# Chapter 2

## Key issues

2.1 The majority of submissions supported the Bill's objective to protect vulnerable workers and uphold the integrity of the skilled migration scheme. However, some submitters expressed concerns about the following measures:

- the application of penalties to sponsors (and other third parties) and visa holders:
- definitions; and
- appropriateness of powers.

2.2 In his second reading speech, the Minister for Immigration and Border Protection, the Hon Peter Dutton MP (Minister), noted that:

> 'Payment for visas' conduct is not currently unlawful. This conduct is unacceptable to the government and the Australian people because it undermines the genuine purposes for which visas are intended to be granted. This bill will strengthen the integrity of Australia's migration program by allowing action to be taken where 'payment for visas' conduct has occurred.
>
> 'Payment for visas' conduct may occur through an employer offering to sponsor a visa applicant in return for a payment or benefit. It may occur before the applicant applies for a visa or during the visa holder's stay in Australia. Evidence obtained through monitoring sponsors indicates that the sponsor and applicant are complicit in the majority of 'payment for visas' activity. Employers may also exploit an employee by requiring payment in return for an ongoing sponsorship.
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> A strong response is required to ensure that this practice, which has continued under successive governments, does not continue.[1]

### Sponsors and visa holders

2.3 Many submitters were supportive of the policy objective to prevent 'payment for visas'. The Migration Institute of Australia (MIA) noted that 'the criminal and civil penalties specified in this Bill send a clear message to those who engage in exploitative behaviour and undermine Australian workplace and migration law'.[2] The Australian Council of Trade Unions (ACTU) agreed 'that the practice of "payment for visas" needs to be stopped'.[3] Similarly, the Ai Group submitted that 'this practice [of

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1 Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 16 September 2015, p. 23.

2 Migration Institute of Australia, *Submission 3*, p. 3.

3 ACTU, *Submission 4*, p. 6.

payment for visas] is unacceptable and undermines the integrity of the skilled migration system'.[4]

2.4 Many of the concerns that submitters raised with the current system relate to the extent to which some visa holders are being exploited by employers and other third parties. Some cases 'have involved employers seeking payments of up to $50 000 or more'.[5] The MIA provided further examples of exploitation:

> Over the years the MIA has heard anecdotal reports of payment for visa models, from, at the most basic level, requiring the visa applicant to pay the sponsor's costs for 457 sponsorship, up to payments of $250,000 per year which included an amount to [be] 'recycled' back as a high income salary that allowed the visa holder to bypass the English language requirement.[6]

2.5 In other cases, the committee heard that 'employers have charged migrant workers large sums of money for enrolment in what are presented as legitimate "courses" to secure work or student visas or gain skills'.[7]

### *Penalising visa holders*

2.6 All submitters agreed that sponsors and other third parties should be punished in the event that the provisions of this Bill are contravened. For example, the ACTU stated in its submission that:

> We support the Bill insofar as it makes it unlawful for employers and other third party agents to solicit and receive payments from overseas workers in return for sponsorship and other visa outcomes. This is a long overdue law reform that addresses a known problem and it is something the ACTU has been calling for, for some time.[8]

2.7 However, submitters suggested that the proposed penalties outlined in the Bill, including the cancellation of visas, disproportionately impacts on vulnerable visa applicants and holders. The ACTU highlighted that in many cases, employers, rather than applicants, are chiefly responsible for engaging in 'payment for visas' conduct:

> The Bill appears to rest on the mistaken assumption that employers, agents and workers are all equally responsible for, and complicit, in the practice of payment for visas, when all the available evidence suggests it is virtually always the employer/agent who is pressuring the worker in these cases.[9]

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4 Ai Group, *Submission 7*, p. [1].

5 ACTU, *Submission 4*, p. 6.

6 Migration Institute of Australia, *Submission 3*, p. 3.

7 Law Institute of Victoria, *Submission 9*, p. 5. See also: Federation of Ethnic Communities' Councils of Australia, *Submission 11*, p. 2.

8 ACTU, *Submission 4*, p. 3. See also: Migration Institute of Australia, *Submission 3*, p. 2; Law Institute Victoria, *Submission 9*, p. 3.

9 ACTU, *Submission 4*, p. 7.

*Vulnerability of visa holders*

2.8 Submitters raised concerns about the vulnerable position of visa holders relative to an employer or migration agent. The Federation of Ethnic Communities' Councils of Australia (FECCA) submitted that:

> Temporary visa holders are among the most vulnerable in the workplace and tend to be concentrated in the sectors of the job market which create a potential for exploitation. Lack of knowledge about the Australian workplace relations scheme, including their workplace rights and entitlements, lack of support networks, social isolation, and language barriers all contribute to this vulnerability.[10]

2.9 In its submission, the Law Institute of Victoria (LIV) noted that 'migrant workers [are] a vulnerable group already subject to exploitation and poor treatment in the Australian workforce'.[11] Similarly, Ernst and Young observed that 'temporary visa holders are vulnerable to exploitative employers and can be coerced into breaches of the law which cements the exploitative situation'. Ernst and Young attributed the vulnerability of visa applicants or holders to exploitation to them having:

> …limited knowledge of Australian law and business culture and com[ing] from cultures where it may common practice to provide a "benefit" of some kind in return for job placement or other services.[12]

2.10 Submitters noted that 457 visa holders, due to their reliance on their employers for the continuation of their visas, are particularly vulnerable to exploitation.[13] Associate Professor Joo-Cheong Tham of the University of Melbourne School of Law highlighted that the final report of the then government's 2008 Integrity Review into 457 Visas found that:

> Despite the views of some employers and employer organisations, Subclass 457 visa holders are different from other employees in Australian workplaces. They are the only group of employees whose ability to remain in Australia is largely dependent upon their employment and to a large extent, their employer. It is for these reasons that visa holders are vulnerable and are open to exploitation.[14]

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10 FECCA, Submission 11, p. [1].

11 Law Institute of Victoria, *Submission 9*, p. 3. See for example, ABC Four Corners investigation 'Slaving Away' exposing exploitation and slave-like conditions on farms supplying Australian supermarkets; the case of a 457-visa holder trafficked to Australia and held in slave-like conditions in a restaurant for 16 months reported in the Sydney Morning Herald; and the recent Fairfax and Four Corners investigation revealing widescale abuse of workers by 7-Eleven franchisees.

12 Ernst and Young, *Submission 6*, p. 4.

13 FECCA, *Submission 11*, p. [2].

14 Associate Professor Joo-Cheong Tham, *Submission 2*, p. 4. See also: Commonwealth of Australia, *Visa Subclass 457 Integrity Review: Final Report*, 2008, p. 69, https://www.border.gov.au/Trav/Work/Work/Subclass-457-Integrity-Review#d (accessed 13 October 2015).

2.11 The ACTU highlighted that the experience of exploitation is common among temporary visa holders:

> A recurring theme with these cases is the vulnerable situation the temporary visa holders were in, whether that was influenced by their desire to stay in Australia or achieve permanent residency, the fear of retribution if they spoke out, their lack of knowledge of their workplace rights, their poor English, the spectre of a debt hanging over them, or a combination of all these factors. In many cases, it is their direct employer who is taking advantage of them, but in others it is an agent of some description based in Australia or the home country of the visa holder. In some cases, employers and agents are acting together in organised scams which are more akin to labour trafficking and even slavery. In all cases, workers are left disillusioned with their experience of working in Australia.[15]

2.12 Some submitters suggested that the Minister be granted greater discretion to consider the extent of a visa applicant or holders' vulnerability when determining civil penalties or visa cancellations.[16]

*Civil penalty provisions*

2.13 As a result of this vulnerability, some submitters argued that it would be disproportionate to apply the same penalties to visa holders as those applied to employers and other third parties. Further, employers and other third parties are aware of Australian law and custom and, in the majority of cases, are the ones who primarily facilitate and financially benefit from the 'payment for visas' and as such should be held to a higher standard than visa holders and applicants. LIV suggested that the penalties proposed in the Bill may act as a disincentive for visa holders to report exploitative actions by employers:

> It is paradoxicial [sic] that this Bill seeks to protect migrant workers from exploitation and at the same time includes severe penalties for migrant workers who may be at risk of exploitation. The LIV is concerned that the high penalties contained in this Bill may have the practical effect of deterring migrant workers in exploitative situations from coming forward, for fear that they may have their visa cancelled or be subject to civil penalties.[17]

2.14 These submitters recommended amendments to the Bill that would ensure that the proposed penalties would not apply to visa holders.[18] For example, Associate Professor Tham suggested that 'the Bill should be amended so that no penalties—

16 Ernst and Young, *Submission 6*, p. 4.

17 Law Institute Victoria, *Submission 9*, p. 4. See also: Federation of Ethnic Communities' Councils of Australia, *Submission 11*, p. 2.

18 See: ACTU, *Submission 4*, p. 3; The Law Society of South Australia, *Submission 8*, p. 1.

including criminal offences, civil penalties and the prospect of visa cancellation—are imposed on visa holders'.[19]

2.15 The department noted that it 'takes a tiered approach to unlawful conduct, with stronger responses and more serious outcomes reserved for more serious conduct' meaning that penalties would be applied in a manner befitting the magnitude of the infringement. The department further clarified that all allegations of 'payment for visas' conduct would be subject to an investigation by appropriately delegated Australian Border Force Officers.[20]

*Cancellation of visas*

2.16 Submitters raised concerns about the provisions allowing the Minister to cancel visas of visa holders found to be engaging in 'payment for visa' conduct. In particular, the Law Institute of Victoria expressed concern that the cancellation may apply whether or not a sponsorship event actually happened.[21]

2.17 Submitters also argued this provision presents an 'unacceptable risk' to victims of human trafficking.[22] A joint submission from the Salvation Army, Uniting Church, National Union of Workers and Harris Wake argued that the provision may act as a disincentive for reporting human trafficking, forced labour or slavery:

> With the threat of cancellation of a visa, it is likely to have the perverse outcome of assisting those engaged in human trafficking and egregious workplace exploitation by further deterring victims of such crimes from reporting the crimes against them if they have been offered a sponsorship related event.[23]

2.18 These submitters suggested that the Minister should not be granted the authority to cancel the visa of a person who is subject to human trafficking, or where an investigation is underway into such allegations.[24]

2.19 In its submission, the Department of Immigration and Border Protection (the department) clarified that that:

> [C]onsistent with other cancellation powers in the Act, the visa holder would be afforded procedural fairness during the cancellation process. In considering whether to exercise the discretion to cancel, the Minister or delegate would consider a range of factors including the visa holder's complicity in the 'payment for visas' conduct, the extent of the 'payment for visas' conduct, and whether a benefit was obtained as a result of the 'payment for visas' conduct. Other considerations would include the

19 Associate Professor Joo-Cheong Tham, *Submission 2*, p. 5.

20 Department of Immigration and Border Protection, *Submission 10*, p. 8.

21 LIV, *Submission 9*, p. 5.

22 The Law Society of South Australia, *Submission 8*, p. 1.

23 Uniting Church in Australia, The Salvation Army, National Union of Workers and Harris Wake, *Submission 5*, p. 4.

24 *Submission 5*, p. 1.

> strength of the visa holder's ties to Australia and contribution to the Australian community, as well as Australia's international obligations such as the best interest of children, family unit and non-refoulement obligations.[25]

2.20 The department further clarified that all visa cancellation decisions would be subject to review:

> A person whose visa is cancelled by a delegate would have the ability to seek merits review of that decision. Where the cancellation decision is made by a Minister, the person would be able to seek judicial review.[26]

### *Consultation and transition arrangements*

2.21 The MIA highlighted that the changes proposed in this Bill need to be effectively communicated to vulnerable visa holders, particularly those from non-English speaking backgrounds:

> Applicants from non-English speaking backgrounds may be among the most vulnerable to this exploitation. The MIA recommends that widespread media campaigns be conducted to inform potential sponsors and visa applicants to inform them of their obligations and rights. The MIA also recommends that the information be provided in common community languages.[27]

2.22 The MIA noted that the provision of widespread media campaigns using a range of common community languages would empower visa holders to know when they are being taken advantage of and to report it.[28]

2.23 The committee agrees that the department should instigate a consultation process with current and potential visa holders, employer groups and the migration advice profession to ensure that these changes are well understood.

## Definitions

2.24 Submitters expressed concern that the definitions set out in proposed section 245AQ were either too broad, or too narrow, including:

- what constitutes a benefit;
- what is considered a sponsorship related event; and
- executive officers.

### *Benefits and advantages*

2.25 Ernst and Young submitted that the definition of 'benefit' in the Bill was 'unnecessarily broad' and that 'in particular the term "an advantage" may be broadly interpreted by immigration department officers, tribunals and courts'. Ernst and Young

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25 Department of Immigration and Border Protection, *Submission 10*, p. 9.

26 Department of Immigration and Border Protection, *Submission 10*, p. 9.

27 Migration Institute of Australia, *Submission 3*, p. 3.

28 Migration Institute of Australia, *Submission 3*, p. 3.

suggested that the provision of benefits that would 'ordinarily arise out of lawful employment' should be excluded from this definition or in the form of policy guidance.[29]

2.26 The MIA also expressed concern 'that the difference between receiving a benefit from a sponsorship related event and paying for professional migration advice' is not clearly distinguished in the Bill.[30] The Ai Group also highlighted the Bill's unintentional capture of legitimate work related benefits such as advancing salary or wages to assist a visa holder with relocation and establishment costs prior to commencement of employment.[31]

2.27 Ernst and Young argued that greater clarity is required as to what is considered a reasonable amount:

> The Bill places the evidentiary burden on a defendant to prove that a "benefit" is a payment of a reasonable amount for a professional service, that is, at market rates. The question that arises is how and by whom it will be determined that the service was provided at market rates. Fees for immigration services, for instance, vary significantly across the market which encompasses a wide range of providers from sole traders to global law firms. Commercial in confidence information regarding fees charged by competitors may not be available to a defendant and is unlikely to be available to a delegate of the Minister. There is therefore scope for a delegate to erroneously find that a fee charged for a legitimate professional service is not "a reasonable amount"…
>
> Clear policy guidelines must also be developed to direct delegates to take into account a wide variation in fees for legitimate professional services.[32]

2.28 Similarly, Ai Group expressed concern that some legitimate payments from visa holders to sponsors may be defined as 'benefits', such as reimbursements to the sponsor of an advanced payment on the visa holder's salary to help pay for accommodation or other living expenses.[33]

2.29 The Explanatory Memorandum notes that the Bill provides for a specific defence for persons receiving a benefit payment under proposed section 245AR and 245AS of the Bill. This provision allows a defence for what might be contested as a reasonable amount for professional services. In its submission, the department noted:

> Legitimate business practices would not constitute conduct that involves asking for or receiving a benefit to enter into a "payment for visas" arrangement. Therefore, it is not considered that the new offence and civil penalty provision would apply to professional services such as the provision of immigration assistance or recruitment advice, or to benefits received by

29 Ernst and Young, *Submission 6*, p. 2.

30 Migration Institute of Australia, *Submission 3*, pp 3–4.

31 Ai Group, *Submission 7*, p. 1.

32 Ernst and Young, *Submission 6*, p. 3.

33 Ai Group, *Submission 7*, p. 1.

> an employer by way of business profits or other routine business benefits that flow from employing or engaging a person.[34]

### *Sponsorship-related event*

2.30 Concerns were also raised about whether the definition of sponsorship related events is sufficiently broad enough to capture all types of 'payment for visas' activities that are likely to occur. The ACTU highlighted examples which the Bill may not capture, such as:

> …the potential for employers to seek a benefit in return for providing a working holiday visa holder the 88 days' work that can lead to a second year working holiday visa extension.[35]

2.31 The ACTU further expressed concern that other related 'events', such as advertising of positions with the 'lure' of migration outcomes may not be included in the definition:

> We would also like to see a ban on job ads that target positions for overseas workers with the lure of various migration outcomes; for example, job ads that advertise only for working holiday visa holders or that use the inducement of a second year working holiday visa.[36]

### *Executive officers*

2.32 The ACTU argued that the definition of 'executive officer' should be broadened beyond the definition set out in section 245AQ 'as directors, CEOs, CFOs and secretaries' of corporations. The ACTU asserted that 'there is a case for extending this liability to others with relevant authority outside these confined categories'.[37]

2.33 The department advised that the Bill reflects best practice corporate governance which provides for directors, CEOs, CFOs and secretaries of corporations to be the ones ultimately responsible for the culture and actions undertaken within a company.[38]

## Appropriateness of powers

2.34 Proposed sections 245AR and 245AS of the Bill define the offence of 'offering to provide or providing a benefit' and 'asking for or receiving a benefit in return for the occurrence of a sponsorship-related event'. In both sections, a person is deemed to have contravened these sections even 'if the sponsorship-related event does not occur'. In both cases the 'request for, or offer to provide 'payment for visas' is deemed to be an offence.[39]

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34 Department of Immigration and Border Protection, *Submission 10*, p. 6.

35 ACTU, *Submission 4*, p. 9.

36 ACTU, *Submission 4*, p. 9.

37 ACTU, *Submission 4*, p. 9.

38 Department of Immigration and Border Protection, *Submission 10*, p. 6.

39 Explanatory Memorandum, pp 9 & 12.

2.35 The Queensland Council for Civil Liberties (QCCL) submitted that these sections 'make the presumption that the person is guilty and has the burden of proving his/her own innocence'. QCCL notes that the reversal of the onus of proof in these sections of the Bill is in violation of Article 11 of the United Nations Universal Declaration of Human Rights that protects the presumption of innocence until proven guilty in a court of law.[40]

2.36 The Explanatory Memorandum explains that the reversal of the onus of proof is a 'necessary' measure: :

> It is necessary to reverse the onus of the burden of proof in relation to this matter because the information as to whether the benefit constitutes a reasonable fee for a professional service is uniquely within the knowledge of the defendant. The applicant for a civil penalty order would still be required to prove that the benefit was asked for or received in return for the occurrence of a sponsorship-related event.[41]

## Committee view

2.37 Most submissions to this inquiry supported the findings of the 2014 independent review that 'payment for visas' is an area of migration policy requiring reform.[42] The committee recognises that by designating 'payment for visas' as an unlawful action, this Bill would help to reduce the exploitation of visa applicants and holders. The Bill's range of criminal and civil penalties for 'payments for visas' would also be a useful disincentive to those who consider engaging in these activities.

2.38 It is the committee's view that whilst this Bill is tough on those who participate in 'payment for visas' activities, it has a number of review mechanisms to ensure that vulnerable visa holders would not be disproportionately affected. The committee is confident that the range of penalties available to the department ensures that penalties are applied in proportion to the alleged offence. The department should ensure that the changes proposed in this Bill are communicated through a consultation process with current and potential visa holders, employer and employee groups and the migration advice profession.

### Recommendation 1

**2.39 The committee recommends that a comprehensive consultation process is established and implemented with current and potential visa holders, employer groups and the migration advice profession to ensure that the changes proposed in this Bill are well understood.**

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40 Queensland Council for Civil Liberties, *Submission 1*, pp [1–2].

41 Explanatory Memorandum, p. 11. See also, p. 12.

42 John Azarias, Jenny Lambert, Professor Peter McDonald, Katie Malyon, 'Robust New Foundations. A Streamlined, Transparent and Responsive System for the 457 Programme: An Independent Review into Integrity in the Subclass 457 Programme', September 2014, p. 6, http://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/streamlined-responsive-457-programme.pdf (accessed 2 October 2015).

2.40 The committee notes that the reversal of the onus of proof in this Bill only relates to determining a professional fee; the onus for proving that a benefit was asked for or received (or offered to provide or provided) still rests with the department and the Minister. The Statement of Compatibility with Human Rights notes that 'in most cases, professional services would not constitute [payment for visas] conduct'. It is also noted that the reversal of the onus of proof has been included 'as a safety net to cover unusual circumstances that might arise in the course of work legitimately undertaken by migration agents or recruitment agents that might inadvertently constitute' payment for visas conduct.[43]

2.41 The committee is satisfied that this Bill achieves the right balance with regard to definitions for 'benefit', 'sponsorship related event', and 'executive officers'. The definitions are sufficiently broad to capture the broad spectrum of activities that constitute 'payment for visas' whilst providing opportunities for review for those who deem their actions to be legal. These review mechanisms provide migration and recruitment agents, and visa applicants and holders opportunities to provide information that may assist the department in determining the legality of their actions. The committee therefore recommends that the Bill be passed.

**Recommendation 2**

**2.42 The committee recommends that the Bill be passed.**

**Senator the Hon Ian Macdonald**
**Chair**

43 Explanatory Memorandum, Attachment A, p. 32.