</p>	<p>Nil benefits</p>
<p>Small business</p>	<p>Small business would likely experience the same costs as noted above.</p>	<p>Nil benefits</p>

Consultations

1. There has been extensive consultation with employer, industry, business, and union and community groups on employer sanctions – during the review by Mr Howells and subsequently on the possible reforms he recommended. Upon public release of the report of the review, DIAC representative wrote to key stakeholders seeking their views on the report's recommendations and inviting them to attend a briefing session on the review's findings. Peak industry and union bodies were invited to attend a roundtable discussion in August 2011 to provide further comments. The department received 24 submissions from key stakeholder groups and three submissions from interested members of the public. The submissions covered a range of issues, and could be categorised into three main groups: employer and industry groups, unions and community/religious groups.

Consultation with peak industry, employer, union and community bodies

1. There was a marked contrast between the comments provided by the union groups and the industry groups regarding the need for increased regulation. Union groups advocated increased sanctions with harsher penalties whilst industry groups sought a more moderate approach which provided support for affected businesses.
2. Community and religious groups highlighted the need for protection of workers from exploitation and the detriments of illegal work. Unions and several industry groups approved of the introduction of civil penalties with or without strict liability provisions, although they stressed the need for education and increased support for small businesses.

Peak Employer & Industry Group positions

1. Industry groups provided a diverse range of responses that were generally hesitant about introducing more regulatory burdens upon business. A number of employer and industry groups indicated that the regulatory response was disproportionate to the problem and that the problem of illegal work in Australia was overstated. These groups commented that further change is unnecessary and the introduction of a strict liability civil offence is excessive. These groups recommended that the requirement of fault be retained for all penalty regimes.
2. The submissions provided broad agreement that labour hire intermediaries and subcontractors, rather than primary employers, should bear responsibility for verifying the entitlements of the workers they engage.
3. Employer groups noted the importance of overseas workers to fill systemic skill shortages, and recommend the reforms be accompanied by programs to facilitate greater and easier access to legal migrant labour.
4. Stakeholders suggested, in relation to proposed statutory defences, that the period in which a VEVO check is expected should be commenced at one week and subsequently reduced to 48 hours (as proposed) over a period of years.

Peak union body positions

1. The unions were supportive of the changes proposed by Howells. They provided broad agreement that where an intermediary is engaged, the principal employer, as the end user of labour should retain partial or whole liability for a worker's entitlements. The unions recommended that every incidence of hire/referral of an individual illegal worker should constitute a separate offence. They further recommended that sanctions be differentiated and appropriate to the offence committed. Several unions also suggested that sanctioned businesses should be disqualified from tender for government work.

Community and Religious Groups

1. These groups were particularly focused on protecting those disadvantaged or exploited by unauthorised work situations. They showed support for better education of employees and employers to ensure greater awareness of rights and responsibilities. They particularly highlighted the need for appropriate education for those with limited English language skills.
2. One of these groups recommended that the terminology be changed from 'illegal worker' to 'unauthorised worker' to avoid discrimination towards vulnerable or exploited people and guilt based stigmas. They recommended the establishment of a short term bridging visa to protect the rights of these workers.

How the proposal has been modified

Option 2: The Howells Approach —

1. includes information relating to Mr Howells' recommended deeming employment provision. Mr Howells' suggested deeming employment provision was identified by stakeholders as an area that required further development, and has been amended for inclusion in option two and three. It has been designed to concentrate on the policy intention rather than the mechanism to achieve it. Thus, specifying instead the range of entities and relationships intended to be captured, leaving the actual mechanism up to the legislative drafting process. This approach would give effect to the intent of Mr Howells' recommendation, while also alleviating some stakeholder's concerns.

Option 3: Alternative to the Howells approach,

1. has been provided as an option following stakeholder concerns regarding the strict liability civil penalty provisions. Their recommendation was that fault and recklessness should be retained in the civil penalties. Option three details a tier two civil penalty that is fault-based, with an attached tier three statutory warning notice scheme.

Option 4: Enhancements to the Employer Awareness Campaign (EAC)

1. has also been identified by Australian government, industry, employer and union groups as being necessary part of the package of reforms. For this reason, it has been listed as a stand alone option, which could be used in tandem with either regulatory option.

Option 5: Enhancements to the Visa Entitlements Verification Online (VEVO) service

1. has been included to increase the user-friendliness of the service, and to lessen the impost on businesses. A number of stakeholders made recommendations as to how to improve access to the system, and this option now reflects those recommendations. This is another non-regulatory option which is designed to be implemented with one of the regulatory options, and would be further supported by option four (education campaign).

Option 6: Enhancing non-citizen work entitlements awareness campaign

1. has been included following stakeholder consultations. A number of community and industry groups recommended a targeted or enhanced awareness campaign for non-citizens to make them better aware of their rights and entitlements.

Recommendation and conclusion

1. After evaluating each of the options proposed and their anticipated impacts and benefits, and considering the consultation with industry, union representatives and government stakeholders, the following options are recommended to be introduced in tandem:
2. Option 2: The Howells approach—reform the employer sanctions framework by supplementing the existing criminal offences with non-fault based civil penalty provisions and infringements
3. Option 4: Enhancements to the Employer Awareness Campaign (EAC)
4. Option 5: Enhancements to the Visa Entitlement Verification Online (VEVO) service
5. Option 6: Enhanced non-citizen work entitlements awareness campaign.
6. Option two would reduce the instance of illegal work in Australia by enabling a graduated scale of sanctions for non-compliant businesses. The establishment of this framework would deter non-compliant employers and referral agencies through a range of penalties which would be appropriate for the level or continuance of the non-compliant behaviour.
7. Option two is preferred over option three because, although it will increase compliance costs more than option three, it has the benefit of being easier to prove breaches and thus creates a stronger deterrent for non compliant behaviour. Option two would provide a greater incentive to business to check work permission of prospective non-citizen employees so they can avail themselves of the statutory defences. VEVO usage is expected to increase as more business become compliant. This is likely to result in an overall increase in time costs to businesses; however, it is not possible to precisely quantify this across all Australian businesses.

8. The foreseeable impact on labour market and wages of option two through the reduced use of illegal workers is expected to be low as illegal workers comprise less than one per cent of the Australian workforce (and this number is expected to decrease), although the impact may be higher in some areas due to localised conditions. Similarly, the impact on business in general may differ in some areas due to regional or sectorial conditions, such as greater reliance on itinerant or seasonal non-citizen labour. It is not possible to calculate this with any accuracy, however, the impact is not significant overall given the size of the Australian workforce and identifiable sources of alternative (legal) labour. This impact can be minimised through alternative sources of labour (for example, non-citizens with work permission such as working holiday makers or entrants under the Pacific Seasonal Workers Pilot Scheme; or other government measures to address labour shortages).
9. Those employers or referrers who are willing to comply, but are unaware of their new obligations as a result of option two, will be educated as a part of option four. The awareness campaign will also provide assistance in regards to using VEVO. The general awareness campaign will also deter non-compliance (through information on potential penalties).
10. Option five would improve the capacity for those employers or referrers who seek to voluntarily comply with their obligations, as it will minimise the time required to undertake a work entitlements check on the online VEVO system. Implementing option five in tandem with option two, would minimise the compliance costs on businesses, as VEVO is free to access (only an internet connection required) and the system enhancements would improve the user-friendliness of the VEVO system.
11. Option six would minimise the supply of these types of workers, while the other recommended options would deter the demand of the workers. This option would work together with the other recommended options to deter and minimise both the supply of and demand for illegal workers.
12. Together, the four recommended options will provide the lowest compliance costs for businesses, whilst establishing a simple, practical, cost effective employer sanctions regime that employers easily understand and is simple to administer.

Implementation and review

1. Assuming the recommended approach is adopted, we expect that a reformed employer sanctions regime could be implemented once legislation is passed in Parliament. Following the start of the regime, DIAC would be responsible for the administration and enforcement of the sanctions.
2. The general awareness campaign would begin shortly after government approval for the approach is achieved. The awareness campaign would run over several years. The enhancements to VEVO would be developed so they are in place for the commencement of enforcement of the new employer sanctions regime.
3. It is envisaged that an evaluation of the effectiveness of the new employer sanctions and enforcement strategy in deterring illegal work in the third year of the sanctions being in operation.