Chapter 3

Issues

3.1 The committee's short timeframe for conducting this inquiry has required the matters discussed in this short report to be confined only to the broad, key issues that emerged. A number of other issues were raised in submissions, but in the time available the committee can do little more than identify these in general terms.

3.2 It appears to the committee that there are four key issues which emerged repeatedly during the inquiry. These were in relation to:

- need for the bill;
- effects on industry;
- obligations and enforcement; and
- the application of new obligations to existing sponsors (referred to by some submitters as retroactive or retrospective provisions)

3.3 Other issues that the committee does not explore in detail in this report included:

- lack of clarity about certain terms;
- employer hopping on the part of subclass 457 visa holders; and
- privacy issues.

3.4 A number of organisations that gave evidence either supported the intent of the bill or said that it was largely unobjectionable in itself. However, many pointed out that the bill does little more than provide a framework. The detail, and in particular the nature of the obligations to be imposed on sponsoring employers, will be in regulations. This detail is as yet unknown but was a major concern to those who gave evidence. As such, many of those who gave evidence were responding to the discussion paper on the proposal, not on the bill itself. Many of those organisations that made submissions to this inquiry had also responded to the discussion paper issued by the Department on Business long stay subclass 457 and related temporary visa reform in June 2008, and attached their responses to the paper to submissions made to this inquiry.

Need for the Bill

3.5 This legislation received a mixed response from stakeholders during the inquiry. While many submitters were broadly supportive of the overall objectives of the bill (some expressing concern about the details to follow in regulations), others openly questioned the need for the initiative.

3.6 The Australian Chamber of Commerce and Industry (ACCI) submitted that the changes 'seem disproportionate to the actual scale of sponsorship problems.' The ACCI pointed out that according to the Department's own statistics, published in the 2006-07 Annual report, only 1.67 per cent of sponsors were found to have breached their sponsorship obligations.[1] The ACCI submitted that it was concerned that a number of the measures proposed would have a detrimental effect on Australian business, especially on small to medium enterprises. The ACCI also thought that the cost of the measures might be prohibitive for many businesses and would discourage the use of the program by Australian employers experiencing genuine skills shortages.[2]

3.7 In evidence to the committee at the public hearing, the ACCI representative reiterated the view that there were only a very small proportion of sponsors who abused the system, and that those breaches that had come to light had been over-sensationalised by the media.[3]

3.8 A range of other witnesses from other organisations representing industry made similar comments. Many saw the legislation as a disproportionate response, and the term 'using a sledgehammer to crack a nut' was used by several. A representative of the Australian Mines and Metals Association (AMMA) told the committee that 'we seem to be at odds as to where the justification for such a bill comes from'.[4]

3.9 The Association of Consulting Engineers of Australia (ACEA) also questioned the need for the legislation, telling the committee that many breaches involving subclass 457 visa holders are in fact industrial relations breaches, rather than breaches of sponsor obligations. The representatives said that such breaches should be dealt with through the appropriate mechanisms.[5] The ACEA told the committee that abuse of sponsor obligations in white collar professional industries was extraordinarily low, and sought consideration of a two tiered system that differentiated between migrant employees who were acknowledged as potentially at risk, and those who were more likely to be capable of looking after their own interests. This proposal is discussed briefly later in this report.

3.10 The committee received several submissions from trade unions, all of which welcomed the legislation. The ACTU submission said that, over time, there had been a significant shift in the nature of employer demand for subclass 457 visas, with more persons in the trades and lower skilled areas entering the country. The ACTU submitted that:

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1 Australian Chamber of Commerce and Industry, *Submission 6*, Attachment: Response to discussion paper – Business (Long Stay) subclass 457 and related temporary visa reforms, p. 1.

2 Association of Consulting Engineers Australia, *Submission 4*, p. 4.

3 *Committee Hansard*, p. 27.

4 *Committee Hansard*, p. 16.

5 *Committee Hansard*, p. 9.

> Over the past few years, the 457 visa program has proven time and time again to be incapable of protecting temporary overseas workers. As it is currently constituted, the subclass 457 visa program places the rights and interests of Australian workers and temporary overseas workers at risk. The ACTU believes that the current situation must not be permitted to continue…Temporary overseas workers are more vulnerable to exploitation and abuse by unscrupulous employers than permanent residents. The risks inherent in temporary overseas worker programs are widely acknowledged by international organisations and labour migration experts.[6]

3.11 The Association of Professional Engineers, Scientists and Managers Australia (APESMA) was also critical of the current subclass 457 visa system, supporting the ACTU submission.[7]

3.12 The CFMEU also welcomed the legislation, submitting that 'we regard this Bill as a long overdue start on better regulation in this area'.[8] The CFMEU witness who gave evidence at the public hearing told the committee that he thought the legislation did not go far enough, and that there should be criminal penalties applied in some cases.

3.13 The CFMEU disputed the view that the extent of abuse of the subclass 457 visa provisions was minimal and the exploitation of migrant workers was relatively uncommon, although the representative conceded that breaches were more likely to occur in relation to immigrant workers at the ASCO 4 and above skill levels.[9] The representative was critical of the Department's investigation of breaches:

> I have taken a close personal interest in a lot of the abuses in recent years and monitored it all fairly closely. I am highly critical of the department in terms of their failure to address the exploitation in a serious enough manner. It does not surprise me that the department would continue to try to paint the picture that it is a tiny minority of breaches. I am critical of the fact that the department do very few random inspections. Most on-site inspections the department do are announced. In other words, the sponsor gets prior warning that they are coming.[10]

3.14 Asked to substantiate his view that the extent to which sponsorship obligations are breached is underreported, and to provide examples of such breaches,

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6 Australian Council of Trade Unions, *Submission 19*, p. 4.

7 The Association of Professional Engineers, Scientists and Managers Australia, *Submission 5*, pp 1-2.

8 Construction Forestry Mining and Energy, *Submission 7*, p. 4.

9 ASCO – Australian and New Zealand Standard Classification of Occupations, which is a skill-based occupations index. The scale comprises 9 points corresponding to 5 skill levels ASCO 1-3 (skill levels 1 and 2) comprises managers and administrators, professionals and associate professionals. ASCO 4 (skill level 3) comprises Tradespersons and related workers. ASCO 9 (skill level 5) describes labourers and related workers.

10 *Committee Hansard*, p. 43.

the CFMEU provided a dossier of material which the committee has posted on its website as Additional Information. The representative maintained that abuse of migrant workers is widespread.

> There are abuses in construction, hospitality, engineering workshops and nursing homes. I have seen abuses in a whole variety of industries. The area of work that I would draw the inquiry's attention to is at the ASCO 4 level, from skilled down to semiskilled grades. The 457 visa was meant to be a skilled visa, but you probably know that in the regions you can go down, I think, as far as ASCO 9, although I am prepared to be corrected on that. Anyway, you certainly can have semiskilled workers in the regions. The meat industry is another industry where there have been a lot of abuses as well.
>
> I have seen all manner of abuses in the last three or four years and publicised many of them. I have seen workers killed at workplaces where they did not have English language capacity. Workers were sent to do jobs they were patently not trained to do. I have seen all manner of abuse. I have seen workers put up in accommodation that is appalling and that no Australian would live in. I have seen middlemen who control the bank accounts of these workers. I have seen middlemen take huge fees off these workers. I have seen workers that are in fear that if they ever disagree with the boss or they ask for a day off that the sponsorship may well be cancelled and they can be tossed out of the country. I would be here for a long time if I wanted to put before you all of the examples that I have personally seen, and I know the detail of many of them.[11]

3.15 The government's reasons for introducing this bill appear to coincide with the concerns referred to by union movement representatives and were explained in the Minister's second reading speech.

> Over the last five years Australian employers have increasingly turned to the temporary skilled migration program to bring in the skilled workers they need. However, the sudden growth of the scheme in recent years, coupled with its expansion into lower-skilled occupations and increasing numbers of workers with lower levels of English language skills have placed new pressures on the integrity of the Subclass 457 visa program.
>
> Community confidence in the scheme suffered under the previous government following a series of well publicised abuses of workers on Subclass 457 visas.
>
> The negative perception of the Subclass 457 visa program is a very serious problem for the employers and industries that rely heavily on it. The economy desperately needs access to temporary skilled labour, but this is only sustainable if the community is confident that temporary overseas workers are not being exploited or used to undermine local wages and conditions. That is why the Rudd Government is placing such a high

11 *Committee Hansard*, p. 43.

priority on both improving the responsiveness of the Subclass 457 visa program and restoring integrity to the program.[12]

3.16 The committee notes the following statistics about the subclass 457 visa program:

Table 3.1 Subclass 457 visa grants to applicant type and financial year of visa grant[13]

Applicant Type	Financial Year of Visa Grant										
	1997-98	1998-99	1999-00	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08
Primary	16 550	16 080	17 540	21 090	18 410	20 780	22 370	27 350	39 530	46 650	58 050
Secondary	14 330	13 250	13 530	15 810	15 100	16 020	17 130	21 250	31 620	40 640	52 520
Total	30 880	29 320	31 070	36 900	33 510	36 800	39 500	48 590	71 150	87 310	110 570

Note 1: Excludes Independent Executives
Note 2: Up until 1 April 2005, medical practitioners applied for a visa in Subclass 422 Medical Practitioner. From that date, medical practitioners have been encouraged to apply for a Subclass 457 visa
Note 3: 'Secondary' refers to a spouse, interdependent partner, dependent child or other relatives

Table 3.2 Subclass 457 visa grants to primary applicants by ASCO Major Group of the Nominated Occupation[14]

Figures rounded to the nearest 10

ASCO Major Group of the Nominated Occupation	Financial Year of Visa Grant				
	2003-04	2004-05	2005-06	2006-07	2007-08
1 Managers and Administrators	3 500	3 860	4 100	4 230	5 520
2 Professionals	13 650	16 080	21 510	27 210	33 890
3 Associate Professionals	2 870	3 430	4 480	5 580	7 590
4 Tradespersons and Related Workers	1 810	3 370	8 430	8 640	10 060
5 Advanced Clerical and Service Workers	10	10	10	10	10
6 Intermediate Clerical, Sales and Service Workers	220	300	360	330	320
7 Intermediate Production and Transport Workers	150	220	480	540	390
8 Elementary Clerical, Sales and Service Workers	50	60	70	30	0
9 Labourers and Related Workers	20	10	20	< 5	0
Not specified	100	20	80	120	260
Total	**22 370**	**27 350**	**39 530**	**46 680**	**58 050**

Note 1: Excludes Independent Executives

12 *Senate Hansard*, 24 September 2008, p. 1521.

13 Information provided by the Department of Immigration and Citizenship.

14 Information provided by the Department of Immigration and Citizenship.

Table 3.3 Subclass 457 Departmental monitoring[15]

Measure	2005-06	2006-07	2007-08
Active sponsors (sponsors with primary visa holder in Australia at the end of the financial year)	N/A	15 410	18 750
Sponsors monitored	6 471	6 463	5 293
Sponsors site visited	1 717	1 553	1 759
Sponsors formally sanctioned	3	95	192
Sponsors formally warned	99	313	1 353
Referrals to other agencies	45	167	218

A two tiered approach?

3.17 While acknowledging that there had been some abuses but disputing that these had been as widespread as reported, several industry representatives questioned the appropriateness of treating all migrant workers on subclass 457 visas as one group, seeking to differentiate professional workers such as engineers. Representatives submitted that engineers and other white collar workers are clearly less in need of a stringent enforcement regime.

3.18 The ACEA for example submitted that there should be a two tiered system:

> One of the things that we would like to suggest is that the 457 program—and in fact we have suggested this on a number of occasions—is that there really needs to be almost a two-tiered system. The minister has recognised this and in fact has indicated that there will be some form of accreditation program for the types of employees that we represent—people, for example, not only in professional engineering and technical services firms but in the financial services sector and legal professionals. When you are talking about university educated, white-collar professionals, they really need to be dealt with in a different manner from 457 visa holders who are unskilled or from non-English-speaking backgrounds and who are therefore not as capable of determining their rights and negotiating their conditions.
>
> The abuse in our industry is extraordinarily low, as we believe the abuse within the overall system is very low. But it is extraordinarily low in those white-collar, professional industries. One of our concerns with these amendments is that we are using a sledgehammer to crack a peanut for our industry; that an industry that is so desperately in need of skills is going to

15 Department of Immigration and Citizenship, *Submission 18a*, p. 19 .

> be disincentivised from bringing in those skills through onerous obligations.[16]

3.19 Similarly, the AMMA submitted that the legislation and regulations should only target those visa holders who may be at risk of exploitation. AMMA proposed a threshold salary of $75 000, above which visa holders would not be subject to the full extent of the legislation and regulation protection regime.[17]

Effects on industry

3.20 A range of witnesses told the committee that the broad effects of the Bill and the overall reform package would be to burden industry and discourage the use of the subclass 457 visa system. Several portrayed this as counterproductive, particularly in light of the overall skills shortage, and the government's objectives to address the financial crisis by bringing forward infrastructure projects:

> As Governments across Australia announce record infrastructure spending, the engineering industry has warned that many of these planned projects will be delayed, over budget or completely shelved because there aren't enough skilled engineers to get the job done. Australia's ability to design and deliver an estimated $400 billion in infrastructure projects over the coming decade is under threat.[18]

3.21 For its part, the ACEA highlighted the shortage of engineers in Australia, telling the committee that:

- the shortage of engineers is systemic, not cyclical;
- Australia has an annual shortage of about 28 000 engineers;
- only 6000 engineering graduates are produced by Australian universities each year; and
- approximately 4 652 engineers currently in Australia are on S457 visas.

3.22 The ACEA and others argued that the changes in the bill would discourage the use of the subclass 457 visa system and would exacerbate what is already an acute shortage of labour:

> Increasing penalties and costs for potential and unforeseen circumstances will make the 457 visa migration scheme unusable as employers will become too burdened by cost. Legislation which places too many restrictions and burdens on employers essentially makes the 457 visa scheme unusable.[19]

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16 *Committee Hansard*, p. 8.

17 Australian Mines and Metals Association, *Submission* 8, p. 3.

18 Association of Consulting Engineers Australia, *Submission 4*, p. 4.

19 Association of Consulting Engineers Australia, *Submission 4*, p. 6.

3.23 The ACCI made a similar point, emphasising that the extra costs associated with increasing the number and scope of obligations to be imposed on employers sponsoring a subclass 457 visa migrant would be prohibitive, particularly for small employers:

> It is ACCI's concern that a number of the measures proposed will have a detrimental effect on Australian business, especially on small to medium enterprise. These proposed changes include requiring employers to pay for sponsored employees' income protection insurance, travel to Australia, removal costs, recruitment and migration agent costs, licensing and registration, certain medical costs or health insurance; and school-aged dependants' public education costs. We are concerned that the costs to employers of many of the proposed changes will be prohibitive for many businesses and will discourage use of the program by Australian employers experiencing genuine skilled labour shortages.[20]

3.24 In a similar vein, the Migration Institute of Australia (MIA) submitted that:

> While being broadly supportive, the MIA believes that the Bill and its outcomes can be enhanced, primarily through the striking of a better balance between worker protection and industry protection…
>
> Detailed sponsorship obligations are not yet known as they will be specified later in Regulations. There are, however, indications in the Bill that the balance set by the Bill and in subsequent regulations, in combination, may weigh heavily against the sponsoring employer. If this proves so, Australian employers will avoid sponsoring overseas workers they need in the Australian labour market, the employers will either fail or take business offshore. This we suggest is not a desired or intended outcome. Getting the balance correct is the major challenge.[21]

3.25 A submission from the Ethnic Communities Council of Queensland (Council) put a similar position to that of the MIA in relation to balancing obligations and sanctions, although this was expressed from the perspective of the visa holder, rather than the employer. The Council argued that if the legislation and regulations are too severe, visa holders themselves may be themselves disadvantaged by the measures.

> Whilst the intent of better defining employer and sponsor obligations appears to be better protect against exploitation of the migrant – a goal which ECCQ fully supports – it must be remembered that putting unnecessarily onerous or costly obligations on employers may have the consequence of preventing an employment opportunity being provided at all.
>
> It is particularly problematic if an employment opportunity is withdrawn once a migrant worker, and potentially also their family, has already entered the country – often expending significant resources in the process. People in Australia on 457 visas are particularly vulnerable if their employment is

20 Australian Chamber of Commerce and Industry, *Submission 6*, p. 4.

21 Migration Institute of Australia, *Submission 23*, p. 1.

> withdrawn. The low level of rights the migrant has in this situation, and the resultant level of powerlessness, can leave them more at risk of exploitation, regardless of the legal obligations on the employer.
>
> …
>
> Any action taken by the government against an employer, no matter how completely justified it may be, has the potential to impact unfairly and negatively on the migrant who may find themselves having a very short period of time to find a new job before they are at risk of being removed from the country.[22]

3.26 It is clear from the Explanatory Memorandum that this bill has multiple objectives, which must be balanced against each other. While the bill is largely intended to improve the operation of the subclass 457 visa system, and ensure that migrant workers' working conditions meet Australian standards, it is also intended to preserve the integrity of the Australian labour market. In a supplementary submission, the Department of Immigration and Citizenship stated that this department considers that the bill strikes an appropriate balance between facilitating the entry of overseas workers to meet genuine skills shortages, preserving the integrity of the Australian labour market, and protecting overseas workers from exploitation.[23]

3.27 The committee notes the concerns of industry representatives, who consider that imposing an excessively stringent and costly set of obligations on employers runs the risk of making the subclass 457 visa system unviable in the face of a severe shortage of certain professions. The committee also is conscious of concerns that some migrant workers, particularly those in the ASCO 4 and above skills groups, many of whom may lack language skills, are vulnerable and in need of greater protection than is afforded under the current legislation. However, in the absence of the detail of the new obligations that will be contained in regulations, it is difficult for the committee or anyone else to assess whether the right balance has been struck.

Obligations and Enforcement

Sponsor obligations framework

3.28 The Explanatory Memorandum states that the proposed amendments are to enhance the framework for the sponsorship of non-citizens and that one of the ways in which the sponsorship framework will be improved is by:

> …providing the structure for better defined sponsorship obligations for employers.[24]

3.29 The department expanded on this in its submission to the committee:

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22 Ethnic Communities Council of Queensland, Ltd, *Submission 1*, p. 5.

23 Department of Immigration and Citizenship, *Submission 18a*, p. 1.

24 Explanatory Memorandum, p. 2.

> By clearly defining the sponsorship obligations framework, the Worker Protection Bill clarifies a sponsor's responsibilities in relation to their approval as a sponsor and in relation to the visa holders they sponsor. It is anticipated that the obligations prescribed in the Migration Regulations will clearly set out the period of time in which an obligation must be satisfied, and the manner in which the obligation is to be satisfied.[25]

3.30 Some concerns have been raised with the committee about whether a new framework is needed and others support the new framework. Aside from the issue of support or concern, the framework provides an opportunity to outline a key concern highlighted in evidence from a wide range of organisations. A significant complaint made to the committee is that the really important issue is that the content of the regulations is not available. Witnesses frequently commented that it is very difficult to comment on the impact the bill will have because the detail is not known. A sample of the concern expressed is:

> What we are all doing is sitting around making submissions and discussing a bill which is essentially just a framework, but the real substance that is going to make the real difference is unknown at this stage, and this is the fundamental problem.[26]

3.31 The evidence given also referred to the impact this is already having on employers currently considering sponsoring worked on subclass 457 visas:

> …employers who are already a little bit shy at the moment about what their future employment and growth decisions are going to be are saying, 'Hang on, how is this going to affect our decisions to employ and continue?'[27]

3.32 The department has explained that:

> …The policy settings that underpin any draft regulations are dependent on recommendations yet to be made by the [Interdepartmental Committee] and the Skilled Migration Consultative Panel…as well as the integrity review presently being conducted by Ms Barbara Deegan.
>
> The Department expects that a draft of the proposed regulations would be available in the first part of 2009…any regulations made under the amendments proposed in the Bill will be subject to scrutiny in the Senate and by the Senate Standing Committee on Regulations and Ordinances, and would be disallowable.[28]

3.33 The committee notes the explanation provided, but agrees with the concern expressed that it is very difficult to properly inquire into the bill, including the sponsor obligations, when it is not possible to assess its role in the full legislative scheme.

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25 Department of Immigration and Citizenship, *Submission 18*, p. 8.

26 *Committee Hansard*, p. 35.

27 *Committee Hansard*, p. 36.

28 Department of Immigration and Citizenship, *Submission 18*, p. 15.

Enforcement

Civil penalties

3.34 The concern about the unavailability of the content of the regulations is also particularly relevant to the issue of enforcement.

3.35 Broadly, to the extent that it was raised with the committee, there was support for strengthening the integrity of the visa program by the proposed inclusion of a civil penalties framework and in addition to maintaining the administrative sanctions available. However, a number of concerns were raised with the committee about elements of the detail of the proposed civil penalty scheme.

3.36 The bill seeks to insert two civil penalty provisions into the Act:

> 140Q Civil penalty—failing to satisfy sponsorship obligations
>
> (1) A person contravenes this subsection if:
>
> (a) the regulations impose a sponsorship obligation on the person; and
>
> (b) the person fails to satisfy the sponsorship obligation in the manner (if any) or within the period (if any) prescribed by the regulations.
>
> Civil penalty:
>
> (a) for an individual—60 penalty units; and
>
> (b) for a body corporate—300 penalty units.
>
> (2) A person contravenes this subsection if:
>
> (a) the person (other than a Minister) is a party to a work agreement; and
>
> (b) the terms of the work agreement:
>
> (i) vary a sponsorship obligation that would otherwise be imposed on the person by the regulations; or
>
> (ii) impose an obligation, identified in the agreement as a sponsorship obligation, on the person; and
>
> (c) the person fails to satisfy the sponsorship obligation in the manner (if any) or within the period (if any) specified in the work agreement.
>
> Civil penalty:
>
> (a) for an individual—60 penalty units; and
>
> (b) for a body corporate—300 penalty units.

3.37 If a person contravenes one of these provisions, it is proposed that new Part 8D (subsection 486R(1)) will provide that the Minister may apply to the Federal Court or the Federal Magistrates Court for a pecuniary penalty order against the person. The maximum amount of the penalty is determined by the applicable number of penalty units. One penalty unit is currently equal to $110 so the maximum civil penalty for an individual per offence would be $6,600 and for a body corporate it would be $33,000.

3.38 Many of the concerns raised with the committee relate to the lack of detail about the proposed civil penalties on the face of the legislation and to the unavailability of the detail of the sponsorship obligations and the way/s in which these

will need to be satisfied. As noted earlier, these details will be prescribed by regulations which are not yet available.

3.39 The concerns about the proposed civil penalty framework include:

- it is not clear that an element of 'fault' will be required;
- there are no statutory defence options; and
- no Ministerial discretion is apparent on the face of the legislation.

3.40 A number of these matters are the subject of discussion in the Commonwealth's *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* such as the principle that civil penalties should be 'stand alone' provisions, and the principle that they require or exclude fault in clear terms.[29]

3.41 The concerns raised with the committee are heightened by one of the other major themes arising in relation to the bill – that the effect of proposed transitional arrangements will be that current sponsors will have to comply with the new sponsorship obligations (and accompanying civil penalties) when the new provisions commence and these regulations may in turn be amended or replaced by future regulations (see the section titled *The application of new obligations to existing sponsors* for a more detailed discussion of this aspect of the bill).

3.42 In relation to the issue that a significant level of the detail of the civil penalties provisions will not be included in the primary legislation, the department argues that detail needs to be in regulations:

> …to ensure that there is flexibility for effective and responsive administration of the sponsorship framework through the regulations.
>
> This flexibility is necessary because:
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> - over time sponsor behaviour might change and new obligations will be required;
> - there may [be] a need to give visa holders more/less protection as time goes on and this can more swiftly be done by way of regulation; [and]
> - the sponsorship framework is intended to apply to a number of different visas with different criteria, and the dynamic nature of the immigration and economic environment means that different obligations will apply to different current and future visas.[30]

3.43 In relation to the complaint that the provisions should require or exclude 'fault' in clear terms the department explains that new section 140Q:

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29 Interim New Edition – uncleared draft issued by the Attorney-General's Department, February 2008, pp 64 and 65. The *Guide* was originally issued March 2004.

30 Department of Immigration and Citizenship, *Submission 18A*, p. 4.

> …does not specify a fault element because the appropriate fault element may differ according to the obligation in question. Similarly, not specifying the offence as being 'strict liability', allows the Regulations to include fault elements as appropriate.[31]

3.44 The department did not specifically address the issue of the inclusion of statutory defences in relation to the civil penalties provisions, though the committee notes that it follows from the above evidence that it should be possible to include them to be prescribed by regulation as appropriate.

3.45 In relation to ministerial discretion, the department observed that the Minister will not be required to take civil penalty action where an obligation has been breached and it is also clear from the wording of Part 8D subsection 486R(1) that the Minister's decision to take pecuniary action in response to the contravention of a civil penalty provision is discretionary.[32] The committee also notes that in determining a pecuniary penalty, proposed subsection 486R(3) directs the court to 'have regard to all relevant matters' including four specified matters.

3.46 Generally in relation to enforcement, the department also advised the committee that:

> The Department's intended approach to compliance with the various provisions proposed in the Bill will be such that the most appropriate action will be determined by considering all the circumstances. In the case of minor or inadvertent first-time breaches the Department will likely take no action, while in the case of serious, deliberate and repeated breaches the Department will likely take civil legal action. The other enforcement tools are intended to deal with the range of conduct in between these extremes. The discretion to choose the most effective tool in particular circumstances is a fundamental feature of the program's design.[33]

3.47 The committee notes the points the department makes about the overall approach taken to the civil penalties regime. The committee also notes the information provided by the department about its intended approach to compliance. Notwithstanding the reasons put forward for the delay in providing detail of the proposed regulations, it is possible that the concerns raised would be alleviated by the availability of the detail of the forthcoming regulations. The committee understands that in its absence those who will be affected by the proposed legislation are anxious about the actual detail.

3.48 Important policy principles provide the foundation for the approach outlined in the *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. While taking into account the department's explanations about the proposed

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31 Department of Immigration and Citizenship, *Submission 18A*, p. 4.

32 Department of Immigration and Citizenship, *Submission 18A*, p. 8.

33 Department of Immigration and Citizenship, *Submission 18A*, p. 9.

approach, the committee retains serious misgivings about some aspects of it and is of the view that for penalties of this significance it is arguably appropriate for the scheme to clearly include elements of fault or the availability of relevant statutory defences, or both, and for this to be apparent from the face of the legislation and to not be left to prescription by regulation.

Administrative sanctions

3.49 One aspect of the proposed amendments to 'maintain and enhance the existing sanction and enforcement tools in relation to sponsorship'[34] attracted concern from some witnesses. This is that the proposed section 140L test for circumstances in which a sponsor may be barred or have their approval cancelled is unsatisfactory. The section requires that the Minister is 'reasonably satisfied that a person has failed to satisfy a sponsorship obligation'. Witnesses queried what this means:

> …there is a civil penalty for an employee's sponsor who fails to satisfy the sponsorship obligations. That is a very novel way of creating an offence, in one sense. There is no definition of what failing to satisfy a sponsorship obligation is. That could mean anything when one comes to a court and faces prosecution.[35]

3.50 Fragomen Global noted:

> The issue of the Minister's 'reasonable satisfaction' and how it was derived would be one area that would no doubt be open to considerable inquiry and challenge.[36]

3.51 The department maintains that:

> The use of the term 'satisfied' is common throughout the Migration Act and the statute book generally and has been used effectively in other contexts. The Department's view is that the proposed formulation of the provision, as drafted, is appropriate.[37]

3.52 Other problems raised with the committee about the proposed enforcement provisions include that the proposed mandatory sanction provision in subsection 140L(2) could be harsh and unworkable[38] and that the absence of an upper limit to the total penalty that can be imposed for multiple breaches 'could do significant economic damage' to small businesses.[39] In relation to partnerships and unincorporated associations the penalty applies per 'wrongdoing' partner or committee member with no maximum limit for the partnership or unincorporated association as a whole:

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34 *Explanatory Memorandum*, p. 2.

35 *Committee Hansard*, p. 17.

36 Fragomen Global, *Submission 11*, p. 11.

37 Department of Immigration and Citizenship, *Submission 18A*, p. 5.

38 Fragomen Global, *Submission 11*, p. 10.

39 *Committee Hansard*, p. 34.

> For example, if 20 partners were found to be collectively responsible for a contravention then the maximum penalty would be $132,000 (20 x 1/5 of $33,000) A corporation would only be liable to a maximum penalty of $33,000 for an identical contravention. [40]

3.53 The department's response to this concern is that the approach taken is consistent with other Commonwealth acts including the *Corporations Act 2001* and the *Telecommunications Act 1997*.[41] The department also noted generally in relation to penalties that courts always retain a discretion to impose a penalty of less than the maximum.[42]

Inspectors

3.54 Overall, there was no broad concern identified about the proposed scheme for inspectors. However, there was again significant concern expressed to the committee about some of the detail.

3.55 Proposed section 140X will permit an inspector to enter a sponsor's premises if the inspector has reasonable cause to believe that there is information, documents or any other thing relevant to determining whether a sponsorship obligation is being complied with. A concern has been raised that the basis for the entry power should be stronger: for example that for unannounced visits an inspector should be required to have a reasonable suspicion that a breach has occurred.[43]

3.56 The Explanatory Memorandum notes that the proposed powers are not in accordance with the *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, but argues:

> …it is necessary for inspectors appointed under new section 140V to have similar powers as Workplace Inspectors, as it is probable that Workplace Inspectors will also be appointed as inspectors under new section 140V. If so, it would be intended that the Workplace Inspectors will exercise their powers for the purposes of both the *Workplace Relations Act 1996*, and the purposes in section 140X(1) concurrently.[44]

3.57 In addition to any impracticality, the argument was also made to the committee that the proposed scheme of inspectors is, in effect, workplace compliance for migrant workers.[45] It is therefore appropriate that it be equivalent to the scheme for domestic workers.

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40 Fragomen Global, *Submission 11*, p. 3.

41 Department of Immigration and Citizenship, *Submission 18A*, p. 10.

42 Department of Immigration and Citizenship, *Submission 18A*, p. 3.

43 *Committee Hansard*, pp 36-37.

44 Explanatory Memorandum, p. 40.

45 *Committee Hansard*, p. 32.

3.58 The committee agrees that the approach proposed in the bill in relation to inspectors is appropriate.

3.59 The committee also notes that one of the submissions observed that there is no enforcement power for paragraph 140X(2)(b).[46]

3.60 A further issue raised with the committee relates to proposed section 140Z. This section seeks to create a criminal offence punishable by up to six months in prison for a person who contravenes the requirement to produce a document or thing to an inspector by a specified time (not less than seven days). A concern has been raised that there is no defence available for reasonable failure to provide inspectors with information in the time requested.[47]

3.61 The department has advised the committee that statutory defences are not required to be specifically included in the proposed legislation because Part 2.3 of the Criminal Code *Circumstances in which there is no criminal responsibility* applies. The defences include mistake, ignorance of fact, duress or intervening conduct.[48]

3.62 The committee agrees that although they are not apparent from the face of the legislation appropriate defences do apply to this proposed provision. The committee suggests that it may be useful for the bill to include a note to explain the availability of the Criminal Code defences.

3.63 A concern was also raised about the ambiguity and breadth of the proposed paragraph 140X(2)(c) requirement, by written notice, to produce a 'document or thing' to an inspector.[49] The Department noted that this was common drafting practice.[50] The committee also notes that section 25 of the *Acts Interpretation Act 1901* includes a standard definition of 'document'.

The application of new obligations to existing sponsors

3.64 A very significant issued raised repeatedly with the committee was described by many who provided submissions and evidence to the committee as the 'retrospective' operation of the proposed sponsorship obligations.[51]

3.65 The transitional provisions seek to provide that the amendments proposed in the bill will apply to several categories of sponsors:

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46 Fragomen Global, *Submission 11*, p. 9.

47 Fragomen Global, *Submission 11*, p. 9.

48 Department of Immigration and Citizenship, *Submission 18A*, p. 6.

49 For example, Chamber of Minerals and Energy, WA in conjunction with Australian Petroleum Production & Exploration Association Ltd, *Submission 14*, p. 2.

50 Department of Immigration and Citizenship, *Submission 18A*, p. 7.

51 For example, see *Committee Hansard*, p. 5.

- a person or organisation who is a sponsor of a subclass 457 visa holder immediately prior to the date of commencement;
- a party to a 'work agreement' whether the agreement was signed before or after the date of commencement; and
- all partners and members of the committee of an unincorporated associations on commencement.

3.66 The department was at pains to point out that the effect of the bill is not retrospective. Acts or omissions by a sponsor before the commencement of these provisions cannot found any action under the proposed provisions of the new bill. The department states clearly that:

> All provisions will apply prospectively from the date of commencement...and will not affect the status of acts or omissions that occurred prior to commencement.[52]

3.67 Nonetheless, Fragomen Global observed that the effect of proposed transitional arrangements will be that:

> the fundamental point [is] that sponsors are going to be deemed to accept the new obligations at the point where they are introduced by regulation.[53]

3.68 Further that the regulations 'can be amended with a much greater deal of flexibility',[54] and that the imposition of obligations on sponsors seems to be proposed:

> …with little regard to the impact of these new obligations on either the company or the individual 457 visa holders.[55]

3.69 The department argues that this approach is necessary for the following reasons:

- the nature of the sponsorship obligations which will be required to be satisfied will not be significantly different from the existing undertakings;
- the possible transitional period if these existing former approved sponsors are not transitioned into the new sponsorship framework is impractically long (up to six years) for the large caseload;
- the administrative complexity for sponsors, the Department of Immigration and Citizenship, and other stakeholders of administering two sponsorship frameworks makes the alternative unworkable for the large caseload; and

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52 Department of Immigration and Citizenship, *Submission 18*, p. 12.

53 *Committee Hansard*, p. 35.

54 *Committee Hansard*, p 16.

55 *Committee Hansard*, p. 33.

- existing sponsors will have sufficient notice to terminate the sponsorship of their Subclass 457 (Business (Long Stay)) visa holders if they are not prepared to satisfy the new sponsorship obligations in relation to those visa holders.[56]

3.70 Even those with concerns about the approach recognised that there are substantial difficulties for the department in managing the transition of existing sponsors to the new scheme:

> We do appreciate the difficulty of having multiple sponsorship regimes with different employers being accountable for different obligations at different times depending on when they were approved as a sponsor.[57]

3.71 However, the objections and potential costs of this approach were identified in a number of submissions made to the committee. For example,

> ACCI is strongly opposed to the retrospective application of any of the proposed changes to existing sponsors and visa holders. Not only is this grossly unfair to compliant sponsors who have sponsored 457 workers in good faith under the current obligations framework, but it will also represent a significant administrative burden on existing sponsors who may need to redraft and renegotiate contracts and revise many aspects of current business practice.[58]

3.72 This view is also held by the ACEA:

> If the Bill varies the Migration Act so that all 457 visa holders currently employed by Australian firms are subject to new regulations, this will undoubtedly mean contract re-writes, additional payments (either to the Government or the visa holder) and costly internal policy change. These kinds of costs will make the visa scheme less attractive and essentially unusable for a number of Australian businesses who require the scheme to bring in highly skilled professionals.[59]

3.73 Comments made by the Australian Industry Group not only outline concerns about the potential cost burden of applying new obligations to existing sponsors, but the added complexity of assessing the impact of the bill because a significant amount of detail is not yet known and will be subsequently prescribed by regulation.

> We strongly oppose this approach as it has the potential to significantly increase sponsors' financial liabilities. While the regulations associated with the Bill are yet to be finalised, there are a number of measures which have been widely canvassed for possible inclusion in the legislation. One example of this is the suggestion that sponsors will be required to pay health insurance costs for visa holders.

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56 Department of Immigration and Citizenship, *Submission 18*, p. 73.

57 *Committee Hansard*, p. 35.

58 Australian Chamber of Commerce and Industry, *Submission 6*, p. 2

59 Association of Consulting Engineers Australia, *Submission 4*, p. 5.

> In many cases sponsors will have made arrangements with existing visa holders…as long as [they do] not reduce their salary below the designated Minimum Salary Level.[60]

3.74 These concerns were also echoed in other evidence provided to the committee.

3.75 Another aspect of importance illustrated by the Australian Industry Group evidence is the idea that sponsor and visa holder arrangements in place at the time the new provisions commence have been negotiated outside the framework of the new provisions. Even though the proposed detail of the bill is now available, the content of the regulations is not yet known. The imposition of new arrangements could detrimentally affect sponsors and visa holders. The AMMA even asserted that:

> We say that that would be improper where people have entered into a four-year arrangement to bring someone to Australia from overseas on the basis of the existing arrangements and are then told, even though there might be a lead-in period of time, that there are new rules and obligations and that they have to meet those.[61]

3.76 The committee notes the reasons outlined by the department for taking the proposed approach, but also notes the impact that business expects it to have. On balance, the committee accepts that it is not practical for the department (and sponsors who continue to recruit subclass 457 visa holders after the provisions commence) to manage two systems for up to six years,[62] but suggests that consideration be given to allowing a sponsor to seek an exemption from the new obligations (and to continue to be bound by existing obligations) in cases where the new obligations would impose extreme hardship. For example, if the sponsorship arrangement will only apply for a short period after the new provisions commence or if existing arrangements between the sponsor and visa holder already satisfy a new obligation.

Committee view

3.77 Overall the aims of the bill are commendable. However, the committee notes that because the legislation is 'framework' legislation and a significant amount of detail for the framework will be contained in future regulations it is very difficult to assess the impact of the full legislative scheme.

3.78 The committee notes that most evidence, including that which expressed strong reservations about the detail of the obligations that are to be imposed by subsequent regulation, indicated that the bill itself is largely supported.

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60 Australian Industry Group, *Submission 12*, p. 2.

61 *Committee Hansard*, p. 18.

62 Department of Immigration and Citizenship, *Submission 18*, p. 73.

3.79 The committee notes that many important aspects of the bill such as the requirements of civil penalty provisions are to be prescribed in regulations. The committee considers that such provisions are usually more appropriately contained in the primary legislation. Combined with the fact that the bill proposes that new obligations will apply to existing sponsors from the date of commencement, the committee is of the view that the examination of the legislation and the overall impact of the scheme would have benefited from having the regulations available.

3.80 However, this concern needs to be considered in light of the justification advanced by the department for including details in regulations rather than in the bill. This justification is that flexibility is essential for the effective program operation in such a dynamic area and that more visa types may be brought within the new sponsorship framework which will require additional obligations to be prescribed.[63]

Recommendation 1

3.81 The Committee recommends that the operation of the legislation, as amended by this Bill, be reviewed within three years after the commencement of the provisions.

Recommendation 2

3.82 The Committee recommends that the Senate pass the Bill.

Senator Trish Crossin

Chair

63 Department of Immigration and Citizenship, *Submission 18A*, p. 2.