CHAPTER 3

KEY ISSUES

3.1 This chapter discusses the key issues and concerns raised in submissions, and at the hearing, on the Migration Amendment (Employer Sanctions) Bill 2006 (the bill).

3.2 Submissions generally supported the policy initiatives of the bill, namely, the reduction in the number of people working illegally in Australia.[1] The key issues raised in submissions and at the public hearing related to:

- the consultation process for the bill and proposed future consultations on the issue of illegal workers in Australia;
- the need for an employer awareness campaign;
- enforcement of the legislation;
- the definition of 'recklessness' in the context of the offences;
- the burden on employers in complying with the legislation;
- the potential for discrimination;
- the scope of working relationships which are captured in the definition of 'allows a person to work';
- expanding access to the Entitlement Verification Online (EVO) facility; and
- expanding work rights on visas.

Consultation process

3.3 One of the issues canvassed in submissions, and in the hearing, was the extent of consultation which had occurred between the Department of Immigration and Multicultural Affairs (the Department) and stakeholders, and the Department's plans for future consultation.[2]

3.4 The Explanatory Memorandum provides an outline of consultations since 1999 which have taken place between the Department, peak industry bodies, employer groups and other Commonwealth departments and agencies.[3]

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1 See for example Migration Institute of Australia (MIA), *Submission* 1, p. 3; Australian Chamber of Commerce and Industry (ACCI), *Submission* 8, p. 4; National Farmers' Federation (NFF), *Submission* 9, p. 2.

2 See for example MIA, *Submission* 1, p. 6; Department of Immigration and Multicultural Affairs (DIMA), *Submission* 5, p. 1; NFF, *Submission* 9, p. 1; Mr Steve Balzary, ACCI, *Committee Hansard*, 26 April 2006, pp. 2 and 7;

3 Explanatory Memorandum, Part 5.

3.5 The Migration Institute of Australia (MIA) recommended that the Department consult more widely on the bill:

> The MIA strongly recommends that [the Department] consults with the two peak [recruitment] industry bodies, being Recruitment and Consulting Services Association Ltd (RCSA) and the Information Technology Contract and Recruitment Association (ITCRA) to seek their views on this draft Bill, particularly in relation to S245AD. Given the penalties involved, we further recommend that the Australian Human Resources Institute, the Australian Institute of Management and the Law Council be consulted on the draft Bill.[4]

3.6 At the hearing, Mr David Mawson, Chief Executive Officer of the MIA, told the committee that his organisation had had no active consultation with the Department on the bill (although he noted that the MIA would not necessarily expect such consultation to occur). However, Mr Mawson did indicate that there are issues in relation to the bill which the MIA would take up with the Department in future consultations.[5]

3.7 Mr Steve Balzary, Director, Employment and Training of the Australian Chamber of Commerce and Industry (ACCI), told the committee that ACCI has had ongoing discussions with the Department:

> We have certainly had discussions with [the Department] over the last three to six months about clarity and getting better information to employers across the programs, and we are working with [the Department] on that.
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> … All my members were involved in a series of consultations undertaken by Minister Vanstone a month or so ago which went right across the arrangements.[6]

3.8 The Department's submission indicated that there were future consultations planned on this issue.[7] At the hearing a Departmental officer provided the committee with the following information in relation to these proposed consultations:

> …our intention … would be that during the six months between the time these provisions become law and their taking effect we would be engaging in a very comprehensive stakeholder engagement strategy that would include some of the organisations, if not all of them, that we had already consulted with over the previous numbers of years and, in particular, those organisations which, during this process, have indicated that they would want to be consulted …[8]

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4 MIA, *Submission* 1, p. 6.

5 *Committee Hansard*, 26 April 2006, p. 20.

6 *Committee Hansard*, 26 April 2006, pp. 2 and 7.

7 DIMA, *Submission* 5, p. 1.

8 *Committee Hansard*, 26 April 2006, p. 34.

3.9 Departmental officers also indicated that future consultations would include organisations such as the Institute of Management and other peak bodies that the MIA noted in its submission as potentially having an interest.[9]

Committee view

3.10 The committee recognises the efforts that the Department has made in carrying out consultations on the bill to this point. The committee endorses the intention of the Department to continue consulting with those stakeholders already involved in the process, and to broaden its consultation to include those organisations which have indicated an interest in the process, or been identified in submissions as potentially having an interest in the process.

An awareness campaign

3.11 A number of submissions and witnesses at the hearing highlighted the need for the introduction of the legislation to be accompanied by a comprehensive educational campaign, not only to raise awareness among employers and workers about the offences in the bill, but also to generally raise awareness amongst employers of the variety of visas and associated working restrictions.[10]

3.12 In its opening statement to the committee, a representative from the Department noted the information campaigns have been running for four years, which:

> … consists of employer awareness visits, an improved information kit for employers, the issuing of illegal worker warning notices to employers and, perhaps most importantly, the introduction of new work right checking services such as the employer work rights fax-back facility and the internet based entitlement verification online.[11]

3.13 The Departmental representative also told the committee that in the previous four years it has delivered 7,200 employer awareness sessions and issued over 6,700 illegal worker warning notices.[12]

3.14 While noting these efforts, Mr Balzary from ACCI said:

> … we are leaning towards a promotional program that is connected up to promoting to employers what their roles and responsibilities are. We think it would be a much better effort to have a targeted link to a targeted campaign which is done on a risk basis in industries where there may be a history of employing people who come through illegal migration, and supported by that process.[13]

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9 *Committee Hansard*, 26 April 2006, p. 34.

10 See Mr Balzary, *Committee Hansard*, 26 April 2006, pp 2-4; and MIA *Submission* 1, p. 3.

11 *Committee Hansard*, 26 April 2006, p. 24.

12 *Committee Hansard*, 26 April 2006, p. 24.

13 *Committee Hansard*, 26 April 2006, p. 2.

3.15 Mr Balzary considered that the Employer Awareness Campaign (EAC) was a good 'building block', but that what was needed now was a more comprehensive campaign, across all visa categories, involving industry organisations going out and talking to employers about their responsibilities.[14] Accordingly, he recommended a partnership arrangement between government and industry where Departmental officers are seconded to a range of industry organisations, who in turn can provide information to employers about their responsibilities under the legislation.[15]

3.16 The MIA noted that the Department had put considerable effort into raising awareness amongst employers about the issue of illegal workers. MIA recommended that the current EAC be complemented by a leaflet campaign targeted at people travelling to Australia. The leaflet would refer travellers to the Entitlement Verification Online (EVO) facility and other avenues for checking working entitlements of prospective employees. The MIA also suggested that the Department investigate the feasibility of putting a reference to the EVO facility on all temporary entry visas.[16]

3.17 At the hearing, Departmental officers indicated that the Department intends to use the six month period before the offences take effect to focus on raising employer awareness through means such as advertisements in industry publications and national newspapers, as well as engaging with key stakeholders (discussed above). The Departmental representatives also indicated an intention to work with industry groups to ensure that employer information kits provided clear information on employers' rights and responsibilities with regard to the new offences.[17] The Department's representative told the committee that until this point their activities had focussed on general awareness raising, however once the legislation was introduced:

> … we could do as the submissions are calling for and focus on what would specifically be required under the new offence provisions that would be introduced. I think we could see that as one benefit of a phased-in introduction over a six-month period – that is, for us to work with industry and provide relevant information. It would allow us to provide answers to factual, example based questions that different industries may have and to incorporate those into tailored information for them.[18]

3.18 The Department also indicated that it is actively considering some of the suggestions by the MIA for raising awareness amongst travellers.[19]

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14 *Committee Hansard*, 26 April 2006, p. 4.

15 *Committee Hansard*, 26 April 2006, p. 3.

16 MIA, *Submission* 1, p. 3.

17 *Committee Hansard*, 26 April 2006, p. 25.

18 *Committee Hansard*, 26 April 2006, p. 27.

19 *Committee Hansard*, 26 April 2006, p. 27.

Committee view

3.19 The committee is satisfied that the Department has in place plans to raise awareness of the offences during the 6 months following the passage of the legislation. However, the committee believes that both the ACCI and MIA have made useful suggestions as to how the awareness of both employers and prospective employees can be raised. The committee recommends that the Department work with both these organisations to determine the feasibility of those suggestions

Recommendation 1

3.20 The committee recommends that the Department consult with the ACCI, the MIA, and other interested organisations, to assess the feasibility of programs aimed at increasing the awareness of both employers and employees of the offences in the bill.

Enforcement of the legislation

3.21 The committee considered two issues in relation to the enforcement of the legislation. Firstly, the risk of employers being prosecuted for offences under the bill in cases of 'inadvertent' breaches. Secondly, the committee considered the priority and resources that the Department was able to direct to the enforcement of the legislation.

3.22 The issue of enforcement of the offences in the bill is important by reason of its bearing on two related issues – the definition of reckless; and the compliance burden on employers – which are discussed separately below.

3.23 In relation to the former issue, the MIA gave the committee some insight into how employers could may inadvertently breach the bill. Mr Brendan Ryan, a member of the MIA, highlighted two specific examples:

> The ones that people would often get into trouble with in an employer relationship and which specifically goes to this bill would be things like the working holidaymaker visa, which places a three-month limit on the time that they can work for any one employer. Another would be that on a 457 work permit someone cannot change their employer without the prior approval of the department. That means a fresh application or a visa. So if they jump from one employer to another and they have not been approved to work for the new employer they are in breach of their visa condition.[20]

3.24 However, the Department indicated that it is not their intention to take a heavy handed or unreasonable approach to the enforcement issue. On the issue of employers being inadvertently caught by the legislation, the Department told the committee that:

> … as a matter of policy we would not seek to refer any cases to the Director of Public Prosecutions unless an employer had first been given a warning and guidance on how to check work rights. In other words, no employers

20 *Committee Hansard*, 26 April 2006, p. 20.

> would be caught off-guard by these offences. There would of course be exceptions for cases involving employment rackets or aggravated offences but, as a general rule, no employer will be prosecuted unless they have first been given a warning. We would want to be fair and reasonable with employers.[21]

3.25 In general, the Department intends to take a more 'leveraged' approach

> Some of that might mean that we change a little bit the way we go about our operations. For example, if we have information that there may be illegal workers at a premises then, rather than to turn up unannounced and identify the worker and remove them from the premises, more and more our approach would be to contact the business and discuss the information with the employer and allow them to self-regularise the situation. Again, the employees may be entitled to regularise their situation.[22]

3.26 At the hearing, the committee also sought information from the Department on the resources available to implement and enforce the legislation. Consistent with the discussion above, the Department's representatives did not anticipate resource issues, given that the bill is associated with a shift in focus in compliance activities away from locating and resolving the status of individual employees, and towards a small number of employers who are currently not doing the right thing.[23] A representative of the Department stated:

> The department has around 300 officers involved in compliance activities, either locating over-stayers and people undertaking illegal work or considering cancellation of visas where there has been breach of conditions for a range of reasons. So they would be the key people that we would see building into their everyday activities that they are already discharging the identification of potential illegal work breaches that might lead to referral to the DPP for possible prosecution.[24]

3.27 Representatives for the Department explained that there were already work practices in place, such as the issuing of Illegal Worker Warning Notices, which could be further developed so that, once the legislation came into effect, cases could be referred to the Director of Public Prosecutions.[25]

3.28 The committee also notes the MIA suggestion that enforcement of the legislation could be assisted by Workplace Inspectors from the Department of Employment and Workplace Relations being trained to recognise potential breaches of the bill.[26] Representatives from the Department noted that no arrangements had been

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21 *Committee Hansard*, 26 April 2006, p. 25.

22 *Committee Hansard*, 26 April 2006, p. 32.

23 *Committee Hansard*, 26 April 2006, p. 28.

24 *Committee Hansard*, 26 April 2006, pp. 27-28.

25 *Committee Hansard*, 26 April 2006, pp. 27-28.

26 MIA, *Submission* 1, p. 5.

concluded with other agencies involved in administering the offence provisions, however suggestion would be followed up with the Department of Employment and Workplace Relations.[27]

Committee view

3.29 The committee accepts that the bill represents a more 'leveraged approach' by the Department, and a targeting of its resources towards non-compliance employers rather than individual employees.[28] As such, and with enforcement efforts being focused on intransigent worst offenders, the committee does not consider that employers would be caught by an arbitrary or surprise charge under the proposed legislation. For that reason, the committee understands that more resources should not be required by the Department to implement and enforce the offences in the bill.

3.30 The committee also notes that the Department intends to have primary responsibility for the enforcement of the offences. However, the committee encourages the Department to pursue discussions with the Department of Employment and Workplace Relations regarding the feasibility of using Workplace Inspectors in the implementation and enforcement of the bill.

The definition of 'reckless'

3.31 The definition of reckless, and when an employer or labour supplier would be considered reckless in employing an illegal worker, was a key issue in a number of submissions.[29]

3.32 The Explanatory Memorandum notes that subsection 5.4(1) of the Criminal Code provides that a person is reckless with respect to a circumstance if:

- he/she is aware of the substantial risk that the circumstance exists or will exist; and
- having regard to the circumstances known to him or her, it is unjustifiable to take the risk.[30]

3.33 The Explanatory Memorandum states that:

> Current case law indicates that the fault element of recklessness is a variable standard that provides 'flexibility having regard to the vast range of offences covered by the Code'. What constitutes a *substantial risk* 'may vary depending on the context and gravity of the criminal activity' (*Hann v Commonwealth DPP* [2004] SASC 86 (26 March 2004), at paragraph 23).[31]

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27 *Committee Hansard*, 26 April 2006, p. 28 and 34.

28 *Committee Hansard*, 26 April 2006, p. 28.

29 See ACCI, *Submission* 8, pp. 4-5; MIA, *Submission* 1, p. 3; NFF, *Submission* 9.

30 Explanatory Memorandum, paragraph 21.

31 Explanatory Memorandum, paragraph 23.

3.34 The ACCI argued against using the dual test of knowingly or recklessly, submitting that:

> the concept of 'reckless' involves a significantly lesser level of awareness by an employer of the true nature of a worker's work status than the primary offence in the Bill, of having knowingly engaged such a person to work. While employers may seek to avoid the 'knowingly' criterion by not checking employees' work rights, the low awareness threshold for an employer to be judged to have been reckless exposes employers to large penalties and is in our view unreasonable.
>
> Our concern is highlighted by paragraph 25 of the explanatory memorandum which reads 'it is intended that a person would be reckless as to the circumstances in paragraph 245AB(1)(b) where he/she is aware of the possibility that a worker could be an unlawful non-citizen.'
>
> In order to avoid breaching this legislation, employers will be placed in a situation of having to make a value judgement about whether a prospective employee is at risk of being an illegal worker.[32]

3.35 At the hearing, Mr Balzary of the ACCI noted that the organisation supported sanctions against employers who knowingly *and* recklessly engaged illegal workers. However, ACCI's concerns are particularly with the 'length and breadth' of the concept of recklessness.[33] Mr Balzary explained ACCI's concerns to the committee in this way:

> The issue for us is: how far does an employer need to go to ascertain whether someone is a legal worker? For example, if someone comes in under a particular visa category they may be a legal worker in some instances but they move, and they may still have some degree of proof that they are a legal worker but not for that particular industry or region. In addition to that, and more importantly for us, what does the employer need to make sure they have proof? We are looking from a practical point of view.[34]

3.36 In contrast the National Farmers' Federation did not find the concept of recklessness problematic, stating in its submission:

> The requirement to prove actual intent or recklessness is understood to not create any liability on a farmer who was simply careless in their recruitment of an illegal worker. It is also understood that the term recklessness means that it would have to be proved that the farmer knew there was a substantial risk that the job applicant was an illegal worker and that under the circumstances known to the employer, it was unjustifiable for the employer to have taken that risk.[35]

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32 ACCI, *Submission* 8, pp. 4-5.

33 *Committee Hansard*, 26 April 2006, p. 2.

34 *Committee Hansard*, 26 April 2006, p. 2.

35 NFF, *Submission* 9, p. 1.

3.37 A Departmental officer provided the committee with the following explanation of the meaning of recklessness in the context of the bill:

> In our view, the fault element of recklessness would only require an employer to consider checking the work rights of a job applicant where there is a substantial risk the applicant is an illegal worker. The explanatory memorandum indicates that a substantial risk will exist where there is a possibility that a prospective employee is an illegal worker. In this context, our legal advice indicates that proof of recklessness would require a range of circumstances to be taken into account, including, for example, whether the employer operates in an industry where a large number of illegal workers are located, whether the department's employer awareness campaign has highlighted the risks in those industries, whether the particular employer has been given information about the risks – for example, by being given an illegal worker warning notice and guidance on how to check work rights – and whether the illegal worker said anything at their job interview from which a court could conclude that the employer was aware of the possibility that the job applicant was an illegal worker – for example, by mentioning that they were visiting Australia from abroad.[36]

3.38 A representative of the Department also pointed out that a number of other countries already had legislation requiring a much higher level of work rights checking. For example, in Switzerland and Canada sanctions apply to employers who 'merely act negligently or who fail to exercise due diligence in checking work rights'.[37]

3.39 On the difference between reckless and careless raised by the NFF, Special Counsel for the Department had this to say:

> I would say that there is a clear legal distinction between 'recklessness' and 'carelessness'. 'Carelessness' imports an objective standard of failure, to follow what a reasonable person might do in the circumstances. 'Recklessness' is a subjective, conscious concept that focuses on the awareness of the individual—the subjective awareness of the risk in those circumstances, and it is required to be proved on a subjective basis, as you would in the case of intention or knowledge, so it is a much higher threshold than mere carelessness.[38]

3.40 A related issue is whether it would be preferable to locate the definition of the term 'reckless' in the legislation itself, instead of the Criminal Code as proposed. The MIA commented that:

> We note that the Explanatory Memorandum (paragraph 20), states that the penalty must be read with Sections 4AA and 4B of the *Crimes Act 1914*, and that at paragraph 21 it refers to the definition of 'reckless' contained in Subsection 5.4 (i) of the *Criminal Code*. However, we believe that this

36 *Committee Hansard*, 26 April 2006, p. 25.

37 *Committee Hansard*, 26 April 2006, p. 25.

38 *Committee Hansard*, 26 April 2006, pp. 33-34

> definition of the term 'reckless' is so central to the application of these penalties, that it should be included in the body of the [bill], or at the very least we **recommend** that the Explanatory Memorandum includes an expanded range of examples.[39] (emphasis in original)

3.41 At the hearing representatives of the Department noted that the term 'reckless' had a well-established definition which is used in many *Criminal Code* situations.[40] In response to MIA's recommendation that the definition of recklessness be included in the provisions of the bill, the Department's Special Counsel stated:

> … the policy of the drafters and the Attorney-General's Department is not to have specific references or at least not to have the definitions restated in specific legislation but to rely on the definitions that are in the [*Criminal Code*].[41]

Committee view

3.42 The committee notes that it is the policy of the Attorney-General's Department not to duplicate in specific legislation definitions which already appear in the *Criminal Code* and concurs with the Department that the term 'reckless' (or recklessness) is a well-established definition used in the *Criminal Code*, although the bill provides a new context in which the term 'reckless' is used.

3.43 The committee understands that the term 'reckless' is a cause for concern in some organisations. However, the committee also notes that the Department is committed in the six month phase-in period for the offences to providing answers to factual, example based questions that different industries may have, and to providing industry-specific information in relation to the bill. The committee also notes statements (discussed above) by the Department that it intends to approach enforcement of the provisions in a fair and reasonable manner, and that in the majority of cases, a matter will not be referred for prosecution unless the employer has previously been provided with a warning and guidance on how to comply with the legislation.

3.44 The committee believes, given the proposed initiatives by the Department, that no amendment to the bill is necessary in respect of the term 'reckless', however the committee will seek reports from the Department as to the progress of enforcement.

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39 MIA, *Submission* 1, p. 3.

40 *Committee Hansard*, 26 April 2006, p. 26.

41 *Committee Hansard*, 26 April 2006, p. 26

Burden on the employer

3.45 Some submissions expressed concern that the proposed amendments would place a heavy compliance burden on employers and labour suppliers.[42]

3.46 The Regulation Impact Statement, contained in the Explanatory Memorandum, in discussing the impact of the new offences on small businesses, states:

> The proposed offences may have an increased impact on small businesses in the construction, taxi and hospitality industries where there are higher proportions of illegal workers. However, the proposed offences would not require routine work rights checking. A check would only be needed where there is a substantial risk that a prospective employee is an illegal worker.[43]

3.47 However the ACCI submitted that this understates the likely real impact of the legislation:

> … this requirement will impose additional workload on employers, and may be particularly onerous for those in industries with traditionally little formal paperwork around hiring practices.
>
> The amount of time per worker required to verify their immigration status may only amount to a few minutes, but this could build up to a significant amount for businesses that employ large numbers of workers, and with high turnover rates (eg in the fruit-picking industry). This time needs to be balanced against the potential loss in productivity that could be experienced if illegal employees were removed from the workplace because of breaches of immigration laws.[44]

3.48 Mr Balzary of ACCI linked the matter of compliance burden on employers to the uncertainty in the term 'recklessness', because it was a matter of employers not knowing how much they needed to do in order to not be considered reckless.[45]

3.49 Mr Robert Jackson, a member of the MIA, advised the committee of the nature of his advice to clients in relation to compliance in such a situation:

> As a professional adviser, seeing the legislation that currently stands, I would say to any employer, 'Just take all steps you can because the penalties are grave and it's not clear what you have to do.' … if a policy was developed that all employers had to ask for the visa label or make use of the EVO system and they knew that they had to do one, two or three things, it would be a lot easier to give concrete advice and it would catch

42 See ACCI, *Submission* 8, pp. 5-6; Restaurant & Catering Australia, *Submission* 10.

43 Explanatory Memorandum, paragraph 4.4.27.

44 *Submission* 8, p. 5.

45 *Committee Hansard*, 26 April 2006, p. 2.

> out those who are truly reckless and do not care about the legislation at all.[46]

3.50 However, the Department notes in its submission that 'Considerable care has been taken to ensure that the legislation would not place an undue burden on business',[47] while the Explanatory Memorandum states that it is not intended that the proposed offences would require employers to conduct routine checks of employees' working rights.[48]

3.51 This notwithstanding, an officer of the Department explained that:

> We would certainly suggest that routine work rights checking may be good practice for employers, if for no other reason than to prevent the loss of their investment in training and the production of an employee if an Immigration visit were to lead to us remove one of their workers from the workplace … But I think the point is that there is nothing in this bill that would require an employer to have comprehensive work rights checking. So we will continue to work with the employer associations in suggesting that that is best practice, but we would certainly not be implying that we believe it is necessary under this bill for employers to be doing that.[49]

The taxi industry

3.52 In the particular circumstances of the taxi industry, Mr Blair Davies, Executive Director of the Australian Taxi Industry Association (ATIA), indicated that the organisation saw the issue of verification of working entitlements of taxi drivers as one which could be carried out by the State and Territory industry regulators as part of the process for issuing drivers' authorities or certification.

3.53 State and Territory industry regulators have broadly consistent processes for issuing drivers' authorities/certification, which involve health and criminal record checks, as well as training in areas such as service delivery and emergency procedures. As Mr Davies explained to the committee:

> Before somebody receives an authorisation or a certification to be a taxi driver, they do need to go over a significant number of hurdles. From that point of view, we see the requirement that they be a citizen of Australia or, alternatively, a legal non-citizen as being yet another hurdle for a taxi driver. In that regard, our original submission to this committee was along the lines that this requirement and this bill should be integrated with the drivers' authority or certification process administered by the state regulators.[50]

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46 *Committee Hansard*, 26 April 2006, p. 22.

47 DIMA, *Submission* 5, p. 1.

48 Explanatory Memorandum, paragraph 4.4.27.

49 *Committee Hansard*, 26 April 2006, p. 29.

50 *Committee Hansard*, 26 April 2006, p. 13.

3.54 If the State and Territory industry regulators were to encompass a working rights verification procedure into the existing driver's authority/certification process there would be no additional compliance burden placed on individual taxi owners or licence holders.

3.55 An officer from the Department indicated to the committee that the Department is already negotiating with State and Territory taxi regulators to enable their access to the EVO facility, with progress made with the NSW and Victorian bodies.[51] However, Mr Davies indicated that in the course of ATIA's discussions with State and Territory regulators, as yet, no regulators had signalled a preparedness to change arrangements for issuing driver's authority/certification to include this check.[52]

Committee view

3.56 The committee is aware of an inevitable conflict between the outcomes sought by employers and labour suppliers: on one hand, the desire for compliance certainty and on the other, the desire to minimise compliance costs. However, complete certainty as to a worker's status can only be achieved through compulsory and universal work entitlements checks. Such compulsory checks would, in most cases, be unnecessary relative to the actual risk of an employee being an illegal worker. The committee believes that the best balance between the costs of compliance and the risk of non-compliance will not be achieved through prescriptive measures, but rather on a risk based approach in each specific industry – as proposed by the bill.

3.57 The committee appreciates that the bill will result in a greater workload for some employers, particularly those in industries with a naturally high turnover of staff.

3.58 The committee also notes that, although not required by the bill, the Department suggests routine work rights checking as a matter of good practice for employers. The committee considers that this additional effort will provide employers with some degree of comfort that, where they are investing in the recruitment and training of employees, that investment will not be lost through it later being discovered the employee is an illegal worker.

3.59 The committee also notes the efforts of the Department to remove some of the burden from employers. In the case-study of the taxi industry, described above, the logical outcome is enabling the State and Territory regulatory bodies for taxis to access the EVO facility. The committee recognises that the Department can not compel State and Territory bodies to follow work entitlement checking procedures, however the committee encourages the Department to pursue any other similar arrangements which would reduce the compliance burden on employers.

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51 *Committee Hansard*, 26 April, 2006, p. 33.

52 See *Committee Hansard*, 26 April 2006, pp. 14-15.

The potential for discrimination

3.60 The bill requires an employer or labour supplier to make an assessment of the risk that a person is an illegal worker. The Australian Catholic Migrant and Refugee Office (ACMRO) expressed a concern the requiring employers and labour suppliers to make such assessments may result in discrimination:

> There might also be a problem in the way that the amendments are singling out prospective employees who say that they are not permanent [residents] or those who may not sound or look like permanent residents. With the amendment stating that it is an offence to knowingly or recklessly allow those without work rights to work in Australia illegally people who might look or sound differently are likely to find themselves not only questioned but also suspected of breaking the law. This might further fuel prejudices, racism and xenophobia and result in further exclusion for a group that is already experiencing disadvantages and discrimination in the labour market.[53]

3.61 The ACCI also expressed concern in its submission that requiring employers to make a subjective assessment as to whether or not there is a substantial risk that a person is an illegal worker could, potentially, expose employers to prosecution under anti-discrimination legislation.[54]

3.62 The Department responded to these concerns stating that race and ethnic origin should not be used as a basis for requesting proof of work entitlements as these factors do not indicate immigration status in a multicultural society and have no relevance as to whether a job applicant is an illegal worker. The Department went on to say:

> To avoid discrimination employers should either ask all job applicants for proof of work entitlements so that all applicants are treated equally, or only rely upon factors that suggest a person may not have work rights, such as a comment by a job applicant that they are only visiting Australia.[55]

Committee view

3.63 The committee notes the concerns about the interaction of the bill and anti-discrimination legislation. The committee concurs with the Department's assessment that properly implemented recruitment practices will not expose employers to prosecution under anti-discrimination legislation.

3.64 However, the committee does acknowledge the potential that some employers may become reluctant to employ people from some migrant groups which may be perceived as risk groups in the context of this legislation. The committee suggests that

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53 Australian Catholic Migrant and Refugee Office (ACMRO), *Submission* 3.

54 ACCI, *Submission* 8, p. 5.

55 DIMA, *Submission* 5A, Answers to Questions on Notice, p. 2.

the Department consults with and seeks feedback from ethnic communities and organisations to identify whether these measures are having any adverse impacts and take any necessary action to address them.

The definition of 'allows a person to work'

3.65 A number of submissions were concerned over the scope of working relationships covered by the definition of 'allows a person to work' in proposed subsection 245AG(2).[56] In particular, organisations sought guidance on the types of working relationships which would be captured by the bill, outside of the traditional employer-employee relationship, in order to determine liability under the bill.

3.66 Proposed subsection 245AG(2) defines when a person 'allows' another person to work, by reference to four types of working relationships, being where a person (the first person):

- employs a second person under a contract for service; or
- engages a second person, other than in a domestic context, under a contract for services; or
- bails or licenses a chattel to a second person, or another person, with the intention that the second person will use the chattel to perform a transportation service; or
- leasing or licensing premises, or a space within a premises, to a second person, or another person, with the intention that the second person will use the premises or space to perform sexual services.

3.67 The Explanatory Memorandum states:

> The circumstances [in proposed section 245AG(2)] are broad enough to cover not only the traditional employer-employee relationships, but also alternative working arrangements that are common in industries where illegal work occurs, such as in the construction, taxi, hospitality, cleaning and sex industries.[57]

3.68 Three specific working relationships were raised with the committee.

3.69 First, both the ACCI and the Western Australian Chamber for Commerce and Industry noted that paragraph 245AG(2)(b) could apply to a principal-contractor-sub-contractor relationship. In evidence to the committee Mr Balzary of ACCI indicated that organisation sought clarification on whether paragraph 245AG(2)(b) would extend an obligation to a principal to verify the working entitlements of a sub-contractor:

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56 Melbourne Catholic Migrant and Refugee Office (MCMRO), *Submission* 4; ACCI, *Submission* 8, p. 5; Mr Davies, ATIA, *Committee Hansard*, 26 April 2006, p. 14;

57 Explanatory Memorandum, paragraph 95.

> With respect to an organisation that uses a subcontracting type arrangement – for example, a labour hire company which utilises someone's labour in their own right – the actual host organisation may not be fully aware of who is on site, and it is not their responsibility to check the validity of the basis on which they are operating. So with regard to the example of entity A contracting entity B to provide a service, and entity B subcontracting to individual C, we are concerned about whether this means … that the principal contractor, party A, is not covered under this arrangement.[58]

3.70 The Department does not consider that the offences in proposed sections 245 AB and 245AC would apply to the principal in this situation, because the relevant relationships in paragraphs 245AG(2)(a) and (b) do not exist between entity A and individual C.[59]

3.71 Second, the Explanatory Memorandum notes that paragraph 245AG(2)(c) is intended to affect taxi companies and other chauffeured car hire services.[60] Mr Davies of ATIA explained to the committee how taxi licensing arrangements work:

> There is the bailor, who may well be what we would call a taxi operator. Then there is the taxi licence owner … The taxi licence owner can be – and is, on many occasions – the bailor of the taxi, who has a direct relationship through a bailment agreement with the taxidriver. However … the owner can be akin to an investor in the taxi licence and therefore has a relationship – perhaps via a lease agreement or an assignment agreement or a management agreement – with a bailor but has no direct relationship with any taxidriver associated with that licence.[61]

3.72 ATIA's concern is that paragraph 245AG(2)(c) would capture situations where the owner of a taxi licence was not the bailor, and who therefore had no direct relationship with the driver.[62]

3.73 In relation to this particular concern, a Departmental officer was able to provide the following response:

> The offences would only apply where the taxi owner intends the illegal worker to use the taxi for transportation services. If the owner of the taxi is completely unaware of the use down the track by subsequent drivers then we would not think that this provision would apply to them. If, however, they were to sublease the taxi to a colleague or an associate and did have the intention that the subsequent use of that taxi would be by a person who was not with work rights then they may come within the provision. But, in

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58 *Committee Hansard*, 26 April 2006, p. 4.

59 DIMA, *Submission* 5A, Answers to questions on notice, p. 2. The Department's answer to the questions also refers to the explanation in paragraph 31 of the Explanatory Memorandum.

60 Explanatory Memorandum, paragraph 102.

61 *Committee Hansard*, 26 April 2006, p. 14.

62 Mr Davis, *Committee Hansard*, 26 April 2006, p. 14.

> the absence of that knowledge of how the taxi were to be used, we cannot see how they would fall foul of this provision.[63]

3.74 Third, the committee is also aware of concern amongst some charitable organisations that they may be exposed to prosecution where illegal workers perform voluntary work for them. The Department addressed this concern in its submission stating that organisations who allowed illegal workers to participate in charitable or community activities would only commit an offence where the relationships in paragraphs 245AG(2)(a) to (d) existed:

> In the Department's view, it would be highly unlikely that … these relationships would exist where an unpaid volunteer was engaged in activities such as door-knocking for charities, working in homeless shelters or assisting with children's sporting activities.[64]

3.75 A further issue was also raised by the Melbourne Catholic Migrant and Refugee Office (MCMRO) in relation to paragraph 245AG(2)(d), which deals with the lease of premises to enable a person to perform sexual services. MCMRO stated in its submission:

> the government has to be careful not to treat trafficking of women and young girls into prostitution and sexual servitude in Australia as simply an employer non-compliance issue. There are a whole range of other more serious crimes and human rights violations occurring apart from employers employing 'illegal workers'.[65]

3.76 A representative of the Department provided the committee with information on steps that the Federal Government was taking in addressing the issue of people trafficking for the purposes of prostitution and sexual slavery:

> … the government has taken a very comprehensive whole-of-government approach to dealing with trafficking matters, manifested by the package of measures that came into effect during 2004, I believe, which involved the visa framework that we set in place to deal with trafficking matters … In addition to that, there were legislative provisions introduced by Attorney-General's and the comprehensive victims support program managed through the Office for Women, as it is called now.
>
> From our perspective, in January 2004 we introduced the bridging visa F provisions, which enable a suspected trafficking victim to remain in Australia, initially for a period of 30 days, while law enforcement agencies and the individual decide whether there is enough evidence on which to proceed to a criminal justice visa and prosecution matters, but also for the individual to decide for herself, in the main—it is usually a female—whether they want to be part of that process. From our perspective, there are

63 *Committee Hansard*, 26 April 2006, p. 33.

64 *Submission* 5, pp. 5-6.

65 MCMRO, *Submission* 4, p. 1; see also Ms Hubber, *Committee Hansard*, 26 April 2006, pp. 9-10.

> the criminal justice visa provisions and the possibility of moving to an either temporary or permanent witness protection trafficking visa after those proceedings.[66]

3.77 The committee also notes that the new offences in the bill create penalties against brothel owners who rent premises to people who are the victim of human trafficking, or to the traffickers themselves. Previously, it was debateable whether a brothel owner would come within the provisions imposing penalties for human trafficking.[67]

Committee view

3.78 The committee understands that the definition in proposed subsection 245AG(2) is designed to capture various working relationships which fall outside the concept of the traditional employer-employee model. The committee appreciates the Department's efforts both at the hearing, and in answering questions on notice, in addressing the concerns of stakeholders about how the legislation applies to various working relationships.

3.79 The committee is satisfied with the explanation provided by the Department that charities who have non-citizens without working entitlements doing volunteer work are unlikely to be captured by the bill, because the relationship is unlikely to fall within the definition of 'allows a person to work' in subsection 245AG(2).

3.80 The committee is of the view that issues in relation to this definition will continue to be raised as awareness of the legislation increases. Again, the committee notes the willingness of the Department to work with industry to develop industry-specific information on the application of the bill, and the committee believes that this issue should be a particular focus for the Department in the development of industry-specific information.

3.81 The committee does not accept the concern that the bill represents a danger that the issue of trafficking of people for prostitution and sexual servitude will be treated as only one of employer non-compliance. This bill is separate to an existing strong program targeted specifically at the trafficking of people for prostitution and sexual servitude.[68] To this end, the committee welcomes the offences in the bill as

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66 *Committee Hansard*, 26 April 2006, pp. 34-35.

67 *Committee Hansard*, 26 April 2006, pp. 34-35.

68 For a more detailed description and assessment of the government response, the committee refers readers to the following reports: Senate Legal and Constitutional Committee, *Report on the Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004*, tabled 10 March 2005; Parliamentary Joint Committee on the Australian Crime Commission, *Australian Crime Commission's response to the trafficking of women for sexual servitude*, tabled 24 June 2005; and Parliamentary Joint Committee on the Australian Crime Commission, *Supplementary Report on the trafficking of women for sexual servitude*, tabled 11 August 2005.

applying to people who may previously have escaped prosecution under the trafficking offences.

Expansion of access to the Entitlement Verification Online (EVO) Facility

3.82 The MIA and the Western Australian Chamber of Commerce and Industry submitted that access to the EVO facility be expanded to include their respective stakeholders, namely, registered migration agents.[69]

3.83 The Explanatory Memorandum notes that while each of the policy options for reducing the number of illegal workers in Australia can stand alone, the options are also complementary.[70] The Department-administered EVO facility is one of the complementary policy options accompanying the bill.

3.84 At the hearing Departmental officers indicated that there is merit in those suggestions, and the migration groups would be a key group for accessing Departmental facilities through portal based technology. The Department intends to progress this matter further with the MIA.[71]

Committee view

3.85 The committee agrees with the MIA and the Western Australian Chamber of Commerce and Industry that, in the context of the new offence provisions, there is potentially a benefit in expanding access to the EVO facility.

3.86 The committee notes that the Department is currently reviewing its information systems.[72] The committee recommends as part of that review process, the Department consult with the MIA, the ACCI, and any other interested stakeholders, to discuss future access to the EVO facility.

Recommendation 2

3.87 The committee recommends that as part of the current review of information systems, the Department conduct discussions with the MIA, the ACCI, and any other interested stakeholders, the feasibility of expanding access to the EVO facility.

Extension of working rights

3.88 The Explanatory Memorandum sets out six options considered for reducing the prevalence of illegal workers in Australia. One of those options, the expansion of

69 See *Submission* 1, p. 4; and *Submission* 7, pp. 4-5.

70 Explanatory Memorandum, paragraph 7.1.

71 *Committee Hansard*, 26 April 2006, p. 27.

72 *Committee Hansard*, 26 April 2006, p. 27.

work rights on visas, was rejected as not meeting the Federal Government's objectives.[73]

3.89 The MCMRO queried why this option had been rejected.[74] Representatives of the Department explained:

> … redefining the scope of illegal work is one way to reduce it … The department's view, and I think the government's view, would be that [labour market needs] are fairly targeted and that to broaden out at a very general level the work rights issue may be counterproductive. It is better to focus on where there are specific labour shortages and ensure that, through substantive visa options – whether it is through the extension of the holiday work program or working with particular industry groups around the harvest trail initiative – we can refer employees to where there is demand. Those seem to be better targeted approaches to deal with this issue than perhaps just relaxing the notion of work rights across the board.[75]

3.90 A further aspect of the work rights issue relates specifically to asylum seekers. The ACMRO and MCMRO both advocated in their submissions that asylum seekers should be given working rights to enable them to support themselves.[76] Ms Hubber, the Executive Officer of MCMRO, expanded on this issue at the hearing:

> Research has found that ineligible asylum seekers live in abject poverty with virtually no mainstream supports available to them. The impact of this coupled with prolonged passivity has caused high levels of anxiety, depression, mental health issues and a general reduction in overall health and nutrition. Though [Bridging Visa Category E was] originally intended to be of only three months duration, there are some asylum seekers who have been on a bridging visa E for over eight years. The burden to support these people has been left to underresourced community and church groups and is unsustainable, particularly for the needs of growing children. Most people seeking Australia's protection in this situation are completely reliant on charity.[77]

3.91 In response, a Departmental officer provided the following information in relation to the limited number of asylum seekers living in the community without working rights:

> Approximately 1,600 people nationally have protection visa applications on hand either with the department or at merits review. Of these, some two-thirds are on bridging visas with work rights, so we are talking about a

73 Explanatory Memorandum, paragraph 7.3.1.

74 MCMRO, *Submission* 4.

75 *Committee Hansard*, 26 April 2006, p. 29.

76 See ACMRO, *Submission* 3; and MCMRO, *Submission* 4.

77 *Committee Hansard*, 26 April 2006, p. 9.

> minority of people seeking protection visas that are not currently able to reside in the community with work rights.[78]

3.92 The Department's representative indicated that the particular issue that some non-government organisations were focussed on was the so-called '45-day rule', which was introduced to deter people from lodging protection visa applications well after they have entered the country. According to the Department, the 45-day period provides asylum seekers with sufficient time to obtain information about the protection visa process and to access legal assistance to complete their applications:

> The majority of protection visa applicants do lodge within those 45 days and are then eligible for work rights. These proposed offences are not going to change the situation for any of those people, but … it was important to make it clear that it is in the context of the fact that the majority of asylum seekers do make that application within 45 days and generally do have access to work rights.[79]

3.93 Representatives for the Department noted that the issue of working rights for those on Bridging Visa Category E would be a matter for the review that the Department is currently undertaking in relation to the scope of bridging visas.[80]

Committee view

3.94 The committee concurs with the Department that, at this time, the expansion of working rights on visas is not the appropriate means by which to address the prevalence of illegal workers in Australia.

3.95 On the specific issue of granting working rights to asylum seekers, the committee understands that this is a matter which is currently under review by the Department.

Recommendation 3

3.96 The Committee recommends that subject to the preceding recommendations the bill proceed.

Senator Marise Payne
Committee Chair

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78 *Committee Hansard*, 26 April 2006, p. 31.

79 *Committee Hansard*, 26 April 2006, p. 31.

80 *Committee Hansard*, 26 April 2006, pp. 30-31.