

## 457 visa compliance arrangements, communication and program administration: key issues and improved procedures

### Introduction

- 3.1 Chapter 3 discusses the important area of monitoring, reporting and enforcement under the 457 visa program, including penalties, sanctions and other enforcement mechanisms. This area is essential to reinforcing the integrity of the program and ensuring public confidence in 457 visas, while still meeting the needs of business for streamlined arrangements. Other matters discussed include Commonwealth, state and territory collaboration in compliance; an improved mechanism for 457 visa holders and others to report alleged breaches of program requirements; and clarification of the '28-day' rule for visa holders to find a new employer sponsor.
- 3.2 The chapter also looks at communication processes under the program – in particular, communication between the Department of Immigration and Citizenship (DIAC) and employer sponsors, visa holders and other stakeholders – and how this area might be improved.
- 3.3 Chapter 3 concludes by looking at issues relating to DIAC's administration of the program – most notably, 457 visa processing times, which was raised as a major area of concern during the inquiry.

## Monitoring, reporting and enforcement

- 3.4 On 26 April 2007, in announcing changes to skilled temporary visa arrangements, the Minister for Immigration and Citizenship stated that:

Employers must recognise that access to skilled temporary migrants is a privilege, not a right, and if they abuse this privilege, then they will face strong penalties.

The changes that have been announced today will ensure that further obligations are put in place to protect and strengthen the integrity of the 457 visa scheme.<sup>1</sup>

- 3.5 The announced changes include:

- New civil penalties for employers who breach the law

The Migration Act will be amended to ensure employers of skilled temporary overseas workers (457 visas) face tougher penalties if they breach their sponsorship obligations.

New civil penalties will apply for those employers who commit the most serious offences. Offences will relate to such matters as failure to pay the minimum salary level and using workers in unskilled jobs.

- Greater powers for DIAC and the Workplace Ombudsman (formerly the Office of Workplace Services) to investigate employers

The Department of Immigration and Citizenship will also be given stronger powers to enforce employer compliance with the 457 visa programme, including the power to conduct unannounced audits of employers and their premises.

This will be complemented with greater powers for the Office of Workplace Services to investigate breaches of the Minimum Salary Level.<sup>2</sup>

- 3.6 These changes will require an amendment to the *Migration Act* 1958. To this end, the Migration Amendment (Sponsorship Obligations) Bill
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1 Media release by the Hon Kevin Andrews MP, Minister for Immigration and Citizenship, 'New changes to the skilled temporary visa laws', 26 April 2007, <http://www.minister.immi.gov.au/media/media-releases/2007/ka07030.htm>.

2 Media release by the Hon Kevin Andrews MP, Minister for Immigration and Citizenship, 'New changes to the skilled temporary visa laws', 26 April 2007, <http://www.minister.immi.gov.au/media/media-releases/2007/ka07030.htm>.

2007 was introduced into Parliament on 21 June 2007. As set out in Figure 3.1, the legislation seeks to strengthen the obligations of sponsors who employ 457 workers.

Figure 3.1 Penalties to strengthen integrity of temporary skilled migration program<sup>3</sup>

Employer obligations under the legislation will include:

- Payment of the Minimum Salary Level (MSL);
- Payment of all costs associated with recruitment of the sponsored worker and migration agent fees for the worker and their family;
- Payment of fees for mandatory licence, registration or membership required for the sponsored worker to work;
- The payment of a number of other costs, such as recruitment, medical and travel costs,
- Employing skilled workers in skilled positions, as opposed to semi or unskilled work.

Sponsors will also be required to keep records of all of these payments.

Sponsors will be obliged to produce documents on request. Failure to do so could result in six months imprisonment.

Failure to comply with these obligations could result in a civil penalty being imposed together with the cancellation of a sponsor's access to the 457 visa programme.

The bill attaches civil penalties to breaches of obligations with a maximum of \$6 600 for an individual and \$33 000 for a body corporate for each identified breach ...

The bill also authorises disclosure of personal information regarding sponsors and visa holders to relevant Commonwealth government agencies and government agencies in states and territories. For example, where a workplace appears to fall short of basic occupational health and safety standards, an inspector can make this known to the Commonwealth, state or territory body responsible for monitoring such standards.

To help enforce these provisions, trained officers will have the power to enter unannounced, without force, any place which they believe contains information or documentation relevant to monitoring the sponsor's compliance.

3 Media release by the Hon Kevin Andrews MP, Minister for Immigration and Citizenship, 'New tough penalties strengthen the integrity of the Temporary Skilled Migration Programme', 21 June 2007, <http://www.minister.immi.gov.au/media/media-releases/2007/ka07047.htm>.

- 3.7 These changes are supported by the earlier announcement in May 2007, as part of the Budget, of an additional \$85.3 million in funding over the next four years to 'maintain the integrity of Australia's temporary skilled migration program'.<sup>4</sup> Mr Parsons from DIAC noted that the department would receive \$66.1 million in support of these initiatives, with the remainder going to the Workplace Ombudsman, the Department of Employment and Workplace Relations, the Department of Education, Science and Training and the Australian Taxation Office.<sup>5</sup>
- 3.8 The Committee further heard that DIAC would be expanding its monitoring arrangements to include:
- ... a survey, a small list of questions, which we will proactively send to the applicants themselves. Based on the responses that we get to those sorts of questions, they too will inform the more detailed monitoring that our state offices undertake.<sup>6</sup>
- 3.9 As Mr Hitchcock from the Migration Institute of Australia (MIA) observed, '[a] further enhancement of the monitoring process would be for the department to have access to employees as well as employers'.<sup>7</sup>
- 3.10 Given the changing ground during this inquiry, with new arrangements for monitoring, reporting and enforcement being announced after the bulk of evidence had been received by the Committee, some of the concerns raised about this area have inevitably been overtaken by events. However, the Committee is concerned that the implementation and administration of these new arrangements should benefit from the 'lessons of the past'. Accordingly, the discussion below provides a summary of some of the concerns in this area raised during the inquiry.
- 3.11 In summary, the Committee welcomes the Minister's amendments to the program in response to concerns raised during the course of the inquiry and is pleased that the inquiry precipitated action in this area. The Committee believes these changes, particularly the increased powers to monitor sponsors and penalise non-compliance, will
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4 Media release by the Hon Kevin Andrews MP, Minister for Immigration and Citizenship, 'A first class skilled migration system', 8 May 2007, <http://www.minister.immi.gov.au/media/media-releases/2007/ka07034b4.htm>.

5 Mr Parsons, DIAC, *Transcript of Evidence*, 1 June 2007, p. 69.

6 Mr Parsons, DIAC, *Transcript of Evidence*, 1 June 2007, p. 77.

7 Mr Hitchcock, MIA, *Transcript of Evidence*, 16 May 2007, p. 26.

strengthen the effectiveness, fairness and integrity of the 457 visa. As the MIA commented:

Abuse at the hands of a few will continue to occur and it is through monitoring and compliance/enforcement action that progress can be made in addressing such matters.<sup>8</sup>

- 3.12 At the time of finalising this report, the Senate Standing Committee on Legal and Constitution Affairs was inquiring into the Migration Amendment (Sponsorship Obligations) Bill 2007.<sup>9</sup> A detailed examination of the legislation was outside the scope and timing of this report.

## Need for improved monitoring, reporting and enforcement arrangements

- 3.13 A central theme that emerged in evidence to the Committee was the broad support for a stronger monitoring and compliance regime, with this being seen as a means of reinforcing the integrity of the program and reducing the risk of exploitation of 457 visa holders:

ACCI does not object to the sanctioning of employers who deliberately and knowingly breach their obligations under the relevant visa class. Provided employers are able to understand their obligations, ACCI supports proportionate sanctions for misuse, following due legal process.<sup>10</sup>

Employers who have breached the scheme should be barred from further sponsorship with civil and criminal sanctions applicable where appropriate.<sup>11</sup>

There will be greater understanding and respect for employer and 457 visa holder obligations if there is greater awareness that the 'system' is monitored and that those deemed to have engaged in exploitation or other activities which damage the integrity of this important program are brought to account ... Current sanctions for employers found to be in breach of their 457 sponsorship and employee obligations are not sufficient

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8 MIA, *Submission No. 9*, p. 14.

9 For further information, see [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/migration\\_sponsorship/index.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/migration_sponsorship/index.htm).

10 Australian Chamber of Commerce and Industry, *Exhibit No. 6*, p. 5.

11 Australian Council of Trade Unions, *Submission No. 39*, p. 11.

in our view in seriously deterring those few who intend to deliberately exploit 457 visa holders.<sup>12</sup>

3.14 However, it was also acknowledged that such programs ‘can rarely be made “bullet proof” in terms of nil levels of abuse or exploitation’.<sup>13</sup>

3.15 It is important to acknowledge at this point in the report the considerable level of media attention that the 457 visa has received over recent years concerning alleged and proven abuses of workers under the program. This matter was raised by several contributors to the inquiry:

There have been many reported cases in the media of alleged situations where 457 visas have been abused by employers. Examples have included underpayment of wages or no payment for overtime, discrimination on the basis of union membership, workplace safety and training requirements not being met and 457 workers being used as strike breakers.<sup>14</sup>

... the conditions of employment afforded to temporary visa holders and the treatment of those visa holders as participants in the Australian workforce is of critical concern to the ACTU. Many cases have been brought to light in the last 12-18 months exposing appalling treatment of business visa holders by some employers. These cases highlight the need for a greater degree of monitoring and enforcement of standards afforded to the visa holders through relevant departments of government.<sup>15</sup>

3.16 The Committee heard that alleged breaches of the 457 visa program have included:

- underpayment of the minimum salary level
  - ⇒ Filipino chefs who worked in Canberra were promised \$39,000 before they came to Australia. When they got here they were paid \$29,100, and for that they worked a

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12 MIA, *Submission No. 9*, pp. 14-16. See also Australian Industry Group, *Submission No. 57*, p. 2; RCSA, *Submission No. 11*, p. 4; Liquor, Hospitality and Miscellaneous Union, *Submission No. 20*, p. 4; Entity Solutions, *Submission No. 44*, p. 12; and Australian Meat Industry Council, *Submission No. 26*, p. 2.

13 MIA, *Submission No. 9*, p. 5.

14 NSW Government, *Submission No. 51*, p. 3.

15 Australian Council of Trade Unions, *Submission No. 39*, p. 5.

60-hour week. They got no overtime and no superannuation.<sup>16</sup>

- unlawful deductions from the minimum salary, such as for travel or medical costs, or deductions unapproved by the worker, such as for accommodation costs
  - ⇒ There is a common practice in the industry whereby the cost of travel to and from the country of the sponsored employee's origin is paid for by the employer, however then recouped from the employee via deductions from the sponsored employee's wages over the first 12 months of employment.<sup>17</sup>
- non-payment of overtime or working excessive hours
  - ⇒ He worked between 15-18 hours a day, 7 days a week for more than 18 months ... Despite the long hours his weekly pay slip showed he only work 40 hours. He was paid no overtime ...<sup>18</sup>
- discrimination on the basis of union membership
  - ⇒ Both of these contracts provide that grounds for termination of employment include engagement of union activities and prohibition of engagement in union activities.<sup>19</sup>
- employment of skilled workers in unskilled roles
  - ⇒ There are also numerous complaints regarding 457 visa holders entering the workplaces to undertake skilled occupations, but then being used as cheap manual labour.<sup>20</sup>

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16 Mr Bibo, Liquor, Hospitality and Miscellaneous Union, *Transcript of Evidence*, 16 May 2007, p. 52. See also Australian Manufacturing Workers Union, *Submission No. 40*, p. 55.

17 Australasian Meat Industry Employees Union, *Submission No. 23*, p. 23. See also Construction, Forestry, Mining and Energy Union, *Submission No. 21*, p. 4; and Immigrant Women's Speakout Association of New South Wales and the Philippines-Australian Women's Association, *Submission No. 49*, p. 7.

18 Dr Wise and Dr Velayutham, *Submission No. 85*, p. 13. See also Uniting Church in Australia, *Submission No. 15*, p. 2.

19 Australian Council of Trade Unions, *Submission No. 39a*, p. 4. See also Australian Manufacturing Workers Union, *Submission No. 40*, p. 55.

20 Australian Manufacturing Workers Union, *Submission No. 40*, p. 50.

- payment by workers of recruitment costs or migration agent fees
  - ⇒ I was required to pay approximately \$10,000 to get the job, as well as my own airfares.<sup>21</sup>
- unfair termination of employment
  - ⇒ Workers being fired and sent home with no notice ...<sup>22</sup>
- racial abuse and threats of physical harm
  - ⇒ When he asked for compensation for his India trip, the owner threatened to kill him and harm his family in India.<sup>23</sup>
- overcharging for training and accommodation
  - ⇒ the rental rates that are being charged are way above what would normally be expected.<sup>24</sup>

3.17 Several case studies were also drawn to the attention of the Committee involving 457 workers who had allegedly experienced serious breaches of their employment conditions (noting in some cases that these breaches had later been proven) – see, for example, the work conducted by Dr Wise and Dr Velayutham on 457 visas and the case studies provided by the Australian Manufacturing Workers Union (AMWU).<sup>25</sup> A list of media reports of alleged abuse of the 457 visa was also providing by the Construction, Forestry, Mining and Energy Union (CFMEU).<sup>26</sup>

3.18 This evidence notwithstanding, the Committee emphasises that, on occasions over the course of the inquiry, breaches alleged by one body were contested by another. For example, the various allegations made by the Australian Nursing Federation (ANF) about the ‘misleading’ recruitment of workers with overseas nursing qualifications under the 457 visa by Cytech Intersearch Pty Ltd were refuted as inaccurate by that company:

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21 Mr Kandasamy, 457 visa holder, *Transcript of Evidence*, 16 May 2007, p. 78. See also Dr Wise and Dr Velayutham, *Submission No. 85*, p. 7; and Australasian Meat Industry Employees Union, *Submission No. 23*, p. 24.

22 Filipino Australian Affiliation of North Queensland, *Submission No. 24*, p. 2. See also Australian Manufacturing Workers Union, *Submission No. 40*, p. 50.

23 Dr Wise and Dr Velayutham, *Submission No. 85*, p. 12. See also Mr Bibo, Liquor, Hospitality and Miscellaneous Union, *Transcript of Evidence*, 16 May 2007, p. 53.

24 Ms Bissett, Australian Council of Trade Unions, *Transcript of Evidence*, 14 March 2007, p. 12. See also Australasian Meat Industry Employees Union, *Submission No. 23*, p. 23; and Australian Manufacturing Workers Union, *Submission No. 40*, p. 54.

25 Dr Wise and Dr Velayutham, *Submission No. 85*; and AMWU, *Submission No. 40*, p. 44 onwards.

26 CFMEU, *Submission No. 21*, pp. 13-14.

The ANF has grave concerns regarding the manipulation or potential manipulation of internationally qualified nurses by migration agencies and employers using 457 visas. We understand that groups of nurses, qualified in their own countries but not eligible for automatic registration in Australia, are approached off-shore and encouraged to come to Australia under a non-nursing skilled migration category while being told they will be working as nurses or that they will be eligible to apply for registration once they are here. They are misinformed and severely disadvantaged as a result of ineffective monitoring, enforcement and reporting arrangements.<sup>27</sup>

... as at 30th March 2007, Cytech Intersearch received notification from the Department of Immigration that we are meeting our obligations based on the recent monitoring and documentation submitted ... We would like to rectify the statement from the ANF 'that the position being made available is indeed the position that the applicants believe they are being employed for. And further, that no disadvantage is experienced, either financially or otherwise once workers from other countries arrive as regards the need for further education or gaining of skills' ... the comments by the Australian Nursing Federation are grossly unfounded.<sup>28</sup>

- 3.19 Further, in a number of other cases, those alleging breaches of 457 visa requirements were unable to provide factual evidence in the form of specific documented examples to back up their claims. However, the Committee acknowledges that this matter was sometimes further complicated by privacy concerns and the reported unwillingness of some 457 visa holders to speak up about alleged breaches of their sponsorship conditions. As Dr Zirnsak from the Uniting Church commented:

... in this particular case, the person in question does not wish to be identified because they hold a grave fear that, if they are identified or if their employer is identified in any way, they

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27 ANF, *Submission No. 63*, p. 5. See also case study on Cytech Intersearch at p. 6 of the ANF submission.

28 Cytech Intersearch Pty Ltd, *Submission No. 84*, p. 17 and p. 38. It should also be highlighted here that Cytech stated they 'do not utilize 442 Visas. We have only ever utilized the Subclass 457 Visa program. Therefore the entire section under 442 Visas [in the ANF submission] is of no relevance to Cytech Intersearch and must be noted', p. 20.

will be subject to retributive action that would involve their dismissal. They hold a grave fear that they would then be deported without the ability to find an alternative sponsor, particularly, in this case, given their lack of English skills.<sup>29</sup>

- 3.20 During the inquiry, the Committee published a statement on 'Protection for witnesses' on its website to reinforce the point that such individuals would be protected by parliamentary privilege should they choose to give evidence to the inquiry:

It is an important part of the inquiry process for committees to hear from a wide range of groups and individuals, who often have very different views about a subject. It is equally important that the evidence given is provided freely and without undue influence from other people.

Anyone making a written submission or giving evidence at a public hearing is protected by parliamentary privilege. Essentially this means that no legal action can be taken against a person because of what they say during a hearing (the protection does not apply if, after the hearing, a witness repeats statements made in evidence). Parliamentary privilege also means that it is an offence to inflict 'any penalty or injury upon, or deprive of any benefit, another person' on account of evidence they may give before a committee. Similarly it is an offence to influence another person about the evidence they may give, or to try and prevent a person from giving evidence.

If a witness to the inquiry feels that they have been intimidated, threatened or suffered adverse consequences as a direct result of having given evidence to the Committee, they should contact the committee secretariat immediately.<sup>30</sup>

- 3.21 The Committee was aware that the reported unwillingness of some 457 visa holders to speak up about alleged breaches of their sponsorship conditions was due in some cases to the threat of their employment being terminated in retaliatory action by their employer. (This matter is discussed in further detail later in this chapter.) In this regard, the Committee sought assurance from DIAC that, 'in the case of witnesses to the inquiry, it be consulted prior to action being taken

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29 Dr Zirnsak, Uniting Church in Australia, *Transcript of Evidence*, 14 March 2007, p. 15.

30 Joint Standing Committee on Migration website, <http://www.apf.gov.au/house/committee/mig/457visas/hearings/PROTECTION%20FOR%20WITNESSES.pdf>.

to terminate the visa of the witness and return them to their country of origin'.<sup>31</sup> DIAC confirmed that:

In respect of any Subclass 457 visa holder who may give evidence to the Committee, subject to permission from the visa holders themselves, the Department can give its assurance to advise the Committee of any action the Department may consider to assist the visa holders to return to their country of origin if the visa holders are dismissed by their sponsor and are unable to find another sponsor.<sup>32</sup>

- 3.22 That said, in some other cases, the Committee did receive documentary evidence backing up claims of alleged breaches. Some of the breaches alleged above have also been proven by DIAC and the Workplace Ombudsman (formerly the Office of Workplace Services)<sup>33</sup> or through the courts. For example, DIAC advised that, for the 2006-07 financial year (to 31 March 2007), 68 sponsors had been sanctioned.<sup>34</sup> In addition, the department advised that, for the 2006-07 financial year (to 31 January 2007), around 300 sponsors were under investigation and were not allowed to sponsor further overseas workers until these investigations were complete.<sup>35</sup>
- 3.23 The Committee acknowledges the seriousness of these issues and the importance of the Minister's announcements as a necessary means of building the integrity of, and public confidence in, the program in terms of fair treatment of 457 visa holders. Importantly, all those reporting alleged breaches of the 457 visa program to the Committee were advised that they should report them to DIAC, if they had not already done so.
- 3.24 It also needs to be stated at this point in the report that, as several contributors to the inquiry emphasised, the majority of employers under the program are 'doing the right thing':

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31 Correspondence to DIAC from the Joint Standing Committee on Migration, reproduced in *Submission No. 86*, p. 4.

32 DIAC, *Submission No. 86*, p. 1.

33 See on this point, for example, the Australian Council of Trade Unions, *Submission 39a*, p. 2; and the Australian Manufacturing Workers Union, *Submission No. 40*, p. 52 and p. 55. See also details of legal action listed on the Workplace Ombudsman website, <http://www.wo.gov.au/asp/index.asp?sid=7407&page=legal-action> (accessed 16 July 2007).

34 DIAC, *Submission No. 86a*, p. 39.

35 Commonwealth Government, *Submission No. 33*, p. 13.

According to official figures, allegations of misuse of the 457 visa program have been levelled against some 180 employers, out of more than 10,000 businesses using the program. That is, 98.4 per cent of employers involved in the temporary skilled migration program are doing the right thing and just 1.6 per cent might be doing the wrong thing. However, and again according to government statistics, more than 70 per cent of those allegations of misconduct by employers will be disproved or found to have no merit ... Taken together, this indicates 99.4 per cent of employers are doing the right thing ...<sup>36</sup>

Much of the media attention on 'Section 457 visas' and 'overseas worker exploitation' has been generated as a result of an overly narrow but magnified coverage of a relatively small number of employers not abiding by Australian immigration and workplace relations laws. Lesser known are the large number of employer sponsors of temporary overseas workers who are diligently complying with and upholding their sponsorship obligations as part of the temporary business visa program for 457 visas.<sup>37</sup>

There is no doubt that the majority of employers can be relied upon to at least be paying the 457 visaholder the relevant pay rate and to be employing the visaholder to work in the occupation for which they sponsored them.<sup>38</sup>

In our experience, acting for many hundreds of large and small companies – Australian owned and multinational companies – the vast majority of those companies utilising the 457 visa are not abusing that privilege and are not disadvantaging Australian workers through their recruitment or employment practices.<sup>39</sup>

- 3.25 DIAC pointed to a sanction rate of some 0.57 per cent for the program.<sup>40</sup> The Committee therefore notes that there are many examples of 457 visas working successfully for all parties.

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36 Australian Chamber of Commerce and Industry, *Exhibit No. 6*, p. 2.

37 Chamber of Commerce and Industry WA, *Submission No. 53*, p. 13.

38 Communications, Electrical and Plumbing Union, *Submission No. 61*, p. 19.

39 Mr Walsh, *Fragomen Australia, Transcript of Evidence*, 1 June 2007, p. 10. See also Cairns Chamber of Commerce, *Submission No. 27*, p. 3; and Ms Kearney, *Australian Nursing Federation, Transcript of Evidence*, 14 March 2007, p. 40.

40 DIAC, *Submission No. 86a*, p. 39.

- 3.26 However, several inquiry participants raised concerns about the small number of employer sponsors monitored by DIAC and the low rate of site visits (see Table 3.1):

New South Wales is ... concerned that the level of compliance activities conducted by DIMA is inadequate. In 2005-06, DIMA reported in its annual report that only 65.2 per cent of 457 visa sponsors were monitored for compliance with visa conditions, down from 96.9 per cent the previous year and falling well short of the target of 100 per cent. For all visas, only 33 sanctions were issued where there was a breach of visa or sponsorship conditions identified.<sup>41</sup>

- 3.27 DIAC advised the following statistics:

Responses from employers are reviewed by DIAC and other checks as appropriate, including referring matters to other relevant agencies, are then conducted. In 2005-06, over 6 400 employers were checked in this way.

DIAC also undertakes targeted site visits of employers to verify responses provided and/or undertake additional checks. During the site visits, interviews are conducted with the employers and separately with some of the employees. In 2005-06, some 1 790 sponsors were site visited ...

For the 2006-07 financial year to 31 January 2007, 20 sponsors have been sanctioned. In addition, around 300 sponsors are currently under investigation and are not allowed to sponsor further overseas workers until these investigations are complete.<sup>42</sup>

- 3.28 More recently, for the financial year 2006-07 (through to end April 2007), DIAC advised that 1,400 site visits had been undertaken.<sup>43</sup> Tables 3.2 and 3.3 provide a summary of sponsor investigations by outcome and sponsor sanctions by reason.

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41 NSW Government, *Submission No. 51*, p. 2.

42 Commonwealth Government, *Submission No. 33*, pp. 12-13.

43 Mr Parsons, DIAC, *Transcript of Evidence*, 1 June 2007, p. 78.

Table 3.1 DIAC compliance data: 2003-04 to 2005-06

	2003-04	2004-05	2005-06
457 visa sponsors monitored for compliance with visa conditions	100 per cent	96.6 per cent	65.2 per cent
457 visa sponsors site visited at place of employment	28 per cent	22.4 per cent	18.0 per cent

Source DIMA Annual Report 2005-06, p. 84.

Table 3.2 457 sponsor investigations by outcome: 1 July 2006 to 30 April 2007

Outcome of investigation (269 investigations)	%
Unsubstantiated	33
Sanctioned	25
Formally warned	19
Referral to other agency (no current DIAC action)	23

Source DIAC, Submission No. 86a, p. 35.

Table 3.3 457 sponsor sanctions by reason: 1 July 2006 to 30 April 2007<sup>44</sup>

Sanctions by reason (breaches: 162, sanctions: 68)	%
Breach of minimum salary level	40
Failure to notify DIAC of change in circumstances	13
Failure to pay superannuation	9
Failure to comply with Workplace Relations laws	7
Non-compliance with monitoring request	6
Failure to pay tax for employee	5
Failure to continue to satisfy requirements of sponsorship	4
Failure to notify of cessation of employment	4
Not working in nominated position	4
Breach of immigration law	4
Business no longer active	2
Provision of false information	1
Employing unlawful non-citizen	1

Source DIAC, Submission No. 86a, p. 36.

44 The table reflects the fact that some sponsors have been sanctioned for more than one reason.

3.29 Reflecting the concerns of a range of organisations, issues raised about monitoring, reporting and enforcement arrangements included that DIAC:

- lacked the enforcement provisions to fine sponsors;<sup>45</sup>
- provided pre-notification to employer sponsors before making a site visit for an alleged breach of program requirements;<sup>46</sup>
- had to refer certain matters to other agencies for investigation (alleged OH&S or workplace relations breaches, for example) but legislative difficulties complicated the sharing of information with these agencies, particularly across the states and territories;<sup>47</sup>
- did not have the power to order an employer to pay a 457 worker owed money under the minimum salary level requirement;<sup>48</sup>
- lacked sufficient resources to undertake adequate monitoring;<sup>49</sup> and
- had limited investigative powers to access employer documents, particularly in terms of monitoring the minimum salary level requirement.<sup>50</sup>

### Previous DIAC arrangements for monitoring, reporting and enforcement

3.30 Legislation came into effect on 1 July 2004 providing for sanctions against sponsors found in breach of sponsorship undertakings. These allowed for cancellation of the business sponsorship approval and a bar for up to five years on bringing in overseas workers.<sup>51</sup> On 30 October 2006, the former Minister for Immigration and Multicultural Affairs announced that \$17.6 million in funding, over four years, would be provided for the establishment and training of 'investigative mobile strike teams', to ensure employers of temporary

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45 Philippines Australia Union Link, *Submission No. 45*, p. 5.

46 Liquor, Hospitality and Miscellaneous Union, *Submission No. 20*, p. 6.

47 WA Government, *Submission No. 68*, p. 5.

48 Communications, Electrical and Plumbing Union, *Submission No. 61*, p. 6.

49 MIA, *Submission No. 9*, p. 14.

50 Communications, Electrical and Plumbing Union, *Submission No. 61*, p. 20.

51 DIMIA, *Annual Report 2004-05*, p. 74.

skilled migrants were complying with sponsorship requirements.<sup>52</sup> This statement was followed by the major changes announced to the program in April 2007, as discussed above.

- 3.31 The April 2007 amendments to the program, announced late in the inquiry process, will inevitably alter DIAC's monitoring, reporting and enforcement procedures and practices. However, for the record, DIAC submitted details of its current arrangements in this area – principally, that all 457 visa sponsors were required to sign-up to and comply with the sponsorship undertakings set out in Figure 3.2.

Figure 3.2 DIAC's existing compliance arrangements<sup>53</sup>

- (1) For subsection 140H(1) of the Act, an applicant for approval as a standard business sponsor must make the following undertakings:
- (a) to ensure that the cost of return travel by a sponsored person is met;
  - (b) not to employ a person who would be in breach of the immigration laws of Australia as a result of being employed;
  - (c) to comply with its responsibilities under the immigration laws of Australia;
  - (d) to notify Immigration of:
    - (i) any change in circumstances that may affect the business's capacity to honour its sponsorship undertakings; or
    - (ii) any change to the information that contributed to the applicant's being approved as a sponsor, or the approval of a nomination;
  - (e) to cooperate with the Department's monitoring of the applicant and the sponsored person;
  - (f) to notify Immigration, within 5 working days after a sponsored person ceases to be in the applicant's employment;
  - (g) to comply with:
    - (i) laws relating to workplace relations that are applicable to the applicant; and

52 Media release by Senator the Hon Amanda Vanstone, former Minister for Immigration and Multicultural Affairs, 'Package to enhance integrity of temporary skilled migration', 30 October 2006, <http://www.minister.immi.gov.au/media/media-releases/2006/v06247.htm>. On 21 May 2007, Ms Daniels from DIAC stated, 'I am not sure that we call them mobile strike teams; we call them additional monitoring resources', Transcript of Senate Standing Committee on Legal and Constitutional Affairs, Estimates, 21 May 2007, p. 58.

53 Commonwealth Government, *Submission No. 33*, pp. 70-71.

- (ii) any workplace agreement that the applicant may enter into with a sponsored person, to the extent that the agreement is consistent with the undertaking required by paragraph (i);
- (h) to ensure that a sponsored person holds any licence, registration or membership that is mandatory for the performance of work by the person;
- (i) to ensure that, if there is a gazetted minimum salary in force in relation to the nominated position occupied by a sponsored person, the person will be paid at least that salary;
- (j) to ensure that, if it is a term of the approval of the nomination of a position that a sponsored person must be employed in a particular location, the applicant will notify Immigration of any change in the location which would affect the nomination approval;
- (k) either:
  - (i) for an application made before 1 November 2005 – to pay all medical or hospital expenses for a sponsored person (other than costs that are met by health insurance arrangements); or
  - (ii) for an application made on or after 1 November 2005 – to pay all medical or hospital expenses for a sponsored person arising from treatment administered in a public hospital (other than expenses that are met by health insurance or reciprocal health care arrangements);
- (l) to make any superannuation contributions required for a sponsored person while the sponsored person is in the applicant's employment;
- (m) to deduct tax instalments, and make payments of tax, while the sponsored person is in the applicant's employment;
- (n) to pay to the Commonwealth an amount equal to all costs incurred by the Commonwealth in relation to a sponsored person ...
- (2) For paragraph (1)(n), the costs include the cost of:
  - (a) locating the sponsored person; and
  - (b) detaining the sponsored person; and
  - (c) removing the sponsored person from Australia (including airfares, transport to an airport in Australia and provision of an escort (if needed)); and
  - (d) processing an application for a protection visa made by a sponsored person.

3.32 Mr Parsons from DIAC further advised that:

The monitoring program is driven by a number of things. The first is that we have a profile based on experience by industry, so that there are certain industries which have proved to be more problematic in their adherence to the requirements. Sponsors from those industries score additional points in our risk assessment for receiving closer monitoring than others. The department also sends a questionnaire to sponsors six months after the commencement of a 457 applicant and thereafter every 12 months. That information – the answers or the non-reply to that questionnaire – is fed into the mix as well. The third element that currently feeds into the direction of our targeted monitoring is information that comes to the department through the customer service line or from ... third parties ... That then informs our state office people as to where best to target their monitoring at present.<sup>54</sup>

3.33 DIAC currently has '62 monitors working on the 457 program, with plans to grow that by a further 30 as a result of the funding coming from government in the package that was announced by the minister'.<sup>55</sup>

## Suggestions for improvement

3.34 The Committee is concerned that the implementation and administration of the new compliance arrangements for the 457 visa program should benefit from suggestions for improvement raised during the inquiry – noting that some of these have already been addressed by the new arrangements. Reflecting the concerns of a range of organisations, these suggestions included that:

- workplace inspections should be 'both announced and unannounced' and workplace inspectors should have the power to conduct interviews with temporary business visa holders and employer staff;<sup>56</sup>
- monitoring and integrity measures 'should focus on what is at the heart of the sponsorship mechanism' – that is, 'ensuring that the

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54 Mr Parsons, DIAC, *Transcript of Evidence*, 1 June 2007, p. 77. The questionnaire referred to above is DIAC Form 1110, 'Business Sponsor Monitoring' – see Commonwealth Government, *Submission No. 33*, pp. 73-78.

55 Mr Parsons, DIAC, *Transcript of Evidence*, 1 June 2007, p. 82.

56 Human Rights and Equal Opportunity Commission, *Submission No. 4*, p. 5.

right money is paid' and 'that the work nominated is being undertaken';<sup>57</sup>

- any employer found abusing the system 'should be excluded from further participation in the scheme and be subject to civil and criminal penalties';<sup>58</sup>
- in order to expedite the 457 visa process, standard business sponsors 'who have a demonstrable record of compliance with the spirit and intent of the 457 visa process should be provided with dispensation in respect of some of the requirements';<sup>59</sup>
- DIAC should have the 'same powers as the OWS to demand access to company information particularly where it relates to pay rates and conditions';<sup>60</sup>
- there should be data matching of '457 data against tax records of 457 visa-holders held by the ATO';<sup>61</sup>
- there should be 'capacity to source information from other Government Departments' and 'joint and priority investigation of breaches of Australian laws such as those related to employment relations, superannuation, occupational health and safety, workers compensation, taxation';<sup>62</sup>
- there should be a 'ban on agents charging potential 457 holders exorbitant fees to secure employment and a visa';<sup>63</sup>
- there is a need for 'appropriate legislation that is enforceable' – the current 457 visa program 'does not have sufficient legislative support to ensure integrity in the enforcement process';<sup>64</sup> and
- 'some attention is immediately required to make clear what are permissible and impermissible deductions and what deductions

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57 JohnInfo Lawyers, *Submission No. 38*, p. 4.

58 Australian Council of Trade Unions, *Submission No. 39*, p. 34.

59 Australian Mines and Metals Association, *Submission No. 30*, p. 5.

60 Communications, Electrical and Plumbing Union, *Submission No. 61*, p. 6.

61 Mr Kinnaird, *Exhibit No. 8*, p. 64.

62 Immigrant Women's Speakout Association of New South Wales and the Philippines-Australian Women's Association, *Submission No. 49*, p. 3. See also Australian Manufacturing Workers Union, *Submission No. 40*, p. 9.

63 Dr Wise and Dr Velayutham, *Submission No. 85*, p. 15.

64 Australia Meat Holdings Pty Ltd, *Submission No. 73*, p. 3.

cannot be brought into account in determining whether minimum salary levels have been met'.<sup>65</sup>

- 3.35 A number of participants also emphasised that DIAC must be properly resourced to undertake any enhanced monitoring role: '[t]he first issue is that DIAC and the Office of Workplace Services are not sufficiently staffed to be able to monitor the situation'.<sup>66</sup>
- 3.36 In summary, as Mr Waters from the MIA commented: '[i]f employers ... know that the monitoring process is for real and is happening, and is happening extensively, they will respect this particular program in the same way perhaps as they would respect the rules of the ATO and other government institutions'.<sup>67</sup>

## Reinforced integrity measures

- 3.37 Given the evidence provided to the inquiry about the need for enhanced monitoring, reporting and enforcement arrangements and the constructive suggestions made towards improving this area, the Committee supports the measures taken by the Minister in this regard. In particular, the Committee notes the proposal to elevate key obligations of the employer sponsor to the Migration Act as a reflection of their importance so that they will come into effect by operation of law. The new investigative and enforcement powers are also welcomed. As the Minister noted in his second reading speech on the legislation:

The New Investigative Powers

The bill also gives my Department greater investigative powers.

These powers, to the extent possible, have been adapted from the investigative powers of Office of Workplace Services inspectors.

Specially trained officers of my Department will have the power to enter (unannounced and without force) any place of business or any other place which they have reasonable cause

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65 Australasian Meat Industry Employees Union, *Submission No. 23*, p. 25. See also Australian Manufacturing Workers Union, *Submission No. 40*, p. 7 and Engineers Australia and Association of Professional Engineers, Scientists and Managers Australia, *Submission No. 54*, p. 13.

66 Mr Moir, WA Small Business Development Corporation, *Transcript of Evidence*, 30 April 2007, p. 17.

67 Mr Waters, MIA, *Transcript of Evidence*, 16 May 2007, p. 27.

to believe there is information, documents or any other thing, relevant to monitoring the approved sponsor's compliance with the obligations.

In support of inspectors' information gathering powers, the Bill also creates an offence for failing to produce a document requested by an inspector. This offence attracts a maximum penalty of imprisonment for 6 months.

#### The New Enforcement Powers

The bill attaches civil penalties to breaches of obligations with a maximum of \$6 600 for an individual and \$33 000 for a body corporate for each identified breach.

These penalties are complemented by other enforcement measures, both existing and others set up by this bill.

I will continue to have the power to cancel sponsorship approval or bar sponsors where they have failed to comply with a new obligation. I will also now be able to bar sponsors who have breached a law of the Commonwealth, State or Territory where appropriate.

Where my Department has identified a breach of an obligation and is pursuing civil remedy proceedings, the Court, in addition to imposing a civil penalty on the employer, has the power to order the employer to pay a person monies owed under an obligation.

Persons owed money under an obligation may also independently seek restitution. If, for example, a worker has been paid less than the 'minimum salary level', he or she may pursue an order for the amount of the underpayment.

As well as creating a right of recovery, the bill also provides a power to make regulations to set up an infringement notice regime, under which sponsors would be issued with infringement notices as an alternative to civil proceedings. The amount of the infringement notices cannot exceed 1/5th of the maximum amount of the civil penalty (\$1 320 for an individual and \$6 600 for a corporation).<sup>68</sup>

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68 Hon Kevin Andrews MP, Minister for Immigration and Citizenship, Second reading speech on the *Migration Amendment (Sponsorship Obligations) Bill 2007*, 21 June 2007, <http://www.minister.immi.gov.au/media/speeches/2007/ka04-21062007.htm>.

- 3.38 As these changes are essential to strengthening the integrity of the 457 visa program and, taken as a whole, make fundamental modifications to its operation, the Committee believes it is important the program in its new form be independently reviewed in 12-18 months time.<sup>69</sup> It is also important that these changes do not increase 'red tape' and add to costs and processing times for business. Adequate resources also need to be allocated by DIAC to the implementation, monitoring and enforcement of the new arrangements.

#### **Recommendation 16**

- 3.39 **The Committee recommends that, given the number of significant changes made to the 457 visa program in 2007 and past concerns about the program, the Department of Immigration and Citizenship commission an independent review of the program in 2008-09 to assess the impact of these changes on the program's effectiveness, fairness and integrity.**

#### **Recommendation 17**

- 3.40 **The Committee recommends that the Department of Immigration and Citizenship ensure that adequate resources are allocated to the compliance regime under the 457 visa program and, in particular, to the implementation and enforcement of the new arrangements.**
- 3.41 There is also a need for DIAC to undertake more detailed reporting on its monitoring activities to further build public confidence in the 457 visa program.

#### **Recommendation 18**

- 3.42 **The Committee recommends that the Department of Immigration and Citizenship regularly report on its website details of monitoring and enforcement activities – for example, on the number of employer sponsors monitored, sites visits conducted, sponsor approvals cancelled, sponsors banned and sponsors fined.**
- 3.43 The Committee further emphasises that, in order for this new compliance regime to operate effectively and fairly, information about

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<sup>69</sup> See, for example, the recommendation by the Cairns Chamber of Commerce that 'a regular review process (possibly every 2 years) be put in place to ensure the 457 visa program remains a useful tool for the business community', *Submission No. 27*, p. 9.

457 visa requirements, compliance obligations and sanctions needs to be clearly communicated to employers, migration agents and other stakeholders. This issue is discussed later in this chapter.

## Mechanism for reporting alleged breaches

- 3.44 The Committee was concerned to hear of the plight of some 457 workers who were in allegedly 'exploitative' positions but felt unable to report their concerns about possible breaches of immigration, OH&S, taxation, workplace relations and criminal law as they were not assured of a confidential mechanism that would protect them from possible retaliatory action from their employer.<sup>70</sup>
- 3.45 They therefore risked termination of their employment and ultimately having their visa cancelled and being deported from Australia. As Ms Bissett from the ACTU commented: 'there needs to be some protection for the 457 visa holders who do have legitimate complaints and legitimate issues so that they can raise those without having the threat hanging over their head of a 28-day deportation'.<sup>71</sup>
- 3.46 Concerns were also raised that, on a more basic level, some 457 visa holders did not know where to go to in any case to report their concerns: 'we found that there is really very little knowledge about how you seek redress. None of them really knew about the Office of Workplace Services, for example ... That is the big thing that has come out'.<sup>72</sup> This is further discussed in the section on Communication, later in this chapter.
- 3.47 During the course of the hearing, the Committee sought information from DIAC about what protection is afforded to 457 visa holders bringing possible abuses of the program to the department's notice. DIAC advised that:

... these matters are investigated in a manner that provides as much protection to the visa holder as possible. For example, where the allegation is in relation to underpayment of the MSL, DIAC investigates salary records for a number of workers, where this is possible, not just the complainant. In

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70 See, for example, Immigrant Women's Speakout Association of New South Wales and the Philippines-Australian Women's Association, *Submission No. 49*, p. 8.

71 Ms Bissett, Australian Council of Trade Unions, *Transcript of Evidence*, 14 March 2007, p. 8.

72 Dr Wise, Macquarie University, *Transcript of Evidence*, 1 June 2007, p. 64.

this way, any issues that are identified are seen to arise from normal monitoring activities, not from an allegation made by the visa holder.<sup>73</sup>

- 3.48 Several contributors specifically highlighted the need for some kind of 'whistleblowing' mechanism or 'complaints hotline' to protect 457 workers – to provide them with a confidential way to report alleged breaches or seek advice and assistance:<sup>74</sup>

The fear of deportation and losing even very limited income has meant that the employee will not make a complaint ... Protections for visiting migrants holding subclass 457 and related visas should be improved, to ensure that all such visa holders ... are able to freely make a complaint without fear of reprisal by their employer.<sup>75</sup>

The fear of loss of job (with no access to remedies against unfair or unlawful termination), and hence a requirement to leave the country if no new sponsorship is found, is a major impediment to reporting breaches and/or mistreatment of temporary skilled overseas workers by the workers ... Relevant agencies must establish safe and secure mechanisms of communication between the agency and the 457 visa holder.<sup>76</sup>

... the department [should] establish an anonymous hotline for reporting situations of abuse of 457 holders. This should be widely promoted to 457 holders with a particular focus on problem industries.<sup>77</sup>

- 3.49 The Human Rights and Equal Opportunity Commission (HREOC) best summarised how such a mechanism might work:
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73 DIAC, *Submission No. 86*, p. 2.

74 Interestingly, Mr Waters from the MIA commented that they had 'introduced a pro bono service for at-risk visa holders in the 457 area ... in close consultation with the ACTU and the immigration department to ensure that those exploited visa holders have independent, effective and appropriate assistance available to them at no cost', *Transcript of Evidence*, 16 May 2007, p. 25.

75 Uniting Church in Australia, *Submission No. 15*, p. 3 and p. 5.

76 Australian Council of Trade Unions, *Submission No. 39*, p. 34 and p. 37.

77 Dr Wise and Dr Velayutham, *Submission No. 85*, p. 15. See also Entity Solutions, *Submission No. 44*, p. 12; Liquor, Hospitality and Miscellaneous Union, *Submission No. 20*, p. 6; Federation of Ethnic Communities Council of Australia, *Submission No. 34*, pp. 3-4; Snedden, Hall and Gallop Lawyers, *Submission No. 17*, p. 2; Australian Nursing Federation, *Submission No. 63*, p. 5; and Australian Manufacturing Workers Union, *Submission No. 40*, p. 9.

DIMA should ensure that any person with concerns about the way they are being treated by their employer have free, simple and confidential access to a DIMA complaints line for temporary business visa holders.

The DIMA complaints line should be linked to TIS [Telephone Interpreting Services].

DIMA should ensure that contact information for the following complaint agencies is prominently displayed in all workplaces where temporary business visa holders are employed:

- DIMA
- Office of Workplace Services ...
- Human Rights and Equal Opportunity Commission
- State and Territory anti-discrimination and equal opportunity agencies
- legal aid services in the relevant state or territory
- relevant unions.

Staff on the DIMA complaints line should be properly trained as to the alternative complaint options available to the temporary business visa holder.<sup>78</sup>

- 3.50 DIAC advised that 457 visa holders have 'a range of ways to bring their complaint to the attention of the department. They include contacting us directly, contacting a business centre, ringing us through our standard 131 number or ringing us through our "dob in" line'.<sup>79</sup>

### **Recommendation 19**

- 3.51 **The Committee recommends that the Department of Immigration and Citizenship introduce a more comprehensive, confidential complaints mechanism so that 457 visa holders are able to report potential breaches of visa requirements without provoking retaliatory action. This mechanism should also be widely promoted to 457 visa holders.**

<sup>78</sup> Human Rights and Equal Opportunity Commission, *Submission No. 4*, p. 3.

<sup>79</sup> Ms Daniels, DIAC, *Transcript of Evidence*, 1 June 2007, p. 73.

## Cessation of employment

3.52 As referred to above, the Committee recognises that one of the reasons visa holders can be reluctant to report abuse is that they are fearful their employment will be terminated and they will be returned home. It was put to the Committee that the 28-day period to find alternative employment was insufficient for visa holders and increased their vulnerability to 'rogue' employers.<sup>80</sup> The Philippines Australia Union Link commented that, if a visa holder 'leaves the employer's service, they lose any income, their visa and any right to work in Australia'.<sup>81</sup> It was argued that finding a sponsor within 28 days was:

... a very hard task as no information on which businesses are approved sponsors is available publicly. Moreover, the employee is out of their country, is likely to be burdened by debt, and may face the situation where the erring employer will not or can not pay entitlements owing to the employee, including the cost of return travel to their country of origin. If detained and deported, the costs incurred may become a debt to the Commonwealth.<sup>82</sup>

3.53 It was recommended to the Committee that visa holders be given three months to find alternative employment.<sup>83</sup> Furthermore, it was argued that this period be extended if compensation or employment litigation were being sought, and that visa holders be provided with relevant welfare and employment services.<sup>84</sup>

3.54 The Australian Industry Group saw the 28-day transition period as an opportunity for visaed employees to leave unsatisfactory employment conditions:

They can vote with their feet. As you would be aware, they have 28 days to change employment. They are in very high demand areas. To be on the list and to have been brought out

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80 Construction, Forestry, Mining and Energy Union, *Submission No. 21*, p. 4; and Liquor, Hospitality and Miscellaneous Union, *Submission No. 20*, p. 5.

81 Philippines Australia Union Link, *Submission No. 45*, p. 8.

82 Philippines Australia Union Link, *Submission No. 45*, p. 9. See also Immigrant Women's Speakout Association of New South Wales and the Philippines-Australian Women's Association, *Submission No. 49*, p. 8.

83 Ms Bissett, Australian Council of Trade Unions, *Transcript of Evidence*, 14 March 2007, p. 8; Mr Conroy, Australian Manufacturing Workers Union, *Transcript of Evidence*, 17 May 2007, p. 19; and Construction, Forestry, Mining and Energy Union, *Submission No. 21*, p. 4.

84 Australian Council of Trade Unions, *Submission No. 39*, p. 25.

here you can guarantee that their skills will be in great demand, and if there are abuses in their workplaces they will vote with their feet. We have quite a number of cases where we have heard that happen ... That is a huge cost for the employer, who might have spent \$5,000 or \$10,000 bringing that person out here.<sup>85</sup>

- 3.55 In a letter to the Committee, DIAC outlined their approach to visa holders who cease working for their sponsoring employer.<sup>86</sup> In summary, visa holders are given 28 days to find an alternative sponsor, during which time their original sponsor continues to pay their salary. 'At the end of 28 days', DIAC explained:

... the Department will seek to make contact with the visa holder to discuss options. If the visa holder has reasonable prospects of finding another sponsor, we will provide the visa holder with more time to continue to look. It should be noted, however, that after the 28 days, the original sponsor is no longer liable for provision of salary to the employee unless this is part of an applicable industrial entitlement. It is the link to continuation of salaries paid after the visa holder loses their job that tends to highlight the 28 day period.<sup>87</sup>

- 3.56 If the visa holder does not have 'a reasonable prospect' of finding an alternative sponsor they are assisted to return home.<sup>88</sup>

- 3.57 The Committee heard that the DIAC Business Centres located in each state had the discretionary power to afford visa holders with additional time to arrange alternative employment.<sup>89</sup> As Ms Daniels from DIAC informed the Committee:

I think it is fair to say that the general parameters are that they have 28 days to find a new employer, but on a case-by-case basis we would expect that each individual is effectively case managed in the sense that if they need more time or they are actively looking for a new employer then we certainly

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85 Mr Melville, Australian Industry Group, *Transcript of Evidence*, 1 June 2007, p. 5.

86 DIAC, *Submission No. 86*, pp. 1-2.

87 DIAC, *Submission No. 86*, p. 1.

88 DIAC, *Submission No. 86*, p. 1.

89 Ms Daniels, DIAC, *Transcript of Evidence*, 1 June 2007, p. 76.

would expect that they would have the opportunity to take a little bit longer than the 28 days.<sup>90</sup>

- 3.58 The Committee was satisfied that the 28-day transition period was sufficient in view of the discretionary powers of DIAC to provide additional time if required. It is the Committee's view that sponsors and visa holders should be informed that DIAC has the flexibility to permit workers to remain beyond 28 days following the termination or cessation of employment.

### **Recommendation 20**

- 3.59 **The Committee recommends that the Department of Immigration and Citizenship (DIAC) develop and distribute promotional material for 457 sponsors and visa holders that clearly sets out the rights of visa holders and the process that follows employment cessation. This information should:**

- **clearly state that DIAC has the power to allow 457 visa holders to stay beyond a 28-day period following the cessation of employment;**
- **be distributed to all new 457 visa holders and sent to the known postal addresses of 457 visa holders currently in Australia; and**
- **be provided in both English and the first language of the visa holder.**

### **Commonwealth, state and territory collaboration in compliance**

- 3.60 The Committee heard a number of concerns about the need for improved cooperation between Commonwealth and state/territory agencies relating to compliance, to ensure prompt referral and investigation of potential breaches of Australian laws. The Western Australian Government commented, for example, that '[s]trengthening both Commonwealth and State Government processes for monitoring and enforcing employers' compliance with employment and other laws is crucial to the integrity of the 457 visa program.'<sup>91</sup>
- 3.61 Similarly, the ACTU commented that 'the rights of temporary skilled overseas workers can be best protected through a high level of co-

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90 Ms Daniels, DIAC, *Transcript of Evidence*, 1 June 2007, p. 75.

91 WA Government, *Submission No. 68*, p. 6.

operation between all agencies involved in monitoring of workplaces, including employment rights, occupational health and safety, wages, visa inspection'.<sup>92</sup>

- 3.62 There was also a call for DIAC to provide more detailed information to the states and territories on 457 visa usage, particularly where significant numbers of 457 visa holders are settling in regional centres, to assist with settlement and planning issues:

DIAC should be required to provide to State Governments the details of s.457 holders' employers and general numbers of s.457 holders located within their jurisdiction, to enable the States to accurately assess impact, monitor workplace health and safety, and plan for adequate services.<sup>93</sup>

- 3.63 One of the impediments to information sharing apparently related to privacy laws:

... Commonwealth agencies are currently unable to share information on their investigations with State agencies due to privacy laws ... The issue of federal privacy laws in sharing information across governments needs to be clarified in the context of the compliance and monitoring of employers under the 457 visa system.<sup>94</sup>

- 3.64 The Committee considers that these concerns appear to have been addressed by the Minister's recent announcement about the program:

The Bill authorises disclosure of personal information regarding sponsors and visa holders to prescribed agencies of the Commonwealth or of a State or Territory.

For example, where in the course of performing his or her functions, an inspector finds a workplace that obviously appears to fall short of basic occupational health and safety standards, he or she would be able to make such an observation known to the State or Territory body responsible for monitoring such standards.

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92 Australian Council of Trade Unions, *Submission No. 39*, p. 33.

93 Queensland Government, *Submission No. 65*, p. 5. See also Australian Council of Trade Unions, *Submission No. 39*, p. 33; R T Kinnaird and Associates, *Submission No. 80*, p. 1; and Australian Manufacturing Workers Union, *Submission No. 40*, p. 8.

94 WA Government, *Submission No. 68*, p. 5.

I would expect my Department to be informed of the outcome of any such investigation so consideration could be given to bar the sponsor for breach of a law of the Commonwealth, State or Territory.

To facilitate information exchange with the Australian Taxation Office, the bill also includes necessary amendments to the Taxation Administration Act 1953.<sup>95</sup>

3.65 The Committee also notes that the COAG review of the 457 visa program is still ongoing and that this process is looking at measures to better:

- enable cooperation between relevant Commonwealth/State agencies to ensure expedient referral and investigation of potential breaches and secure compliance with Australian laws ...
- examine the ability for Commonwealth/State agencies to exchange information in this area.<sup>96</sup>

## Communication

### DIAC's communication with sponsors, visa holders and other stakeholders

3.66 This report has necessarily canvassed a number of communication issues associated with the 457 visa program. There was consensus in the evidence that more needed to be done to ensure that visa holders and sponsors were aware of both their rights and responsibilities.<sup>97</sup> Of particular concern was that visa holders' vulnerability to abuse was increased due to limitations in the provision of information:

Should they be well-informed of their rights, entitlements and obligations? Absolutely. DIAC or the sponsoring employer should have a requirement to give them a show bag, or whatever term you want to use, of information in English, or possibly in their home language, that they can understand. That information should say, 'If you have a problem or if

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95 Hon Kevin Andrews MP, Minister for Immigration and Citizenship, Second reading speech on the *Migration Amendment (Sponsorship Obligations) Bill 2007*, 21 June 2007, <http://www.minister.immi.gov.au/media/speeches/2007/ka04-21062007.htm>.

96 Ministerial Council on Immigration and Multicultural Affairs, '457 Visa', 14 July 2006—see Commonwealth Government, *Submission No. 33*, p. 16.

97 Association of Consulting Engineers Australia, *Submission No. 14*, p. 6.

your employer's obligations, as set out in this literature, aren't what's happening to you, here is a 1800 number to ring.' That should be to DIAC and DIAC should then make appropriate enquiries. We have no problem with that at all.<sup>98</sup>

3.67 The Committee heard a range of options aimed at improving the dissemination of information and communication exchange between stakeholders. These included:

- creating a telephone hot line for visa holders to report abuse;<sup>99</sup>
- providing all visa holders with a copy of the sponsor's visa approval letter which outlines the employer's responsibilities;<sup>100</sup>
- developing a plain language information and orientation kit for visa holders, including information on employment rights, OH&S, unions, Australian Workplace Agreements and minimum conditions, and contact points for relevant government agencies and ethnic community organisations, as well as advice on record keeping in case of a dispute with their sponsor;<sup>101</sup>
- informing relevant community, union and other support groups when large groups of 457 visa holders enter a community;<sup>102</sup>
- ensuring state and territory authorities have the necessary information to monitor 457 visa holders and sponsors;<sup>103</sup>
- reviving the idea of a Business Advisory Panel to provide policy advice to DIAC about the needs of business in regard to the 457 visa program;<sup>104</sup>
- sending sponsors a checklist outlining their obligations;<sup>105</sup> and
- developing simple mechanisms for sponsors to provide DIAC with relevant compliance information, such as through the use of templates and the provision of direct email links.<sup>106</sup>

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98 Dr Davis, Australian Chamber of Commerce and Industry, *Transcript of Evidence*, 1 June 2007, p. 46.

99 Entity Solutions, *Submission No. 44*, p. 12.

100 Mrs Carstairs, Rural Enterprises, *Transcript of Evidence*, 30 April 2007, pp. 40-41.

101 Dr Wise and Dr Velayutham, *Submission No. 85*, p. 14.

102 Australian Council of Trade Unions, *Submission No. 39*, p. 10.

103 Queensland Government, *Submission No. 65*, p. 5.

104 Fragomen Australia, *Submission No. 13*, p. 10.

105 Cairns Chamber of Commerce, *Submission No. 27*, p. 7.

106 Entity Solutions, *Submission No. 44*, p. 12.

- 3.68 While addressing several problems identified with the current visa arrangements, the recent changes proposed by the Minister provide DIAC with a considerable communications challenge. As the MIA emphasised: '[t]here should be a substantial information campaign to alert employers should employer sanctions be increased'.<sup>107</sup> In his second reading speech to Parliament on the bill to amend the Migration Act, the Minister outlined undertakings to address limitations in the program's communication strategy and provide clarity on issues that had previously caused confusion, including:
- 'enhanced information exchange powers between my department [DIAC] and other prescribed Commonwealth, state and territory agencies';<sup>108</sup> and
  - elevating the existing undertakings required of sponsors to legal requirements and clearly delineating sponsors' legal obligations with regard to travel costs, medical expenses, recruitment and migration fees, and adequate record keeping.<sup>109</sup>
- 3.69 Effective communication of these proposed changes to sponsors, visa holders and the public at large is essential to the program's integrity and ensuring public confidence in the program. The Committee urges DIAC to develop and resource a comprehensive communications strategy to promote the proposed changes. The Committee believes that with adequate promotion the announced changes will strengthen the program and address key issues identified during this inquiry.

### **Recommendation 21**

- 3.70 **The Committee recommends that the Department of Immigration and Citizenship develop a communications strategy to ensure that stakeholders, including sponsors and visa holders, and the broader Australian population are adequately informed of the proposed changes to the 457 visa program. This should provide clarity on sponsors' legal obligations, including the payment of travel costs, medical expenses, recruitment and migration fees, and the necessity of adequate record keeping.**

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107 MIA, *Submission No. 9*, p. 15.

108 Hon Kevin Andrews MP, Minister for Immigration and Citizenship, Second reading speech on the *Migration Amendment (Sponsorship Obligations) Bill 2007*, 21 June 2007, <http://www.minister.immi.gov.au/media/speeches/2007/ka04-21062007.htm>.

109 Hon Kevin Andrews MP, Minister for Immigration and Citizenship, Second reading speech on the *Migration Amendment (Sponsorship Obligations) Bill 2007*, 21 June 2007, <http://www.minister.immi.gov.au/media/speeches/2007/ka04-21062007.htm>.

## Recommendation 22

3.71 **The Committee recommends that the Department of Immigration and Citizenship (DIAC) provide clear guidelines for 457 sponsors and visa holders on their rights and obligations. At the time of granting a visa DIAC should provide:**

- **sponsors with a checklist outlining their obligations; and**
- **visa holders with a list of their rights and their sponsor's obligations in both English and their first language.**

**In addition, this information should be provided to existing sponsors and visa holders in Australia.**

### Data reporting

3.72 A number of contributors pointed to the need for more detailed data on the operation of the 457 visa program:

... there should be much greater transparency and public disclosure of information about the 457 visa program.<sup>110</sup>

The ANF asks that DIMA establish regular and accurate reports and statistics on all aspects of the 457 visa program.<sup>111</sup>

3.73 Mr Kinnaird suggested that this data should encompass:

- the jobs for which 457 visa nominations have been approved ...
- location of the position (for example, Sydney, country NSW), detailed industry and occupation (ASCO six-digit code), base salary and other remuneration, skill sets specified by the employer for the position ... and specified experience required ...
- aggregated data on 457 visa nominations approved, say by industry sector and/or detailed occupation groupings ...
- data on actual base salaries paid to 457 visa-holders [as distinct from 457 salary levels approved by DIAC when it approves the visa] ...<sup>112</sup>

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110 R T Kinnaird and Associates, *Submission No. 80*, p. 1.

111 Australian Nursing Federation, *Submission No. 63*, p. 9. See also Liquor, Hospitality and Miscellaneous Union, *Submission No. 20*, p. 3.

112 Mr Kinnaird, *Exhibit No. 8*, p. 63. See also Queensland Government, *Submission No. 65*, p. 5; Communications, Electrical and Plumbing Union, *Submission No. 61*, p. 24; and Australian Nursing Federation, *Submission No. 63*, p. 9.

- 3.74 The Committee agrees that greater transparency and public disclosure of information and statistics would be of benefit, particularly in reinforcing community confidence in the operation of the program.

### **Recommendation 23**

- 3.75 **The Committee recommends that the Department of Immigration and Citizenship collect and publish, as appropriate under privacy laws, more detailed statistics on the 457 visa program – for example, on the occupations and actual base salaries of 457 workers – to enhance transparency and reinforce public confidence in the operation of the program.**

## **DIAC program administration**

### **Visa processing times**

- 3.76 Lengthy 457 visa processing times were widely reported in evidence to the Committee. For example, the MIA, a body representing some 1,500 migration agents in Australia, commented that:

A deterioration of Temporary Resident 457 sponsorship and visa processing times is unacceptable and causing damage to employers who need skills urgently that for labour shortage or product specific reasons are not available locally. We understand from our regular liaison with DIAC at state and national level that the delays have been caused variously and collectively over the past 2 years by staff shortages, insufficient training effort and software and information technology problems. Fixing these problems is of vital importance.<sup>113</sup>

- 3.77 Those providing evidence to the inquiry also commented on the serious cost implications such delays had on their business:

Given that many of our sponsored employees are required in Australia as a matter of urgency in order to implement or oversee critical projects, particularly in a specialist ICT field, a

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113 MIA, *Submission No. 9*, p. 17.

6 to 8 week processing delay is simply untenable to the operations of Australian businesses.<sup>114</sup>

3.78 It was further observed that slow processing times affect Australia's competitiveness in the global market for skills:

The shortage of engineers is now becoming a global issue, meaning the potential for business migration to fill these gaps is increasingly competitive. It will be vital for Australian processing procedures and times to remain simple and short to avoid potential applicants accepting positions in other countries.<sup>115</sup>

3.79 DIMA's *Portfolio Budget Statements 2006-07* indicated median processing times against service standards for the 457 visa of 30 days for applicants from low-risk countries, and six weeks for medium-risk countries.<sup>116</sup> However, the Committee heard of the following variation in processing times:

Electronically lodged packages ... have gone out on average from 2 weeks processing time to up to 8 weeks over the past 2 years. Manually lodged packages have gone out from 4 weeks on average to a minimum of 3 months.<sup>117</sup>

Over the last couple of years we have seen a significant increase, we believe, in the processing time for 457 visas. It went from about 10 to 14 days early last year through to about six to eight weeks.<sup>118</sup>

457 visa processing times, at least in Sydney, take from six to eight weeks for non ETA nationals and four to six weeks for ETA nationals. Processing times appear to be getting progressively longer.<sup>119</sup>

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114 Entity Solutions, *Submission No. 44*, p. 8. See also Association of Consulting Engineers Australia, *Submission 14a*, pp. 2-3.

115 Tourism and Transport Forum Australia and Infrastructure Partnerships Australia, *Submission No. 28*, p. 5.

116 DIMA, *Portfolio Budget Statements 2006-07*, Canberra, 2006, p. 66. 'High risk' is defined as those nations for whom ETA is not available. Service standards exclude sponsorships and nomination processing.

117 MIA, *Submission No. 9*, pp. 16-17.

118 Ms Motto, Association of Consulting Engineers Australia, *Transcript of Evidence*, 16 May 2007, p. 34.

119 Stirling Henry Migration Services, *Submission No. 16*, p. 4.

... the period prior to final approval can range from 6 to up to 12 weeks.<sup>120</sup>

3.80 The Committee also heard of delays with overseas integrity checking:

Applications lodged where 'in-country' integrity checking is required [have] increased from six weeks, to a minimum of three months and in some cases up to eight months. Member feedback indicate that the resources to undertake this level of checking are inadequate.<sup>121</sup>

3.81 In their submission, DIAC pointed to a 'general improvement in processing times between July 2003 to January 2006', partially due to the introduction of electronic lodgement. However, the department indicated that the 'increase in processing times in 2006 is likely to be linked to an increase in the volume of higher risk cases that require closer checking'.<sup>122</sup> DIAC advised in June 2007 that the average processing time for ASCO 1-3 applications was 'currently running at 27 days'. In the case of lower ASCO classes, DIAC commented that 'it is probably fair to say that there is increased evidence of fraudulent documentation or fraudulent statement of skills or qualifications'.<sup>123</sup>

3.82 Streamlined visa processing is of critical concern to employers. Although it is accepted that there has been a steady increase in 457 visa applications over recent years, these lengthy processing times are of serious concern to the Committee.

3.83 While the Committee acknowledges that some aspects of visa processing times are affected by factors over which DIAC has limited control, such as whether applications lodged have been fully completed and the time taken to undertake security and health checks, clearly there is an urgent need to streamline processes for business, without putting the integrity of the program at risk.

3.84 Accordingly, the Committee welcomes the Minister's recent announcement on the implementation of arrangements for the 'fast-tracking' of applications from employers with a 'demonstrated record' of complying with the 457 visa program:

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120 Australian Mines and Metals Association, *Submission No. 30*, p. 19.

121 MIA, *Submission No. 9*, p. 17.

122 Commonwealth Government, *Submission No. 33*, p. 11.

123 Mr Parsons, DIAC, *Transcript of Evidence*, 1 June 2007, p. 70.

Applications lodged by fast-tracked employers and their overseas personnel will be priority processed, helping to streamline access to skilled workers.<sup>124</sup>

- 3.85 However, at the time of finalising this report, there was no detailed information available on how this arrangement would work in practice or what processing service standards have been set and resources allocated to achieve ‘fast-tracking’<sup>125</sup> – how, for example, processing times might be speeded up for visas from certain countries where further checking was required, without compromising the integrity of the program.

#### **Recommendation 24**

- 3.86 **The Committee recommends that, to ensure fast-tracked service standards for processing times are met, the Australian National Audit Office undertake a performance audit of the administration of the 457 visa program next financial year. This audit should examine processing efficiency – that is, the extent to which the fast-track processing initiative leads to faster processing times compared to the rest of the caseload.**

#### **Electronic lodgement arrangements**

- 3.87 The Committee understands that an electronic lodgement facility was introduced on 1 November 2003, enabling Australian employers and overseas workers to make applications for online 457 sponsorship, nomination and visas.<sup>126</sup> DIAC commented that the use of this facility in terms of the 457 visa had grown rapidly. For example, in 2005-06, some 65 per cent of sponsorships were lodged online, 72 per cent of nominations and 73 per cent of visas.<sup>127</sup>
- 3.88 Several participants to the inquiry were critical of this electronic lodgement facility. The MIA commented that, while this process ‘seemed to work well for a short period in its infancy, it has been

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124 Media release by the Hon Kevin Andrews MP, Minister for Immigration and Citizenship, ‘New changes to the skilled temporary visa laws’, 26 April 2007, <http://www.minister.immi.gov.au/media/media-releases/2007/ka07030.htm>.

125 For further details on how the fast-track processing arrangement might be implemented see Mr Waters, MIA, *Transcript of Evidence*, 16 May 2007, p. 24; and Association of Consulting Engineers Australia, *Submission No. 14a*, pp. 4-5.

126 Commonwealth Government, *Submission No. 33*, p. 11.

127 Commonwealth Government, *Submission No. 33*, p. 11.

fraught with problems, delays and downtime overall and there is no sign of this situation improving in the foreseeable future.’<sup>128</sup> The MIA also pointed to insufficient training of DIAC staff working in 457 e-lodgement processing.<sup>129</sup>

### **Recommendation 25**

- 3.89 **The Committee recommends that the Department of Immigration and Citizenship improve its visa electronic lodgement procedures to ensure the effectiveness of the 457 visa program.**

### **Industry Outreach Officers**

- 3.90 Currently there are 15 DIAC Immigration Outreach Officers (IOOs) working in 19 host organisations.<sup>130</sup> DIAC described the role of the IOOs as being:

... to engage with those key industry sectors to ensure that there is a two-way flow – that there is understanding by those industry sectors of what the obligations and parameters of the migration program are. In return, we get very useful and very timely insight and feedback from those industry sectors on the effectiveness of the various parameters of the visa programs.<sup>131</sup>

- 3.91 The Committee heard overwhelmingly positive feedback from organisations that were utilising IOOs, and evidence suggested that they were providing a two-way communication flow between DIAC and industry as intended.<sup>132</sup> As Restaurant and Catering Australia submitted:

The R&CA is most grateful for this resource and commends the Government for this commitment to building the level of knowledge and understanding, within the business community, of immigration programs ... The Association

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128 MIA, *Submission No. 9*, p. 17.

129 MIA, *Submission No. 9*, p. 18.

130 Mr Parsons, DIAC, in Transcript of Senate Standing Committee on Legal and Constitutional Affairs, Estimates, 21 May 2007, p. 53.

131 Mr Parsons, DIAC, in Transcript of Senate Standing Committee on Legal and Constitutional Affairs, Estimates, 21 May 2007, p. 53.

132 Mr Howard-Smith, WA Chamber of Minerals and Energy, *Transcript of Evidence*, 30 April 2007, p. 5; Restaurant and Catering Australia, *Submission No. 50*, p. 15; Mr Bidwell, Commerce Queensland, *Transcript of Evidence*, 16 April 2007, p. 55; and Association of Consulting Engineers Australia, *Submission No. 14*, p. 4.

believes that this program is a meaningful way to gather intelligence from the business community to improve administrative procedures, monitoring and enforcement of temporary business migration arrangements.<sup>133</sup>

- 3.92 Although no exact figures were given with regard to the cost of the IOO program, there were indications of some resource sharing between DIAC and host organisations.<sup>134</sup> DIAC provided salaries and computing equipment, while host organisations provided accommodation.
- 3.93 The Committee commends DIAC on the development of the IOO program and supports its continuation and expansion. The Committee believes the initiative provides a 'best practice' model for other government departments interacting with industry.

Don Randall MP  
Chair

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133 RCA, *Submission No. 50*, p. 15.

134 Mr Melville, Australian Industry Group, *Transcript of Evidence*, 1 June 2007, p. 8. See also Mr Parsons, DIAC, in *Transcript of Senate Standing Committee on Legal and Constitutional Affairs, Estimates*, 21 May 2007, p. 54.