CHAPTER 3

PROTECTION OF 457 VISA HOLDERS' RIGHTS

Introduction

3.1 This chapter details the committee's consideration of the framework and operation of the Temporary Work (Skilled) - Standard Business Sponsorship (Subclass 457) visa program (457 visa program) in relation to the maintenance and enforcement of 457 visa workers' rights. These issues relate to both terms of reference (d) and (h), which tasked the committee with inquiring into the monitoring of the 457 visa program and:

> …the capacity of the system to ensure the enforcement of workplace rights, including occupational health and safety laws and workers' compensation rights…

3.2 As noted previously in this report, the protection of 457 visa workers' rights is an explicit and significant aim of the policy settings of the program. The extent to which the program effectively protects the rights of 457 visa holders, and ensures they receive no less favourable working conditions, impacts on the other priorities of the 457 visa program, namely ensuring that 457 visa holders are employed only in response to genuine skill shortages, and that employment opportunities and conditions of local workers are adequately protected.

3.3 The committee notes that this concern also intersects with fundamental issues of human rights. The Human Rights Council of Australia (HRCA) submission drew attention to this, noting that Australia's immigration program was relevant to the overarching principles of, first, non-discrimination and, second, the protection of the rights of all non-citizens on temporary visas working in Australia. The HRCA emphasised that conformity with these rights would 'substantially strengthen Australia's ability, through the 457 visa program, to protect and fulfil the rights of both local and migrant workers'.[1]

Vulnerability of 457 visa holders

Factors associated with vulnerability of 457 visa holders

3.4 The committee notes that what may be termed the 'special vulnerability' of 457 visa holders has long been recognised in relation to the framework and operation of the 457 visa program. For example, an issues paper released by the 2008 Visa Subclass 457 Integrity Review (the Deegan review) noted that '457 visa holders are potentially vulnerable to exploitation, arising out of their position as temporary visa holders in Australia'.[2]

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1 Human Rights Council of Australia, *Submission 33*, p. 1.

2 Visa Subclass 457 Integrity Review, Issues Paper #3: Integrity/Exploitation, September 2008, p. 12.

3.5 Pointing to the analysis of the Deegan review, the submission of Dr Joanna Howe, Professor Alexander Reilly and Professor Andrew Stewart noted that the vulnerability of 457 visa holders is particularly associated with:

> ….[those] at the lower end of the salary and skill scale because they are reluctant to make any complaint which may put their employment at risk, and they possess less labour market power as their skill level is more easily replaceable than for highly skilled workers.[3]

3.6 The committee heard that the potential vulnerability of 457 visa holders is increased for those who may have aspirations towards permanent residency.[4] Mr Tim Shipstone, Industrial Officer, Australian Council of Trade Unions (ACTU), for example, noted that in such cases a worker may be less likely to 'speak out or to challenge their employer or seek outside help for fear of jeopardising their visa status'.[5]

3.7 More generally, the submission of Dr Joanna Howe, Professor Alexander Reilly and Professor Andrew Stewart observed:

> [The] vulnerability of subclass 457 visa holders is exacerbated by their profile as migrants. The vulnerability of temporary migrant workers in general is well documented. Migrant workers lack the capacity of citizens to participate in the political system that determines their work rights, they lack security of residence, and they often face language and cultural barriers which makes it less likely they will know their rights as workers, and more difficult for them to assert them against a local employer.[6]

3.8 Appearing at the hearing for the inquiry in a private capacity, Dr Joanna Howe, while noting that most employers seek to employ 457 visa holders for legitimate purposes, pointed to academic literature and anecdotal evidence ascribing a range of motivations for the exploitation of the special vulnerability of 457 visa workers:

> There is a range of motivations for why an employer may seek to use a 457 visa worker [against the policy intention of the program]…One of those agendas could be de-unionisation. Firstly, a 457 visa worker is much less likely to be a member of a union and to identify with a union. Secondly…457 visa workers tend to be more compliant and less likely to complain about working hours, conditions and expectations of them.[7]

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3 Dr Joanna Howe, Professor Alexander Reilly and Professor Andrew Stewart, *Submission 11*, p. 5.

4 Visa Subclass 457 Integrity Review, Issues Paper #3: Integrity/Exploitation, September 2008, p. 12.

5 Mr Tim Shipstone, Industrial Officer, Australian Council of Trade Unions, *Committee Hansard*, 23 May 2013, p. 4.

6 Dr Joanna Howe, Professor Alexander Reilly and Professor Andrew Stewart, *Submission 11*, pp 5-6.

7 Dr Joanna Howe, private capacity, *Committee Hansard*, 23 May 2013, p. 59.

Risks associated with vulnerability of 457 visa holders

Impact on rights and conditions of local workers

3.9 As noted in Chapter 2, where a genuine skill shortage does not exist in relation to a position, the employment of a 457 visa holder represents a fundamental breach of the program's central aims, and as a matter of course must impact negatively on the opportunity for local workers to fill that position. The submission of the HRCA highlighted this relationship between the protection of 457 visa holders' rights and the protection of the employment opportunities and conditions of local workers:

> If the Australian industrial relations system conforms to international human rights standards then it follows that all local workers will be guaranteed the opportunities of employment to which they are fairly entitled because employers will have no incentive to use the 457 visa program as a means to avoid the employment entitlements of local workers... So long as violations of the rights of migrant workers persist and are tolerated, local workers will be exposed to the risk of degraded labour standards which arise when any worker's entitlements are withheld.[8]

3.10 The importance of ensuring a 'fair playing field' in this regard was also emphasised by Mr Tony Sheldon, National Secretary, Transport Workers' Union of Australia (TWU):

> You cannot have a fair playing field in the market between companies that employ Australians…[using] the same skill and in many circumstances paying more money…whilst other companies…are employing 457 visa holders without the same rights and with lower wages and the capacity for instant dismissal.[9]

Impact on rights and conditions of 457 visa workers

3.11 A number of submitters and witnesses pointed to a range of abusive and exploitative behaviours to which 457 holders may be subject in the employment context, including:

- being engaged where skilled and qualified Australian workers were available to do the work;
- being required to perform unskilled work, outside the sponsor-nominated occupation, on a regular or permanent basis;
- breaches of employer sponsorship obligations, such as the requirement not to recover certain expenses from 457 visa holders;
- breaches of workplace and occupational health and safety laws;
- under-payment of wages;
- workplace bullying; and

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8 Human Rights Council of Australia, *Submission 33*, p. 2.

9 Mr Tony Sheldon, National Secretary, Transport Workers' Union of Australia, *Committee Hansard*, 23 May 2013, p. 7.

- debt bondage.[10]

3.12 As well as pointing to publicly reported instances of abuse and exploitation of 457 visa workers,[11] the committee was provided with a number of confidential submissions outlining other instances of claimed abuse or exploitation not currently in the public domain.[12] Regarding the unreported status of such claims, the ACTU submitted:

> The ACTU has reported individual cases to the Department of Immigration [DIAC], where appropriate and subject to the wishes of the visa holders themselves. Callers to the [ACTU] hotline are often very reluctant to go to DIAC, or to have the ACTU contact DIAC on their behalf, for fear of losing their visa and being deported.[13]

3.13 In addition to evidence of specific cases of exploitation and abuse, the committee heard that the special vulnerability of 457 visa workers may have implications for not only the level of reporting of employer exploitation but also the level of reporting of workplace health and safety issues, including workplace accidents and injury. Representatives of the Construction, Forestry, Mining and Energy Union (CFMEU) drew the committee's attention to reports about the reluctance of 457 visa workers to report workplace safety issues,[14] and to data suggesting that, in the period March 2007 to December 2011, the work-related fatality rate among 457 visa workers was 'more than double the rate among Australian workers in equivalent occupations'.[15]

Extent of exploitation of 457 visa workers

3.14 Submissions and the hearing for the inquiry devoted some time to the question of the extent of abuse and exploitation of workers in the context of the 457 visa program.

3.15 A number of submitters and witnesses sought to contextualise their views on this question by reference to reported estimates by the Minister for Immigration and

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10 Australian Council of Trade Unions, responses to questions on notice, 23 May 2013 (received 30 May 2013), p. 1.

11 See, for example, Transport Workers' Union of Australia, *Submission 20*, pp 7, 9, 13 and 14.

12 Confidential submissions were received, for example, from the Australian Council of Trade Unions and Construction, Forestry, Mining and Energy Union. The committee requested information pertaining to unreported cases of abuse to be provided confidentially to ensure the protection of all parties to such matters.

13 Australian Council of Trade Unions, responses to questions on notice, 23 May 2013 (received 30 May 2013), p. 2.

14 Mr Dave Noonan, National Secretary, Construction and General Division, Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 23 May 2013, p. 12.

15 Mr Bob Kinnaird, National Research Director, Construction and General Division, Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 23 May 2013, p. 12; and Construction, Forestry, Mining and Energy Union, response to questions on notice, 23 May 2013 (received 3 June 2013), pp 2-5.

Citizenship (the minister), in April 2013, that instances of 'illegitimate use of 457s would exceed 10 000' instances,[16] being approximately 9 per cent of the total number of principal visa holders in Australia as at 30 April 2013 (108 810).[17]

3.16 Evidence relied on in support of arguments going to this question included:

- anecdotal evidence of particular instances of abuse and exploitation (discussed above);
- the level of reporting to the unions generally, and to union and departmental hotlines;[18]
- statistical trends in the 457 visa program (discussed in Chapter 2);
- compliance monitoring and enforcement outcomes (discussed below); and
- the findings of the Migration Council of Australia (MCA) report, 'More than temporary: Australia's 457 Visa Program', 11 May 2013 (the MCA report), particularly in relation to that report's finding that '2 per cent of 457 visa holders reported incomes less than the threshold income set by regulation'.[19]

3.17 In general terms, some submitters and witnesses, particularly the groups representing employee interests, relied on broader statistical trends in the 457 visa program, and anecdotal evidence of specific instances, to argue that 457 visa workers are subject to a substantial degree of abuse and exploitation under the 457 visa program,[20] such as would justify significant changes to the policy settings of the program.

3.18 Conversely, other submitters and witnesses, particularly those representing employer and industry groups, relied on broader statistical trends in the 457 visa

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16 See, for example, Bianca Hall, *Sydney Morning Herald*, '457 visas: more than 10,000 are rorting system, says minister', 28 April 2013, http://www.smh.com.au/opinion/political-news/457-visas-more-than-10000-are-rorting-system-says-minister-20130428-2imcy.html (accessed 11 June 2013).

17 Department of Immigration and Citizenship, 'Subclass 457 State/Territory summary report 2012-13 to 30 April 2013', p. 2.

18 See, for example, Australian Council of Trade Unions, responses to questions on notice, 23 May 2013 (received 30 May 2013), p. 2; and Mr David Wilden, Assistant Secretary, Skilled Migration Policy Section, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Committee Hansard*, 23 May 2013, p. 69.

19 Migration Council of Australia, 'More than temporary: Australia's 457 Visa Program', 11 May 2013, p. 4. See, for example, Mr Anthony Melville, Director, Public Affairs and Government Relations, Australian Industry Group, *Committee Hansard*, 23 May 2013, p. 40; Mr Scott Barklamb, Executive Director, Industry, Australian Mines and Metals Association, *Committee Hansard*, 23 May 2013, p. 41; and Construction, Forestry, Mining and Energy Union, responses to questions on notice, 23 May 2013 (received 3 June 2013), p. 8.

20 See, for example, Mr Dave Noonan, National Secretary, Construction and General Division, Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 23 May 2013, pp 5 and 10; and Mr Tim Shipstone, Industrial Officer, Australian Council of Trade Unions, *Committee Hansard*, 23 May 2013, p. 11.

program, the level of reporting to unions and to union and departmental hotlines, compliance monitoring and enforcement outcomes, and the MCA report to argue that the extent of abuse and exploitation of 457 visa workers is within the expected margins of compliance,[21] can be adequately dealt with under the current arrangements, and would not justify anything other than minor changes to the policy settings of the program.[22]

Compliance monitoring and enforcement

3.19 The committee notes that the capacity to effectively monitor compliance with and enforce the sponsorship obligations designed to preserve the integrity of the 457 visa program is integral to ensuring that the program's fundamental tenets are not undermined.[23]

Current arrangements and performance

3.20 The departments' submission advised that the Department of Immigration and Citizenship (the department) monitors sponsors to ensure they continue to meet sponsorship obligations, including:

- to provide overseas workers with the same terms and conditions of employment as Australians performing equivalent work in the business; and
- to pay a 457 visa holder's return travel costs to their home country at the conclusion of their employment.[24]

3.21 The main monitoring mechanisms are:

- information exchange with Australian state and territory government agencies;
- written requests to sponsors to provide information in accordance with sponsorship obligations; and
- visiting businesses (with or without notice).[25]

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21 Mr Scott Barklamb, Executive Director, Industry, Australian Mines and Metals Association, *Committee Hansard*, 23 May 2013, p. 41.

22 See, for example, Law Council of Australia, *Submission 29*, p. 11.

23 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 17.

24 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 17.

25 Department of Immigration and Citizenship website, 'Sponsors [sic] Obligations', http://www.immi.gov.au/skilled/skilled-workers/sbs/obligations-employer.htm (accessed 11 June 2013).

3.22 The departments' submission provided the following table showing the compliance monitoring and enforcement outcomes in relation to the 457 visa program over the period 2009-12.[26]

26 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 18.

Measure	2009–10	2010–11	2011–12
Active sponsors (sponsors with a primary visa holder in Australia at the end of the financial year)	18 270	18 520	22 450
Sponsors monitored	2 546	2 091	1 754
Sponsors' sites visited	1 245	814	856
Sponsors formally sanctioned	164	140	125
Sponsors formally warned	510	453	449
Referrals to other agencies	65	61	18
Sponsors issued with an infringement notice	n/a	9	49
Sponsors subject to pecuniary penalty by the Federal Magistrates Court	0	0	1

3.23 With reference to these outcomes, the departments' submission noted that there had been a recent shift in monitoring activities from conduct of educational site visits to investigation of 'significant failures of sponsorship obligations' based on the targeting of sponsors 'with a greater risk of exploiting visa holders or abusing the sponsorship program'.

3.24 The departments' noted that the investigation of cases of abuse and exploitation was an inherently time consuming process, involving the 'meticulous gathering and assessing of evidence, including affidavits and documentary evidence, to present a sound case and optimise the chances of a successful prosecution'. The shift in focus to investigation was therefore reflected in the lower number of sponsors monitored and increased number of sanctions and infringement notices in 2012-13.[27]

3.25 In relation to the resources available to support compliance monitoring and enforcement, it was noted that the department currently has 32 inspectors across Australia. The inspectors have the following powers:

- to enter a premises or place without force;
- to require a person to produce a record or documents;
- to inspect and make copies of any number of documents; and
- to interview people while at a premises or place.[28]

3.26 A sponsor that fails to meet a sponsorship obligation may be:

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27 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 18.

28 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 17.

- sanctioned, including:
    - being barred from sponsoring or applying to sponsor a 457 visa worker for a specified period, and
    - cancellation of existing sponsorship approvals.
- issued with an infringement notice for each failure of up to $1320 (for individuals) and $6600 (for body corporates); and
- subject to civil court action, with potential fines for each failure of up to $6600 (for individuals) and $33 000 (for body corporates).[29]

3.27 At the hearing for the inquiry, an officer of the department advised that compliance monitoring and enforcement are managed according to assessments of risks and the most effective use of available resources, noting:

> The monitoring function the department has…goes right across our visa categories, so decisions about where the main issues of concern are regularly reviewed, monitored and then have action taken as required.[30]

3.28 A number of submitters and witnesses described the compliance monitoring and enforcement powers currently available to the department as sufficient, with some pointing to the introduction, with the passing in 2009 of the *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth), of the current framework, including sponsorship obligations (with attendant civil penalties); the appointment of departmental inspectors; and greater powers for the department to disclose personal information relating to employers and 457 visa holders.[31] The Migration Institute of Australia (MIA), for example, described the current arrangements as conferring on the department 'extensive powers in every possible aspect of compliance of a sponsoring employer'.[32]

3.29 Mr Bob Kinnaird, National Research Director, Construction and General Division, CFMEU, however, criticised the absence of any penalty for the engagement of a 457 visa worker where a qualified local worker was available:

> It is worth noting that there is absolutely no sanction whatsoever for what is in effect the fundamental breach of the 457 visa program by an employer—and that is to engage a 457 visa worker when there was a qualified Australian worker available. That is intended to be the fundamental objective of the 457 visa program, yet under the current regulations there is

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29 Department of Immigration and Citizenship website, 'Sponsors [sic] Obligations', http://www.immi.gov.au/skilled/skilled-workers/sbs/obligations-employer.htm (accessed 11 June 2013).

30 Mr David Wilden, Assistant Secretary, Skilled Migration Policy Section, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Committee Hansard*, 23 May 2013, p. 69.

31 Dr Joo-Cheong Tham and Dr Iain Campbell, 'Temporary Migrant Labour in Australia: The 457 visa scheme and challenges for labour regulation', Centre for Employment and Labour Relations Law, Working Paper No. 50, additional information received 26 March 2013, p. 18.

32 Migration Institute of Australia, *Submission 7*, p. 7.

> no breach of the regulations where an employer actually discriminates against an Australian worker. Our view is that that particular breach, which is currently non-existent, should exist and should in fact attract the highest penalty under the sanctions regime.[33]

3.30 A number of submissions also recommended the establishment of a name-and-shame register to publicise the details of employers found to have breached their sponsorship obligations under the 457 visa program.[34]

3.31 More generally, concerns were expressed regarding the extent and outcomes of the department's compliance monitoring and enforcement effort. Mr Peter Tighe, National Secretary, Communications Electrical Plumbing Union (CEPU), for example, cited the low level of prosecutions as indicative of an inadequate level compliance monitoring, giving rise to doubts about the effectiveness of the enforcement regime as a deterrent to noncompliant behaviour:

> …[in] the last financial year…[there] was one successful prosecution and three or four in train. When you consider that there are 22,000 sponsoring employers under the 457 arrangement and 100,000-plus people working on those visas, the level of compliance [monitoring] and the degree of sanctions [imposed] are very limited…The first action by the department is usually cancellation of the right to sponsor or suspension of the right to sponsor. It is only on rare occasions when the pursuit of breaches of the act and legislation take it to a court where [the substantial] fines [may be imposed]…The likelihood of [noncompliant employers]…being caught…and having to pay the ultimate penalty is very limited.[35]

3.32 A number of submitters and witnesses contended that, while the powers and sanctions supporting compliance monitoring and enforcement for the 457 visa program are adequate, the department is not sufficiently well resourced to effectively administer that regime.[36]

Empowerment of Fair Work Inspectors

3.33 The committee notes that, on 18 March 2012, the minister and the Minister for Employment and Workplace Relations jointly announced that Fair Work

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33 Mr Bob Kinnaird, National Research Director, Construction and General Division, Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 23 May 2013, p. 12.

34 See, for example, Migration Institute of Australia, *Submission 7*, p. 8.

35 Mr Peter Tighe, National Secretary, Communications Electrical Plumbing Union, *Committee Hansard*, 23 May 2013, p. 11. See also, for example, Human Rights Council of Australia, *Submission 33*, p. 7.

36 See, for example, Mr Alan Chanesman, External, Migration and Policy Adviser, Migration Law Program, Legal Workshop, Australian National University, *Committee Hansard*, 23 May 2013, p. 60; Mr Stephen Bolton, Senior Adviser, Employment Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 23 May 2013, p. 19; Ms Katie Malyon, Vice-Chair, Migration Law Committee, Law Council of Australia, *Committee Hansard*, 23 May 2013, pp 33-34; and Communications Electrical Plumbing Union, *Submission 30*, p. 5.

Ombudsman (FWO) inspectors would be given the power to monitor and enforce compliance with 457 visa conditions to ensure that workers were employed in the jobs for which they were nominated and receiving the correct market salary rates.[37] This would entail FWO inspectors being given relevant powers under the *Migration Act 1958* to enable them to do such things as enter premises, interview people and request and collect documents.[38] At a May 2013 Senate estimates hearing, an officer of the department explained:

> The changes will empower fair work inspectors to monitor key aspects of employer compliance with sponsorship obligations—that 457 visa holders are being paid the market rates and that the job being done by 457 visa holders matches the job title and description approved at the time of nomination. These are the two key features of the 457. During their regular work site visits, when…[FWO inspectors] come across 457 visa holders, they would need to check that information and pass that information or any information about non-compliance on those two aspects of 457 visas to [the department].[39]

3.34 A number of submitters and witnesses expressed their support for this development, and commented that the addition of the FWO inspectors should increase the effectiveness of the compliance monitoring and enforcement effort in relation to the 457 visa program, as well as potentially providing a better appreciation of the level of abuse and exploitation of 457 visa workers.[40]

Workplace rights, including occupational health and safety laws

3.35 The committee notes that, as with sponsorship obligations, the capacity to effectively monitor compliance with and enforce workplace rights, including occupational health and safety laws, is integral to ensuring that the 457 visa program's fundamental tenets are not undermined.

3.36 The departments' submission advised that, as with all Australian workers, 457 visa workers' rights and conditions are protected by workplace relations law, with the FWO, Fair Work Building and Construction and state and territory departments all having a role in ensuring compliance with and enforcement of workplace rights and

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37 The Hon Brendan O'Connor, MP, Minister for Immigration and Citizenship; and the Hon Bill Shorten, MP, 'Fair Work inspectors to monitor rogue 457 employers', joint media release, 23 February 2013.

38 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, Senate Legal and Constitutional Affairs Committee, 27 May 2013, p. 72.

39 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, Senate Legal and Constitutional Affairs Committee, 27 May 2013, p. 72.

40 See, for example, Mr Stephen Bolton, Senior Adviser, Employment Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 23 May 2013, p. 20; Law Council of Australia, *Submission 29*, p. 12; and Australian Industry Group, *Submission 16*, p. 5.

safety in relation to the 457 visa program.[41] If a 457 visa sponsor is found to have contravened a Commonwealth, state or territory law the department may sanction that sponsor.[42]

3.37 The department currently has or is seeking cooperative arrangements with relevant agencies and bodies regarding workplace rights and safety matters, including:

- an Australia-wide memorandum of understanding with Workcover to formally enable the exchange of information on workplace safety related matters; and
- an umbrella agreement with all states and territories in relation to the harmonisation of workplace health and safety laws under the *Work Health and Safety Act 2011* (Cth).[43]

3.38 The committee heard that, in a number of areas, laws protecting workers' rights do not provide sufficient protection or entitlement for 457 visa workers. The HRCA submission observed that such differential treatment gives rise to concerns regarding the rights of 457 visa workers not to be discriminated against and to have access to effective remedies. Further, it noted:

> By creating the potential for a second-tier of workers alongside local workers, these regulatory gaps can depress wages and working conditions for local workers.[44]

3.39 The CFMEU submission noted that 457 visa workers are currently not eligible for Commonwealth financial assistance in the case of insolvency or bankruptcy of their sponsoring employee, and called for the *Fair Entitlements Guarantee Act 2012* to be amended to provide them with entitlements under this scheme.[45]

3.40 The HRCA noted that, in other cases, although 457 visa holders possess the same substantive rights as local workers, they face potential barriers to effective enforcement of these rights arising from their special vulnerability as migrants. In particular, the requirement for a 457 visa holder to leave Australia on cessation of the employment relationship could substantially impair their ability to pursue claims under anti-discrimination and workplace legislation:

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41 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 20.

42 Department of Immigration and Citizenship website, 'Sponsors [sic] Obligations', http://www.immi.gov.au/skilled/skilled-workers/sbs/obligations-employer.htm (accessed 11 June 2013).

43 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 20.

44 Human Rights Council of Australia, *Submission 33*, p. 8.

45 Construction, Forestry, Mining and Energy Union, *Submission 41*, pp 19-21.

> To provide just one example, 457 visa-holders are legally entitled to bring claims of unfair dismissal against their employer sponsor under the *Fair Work Act 2009*. However, once an employer has terminated the employment relationship, 457 visas are liable to cancellation…[of their visa] after 28 days. There is no standard process through which workers with meritorious claims can be granted a Bridging visa to regularise their status past this time period…It has been commonly reported that some employers take advantage of these relative difficulties faced by 457 visa-holders. This area of employment law also illuminates the differential remedial entitlements of temporary migrants workers: the primary remedy for unfair dismissal, reinstatement, is typically not be available where a visa sponsorship is no longer in effect.[46]

3.41 Similarly, the CFMEU also observed that 457 visa holders' entitlements under Commonwealth and state and territory workplace compensation Acts cease upon their leaving Australia, and called for the making of relevant amendments to legislation, and agreements with the states and territories, to address this loss of entitlement. It was suggested that this could be achieved through providing that any entitlement would be retained in the event that a 457 visa worker left Australia, or be provided as a lump sum.[47]

457 visa condition 8107

3.42 The requirement for 457 visa holders to depart Australia within 28 days of ceasing to work for their sponsoring employer, discussed immediately above, arises from visa condition 8107, relating to employment conditions. In summary, this condition provides that a 457 visa holder must:

- work in the occupation for which they were nominated;
- work for the sponsor who nominated the position they are working in (or an associated entity); and
- not cease employment for a period of more than 28 consecutive days.

3.43 In the event that a 457 visa holder ceases working for their employer they may either:

- find another employer to sponsor them;
- apply for another type of substantive visa; or
- make appropriate arrangements to depart Australia.[48]

3.44 A number of submitters and witnesses noted that the effect of condition 8107 on the ability 457 visa holders to pursue their rights and to remain in Australia

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46 Human Rights Council of Australia, *Submission 33*, p. 8.

47 Construction, Forestry, Mining and Energy Union, *Submission 41*, p. 21.

48 Department of Immigration and Citizenship website, 'Conditions and obligations for holders of a subclass 457 visa', http://www.immi.gov.au/skilled/skilled-workers/sbs/obligations-employee.htm (accessed 12 June 2013).

(particularly where they may aspire to permanent residency) is to increase their vulnerability to, and potential unwillingness to report, workplace abuse and exploitation. The HRCA submission for example, noted:

> The [International Covenant on Civil and Political Rights] (ICCPR)] guarantees freedom from forced labour. The [International Covenant on Economic, Social and Cultural Rights (ICESCR)] safeguards, more broadly, the 'right of everyone to the opportunity to gain his living by work which he freely chooses or accepts' (Art 6.1). Serious questions arise as to whether the employer sponsorship mechanism in the 457 visa scheme compromises these rights of migrant workers.
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> …Condition 8107…[including] the extremely tight timeframe within which the visa's validity is affected, arguably restrict visa-holders' freedom of employment. There are clear disadvantages in such an inflexible process, since a migrant worker's dependency on a particular employer or enterprise may result in an unproductive employment relationship or exploitative conditions.[49]

3.45 The HRCA concluded that '[a]s long as 457 visas rely for their validity on the ongoing sponsorship of employers, 457 visa-holders may have as much if not more to lose from government detection of an employers' non-compliance with immigration rules'.[50]

3.46 In light of concerns about the effect of the 28-day limit on 457 visa holders remaining in Australia on cessation of the employment relationship, the HRCA, in addition to a number of other submitters and witnesses, supported an extension of the period, with some specifying 90 days as appropriate.[51]

3.47 However, other witnesses maintained that the apparent harshness of condition 8107 is ameliorated in practice by the department's administrative approach to enforcement of the condition. Mr Wayne Parcell, Secretary, Australian Capital Territory and New South Wales, MIA, for example, advised:

> …the department's practices at around the 28-day mark are to notify the individual of the department's intention to consider cancellation of the visa if they have no further employment, at which point the individual has an opportunity to respond to the department, usually in about 14 days, to advise the department of reasons why the visa should not be cancelled. The

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49 Human Rights Council of Australia, *Submission 33*, p. 5. See also, for example, Mr Tony Sheldon, National Secretary, Transport Workers' Union of Australia, *Committee Hansard*, 23 May 2013, pp 7 and 9-10.

50 Human Rights Council of Australia, *Submission 33*, p. 6.

51 Human Rights Council of Australia, *Submission 33*, p. 6. See also: Mr Richard Gunn, Migration law Committee, International Law Section, Law Council of Australia, *Committee Hansard*, 23 May 2013, p. 35; Ms Katie Malyon, Vice-Chair, Migration Law Committee, Law Council of Australia, *Committee Hansard*, 23 May 2013, p. 35; Mr Stephen Bolton, Senior Adviser, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 23 May 2013, p. 21; and Ms Angela Chan, National President, Migration Institute of Australia, *Committee Hansard*, 23 May 2013, p. 29.

> practical reality is, though, that people can in fact put their case to the department and an officer can make a decision to allow the person more time. Alternatively, the department could go on to make a decision, the ultimate outcome being that the person might potentially be in Australia for 60 days or so.[52]

Provision of migration assistance by employers

3.48 A number of submitters and witnesses expressed concerns that a potential area of vulnerability of 457 visa holders arose in connection with the current ability of employers, under current legislation, to provide assistance to prospective 457 visa employees.[53]

3.49 The LCA, for example, submitted that employers being able to act as intermediary between a prospective employee and the department represents a conflict of interest and potentially diminishes the former's 'knowledge of, and access to, their rights under Australian immigration and workplace laws'.[54] The LCA was aware of 'numerous instances' in which sponsored employees had not received copies of visa approval notifications and were unaware of their visa conditions and sources of information regarding work rights.[55]

3.50 In addition, employers were not necessarily adequately versed in the legislation, policies and procedures relevant to the 457 visa program, and were not accountable under the code of conduct and ethical and professional standards that apply to registered migration agents.[56]

3.51 In light of these concerns, the LCA recommended that employers be prevented from providing assistance to prospective employees or, alternatively, be required to provide a full copy of the visa approval notification to a 457 visa holder, as well as information regarding the sponsor's obligations and penalties for any failure to comply.[57]

Provision of information to 457 visa holders

3.52 More generally, a number of submitters and witnesses suggested to the inquiry that improved dissemination of information to 457 visa holders regarding

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52 Mr Wayne Parcell, Secretary, Australian Capital Territory and New South Wales, Migration Institute of Australia, *Submission 7,* p. 29. See also: Mr Richard Gunn, Migration Law Committee, International Law Section, Law Council of Australia, *Committee Hansard*, 23 May 2013, p. 33; and Mr Robert Walsh, Managing Partner, Australia and New Zealand, Fragomen, *Committee Hansard*, 23 May 2013, p. 53.

53 Law Council of Australia, *Supplementary submission*, p. 6.

54 Law Council of Australia, *Supplementary submission*, p. 7.

55 Law Council of Australia, *Supplementary submission*, p. 7. See also: Human Rights Council of Australia, *Submission 33*, Attachment 1, p. 5.

56 Law Council of Australia, *Supplementary submission*, p. 7; and Migration Institute of Australia, *Submission 7*, pp 15-16.

57 Law Council of Australia, *Supplementary submission*, p. 7.

sponsors' obligations, workplace and human rights, and sources of information, advice and assistance while working in Australia could help to reduce any vulnerability of such workers.[58]

3.53 Suggestions in relation to this issue included introducing mandatory requirements for the department and/or employers to provide specified information, and ensuring a sufficiently broad array of printed and online resources directed at 457 visa holders.

457 visa program as a permanent migration pathway

3.54 A further issue of concern to some submitters and witnesses was the extent to which the vulnerability of 457 visa workers is affected by the policy settings relevant to the 457 visa program as a permanent migration pathway.

3.55 On this issue, the submission of Dr Joanna Howe, Professor Alexander Reilly and Professor Andrew Stewart, recalling the special vulnerability of 457 visa workers (particularly in the case of low- and semi-skilled workers and those aspirating to permanent residency), noted that exclusive reliance on an employer-sponsored pathway to permanent residency could increase a person's vulnerability to pressure to perform unsafe work, accept low wages or suffer sub-standard conditions without complaint.[59]

3.56 The HRCA submitted that reliance on employer-nominated pathways to permanent residence had in fact increased since changes affecting independent migration pathways in 2008. Conditions attached to the Employer Nomination Scheme (subclass 186), for example, through which 457 visa holders may transition to permanent residency, could therefore be operating to increase or entrench the vulnerability of such persons:

> ...this scheme requires 457 visa-holders to have worked for their sponsoring employer for the last two years and to secure an offer from that same employer for at least a further two years. By creating such strong incentives to remain employed with a sponsoring employer, this policy amplifies 457 visa-holders' reliance upon employers and increases the prospect of abuse of migrant workers' rights.[60]

3.57 The HRCA recommended that 457 visa holders and holders of employer nominated visas generally be permitted to change employers more easily so as to reduce their dependence on sponsoring employers.[61]

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58 See, for example, Migration Institute of Australia, *Submission 7*, p. 10; Mr Stephen Bolton, Senior Adviser, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 23 May 2013, p. 22; and Mr Andrew Bartlett, Research Fellow, Migration Law and Practice, Migration Law Program, Australian National University, *Committee Hansard*, 23 May 2013, p. 58.

59 Dr Joanna Howe, Professor Alexander Reilly and Professor Andrew Stewart, *Submission 11*, p. 7.

60 Human Rights Council of Australia, *Submission 33*, pp 5-6.

61 Human Rights Council of Australia, *Submission 33*, pp 5-6.

3.58 Similarly, the CFMEU noted that the employer-sponsored Regional Sponsored Migration Scheme (RSMS) visa is a frequent pathway for 457 visa holders, with approximately 80 per cent of such visas granted to 457 visa holders.[62] The CFMEU was concerned that a condition of this visa is that the visa holder remain employed in the nominated position in the regional area for at least two years, or risk cancellation of the visa:

> It is unacceptable that a single employer can effectively determine whether a worker can continue to hold a PR [permanent residency] visa in Australia. This arrangement continues the state of labour bonded to the employer that is such an objectionable feature of the original 457 temporary visa program.
>
> It places excessive powers in the hands of employers and completely distorts the bargaining relationship between employers and workers. It guarantees – under duress – compliance with employer-determined wages and conditions for the duration of the bonded period.[63]

3.59 Accordingly, the CFMEU called for the removal of this condition on holders of an RSMS visa.[64]

3.60 Dr Joanna Howe, Professor Alexander Reilly and Professor Andrew Stewart suggested that a possible way to ameliorate the potential for increased vulnerability of 457 visa holders arising from the use of the program as an avenue to permanent migration would be to restrict the length of time which a person may hold such a visa. At the end of that time, the person would be required either to return home or be offered permanent residence.[65]

3.61 The CEPU, however, called for the severing of the 'link between the [457 visa] temporary scheme and permanent residency', given that the less stringent requirements for entry through the 457 visa program made it likely that the program was being used as a preferred avenue of permanent migration, to the detriment of the stated policy aims of both the 457 and general skilled migration programs.[66]

COMMITTEE COMMENT

3.62 A significant body of evidence received by the inquiry drew attention to the special vulnerability of 457 visa holders, and the relevance of this fact to the extent to which the policy settings of the 457 visa program effectively ensure the protection of such workers' rights, and that their employment conditions are no less favourable than those under which local workers are employed. These matters raise fundamental issues of human rights, and interact directly with the labour market objectives of the 457 visa program, which are to ensure that 457 visa holders are employed only in

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62 Construction, Forestry, Mining and Energy Union, *Submission 41*, p. 22.

63 Construction, Forestry, Mining and Energy Union, *Submission 41*, p. 22.

64 Construction, Forestry, Mining and Energy Union, *Submission 41*, pp 3 and 22-23.

65 Dr Joanna Howe, Professor Alexander Reilly and Professor Andrew Stewart, *Submission 11*, p. 7.

66 Communications Electrical Plumbing Union, *Submission 30*, pp 6 and 28.

response to genuine skill shortages, and that employment opportunities and conditions of local workers are adequately protected.

3.63 In simple terms, any unwarranted discrimination (that is, discrimination not reasonably and proportionally directed to the legitimate aims of the 457 visa program) or shortfall in the employment conditions pertaining to 457 visa holders may increase the potential for their abuse and exploitation, and for employers to seek to engage such workers for reasons other than to fill a position subject to a genuine skill shortage.

3.64 The particular vulnerability of 457 visa workers may arise from any one or a combination of factors connected to their migrant status, such as language barriers. This is particularly the case for those 457 visa workers aspiring to permanent residency, who may be more likely to accept, and less likely to report, any instances of abuse or exploitation for fear of jeopardising their visa status or prospects of permanent residency.

3.65 A number of submitters and witnesses addressed the question of the current extent of abuse and exploitation of 457 visa workers in Australia. The committee considered a range of evidence on this point, including anecdotal and publicly reported cases and surveys, confidential submissions detailing alleged cases of abuse and exploitation, levels of reporting through various means and the results of the department's compliance monitoring and enforcement activities in relation to the 457 visa program. This evidence suggests that, while there is certainly a degree of noncompliant behaviour, the majority of employers use the 457 visa program for its legitimate purposes—that is, to source overseas workers to fill positions which are unable to be filled locally.

3.66 However, a prudent analysis of any degree of abuse and exploitation of 457 visa holders must also take into account the seriousness of the consequences of abuse and exploitation for 457 visa workers, and reflect an appreciation of the likelihood that there is at least some degree of under-reporting arising from their particular vulnerability. In this respect, the committee notes that abuse and exploitation of 457 visa workers may involve serious breaches of their human and workplace rights, and there was some evidence that 457 visa workers may be vulnerable to higher rates of workplace injury and death.

3.67 Accordingly, the focus of the committee's consideration of such matters was not to determine whether there is an 'acceptable' degree of noncompliance in the 457 visa program, but whether the current policy settings of the program are appropriate to prevent, detect and sanction noncompliant behaviour, taking into account the seriousness of the consequences of any such behaviour.

3.68 However, given the possibility that 457 visa workers may have been or are subject to higher rates of workplace injury and death, which the committee regards as a matter of the utmost seriousness, and, more broadly, the potential for under-reporting of abuse and exploitation in relation to such workers, the committee considers that the Government should initiate an inquiry on the question of whether temporary migrant workers in Australia are adequately protected by relevant

workplace and occupational health and safety laws. Recommendation 5 below is directed to this matter.

Compliance monitoring and enforcement

3.69 The inquiry revealed relatively widespread concern over the extent and effectiveness of compliance monitoring and enforcement that takes place in relation to the 457 visa program. Such concerns were generally based on the small proportion of sponsors annually subject to monitoring events, as well as the small number of sanctions and civil penalties annually arising from the compliance monitoring and enforcement effort.

3.70 Many submitters and witnesses expressed the view that, on the basis of these outcomes, the department is significantly under-resourced in terms of its compliance monitoring and enforcement activities.

3.71 Evidence from the department indicated that the compliance monitoring and enforcement effort in relation to the 457 visa program has recently undergone a shift in focus from education of sponsors to detection and enforcement activities.

3.72 The department also drew attention to the Government's intention to empower FWO inspectors to monitor sponsorship obligations under the *Migration Act 1958*. This proposal drew widespread support from submitters and witnesses. The legislative basis for this proposal was included in the Migration Amendment (Temporary Sponsored Visas) Bill 2013 (the bill), introduced into the House of Representatives on 6 June 2013, and the matter is therefore further discussed in Chapter 5 of this report.

Workplace rights, including occupational health and safety laws

3.73 Evidence to the inquiry revealed a number of areas of concern in relation to the application of Australian workplace rights, including occupational health and safety laws.

3.74 First, the committee was advised that 457 visa workers are currently not eligible for Commonwealth financial assistance, under the *Fair Entitlements Guarantee Act 2012*, in the case of insolvency or bankruptcy of their sponsoring employee.

3.75 In the committee's view, the omission of 457 visa workers from eligibility for this scheme is, on its face, discriminatory, given that there is no coherent policy basis justifying the distinction between the entitlements of local and 457 visa workers in such circumstances. Accordingly, the committee considers that the *Fair Entitlements Guarantee Act 2012* should be amended such that 457 visa holders are made eligible for entitlements under the scheme.

Recommendation 4

3.76 The committee recommends that the *Fair Entitlements Guarantee Act 2012* be amended to make 457 visa holders eligible for entitlements under the Fair Entitlements Guarantee scheme.

3.77 Second, a number of submitters and witnesses provided evidence that 457 visa workers face potential barriers to seeking effective remedies under workplace and

occupational health and safety laws. In particular, the requirement for a 457 visa holder to leave Australia on cessation of the employment relationship can substantially impair their ability to pursue claims under anti-discrimination and workplace legislation. Further, a 457 visa holders' entitlements under Commonwealth and state and territory workplace compensation Acts ceases upon their leaving Australia, again leading to substantively discriminatory and unfair outcomes, particularly in cases where that person was required to leave the country due to cessation of the employment relationship.

3.78 In the committee's view, the substantive impairment of 457 visa holders in respect of seeking effective remedies or maintaining entitlements under workplace and occupational health and safety laws undermines one of the clear policy aims of the 457 visa program, namely that 457 visa holders receive no less favourable conditions than local workers. The committee notes that, in addition to amendment and harmonisation of relevant Commonwealth and state and territory legislation and schemes, addressing this substantive impairment of 457 visa workers' rights may also require changes to the immigration program to provide adequate bridging arrangements to allow 457 visa workers to pursue meritorious claims under workplace and occupational health and safety legislation.

Recommendation 5

3.79 The committee recommends that the Government initiate an inquiry into the extent to which relevant workplace and occupational health and safety legislation protects the legal rights, remedies and entitlements of 457 visa holders and whether temporary migrant workers in Australia are adequately protected by relevant workplace and occupational health and safety laws.

Recommendation 6

3.80 The committee recommends that the immigration program be reviewed and, if necessary, amended to provide adequate bridging arrangements for 457 visa workers to pursue meritorious claims under workplace and occupational health and safety legislation.

457 visa condition 8107

3.81 In a related matter, a number of submitters and witnesses were critical of the current 457 visa condition which requires a visa holder not to cease working for their sponsoring employer for a period of more than 28 days, or else face cancellation of their visa and subsequent deportation.

3.82 The committee heard that this requirement may contribute to the vulnerability of 457 visa workers, insofar as the very short timeframe may increase a visa holder's dependence on their sponsor for maintaining their visa status, thereby reducing their willingness to report, and increasing their vulnerability to, abuse and exploitation.

3.83 In light of these concerns, the inquiry registered a broad level of support for increasing the 28-day period in relation to condition 8107 to 90 days, in acknowledgement that a longer period may reduce the dependence of 457 visa workers on their employers and potentially increase rates of reporting of abuse and exploitation.

3.84 The committee notes that the legislative basis for this proposal was included in the bill introduced into the House of Representatives on 6 June 2013, and the matter is therefore further discussed in Chapter 5 of this report.

Provision of migration assistance by employers

3.85 A number of submitters and witnesses expressed concern that, under current legislation, employers are able to provide assistance to prospective 457 visa employees.

3.86 This was seen as being problematic on a number of fronts. First, such arrangements may increase the reliance of 457 visa workers on their employers, potentially increasing their vulnerability to abuse and exploitation. Second, an employer's lack of expertise or knowledge in relation to the immigration system may result in a visa holder having an inaccurate or incomplete understanding of the rights, obligations and conditions pertaining to the 457 visa and program. Third, employers are not accountable under the code of conduct and ethical and professional standards that apply to registered migration agents in the giving of such assistance.

3.87 While the committee acknowledges concerns in this area, it notes that the amount of evidence received on this issue was limited. Given this, and without an appreciation of the full range of circumstances in which it might be desirable or even necessary for employers to provide assistance to prospective workers, the committee makes no recommendation in this case.

3.88 The committee notes that the concerns which might arise from the giving of incomplete or defective advice to prospective or successful 457 visa holders by employers may be ameliorated by ensuring more generally the provision of complete and accurate information.

Provision of information to 457 visa holders

3.89 On this issue, a number of submitters and witnesses suggested to the inquiry that improved dissemination of information to 457 visa holders regarding sponsors' obligations; workplace and human rights; and sources of information, advice and assistance while working in Australia could help to reduce the vulnerability of such workers.

3.90 While the committee acknowledges that there exists a number of sources of information and assistance on which 457 visa holders in Australia may rely, including the department, the FWO, unions and formal and informal community migrant networks, it notes also the importance of ensuring that authoritative, comprehensive and accessible (that is, in a language and form able to be easily comprehended by the intended recipient) information is provided to 457 visa workers upon approval, and any subsequent amendment or re-approval, of their visa application. The committee considers that such information provided at early and transitional stages could reduce the potential for misinformation and misunderstanding to intrude, and ensure that 457 visa workers are in possession of complete and accurate information at critical times.

Recommendation 7

3.91 The committee recommends that the Department of Immigration and Citizenship be required to provide 457 visa holders, on each approval, variation or re-approval of an application, with comprehensive information regarding sponsors' obligations; relevant workplace and human rights governing the employment relationship; and sources of workplace, legal and migrant advice and assistance while working in Australia.