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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Reference: Migration Amendment (Employer Sanctions) Bill 2006

WEDNESDAY, 26 APRIL 2006

SYDNEY

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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Wednesday, 26 April 2006

Members: Senator Payne *(Chair)*, Senator Crossin *(Deputy Chair)*, Senators Bartlett, Kirk, Mason and Scullion

Substitute members: Senator Stott Despoja for Senator Bartlett

Participating members: Senators Abetz, Allison, Barnett, Bartlett, Mark Bishop, Brandis, Bob Brown, George Campbell, Carr, Chapman, Colbeck, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Fierravanti-Wells, Heffernan, Hogg, Humphries, Hurley, Johnston, Joyce, Lightfoot, Ludwig, Lundy, Ian Macdonald, McGauran, McLucas, Milne, Murray, Nettle, Parry, Patterson, Robert Ray, Sherry, Siewert, Stephens, Stott Despoja, Trood and Watson

Senators in attendance: Senators Bartlett, Kirk and Payne

Terms of reference for the inquiry:

Migration Amendment (Employer Sanctions) Bill 2006

WITNESSES

Committee met at 9.02 am

BALZARY, Mr Steve, Director, Employment and Training, Australian Chamber of Commerce and Industry

CHAIR (Senator Payne)—Welcome. This is the hearing for the Senate Legal and Constitutional Legislation Committee's inquiry into the Migration Amendment (Employer Sanctions) Bill 2006. The inquiry was referred to the committee by the Senate on 30 March 2006 for report by 2 May 2006. The bill amends the Migration Act 1958 by inserting offences for employers and labour suppliers who allow noncitizens to work in Australia illegally. The committee has received nine submissions for this inquiry and those submissions have been authorised for publication and are available on the committee's website.

Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses, and further copies of those notes are available from the secretariat. Witnesses are also reminded that the giving false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public, but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

I think it is only appropriate to advise the committee that two of our members are Northern Territory senators, both based in Darwin. As such, they have had some difficulties leaving Darwin in recent days, so we note the apologies of Senator Crossin and Senator Scullion. The Australian Chamber of Commerce and Industry has lodged a submission with the committee which we have numbered 8. Do you need to make any amendments or alterations to that submission?

Mr Balzary—No.

CHAIR—In that case, I will ask you to make an opening statement, and at the conclusion of that we will go to questions from members of the committee.

Mr Balzary—Thanks very much for the opportunity. I have to start by apologising for not appearing in person. I have some other engagements in Canberra and unfortunately this is the only way we could do it, so I apologise first up. I guess ACCI have been actively involved, particularly over the last twelve months, in the skilled migration debate. ACCI consider that skilled migration is one of a number of important options for employers to meet the emerging labour and skills shortages in the economy. Obviously, with ACCI being the major employer organisation of the country representing all state and territory chambers together with most of the major national industry associations, our breadth of interest in this issue is significant but also, increasingly, we know that as an important option to fill the labour and skills shortages in the economy many employers have now entered the system to undertake these tasks. When we became aware of the bill, we had a discussion with our membership. We have distributed our draft comments to members to make sure that we are reflecting their views, and what we are putting forward does that.

I would like to make a couple of points specifically on the bill—I have got four I will outline in fairly brief terms. We are very comfortable with supporting an arrangement where, when an employer knowingly takes a person on who is obviously an illegal immigrant, the

forces of law should come to reckoning on them. The issue ACCI has is in relation to recklessness. We would like to put a couple of issues in front of this important committee. The concept of recklessness as defined is quite broad, so the issue from an employer's point of view about what is meant by recklessness appears to be quite subjective. It is not clear in how it is outlined in the regulations in terms of what we have seen, and an employer who may do the right thing may fall into the trap of being seen to be reckless because of that detail.

There is an issue about who will enforce recklessness; who within DIMA would have that responsibility; how would that be enforced across the board; and would it be seen to be going over the top in terms of some arrangements even if there is a risk management strategy undertaken? It also shifts the onus and responsibility somewhat in broad terms on an employer to be a party to the role of enforcement of the arrangements but not having that clarity. Even if an employer undertakes an examination and makes sure someone has a tax file number, says that they are fine et cetera, how far does an employer have to go? That is not defined in the current bill before us.

Another issue for us is the compliance burden. It is quite unclear about what would be required of an employer to ensure that they have undertaken that activity to ensure that they have not been reckless, so looking from the point of view of making sure that all employers are fulfilling their obligations in that area of responsibility. The last issue for us is the fundamental premise, and we have been having discussions with DIMA increasingly over the last six months about making sure that employers have a clear understanding of what their rights, obligations and responsibilities are in migration. Our view at the moment is that they are not clear across all the different visa categories and it is quite confusing. Having this on top of it means that we have got a significant issue about the clarity of purpose and the role of employers in terms of fulfilling their responsibilities.

As I said at the start of this short introduction, we are very supportive of, where people undertake both knowingly and in a reckless way—and we have connected those concepts rather than having them separate—that action being taken. That is quite clear, if that action is supported by clear and precise information from the department working with industry to get that out to all employers, and making sure that employers also undertake the usual standard award, industrial relations and benefits it provides. Where employers do not do that, we are also quite comfortable about prosecutions being undertaken.

In summary, our views are more around: what is the length and breadth of the concept of recklessness; how does that shift the burden of responsibility onto employers; and where does that start and finish? In a global migration labour market, which I think most countries in the world now recognise, how do you make sure that migration is seen to be an important option with clear standards for an employer to undertake without them becoming part of an enforcement arrangement?

CHAIR—Thank you, Mr Balzary. Senator Bartlett is here with us now, and we have a number of questions from members of the committee. In relation to the compliance question, you note in your submission that ACCI has some concerns about a 'potential additional workload on employers'. It seems to me that it is a kind of chicken and egg arrangement: if you put in the additional effort at the beginning to make sure that the person you are hiring is

not 'illegal' that would solve your problem at the other end if they are found to be illegal. DIMA then comes in to deal with that.

Mr Balzary—I think this is where the issue of recklessness is grey. 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. If you have someone of non-European appearance who has not necessarily got a range of supporting documentation but may have a tax file number, what is the role of the employer to ensure that that individual is a legal worker? That differentiation, to us, blurs the boundaries.

Should it be that, as a worker comes forward, the department issues a document that says, 'You are a legal worker'? From our point of view even that is an undue burden because we are not sure what the costs would be. But where do you start and finish in relation to the employer having to determine that? Do they have to make phone calls to DIMA? Do they have to get verification? Does the individual have to write off to DIMA before they appoint someone? What happens if someone objects? For example, what if they are an Australian citizen and they say, 'I'm an Australian citizen; you are discriminating against me'? So there are issues as far as we are concerned about when discrimination legislation comes into effect. That grey area is more the issue for us rather than any other.

Obviously 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 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.

CHAIR—Can you indicate to the committee what level of consultation and discussion on these matters you as a peak organisation have had with DIMA?

Mr Balzary—We have had some discussions with DIMA in very recent times on what is meant by 'recklessness'. We have spoken to them and expressed our concerns in the last three to four weeks about what that term means exactly and how to detail that requirement. We have certainly had discussions with DIMA over the last three to six months about clarity and getting better information to employers across the programs, and we are working with DIMA on that. So on this specific issue it has been quite recent, and I guess we are still looking for some answers.

Senator KIRK—I want to continue with the issue of how employers verify whether workers are of such a status that they are able to work. I understand that, currently, it is really just a case-by-case assessment in most instances, and that when an individual fronts up it is up to the employer to ask the right questions to establish their status.

You mentioned a moment ago some kind of promotional program or the like that you think it would be advisable for DIMA to undertake in order to educate employers. What you seem to be getting at is whether or not there ought to be defined in the legislation a process for

verification—maybe not in legislation but perhaps in some sort of guideline. Is that what you are hinting at in the way that you are outlining your submission?

Mr Balzary—Thanks—it is a good question, Senator. In the end, I think there are probably two cut-and-thrust issues. The first one is: how do you actually define 'recklessness' in a clear way such that you can indicate to the party that you may or may not prosecute? In the end, it is a relatively subjective term, as we see it at the moment.

The second issue is: on top of that, irrespective of whether it is about employer sanctions or not—but, certainly, employer sanctions sharpen the mind—making sure that all employers are fully aware of their rights, obligations and responsibilities in relation to a set of arrangements for all migrant workers. In our view, the best way to do that is with a partnership arrangement between government and industry. Going out and starting a campaign with an out-posted officers program with a range of industry organisations where officers from DIMA are located with employer organisations that can go out and talk to employers about what their responsibilities are is a good first step.

But, underneath and underpinning that, we think it is very important that all employers, irrespective of whether there are some marginal issues around illegal or legal migrants, understand their obligations so we can be quite clear in any case that comes forward that an employer does understand what their responsibilities are. If in our view they do not fulfil those responsibilities—that would be 'knowingly and recklessly' not fulfilling those requirements—then prosecution could follow. The reason for us having 'knowingly' and 'recklessly' is to make sure that it is quite clear to people doing this that, despite making any attempt at all, if they are doing it intentionally to make sure that they are fulfilling a requirement to get someone just because they need it—or whatever the other issues are—then they know they are breaking the law and consequences will follow.

Senator KIRK—So you would rather see that occur by way of some sort of education process or program, as you have described it, rather than by amendments to the legislation to, say, change the definition of recklessness? The definition in 245AB(1)(b) says that a person would be reckless as to the circumstance where he or she is aware of the possibility that a worker could be an unlawful noncitizen. Are you saying that perhaps that definition ought to be tightened up in addition to the education program that you referred to?

Mr Balzary—I think you need both approaches. Our view in terms of the possibility of whether the worker is unlawful or a noncitizen is that it puts the employer in the position where they will be asking a range of people, who may or may not even be Australian citizens, whether in fact they are illegal workers or not. That concerns us because ultimately it means that an employer becomes an arm of government; the issue for us is that connecting 'knowingly' with 'recklessness' certainly strengthens that requirement. So, basically, I think all of us here are interested in having some sanctions for employers that fundamentally are doing things that they know are illegal and doing them wilfully. I do not think anyone in this country would object to that arrangement.

I am worried about the usual grey areas—and there may be some others—where an employer has done something but has not done much. The possibility may be that in fact the person is illegal and then they get trapped in a whole series of other issues. But you cannot

just have sanctions by themselves. I guess our view is that, more broadly than one just to pick up this issue, there needs to be an information campaign right across the board about what all employers must do, irrespective of what visa category or part of industry they are in or whether they are taking seasonal workers or in fact taking a full-blown particular visa class which means they are sponsoring the individual. Everyone—the actual person or applicant themselves together with industry—needs to know about what everyone's rights and responsibilities are, and that needs to be sharpened.

Senator KIRK—I want to canvass one other issue, in relation to independent contractors. You raised this in your submission. Can you outline further for the committee what you think the impact would be on the principal contractor-subcontractor relationship and the difficulties that the principal could well face in trying to verify the working status of, in particular, subcontractors?

Mr Balzary—We have put this forward as an issue that we think is covered but on which I am seeking clarification. 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—we don't think this proposal does, but we are making sure that it doesn't—that the principal contractor, party A, is not covered under this arrangement. They are not the employer; they are basically the subcontractor. So we are trying to see whether, particularly in some of the mine sites or where contracting does occur, the principal company that outsources a whole range of their operations is ultimately responsible. From that point of view, the 'knowingly and recklessly' arrangement would apply to entity B in our example. We think, from our reading, that that is the case, but we are just not sure.

Senator KIRK—Again, that really comes down to the definitions of 'work' and also 'allows a person to work' in 245AG. You are saying there is some ambiguity there, and perhaps that needs to be tightened up, depending on what the intention is.

Mr Balzary—Yes, that is right.

CHAIR—What is ACCI's view of the program that is currently run by DIMA, known as the employer awareness campaign, which is about educating employers in relation to not recruiting people who do not have working rights and outlining the methods of checking a person's working rights?

Mr Balzary—I think that is a good start. This is a building block within which this could happen. We are looking across all visa categories, and we are looking for a more comprehensive campaign that involves industry associations actively going out and talking to employers in terms of what their rights and obligations are. The other issue for us is that there seems to be a myriad different rights and responsibilities in different visa programs and classes, which is confusing for employers who, in some cases, may have one or more visa category people employed by them. So part of this is about having a look at clarity across classes and conveying it in a more comprehensive manner.

My criticism is not that the department is not doing anything; in fact, ACCI are doing some good work at the moment with some of our members in getting some of that information and working with DIMA to clarify that. We are looking for a more comprehensive campaign so that it is very clear for everyone. Recent cases in the media have shown that, when you do talk to people about what their requirements are, it needs to be made crystal clear for them, and not just generally clear about what their requirements are. That would clean up the matter for those employers who, for whatever reason, do not quite understand what their rights and obligations are but who are trying to do the right thing. They are the ones we are particularly interested in. It is not the 'knowingly and recklessly' ones that we are talking about. Our view on those, as I have said on a number of occasions today, is that they should be prosecuted.

Senator BARTLETT—Could you give us an idea from an employer point of view of just what would be involved in verifying somebody's eligibility to work?

Mr Balzary—Certainly in terms of the user requirement, a lot of it is around judgment and a lot of it is really around what sorts of documents someone would have to verify parts of what they have. But the obvious issue is that different visa categories have different requirements and different arrangements. There is no one line or no one document that says, 'This person can work.' Certainly, if there is some lack of understanding then there is an option to contact DIMA on an online phone or fax service. Some companies do that, particularly if they have larger intakes. I was talking to some restaurateurs the other day, and they said that when they advertise a vacancy in their shopfront the advertisement will say, 'You need a current work visa.' So there is no doubt that some responsible restaurateurs put that up front, but the degree to which that is verified would be variable.

Senator BARTLETT—But, broadly speaking, as things currently stand it would be in the interests of an employer, particularly in what might be called a high-risk industry, including catering and the like, to try to verify those sorts of things, wouldn't it?

Mr Balzary—Some do. If someone provides what seem to be bona fide requirements and already has a track record of working in the industry, including in a particular location, is that sufficient? Many employers would say that it is, particularly if they have a lot of skills in that occupation. It is a question of whether in fact every time someone who even remotely looks like they are not from the group or not like an Anglo-Australian approaches an employer for a job that the employer needs to contact DIMA and do a verification test on every one of those applicants.

Senator BARTLETT—What is your understanding of the extent that employers will have to go under the new legislation? Would have to verify beyond reasonable doubt or just verify to the extent of reasonable assurance?

Mr Balzary—I guess that is that issue about recklessness by itself and if that issue around 246AB(1)(b) is a possibility. The whole area is just so subjective. I guess what we are saying is: 'Who are we trying to make sure that we prosecute here?' In our view, the intent of the legislation should be to make sure that we prosecute those who are knowingly doing this in a routine manner to make sure that they get around the requirements under Australian law. I would not have thought this is fundamentally about entrapping people who basically are undertaking the arrangement to the best of their ability. So if they think they are reckless, will

they need to check? It seems to be a double-edged sword. That is our clarity point around what that is. So, yes, people are making their own arrangements and doing some of the checks, but you cannot even rely on a tax file number for some of these areas. That is particularly important as well, because you can have a tax file number but you may not necessarily be able to work in a particular industry or region under your visa category. That seems to be a problem.

Senator BARTLETT—In the statement you made during that answer about the small number of employers who are regularly employing illegal workers knowingly or recklessly to get around local requirements, are you talking about getting around workers compensation requirements, health and safety requirements and those sorts of workplace law requirements? Is that what you are getting at?

Mr Balzary—This is generally known. There are prosecutions that are going before the courts at the moment which we cannot comment on. Certainly there are some instances—a very small number of cases—where the motivations of employers are hugely variable. Some of them are in fact in locations where people simply cannot find suitably qualified or suitable people, given the labour shortages. That puts increasing pressure on employers to find people that are prepared to work, particularly in industries where Australians, for whatever reason, are not inclined to. The tightening of the labour market has had an impact—there is no doubt about it. I do not think it is a campaign in which to duck and weave around certain responsibilities. Part of it seems to be around just recognising the tightening of the labour market in terms of labour and skill shortages. There are some employers that are doing this systematically, and that may happen. But we think that is a minority of cases. Our view is: how do you make a process simple and clear for some employers who are doing the right thing and make sure the arrangement is not subjective but clean and crisp, without offending anyone in the process?

Senator BARTLETT—The notion of bringing in legislation like this has been around for quite a while—back to last century, I understand. Have you any comment on how the proposal has evolved over time? I have it on a piece of paper before me—therefore it must be true—provided by the secretariat that ACCI opposed the legislation when it was proposed originally back in 1999. Going by your submission, subject to the concerns you have raised today, you are willing to accept the need for it. How do you see that things have changed since then that make legislation of this type more acceptable?

Mr Balzary—It has shifted in a buoyant economy. It partially reflects what I have just said. That is, there is an increasing strand of skilled migration, which we connect this to, and that is a legitimate strand to meet the labour and skill shortages which we have talked about—which includes training of young and older Australians and encouraging people to move to where occupations and jobs are. We also got a bit more sophisticated about our policy view on where this sits rather than just, in some cases, opposing some things within a broader context. We have been working over the last 12 months to basically get a more comprehensive set of principles that would apply to skilled migration in Australia. We are making sure that skilled migration arrangements are more balanced. We do think it is very important—and I think it has been in the press over the last six months or so—to make it very clear that we see skilled migration as an important pathway, not only in the short term but in the long term. It has been

a traditional base of us bringing people into Australia for years now. But we want to balance that with other arrangements in terms of increasing participation in the labour market and training young people.

Next to that there is a set of issues that we are working with DIMA on to clarify, fast-track and streamline some of their proposals, structures and procedures. We think DIMA going online and having more support for their requirements, particularly in the last 12 months, is a big step forward in the process. Thirdly, in the end, part of this is also about protecting employers. When most employers do the right thing, it is imperative that we have processes and procedures in place to protect them and also the migrant workers who are actually undertaking work in meaningful ways in this country, and that is the vast majority.

Those three or four issues combined is why we have moved along in accepting that, yes, there is some requirement in that area. We still think, though, that a bit of an issue is having a broad requirement—a sort of catch-all—that does allow for a fair degree of subjectivity and does put some of the onus back on employers. But I still think that if you actually joined the concepts of 'knowingly' and 'recklessly' then you would have a much tighter arrangement which would be easier to enforce and which would in fact, in a public policy sense, do what I think we are all looking for.

Senator BARTLETT—The impression I gained from your last couple of answers is that, with the labour market as it is at the moment, there is an understandable desire on the part of an employer when they cannot find workers to perhaps not explore people's eligibility as much as they might otherwise just because they are so desperate to find workers in some circumstances. I assume that is a fair enough comment. I am not implying people are being reckless about it, but when people are desperate to find workers that obviously means they are keener to grab anybody they can who is putting their hand up.

Mr Balzary—Again, it is about the separation. I know this is sounding very technical, but legislation, as you know, is always technical. The concept I am coming back to which I have problems with is recklessness and how that links to possibilities—whatever that means—and the potential impact on difficult situations. You could have people of non-English-speaking backgrounds who are Australian citizens in front of an employer and the employer saying they are going to do a migration check. I think we have to be very sensitive to that. I think there is a difference between that arrangement and the situation with the vast majority of employers who are doing the right thing. Those that are knowingly doing those things are acting illegally, and we have systems in process to deal with that. I would not have a clue how many of those employers there are. There would not be very many but there may be some. The legislation should target those individuals. In terms of a risk management strategy, that would make sense to us. I am trying to make a distinction between those two arrangements. We think by joining them together the legislation would be a lot stronger.

Senator BARTLETT—You have mentioned a few times the skilled migration stream and its expansion. I note in the department's submission that the sectors in which they locate the most illegal workers are accommodation, catering, agriculture, fishing, manufacturing and construction. As a broad generalisation, I would think that they would include a lot of unskilled work, and I gather that in at least some of those industries it is difficult to get unskilled or moderately skilled labour. Do you or does your organisation have a view about

the desirability of expanding what might be called an unskilled labour stream or temporary visas for less skilled workers as well to help with that sort of demand?

Mr Balzary—We have taken our view of skilled migration, in terms of even five years ago, from a population policy viewpoint of how many people we need in the country and things like that into a labour market view of the world—that is, how it sits with labour and skill shortages. We look at where we need people: from the top end who are highly skilled through to tradesmen and other skilled occupations like that—professionals and paraprofessionals—and then down to people in the unskilled areas. We know that there are significant areas in the economy where we have problems with finding unskilled or semiskilled, if you like, workers.

In our view there needs to be a suite of interventions to cater for all of those groups in a balanced way. Part of the role of DIMA is to set caps on how many people come into the country overall in each of the categories. We do not support a guest worker program but we think that, where there is a need for unskilled—to use a broad term—workers in a particular region or industry, we need appropriate caveats and requirements to prove quite unequivocally the need for those workers and a set of conditions to make sure that those individuals are monitored closely. We think that those should be put forward and taken seriously. I have to say, though, that in our view it would not be the priority for any national migration program, but it could be an element.

So, again, we are not in favour at all of open-slather guest workers. A targeted program where those needs can be clearly verified and considered by the department and the minister is a door we do not want closed off either. Our view is that it has to be in connection with other labour market interventions. It is just as important. We are actively involved, obviously, in the welfare reforms and making sure that, in fact, we increase participation for those groups. We are very involved in the training reforms through the New Apprenticeships program in terms of making sure there is a balance there. We would not sit and say that skilled migration is the only thing in the balance.

We have been trying to talk to a whole range of government agencies, including through the COAG process, to make sure that in fact this is one sensible option and that people are clear about why they are doing it, where it fits and what the numbers are. In certain industries there are different views about what the level should be in terms of the intake. Overall, I think we should have that as a discussion and then actually have some clear arrangements linked to better and more sophisticated labour market information about where people go. It is important we do not have, again, programs where people just come in to Sydney. We are very interested in having targeted arrangements for labour markets where there are labour shortages, particularly to attract people to some of our more remote areas where some Australians may not wish to work.

Senator BARTLETT—Thank you for that. That is useful. How would you describe the level of liaison between groups like your member bodies and the department?

Mr Balzary—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. We would say, across the board, there has been a universal view that DIMA in this area has really lifted

its game in the skilled migration area. I think it is endeavouring to undertake much more consultation with industry and have much more ownership of industry, but it is also prepared to think of some things about where we want to go forward to actually reform some of the programs.

We are working on a policy to put some pressure, like we do in a whole range of other areas, where we still need to go a long way, and we would meet regularly with the executive of DIMA at ACCI. Certainly there have been a number of discussions between our members and ministers and others and that should continue. Getting the dialogue about how to make sure this works in the broader context is important. I think there is also a range of other ministers outside the DIMA portfolio who are interested in seeing how what they do interacts with skilled migration and vice versa. We have been concentrating on getting those dialogues in place. Open consultation and listening to proposals about reform are needed. I think there has been a vast improvement in that regard. When we release some documentation later in the year it will be even more interesting to see how the various parties and others accept that.

CHAIR—Thank you very, Mr Balzary. On behalf of the committee, may I thank the ACCI for its submission and you for appearing today. If the committee has anything it needs to follow up with you, it will come back to you. As you can imagine, our turnaround time for this report is pretty tight, so we will be in touch if we need to.

Mr Balzary—Thank you, senators.

Proceedings suspended from 9.44 am to 10.00 am

HUBBER, Ms Brenda, Executive Officer, Melbourne Catholic Migrant and Refugee Office

CHAIR—I welcome Ms Brenda Hubber from the Melbourne Catholic Migrant and Refugee Office, who is today also representing the Australian Catholic Migrant and Refugee Office. Do you have any comments to make on the capacity in which you appear?

Ms Hubber—I have been asked to attend this inquiry as a representative of our national office in Canberra, the Australian Catholic Migrant and Refugee Office.

CHAIR—The Melbourne Catholic Migrant and Refugee Office and the Australian Catholic Migrant and Refugee Office have lodged submissions with the committee which have been numbered 3 and 4 respectively. Do you need to make any amendments or alterations to either of those submissions?

Ms Hubber—I will expand on some of the points that were raised in those two submissions.

CHAIR—That will be fine. I now invite you to make an opening statement, at the conclusion of which we will go to questions from members of the committee.

Ms Hubber—Firstly, I would like to thank you for the opportunity for our offices to have input into this Senate inquiry. The Australian Catholic Migrant and Refugee Office, ACMRO, was established by the Australian Catholic Bishops Conference and acts at a national level on immigration issues of interest to the Catholic Church in Australia. It is responsible to the Australian bishops through their committee on migrants and refugees. The committee consists of Bishop Joseph Grech from the Sandhurst Diocese in Victoria, as the chair; Bishop Patrick Dougherty from the Bathurst Diocese in New South Wales, as the secretary; Bishop Joseph Oudeman, Auxiliary Bishop from Brisbane, Queensland; Bishop Max Daves of the Australian Defence Forces Military Ordinariate in Canberra; and Bishop Hilton Deakin.

The Melbourne Catholic Migrant and Refugee Office liaises with the national office on various immigration matters but comes under the authority of the of Archbishop of Melbourne, Denis Hart, who has appointed Bishop Hilton Deakin as his Episcopal Vicar for Migrants and Refugees in Melbourne, and he is the person whom I work for.

It should be noted that the director of the ACMRO, Reverend Monsignor John Murphy, in Canberra is a qualified migration agent and would probably be better placed to answer some of the more technical issues on migration law.

I turn to the issues of concern. Firstly, both our offices acknowledge the frustration immigration compliance officers must have experienced, being only able to warn instead of prosecute repeat offenders. Employers who knowingly and repeatedly employ illegal workers should be prosecuted under applicable legislation like this. However, our organisations are concerned that all migrant workers, whether legal or illegal, are not exploited by unscrupulous employers. Minimum wages and conditions of employment should apply to all workers, whether Australian citizens or lawful migrants. This would prevent imported workers from undercutting the Australian work force. Employer sanctions may need to be extended to

prosecute employers who short-circuit the process by not recruiting Australian workers first and who hen exploit legal temporary migrants, as was found recently in Perth and Canberra.

The next issue of major concern is the denial of the right to work to certain temporary visa holders. We do not agree that work rights should be extended to every temporary visitor to Australia, as suggested in option 6 of the explanatory memorandum. However, the denial of the right to work to certain temporary visa holders, namely holders of bridging visa E, is of joint concern to both our offices.

Articles 23.1 and 22 of the Universal Declaration of Human Rights state respectively:

... Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

... Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Some asylum seekers, through no fault of their own, find themselves on bridging visa Es without the right to work or access to social welfare payments, effectively denying them any financial means of supporting themselves or their families. Without the right to work they cannot contribute to the taxation system and consequently are excluded from accessing the health care system.

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 BVEs were 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.

I understand the immigration department is currently reviewing conditions of the various bridging visas and hope the problems articulated by the non-government organisations that support these BVE holders without work rights will see this situation overturned by the abolition of the appropriate legislation. However, I wonder whether it is within the scope of this inquiry to recommend the expansion of work rights, as suggested in option 6, to this group of asylum seekers.

The ACMRO submission suggested that all employers, whether large companies or private individuals, should be treated equally under the employer sanctions. The legislation should not only apply to companies but also to individual employers who are increasingly employing foreign workers to do domestic work such as cleaning, gardening and child care. The ACMRO submission was especially concerned that employment procedures may target employees who might look or sound differently to the general population. Employers will need to err on the side of caution to avoid penalties but ACMRO's concerns stem from the possibility that employers will discriminate against people who look or speak differently further fuelling racism and prejudice and resulting in the exclusion of people already

experiencing disadvantage in the labour market. To avoid discriminating against possible employees, the ACMRO suggests that there should be a blanket employment procedure that checks the work rights status of all potential employees whether they are Australian citizens or migrant workers.

On the issue of people trafficking, the MCMRO was pleased to see that the government is particular concerned about circumstances in which women may be trafficked into Australia to work illegally in conditions of sexual servitude, forced labour or slavery. However, it needs to be careful not to treat the trafficking of women and young girls into prostitution in Australia as simply an employer non-compliance issue. There are a whole range of more serious crimes and human rights violations occurring apart from employing illegal workers.

I am reminded of the sad case of Ms Puangthong Simaplee, who was located in a Sydney brothel in September 2001 by Australian immigration authorities. She told authorities that she had been sold into prostitution at 12 years of age, came to Australia aged 15 on a false Malaysian passport and had been in prostitution ever since. She was 27. When the immigration authorities located her, Ms Simaplee had self-harm scars, hepatitis C and an eye infection and was severely emaciated, weighing only 38 kilos. She was severely addicted to heroin and may have had pneumonia.

Despite her vulnerability, both physically and as a victim of trafficking, she was detained in the Villawood Immigration Detention Centre under Australia's mandatory laws that require the detention of all unlawful noncitizens. Ms Simaplee began to withdraw from heroin and was observed half hourly by detention centre staff. She was provided with a bucket in which to vomit, urinate and defecate when she was too weak to use the bathroom. After three days of prolonged vomiting she died alone in a pool of vomit a short time after being injected with an inappropriate medication. Ms Simaplee's case illustrated the degradation trafficked women and young girls suffer. They are generally unknowingly sold into sexual servitude and, through threat, intimidation and sexual assault, are introduced into prostitution. They are exposed to sexually transmitted diseases and exploited by deviant clients. To survive psychologically they often resort to drugs.

DIMA's submission to this inquiry states that, since 1999, 158 suspected victims of trafficking into the sex industry had been referred to the Australian Federal Police, and even with the introduction of two new witness protection visas there had not been one successful prosecution. The problem is that these visas provide protection only for as long as the trafficked witness is of use to the law enforcement and prosecution agencies. They provide no long-term security or access to rehabilitation support. Without this security, they risk being deported back to the place they were trafficked from, where the people who trafficked them may still be present and where there is possibly a hefty debt bondage still to be paid. No wonder they are reluctant to give evidence.

The Catholic religious congregation's trafficking working group, in its recent shadow report to the United Nations committee for the Convention on the Elimination of All Forms of Discrimination Against Women, recommended that the existing trafficking visa framework be reformed; that trafficking victims should be eligible for visas on the basis of their status as a victim of trafficking, their safety needs and their need for support regardless of their involvement in the criminal justice system; that upon entering the victim support program, a

person receives comprehensive legal advice and access to a health care program; that the Australian government develops the victim support program in Australia to provide supported accommodation and care for all trafficking survivors; and that consideration be given to resourcing other non-government support providers.

It is important to recognise trafficked people not just as potential witnesses in criminal proceedings but as victims of human rights violations that have occurred in Australia. The ACMRO and the MCMRO would like to thank the Senate inquiry for the opportunity to come and speak today.

CHAIR—Thank you very much.

Senator BARTLETT—Thank you for that. I would like to ask about the issue of voluntary work, which has been raised in a few submissions, and whether or not the legislation could be read as catching people who are undertaking voluntary work without work rights. Have you given some thought to that? Do you have an opinion on that?

Ms Hubber—It was an issue of concern, but in the short time I had to prepare for this I did not really look into that section of the legislation. But I do have concerns about people who provide opportunities for people to work in Australia who then, all of a sudden, become illegal workers. Also whether charitable organisations will be caught by this legislation and to what extent we are allowed to ask people to do voluntary work, and to give them some sort of dignity without actually entering into a contract. I think the voluntary work is an issue. If they do not actually enter into a contract they are classified as voluntary workers.

Senator BARTLETT—We can check that with the department this afternoon in any case. Just with regard to your organisation—or organisations, I guess, in the national sense—could I get an idea about the nature of the migrants that you come in contact with? How much concerns the general migration area as opposed to refugee and asylum seekers?

Ms Hubber—Most of our work these days is more involved with refugees—mainly Sudanese people coming through the refugee and humanitarian program. Also, members of our organisation, including Catholics, are involved in other charitable organisations that provide support to people on bridging visa E and the temporary protection visa, in helping with their settlement.

Senator BARTLETT—Do you have much contact or involvement with people who get caught up in immigration compliance raids and those sorts of things?

Ms Hubber—No, not our office. The national office may. The director, as a migration agent, may have an increased workload as a result of that, but generally I have not heard that we are getting caught up in that.

Senator BARTLETT—One of the issues that has come up is that, if employers feel there is a bigger risk attached to inadvertently putting somebody on who turns out not to have work rights, they may develop an instinctive apprehension towards employing people of non-English speaking background, for example. Would you have any comment on or experience of how things currently are with regard to that? I suppose there has been some general commentary, made in the light of the Cornelia Rau incident and those sorts of things, about migrants feeling more insecure about potentially being targeted. Is there anything a bit more

solid than that that you could provide with regard to evidence of people's experiences as refugees or migrants in trying to access employment?

Ms Hubber—I think there is a general reticence to employ people who are newly arrived, no matter how good their qualifications are. It is very difficult. One person I was speaking to who came as a skilled migrant, who now has a teaching position in the south-east area of Melbourne, said that the advice they were given by DIMA was when they finally got here and started going through the Centrelink method and they found that it just was not going to find them a job. They felt they had been misled. They are highly qualified teachers and eventually they found work.

There is a lot of reticence to employ people on temporary protection visas, because of their temporary nature and because they tend to be restricted to fruit-picking and abattoir work in the rural areas. They very rarely get a chance to do the sort of work they are often trained to do. Some of them are pharmacists and doctors, and they are not able to practise in those professions.

Senator KIRK—You raise in your submission your concern about whether the department will actually enforce this proposed legislation, or perhaps whether there will be a willingness by the department to enforce it. What obstacles do you see that might exist in relation to implementation and enforcement of the proposed legislation?

Ms Hubber—I think the department can perhaps target companies more easily. But I think there is an increasing number of new arrivals being used in domestic work, so they are not being employed by companies and it is harder to make them comply. I think that has been going on for a long time—probably the greatest exploitation is occurring in people's homes.

Senator KIRK—That is interesting. I assume you are referring to so-called 'unlawful immigrants' employed as domestic workers in homes.

Ms Hubber—Yes. I think they may enter the country as a visitor, and then to fund their overstay they find work. There are people who are prepared to employ people as cleaners, gardeners and nannies at a reduced rate. That is what I was trying to point out: we perhaps need minimum standards that are acceptable across the board so that these people are not being exploited and so that foreign workers are not undercutting salaries of Australian workers.

Senator KIRK—When you talk about minimum standards, do you mean terms and conditions and wages of workers?

Ms Hubber—Yes.

Senator KIRK—You also suggest that there ought to be a process of checking all prospective employees' working rights as part of a standard recruitment procedure. Can you explain a little further how you see that standard recruitment procedure working?

Ms Hubber—DIMA seems to have a fairly extensive system, which I think is called EVO, for checking visa conditions as to whether a potential employee is entitled to work in Australia. It sounds very easy but I do realise that, in private enterprise particularly, there are a lot of small businesses for whom this would be quite an impost in terms of extra administration work. However, I suppose that in order to protect themselves they would have

to have a blanket policy to say, 'We need to check every person. They need to show us their proof that they are an Australian citizen or show us their visa that gives them work rights.'

Senator KIRK—The witness we had earlier today mentioned, as you just have, the imposition, the burden on business of the compliance that it requires. The witness spoke of the need, as he saw it, for some kind of educational or promotional program to be conducted, perhaps by DIMA, to inform businesses of their obligations and how they ought to go about them. Do you have a view about that matter?

Ms Hubber—The previous witness is coming from a chamber of commerce point of view, so I suppose it depends on whether DIMA can target umbrella bodies like that to feed information and education down through the system. It could probably be couched in the training of human resource managers and workers, rather than it being a separate education program. Perhaps that information can be fed into current human resource practice.

CHAIR—On that point, Ms Hubber, why wouldn't you come from the other direction and say that workers who are presenting as applicants need to present with an affirmation of their status for any job, that it is just a matter of requirement? Why wouldn't you reverse the process?

Ms Hubber—When you go for a job, you do turn up with certain documents.

CHAIR—That is right, so why wouldn't you add this?

Ms Hubber—Yes, it probably should go into employment career information and go out to the general public that when you are putting together your CV, you need to present with these sorts of documents—I do not know whether a birth certificate is acceptable anymore, but a driver's licence is. It should be outlined that these are the things you need to do to prove you are either an Australian citizen or a new arrival with a visa with work rights. Yes, the onus could also be placed on the employee as well. Again, it is about educating people. I suppose it is getting the information out into the career magazines and media so that when you are putting your resume together, you incorporate those sorts of documents.

CHAIR—Although at the same time, if you are talking about jobs in an industry where they are selecting large groups of people for relatively informal work arrangements, I suspect they are not coming armed with word processed CVs for the—

Ms Hubber—No, but they still turn up with a bent manila envelope with bits and pieces in it, and that sort of thing. We can try to include that as something that they present with.

CHAIR—Indeed. Sorry, I interrupted, Senator Kirk.

Senator KIRK—You may want to comment on this, but I am thinking along the lines of whether or not DIMA or the government should establish some kind of green card system, whereby a person literally carries a green card which authenticates their status to be able to work.

Ms Hubber—I think there is a problem with that. It was mentioned in the explanatory memo that the visas are just a stamp on a passport; they do not contain enough information. I do not know whether they could reconfigure that so it is quite clear that the person does have work rights or student visas—I think they are limited to 20 hours a week—and that sort of thing. When it is a condition of their visa, it should be quite clearly stated with the visa.

Whether having a rubber stamp in your passport is sufficient any more, I do not know. I would be reticent to suggest we introduce a new system of administering that information.

Senator KIRK—At least it would then take the onus, in a sense, off the employer. They would be reassured that this person does in fact have the status that they are claiming to have.

CHAIR—As there are no further questions, I thank you very much for appearing before the committee today, Ms Hubber, and for the submissions from your organisation in Melbourne as well as from the Australian Catholic Migrant and Refugee Office. If we have any further matters that we need to follow up with you, the committee will be in touch. Thank you very much.

Ms Hubber—Okay. Thank you for giving me the opportunity.

[10.25 pm]

BOWE, Mr John, President, Australian Taxi Industry Association

DAVIES, Mr Blair, Executive Director, Australian Taxi Industry Association

CHAIR—I welcome our next witnesses. The Australian Taxi Indy Association has lodged a submission with the committee, which we have numbered 6. Do you need to make any amendments or alterations to that submission?

Mr Davies—We have a supplementary submission.

CHAIR—If you table that submission, the committee will receive it. I ask you to make an opening statement and at the conclusion of that, we will go to questions from the committee.

Mr Davies—The Australian Taxi Industry Association is very keen that the taxi industry preserves its good name and reputation. Consequently, part of the reputation goes to the reliability of taxi drivers. They are out there on a 24/7 basis, providing an exclusive service on many occasions to customers. It is imperative for our industry that our customers have confidence in the taxi driver behind the wheel. Consequently, we as an industry body have been supportive of regulators placing conditions on taxi drivers both in terms of their competency to drive a cab and deliver a service and also in terms of their character, particularly with regard to criminal offences. 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. The supplementary provision that we have just provided addresses that issue. We have heard back from a couple of regulators that they do not believe that their driver's authorisation certification process would pick up on the issue of somebody being an unlawful non-citizen. That is a concern to our industry. We believe that it would be important that the Commonwealth government in introducing and implementing this new arrangement placed some onus on the regulators to update and upgrade their driver's authority certification process so that, when somebody is issued with a driver's authority or certification, they are an appropriate person to be driving a taxi.

CHAIR—Thank you very much. The document that you have given us today is currently headed confidential. Did you wish to make that a public document?

Mr Davies—We are happy for it to be made public.

CHAIR—Thank you very much. The committee is acutely aware of the difficulty of some of those situations. Based on my reading of that, you have given us an advice to your organisation from your legal representatives in relation to some of the concerns that you have raised.

Mr Davies—Yes. It was provided to us on the basis that we were likely to table it at this hearing this morning.

CHAIR—Thank you very much. So that the committee is clear on the matter of licensing, which is not an area with which I have a great degree of familiarity myself: if an individual wishes to drive a taxi in Australia, do they apply to the government of the state or territory in which they reside to be given a taxidriver's licence?

Mr Davies—Yes. To be a taxidriver you need to meet a number of requirements. Firstly, you need to be healthy and therefore you would be required to present a medical certificate to show that you are healthy enough to drive a taxi. Secondly, in all states and territories you are required to undertake some training. Typically, that training is associated with the delivery of a taxi service, interaction with customers and competencies associated with working various equipment in the taxi, including for emergency procedures.

The third major component to getting a taxi licence is that the regulator will typically do a criminal history check and will look to see whether the person has a fit and proper character. Obviously, to be a taxidriver, things like honesty are important—you are dealing with money and therefore disqualifying offences include fraud and stealing, but also assaults and more serious things than that. In recent years, particularly with the introduction of things like a blue card or working-with-children type legislation, we have also seen the DA requirements in many states increased to ensure that taxidrivers have a character where they can be alone with vulnerable people and deliver the service.

CHAIR—Does DA mean driver authorisation?

Mr Davies—Yes. We refer to it in the industry as DA or DC.

CHAIR—If I read your submission correctly, your suggestion is as follows. Under the legislation as it is currently drafted, a potential problem is that a taxi owner may be determined to be liable if a driver who is not a lawful worker is allowed to drive the car. To avoid that problem, you suggest that the regulators—the people who hand out the driver authorisations—should be required to add to their list of checks a check that the person is lawfully entitled to work. That would then avoid the whole problem.

Mr Davies—That would avoid a significant part of the problem. It would deal with the issue of an unlawful noncitizen, and we believe that that is a relatively easy thing for the regulator to deal with. In the case of a lawful noncitizen, we would probably need a comment on the driver authority or driver certification to say that it is conditional: for instance, that there are visa conditions—perhaps that they cannot work for more than 20 hours a week, or that their visa is for a period of time and their DA, or DC, expires when that visa expires.

We have something like 70,000 taxidrivers out there. Operators who bail taxis to those drivers have to be satisfied that the driver is an appropriate person to be behind the wheel. As I say, the standard check by which the industry satisfies itself about that is that the driver holds a driver authorisation. So it seemed to us that it would be a very good thing for our industry if all our taxidrivers were either citizens or lawful noncitizens. So we accept the intent of the bill as being a good thing.

However, we are worried about how that might be implemented. There are two parts to this. There is the bailor, who may well be what we would call a taxi operator. Then there is the taxi licence owner—that is someone else. 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, with the changes to the regulations that occurred in the 1990s in many states and territories, 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. As you will see from the advice we received from John Lunny of Phillips Fox, it is a concern that the current wording of the bill would unnecessarily draw into the net a taxi licence owner who has no relationship at all with a driver.

CHAIR—What if you as an association decided that the most efficient way to deal with this was to simply say that, even if they are the taxi licence owners themselves, the bailors need to check this pertinent fact?

Mr Davies—The bailor at the moment has a range of things that they currently check in regard to the taxi driver. The most convenient way to do that is to check that they currently hold their drivers authority or driver certification. In many states and territories, while they cannot be notified directly by the regulator because of privacy concerns, there is an ability to check on databases that the driving authority remains current. We believe that, in the case of unlawful noncitizens and of lawful noncitizens where they have some visa requirements that impact on their ability to drive a taxi, the simple solution is to fold those into the current driver authority and driver certification process.

CHAIR—I do not necessarily disagree with you; I was just putting up an alternative proposition, I guess.

Mr Davies—We have not heard submissions from other entities, but certainly in the case of the taxi industry many of our taxi operators are small business people with limited access to the internet and web services. It would be a concern to us if the onus were left with the bailors and the regulators did nothing in regard to this arrangement. As I said, from our industry's point of view we do not want to unlawful noncitizens driving taxis because the reputation of our industry is at stake. We want to be compliant. We see that the easiest way for us to be compliant is for the regulators to adopt a different approach or a broadened approach to the issuing of their authorities or certifications.

Senator KIRK—I hear what you are saying about the need for the regulator to incorporate this into their processes to ensure that these checks are done. At present I know there are different regulators in each of the states and territories, but, generally speaking, is it something which regulators do check or is it at the moment an omission on their part?

Mr Davies—This is something that we have been trying to find out. Unfortunately for us, while we are a national body, each of the states and territories regulates our industry slightly differently. We have over the last couple of weeks sought to find out from the regulators whether their current system would be compliant and secondly whether they would be prepared to change their system so that they would be able to assure our industry that DAs and DCs would not be issued to unlawful noncitizens. To this point we have not been able to be satisfied that either regulators broadly or any particular regulator would be prepared to do so.

We were unable to provide you with the advice that we got from Queensland Transport, which was perhaps the most detailed response, but it was somewhat equivocal. Even on the

kindest reading, it suggested that Queensland Transport was not prepared to change its current arrangements and it was quite possible for an unlawful noncitizen to be issued with a DA by Queensland Transport. Certainly, in the case of a lawful noncitizen with various visa conditions which related to the issuing of a DA, it did not appear as though they would be able to address that issue at all.

Senator KIRK—Yes, I gathered that from the legal advice that you say you got. I can see what you are saying. Clearly, if the regulator were to undertake this check and provide some kind of reassurance, that would really solve the whole problem from your point of view, wouldn't it, of providing the DA or DC?

Mr Davies—I think it is important to realise that the taxi industry is a unique business. We are a regulated industry in all states and territories with perhaps the exception of the Northern Territory, and, really, that is about the regulation of the supply of taxis rather than regulation of the industry itself. There are plenty of regulations that still exist. The industry is out there on a 24/7 basis, providing a public transport service. We carry millions and millions of people each year. Typically, in most states and territories we carry more than the number of people that move on heavy rail and we carry equivalent numbers to those who travel on buses. We carry a lot of people. Different to the mass transit arrangements, though, there is significant interaction between driver and passenger, and on many occasions the passenger is alone with the taxi driver. Because we are a 24/7 service, on many occasions a taxi driver is alone at night with someone who could otherwise be a vulnerable person. It is terribly important to our industry that the general public and particularly our customers have confidence in the person behind the wheel. As I say, with regard to society's view of sexual predators and the introduction of things like blue cards and other qualifications for working with children, the taxi industry has been a big supporter of those rising standards and increased safety measures. We see this as something which would dovetail quite nicely with that and could be implemented via the various states and territories at a regulator level.

Senator KIRK—Those measures that you referred to such as the blue card, I think you described it as, and other checks: are they currently matters that are investigated by the regulators and then put into the DA or DC? Is there some sort of certification?

Mr Davies—That is right. It would be issued with a drivers authority or a drivers certificate—perhaps if I just refer to it as a drivers authority rather than both; we will offend just the Victorians, I think!

CHAIR—You might be in the wrong state to do that, Mr Davies, but go on!

Mr Davies—In the case of DAs, if you have a disqualifying offence such as some sort of sexual offence then you do not get a DA. If, while you are holding a DA, it emerges that you had a disqualifying offence or, alternatively, have committed a disqualifying offence, your DA is then suspended, withdrawn and potentially cancelled. There is then a process for removing that taxi driver's ability to be behind the wheel, and that is done by the regulator. Importantly, if it is not done by the regulator and an operator or bailor becomes aware that a taxi driver has done something wrong, he can then say, 'I won't let you drive one of my taxis.' In New South Wales there are another 6,000 taxis out there. There are something like 17,000 taxis in Australia. It is important that the regulator is informed when an operator becomes aware that a

taxi driver has some disqualifying behaviour or has exhibited some disqualifying behaviour so that the regulator can then remove that driver's ability to get behind the wheel of any taxi. That is why we try and work with our regulators to get a system in place which works state-wide and, hopefully—through consistent, good regulation—something that works nationally.

Senator KIRK—Is there a fair amount of consistency across the states and territories in terms of the matters that they look into before issuing that certification or qualification?

Mr Davies—A reasonable amount. Interestingly enough there has been movement along those lines as well. Previously, when the regulator would do their criminal history check they would start at a state level. They are now accessing the CrimTrac system and national databases. So they are not just focused on whether somebody has committed a disqualifying offence in their resident state but are looking at their whole background. That has been something that has occurred over the last couple of years and again goes to our argument that the regulators should take an interest in this.

Senator KIRK—You may or may not want to answer this: are there any figures or anecdotal evidence on the prevalence, if any, of illegal workers or unlawful noncitizens working in your industry?

Mr Bowe—We are made aware after the event when the agencies perhaps meet at Tullamarine on a busy Friday night, stop all the taxis and run through the drivers there. The next thing you hear, 11 people who have overstayed their visa or something like that have been removed. However, there is no way that the industry knows that they have got into that position. As a matter of fact, recently in New South Wales a driver who had his authority cancelled appealed to the Administrative Appeals Tribunal and the commission reinstated that driver's authority, yet he was an illegal entrant. So a bit of tidying up needs to be done. As my colleague said earlier, because of privacy and other concerns and the fact that the regulator reserves the right to totally regulate entry and exit, that additional check and balance could be done quite simply, because they are already doing checks on competency in English, competency of driving, competency of knowing the area that they are driving in, CNI and health. So a series of checks and balances is carried out, and we see this as only a minor additional one that would sweep the floor clean.

Senator KIRK—Who conducted that raid—if you can describe it as that at Tullamarine? Was it the regulator?

Mr Bowe—In a lot of cases it is the taxation department because of requirements on a taxidriver under the GST legislation. It can also be the social service department, because at times some of our people have been known to apply for and collect social service. It could also be the regulator or Immigration—the agencies will meet collectively. The state regulator may add a 'please add condition of vehicle' to it and so forth. So it is general housekeeping, but the industry is never notified that this is going to take place, which we accept. That is why we think that this additional bit of housekeeping would save all of that.

Mr Davies—We noticed in the explanatory notes that the taxi industry was referred to by DIMA as being an industry where unlawful noncitizens were found in significant numbers and that we were a target industry. We did not dispute that in our submission to this committee—not because we believed it, but simply because we have no facts and data with

which to challenge it. The taxi industry is an industry that new Australians are drawn to and many find gainful work and business opportunities. As much as we possibly can, we have been very keen to make sure, as I said before, that the person behind the wheel is a reputable person and is able to lawfully drive that taxi and apply for hire. It would be disappointing for us if we were an industry where the practice of engaging unlawful noncitizens occurred in significant measure.

As Mr Bowe said, occasionally we find various government departments target the industry by going out to the feeder areas at airports where there are a lot of taxis. Normally speaking that is a very efficient way for them to go about their business. Unfortunately, for us the maximum number of taxis in the feeder areas of airports is normally when it is busiest at that airport. In going through their checks, they impede the flow of taxis to the rank and consequently the customers are inconvenienced, often significantly. It is a reality that they have to do the checks. It is a reality that the most efficient way for the departments to do it is in a coordinated way somewhere like an airport. We have had useful discussions with the Australian Taxation Office about their compliance measures and finding ways of creating the least inconvenience to our industry. We would hope that any changes that occur as a result of this bill do not badly affect our customers.

Senator BARTLETT—Do you know what the situation is with the issuing of driver's licences in each state? Do you need to demonstrate lawful residence and those sorts of things before you can get a licence?

Mr Bowe—I am not aware that there are any other requirements except for the regulations laid down in that particular state or territory. I can speak for New South Wales. I think the simple address that is given on the driver's licence is sufficient for the regulator. But prior to getting to that point the candidate has to do an English competency test. That is the requirement. There is a medical test requirement. In the process of, perhaps, going through the taxi training school the CNI, the criminal check, is taking place because there is sometimes a bit of a lapse. Finally, the person goes before the regulator to see if they meet the other competency standards that are required. There is a customer service standard, the locality service and the satisfaction that their English is competent regardless of the fact that they have already been tested. By and large, as I said earlier, a further small piece of housekeeping on an already existing list would save us those problems. I guess the same would take place in every state and territory.

Senator BARTLETT—How long are the driver's authorities issued for? Are they renewed annually?

Mr Bowe—It differs. In New South Wales, they are renewable every three years. The first one is issued for 12 months. It is virtually a probation period and then according to the customer complaints or general satisfaction with that particular driver—we have a hotline feedback line regarding complaints which are logged on all drivers—he is then issued, if he is sufficiently acceptable to the regulator, with a three-year authority. I suspect that would be general across the board.

Senator BARTLETT—Would you know whether or not you would have a reasonable incident—or any incident, for that matter—of overseas students who drive taxis? I think they are allowed to work 20 hours a week. Would they be amongst people who would drive taxis?

Mr Bowe—Yes.

Senator BARTLETT—Obviously, in that circumstance they would be entitled to work and to get an authority. How would any owner reasonably be able to prevent them driving 20 hours with one and 20 hours with another—that is, driving more than their 20 hours? Given that the requirement in the legislation is not to employ somebody who is outside the conditions of their visa, would there be any easy mechanism for checking?

Mr Bowe—The easiest mechanism would be to endorse the authority, make it compulsory that that authority is made available to the operator. Dealing with the fact of doubling up would be difficult. I imagine that that would have an expiry date, but that would not govern the 20 hours, whether it was with that one or that one. So that would be difficult to deal with.

Senator BARTLETT—The visa holder would be primarily the one at fault. I can ask this of the department this afternoon, but I am interested in any practical mechanism—because I could not see one—that would make it easy for an owner to detect or verify that sort of thing other than by just asking.

Mr Bowe—Yes.

Mr Davies—In the case of smaller centres, you probably have a single booking company or a single network. They may well have a mechanism for determining how long somebody has been logged on to their system on a weekly basis. When you move into the larger capital cities, which is logically where most folk in the category you are talking about are going to be, you have multiple networks. It is quite possible for taxidrivers to be accredited with and drive for different networks.

Senator BARTLETT—And there is no problem with doing that—say, in somewhere like Sydney, for a driver to be authorised to drive for two or three different networks at once?

Mr Bowe—No.

Mr Davies—Provided they understand the procedures of the multiple companies involved, there is no restriction. From our industry's point of view, it is a difficult one to manage.

Senator BARTLETT—I guess the key point—and I will check it with the department—is how much obligation is on the driver and how far they have to go to verify it or satisfy themselves. What is the demand like at the moment within the industry? I get the impression that owners are always looking for more drivers. Is it hard to fill all the positions that are available?

Mr Davies—It is getting better. The industry generally at the moment is keen for more taxidrivers. Demand for taxidrivers probably exceeds the supply of taxi shifts available. That would be true whenever the general economy has low unemployment rates.

Senator BARTLETT—We hear a lot about the need to pull in more skilled migrants to fill shortages in the labour market in various areas. The taxi industry usually does not come into calculations when people are talking about that sort of thing. Is that in any way an issue the

industry has given thought to—temporary, short-term or any sort of migration for filling some of those vacancies?

Mr Bowe—No. We are probably an industry that migrants coming to this country can quickly fit into, mainly because everybody has a drivers licence and it is only a matter of familiarising themselves as to the laws of the country or the state. The next thing is English competency. To even enter that debate from my point of view, as an industry all of those things would still confront anybody brought in specifically to fill positions in the taxi industry. They would still have to get over those hurdles.

Senator BARTLETT—Are there any insurance issues involved here? I presume that, as long as somebody has a drivers licence and an authority from the relevant department, it is not an insurance issue if someone is an illegal migrant or not authorised to work? It does not come into play, does it?

Mr Bowe—In New South Wales—and that is the only state I can speak of—a taxidriver is deemed under the industrial law in that state as an employee for the purposes of acts. So workers compensation would be a questionable area—for example, damage to the vehicle that he may be driving at the time and the responsibility flowing from that. I can see a WorkCover obligation as being probably the only one.

Mr Davies—New South Wales is the only state that deems taxidrivers to be employees. In every other state and territory, taxidrivers are deemed to be self-employed. Currently, we are not aware that insurance and that sort of issue would be a problem.

CHAIR—I thank both of you. It has been helpful to have you before the committee today and to receive your submission and supplementary material. We will follow up a number of issues with the department in further discussions just before lunch. Hopefully, we will get some clarity around some of the concerns that you have raised.

[11.02 am]

JACKSON, Mr Robert, Member, Migration Institute of Australia Ltd

MAWSON, Mr David, Chief Executive Officer, Migration Institute of Australia Ltd

RYAN, Mr Brendan, Member, Migration Institute of Australia Ltd

CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Mr Ryan—I am a practitioner and a registered migration agent. I am the Managing Director of Asia Pacific Region, Fragomen Global Immigration Services.

Mr Jackson—I am a registered migration agent and a solicitor in private practice in Victoria, working for Kliger Partners.

CHAIR—You have lodged a submission with the committee, which we have numbered one. Do you need to make any amendments to that submission?

Mr Ryan—No.

CHAIR—I invite you to make an opening statement on the bill and, at the conclusion of that, we will go to questions from members of the committee.

Mr Ryan—We are representing the Migration Institute, which is the peak body representing the professional interests of more than 1,400 migration agents throughout Australia. It is important to recognise that we are here today in our capacity as representatives of the profession and not in our dual role as the professional regulator. As you will have seen from our submission, the MIA is generally supportive of this bill. In my experience, across the global operations of our firm, it is unusual for there not to be some regime of penalty for employers who breach visa conditions or employ people illegally. But we do have a number of concerns that we have outlined in our submission to this committee.

The significant issues that we have outlined, if I could just summarise them, are the lack of a definition for or information on the term 'reckless' in the bill. We believe this could lead to some degree of confusion within employer groups, the issue of who exercises the discretion within the department of this bill and where the definition or any other penalties may apply. We believe that a clearer definition is appropriate. We also have concerns about the lack of identification of the responsible person within an organisation.

One of the things that is of great interest to us is that we believe that the penalties in this bill are quite harsh and that, as a result, they will certainly focus the attention of employers, regardless of the size of the industry. I believe there is a view from the department that there only needs to be concern if you are in a high-risk industry, which they have identified in the explanatory memorandum. Our view is that any responsible employer is going to be very focused on these penalties and, therefore, we need to make sure that there is adequate definition so that they can make sure that they are compliant without having an onerous additional burden on their business. We have suggested a couple of ways of assisting the government in achieving this through things like the visa label potentially having reference to the website, which would capture most avenues to identify people's work status, and an

extension of the employer awareness campaign through considering a leaflet campaign at the point of entry to Australia that will also refer them to the website so they can get specific advice. If there were access to multilingual assistance, that would also help a lot of people who innocently breach visa conditions.

But our primary concern rests with section 245AD: the issue of referral. You will see from our submission that we believe that this could be very broadly applied by the department, which is one area of concern. We also believe, in fact, that it dilutes the message that the government is trying to get across by allowing there to be some confusion as to who exactly is responsible. We feel that the most effective way for this legislation to apply is for it to be very clear that those who are in an employer role are the persons or the organisation that is responsible. That, in summary, is where we are coming from, and we are happy to answer any questions.

CHAIR—Thank you very much, Mr Ryan. Just one quick technical question. You have been referring to section 245AD, about referring a person; section 245AE also uses the terminology. Do you also have a concern with that paragraph?

Mr Ryan—Yes, by extension.

CHAIR—In relation to some of your recommendations, which, frankly, to me seem eminently reasonable in most cases, I wonder whether you have taken any of them up specifically with the department in the consultation process to this bill and what extent of involvement you have had in the consultation process.

Mr Mawson—We have had no active consultation with the department on this bill to this point in time. Certainly we will be raising some of these issues with them in our next set of consultations with the department.

CHAIR—Would you have expected to have had some consultation?

Mr Mawson—Not necessarily. The department only consults in certain areas, and I do not believe we have had any consultations for this one. I will clarify: I was not present at the last consultations, but my understanding was that this bill was not canvassed at that particular time.

CHAIR—At the beginning of your submission you refer to the MIA's view on the EVO system. You indicate that you have made a request and to date it has not been actioned by the department. Does that mean it has been rejected by the department or that they just have not said anything to you in response to that request?

Mr Mawson—My understanding is that there has been no feedback from the department.

Mr Ryan—We have had no response.

CHAIR—What sort of time frame are we talking about? When did you make the request?

Mr Mawson—I can take that on notice, if you wish.

CHAIR—Thank you.

Senator BARTLETT—On the issue of referral, can you give me an indication—I understand that you are raising it in part as a general concern but also specifically in relation

to migration agents—what type of circumstance might be involved where an agent would be referring somebody for work?

Mr Ryan—That highlights part of our concern, because it depends on the definition of referral. The most common one that would spring to my mind would be where we are contacted by someone on a working holidaymaker visa who says, 'I want to remain in Australia.' We may say to them: 'We know that a company down the road is employing people. Go and make some inquiries with them and see if you are acceptable. If you are offered a job you will need to apply for a 457 visa—a work permit.' If they go to that employer and are employed but they do not come back, or the employer does not get them the correct visa, our question would be: does that constitute a referral? That is one example that is an everyday event.

Mr Jackson—A more diffuse example is that of client employment agencies. It may not be a referral to the direct employer; it may be to the agency. We say: 'Look, you're a mechanic. They specialise in recruitment in the car industry. Go there and apply in the normal way.' So it can be even one step further removed from any contact with whoever the employer turns out to be.

Senator BARTLETT—At the moment there seems to be a quite bewildering array of visas and subclasses and the like. Without giving us a lecture in migration law, what is the variety of conditions that can be attached to visas that have work rights? I understand there is clearly a group of visas where no work is allowed, and that is clear-cut. How much variation is there in some of the others? I know that a student visa has a 20-hour per week work limit. What other variations are there?

Mr Ryan—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.

Mr Jackson—I would agree. The 457 is the one where there is probably the greatest risk of innocent breach—if that is the right way of putting it. One client came to see me on the employment aspects—he was a German national who had been made redundant by a large German company based in Melbourne—and it was only when I delved into his employment status that it emerged that he was on a temporary visa, a 457, which meant he was tied to that specific employer. He had been merrily looking for alternative employment without fully realising that this was a condition at the time. Nothing suggests this was a person deliberately wishing to flout; none of the potential employers were deliberately wishing to flout the laws either. There just seemed to be a bit of general ignorance and rigidity in being able to work for an employer. He had his family and young children here and a mortgage—all quite legitimately—and had a pressing need to work as soon as possible.

Senator BARTLETT—How easy is it to transfer if you have found another job?

Mr Jackson—My experience is that it is certainly easy, and I think that is consistent with what the department has wanted to do—to try to streamline processes where somebody clearly has the skills and a respectable employer is willing to hire them. The risk there was that the now redundant employee was happily looking for work and having interview with employers who likewise seemed to be quite unaware that both of them would be unwittingly in breach.

Mr Ryan—It is perfectly appropriate for the government to impose the condition that you cannot change employers without a fresh application. The rules say that the employer takes responsibility for that person, so they need to be aware of those responsibilities when they employ them. Taking that example one step further: our concern is primarily that if a person who was sponsored by one employer talks to a recruitment agent who finds them another job in their industry that they are qualified to do but the job is with a different employer and that person assumes that the HR person in the organisation will transfer the visa but they fail to do so, has the recruitment agent actually referred someone who is subsequently in breach of their conditions?

Senator BARTLETT—I do not want to burrow down too far into the micro level, but when we are looking at a new group of people potentially becoming liable for an offence then I need to get an idea of the different ways it could happen. To use the working holiday visa example, where someone can work for only three months for a specific employer, is it just for the one employer or for the one job? Can somebody shift to different jobs with the same firm? To use the taxidriver example, seeing we have just take the taxi industry in here, can they work three months for Black and White Cabs and then three months for Yellow Cabs?

Mr Ryan—Using that example: if it is a different employer—for example, Black and White Cabs and Yellow Cabs are different companies—then that is perfectly fine. However, if there is a single-entity holding company above that then my reading is that it would be in breach of the visa conditions, because they say that you cannot work for more than one employer for a cumulative of three months.

Senator BARTLETT—What about franchises like Coffee Club in Cairns and Coffee Club in Sydney, for example? I am not trying to be difficult, but I am thinking of the second company and whether they may assume it is okay.

Mr Ryan—Franchises would probably be acceptable.

Mr Jackson—I believe so. My experience of dealing with franchisees is that each franchisee tends to be a separate proprietary limited company owned by the family. You might have Joe Bloggs coffee shops across Australia in each and every suburb, but each one would tend to be a separate, family owned business with a corporate structure quite distinct from the franchisor and other franchisees. My view is that that would be separate employment.

Mr Ryan—My only reservation in talking about franchises is that there are some franchise arrangements where the overarching company, the one that has the rights to the company name, retains an ownership in the business. That may get into the very technical area as to whether or not it is the one employer, depending on the shareholding in the franchise. But generally, for instance, different divisions of BHP would be regarded as the one employer.

Senator BARTLETT—If these sorts of circumstances arise then people could get caught inadvertently rather than be trying to rort the system.

Mr Ryan—Absolutely.

Senator BARTLETT—That may have arisen already, given that some of those industries have the most unauthorised workers.

Senator KIRK—I notice on page 3 of your submission you raise the problem as you see it in the definition of the term 'reckless' and you suggest that there ought to be in the explanatory memorandum a greater range of examples of what amounts to recklessness. You suggest too that ideally it should be within the body of the legislation. I wonder if you could expand on that a bit more.

Mr Ryan—Putting it into the body of the legislation, to be honest, would probably be very problematic. Ideally, that would be great, but I recognise that it would be problematic. We talk about putting more examples and perhaps some greater definition into the explanatory memorandum because that is the next point the courts will refer to in trying to get an understanding of the thinking at the time the legislation was drafted. We believe that there is insufficient definition there at the moment to give adequate guidance to the courts if someone is facing a penalty and as a result it can be very broadly applied. I come back to the point that I know that a large focus of this legislation is on the high-risk industries but the legislation does not say that, nor does it specify what those high-risk industries are. If I were an employer in a low-risk industry, I would be very focused on this, given the harshness of the penalties.

Senator KIRK—Is your concern that the term 'reckless' currently could be too broadly applied?

Mr Ryan—Yes, it is.

Senator KIRK—You would like to see a narrowing of that; therefore, the examples would be narrow examples.

Mr Ryan—Exactly. It would give greater clarity around what exactly they mean by 'reckless'.

Mr Jackson—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.' Thinking aloud and laterally, looking at antidiscrimination legislation in occupational health and safety, employers know that having a policy and thinking actively about what they have to do will potentially be a defence. Likewise, 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 out those who are truly reckless and do not care about the legislation at all.

Senator KIRK—Certainly. Like the chair, I think your recommendations in relation to what could be done here are quite good. Are you suggesting that the EVO facility be printed on the temporary entry visa to refer the employer to that database?

Mr Ryan—To refer the employer or indeed the potential employee, because, as my colleague Mr Jackson has pointed out, many people are found to be in breach of their visa

conditions because they have misunderstood them or were simply not aware of a particular condition. We completely agree with the department that it is impossible to print a visa label with all of the conditions on it. I imagine that the IATA, the governing body for international transport, would have a problem with us taking up six pages of a passport with a visa label. We fully accept that. But we believe that the vast majority of people will have access to the internet in some fashion and that it is perfectly reasonable to say that, to reduce the opportunity for a claim to be reckless, printing the website address and saying, 'Go here to check your employment status,' is a practical way to get that message across. That is a very clear message that can go on a visa label.

Senator KIRK—That would assist both the employer and the employee to not breach the visa conditions.

Mr Jackson—Precisely.

CHAIR—I am not sure if anyone has asked this question, but you make a reference in your submission to interdepartmental cooperation. Have we discussed that already?

Mr Ryan—No.

CHAIR—Could you expand on your suggestion on the role of workplace inspectors.

Mr Ryan—It is probably important to acknowledge that it is only a suggestion. We were casting around for ideas on how to help the department to administer this piece of legislation. It occurred to us that under the new IR laws it would appear that workplace inspectors will have a greater role in looking at work sites for breaches of other pieces of legislation. It is not clear to what extent consultation has happened with the Department of Employment and Workplace Relations to see if that is a role that the inspectors could and should take on to at least identify potential breaches that have been brought to the attention of employers to correct before they get into a situation where they could be accused of being reckless or being in breach. That is really where that suggestion came from. It is not clear to us how much consultation has happened. Maybe it already has and it has been agreed that that is not a role that they will take on, but we suggested that it is something worth examining.

CHAIR—It is something that we can pursue. Thank you very much for that. I think that covers most of the areas we wanted to pursue with you. Mr Mawson, at the beginning I asked you a question about consultation. You recommend in your submission that DIMA also talk to the organisations you describe as the peak recruitment industry bodies: the Australian Human Resources Institute, the Australian Institute of Management and the Law Council. How do you think that breadth of organisations could enhance the consultation? What do you think they would add?

Mr Mawson—I will let Mr Ryan answer that question.

Mr Ryan—We believe that they will be able to give further examples of where there would be problems with this issue of referral. That is our primary concern for those organisations. Again, it was not clear to us what consultation had taken place, whether the Institute of Management, for instance, had been consulted on this. But given, again, the harshness of the penalties and the fact that this is an entirely new range of penalties for employers, I would think they would take a keen interest. However, this legislation process is

quick and we are therefore not sure to what extent consultation has taken place. The reference to the recruitment body is clearly because of that issue of referral.

CHAIR—Thank you very much. I do not have anything further, so, on behalf of the committee, thank you very much for your submission and for appearing today. We are grateful for that. If we have any matters we need to follow up, we will come back to you. As ever, we have a tight turnaround time. As you have just referred to, Mr Ryan, it is a very quick process, but if we do need assistance we would appreciate your cooperation. Thank you.

[11.29 am]

MANN, Mr Neil, First Assistant Secretary, Compliance Policy and Case Coordination Division, Department of Immigration and Multicultural Affairs

DANIELS, Ms Yole, Assistant Secretary, Compliance Framework Branch, Compliance Policy and Procedures Division, Department of Immigration and Multicultural Affairs

DEANE, Mr Ian, Special Counsel, Department of Immigration and Multicultural Affairs

TOM, Mr Daniel, Policy Officer, Compliance Policy Section, Compliance Framework Branch, Compliance Policy and Procedures Division, Department of Immigration and Multicultural Affairs

WATERS, Mr Bernard William, Assistant Secretary, Business Branch, Department of Immigration and Multicultural Affairs

CHAIR—Welcome. The department has lodged a submission with the committee which we have numbered five. Do you need to make any amendments or alterations to that submission?

Mr Mann—No.

CHAIR—I remind senators that under the Senate's procedures for the protection of witnesses, departmental representatives should not be asked for opinions on matters of policy and, if necessary, must be given the opportunity to refer those matters to the appropriate minister. I will ask you to make an opening statement, Mr Mann, and we will go to questions after that. There are a number of matters which have been raised with the committee this morning that I expect senators will wish to pursue. I do not think you had anyone here during the morning's proceedings, did you?

Mr Mann—No, we just came up from Canberra this morning.

CHAIR—Mr Deane, is the Office of Special Counsel a new position in the department?

Mr Deane—No, it is not.

CHAIR—Have you appeared before the committee previously?

Mr Deane—No.

CHAIR—The estimates process gives us such familiarity with the department. We are so very fortunate! Mr Mann, can you begin your opening statement and then we will go to members of the committee after that.

Mr Mann—I would like to thank the committee for the opportunity to appear today. The regulation impact statement and our written submission outline in detail why we think this legislation is an appropriate response to the problem of illegal work, and we would be happy to elaborate on any aspect of our written submission to assist the committee with its inquiries. I would like to use my opening statement to outline some of the ways the department intends to help employers to meet their obligations on the offences becoming law and also to provide some comment on some of the concerns that have been raised in the other submissions to this committee.

Ensuring that employers and labour suppliers have appropriate information about the proposed offences has always been a priority for the government and the department. Indeed, shortly after the community consultations in 2000, the former minister for immigration, Mr Ruddock, announced that the proposed offences would be introduced in phases to prepare employers for their new obligations. The first phase was an information campaign. That information campaign has been running for over four years now and 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.

To provide an indication of the scope of our employer awareness activities, I would like to briefly run through some key statistics. During the last four program years, the department has delivered over 7,200 employer awareness sessions. These sessions have focussed on ensuring that employers and labour suppliers are familiar with how to check the work rights of employees. In the same period, over 6,700 illegal worker warning notices were issued. These warnings are designed to alert employees to the risks of employing illegal workers and to help deter subsequent breaches by advising of the possibility of future prosecution under these proposed offences.

During the information campaign, the department has made the process of checking work rights much easier for employers by introducing the fax-back facility, a work rights checking line and the internet based entitlement verification online system, known as the EVO. These new work rights checking services go a long way towards addressing the concerns of employers who have maintained that the process of checking work rights of noncitizens is too difficult. Significantly, employers will no longer have to undertake the at times difficult task of interpreting visa labels and can instead use the EVO system to obtain plain English advice about a person's work entitlements. EVO is available 24 hours a day, seven days a week and provides an instantaneous advice.

Clearly, any new legislation that encourages employers to check the work entitlements of employees must be accompanied by services to make these checks as easy as possible. In this regard, the department is pleased to see the number of the submissions to this committee which acknowledge our work on the EVO system. Since the system was implemented in November 2004, over 2,600 employers and labour suppliers have registered to use EVO. In March 2006, around 11,000 successful EVO checks were made compared to 5,000 over the same period in 2005—an increase of around 120 per cent.

On the proposed offences becoming law the department will use the six-month period before they take effect to focus on the employer awareness campaign and to engage with key stakeholders. This is likely to include advertisements in industry publications and national newspapers. The department will also be working very closely with industry groups to ensure that our information kits provide clear information about the rights and responsibilities of those affected by the new offences. Our staff, especially our EVO contact officers, will be actively engaging with employers and peak bodies at the local level. Our compliance strategies are being increasingly focused on prevention and deterrence.

Let me now take this opportunity to clarify the department's view on when a work rights check would be required under the proposed legislation and comment on the notion of recklessness, which a number of submissions have highlighted. 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.

The second reading speech for the bill makes it clear that these circumstances would be relevant to proving recklessness. While some submissions argue 'recklessness' is too burdensome for employers, it is important to keep in mind that a number of other countries have introduced laws that require a higher level of work rights checking. For example, both the United Kingdom and New Zealand operate schemes whereby employers of illegal workers will commit an offence unless certain checks are undertaken at the point of recruitment. Other countries such as Switzerland and Canada apply sanctions to employers who merely act negligently or who fail to exercise due diligence in checking work rights.

The other key point is 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 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. However, if an employer knows an illegal worker is being exploited through slavery, forced labour or sexual servitude we would want them to face the full force of the law. We are determined to stamp out those sorts of practices.

Finally, I would like to briefly comment on the concern that the offences could apply to charitable organisations that allow illegal workers to perform unpaid voluntary work. For the reasons set out in the department's submission, we think it would be very unlikely that the offences would apply to charitable organisations. This is because none of the relationships in proposed section 245AG(2) would be likely to exist where an illegal worker performs unpaid voluntary work for a charitable organisation. That concludes my opening statement. We are happy to answer any questions that the committee might have on this bill.

CHAIR—Thank you very much, Mr Mann. A number of questions have been raised, as I said, during the proceedings this morning. I think the first of those which is of concern to submitters and which you may have seen in their submissions relates to the definition of the

term 'reckless' and, in the view of submitters and witnesses, the breadth of that definition. The Chamber of Commerce and Industry, in its presentation today and in its written submissions from constituent bodies, has raised that, and it is raised by the Migration Institute and in a slightly different way by the National Farmers Federation. What is the department's comment on those concerns?

Mr Mann—Our view would be that the term 'reckless' is already defined in section 5.4 of the Criminal Code, which codifies general principles of criminal responsibility that apply to all Commonwealth offences. So, in that sense, it is a well established term although here applied to new subject matter.

CHAIR—And not included in this piece of legislation though. To find the definition you have to refer back to the Criminal Code.

Mr Mann—It uses the definition in the Criminal Code but it is a well established definition that is used in many Criminal Code situations, many of which employers would be aware of. Perhaps Mr Deane—

CHAIR—The committee is acutely, sometimes painfully, familiar with the provisions of the Criminal Code, so I know what you mean but from the perspective of small business it has been raised as a concern. Mr Deane, do you wish to add anything?

Mr Deane—I think the policy of the Attorney-General's Department and the government generally is not to spell out definitions that are already in the Criminal Code.

CHAIR—We find it ever so helpful.

Mr Deane—All I can say is that 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 code. It is the EM that refers you to the definition in the Criminal Code.

Mr Mann—We have given some thought to what we believe would be necessary to make out recklessness in the context of this bill, and I think the explanatory memorandum picks that up as well. Relevant circumstances, for example, would include, as I have mentioned before, whether the employer operates in an industry where a large number of illegal workers are located—something that would generally be known to employers; whether the department's employer awareness campaign has highlighted the risks, so we would see that our department has a role in bringing to notice of employers where there may be issues regarding illegal work; whether the particular employer has been given information about the risks—for example, if the department has found illegal workers on a premises and provided warning, we think that would be something that should be taken into account in future recruitment of workers by the employer; and whether, through the normal recruitment or job selection process, the prospective employee has made any indication that perhaps work rights is an issue by admissions around their status should be again something that is known to the employer and should be acted upon if it is brought to their attention.

The recklessness still needs to be proved beyond a reasonable doubt, so it is not the department deciding whether or not recklessness is made out but a court beyond a reasonable doubt. Our view is the legislation would only require an employer to consider conducting a

work rights check where there is a substantial risk, so we do not believe this bill is requiring employers to systematically embark on work rights checking for all employees but only where they are aware of and there is a substantial risk

CHAIR—There were some suggestions from witnesses that all employers should make checks into all employees, but I guess that conversation went in several directions between witnesses and the committee. I do not think we came to a particular meeting of the minds. I place on the table those concerns that have been raised in relation to the use of reckless in this context—the definition from the Criminal Code not appearing in the bill. I note Mr Deane's admonition in relation to the Attorney-General's Department drafting procedures—and we talk about that all the time, so we are familiar with those. It does not mean we are entirely happy, but I guess they do not really care if we are happy or not at the end of the day.

The other question I wanted to ask before I went to my colleagues concerns in some ways, Mr Mann, your reference to the department's information/awareness campaign. I think it is fair to say that most of the submissions received would heartily encourage the department to up the ante in that regard, as it were, at both ends of the process—that is, both the employer and employee ends. For example, the MIA suggests placing a very brief message on the temporary visa forms in relation to checking the EVO site. In fact, the MIA makes some suggestions and recommendations the committee regard as reasonable and quite practical in the circumstances. We would be interested in the department's comments on those. On the awareness campaign, I really do think there is some significant concern from employers—small and large and everything in between—about the need for that to be ramped up, if you like, by the department.

Mr Mann—Our intention would be, should the bill be enacted, that the next six months would see intensive activity by the department working with peak bodies, as well as industry bodies and labour hire suppliers, and focusing the information campaign on the fact that we would have these offences. Up until now it has been general awareness raising. If this bill were to be enacted, 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.

CHAIR—Have you had a chance to look at the suggestions and recommendations in the submission of the Migration Institute?

Mr Mann—We have looked at some of their suggestions. A couple spring to mind. One is the suggestion that migration agents should be given access to EVO. At the moment they would have access only if they themselves were an employer or a labour referrer. We are considering how we could better provide for migration agents access to a range of information, particularly in relation to their own clients.

CHAIR—They understand the privacy obligations. They have made that quite clear in their submission.

Mr Mann—Yes. We do believe that that suggestion does have merit, and we will be following up with the MIA on how we might progress that. The department are undertaking a fairly comprehensive review of our information systems.

CHAIR—I am aware of that.

Mr Mann—Using portal based technology, one key user group we would see is migration agents. In the development of that system, we will be consulting MIA on what kinds of functions they would like to see presented to them through a migration agent portal. This will clearly be considered in that context.

CHAIR—What about the EVO reference on a temporary entry visa label, for example?

Mr Mann—We will consider the option. It should be noted that it is not going to help in the growing area where there is no evidence of a grant of a visa—for example, with the electronic travel authorities. There are limits, I guess, to the coverage that that could have. In the spirit of the suggestion, we could look, for example, at providing such information in approval letters, where we inform people of the grant of a visa. We will take on board that suggestion as we develop the information campaign to provide practical ways of better getting out a message around people's work entitlements. We are also looking at whether or not we can expand access to EVO to the employees or the visa holders themselves, which would again assist the employers—because employees would be able before they applied for a job to check what their entitlements might be. We are looking to see whether or not we can do that in the next six to 12 months. That would be another way of addressing this issue of how the visa holders know what work entitlements they hold.

Senator KIRK—Thank you for your submission. I would like to ask about how the department envisages that this legislation, if it is enacted, will be enforced. Particularly, what resources does the department have available to it to ensure that the provisions of the legislation are complied with? Also, who, if anyone, do you see will be given that role? For example, might the inspectors from the Department of Employment and Workplace Relations have a role in enforcing this regime?

Mr Mann—The department has around 300 officers involved in compliance activities, either locating overstayers 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.

As a matter of policy we have for some time already been issuing employers with warning notices where we have discovered illegal workers. So we have already got a work process where, after subsequent findings of breaches, that case could continue to a referral to the DPP. So the department have gone some way in already building into its work processes how it would administer these new offence provisions. We have not concluded any arrangements to have other agencies involved directly in administering the offence provisions, but we are increasingly undertaking joint activities and, within privacy constraints, sharing information around both facilitators of labour exploitation as well as employers and individual employees. So I think the department's view, at this stage, would be that we would take the responsibility

for making a decision whether to refer an employer for possible prosecution but we would increasingly be working in an intelligence sense and in a joint operations sense with other key agencies.

Senator KIRK—So you are not looking to increase the number of officers involved in this compliance process—do I take it from that that you are not expecting there to be many breaches of the legislation?

Mr Mann—No, I think one of the key shifts that this legislation would facilitate from our compliance activities is a move away from the focus on locating and resolving the status of individual employees who are found not to be working with work rights to, perhaps, a more leveraged approach to prevent that occurring by having some sanction for the small number of employers that currently are not doing the right thing. So we would see it as making our operations more efficient by moving a little bit upstream to prevent or deter the problems that our compliance officers are coming across day by day on a case-by-case, worker-by-worker basis.

Senator KIRK—It was raised with us, I think by the Australian Catholic Migrant and Refugee Office, there is a growing problem of domestic workers who are unlawful noncitizens. Obviously one would hope that this legislation would apply to those employers of those persons. What resources or facilities do you have available to you to make investigations of those kinds of very small businesses? It is not even a business but just individuals employing people within their home.

Mr Mann—Certainly the priority for our compliance activities range over the nature of the breaches, so if there is any suggestion of exploitation, for example, it is irrelevant to us whether that is a large business or a small business. If a worker is being exploited then that is something that we would treat very seriously.

Senator KIRK—How do you find out about that sort of thing going on?

Mr Mann—One of the key ways we find out is through a very active community information service that keeps the department informed. Also, former employees, who might be too scared at the time they are working, are not too scared once they leave to inform the department of the treatment that they may have endured. We also work with other departments, sharing information. We have our routine activities of looking at people who have overstayed their visas. We also have routine visits to employers' premises to locate people; they may be in commercial or domestic situations, depending on the nature of the particular case. So we have a range of ways of targeting our activity. Certainly, we do so in a hierarchy, with the worst cases of exploitation at the top and moving through to more everyday matters as we are able to resource that activity.

Senator KIRK—And you think all this can be done with existing resources?

Mr Mann—I think this measure allows us to do our job more effectively and efficiently. We could always do with more resources, but I think that this would be a way of using our current resources more effectively.

Senator KIRK—You have said here today that your understanding of the legislation is that employers only need to make a check of working rights where there is a substantial risk that a

person is an unlawful noncitizen. Certainly, those who have come before the committee today have got the impression from the bill that, rather than just making an inquiry where there is a substantial risk, employers ought to be making inquiries of all prospective employees. I know you have already spoken to this, but what do you think the benefits are of inquiries just being made where there is a substantial risk, as opposed to making an across-the-board check of work rights entitlements?

Mr Mann—I think it is probably important to say what the department would suggest to employers is good practice. 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. So there are already incentives, under the existing regime, for employers not to take that risk and to check work rights, not just to comply with a code of practice or for the sake of being a good corporate citizen but to make sure that their own business is not put at risk, as it would be if they were to be found engaging illegal workers. 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.

Senator KIRK—So is the reason why you are suggesting that the checks definitely need to be made—where there is a substantial risk—because of the onus, as you see it, that needs to be discharged when it comes to a prosecution, say?

Mr Mann—The bill is not proposing a no-fault regime; it is proposing a fault regime, and recklessness and knowledge are the key components of fault based criminal regimes. It is fairly late in the piece, if you compare us to other countries, to be getting into the area of imposing employer sanctions, but it is certainly not going as far as many countries have, with a no-fault regime. We understand that and would respect that in the way that we administered it. We are looking to work with employers to make sure that we improve, over time, the problem of illegal workers. We are not trying to catch employers out. The bill is putting forward the notion of recklessness, which is a fairly well established notion under our criminal law. As I say, we would be more than happy to try to clarify when we believe recklessness would be present in a particular circumstance—although, ultimately, that is a matter for a court to decide.

Senator KIRK—It has also been suggested to us that perhaps further examples of what could be accounted recklessness could be included in the explanatory memorandum, for example.

Mr Mann—I think the examples in the explanatory memorandum are useful and give a good indication of the aim of the bill. Our approach would be to work more closely with particular industry groups over the next six months to agree on how the department would approach the matter in practice: for instance, what evidence we would take into account before we would bother referring the matter to the Director of Public Prosecutions so that he could make a judgment on whether or not there was a potential prosecution.

So, as a matter of policy, we believe that we can do a number of things to cater for the concerns that have been raised. Some of it is information; some of it is taking into account the practicalities—for example, we would give an employer who has a large number of employees for short-term work time to conduct those checks—not before engagement but, say, within 48 hours of engagement—if they thought there might be a risk so that there is a way of managing some of the tensions that no doubt employers may have in coming to grips with this new requirement.

Senator BARTLETT—The regulation impact statement lists, among the different options it has explored for achieving the objective of reducing the number of illegal workers, the extension of work rights for visitors. Could you give a bit of detail on why that option was rejected?

Mr Mann—I suppose redefining the scope of illegal work is one way to reduce it. I think it is in the broader policy setting of what the labour market needs are at this point in time. The department's view, and I think the government's view, would be that those 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.

Senator BARTLETT—As I understand it, some of the business sectors that you have identified as having a high proportion or a high incidence of illegal workers—such as agriculture, manufacturing and some of the catering areas—are areas where there are labour shortages. We had the tax industry here earlier on—although, that is perhaps a different circumstance. Apart from the initiatives that you mentioned, such as the working holiday visa and the like, is the government putting forward any other initiatives to address shortages in those areas?

Mr Mann—I might ask Mr Waters to come to the table when he returns. I am not aware of broader changes. The department is undertaking a review at the moment, not on the substantive visa issue but on the scope of bridging visas. An issue that has been raised in the context of that review is the work rights that might attach to bridging visas.

Senator BARTLETT—On a related issue, I think you said in your introductory remarks that, when considering who might be pulled into the scope of the legislation, people who were engaged in an industry where there were lots of illegal workers would be taken into account. I take it from that that, if they were in such an industry, they would be more likely to come under the scope of this legislation and should be aware that that is what they should be looking out for. Is that right?

Mr Mann—Yes, that would be a relevant consideration, but we would also look for the employer's specific awareness of the risk and any other indicators. I do not think we would be saying that that by itself would make out recklessness, but in the context of what they have

done during the recruitment process—whether or not they had any awareness of that particular risk as an individual employer—would all be taken into account.

Senator BARTLETT—I realise that the law is the law and that whatever law a parliament decides to bring down people need to comply with it. But, looking at human nature and market factors, I think that, if it is an industry where there is a shortage of employees and people are desperate to get work, employers will be more likely to grab anybody who comes along than perhaps those who can get workers but who are just wanting to make use of illegal people for exploitation purposes. Is there any scope for that sort of—

Mr Mann—One of the elements of the offence under the recklessness element would be not only that there was a substantial risk and an awareness of the risk but also accepting or not acting on that risk where it would seem to be unjustifiable—that is, not just to the immigration department but also to the man in the street, was it justifiable not to act on that risk? I guess there may be some leeway in that element to take into account the particular circumstances that that employer was faced with in that situation at that point in time. That provides some comfort in that area.

CHAIR—Senator Bartlett, would you like to ask Mr Waters to respond your earlier question?

Senator BARTLETT—Yes. Mr Waters, it was suggested that you may be able to expand a bit further on my earlier question. It is to some extent a broader policy question, so I realise that there are limits to what you can say. The regulatory impact statement rules out the option of extending work rights that are available for visitors. Obviously, there is a much wider debate at the moment about labour market shortages, not just in the skilled area but also in the lesser skilled areas. As a broad-brush statement, that seems to be more where this type of illegal activity happens, although not exclusively. I was just wondering, given that the general option of extending work rights has been ruled out, what other initiatives the government is undertaking to try to address the labour market shortage. Obviously, that can be a key factor. If employers just cannot get anybody else then obviously they are much more likely to feel the need to grab anybody.

Mr Waters—Yes, they may grab who they can. The department has done a number of things in this area. I think the single most important area where the government has made a response is in regard to the migration program. There has been a substantial increase particularly in the skilled component. This year we have the largest migration program probably in 30 years. The skilled migration component of that, at 97½ thousand, is the largest ever skilled stream component in Australia's history.

In addition to that permanent migration element that addresses particularly the skills shortages, there have been a range of other temporary entry options that have in fact been worked on. In terms of the skilled area again, the long stay business visa—the so-called subclass 4 type 7 visa that enables employers to sponsor skilled workers to come to Australia—has in fact been expanded. We are expecting to be issuing in the order of 60,000 visas to temporary residents for stays of up to four years this year. That is in comparison to just under 50,000 last year and closer to 40,000 the year before. So there has certainly been quite a big increase in the number of people coming in from overseas.

At the same time, the student visa program has increased. Again, it is at record levels. These are people who can in fact work 20 hours per week. They do not necessarily all have to be employed in skilled occupations. Quite importantly, the working holiday maker program has also been expanded in a particular way to address some of the issues that you have alluded to, particularly in the horticultural area and in regional Australia and the like. People who come to Australia on a working holiday maker visa can apply for a second one if they have in fact worked in those sorts of areas. So we are having not only larger programs but also an expansion to encourage people to work in areas of need. They are some of the things that we have specifically brought in to address the issue you mentioned.

Senator BARTLETT—Mr Mann mentioned the review that is happening at the moment with bridging visas and entitlements relating to that. Indeed, the Catholic Migrant and Refugee Office did mention the bridging visa E issue and the inability to work under that visa, which I am sure you are aware of. Are these sorts of factors part of what is being looked at in that review?

Mr Waters—Quite clearly, that sort of issue would need to be considered in the broad context of that review. I am not really in a position to comment on that.

Mr Mann—Without pre-empting what the review might suggest to government, it is important. 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 minority of people seeking protection visas that are not currently able to reside in the community with work rights. The particular issue that some of the NGOs have focused on is known as the 45-day rule, which was introduced to deter people from lodging protection visa applications well after they have entered the country knowing that they may not have claims for protection. The 45-day period provides genuine 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 I thought 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.

Senator BARTLETT—Can I clarify the issue of volunteer work that you mentioned in your introductory remarks? My understanding is that the explanatory memorandum does specifically mention voluntary work in relation to the definition of work. It is also my understanding that those people in the bridging visa E situation are not entitled to do voluntary work either. When you say it is not going to capture people undertaking voluntary work, are you really saying that is not the purpose of the legislation?

Mr Mann—There are two aspects. In many cases of assisting not-for-profit organisations going about their business, the relationship between the person performing the activities and the body itself is not one that you describe as an employment relationship. There is no mutual obligation or any real contractual basis to it. In that case, we would say that it is not going to fall within the definitions of allowed to work. Indeed, with regard to those visa holders whom we might be concerned are in breach of their work entitlement, the definition of work that

would apply to such people relates to an activity that, in Australia, normally attracts remuneration. In many of the situations where you have volunteers, they are undertaking activities that would not normally attract remuneration. For those two reasons, we think it is very unlikely that charitable organisations are at any risk of prosecution under this particular bill.

Senator BARTLETT—It seems to me to be quite a sensible approach to be targeting the employers who employ a wide range of people illegally rather than continually trying to get the employees. One of the problems that I think you have alluded to in your submission is that people who are working illegally or on the fringes continually face the threat of being dobbed in to the department and losing their visa et cetera. That is obviously also a disincentive for them to report what is happening. Is there any scope in assisting the effectiveness of these types of measures in this legislation to give incentives, amnesties or something to people working illegally who do report? I am not sure what they might be off the top of my head but, if we are looking at trying to be more effective at capturing these people who are quite consciously illegally employing people, what if we were able to give more incentives to people to report that type of activity without feeling like they will be booted out of the country, charged or those sorts of things?

Mr Mann—Currently, around half of the people we find either overstaying or illegally working come to the department; they have self-disclosed. Our approach is to see what options they have to regularise their immigration status so that we are not rushing to seek to remove people from the country if there are other legitimate entitlements that they might have under our visa system. Around half of the people are coming to the department to disclose their situation and we provide assistance at that time to see whether or not they have options to remain here and apply for other visas before we take other action.

There is no direct plan to ignore illegal work, but certainly we are looking at more leverage approaches, as you say, to focus on facilitators or those who might engage the workers in the first place. 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.

Certainly, where we have reason to believe the employer is involved in exploitation or something like sexual servitude, that would not be the approach. We would continue our approach of unannounced visits in those circumstances. I think that by working with employers we are seeing some success in getting greater leverage. For example, in a recent operation, instead of going out to locate the particular employees who were alleged to be working illegally, we contacted the business, which was a fairly major business, and it undertook not only to regularise those particular workers but also then subscribed to the EVO and now has something like 11,000 workers subject to regular entitlements checking. We would say that working with employers in that way might be more productive than simply continuing to turn up unannounced to take away their workers on all accounts.

Senator BARTLETT—The issue of referral, and what constitutes referral, came up particularly in the MIA submission and in their evidence about just how widely that might be interpreted. I appreciate what you have been saying. I think the tenor of all of your evidence is that, in law, the charging of people is the extreme end and is aimed at people carrying out more severe and calculated activities. That is one thing to say as a general reassurance, but people still have that fear of being caught inadvertently by the black letter of the law. Are you able to clarify this a bit more. I do not know if you are aware of the example the migration agent gave of referring people on a working holiday visa and saying, 'There are jobs over here and if you go there you then have to apply for a 457 visa or something' and then they did not do that.

Mr Mann—Yes, I think we could reassure the MIA on that specific example. In that scenario provided by the MIA of a migration agent referring a working holiday maker for work who does not subsequently return to the agent to arrange a subclass 457 visa, in our view the agent would not be committing an offence, because at the time of the referral the worker, in doing the work, would not have been in breach of any condition restricting the work that could be done. At the time of the referral, the worker would hold a visa that permitted work. So in that particular example I do not think the agent would have a concern. It is also doubtful that suggesting someone explore the mere opportunity of future work would be considered by us to be a referral for work. So I think there is plenty of scope for us to tease out with the MIA where their members may need to be concerned in this context.

Senator BARTLETT—Again, without getting into too much of the fine detail of legal definitions, which are always subject to court rulings, does the issue of intent come into it much? I know there is the recklessness issue, but what if there is the intent to refer someone to a job you know that person is not eligible to do?

Mr Mann—It is referring someone for work; it is in the knowledge that you are referring someone for employment. It is intended to apply to organisations such as the members of the Job Network and companies that arrange large volumes of workers. But it does have this broader application where people may, not as their primary business but as part of their business, be engaged in, for reward or otherwise, referring people for work, and employers come to rely on them to get a regular supply of workers. In those circumstances, where the referrer was aware that the worker that they were vouching for to a prospective employer for some reason might not have that working entitlement, we would think it was appropriate, if there were a substantial risk and they were aware of that risk, for them to be considered under this provision.

Senator BARTLETT—I want to use one of the taxidriver examples that came up. I do not want to go through every single industry and every single scenario; I just want to get a sense of the broader situation. For example, if people on student visas engage in taxi-driving work, how far does an owner have to go to ascertain whether or not they are working elsewhere and thus working more than the total of 20 hours a week they are permitted?

Mr Mann—Certainly, if it were in the sense of a breach of working conditions—say, a student who worked more than the 20 hours. If that student were driving a taxi for 10 hours, we would not expect the owner of the taxi to make any inquiries as to whether or not that student had another employer for whom they worked 11 hours and were therefore in breach of

their working conditions. That is certainly not something that we would expect a taxi owner to be involved in. Our focus would be much more on the use of their taxi—whether they had any knowledge that the driver was a student with limited work rights and that student was driving their taxi for more than 20 hours a week. That is the area that we would have an issue with.

Senator BARTLETT—In the MIA's submission, they brought up a specific issue about the use of a taxi that I do not think has been covered by anyone else's questioning—about whether the owner, who is almost one step removed, is liable. They are concerned that, based on paragraph 104, I think, of the explanatory memorandum, the owner might be deemed to be allowing that driver to work. Do you have a response to that?

Mr Mann—The definition of 'allows' to work has been amended to make sure it covers arrangements such as those in the taxi industry where a vehicle might be leased to a driver. I think the particular issue you are raising, though, is what happens if the owner of that taxi leases it to another person who then subleases it to a driver.

CHAIR—Which we understand to be quite a regular occurrence.

Mr Mann—Yes. 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 the absence of that knowledge of how the taxi were to be used, we cannot see how they would fall foul of this provision.

Senator BARTLETT—It is really put in the legislation to enable people to be captured by the legislation if there is a clear intent of wrongdoing, if you like?

Mr Mann—I think it is basically saying, 'You can't get out of this provision, simply by subleasing to another person, if in fact you do have knowledge.'

Senator BARTLETT—But it would need to be a proactive, conscious intent to allow that type of use?

Mr Mann—There would need to be knowledge of a substantial risk and a failure to act upon it.

CHAIR—At the same time, you say that you are working with authorities who are responsible for licensing arrangements for drivers to encourage them to check this matter themselves?

Mr Mann—Like the Taxi Industry Association, we are very hopeful of having state regulatory authorities use the EVO as a step—

CHAIR—It would seem logical.

Mr Mann—to the licensing of drivers. We have already had success in New South Wales and Victoria. We are talking to Queensland in the short term and we will continue down that path. We think it is a very sensible and a high leverage approach that relieves much of the burden on individual employers.

CHAIR—I gather from the association that talking to Queensland might be an important step to take?

Mr Mann—As it happens, we have that on our schedule.

CHAIR—I have a couple of brief questions. I do not have the National Farmers Federation submission in front of me, but they do make some observations about recklessness, where they indicate that their understanding is that recklessness will not create any liability on a farmer who is just 'careless' in their recruitment of an illegal worker. Would you describe that as a correct understanding? They also make an observation about the 48-hour grace period—the policy approach that is referred to in the explanatory memorandum. Has that policy development progressed? There are two questions.

Mr Mann—On the first question, I think we would accept there is a difference between 'careless' and 'reckless'. I will ask Mr Deane to expand a little.

Mr Deane—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.

CHAIR—My last question concerns consultation, which has been raised with us by a number of submitters and witnesses today—some have said they did not expect to be included and some are disappointed they were not. Can you outline the department's approach to consultation on these initiatives?

Mr Mann—In doing so, I will also answer the second part of your last question. I have not had the benefit of reading the NFF submission myself.

CHAIR—It is just a couple of pages.

Mr Mann—The 48-hour policy approach is certainly an indication of how we would approach the implementation of this bill. We are more than happy to sit down and discuss with the NFF or others whether it is adequate and clear enough in its application. We are certainly very keen to follow up with the NFF to make it a more formalised policy. I will let Ms Daniels describe a little about the consultation approach that we have been through and what is planned over the next six months.

Ms Daniels—Since the review of illegal workers in 2000 there have been some extensive consultations which are outlined in the explanatory memorandum. Rather than going over what has happened, our intention—as Mr Mann indicated in his opening statement—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 and some of the peak bodies which have indicated—I cannot remember which submission it was in—that we should talk to the labour hire companies, the Institute of Management and those broader peak bodies. Our

intention would be to have that strategy span the spectrum of stakeholders, from employers, peak bodies and other interested agencies right down to the individuals who hold the visas themselves.

CHAIR—And that is the six-month process that you referred to earlier?

Ms Daniels—Yes.

CHAIR—The last question also comes out of the submission by the Migration Institute of Australia and concerns any role, if appropriate, for DEWR inspectors, particularly given their enhanced obligations under the new legislation. Does DIMA envisage a role for them in this context?

Mr Mann—As we discussed before, I think we would see DIMA having the prime responsibility for considering whether or not to refer an employer under these provisions. Certainly there are opportunities to share intelligence both ways. As I walked in I heard a suggestion from MIA that perhaps those inspectors could provide a service, if you like, to employers by bringing to their attention what they see in the workplace.

CHAIR—And potentially to DIMA, I think.

Mr Mann—Both ways, yes. I think at this stage the best I could say is that we will follow up those suggestions with DEWR.

CHAIR—I think that covers most of the areas the committee wanted to raise. In relation to trafficking victims, this committee has previously considered government initiatives on trafficking issues, not the least of which was the legislation to implement the convention obligations on trafficking. One of our witnesses today did raise some concerns and implied—and I would have to disagree with the implication—that they were concerned that this would be the government's only response on trafficking matters. That is clearly not the committee's experience per se. Is there any comment that you want to make on that? They are the Melbourne Catholic Migrant and Refugee Office and the Australian Catholic Migrant and Refugee Office submissions specifically.

Ms Daniels—I think it would be fair to say that 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. I am happy to explain that to the committee. 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 the criminal justice visa provisions and the possibility of moving to either a temporary or a permanent witness protection trafficking visa after those proceedings. So I think it would be fair to say that there is a very whole of

government approach to trafficking which these provisions actually complement in the sense that—

CHAIR—There have not been penalties before for the employers, have there?

Ms Daniels—There have been penalties for traffickers. However, in—

CHAIR—For employers, though.

Ms Daniels—It really depends on whether the trafficker is the employer. But in terms of the complementarity of these provisions, for example, a brothel owner may take on a person to whom they might rent a room who is actually under the control of the trafficker, and it is debatable whether that brothel owner comes within the provisions of the existing legislation. However, under these provisions, if the brothel owner allows that situation to occur then they would potentially come within the provisions of this legislation.

CHAIR—Thank you for clarifying that. If there are any further issues that the committee wishes to pursue, we will do that on notice. However, you would be familiar with the fact that we are required to report to the Senate on this matter on 2 May, so we have a very tight time frame. We thank you for your submission. We do not always receive submissions from a department, so it is very helpful to have had some response on those issues in advance of the hearing process. We thank you for your attendance here today and for your answering of questions over an extended period. We look forward to further communications on matters arising from our drafting of the report. We would appreciate your cooperation if we need responses quickly.

Mr Mann—Would it assist the committee if we were to table a copy of my opening remarks?

CHAIR—Yes, it would. Thank you very much. I declare this hearing of the Senate Legal and Constitutional Legislation Committee closed.

Committee adjourned at 12.37 pm