



COMMONWEALTH OF AUSTRALIA

# Proof Committee Hansard

## SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL  
AFFAIRS

**Reference: Migration Legislation Amendment (Worker Protection) Bill 2008**

FRIDAY, 31 OCTOBER 2008

SYDNEY

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**SENATE STANDING COMMITTEE ON  
LEGAL AND CONSTITUTIONAL AFFAIRS**

**Friday, 31 October 2008**

**Members:** Senator Crossin (Chair), Senator Barnett (Deputy Chair), Senators Farrell, Feeney, Fisher, Hanson-Young, Marshall and Trood

**Participating members:** Senators Abetz, Adams, Arbib, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Collins, Coonan, Cormann, Eggleston, Ellison, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

**Senators in attendance:** Senators Farrell, Feeney and Fierravanti-Wells

**Terms of reference for the inquiry:**

To inquire into and report on:

Migration Legislation Amendment (Worker Protection) Bill 2008

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**Committee met at 9.03 am**

**ACTING CHAIR (Senator Feeney)**—Welcome to the Senate Standing Committee on Legal and Constitutional Affairs. This is a public hearing for the inquiry of the Senate standing committee into provisions of the Migration Legislation Amendment (Worker Protection) Bill 2008. The inquiry was referred to the committee by the Senate on 14 October for report by 7 November 2008. The bill seeks to amend the Migration Act 1958 to change the framework for the sponsorship of noncitizens seeking entry into Australia. To date, the committee has received 24 submissions for this inquiry. All of those submissions have been authorised for publication, and the submissions are available on the committee's website.

I remind all witnesses that, in giving evidence to this committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. The committee prefers all evidence to be given in public, but, under the Senate's resolutions, witnesses do 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. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken, and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, also be made at any other time.

[9.05 am]

**BROWN, Mr Ray, Director, Migration Institute of Australia**

**CHAO, Ms Laurette, Director, Migration Institute of Australia**

**ACTING CHAIR**—Welcome. The Migration Institute of Australia has lodged submission No. 23 with the committee. Before we commence do you wish to make any amendments or alterations to your submission?

**Mr Brown**—No.

**ACTING CHAIR**—I invite you to make a short opening statement.

**Mr Brown**—Thank you for providing us with the opportunity to appear before you. The MIA is the peak professional body representing registered migration agents Australia wide, with a little over 2,000 members at this stage, including lawyers as well as nonlawyers. For many years we have had a very active and constructive consultative process with the department of immigration in regard to proposed legislation and proposed policy changes. I think we have worked constructively in that area. That consultation has occurred less frequently over the last two years, but we are very keen for it to continue.

We have also sought to establish and maintain a constructive relationship with the ACTU. More than 12 months ago we established dialogue with the ACTU, primarily prompted by the area of worker protection. We were conscious of the media coverage which was arising—coverage which was representing workers being disadvantaged and unfairly treated by employers. We established a pro bono work group to provide assistance to workers that are in that situation. We have promoted that to the ACTU and advised the ACTU and the department of immigration of it, and I understand we have had 15 referrals.

**Ms Chao**—Approximately.

**Mr Brown**—Yes. I think they have come primarily from the ACTU in that area. As we have said in the submission, we support the thrust of the bill—that is, the thrust of worker protection. In our submission and in being here today, our interest primarily lies in the right balance being struck with the legislation and with some of the practical ramifications and some of the equity issues that have been touched upon in our paper.

What is the bill about? If you distil it down and read the information, the explanatory memorandum and the bill itself, it is about worker protection. But to my mind the real issue is how best to achieve that. It needs simple, clear legislation and legislative framework. I believe there needs to be an educational aspect to it for both employees and employers. It should encourage good practice. We have not noticed anything in the bill or in the explanatory memorandum that talks about the reward of good practice. Everything is in the range of being punitive. If it needs to be punitive, we think punitive should be at the end of the process. There needs to be flexibility so that inadvertent breaches can be treated as such, and administrative error or administrative breaches should be treated as such and not encapsulated into major breaches.

**ACTING CHAIR**—Thank you very much.

**Senator FIERRAVANTI-WELLS**—Can I first thank the Migration Institute of Australia for your submission. I would like to take you through some of your concerns. I might start with a set of general questions and then take you more specifically to your concerns. We are effectively going from undertakings to statutory obligations. How do you compare the two? Clearly an undertaking is different to an obligation. How much more onerous is it, leaving aside the content of that actual undertaking? Do you see this as a much more onerous obligation on sponsors?

**Ms Chao**—In essence, we see there is merit in having a requirement or an obligation, whether it is contained as an undertaking or a statutory obligation. I think the onerous aspect of it is the time of application and what is apparently a retrospective application of it. In our view, if there is an obligation and that obligation and when it commences to apply is clearly articulated to the employer, and the employees have an understanding of it as well, then that would not be unreasonable.

What the bill appears to say is that we have a pool of employers in the marketplace who have signed undertakings. The vast majority, we are of the view, are compliant with those undertakings or make their best efforts. Like a lot of Australian employers, they do make mistakes with regard to all aspects of the law, not only migration law, as we know. The nature of the statutory obligations leading to the penalties makes for very serious consequences if it applies immediately on commencement of the act and the regulations without

employers having a clear understanding of it. So they will be subject to breaches, infringement notices and penalties very quickly, in our view.

**Senator FIERRAVANTI-WELLS**—And you are concerned that there is not an adequate lead time? That retrospectivity is really, I think, a concern that has been raised by most of the submissions et cetera.

**Ms Chao**—Yes.

**Senator FIERRAVANTI-WELLS**—You make this comment that the regulations ‘may weigh heavily against the sponsoring employer’. You also make this point, and I would appreciate it if you could elaborate on it:

Australian employers will avoid sponsoring overseas workers and without the skilled workers they need in the Australian labour market, the employers will either fail or take business offshore.

From your perspective, can you give me a little bit more background as to the basis of that assertion and how extensive you think that will actually be?

**Mr Brown**—I think the concern primarily comes into the practicalities. Some of it is not clear, but the inference that I take from the explanatory memorandum is that we are going to see a micromanagement process here. When I read in the explanatory memorandum, for example, that an employer may be required to maintain records in a specific form—electronic—it suggests that we are not looking at the broad thrust of the protection but getting into the management of the administration of this. That is where it concerns me and where I think it potentially will strike at employers.

We have seen with government bodies in the past that, once given a framework which goes down that path of micromanagement, the inclination is to drive that very heavily. We get caught up in the detail and the process rather than what the outcomes are. That can impose a substantial cost on the employer. If you are a very large employer, it could be a large cost, but small employers may not have the capacity to do that.

Bringing someone in from overseas is already an expensive process. There are substantial additional costs to employers in bringing someone in from overseas as compared to employing someone locally. Any employer is going to weigh up those costs and ask, ‘Can my business afford to bring this person in.’, and they are already doing that. If they have these other layers of costs imposed on them in doing this, they have to factor that in as well. Are they going to be able to afford them? If not, if that is a skill that they need, then that is a part of their business that will not be able to operate. I am not at liberty to talk about individual cases, but I can think of an individual case where this was a very real issue that they went through. This business is in a regional location, employs a number of local people and has quite an input into the local economy. That business was at a stage of maybe having to shut its operations.

**Senator FIERRAVANTI-WELLS**—And that is where you pick up the concern that you have that it may impose an unreasonable economic burden, particularly on a small business operator who may keep absolutely good records but may not operate in the sort of way that is prescribed by DIAC and therefore would find himself in breach, notwithstanding that he may be well and truly meeting his obligations.

**Mr Brown**—That is right. It is in that administrative area that the onerous part of it seems to come from. We do not really have an issue with the indicators of the broad obligations. It is the administration of those.

**Senator FIERRAVANTI-WELLS**—Can I just take you back. Of course, in your position you have experience across the spectrum of the users of a wide range of visas and the users of the wide spectrum of 457 visas.

**Mr Brown**—Yes.

**Senator FIERRAVANTI-WELLS**—Thank you. Can I just take you to this issue of the worker agreement and how it can vary the sponsor obligations. Could you just elaborate some of your concerns in that area as well?

**Ms Chao**—From our reading, the work agreements are designed to provide flexibility for the government and the department to cover more visa subclasses, potentially, or sponsored workers than the 457 regime. So it can move towards the religious worker visas. I will not quote any subclasses, lest I be in error—

**Senator FIERRAVANTI-WELLS**—Yes. But there is a range of subclasses.

**Ms Chao**—Yes, there is a range. Our concern is that, in essence, where you do have sponsor obligations and undertakings that are contained in the law or the regulation, although it is difficult for a worker or an employer to, on a day-to-day basis, read or have an understanding of it, they will be able to find it and seek

advice about. The information will be on the department's website, as it already is to a degree, although not necessarily the exact, detailed but part of it. Once you have work agreements in the scheme of things that vary and override those obligations, it adds an extra layer of complexity, which an employee and an employer can get confused about. An example that we have included here is that an employer can employ a range of temporary resident employees and, to have a better understanding of what the company's obligations are, they would turn to the act, the regulations and their adviser if they have one. If they were also subject to a portion of their employees to a work agreement, the bill suggest that the work agreement could vary the other sponsor obligations. So an employer could be subject to different ranges of obligations for different employees who may work at the same workplace and that creates an added level of complexity, equally for the employee, who may not have a true understanding. It is not transparent from a broad point of view, because obviously the agreement is an agreement between the Commonwealth and whichever industry or employer it is. Therefore, a potential employee cannot see what they are walking into. That, in general terms, is an issue about the work agreements.

**Senator FIERRAVANTI-WELLS**—There is also an issue because the regulations are not on the table. Can you comment on that? You make reference to that. How important do you see that we should have the regulations at this point to look at this in its totality rather than waiting for some stage later on? It has been a feature of some of the submissions. What is your opinion of that?

**Ms Chao**—It is very important because in essence we have a framework which raises some alarm bells which could be ameliorated by regulations. Equally, it could add the clarity and concern to provide better decision making at this point.

**Mr Brown**—That was part of the catalyst, almost, for some of the issues in our submission. It is not so much the framework of the bill by and large; it is the detail that is coming down. We do not know.

**Senator FIERRAVANTI-WELLS**—We are going blind on the details. That really is the issue. In fact, in reading your submission your concern is that the regulations, which may be imposed from time to time, can vary obligations on an employer and suddenly they may find themselves with added obligations to an arrangement that had been entered into on the basis of other obligations. All of a sudden regulations can vary that and add other obligations. That sits squarely within your concerns.

**Mr Brown**—That is right.

**Ms Chao**—I can provide an example of a retrospective change of law. The minister recently announced something and an increase was made to the minimum salary level. That was applied retrospectively. We are aware of examples where employers and employees were very happy in their employment arrangement. In particular one employer had not been found to breach any of its undertakings but the retrospective increase for that employee's salary required the employer to make a decision—a cost benefit analysis—and had to terminate the employment of the employee. The employee was very distressed because he was very happy. He did not need the three per cent increase. He was grateful, but he also knew that his employer was unable to keep him in employment. That was very distressing because his son was completing his high school certificate and the timing was very poor. Retrospective application of obligations and the like have a very real practical impact not only on an employer but on the very people we are seeking to protect with the worker protection. That is just a small example.

**Mr Brown**—That example reinforces that the very people we are trying to protect, particularly when you impose retrospective provisions, could be the people that are disadvantaged.

**Senator FIERRAVANTI-WELLS**—You make reference in point 4 to concerns about methodology. Can you elaborate in relation to that?

**Ms Chao**—Point 4 refers to the minimum salary level provisions. They have changed on various occasions and there is confusion about the minimum salary level and how it applies. The formula has been changed and legislative instruments have been passed on various occasions trying to better explain it. So what was initially a two-page document has turned into a 12-page document with examples of how to apply the minimum salary level. Employers and employees are getting increasingly confused as to how they are supposed to be paid or to comply, rather than just simply, 'Oh, I get a salary; it is a base; it excludes certain things such as allowances, commissions, bonuses, living away from home allowance and superannuation.' Our concern, again without seeing the detail, is what method, what calculation, will be suggested to work out the cost. Unfortunately, employers, employees and certainly registered migration agents—lawyer or non-lawyer; they are not

actuaries—are not all mathematicians. When you start getting formulas introduced that become more and more complex it does create a problem. That is what we are concerned about.

**Mr Brown**—There was also the issue of working out the costs that may be incurred in locating and detaining a person. The explanatory memorandum at paragraph 121 says that the minister may by written instrument specify ‘one or more methods for working out’. That is what we are getting it—the ‘one or more methods’. We do not know what the methods are. There could be a range of methods. The concern again is that if you have a number of different methods is there equity between one and the other, and certainty as well.

**Senator FIERRAVANTI-WELLS**—In your submission you make comments like ‘overly rigid’ and ‘oppressive enforcement regime’. You particularly focus on the failure to provide a document and the potential for a six-month jail term. You refer to the mandatory nature of obligations and that there does not seem to be any provision for an innocent mistake. All this amounts to serious concerns on your part about whether this is overly regulating a situation. I appreciate that there have been problems; I do not discount that. Previous legislation—the sponsorship obligation bill, of which you are no doubt aware—picked up some of these issues. Do you feel that the framework proposed is too rigid for what is sought to be achieved, which is to catch in effect those employers who are not doing the right thing?

**Mr Brown**—We believe it is largely because it is drilling down very much into the micro side of it. The broader obligations as indicated here are essentially the same as they were under the current regime. So it is not really in that area at all that our concerns are. As suggested in here, it is in the way it is going to be administered and the retrospective aspects. It is in those two areas that our concerns primarily lie.

**Senator FIERRAVANTI-WELLS**—Perhaps you could take this on notice: there are information sharing provisions which are proposed; do you have any comments in relation to that? Also about the possibility of inspectors and a wider scope for them so that in effect you have one inspector coming in and doing a series of things. I think you have touched on the recovery limits being prescribed and what those costs are. I think you were concerned about that—on the retrospectivity.

**Senator FARRELL**—I would like to follow up on that last question about information sharing. Do you have any comments that you want to make today or would you like to take that on notice?

**Ms Chao**—I will take that on notice.

**ACTING CHAIR**—As I understand your evidence, you are essentially satisfied with the broad thrust and the goals of the legislation.

**Ms Chao**—Yes.

**ACTING CHAIR**—Are you comfortable with the policy objective which has been articulated, which is that workers working pursuant to these visas effectively work in Australia under a premium, if I can put it in those terms. That is to say that the system is designed so that foreign workers are intrinsically more expensive than Australian workers. That is in fact one of the intents. Do you have any response to that?

**Mr Brown**—We do not really have a problem with that concept. Where it seems to get lost though is that as a broad statement that is all right; when you start getting into the detail of this that message seems to get lost.

**ACTING CHAIR**—Senator, do you have any more questions?

**Senator FIERRAVANTI-WELLS**—I was very conscious of the fact that these witnesses are here until 9.45, but I do have other questions that I would like to ask. There is a substituted provision which redefines ‘approved sponsor’, and that approved sponsor will include a party to a work agreement. Do you have any concerns or comments about the proposed redefinition? Do you envisage that that will expand the scope of the potential sponsors?

**Ms Chao**—Yes, we would envisage that it would expand it, certainly. I think I mentioned it a little earlier in terms of it covering other visa subclasses, so it would cover religious organisations that are not dictated by the sponsorship obligations or undertakings currently.

**Mr Brown**—We do not quibble with or have an issue with the obligations covering sponsors in other visa classes.

**Senator FIERRAVANTI-WELLS**—Can I ask you a global question. The 457 visa framework has grown considerably over the years. Picking up the point that Senator Feeney made, employers in Australia are going overseas because they perceive there is a deficiency in the labour market here in Australia. In the end, in your observations in workplaces, leaving aside the cases that we have seen where there have clearly been breaches

of undertakings, do you have a view as to the overall success of the visa program? As a second part to that, it seems to be painted in the light of the workers themselves being worse off, if I can put it that way—and I appreciate the framework for the need to install a protection. But it seems to me that you cannot on the one hand say that they are being paid more and then at the same time say that they are more hard done by. Do you have a comment on that?

**Mr Brown**—I was going to make the comment that I think the public information which has been released over many years and our own anecdotal experience as well is that the scheme has been successful. I think 457s have generally been regarded and endorsed within government as being a major success up until some of these abuses came to light and attracted publicity. That caused, naturally, a rethink. It was obvious and necessary that there was a rethink in that area. But the information still suggests that that area of abuse is very limited in terms of the broad scheme. It needs attention, but the attention has to be careful about, to use the old saying, throwing the baby out with the bath water. We do not need a sledgehammer here to crack the proverbial nut. I do not think the framework does that, except, again, there are concerns of retrospectivity and the penalties and the detail that might come in the regulations.

As to the second part of the question, I find it very difficult to provide you with an informed answer, because there are individuals that are worse off but, equally, there are others that are better off through the scheme. This legislation as I read it is looking to put in an underpinning and a baseline to make sure that those that are potentially subject to the abuse are safeguarded against that. At that level I think that is appropriate.

**Senator FIERRAVANTI-WELLS**—Obviously as the institute you do research analysis from time to time. Have you done any work in relation to 457s?

**Ms Chao**—No research specific to 457s Senator.

**Senator FIERRAVANTI-WELLS**—Thank you. If, in taking matters on notice, there are others that you wish to add, please feel free to do so. Thank you.

**CHAIR**—We do not have any further questions. Thank you very much for attending today.

**MOTTO, Ms Megan, Chief Executive Officer, Association of Consulting Engineers Australia**

**OSTROWSKI, Ms Caroline, National Policy Officer, Association of Consulting Engineers Australia**

**ACTING CHAIR**—I welcome representatives from the Association of Consulting Engineers Australia. The association has lodged submission No.4 with the committee. Do you wish to make any amendments or alterations to the submission that you have lodged with us?

**Ms Motto**—Not at this time.

**ACTING CHAIR**—I now invite you each to make a short opening statement, at the conclusion of which I will invite members of the committee to ask questions.

**Ms Motto**—I would like to start by explaining a bit about who we are and the types of members that we represent. We represent firms that operate in consulting engineering and the technical services professions, so our firms range from very large multidisciplinary firms right through to small one-man-bands, sole practitioners. Our industry is of a demographic that is similar to general industry, which is 96 per cent made up of small businesses, and we represent all of those members and all of those disciplinary categories. Our members employ not only engineers but quantity surveyors, architects, a range of professionals within the built environment professions and also beyond—scientists, biologists, psychologists and the like. At last count we had about 104 separate occupational groupings employed within our member firms, so they are extraordinarily multidisciplinary.

Our industry is experiencing a critical skills shortage at this point in time. It came to our attention in about 2000-01 and it continues to exist. At that time the member firms, at least the CEOs of the large firms, felt that probably the skills shortage of the time was cyclical in nature, but they have since come to discover that it is quite systematic in nature in terms of engineering professions in Australia. In fact, recent research coming out of Engineers Australia shows that there is a shortage of about 28,000 engineers in Australia and, given that we only graduate about 6,000 engineers a year, we are not going to be graduating enough engineers over the next five, 10 or even 15 or 20 years. Given the ageing demographic of the engineering population, we will actually be losing more engineers in terms of retirement over the next five to 10 years than we will be graduating. So in fact we are looking at going backwards in terms of our production of home-grown engineers in Australia.

In addition to that, we survey our own member firms in terms of their labour capacity and our last three years of skills surveys show that about two-thirds of infrastructure or engineering projects that the firms are asked to do have to be sidelined either temporarily or indefinitely because they just do not have the people to do the job. Two-thirds is a reasonably big figure, particularly considering the current economic climate that we find ourselves in whereby the government is injecting capital into infrastructure works and bringing forward the expenditure of the Building Australia Fund. The reality is that, without engineers to design and deliver the projects, we will not be able to physically deliver the infrastructure required to kick-start the economy. So it is very important.

In terms of the use of 457 visas, in the last 10 years we have gone from about 1,000 to the latest statistics that we have from DIAC which show that there are about 4,652 engineers on 457 visas in Australia. So they are widely utilised. So we certainly know that there is a high percentage of 457 use and many of them are used by our member firms. Some of our large member firms are employing more than 200 457 visa holders on a variety of projects around Australia.

The skills shortage in our industry is very real. It has been measured. We did a search on seek.com—and of course that is statistically viable, as everyone would appreciate—and 27,000 results came up on a search for engineers. That is in comparison to about 800 for cooks and 454 for hairdressers. So 27,000 results represent a fairly large figure in comparison to some of the other professions that use 457 visas.

We feel that the 457 visa program and certainly the amendments to the bill make an assumption that all 457 visa holders are low-skilled, from non-English-speaking backgrounds and people who cannot negotiate on behalf of themselves or determine their own rights. Certainly that is not true for our profession. We bring in high-skilled, white-collar, university educated professionals. Engineers are not only in shortage in Australia; there is a global shortage of engineers. So they are paid well in excess of the minimum salary level in most cases, depending on their level of experience and education and other skill sets that they bring to the job, of course. But, generally speaking, the people that our industry brings in on 457 visas are more than capable of understanding and negotiating their rights and salaries et cetera.

One of the things that we would like to suggest is that the 457 program—and in fact we have suggested this on a number of occasions—is that there really needs to be almost a two-tiered system. The minister has recognised this and in fact has indicated that there will be some form of accreditation program for the types of employees that we represent—people, for example, not only in professional engineering and technical services firms but in the financial services sector and legal professionals. When you are talking about university educated, white-collar professionals, they really need to be dealt with in a different manner from 457 visa holders who are unskilled or from non-English-speaking backgrounds and who are therefore not as capable of determining their rights and negotiating their conditions.

The abuse in our industry is extraordinarily low, as we believe the abuse within the overall system is very low. But it is extraordinarily low in those white-collar, professional industries. One of our concerns with these amendments is that we are using a sledgehammer to crack a peanut for our industry; that an industry that is so desperately in need of skills is going to be disincentivised from bringing in those skills through onerous obligations, particularly small and medium firms that are in particular struggling to find skills in Australia. In any case, what tends to happen is that small firms generally tend to find university graduates or bring in 457 visa holders only to have them poached by big firms down the track.

The lasting comment that I would make is that we believe that the 457 visa system should be in fact a freer system that really recognises a modern economy, particularly a modern economy in the services sector, which is where Australia and certainly our industry sit, and where Australia is moving—towards more services sector industries, particularly professional services sector industries. I think I will leave it there and ask for any questions.

**ACTING CHAIR**—You have described quite vividly for the committee the capacity constraints that bedevil your industry and the fact that those capacity constraints were identified quite some time ago, in 2000-01. Given that, as you put it, this is a systemic rather than a cyclical problem, what role do you see these visas playing in ameliorating what is clearly a bigger, more long-term and more national issue than perhaps the visa program was originally conceived to handle?

**Ms Motto**—The visa program—in fact, the whole skilled migration program—is not going to be the be-all and end-all in addressing the skill shortage of engineers in Australia. ACEA actually has a multifaceted skills development strategy which looks at skilled migration and 457s as a bit of a stopgap, if you like, to ameliorate the short-term problems whilst we are looking at the education system at all levels to look at the long-term problems. So we are engaged in primary school education, trying to get more students involved in maths and science, trying to improve the quality of the teaching of science in primary schools, through to educating high school students about the role of engineers and what engineers do.

We have produced a DVD that has gone into every secondary school in Australia to explain what engineering is as a profession. That is unfortunately something that is needed, because most students understand what a doctor is and a lawyer is and they certainly understand what a forensic scientist is—because of *CSI* and the like—but they do not appreciate really what an engineer is. There is a perception out there that engineering is dark and dirty—down the mine with a hard hat on and all the rest of it. They do not appreciate that most of the work is in fact in front of a computer in a nice air-conditioned office doing design work.

Then we do a lot of work in the universities educating people who have already chosen to be engineers, in terms of coming into consulting services. Many years ago you went straight into the public sector if you became a graduate engineer, whereas now we are looking for many graduates to come directly into consulting services businesses.

So we cover all aspects of an education. It is a long pipeline. Even if we get more secondary students choosing engineering at university, there is a four- to five-year pipeline before they will even graduate and enter the industry. So the 457 visa program is really just to try and top up the numbers, if you like, to alleviate the short-term problems—although, once again, as we said, it is going to take a long time to turn around the fact that we are living in a society that has moved substantially away from the hard maths and sciences and more into the humanities in education and therefore produce the numbers of engineers that we really need in this country.

**ACTING CHAIR**—You have described how in your particular industry—or perhaps I should say industries, given the breadth of occupations—there are some unique circumstances, most particularly demand and supply, which mean that persons are not going to be exploited, in the traditional understanding of that term. As a consequence, people working in your industry, including visa holders, are in a position to command good salaries, good conditions and so forth. Given that those circumstances apply, how is it that those

protections found in the bill, those provisions that go to system integrity—and system integrity, I suppose, is one of the aspirations of the bill—form an onerous obligation on your members, on the sponsors? How is it that the fact that that sort of exploitation is not going on means that those sorts of protections form any kind of additional, onerous burden?

**Ms Motto**—There are a couple of aspects in the bill itself. The first is the aspect of retrospectivity. The language in the bill makes it uncertain whether the bill will be applied retrospectively. Given that we have over 4½ thousand 457 visa holders already in Australia, the sponsorship obligations for going retrospective for those visa holders would be quite onerous on the firms. Not only would they then have to look at those conditions for 457 visa holders but they would also have to for all employees for parity purposes, because 457 visa holders talk to the other employees—and, if they are being afforded, for example, payments for their children to go to school, then why are the Australian employees not afforded the same advantages?

The implications for the firms could be quite extraordinary in terms of the financial consequences of some of the obligations. In particular, we are concerned about the penalty determination and the section that talks about the minister needing to be reasonably satisfied that a breach has occurred to determine a penalty. We suggest that the bill needs to go further than that and that that satisfaction needs to be based on hard evidence, because we know from some years ago, when the media was full of stories of abuse of 457s, particularly in the hospitality industry at that stage, that that was the birth of the review of the 457 visa holders. On research and evidence from those cases of abuse, it has since turned out that in many of those cases the workers were not actually on 457 visas at all. They were permanent residents of Australia, and those breaches should have been dealt with through the Workplace Ombudsman because they were industrial relations breaches, not 457 visa breaches.

We are very concerned about the penchant of the media for beating up some of these stories and, therefore, the minister feeling pressured to once again deal more harshly with the firms involved than is possibly necessary in those circumstances. In any case, we believe that the minister should have at their disposal evidence to see that a breach has happened and that it has happened purposefully—that it has not been an inadvertent breach. When you are dealing with firms that have 5,000 employees and an engineer who is a manager in a regional location hiring a 457 visa holder, they are not necessarily trained in industrial relations, sponsorship obligations or any of the other HR issues that would surround the employment of 457 visa holders. They can make inadvertent mistakes. We have suggested in our two-tiered system that it be a very stringent system—that one inadvertent mistake be let go but, on the second strike, you are fundamentally out. After they have been found to have made an inadvertent breach, it is incumbent on the employer to then train all of their staff in the obligations so that those inadvertent breaches do not happen again. We are proposing quite a strict system, but we do believe that there needs to be evidence involved other than just ‘reasonably satisfied’, because from the public’s perception there is an imperative on ministers to make quick decisions, and all of the evidence may not necessarily be available to the minister.

With regard to amounts payable with sponsorship obligations: whilst our member firms are employing highly skilled workers who can negotiate their rights, we are talking about 96 per cent of those businesses that are small and that are struggling in the current economic climate. Having fees imposed upon them would just turn them off using the 457 system altogether. These fees are, of course, on top of recruitment fees, travel fees to go to recruit these people and interview fees. These are jobs where the firms do not just ring a labour-hire company and say, ‘Get me 10 staff.’ These are highly skilled professionals who need to be incorporated into the cultural landscape of the Australian employment market in these firms. They have to communicate with clients, construction companies, infrastructure developers and government. They are very highly skilled, and the firms have to go overseas and interview these people rigorously—which they do.

On top of all those recruitment costs, to ask employers to pay additional costs just in case something goes wrong we believe is too onerous. Given that the number of over-stayers is less than five per cent from the 457 visa program and that most over-stayers come from the visitor visa program, we believe that is, once again, cracking a walnut with a sledgehammer. It is overkill considering the level of abuse that happens in the industry.

**ACTING CHAIR**—You may have heard me ask this question of the previous witnesses. The government has articulated the policy view that workers working pursuant to these visas should be more expensive than Australian workers, that in fact that premium is part of the idea. I wonder what your response to that is and how that policy objective marries with your idea that these recruitment costs and so forth are too expensive?

**Ms Motto**—In our industry, we believe that the market should decide. There is a global shortage of engineers, as evidenced at our last international conference of 79 sister organisations around the world—73 out of the 79 indicated that skill shortage was their major problem. This is certainly a global problem for engineers. At the end of the day, if there are Australia workers to fill the gaps, that is the cheapest solution for Australian firms because of the additional costs involved in recruitment. Firms will certainly take that option if they can. In fact, in our industry, certainly the 457 visa system and the migration option is a more expensive option. The firms are happy to live with that but they desperately need the skills, so they must go down that path.

The minister's comments are in line with what is happening at the moment in the Australian market. However, given a turn in the market and given the breadth of the 457 visa program, certain markets will not necessarily be in those conditions. It might be a cheap option we understand to bring in 457 semiskilled or unskilled workers and undercut Australian wages, which is exactly why we suggested that there needs to be a two-tiered system. That idea initially came from consultations with former minister Vanstone then with former minister Andrews and now with Minister Evans. If we look around the table at consultations, we have hospitality, hairdressers, semiskilled workers, fruit pickers and the like on one side and we have the financial services market, legal professions, consulting engineers, architects et cetera on the other side. Our needs are clearly different.

**Senator FIERRAVANTI-WELLS**—Thank you very much for your submission. Your material is very comprehensive. I notice you gave a very detailed submission as part of the consultation process and the discussion paper, and you list a series of recommendations. Given where you are on the spectrum of 457s, how many of your recommendations have actually been incorporated into this draft bill? You might take this on notice if you do not want to pick it up now. I am interested in the point you just made about consultation.

**Ms Motto**—I will make a few comments, but I will take the major question on notice. In terms of the recommendations, the particular discussion paper that came out for the worker protection bill does not necessarily cover all of the areas about which we have made recommendations. It is limited in its scope. We do not feel that our recommendations have been highly picked up in terms of penalising all organisations for breaches that happen by a few. For example, the indication that organisations or firms would have to all pay a flat fee, in fact, goes against our recommendation, which is to only penalise those organisations which are seen to be, through evidence once again—

**Senator FIERRAVANTI-WELLS**—Or history of.

**Ms Motto**—or history of—playing around the edges of the 457 visa obligations as they currently stand. Our industry is certainly not in that basket, so to ask our member firms to pay an up-front fee for the likelihood of someone absconding that is less than maybe two or three per cent, we feel that is not justifiable.

**Senator FIERRAVANTI-WELLS**—Comparing current undertakings and the obligations that are now, in so far as we know them, set out in this bill, how do you think the two compare?

**Ms Motto**—We have some problems with current undertakings, and we would like to see some of those repealed. For example, the obligation to pay up to \$10,000 for location detention and deportation of individuals if someone does abscond from their visa. Once again, those employees should be treated like any other Australian employee when they are in a marketplace which is valuing them highly. Another example is the payment of medical expenses. The 457 visa holders contribute to our taxation system and we believe that they should have the same benefits as Australian workers in terms of being covered by medical benefits and the like. So there are a number of obligations in the current legislation that we would like to see repealed under our two-tiered system once again.

The difference between the current obligations and the proposed obligations is that, once again, they are going that one step further in trying to provide a blanket approach for all businesses. So rather than if something happens you will be expected to pay, now it is everyone is going to pay a premium just in case something happens. The presumption is really turned more to one of guilt before you are proven innocent rather than innocent until you are proven guilty, as we see in some of these new obligations.

**Senator FIERRAVANTI-WELLS**—My next question is: do you think that this is going to detract employers from recruiting 457s and, in turn, have the effect of shutting down businesses and the necessary economic consequences that that will entail? Let me give you an example. You have a small business that is typical in your organisation. In your view, if I understand you correctly, if you make the burden on them so

great so they will not bring the 457 visa holders from overseas, but if they cannot bring them in then you envisage that that small business may well fold.

**Ms Motto**—That has, in fact, already happened to some extent in our business.

**Senator FIERRAVANTI-WELLS**—And the Australian workers who are in that small business will then find themselves out of a job.

**Ms Motto**—I would not necessarily say that the workers would find themselves out of a job because there are plenty of jobs to go around for our industry, but what has tended to happen in our industry already is that small businesses find it difficult to compete for staff with large businesses. They find the 457 process, even as it currently stands, too onerous and too difficult, therefore they do not pursue that option. Rather than pursue that option, they sell their organisation to a bigger firm and merge with a bigger firm. That creates less competition in the market, it creates less impetus for small business and entrepreneurship in Australia, in our industry, and it certainly creates less employment opportunities for a myriad of growing small businesses as opposed to the consolidation of the market, which is what has happened in our industry substantially.

**Senator FIERRAVANTI-WELLS**—There is some concern about the fact that there is this new framework, but the details of the regulations are yet to be drafted. Notwithstanding the consultation and the reviews that have occurred, we are yet to see those regs and we are not going to see them until next year. Of course, that means that we do not know what obligations are going to be known. Would you like to comment on that?

**Ms Motto**—We are very concerned about the fact that we do not know what the regulations are going to be. The devil in these things is, as always, in the detail. Certainly from the association's perspective, we find it difficult to respond to the overarching bill without knowing what the regulations are going to be because we are really not sure how our industry will be affected without those regulations.

**Senator FIERRAVANTI-WELLS**—Having gone through the process of consultation thus far, do you think the government has already consulted sufficiently to put it in a position to make the regulations available?

**Ms Motto**—No, we do not believe the government has consulted sufficiently. The time frame for some of these submissions to be handed in has been extraordinarily truncated. We have had very little time to consult with our members and pull together the appropriate evidence required to really make it full and thorough. I appreciate that our submission is thorough, but it would be even more so if we had had more time to consult with our members in a more detailed manner.

**Senator FIERRAVANTI-WELLS**—So your view is that basically the government should now put the regulations on the table—

**Ms Motto**—And give us time to look at them.

**Senator FIERRAVANTI-WELLS**—have the consultation process and then enact the legislation?

**Ms Motto**—Most certainly. We need time to digest them, particularly given the changing circumstances over the last few weeks and months in the financial markets. We need to reassess the position in the new landscape. It is very important. As I said, I think that our industry will be less affected by the new financial landscape than other industries because of the bringing forward of the Building Australia Fund and the increased infrastructure work going on in Australia, and also the globalisation of some of our firms. There is a still lot of work elsewhere in the world that is also injecting capital into infrastructure programs, but there needs to be far more time for consultation on these issues because we have found it very difficult to make recommendations given the truncated time frames for consultation.

**Senator FIERRAVANTI-WELLS**—Following on from that, this proposed approved sponsor in this new item 8, which will include a party to a work agreement. It basically says:

... work agreement means an agreement that satisfies the requirements prescribed by the regulations for the purposes of this definition.

It follows on from the very point that you are now making about the fact that we do not actually know what is in the regulations and clearly there are concerns about the proposed work agreement framework.

**Ms Motto**—That is right.

**Senator FIERRAVANTI-WELLS**—I have a couple of other questions, if I may. One is the question of the inspectors and the proposed framework for inspectors. The gist seems to be to create efficiencies in inspector visits. Do you have a view in relation to those inspector obligations?

**Ms Motto**—We do not have major concerns about inspector visits in our industry. One of the reasons we do not have major concerns is that we are lucky enough to have an immigration outpost officer posted with our organisation three days a week. We find that our firms get the advice up-front to do the right thing, so we do not have a huge issue with inspectors coming in and the process with which that is done. We suspect that, once again being highly skilled, highly professional white-collar industry firms, that would continue to be the case. So we do not really have a major comment to make on the inspector program at this point in time.

**Senator FIERRAVANTI-WELLS**—I have a couple of other questions in relation to the proposed increased information sharing arrangements. Do you have any comments in relation to that?

**Ms Motto**—Once again, as long as it is very clear to firms what information is required, what the penalties for not providing that information would be, what the time frames for providing the information would be and ensuring that the information is not required in a format that is onerous for the firms to put together, we have no problems with the firms sharing information with the department. In fact, we would encourage more information sharing, not only between the firms and the department but, for example, between department, the ATO, the workplace ombudsman and the agencies so that, as I described before, those situations where it is not necessarily a visa breach but an industrial relations breach are picked up earlier in the process and handled appropriately.

**Senator FIERRAVANTI-WELLS**—And of course the prescribed form for that information to be provided. Obviously, if you are talking about a small firm, these are set requirements that could cause some burden on some firms in terms of the prescribing of the way that information has to be provided.

**Ms Motto**—That is right. Once again, it is horses for courses. A firm that is employing 200 visa holders would have systems and processes in place. But that would be as long as the department is flexible in terms of the way that the information arrives so that it is not unduly placing a burden on business. Small businesses would only have one or two 457 visa holders and would be able to fill out a simple form. Larger firms may have administration or payroll systems that spit out a whole range of information that is appropriate for the department but that may not necessarily be in the format that the department would prefer. I think there needs to be some flexibility in terms of how the department would accept information, as long as the information is all contained.

**Senator FIERRAVANTI-WELLS**—You mentioned before media reports. Do you believe there has been a sustained campaign driven in relation to diluting the 457 visas? Do you think that has been a campaign that has been run here by certain elements to try to shut this thing down?

**Ms Motto**—I believe that there have been a number of campaigns in Australia over the last year or so that have confused the issues. There is no doubt about it that some abuse happens, but to make assumptions based on those campaigns that the abuse is widespread, across all the industries, is absolutely incorrect. Whilst we have no problems with factual information being released, it does need to be factual information that puts the abuse situation in the context of the broader picture, and we do not believe that that has been adequately portrayed. We do feel that some of the information that is now coming out in the new regulations and bill are a little heavy handed because of the pressure of the media.

**Senator FIERRAVANTI-WELLS**—In the areas where your members operate are you aware of direct or indirect union activity as a campaign against 457 visas?

**Ms Motto**—No. The union we deal with mostly is APESMA, the Association of Professional Engineers, Scientists and Managers of Australia. We have a very good relationship with our union. We do not have the normal relationship, because we are white-collar professional workers and there are few breaches. We work quite closely with our union. In fact, I rang the acting CEO of the union before I appeared today to discuss some issues with him.

**Senator FIERRAVANTI-WELLS**—We actually have a submission from them as well.

**Ms Motto**—Yes. So we have a very good relationship. In a number of industrial relations matters we work collectively with the union to pursue those matters. It is not a great issue in our industry.

**Senator FARRELL**—Are you familiar with the proposals regarding information sharing in the new legislation? Do you have any suggestions as to how that might be improved or any comments generally about that?

**Ms Motto**—Once again, if you would like more details then we could take the question on notice. As a general comment, we do feel that information sharing between the departments has been insufficient in the past. Because of the need for expediency in dealing with some of the breaches, all the appropriate consultation between the Workplace Ombudsman and the ATO has effectively happened down the track as opposed to upfront in the process. We do believe that better information sharing between departments would be of benefit in terms of getting some of the stories right and therefore pursuing the correct path of action with regard to how bills may need to be amended to prevent abuse in the future.

We believe consultation between firms and the department could also be tightened and we believe that the information outpost officer program is the perfect way to do that. We are very pleased with how that program is working for our members in terms of two-way information sharing. It has not only opened up paths for our members to learn more about the visa program and access that program more easily but it has created a very nice conduit between the association's information and the department's information so that we are much more in tune with what is going on in our industry.

Of course, the other thing it has provided is an area of specialisation within the department that understands our industry's specific needs. One of the problems that we used to experience in our industry—and in fact we quoted this problem when we were vying for one of the outpost officer positions—was that, every time a member firm rang up an officer in the department, they had to explain what engineers are and what the difference between a mechanical engineer and a mechanics engineer is. Similarly to the education program that we are running for secondary education students, we could probably run an education program for the wider community, because engineering is a very specific industry. A civil engineer that works on railways is very different from a civil engineer that works on roads. Different skill sets are required, and we need someone in the department who understands that.

**ACTING CHAIR**—I have two questions which follow on from the questions from Senator Fierravanti-Wells. Firstly, we have received a submission, albeit a brief one, from APESMA, and I want to put one of their contentions to you. Their submission is submission No. 5 and is signed by Michael Butler, Acting Executive Director, Industrial Relations. In that submission he says:

Temporary overseas workers are more vulnerable to exploitation and abuse by unscrupulous employers than permanent residents. The risks inherent in temporary overseas worker programs are widely acknowledged by international organisations and labour migration experts.

That could perhaps be interpreted as contradictory to some of your evidence today. I just wonder if you have a response.

**Ms Motto**—Indeed. I think you can see from the breadth of our submission material in comparison to the breadth of APESMA's submission material that we believe that is a fairly sweeping statement. We also understand that APESMA deal with a range of professions across the engineers, scientists and managers professions and that they are making sweeping statements that are geared not necessarily just to their members but to the general community. We would say the same: across the whole program there is a requirement for tightening up the sponsorship obligations. But we would say: do not tar everyone with the same brush. Whilst I agree that those comments might be correct in the context of the whole program, they are certainly not true for the context of our industry.

**ACTING CHAIR**—Secondly, you made a comment about how the skills gap generally, together with this program, is driving consolidation in your industry. I wondered whether that consolidation meant that there was a changing profile in your industry and that your members were ceasing to be small businesses as they consolidated. Do you have a remark in response to that?

**Ms Motto**—There are still plenty of small businesses. Many sole practitioners prefer to operate as small businesses or independent contractors in our industry and contract their services to the larger firms because they have specialist niche expertise and that is the way that they prefer to run their lifestyle and conduct themselves. So, whilst there is heavy consolidation, it tends to be of the larger sized small and medium firms with the large firms. The large firms are definitely getting bigger. As an example of this, I can quote to you that, when I began at the association in the year 2000, we had about 350 member firms that employed about 12,000 staff. We now have 260 or so member firms, so the number of firms has gone down, but they now employ 45,000 staff. So the big firms are getting much bigger and the small firms are working as either

consultancies or subconsultants to the large firms, but the small-firm market is still very active in Australia in our industry because of those niche expert skills that are required. There will always be a robust small-firms market in our industry, but, in consolidation, as I said, we reduce competition in the market, particularly amongst the firms that are capable of bidding for the bigger projects independently. In fact, in many of the big projects now, you will find that most firms tender as joint ventures because they do not have the skills to do it alone. Even the very large firms that employ 4,000, 5,000 or 6,000 staff do not have the labour capacity to bid for large projects in Australia independently of doing so through a joint venture with other large firms.

**Senator FIERRAVANTI-WELLS**—In response to some of the questions that Senator Feeney has just asked you, you made some statements in relation to a shortage of 28,000. Of course, 4½ thousand or thereabouts come in on 457 visas. If the changes that are envisaged here are made, do you think that the scope for at least maintaining that level of 457 visas will be curbed? Given the demands of what the government is saying it is going to do, are you going to have to increase your 457s, at whatever cost, or are you just going to have to reduce them?

**Ms Motto**—The former. I believe that the firms will just have to swallow the costs and continue to access the 457 program. The problem is that you are going to be setting up a distinction between the large firms, which have the capability of doing so, and the small firms, which will see it all as just too hard. So, once again, the small firms will not pursue 457s, I believe. There is limited pursuit of 457s from the small firms as it is because of the costs involved in overseas recruitment. They will access the program even less because of the onerous conditions involved in some of the proposals. I believe the large firms, in the short term at least, will continue to have to recruit 457s if they are to complete the projects that they are trying to tender—

**Senator FIERRAVANTI-WELLS**—That they are currently doing—

**Ms Motto**—That they are currently doing.

**Senator FIERRAVANTI-WELLS**—let alone what may come up in the future.

**Ms Motto**—That is exactly right. As I said, two-thirds of our member firms are saying that they have to actually delay tenders for up to nine months or even indefinitely, shelving projects altogether. My understanding, through the government, is that there have been some major projects announced that they have received no tenders for because they cannot do the jobs.

**Senator FIERRAVANTI-WELLS**—So much for building back Australia.

**Ms Motto**—That is right.

**Senator FIERRAVANTI-WELLS**—The point I would make is that now the cost of those building projects, whether they be in the private or the public sector, potentially will increase.

**Ms Motto**—There is no doubt that the increased costs will have to onflow to the community.

**Senator FIERRAVANTI-WELLS**—We are not really affecting labour shortages in Australia because we are having to recruit more people at a higher price from overseas, with no actual impact on the labour market. Any increase in the labour market—for example, people in the unemployment queues—is not really going to be affected; you are just going to have firms paying much more to do business and paying more in oncosts. Indeed, you may find that some of those firms have to lay-off their unskilled workers because they are going to have to pay more for their skilled overseas workers.

**Ms Motto**—I do not presume that they would necessarily have to lay-off their unskilled workers, but they are operating in an environment where they have to pay not only more for 457 and migration but more for the Australian home-grown graduates coming out because of the shortage in any case. The reality is that those costs will have to be passed on to the clients and therefore the community at large.

**Senator FIERRAVANTI-WELLS**—Thank you very much. That was very useful.

**ACTING CHAIR**—You promised to take some questions on notice. The committee secretary will correct me if I am wrong, but that would mean sometime between now and next Friday. So we would need the responses early next week. Is that possible?

**Ms Motto**—Of course.

**ACTING CHAIR**—We might say Tuesday of next week?

**Ms Motto**—That is fine. We understand the limited time frame that you have.

**ACTING CHAIR**—Thank you very much for your assistance and thank you very much for your evidence today.

**Proceedings suspended from 10.24 am to 10.48 am**

**BULL, Mr Geoff, Manager, Legal and Migration Services, Australian Mines and Metals Association**

**GRADISEN, Miss Amanda, Executive Officer, Workforce Participation, Chamber of Minerals and Energy**

**ROOCKE, Mrs Nicole, Director, Chamber of Minerals and Energy**

*Evidence was taken via teleconference—*

**ACTING CHAIR**—Good morning and welcome. Do you wish to make any amendments or alterations to the submissions that you have lodged with the committee?

**Mr Bull**—No. We rely on the written submission.

**Miss Gradisen**—No.

**ACTING CHAIR**—I now invite you each to make a short opening statement and at the conclusion of that I will invite members of the committee to ask questions of you concerning your submissions.

**Mr Bull**—As I said, we rely upon the written submissions that we have tendered to the inquiry. By way of a short submission, we say that the objects of the worker protection bill are commendable in the sense that they are said to attempt to minimise exploitation, and no-one can take exception to that concept. What we do raise, though, is that we seem to be at odds as to where the justification for such a bill comes from. There have been numerous recent inquiries in respect of the 457 visa process and its operation. None of those inquiries from our observation has illustrated any evidence of widespread or systematic exploitation of 457 visa holders, and we say that particularly in respect of the resources industry both onshore and offshore, whom we represent.

Indeed, in 2006-07 the statistics that the Department of Immigration and Citizenship released indicated that only around 1.67 per cent of employer sponsors in any way breached their sponsorship obligations, which seems to be a very small percentage to justify a separate bill titled ‘worker protection’. Also, we are aware of many instances where visa holders themselves breach obligations under their sponsorship visa, and we are aware of many cases where employers themselves are exploited by visa holders, but there is no suggestion that there should be a separate bill to prevent that from occurring. So we ask the Senate inquiry to be cognisant of the justifications for such a bill. There is nothing in the second reading speech of the minister that suggests the reasons for this particular bill or that gives any examples of why the bill is to be proclaimed.

The situation as far as Australian Mines and Metals is concerned is that while the objects of the bill are commendable we are concerned with the ability for regulations, which we are unaware of at this point in time, to burden the 457 visa processing system. At the moment we have a system where the sponsorship obligations are actually in the act. The suggestion now is that they come out of the act and be placed in regulations which can be amended with a much greater deal of flexibility. The only indication we have of what those regulations may be is in the DIAC discussion paper that was released earlier this year. There are a number of things in that discussion paper which we would be concerned about. As I said before, there is nothing in that discussion paper or anything released by the minister to date that justifies any of the potential regulation changes.

Some of the things of concern to AMMA—at least in the discussion paper, which is said to possibly form the basis for these potential regulations of the sponsorship obligations that are mentioned in the bill—are things such as not using visa holders as strikebreakers, paying income protection insurance, paying market rates, paying their travel, recruitment, migration fees, licence fees, their health insurance, their education as miners and so forth. The concern that we have is that, while visa holders are required to pay the same taxation as Australian permanent residents, they do not get the same benefits as Australian residents. They do not get health insurance and they do not get welfare benefits, so the option appears to be that the sponsoring employer should make a payment to cover those things.

Even though, as we said, the visa holder pays Australian taxation like anybody else, they do not get those benefits; therefore, the employer should step up to the plate and make those payments if necessary. We see that as risking creating a class of worker who gets conditions superior to those of Australian residents. Australian residents are not in the situation where the employer has to pay for their electrical licences or plumbing licences. They pay those themselves. They do not have private income protection or private health insurance paid for by the employer and so forth. There is a risk with these potential regulations that you will have a new class of employee who comes from overseas and gets better conditions than the people that they are working side by side with. We say that that is a recipe for disaster.

So we are concerned that the potential regulations will jeopardise what is currently a viable and practical solution to recruiting employees from overseas to solve a short-term skill shortage within the Australian workforce. We have already experienced problems with labour agreements where there is the ability for the department, both DIAC and DEEWR, to place additional obligations on employer sponsors outside those currently in the act and that, in our observation, has slowed the process down. It makes unclear what is going to be required from one day to the next. It is a process where the obligations, for example, in labour agreements where they have this flexibility, continually change.

To give you an example, if you are an Australian resident and you are classified in one of the ASCO skills classification between 4 and 7, you are required to have a certificate II in terms of education and the one year's relevant experience. However, if DEEWR under a labour agreement is bringing someone from overseas then we do not worry about those Australian requirements and you are required to have a certificate III with three years experience. They are just placing an additional obligation, without any justification, on sponsoring employers to bring visa holders over. There is no reason given as to why you have this higher standard for people coming in from overseas.

That is just one example but there are many others. If you want to have a labour agreement now you have got to guarantee you are going to have a certain number of apprentices to trades and a number of graduates to professionals and that a certain amount of money is going to be spent on taxation. All those sorts of obligations have now become inflexible and we are concerned that with this worker protection bill that these sorts of obligations, again, will increase the burden on employer sponsors when they are bringing people in from overseas. It is a simple, straightforward exercise at the moment and, without justification, we are at a loss as to why there needs to be this movement from the act to the regulations in terms of sponsorship obligations. If it is to give the department more flexibility, we will be concerned with that, because at the moment they have got flexibility. But labour agreements are unclear; they are changing; and they create higher standards than you have for the normal Australian residents.

Our suggestion—and it is similar to my understanding of the Chamber of Minerals and Energy's suggestion—is that the proposed legislation makes an incorrect assumption in assuming that all 457 visa holders are at risk of being exploited. That is simply not the case. Particularly in our industry, the resources sector, we say that our visa holders who come in from overseas to fill a shortage of technical skills or whatever it might be are not ordinarily the types of people who are at risk. Yet this legislation will cover them. It will just burden those employers unnecessarily.

For example, we do not take issue with people who might be in lower paid industries, but in our industries people are well and truly paid. They might earn \$100,000 or you might bring in a specialist engineer who is paid \$200,000. Those sorts of people can look after themselves. They do not need this legislation or regulations to protect themselves. They are highly educated and highly remunerated, and yet this legislation will in one foul swoop apply to them. It will impact upon the employers or the employer sponsors.

As for salary packaging where they may be given an expat allowance to go and pay for their own education and their own insurance, all of a sudden that is going to be potentially put at risk because these regulations and the bill itself will require the employer to make those particular payments. Our suggestion is that there should be at least a salary threshold, which is not unusual; it happens in industrial relations legislation. We suggest that where an employee receives an income above \$35,000 there should be an exemption from the regulations because they are highly paid and they can look after themselves. They are not working in sweatshops or in areas where they can be exploited. They are remunerated to a level sufficient to look after themselves. It would be our suggestion that if you are going to try to protect people at risk—and we do not take any exception to that—that those people who are well remunerated can look after themselves.

As I say, in our industry we bring in professional people from overseas, whether they be engineers, physicists or whatever else. They are paid well, and they are remunerated on the basis that they look after themselves; they bring their own families in and so forth. There should not be any requirement for the employer then to turn around and, in addition to the higher salary that the employee is being paid, have to pay for their spouse's airfares, their children's education, the migration agent fees or the travel fees. An employer may well pay that, but there should not be an obligation.

In respect of the bill itself, we have two small comments. The first one is in respect of civil penalties where there is a civil penalty for an employee's sponsor who fails to satisfy the sponsorship obligations. That is a very novel way of creating an offence, in one sense. There is no definition of what failing to satisfy a sponsorship obligation is. That could mean anything when one comes to a court and faces prosecution. We

would suggest that that needs to be expanded. It appears to be a no-fault offence—that is, if you unknowingly or without any intention breach one of the sponsorship obligations then you are still an offender. If that is the case, there should be some form of statutory defence, and from reading the bill at this point in time there does not appear to be any statutory defence for an employer who unwittingly, unknowingly or unintentionally breaches a sponsorship obligation. It being a civil penalty, we think that there should be the opportunity for that to be clarified, and the actual definition of what failing to satisfy a particular sponsorship obligation is should be not only expanded but put in there, because there is no definition at all at this point in time.

I noticed in reading some of the submissions that were on the website that people were talking about retrospectivity. There does not appear to be any retrospectivity, but it does appear that these new proposed obligations will apply to existing sponsors. We say that that would be improper where people have entered into a four-year arrangement to bring someone to Australia from overseas on the basis of the existing arrangements and are then told, even though there might be a lead-in period of time, that there are new rules and obligations and that they have to meet those. We would say that it would be best that, if these new regulations and rules come into place, they should only apply to new visa holders and new employer sponsors. It would be unfair for someone who had entered into an arrangement which is going to last up to four years then to be told shortly thereafter that there are new rules and that, despite their having reached this agreement with the government and met the existing requirements, there are going to be new requirements. We would suggest that the new sponsorship obligations apply only to new visa holders and new sponsorship arrangements from whenever the act has application. Those are our short introductory comments.

**ACTING CHAIR**—Thank you very much, Mr Bull. We will now turn to Ms Roocke. I remind all that we are, in fact, conducting an inquiry into the bill and that obviously it is not possible for us to inquire at this time into the proposed regulations.

**Ms Roocke**—I will hand over to Amanda Gradisen, who will present the summary of the chamber submission.

**ACTING CHAIR**—Certainly

**Miss Gradisen**—Some of the information has been presented by Geoff already, so I will just do a brief synopsis and summary of the submission that we put in. With regard to the number of employees the industry will require by 2020, we are looking at an additional 86,000 employees, of which 46,000 will be required in WA. As a consequence, Australia—

**ACTING CHAIR**—Excuse me. I will just interpose for one moment. Senator Farrell has a quick question at that point.

**Senator FARRELL**—Could you repeat that number. You just faded out a little bit when you said it.

**Miss Gradisen**—Sorry. The projection is 86,000 by 2020 across Australia. That is site based employees required.

**Senator FARRELL**—Thank you.

**Miss Gradisen**—Currently in the resource sector there is a disparity of specialist skills for critical operational positions, and the capacity within the Australian labour market and within education to fill these positions currently does not exist, so the option that businesses have used is the 457 business visas for the immediate to short term. In terms of a system that would benefit the sector, we believe and appreciate that you are looking at streamlining the process to ensure that it actually maintains its integrity. However, it is already a highly regulated system, so what we do not want to see is an extra burden placed on businesses and their staff.

It is currently difficult to comment on some aspects of the bill because some of the information will be placed in the regulations, which are not yet available. Again, the issue raised in the submission, and as Geoff raised, is that it does imply that all migrants are vulnerable and would experience poor working conditions compared to Australian co-workers, which is not the case. We would like to see a differentiation between legislation to enable a skilled worker to enter Australia and the actual legislation which applies to both Australian and overseas workers once they are in the country—for example, OSH conditions and workplace relations.

Regarding specific matters in the bill that have been raised, some of the definitions have not been clearly defined. For example, the definition of a document is still very ambiguous at the moment. The other issue is in terms of compliance. The bill says that to be compliant they need electronic versions, otherwise they are

breaching compliance. A suggestion that we propose is that you also include hard copy because some industries do not necessarily have that technology available.

The other point that we raise, and which has been raised earlier, is that employers should be responsible for reasonable costs for skilled migrants. For example, they are currently responsible for flights home for their families. They have negotiated employment conditions and it is actually unreasonable for employers to bear the cost if a skilled worker is detained or has to be deported if they breach fair terms and conditions. This could be considered harsh on the employer. Also, the other consequence is that for those employees who the resource industry and other industries employ on 457 visas—not necessarily the ones on the primary visas but the ones who are on the unrestricted visa—this could be another burden that can cost the employer. Another proposal of ours is that the bill be reviewed in two years time so the industry can provide feedback to government.

In conclusion, the CME does support the government seeking change to address the issue of visas, but not to the detriment of business and Australian businesspeople. Thankyou.

**ACTING CHAIR**—Thank you very much. We might now move to questions. I might perhaps start off with a question to Mr Bull. The government has articulated the notion that workers working pursuant to these visas should in fact be more expensive than Australian workers and that that is a deliberate price distortion so as to protect the Australian labour market. I wondered what your response to that policy objective was.

**Mr Bull**—We would say that they are already more expensive in the sense that these people need to be recruited from overseas. There is obviously an extensive exercise in trying to attain people from overseas who have the necessary skills and experience to come in and do the work that is required. More often than not that involves skills assessment at the cost of the employer. It also involves recruitment costs at the cost of the employer. It then involves an interview process, and then having to pay for someone's airfare to come over to Australia—and their return airfare, for that matter.

The employer then has to take out insurance to cover the public health costs that are not covered here in Australia. They then have to cover for any absences. If the employee gets sick within two days and does not have any sick leave, the employer has to pay that salary. On many occasions, the employee brings over their family—their spouse and minors—and, normally, in our sector that is paid for by the employer. To turn around and add additional costs, which is suggested in the discussion paper—and I know that it is not subject to your inquiry—takes it, we say, beyond the pale; there are already enough hurdles and expenses in bringing in people from overseas. It is not a cheap exercise. It is not a source of cheap labour at all, as far as our industry is concerned. There is just a genuine requirement to try to find skilled people to work for a short period of time. They do not exist in Australia. So we do not support any concept of making the employees more expensive. We think that the current system provides that they are. It is just a matter of fact. The fact that they come in from overseas means they are more expensive.

In our sector we do not pay the minimum salary. We pay the going market rates. When people work side by side with each other they are paid exactly the same, irrespective of their country of origin. It is not a question of making the labour cheaper; it is simply a question of providing labour that does not exist in Australia. As I said, we do not support the concept of making it more expensive, on the basis that they are already more expensive. We cannot just simply put an ad in the paper and recruit someone from Australia, which is obviously a lot cheaper.

**Mrs Roocke**—Essentially the resources sector is utilising the visas in areas where the skills do not actually exist in Australia, as Geoff Bull has already alluded to, and they are skills that are not able to be developed in the short term. It is not just a case of pricing current people out of the market. It is a case that we require skills that do not exist in Australia, and that is where the industry is utilising the 457 visas.

**ACTING CHAIR**—Mr Bull, in your opening remarks you said—and I will paraphrase what you said but do not hesitate to correct me if I get it wrong—something to the effect that the framework of this bill created new obligations for employers, and you were concerned that there were no similar, or perhaps other, obligations upon employees. I think you said something to the effect that employers can and are exploited by visa holders. If I have got that right, could you please expand on that point.

**Mr Bull**—You do have that right; that is what I did say. Let me give you an example: in our industry, as I have said—and we might be different from other industries—normally the employer would pay for the recruitment costs, the airfares, the migration fees, the skills assessment, the health insurance and whatever else might be required to bring someone into Australia. As soon as that employee reaches their destination, on day

1 in Australia they are entitled, by law, to leave that employer and go and work for another company. This does not happen often, but it does happen. We get it raised from time to time that a new employee will come into Australia and they will find out that their friend from the Philippines or Tanzania or wherever is working somewhere else, so what do they do? They say, 'I want to go and work with that person,' and they immediately change sponsors. The employer has no redress whatsoever to get back his airfares or the costs of recruitment. When I say he has no opportunity, let me say that at present they probably do have an opportunity, even though it is very hard to get the money back, but the proposed bill would prevent that completely from happening. What I am saying is that there is the potential for exploitation. It does happen from time to time where all those costs are expended by the employer on the basis that the employee will come and work for the employer, but the employee gets there and decides they want to work somewhere else and there is no redress for the employer to get any of those costs back. We do not even get told by DIAC that the employee is seeking another sponsor. The employee simply does not turn up to work one day—it might be after two weeks—and we just do not see from them. There is no obligation for DIAC to tell us the employee has another sponsor. As far as the employer is concerned they are still liable until the employee gets another sponsor. The employer does not know what is going on. We cannot understand DIAC's response of, 'We can't tell you whether or not they are seeking another sponsor.' We are not trying to have any form of conscription or labour that is required to be bounded labour, but there should be an opportunity for the employer to recoup some of those costs if people leave after a short period of time.

Another example I will give you is where a visa holder misrepresents their skills and experience. People who do not have the skills and experience that they say they do get through the net from time to time. They get to Australia and the employer finds out that they do not have the skills and experience or their performance is just not satisfactory and they misconduct themselves.

In a recent case with one of our members, the visa holder, from Tanzania, was not turning up to work regularly. They made an investigation and found out that they were working for cash somewhere else on the weekends, on their time off, and therefore they wanted to have a day off and get paid for it. When they were terminated, the employer remained liable for a period of 28 days for any health costs that that person incurred and, if they absconded, for their return airfare.

Then they were advised by the department that that 28 days had been extended to three months because the visa holder was looking for another job. When they told the department, 'Hang on a minute; the person was terminated on the basis that they breached their sponsorship obligations—that is, they were working for cash, for someone who wasn't the sponsor,' the visa was not cancelled and the person was allowed to make an application for a further sponsorship with another employer. But the period took up three months. During that period the employer was saying to DIAC, 'We do not know where this person is; it is three months and, during that period, we are liable for that person. If that person has a car accident and they go into a public hospital, we are liable for those health costs.' There was no remedy whatsoever.

That is just a couple of examples of where visa holders are not perfect. Visa sponsors are not perfect, but this bill only addresses the suggested exploitation of visa holders on behalf on employers. We say it is not always one way. There are visa holders themselves who exploit employers.

**ACTING CHAIR**—Thank you.

**Senator FIERRAVANTI-WELLS**—Mr Bull, we have had some evidence about the process of consultation. There was a discussion paper out there. How much consultation do you feel that the government has undertaken in relation to these changes? Do you think that that has been adequate?

**Mr Bull**—I must say we have been somewhat comforted by the fact that we have been given advance notice of these proposed changes. I will give the minister credit where credit is due. That has been in the form of documents that have been forwarded to various parties. We have managed to receive a copy. In response to the documentation that we forwarded about our response, we have not heard anything back. It does not appear, looking at the bill, that any notice has been taken in respect of any suggestions that we have made. In any event, I will say that we have been given advance notice. It has not been put on us by surprise. But we have simply asked on a number of occasions: what is it you are trying to prevent? And we do not seem to be able to get a satisfactory response.

**Senator FIERRAVANTI-WELLS**—You make the comment in your submission about your concerns about the ability for the minister to introduce regulations in a range of areas—in other words, obligations being imposed through regulation. Is it your preferred course of action that we see regulations before this bill is enacted?

**Mr Bull**—Certainly. It is our utmost concern that we are given advance notice of the regulations, not just in the first instance but when the regulations are going to change, as they may well change from time to time if this bill is ever proclaimed. But we do not have any knowledge of the regulations at all. We are told by the department that they are waiting for the report of Commissioner Deegan. That may be fine, but I would think that the Senate would need to be advised well in advance of the proposed regulations. As I said, the objects and the bill itself are commendable and not really controversial. The big issue is what will be contained in the regulations. This gives the department carte blanche right to write its own regulations, and that is where we have great concern because we have experienced it already with the labour agreements, where the department has the ability to impose additional obligations over and above those that exist in the act. They do so on an ad hoc basis and a basis that changes from one month to the next. It slows the whole process and makes it very difficult for employers to know what their rights and obligations are from one day to the next.

**Senator FIERRAVANTI-WELLS**—Obviously you would share the concerns about the work agreement and the changes in item 8. It proposes that an approved sponsor will include a party to a work agreement. And item 8 inserts a definition of work agreement by reference to satisfying prescribed requirements. Clearly, again, that is a work agreement variation in regulations that we know nothing about yet.

**Mr Bull**—That is correct. We understood, incorrectly or otherwise, that they were referring to the existing labour agreements or a different form of labour agreements, which we know nothing about, as you said. Again, we are in the dark as to what exactly is intended there.

**Senator FIERRAVANTI-WELLS**—In your submission you make a comment that you are concerned:

... the proposed regulations have the potential to introduce a regime so draconian that the 457 temporary skilled visa will no longer be a viable and practical solution to a temporary shortage of skilled Australian workers.

Do you believe that there has been a sustained campaign against the 457 regime?

**Mr Bull**—There has certainly been a sustained campaign from certain aspects, whether it be the trade union movement or other groups who represent the downtrodden in one form or another. But I must say that the minister has been quite good, to date at least, in improving the processing for 457 visas. We had great difficulty with 457s being held up. If you wanted to bring in someone on a short-term basis to fix a short-term critical issue it could take up to four months to get someone into the country to do that, therefore it became a worthless exercise. That seems to have been addressed. What we are concerned about is going back to the old days where the regulations impose so many obligations that it is just not worth it or it cannot be done in a hurry, which defeats the whole object.

These are short-term positions. At the moment there is an ability to bring in people on a short-term basis to address a critical shortage of skills issue. If that is jeopardised by additional obligations, by regulations or otherwise, that will really defeat the whole purpose. They are not permanent residents; they should not have to go through the hoops and hurdles required for permanent residents. They are simply coming here and the employer has certain obligations. But if you are going to make those obligations as arduous as potentially appears to be the case under the discussion paper, then people will just lose interest and, in our view, that will jeopardise projects being completed on time or even being commenced at all.

**Senator FIERRAVANTI-WELLS**—You make a comment in relation to information and notification of certain information to the visa holder and you say that it should be subject to information being balanced and nonpolitical. Have you experienced situations where the information that has been provided has been unbalanced and political?

**Mr Bull**—There have been a number of inquiries to date and when you read through the submissions you will see that people have particular agendas to follow. In our respectful opinion, some of the comments being made about certain circumstances are biased and jaundiced and have not been a correct reflection of the facts. There has been no opportunity for anyone to defend that publicly.

**ACTING CHAIR**—If I can interrupt, I think Senator Fierravanti-Wells is asking you whether there have been partisan comments in government communications—

**Senator FIERRAVANTI-WELLS**—Yes.

**ACTING CHAIR**—as opposed to partisan comments from partisan groups.

**Mr Bull**—I am sorry, I am not identifying that, no.

**Senator FIERRAVANTI-WELLS**—I want to ask about the provisions in the bill in relation to responsibilities for breaches and, in relation to the amount of \$330,000, the extent of that liability. Do you

have review in relation to that and the potential, where you do have a breach, for that liability to extend not just to one person but to a range of people in your entities?

**Mr Bull**—We think that the civil penalties should be limited to a set figure and should not be passed on to more than one person within a particular organisation, corporation or unincorporated association. We have not addressed that in our submission, but I noticed that Fragomen have, and we support those comments there that seem to be about an unlimited amount of pecuniary penalty that an organisation may incur under the proposed civil penalty regime legislation. We think that that should be limited in its effect.

**Senator FIERRAVANTI-WELLS**—You and others have specifically raised concerns about the definitions of ‘document’ and ‘thing’ and the issues of the six-month imprisonment, the record keeping and the flight risk of migrants. Clearly your view and the view of others is that that is quite a draconian attempt, particularly in terms of record keeping. Do you have anything further that you want to add about that?

**Miss Gradisen**—With regard to the definitions for ‘document’ and ‘thing’, if you look at them in the context in which they are written in the bill, they are quite broad. I do not have the bill in front of me but, from what I can remember, it states that an inspector can go in and look at a thing, document and machinery—which can imply anything. From an employment perspective, I think that is not really a term or condition of the employment contract.

**Mrs Roocke**—The issue from our position is one of providing adequate definitions so that there is no ambiguity in the legislation. Our belief is that penalties need to reflect the infringement. If there is no defence, as was covered by Geoff Bull earlier, there is concern in that regard.

**Senator FARRELL**—This question relates to the areas of the bill that talk about proposed increased information-sharing arrangements. Do you have any comments or suggestions on those or on how they might be improved?

**Miss Gradisen**—No, we do not have any comment in that regard.

**Senator FARRELL**—Mr Bull, would you like to make any comment about that?

**Mr Bull**—No, we do not oppose the proposition that there should be some information sharing between the government departments. That does not concern us, as long as we respect people’s privacy.

**ACTING CHAIR**—I think those are all the questions we have for you, and I do not think there are any questions on notice, so thank you very much for your submissions and for making yourselves available to the committee this morning.

[11.31 am]

**BACKHOUSE, Mr Nathan John, Manager, Trade Policy and International Affairs, Australian Chamber of Commerce and Industry**

*Evidence was taken via teleconference—*

**ACTING CHAIR**—Welcome. Do you have any amendments or alterations to the submission that you have lodged with the committee?

**Mr Backhouse**—No. I have prepared a brief statement, which may help clarify what our submission entailed.

**ACTING CHAIR**—Please, go ahead.

**Mr Backhouse**—Thank you for the opportunity to comment on the Migration Legislation Amendment (Worker Protection) Bill. We represent over 3,500 businesses nationwide and members have contacted us to say that they highly value the ability to recruit skilled migrants and see the current migration program, also known as the 457 visa program, as a very useful way to address the problem of the continuing skill shortage in Australia. We have made previous submissions in relation to some of the proposed draft regulations. I do not want to make any comments regarding these to the committee today, though suffice to say it is difficult to assess the overall impact of the bill on businesses until these are known.

We have one main area of concern in relation to the proposed amendments—that is, the bill's retrospectivity. It appears from part 2, section 46(1) that the bill applies to business sponsors that were business sponsors before the schedule commences. Also, subsection 140H, Sponsorship obligations, the bill reads:

(1) A person who is or was an approved sponsor must satisfy the sponsorship obligations prescribed by the regulations.

Members believe that this has the potential to significantly increase existing sponsors' financial liabilities in two possible areas. First, existing sponsors who have entered the program with a clear understanding of current obligations would presumably be required to pay additional costs, particularly if some of those proposals in the draft regulations were adopted. This may lead to discouraging business's usage of the program.

Second, if companies are subject to the new regulations applied retrospectively, this would lead to contract rewrites and provide unnecessary and unfair costs to sponsors who had entered the scheme originally in good faith. Our basic position therefore is that we would propose that the bill be amended so that it allows existing employment arrangements to remain in place for existing visa holders and any new regulations apply to sponsors entering the 457 scheme after the date of effect of the legislation.

**ACTING CHAIR**—Firstly, on this issue of retrospectivity, I want to be a little bit forensic about the use of the term. You are of course talking about new requirements that will operate on existing arrangements as opposed to new requirements that will be backdated and imposed retrospectively. Do I understand you correctly there?

**Mr Backhouse**—Our concern was that, say, existing sponsors who would be forced to adopt new regulations that came into force.

**ACTING CHAIR**—So those new obligations and new requirements that would operate on existing arrangements, I would contend are not retrospective insofar as a sponsor is not required to backdate or pay retrospectively those new requirements and obligations. They would operate once the legislation was enacted. Does that make sense?

**Mr Backhouse**—Yes.

**ACTING CHAIR**—One of the stated policy objectives of the government is in fact to create a cost premium for workers working pursuant to these visas. That is a deliberate objective with a view to protecting the Australian labour market and Australians in the labour market. What response do you have to that in the context of your remarks about the increased costs for sponsors?

**Mr Backhouse**—Could you clarify what you mean by cost premium?

**ACTING CHAIR**—In your evidence you have spoken of new and onerous burdens for employers. In the context of trying to make visa workers more expensive than Australian workers those costs are understood by government. I wondered whether you might have any remarks about the premium that visa workers attract.

They are more expensive for a purpose. That is a policy goal to make overseas workers working under this program more expensive.

**Mr Backhouse**—Absolutely. We do not have any problem with that. Companies seeking to employ skilled employees should be as a first point of call definitely using Australian workers. That is the aim of many of the businesses that we represent. In the instance of the inability to attract those workers, companies do not see any problem with paying a premium. There has been no feedback to us that companies are disaffected or disappointed that they must pay additional costs. They are quite happy with the structures that are in place.

**ACTING CHAIR**—In your submission you attached your response to the discussion paper. On page 3 of that you talk about not using overseas workers as a means of strike breaking. ACCI is concerned that the proposed measures may contravene freedom of association principles.

**Mr Backhouse**—Yes.

**ACTING CHAIR**—Could you expound on that point?

**Mr Backhouse**—Basically, we looked at what draft regulations were currently proposed and members' responses to that. Their belief was that companies would not use overseas workers as a means of strikebreaking. We did not see it as a major issue in the criticism of the existing scheme. That was the basic position there.

**ACTING CHAIR**—So, essentially, your evidence is that substitute labour is not used in this manner in Australia. Is that right?

**Mr Backhouse**—That is correct.

**Senator FIERRAVANTI-WELLS**—I will start by picking up the point you discussed with Senator Feeney. Basically, what you are suggesting is that current sponsors should see out their existing arrangements and then re-apply to be sponsors under the new regime. Is that accurate?

**Mr Backhouse**—Yes, that is correct.

**Senator FIERRAVANTI-WELLS**—You say that you have over 3½ businesses. How many of those would use 457s?

**Mr Backhouse**—Sorry—there are 3,050 businesses represented.

**Senator FIERRAVANTI-WELLS**—Yes.

**Mr Backhouse**—Essentially, the majority of businesses that use 457s are related to engineering, civil engineering. They represent about 5,000, 10,000 existing members.

**Senator FIERRAVANTI-WELLS**—So the 457 visa holders are basically workers who are in the white-collar, highly skilled spectrum rather than unskilled workers?

**Mr Backhouse**—That is correct. There has been some talk of hairdressers and people in that sort of work, but that does not constitute a huge number of our representation at all. It is very much, as you mentioned, the skilled workers.

**Senator FIERRAVANTI-WELLS**—You said that the cost to employers will discourage the use of the program. Is it just going to make it more expensive and therefore there will be less use, or do you think that by imposing what you say is quite a strong regime people will just move away from using 457 visa holders?

**Mr Backhouse**—From our perspective the issue was to adapt to labour market conditions and business needs. We saw the current 457 visa regime as providing an option for companies that were not able to find sufficient labour domestically to, in the short term at least, find those workers from overseas and bring them in to work on projects.

**Senator FIERRAVANTI-WELLS**—You say you provided a response to the discussion paper. Have any of your suggestions been picked up in this bill?

**Mr Backhouse**—The way that we see it is that not many of the proposals we put forward were adopted. On the face of it, that is not a major problem because the legislation appears to move those stringent regulations into a separate area. Members are obviously very keen to engage in the process and the finalisation of the regulations when they come about. The amendments, as we saw them, were fairly straightforward; it was just the issue of retrospectivity that concerned existing users. So, in essence, many of the members propose to wait until they have a better idea of what the regulations will actually be and provide a more detailed position at that point.

**Senator FIERRAVANTI-WELLS**—So you think that, in the interim, people will be just a bit hesitant about using 457 visas?

**Mr Backhouse**—Absolutely, yes.

**Senator FIERRAVANTI-WELLS**—So what will be the consequence of that? You will not have 457 visa applications, so what is going to be the effect then on your members and, in turn, their businesses?

**Mr Backhouse**—I do believe that members are very hesitant to use this scheme at the moment. They are unsure of what obligations the new regulations will entail and, as a result, many companies are using existing employees to take up any additional burdens that the businesses may have and they are waiting to see what these new regulations will entail before engaging with the scheme.

**Senator FIERRAVANTI-WELLS**—In the time we have, noting that at 12 o'clock we have the AI Group, I would just like for you to share with me: how many of your organisations and partnerships are unincorporated associations?

**Mr Backhouse**—Approximately 15 per cent. So we are looking at about 35,000.

**Senator FIERRAVANTI-WELLS**—So have those provisions in relation to liability for partners and members of unincorporated associations raised some concerns and alarm bells amongst your membership?

**Mr Backhouse**—No, not really. No, we have not received feedback stating that they are majorly concerned about that, so that was not an issue of concern.

**Senator FIERRAVANTI-WELLS**—Are they aware of the implications of the provisions?

**Mr Backhouse**—I would say that they are not aware. My opinion would be that they are not aware, no.

**Senator FIERRAVANTI-WELLS**—I guess that is a question. There is an issue that has arisen about inadvertent breaches and technical breaches and the potential liability. If a corporation, for example, employs 10 subclass 457 employees and there are issues in relation to breaches there is a potential penalty of \$330,000.

**Mr Backhouse**—Yes.

**Senator FIERRAVANTI-WELLS**—So perhaps it might be useful if some of your members did focus on that. If they are 15 per cent of your membership, I am sure that would raise some concerns.

**Mr Backhouse**—Yes, definitely.

**Senator FIERRAVANTI-WELLS**—Can I just generally ask you about any concerns about the proposed civil penalties and the infringement and the framework that has been set up for minor breaches—for example, the mistake and the potential six months jail and the provisions relating to requirements to produce documents or things. Do you have any views in relation to that?

**Mr Backhouse**—Essentially, we are supportive of some of the positions that the Association of Consulting Engineers would have made. There are concerns that they may be overly harsh.

**Senator FIERRAVANTI-WELLS**—In other words, it has been put in terms of using a sledgehammer to crack a nut. Is that your view?

**Mr Backhouse**—Yes.

**Senator FIERRAVANTI-WELLS**—I think you referred in your submission to the fact that in the department's statistics about only 1.6 per cent of sponsors of temporary entry were found to have breached their sponsorship obligations.

**Mr Backhouse**—Exactly, yes.

**Senator FIERRAVANTI-WELLS**—So your view basically is that it is really those potential sponsors who are the risky ones to whom this should be aimed rather than the ones who have been good sponsors?

**Mr Backhouse**—Exactly, yes. That is exactly right.

**Senator FIERRAVANTI-WELLS**—Can I just ask you some questions in relation to inspectors and the framework of workplace relations inspectors investigating sponsor obligation requirements?

**Mr Backhouse**—Yes.

**Senator FIERRAVANTI-WELLS**—Do you have an issue in relation to that?

**Mr Backhouse**—Not really. Currently, as we understand it, under the existing framework companies keep quite good records of their use of the system. If this proposed system is to assist in reducing the number of

people abusing the system then we see no problem with that. We do not think these powers are overly invasive or intrusive.

**Senator FIERRAVANTI-WELLS**—Do you have any views in relation to the recovery limits and extending the recovery limits for sponsorship obligations?

**Mr Backhouse**—The only points we would make would be again to support the submission made by the Association of Consulting Engineers. They saw it as being slightly unfair if a sponsor were taking on a skilled migrant. If it is very difficult to place them, who is responsible for outstanding debts of a previous sponsor?

**Senator FIERRAVANTI-WELLS**—This legislation is exclusively focused on sponsor obligations. Have you had instances of visa holders employer-hopping, if I can put it that way? Have you had instances of that sort of thing?

**Mr Backhouse**—Yes, I have heard of that. That has come up.

**ACTING CHAIR**—Going back to what you are characterising as retrospectivity—that is, new requirements operating on existing arrangements—you stated a few moments earlier that you believe those existing arrangements should see out their contractual life before they are subject to new requirements; is that correct?

**Mr Backhouse**—That is correct.

**ACTING CHAIR**—Tell me then what would happen if a sponsor not only had existing visa workers but was also continuing to sponsor new workers into this business in this country? Would that not then mean that that sponsor was essentially being required to operate their workers under two systems rather than just a single system?

**Mr Backhouse**—Yes, I guess it would.

**ACTING CHAIR**—I have a concern as a legislator that we are then, in order to avoid providing sponsors with onerous burdens, inadvertently providing them with just that. I am wondering what your comments might be about the proposition that a sponsor essentially manage two systems contemporaneously.

**Mr Backhouse**—From what some members have mentioned, they would see that seeing the length of the existing program out and then reapplying for sponsorship under new obligations would be less onerous than redrafting, for example, contracts for a number of existing employees who are using this program.

**ACTING CHAIR**—You also said in your evidence a little earlier that it would be a virtuous thing if the legislation could distinguish between good sponsors and bad sponsors—those are my words, not yours Mr Backhouse, but I am sure you know what I mean—

**Mr Backhouse**—Yes.

**ACTING CHAIR**—I am wondering if you can provide me with any guidance about how you think it might be that legislators and regulators can distinguish between the goodies and baddies?

**Mr Backhouse**—I think that one way to distinguish between the good sponsors and the bad sponsors would be essentially to look at track record. The sponsors that had no problems with their employees and that were using the system well and to good effect would be regarded as the good sponsors and therefore can continue to use the scheme. As I understand it in immigration, agents that have a very good track record can continue to use the scheme. The requirements to check what they are doing are slightly reduced over time. If they are found to be in breach of the program then suddenly there are far more onerous requirements on them in using immigration schemes and, in cases of abuse, some of them are disqualified from using an immigration scheme.

**ACTING CHAIR**—If I understand you correctly, you are essentially proposing a sliding scale of regulation whereby a breach, whether it be advertent or inadvertent, would attract an ever-increasing level of scrutiny and regulation. Am I right in saying that?

**Mr Backhouse**—Yes, that is correct.

**ACTING CHAIR**—Thank you. I have no further questions. Senator Farrell.

**Senator FARRELL**—Mr Backhouse, I have a couple of questions about the proposed information-sharing arrangements. Do you have any view on those and how they are working at the moment and how they might be improved?

**Mr Backhouse**—Not really. We see that, as long as it does not infringe too greatly on companies, this is a good idea.

**Senator FARRELL**—Sorry, I just missed that comment.

**Mr Backhouse**—We do not have any problems with that.

**Senator FARRELL**—Thank you.

**Senator FIERRAVANTI-WELLS**—I have two questions, one following on from Senator Feeney: if you see out your existing arrangements, you are really only talking about a limited period when there could be overlap?

**Mr Backhouse**—Yes.

**Senator FIERRAVANTI-WELLS**—In some cases, a year, two years?

**Mr Backhouse**—That is correct, yes.

**Senator FIERRAVANTI-WELLS**—The other thing is that, amongst your 350,000 businesses, are you aware if there has been a sustained campaign by certain sections, including the unions, against the 457 program? If so, would you care to elaborate in relation to anything that you have become aware of?

**Mr Backhouse**—Members have not said that they see this system as being overtly attacked by such groups as unions, but many of them do see that the number of breaches that arise and the way that they have been taken up by the media almost sensationalises the issue and raises more attention of those that have abused the system than of those using it correctly. What members are saying is that you are looking at a very, very small proportion of businesses using this scheme that have abused this system and they see that, overall, it is working very well and that perhaps the oversensationalisation of this in the media has led to a very negative view of the system.

**ACTING CHAIR**—As there are no further questions, Mr Backhouse, thank you very much for your evidence and for making yourself available to the committee this morning.

**Mr Backhouse**—It is a pleasure. Thank you very much.

**MELVILLE, Mr Anthony Peter, Director, Public Affairs and Government Relations, Australian Industry Group**

**ACTING CHAIR**—I welcome Mr Anthony Melville from the Australian Industry Group. The Australian Industry Group has lodged a submission, which the committee has numbered 12. Do you wish to make any amendments or alterations to the submission that you have lodged with the committee?

**Mr Melville**—No, I would like it to stand as it is, thanks.

**ACTING CHAIR**—Certainly. I now invite you to make a short opening statement, at the conclusion of which we will have questions for you.

**Mr Melville**—Thank you very much. In addition to the submission, I would like to make a few comments in general about the 457 visa program. It has been growing in recent years and that has been due to the enormous demand for skilled labour in Australia. For business, that program is extremely important because it has been able to fill that gap and it is a very flexible program. By ‘flexible’ I mean that when people need someone they can get them, they can have them for three months to four years, they can fill either a short hole or a longer term or medium-term hole while they train their own staff. So it is a very important program for business.

In terms of the legislation, as we have commented in the submission, one of the big issues that we have is that the legislation itself, as you know, is the framework. In terms of what goes in it later, I assume that there will be some later discussion about that. There has been a lot of discussion over the last couple of years about the various issues that could go into this type of legislation—things like health costs, travel costs, licensing and school fees, which are currently paid, in a lot of cases, by the visa holder themselves—and moving the obligations to the sponsor.

Within the legislation, in section 140J in the transitional area, there is a point, which I notice a number of other submissions have made as well, that the legislation will apply to existing sponsors as well as new sponsors. It is quite a big issue for us and our members, because it could be quite a big cost to companies, even on an individual basis. If they have got large numbers of visa holders, they might be paying \$100,000 or \$120,000 a year for some staff in some areas—more the higher level skilled people—and they may have made a package with them that all these costs are paid by the visa holder themselves. It does not take them anywhere near the minimum salary level, and it is just part of the work arrangements. Under this bill they would suddenly have to pay those fees themselves and they may have entered into arrangements, in a lot of cases, with labour hire companies so that the end employer pays a certain amount, and the new money that this legislation implies will not be recompensed by the labour hire company. One told me that, on current contracts, they would pay an extra \$2 million if all of the issues that have been raised end up in legislation.

Finally, there has been a lot of talk about the immigration program recently because of the global economic and financial crisis. I have noticed some pressure on the program and people calling for it to be brought back. For our members, the 457 visa program is very important because it is flexible and it is a shock absorber. When they cannot get people locally, they can get them from overseas quickly. It is also flexible in the sense that, if there are pressures on the current labour market and there are more people available locally, it is costly to bring people in on 457 visas. There is a lot of cost around it, so employers will go for the local people. So you would logically expect that over time demand on the program will naturally decrease as unemployment perhaps rises in Australia with those pressures on employment in the coming years. But that has not happened yet and business still needs this program. It is a shock absorber for the migration program itself. We believe that the permanent migration program should be at the current level that it is at, and any fall can be taken up naturally through the 457 program. I guess that is contestable, but those are the points I would like to make in opening.

**ACTING CHAIR**—Thank you.

**Senator FIERRAVANTI-WELLS**—Can you give us the membership details of the Ai Group?

**Mr Melville**—The Australian Industry Group is one of the largest employer organisations in Australia. We are nationally based and we have directly around 10,000 members in individual companies in the manufacturing, construction, labour hire and ICT sorts of areas. We also have many affiliations with other associations. We also manage other associations, such as the Australian Constructors Association, which is the peak group for the large prime construction companies. We also run the Australian Industry Group Defence Council, which includes all the main defence manufacturing companies.

**Senator FIERRAVANTI-WELLS**—Roughly, how many of your companies use 457 visas?

**Mr Melville**—It is impossible to say. There would be a lot in the manufacturing area. I could not say percentage-wise. For example, in the last 18 months or so we have had immigration officers based in our Sydney and Melbourne offices and they have had a couple of thousand queries from people. Not all those go on to use the program, but it is significant help to businesses, particularly those that get a contract but cannot get the staff themselves. One of our members said to me the other day: ‘I can shoot ‘em but I can’t eat ‘em. I can get the contracts but I can’t get the staff to fill them.’

**Senator FIERRAVANTI-WELLS**—Is the use of 457 visas amongst your membership across the spectrum, from highly skilled to the less skilled?

**Mr Melville**—I think it is probably more around the ASCO 4 system, which is the skilled trades area. We have most demand there. That includes welders, boilermakers, people working in the foundries, some very highly specialised kiln bricklayers and that type of thing. There are some of the lower levels in the regional areas, where, under concessions, there are some levels of factory hands and plant operators in the heavy machinery and construction types of areas.

**Senator FIERRAVANTI-WELLS**—One of the suggestions that has been made is a two-tier system to deal with the highly skilled end and the not as skilled end of the 457 spectrum, if I can put it in those terms. Do you have a view in relation to that?

**Mr Melville**—It is hard to say. You would make the 457 at that lower end, as you say. If you made it too hard then it would lose its value. If you just lay everything on it then those companies will go: ‘I just can’t do that. It’s too hard; it’s too expensive; there are too many risks involved.’ If there is a risk at that level—and that is what is being argued; that that is the area where there is the most potential for abuse because there may be less English spoken at the 456/7 ASCO end of the spectrum—I think we would prefer to see some of those risks managed through better compliance, through maybe some more visits and through some genuine estimation of what that risk is.

If you look at the immigration department’s annual report you will see that the number of breaches is very small. It is something like one per cent or 1½ per cent. You would have to look at the report; I do not have the number in front of me. I have been told that about 50 per cent of 457 visa holders are visited on these compliance visits and very few are found to be in breach. If you look at that as a risk management strategy, rather than making it too hard to get the visas and pushing all the regulations down to the lower end, you will see abuses of the system are not as big an issue as they may appear from reading the media. It is real, and we think that people should be penalised severely, but our businesses in that area are also where the demand is. They get the contracts and they cannot get the labour to fill them.

It is not an easy option, as some people suggest, to go to 457s; it is very hard. I have had many members come and say, ‘Can’t you make it harder for them to leave my business’, which you cannot do, obviously. They spend \$10,000, \$15,000 or \$20,000 getting an individual out here and that person can go to another business the next day. It is not an easy option, and I do not think we would support making it harder by putting all the pressures on regulation down at the bottom end.

**Senator FIERRAVANTI-WELLS**—In fact that is another issue that has been raised: the visa holder employer hopping, if I can put it that way, and that this legislation seems to be focused very much on the sponsors and the employers without an acknowledgement that there are some problems even with some of the visa holders.

**Mr Melville**—That is right. They do move. We had one case in Brisbane where they moved down the road for an extra \$20 per week, at a huge cost to the employer. They have the right to do that, and we strongly support the department getting out and giving more education to the visa holders about their rights. The issue comes up of the people who, say, cannot speak English very well and are told by their sponsor, ‘If you don’t do what I tell you, you are out of the country.’ There must be better ways than: ‘I will no longer employ you and you will be deported.’ The person, of course, is able to move to a new employer but they may be ignorant of that. There may be better ways to educate those visa holders, and perhaps a bit more work needs to be done there rather than in shifting costs and risks to businesses.

**Senator FIERRAVANTI-WELLS**—You made comments about the transitional provisions and the obligations that will be imposed on existing sponsors. There has been a suggestion that perhaps those sponsors see out their current obligations and then, before other employees come out, they move into the new regime. Do you have a view in relation to that?

**Mr Melville**—Do you mean that if I have someone, say, working as a nurse in a hospital and their contract finishes 12 months from now, after the legislation has been passed, then they will go under the new obligations if they go onto a new contract?

**Senator FIERRAVANTI-WELLS**—Yes.

**Mr Melville**—That is fine. It is interesting to talk to some of the big labour hire companies. A lot of them actually bring out people on single-year contracts at the start. They do not say, ‘You’re here for four years under this contract arrangement’; they do it for a year and then renew the contract. It is almost the opposite of a sunset clause. For those businesses there would still be a cost but that would certainly reduce it.

**Senator FIERRAVANTI-WELLS**—You made comments about the regulations, and there has been strong criticism that we are implementing a new regime but doing it blind because we do not have the regulations. I think most of the submissions raise that in some form or other. You also refer to the transitional provisions. Could you expand on those.

**Mr Melville**—Sure. As an example, if a labour hire company has 200 people currently in Australia on 457 visas, when they brought them out to Australia they then pass them on to an employer in a factory, construction site or whatever, and that employer pays the labour hire company a certain amount of money, a percentage, of all the costs at that point. Let’s say you have a family with someone at the higher end, say over \$100,000. He has have a wife and three children and he will be getting paid a salary that includes the fact that he will cover his own health insurance and that when he finishes he will fly himself and his family home. A lot of them make that arrangement because it is sort of built into their pay. If these regulations change and suddenly the labour hire company has to pay the airfares and the health insurance, which is up to \$5,000 for an individual—and they would have to pay for the wife or husband and kids as well—for those 200 hundred people that is quite a large amount of money that the labour hire companies did not factor in. The labour hire company could not get that back from the end employer because it is a cost that was never agreed to under any contract.

**Senator FIERRAVANTI-WELLS**—Can I now take you, in the limited time available, to the civil penalties. There have been certain concerns raised in relation to that framework—civil penalties having not been previously included in the migration legislation—and their contravention under, for example, 140Q—‘failing to satisfy sponsorship obligations’. The penalties there are \$6,600 for individuals and \$33,000 for a body corporate. Concerns have been raised that where the breach applies to 10 employees the potential penalty rises to \$330,000. Are you aware of that? Is that something that is of concern to your members?

**Mr Melville**—I was not, but that sort of issue has come up in other forms before. It certainly is a concern, and I echo the views of others who have spoken to you on that. Some of those penalties are a bit worrying, not only in cost but what they apply to. If I can just add that there was one issue that we raised in discussion with the department, which I think is in the legislation, and that is the issue of penalties on sponsors if their visa holder applies for a protection visa—if, in effect, they want to become a refugee. There exists now a penalty on the employer under the legislation. If that happens, the employer is penalised. I understand that that is already in legislation, but now that it has come up again in this new legislation, it is certainly worth pointing out that that sort of thing may well be in breach of human rights obligations and refugee conventions, because we are telling the employer, ‘You put pressure on your employee not to apply for genuine refugee status because you will get fined.’ Also, the risk is again shifting, as I mentioned before. The department tests these people on 457 visas when they come in and they judge them to be good visa holders. If something goes wrong, suddenly it is the employers fault. I think that all of that is a bit doubtful.

**ACTING CHAIR**—Senator Farrell, do you have any questions?

**Senator FARRELL**—No.

**ACTING CHAIR**—I have a couple of questions. In your submission and again in your evidence this morning, you raise this question of labour hire companies sponsoring visa holders and now incurring new and unforeseen costs by virtue of the bill. I am a little puzzled as to why those kinds of cost increases that occur by virtue of either regulatory or legislative change would not be covered in the standard rise or fall provisions that govern, or that typically occur, in these industries. Can you perhaps illuminate that for me?

**Mr Melville**—I am told that that is not the case. I am not certain whether that would be the case with every labour hire company, but certainly a couple of the big ones told me that those would be costs that they would directly have to pay themselves. I will ask that question and would be happy to get back to the committee on that, if you wish.

**ACTING CHAIR**—If you could take that on notice, that would be helpful. I do not mean to sound too draconian, but because we have such a short time line, if you could provide that to us by close of business on Tuesday of next week, that would be much appreciated.

**Mr Melville**—Will do, on all provisions.

**ACTING CHAIR**—I apologise for giving you such a short time.

**Mr Melville**—That will be fine.

**ACTING CHAIR**—Thank you very much. I have a further question, then, with respect to this issue of transitional provisions—and this came up in evidence earlier today as well. The proposition that existing arrangements see out their contractual life before they are subject to new requirements in this bill would seem to have the inevitable consequence of some sponsors having to manage two different regulatory regimes simultaneously in their businesses—that is, one regime that applies to their existing or pre-existing visa holders and then a second, new regime for future workers they sponsor into Australia. I wonder if you have any comment to make about how you would envisage your members managing two regulatory regimes contemporaneously in their businesses.

**Mr Melville**—I understand it would be difficult, but for the businesses particularly at these times of economic pressure they would rather have the issues of managing that than the extra costs. There are a couple of categories, if you like, of sponsors. There are the larger companies that have their own HR, which are very experienced and skilled in these programs and they do everything themselves. So they might have 100, 200 or even 500 visa holders at big projects around the country. Then there are the very small companies that will have one or two, perhaps, or even three visa holders, and they will do it themselves. They are the ones that would probably find it quite difficult juggling these sorts of regulatory changes. But the ones in the middle use labour hire companies as their HR, and the labour hire companies are very skilled at managing people from nurses to doctors to boilermakers. So, again, there would be pressure, but they would manage it rather than pay the costs.

**ACTING CHAIR**—In your opening evidence, you made some remarks about the fact that there is a comparatively low percentage of sponsors who are breaching their obligations and that you hold the view that where such a breach can be demonstrated the penalties should be severe. Have I got your evidence correct?

**Mr Melville**—We find very few. There may be a couple of companies that I know of reasonably close to us that have, in one case, inadvertently breached and got into trouble on that. But it was recognised that it was inadvertent and it was corrected. Another one faced the courts in a state over occupational health and safety issues. They did the wrong thing, according to the courts, and they paid the penalties in that system. So there are penalties out there and there are state systems that also, at the same time, work in conjunction with this sort of legislation.

**ACTING CHAIR**—So although you are happy for the wrongdoer to be punished, so to speak, you think the existing arrangements provide sufficient penalties. Is that your point?

**Mr Melville**—I think so. Also, I understand that these things get reviewed and that what this legislation is all about is setting up the framework for reviewed and perhaps more targeted penalties against certain areas that are identified as being high-risk areas in terms of the level of breaches that are being made. I understand that. But at the appropriate time, when some of these things come up—and it has not been finalised, given all the different committees that have been meeting within Immigration, including Commissioner Deegan's inquiry; they have not finalised what their thinking is yet—we will be able to then make a judgement about it. But in terms of this legislation, apart from those civil penalty issues that were raised earlier, I think it is reasonable that if people are proven to have done the wrong thing they are penalised. But I also say that there needs to be a decent appeal mechanism for employers and that they cannot just get someone in the department saying, 'That's it; you're out—no chance of getting a visa for five years,' without any sort of appeal in that.

**Senator FIERRAVANTI-WELLS**—I have a couple of questions in the couple of minutes available. Mr Melville, in terms of consultation, I assume that you have provided your comments in relation to when the discussion paper was issued.

**Mr Melville**—I have, yes—the three discussion papers but also the Department of Immigration and Citizenship discussion paper on long-stay visas.

**Senator FIERRAVANTI-WELLS**—I assume that you made certain suggestions and recommendations. Were many of those picked up in the legislation that is now before us?

**Mr Melville**—Most of it was to do with regulations. I did mention in that—and I would be happy to provide that to the committee as well; I did not provide it before, but I could pass it on—that I made a number of recommendations; they are mostly about the regulations to come, but there is a mention of that transitional sort of area.

**Senator FIERRAVANTI-WELLS**—One of the comments that have been made is that effectively this framework is using a sledgehammer to crack a nut. Do you share that view?

**Mr Melville**—Only in the sense that I know there are breaches out there but that, as I said—even though it is anecdotal and people have terrible stories to tell, and there are terrible stories out there—there are not that many factual breaches, and there are a large number of compliance visits, so something does not quite fit there. As I said, it is reasonable to review these things—to review regulations and penalties—but the vast majority of employers do the right thing.

**Senator FIERRAVANTI-WELLS**—I will conclude with the proposed framework in the bill for inspectors. Do you see efficiencies or, potentially, problems if the work relation inspectors also investigate sponsor obligation requirements?

**Mr Melville**—I think from my reading of it that it was going to mirror the sorts of provisions that apply for local state based workplace relations inspections and that it was going to use those parameters. If I am right, that is what we have been working with for years and that would seem reasonable.

**Senator FIERRAVANTI-WELLS**—Senator Farrell has not asked his information sharing question, so perhaps he might like to. I invite him to do that.

**Senator FARRELL**—All right, I will ask that one. Yes, perhaps you can give us a response on one of the proposals in the bill, which is to increase the information-sharing arrangements. Did you want to comment on those? Are there any suggestions for improvements?

**Mr Melville**—Anything that improves the knowledge of state governments about where 457 visa holders are gives you more information about where the pressures are in terms of skill shortages, because it does reflect and mirror those sorts of demands. I think that is reasonable. It is not exactly what you are mentioning there, but some of the ideas have been to name companies that sponsor visa holders, and that is not something that we support. It is something that should be done within and between departments and between state and federal departments. That is fine, but certainly making it public is a different matter. They could end up being a lightning rod for people who are opposed to the program; that is one of the main reasons there.

**Senator FARRELL**—Thank you for that.

**ACTING CHAIR**—We have no further questions of you, Mr Melville, so thank you very much for your submission and for making yourself available to the committee today.

**Mr Melville**—Thank you very much.

**Proceedings suspended from 12.28 pm to 1.34 pm**

**KESSELS, Mr Ronald, Special Counsel, Fragomen**

**WALSH, Mr Robert, Managing Partner, Fragomen**

**ACTING CHAIR**—Welcome. Do you wish to make any amendments or alterations to the submission that you have already lodged with the committee?

**Mr Walsh**—No, we do not.

**ACTING CHAIR**—In that case I invite you each to make a short opening statement. At the conclusion of that either I or my colleagues will ask questions of you.

**Mr Walsh**—We thank the committee for the opportunity to give evidence here today. We are concerned to ensure that the 457 visa program and all temporary work visa arrangements are equitable for both the employer and the employees who hold 457 visas. We act for a full range of employers from the largest multinational and Australian corporations through to the smallest companies and other entities, all of who seek to utilise the 457 visa program. Of course, we also act for their employees as applicants for these visas. We represent approximately 800 corporate clients and assisted with the granting of approximately 8,500 457 and other temporary work visas in 2007-08. Our submission and our evidence today reflects our significant practical experience in assisting both the corporate clients and their employees.

Broadly, we support the government's initiatives to improve the integrity of the 457 visa program and the introduction of the worker protection bill as framework legislation for the 457 visa program and potentially for all temporary work visas. While in our experience we think there are a number of positive features of the bill, we are concerned with a number of other features of the bill which we believe if not addressed will lead to a less than satisfactory outcome for all affected parties and not achieve the best public policy outcome for the government. Our main areas of concern as detailed in our submission are the lack of clarity in the legislation as to the obligations to be placed on companies and the way in which the obligations are to be satisfied given the serious penalties that can be imposed. There is also the lack of an element of fault or the availability of a statutory defence in relation to the performance of those obligations, the criminal penalty provisions for the failure to produce a document within a certain specified time period as well as the basis upon which an inspector can enter a sponsor's premises.

The mandatory sanctions provisions in the bill also give us concern which relates to the possibility of the cancellation or barring of a sponsor, particularly in the context of the failure of other mandatory visa cancellation provisions in other sections of the Migration Act which, as we note in our submission, were then required to be amended due to the harsh or unfair results of the mandatory provisions as they were originally drafted. A final area of concern is the, in effect, retrospective or the new word seems to be 'retroactive' imposition of obligations on sponsors with little regard to the impact of these new obligations on either the company or the individual 457 visa holders. We do not underestimate the difficulty of achieving an effective framework for the operation of the temporary work visa area of the Migration Act. However, we are strongly of the view that there are significant areas of the current bill that require attention before it is enacted into law. We thank the committee for its time here today and we would be happy to take questions and discuss areas of concern.

**Senator FIERRAVANTI-WELLS**—Thank you very much for your submission and for placing your concerns on record. Is it fair to say that you are the largest law firm and probably, in terms of experience in this country in immigration law, you stand amongst the leading lawyers? Can I put it that way?

**Mr Kessels**—We have to say yes.

**Senator FIERRAVANTI-WELLS**—There cannot be too many law firms that actually have this breadth of experience.

**Mr Walsh**—That is a fair statement.

**Senator FIERRAVANTI-WELLS**—You have obviously gone into this in a lot of detail and I want to pick up on some of the points in a bit more detail if I can. Taking you to page 2 of your submission you pick up the issue about the each contravention of the civil penalty. That really is an issue because potentially there is a penalty there for an individual and then the corporation. I am also concerned about the concept of that wrongdoing and the potential liability for the partnerships and the unincorporated associations. Could you elaborate on that please?

**Mr Walsh**—I will make a couple of general comments and then my colleague can go into it in a little more detail. I guess this is one of the major areas of concern that we have about the bill. We believe there are a number of aspects of it that really do need to be looked at in the way that they have been drafted in the bill. They do give us concern that these civil penalties could be imposed in a way that would do significant economic damage to a company, particularly a small employer, and also through that process really put in jeopardy people who are already in Australia and holding 457 visas.

**Mr Kessels**—The problem with it is that an employer will be in breach of an undertaking if they fail to satisfy it. There is no element of intention or fault in the provision, and there is no defence. What would happen is that if you accidentally breached it you would be at fault, if you breached it because there was no alternative—and the problem partly is that we do not know exactly what the undertakings are going to be. The government has said that they are likely to be similar to what they are now, and that raises a few issues in itself because there are a few that are very vague and hard to enforce already. So, essentially, the problem is that if there is no element of, for want of a better word, ‘fault’ and there is no defence then you end up in a very difficult situation.

One of the examples given in the explanatory memorandum is that one of the undertakings might be that all employers will have to keep records electronically and that if they are required to give them to the department they will be required to do so within 14 days. That would be the undertaking. It says in the explanatory memorandum that, therefore, if a person gave it on the 15th day that would be a breach. That is the sort of thing that is a problem. There might be a reason why it could not be given within 14 days, but there is no provision in the bill to allow anybody to argue that there was a reason for not giving it. That is a fundamental problem, we think. Whether that is dealt with by way of putting an element of fault in the actual provisions. So, in other words, you could say something like, ‘An employer either knowingly or recklessly fails to satisfy.’ In fact, ‘fails to satisfy’ of itself is a bit of a problem. You would normally expect something to say ‘breaches an undertaking’, because what does ‘fails to satisfy’ mean? It is not very clear language when you are talking about penalties of that size.

That is the sort of problem we see in relation to that issue. It is not novel. In our submission we have taken the committee to the government document *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. It purports to set out how civil penalties should be framed. For the reasons that we have put in our submission it just seems that in a number of ways these provisions do not even comply with those guidelines and there is no reason given as to why they should not comply with those guidelines. Those guidelines recognise that you should have fault or, if you are not going to have fault, say there is no fault and then consider whether or not there is at least some defence.

To be fair and balanced about it, there is in the penalty provision a discretion for a judge not to impose a penalty because the provision works on the basis that a judge ‘may’ impose a penalty and then the judge needs to look at certain factors before imposing a penalty and deciding the amount. So there would be a discretion not to impose a penalty, but the problem is that that is completely different, that is the penalty side of it. It still means that a breach has occurred and that could have all sorts of ramifications, including sanctioning provisions.

**Senator FIERRAVANTI-WELLS**—In other words, what you are saying is that if you are going to have this sort of civil penalty structure it should be stand-alone with the full gamut of normal provisions that apply to stand-alone, civil or criminal penalties, depending on which of the two, and this legislation fails to do that.

**Mr Kessels**—That is true. And it fails to do it fundamentally because not only is the fault element not there and there is no defence but also there are no penalty provisions in the legislation because they are all going to be in the regulations. You cannot have a penalty until you have prescribed the actual undertaking.

**Senator FIERRAVANTI-WELLS**—Are you saying that potentially, as drafted, they could be unconstitutional? Is that what you are leading up to?

**Mr Kessels**—I do not know. I have not really done enough research on that, but I do not think so. I think that it is just fundamentally a problem of: how do you pass a bill when what are effectively going to be the elements of the offence, for want of a better word—I realise it is not an offence; it is a civil penalty—are not yet known to anybody and are going to be prescribed at some later point?

**Senator FIERRAVANTI-WELLS**—And yet you are imposing the obligations now because—and this is a point Mr Walsh raised—the retroactivity component of it creates the degree of obligation, the penalty for which is contained in regulations which we do not yet know. Is that it in a nutshell?

**Mr Walsh**—That is correct. We do appreciate the difficulty of having multiple sponsorship regimes with different employers being accountable for different obligations at different times depending on when they were approved as a sponsor. Nevertheless, that does not seem to us to detract from the fundamental point that sponsors are going to be deemed to accept the new obligations at the point where they are introduced by regulation. That, we believe, will happen before 1 July 2009, but it may also mean that other obligations are then introduced subsequent to that and it appears the way the explanatory memorandum reads at the moment that not a lot of regard is being given to the effect of that both on the employer and on the individual 457 visa holder because it makes reference to the fact that, in effect, if the employer does not like the new obligation then they should simply terminate the 457 visa holder and he or she can go back to their home country as though there is no person or family involved in this. That seems to be rather an unfortunate way to look at this. But, yes, in general terms, that is our concern. We feel the obligations, given the size of the penalties that are contemplated here, should be clearly stated in the legislation or at least they should be available in regulations now so that the committee, the Senate and the parliament can have visibility on just what these obligations are going to be.

**Senator FIERRAVANTI-WELLS**—So you are really saying that this bill should await the regulations with it before it has passage?

**Mr Walsh**—I believe that would be a better outcome for this particular area of law, yes.

**Senator FIERRAVANTI-WELLS**—Assuming that the bill is passed and the regulations are not, could there be potential areas of dispute that could arise down the track and do you envisage that potentially there could be litigation arising out of the very situation that you have now indicated?

**Mr Walsh**—My colleague may have more detail on this, but one situation that does come to mind is the very significant uncertainty that has been around in the current obligations with respect to the minimum salary levels that should be paid to 457 visa holders where it was very complicated, it was changing from time to time and a lot of employers, particularly smaller ones but even some larger ones, were not exactly clear on what the minimum salary levels were at any particular time. That was largely because, when they signed up to become a sponsor, the minimum salary level was expressed in one way. It then changed on several subsequent occasions and it was not entirely clear how that applied to the existing sponsor and some of them said, 'We thought we signed up to this under these arrangements; now you are telling us it's changed.' I think that is a small example of a bigger issue that could apply here because of this ability to change the obligations in the future, which may be appropriate, by way of regulation without the parliament having the possibility of looking at that as primary legislation rather than delegated legislation. Ron, did you want to add anything?

**Mr Kessels**—No. I think that covers it.

**Senator FIERRAVANTI-WELLS**—So, in other words, at this point in time the fundamental aspects of what is proposed to go into the regulations should more properly be put into the bill; is that an alternative approach?

**Mr Kessels**—If you contrast it to that, not that it was without fault, but at least in that bill you could clearly see what the obligations were going to be. We had some problems with some of them and maybe how they were expressed, but at least at that point there could have been input and no doubt some changes made. What would happen then is you would have a very clear statement of what the obligations are, having been debated. It is more of a political issue, but there are obviously issues with doing it through regulation. What we are all doing is sitting around making submissions and discussing a bill which is essentially just a framework, but the real substance that is going to make the real difference is unknown at this stage, and that is the fundamental problem.

**Senator FIERRAVANTI-WELLS**—This morning we talked about the possibility, and we had various bodies saying that the concerns of entering into obligations at this point—and I am sure, without breaching your clients, you have probably had requests for advice in relation to what their obligations are and potentially 457s being held up while these issues are procedural.

**Mr Kessels**—It is a big topic at the moment amongst clients, I can assure you of that.

**Senator FIERRAVANTI-WELLS**—Thank you. Mr Kessels, I would appreciate it if you could elaborate on that.

**Mr Kessels**—Clients have concerns about what exactly are going to be the obligations and how it is all going to work. In fact, we are running a series of briefings. Of course, we are in a bit of an awkward situation because we cannot—we can say: 'Here is the legislation and this is how it's going to operate. We can't actually

tell you though whether your obligations are going to change or not change or what they're going to be.' If you are a large company, or even a small company, but if you are a large company planning and you need 50 engineers in the next year to keep a project going and you are trying to decide exactly what your obligations are going to be, are you going to have to pay for all of these people to travel to Australia or not travel to Australia et cetera. If you add into it the company saying, 'If I get this wrong in any way, you're telling me that I'm up for possibly \$30,000 as a penalty for each breach,' then it is not surprising that employers who are already a little bit shy at the moment about what their future employment and growth decisions are going to be are saying, 'Hang on, how is this going to affect our decisions to employ and continue?' It is a constant question.

**Senator FIERRAVANTI-WELLS**—I accept that. The discussion paper was put out there; I assume that you made a submission in relation to that discussion paper that was out there. I would envisage that this would have been contained in that, but how much of your suggestions or recommendations or the issues that you pointed out have been picked up in this bill?

**Mr Kessels**—Can I just clarify: I am not sure that we did.

**Senator FIERRAVANTI-WELLS**—Okay, so you are not sure.

**Mr Kessels**—To Barbara Deegan's three inquiries we have made submissions. I do not know whether—

**Mr Walsh**—The external reference group, we made a detailed submission to that inquiry. To be fair, a lot of the concepts and other matters that we brought forward to the external reference group were picked up in that report. To the department's credit, and I should place this on the record, the department has made a number of changes in the area around processing of visas et cetera. There is a responsiveness there on the part of the government and the department which we do appreciate. One of the most difficult areas that many of our clients have had now for going on three years is to get some certainty around what these obligations are going to be. There has been so much talk about what the obligations are going to be through the COAG process, which has been going on for some time, through the sponsorship obligations legislation of last year and now in this bill. There really is just so much uncertainty out there that the question we are asked most often is from an employer's point of view is: what are our obligations going to be and how can we make decisions to enter into these arrangements when we do not know how far they are going to go.

**Mr Kessels**—I just want to add to that. I realise there are breaches out there, but my experience has been that most employers—small or large—genuinely want to do the right thing. Unfortunately, they are in a situation at the moment where to a great extent they do not actually know what that is and what it is going to be. We are looking forward to having it all clear and concise and then we will all know what we need to—

**Senator FIERRAVANTI-WELLS**—Mr Kessels, at page 9 of your submission you actually give a very concrete example which really crystallises a lot of the concerns, I think. I will come onto issues about inspectors in a moment, but this is very legitimate—not producing records within seven days. If you are a small business man and your accountant is away, there is no way you are going to meet that seven-day deadline.

**Mr Kessels**—No, and the difference with this is that, as we have pointed out in the paper—and it is these little things that just have not been thought through—there does not seem to be any power for the inspector to extend the seven days, even if they think it is reasonable. There does not seem to be any possibility for a person to say, 'Can I have a bit more time?' It is just an offence.

The second thing is that, in relation to inspectors—while we are on them—we do not have any great difficulty, and I am sure employers would not, with people turning up. They are used to it. It is like the tax office or the trust account inspectors that we have come into our office. But the common feature of all of those things is that, unless they are coming there to investigate what they believe to be a breach, in which case certain powers might arise, if it is generally to investigate whether or not you are complying, there would be a provision whereby they would say, 'How about we give you reasonable notice, like we will come on Monday or in a week's time? We'd like to see the following documents and, if you'd like to have your lawyer or your accountant there, that is okay.'

The way that this provision works is that the inspector has the power to go onto the premises if they reasonably believe that there are documents there which would help them to determine whether the obligations have been complied with. Well, that would be all situations, because you would always be checking whether they have been complied with. What you might expect to see is that the inspector has a power, once they have a reasonable suspicion that a breach has occurred, to go in and do these things without notice. We already have

monitoring provisions where employers can be asked to provide documents, from the department. As I keep stressing, it is not that we have a great opposition to the idea of it—they are not bad ideas—it is just that the detail has not, with respect, been at all thought through.

**Senator FIERRAVANTI-WELLS**—Again, the proposed framework for these inspectors—the efficiency of them perhaps inspecting for a range of obligations—is not your objection; the objection is what you have just outlined and the fact that they have to have reasonable cause to believe. And then there is the strange reference to ‘information, documents or any other thing’. ‘Any other thing’ just seems—

**Mr Kessels**—It is the sort of thing you throw in when you are—

**Senator FIERRAVANTI-WELLS**—That is right—doing it on the run perhaps.

**ACTING CHAIR**—Or when you want to describe any other thing.

**Senator FIERRAVANTI-WELLS**—I know, but you have got to then define ‘thing’. Mr Kessels, you also made some comments in relation to the concerns about the mandatory sanction provisions. We have touched on that and we have touched on the retrospective effect of the changes. You mentioned the previous bill, the sponsor obligation bill that was initially proposed. Do you see a great deal of difference between this bill and that one, except for what you mentioned before—a lot more of it was in the act rather than in the regulations?

**Mr Kessels**—I do not know about Robert, but I have not done a detailed sort of analysis of the two and compared each of the provisions, so I could not say. If the committee thought there would be some benefit in that, we would be more than happy to do a bit of a comparison and point out the differences.

**Senator FIERRAVANTI-WELLS**—Thank you.

**Mr Kessels**—They both have civil penalties. I think one of the major differences is in the fact that the last bill did have them clearly enunciated. My memory of it was, though, that it also had a bit of a problem with the elements of fault and defence, which is still the same. That is the same issue.

**Senator FIERRAVANTI-WELLS**—I have one last question, which goes to the issue of the proposed approach extending recovery limits for obligations and absconders, if I can put it that way—the obligations on employers in relation to those sorts of costs, the costs associated with people who abscond. Mr Walsh, does that fit in with the obligation getting further and further and extending and we do not really know the extent of it?

**Mr Walsh**—I think that is a valid concern. Even with the current obligations, in the way that they are drafted and enforced, it is not entirely clear when those obligations come to an end in terms of, for example, the payment of the minimum salary, the payment of health costs and those sorts of things. I think the fundamental thing that all employers are looking for is certainty around what their obligations are and for what period of time they carry those obligations in respect of individual visa holders. I think, Senator, that you have just highlighted yet another example of where the regime as it currently stands and this legislation do not appear to really address that, albeit we have to accept that we have not seen the details of the regulations yet.

**Senator FIERRAVANTI-WELLS**—Perhaps you can take this on notice. I have not seen it, but a two-tier suggestion was made—in other words, that we look at a set of obligations for the top end, if I can put it that way, and then parallel obligations for the two different tiers. Could you take that on notice if you have any comments in relation to it. Another suggestion that was made was in relation to a sponsor letting the time run for their current obligations and then, in relation to any new 457s, going under the new regime. We have been told that that may be a way of getting around some of these things. Perhaps you could take those on notice.

**Mr Walsh**—Certainly.

**ACTING CHAIR**—Senator Fierravanti-Wells, there was also an offer made there by Mr Kessels to compare two instruments. Is that an offer you are interesting in taking up?

**Senator FIERRAVANTI-WELLS**—I think that at this stage I do not want to put Mr Kessels under unnecessary pressure. I may look at that through alternative methods. Thank you for the offer, Mr Kessels.

**ACTING CHAIR**—No worries. The reason I clarify that, Mr Kessels, is that we appreciate your taking questions on notice but that, as you are probably aware, we are working to an exacting schedule.

**Mr Kessels**—That is perfectly all right. I am happy that I do not have to spend my Sunday writing that.

**ACTING CHAIR**—Very good. With those matters that you have taken on notice, could you respond by close of business on Tuesday. I hope that is not too onerous.

**Mr Kessels**—No, that is fine, thank you.

**ACTING CHAIR**—Terrific.

**Senator FARRELL**—Thank you, gentlemen, for your evidence. One of the aspects of the legislation is proposed increased information-sharing arrangements. Do you have any comments on that or suggestions that might improve the way that is done?

**Mr Kessels**—It is not actually a matter that I have turned my attention to at all, to be honest.

**Mr Walsh**—I think on that point that generally speaking it is another area where, particularly, companies who are sponsoring individual 457 visa holders need certainty around what their obligations are. If they are aware that information is to be shared between different agencies and that is being done on a proper basis—I think recently there was a memorandum of understanding entered into between the Department of Immigration and Citizenship and the Australian Taxation Office—and if all of that is clear and on the public record to the extent that it is appropriate for it to be so, generally employers are going to be aware of that. I think employers and our clients recognise that there is a need for sharing of information between different agencies because there are overlapping jurisdictions here, but again it is about employers being aware of that and of the terms on which it is happening and having certainty and clarity around that sharing process.

**ACTING CHAIR**—I have some questions. Let me echo the sentiment of my colleagues and thank you very much for your submission. You have indeed made some very helpful points. You said at the start of your evidence that you embrace the positive features of this bill, which of course is marvellous. I assume that one of those is the ambition of this bill to go to system integrity and dealing with abuses and—dare I say?—perhaps even a prevailing view that there are widespread abuses. In that vein, I just want to delve a little further into your submission in terms of proposed section 140X.

**Mr Kessels**—Could you point us to a page number, Senator. I know I should know it.

**ACTING CHAIR**—It is page 9 of your submission, where you talk about your concerns pertaining to inspectors' powers. I am interested in hearing more on this point. Obviously if we imagine the worst-case scenario—which we are obliged to do and which I trust you are only forced to consider on the rarest of occasions—or consider the worst of circumstances, it is possible, is it not, to imagine that an inspector in fact needs these powers if they are to catch in the act, if I can put it in those terms, someone who is consistently breaching their obligations? We have some examples that have been provided to us in evidence from the hospitality industry in particular where those kinds of things are conceivable. I wonder if you have any remarks about how it is possible to marry that strong investigative set of powers with your own existing concerns about convenience in managing the business.

**Mr Kessels**—I can have a go at trying to do that. A lot of it might be just about the wording of section 140X(2), which is the power of the inspector and how the power comes about. That is the point I was trying to do before. If it were framed in a way that said, for example, 'If an inspector has reasonable cause to believe that a breach of an undertaking might be occurring, these powers follow' then that would be more what you would expect to see. In other words, it is like a person being detained because you have a reasonable belief that they are unlawful—you do not just go around and detain everybody to try and figure out whether or not they are unlawful.

**ACTING CHAIR**—Sure, but are you then not only having regard to the convenience of your clients but also adjusting the onus of proof. It would not simply be a matter of notifying the business that you are going to turn up at X time and inspect X documents; you would also be changing the degree to which an inspector has to show cause.

**Mr Kessels**—That is right, but we might be talking about two different things. I am talking about the concern of inspectors turning up unannounced, just arriving and saying, 'I now demand to see X, Y and Z.' The way that it is currently framed, any inspector can do that at any time, just to make sure that people are complying. I do not know where else that exists. It may exist otherwise in industrial law.

**ACTING CHAIR**—Perhaps in the building industry.

**Mr Kessels**—I do not know; it may. But, as a general principle, what that does is assume that everybody is out there doing bad things and says, 'We're just going to go in and check everybody all the time to find when you are doing the bad thing,' whereas what you might do is say, 'Those types of powers, the unannounced stronger powers, have to have some basis or reason for being used.' The second tier of power, which is the general power to request documents or to make an investigation, is what is already going on within the

department in their monitoring process, and that could be tied with the inspectors in some way to say: 'Inspectors, what have you noticed when you are doing these other breaches? What sorts of industries do you think we should target?' So they would work together and you would have a bit of a balance in terms of the rights of individuals to go about doing their business in the normal way without interference and without having to worry about the HR manager or the payroll officer sitting there one day—and this is the way it can work—and having the officer just come in and say, 'Give it to me now.' Mind you, I have to say, just as an aside, that there seems to be nothing in the act which actually says what happens if the person just says, 'No, go away,' to the inspector. There is no enforcement provision.

**ACTING CHAIR**—Perhaps we are putting our faith in the regulations covering that as well!

**Mr Kessels**—Well, you might—but it does not say, 'Something will happen to you as prescribed in the regulations.' But you might also want to look at that. You might want to say: 'Let's beef that side up' If we really have a reasonable belief that something is going wrong, we have strong powers to go in and do serious things. If what we are doing is really just trying to test out whether we think employers are doing the right thing, if we have no reason to believe—and I do not want to name anyone—that X large company are doing the wrong thing, then why should the employers be subjected to an unannounced visit where they just say: 'Give us every one of these documents now'? I am not saying they do not have the power to ask. It is about how you do that.

**Senator FIERRAVANTI-WELLS**—And if you do not produce them within seven days—

**Mr Kessels**—Managing it in a practical way.

**Senator FIERRAVANTI-WELLS**—then that attracts the breach. It is it a criminal breach and if your accountant is overseas—this is the sort of scenario. I appreciate that the Acting Chair has asked the question, you have responded and I am putting your example into it. And that is the sort of circumstance that really is of concern.

**Mr Kessels**—You might have three tiers. You might have a power where you have a reasonable suspicion that a breach has occurred. You could go in and do certain things. You can demand things and that is backed up by penalties if the person does not cooperate with that investigation. Number two is just a general thing when we are trying to assess whether people are compliant. We do what we are currently doing, which is the monitoring process, but maybe we work with the inspectors in some way in that process. Then finally we have the power to demand documents if they are not there because the person says, 'Well, I can't show you that because they are at my accountant's.' You make the penalty serious if the person does not comply but you have some defence or some way that—it is about picking a power and balancing it off in a way that is fair.

**Senator FIERRAVANTI-WELLS**—Are you saying similar to the 264 section in the tax act?

**Mr Kessels**—I would like to say that but—

**Senator FIERRAVANTI-WELLS**—Acting Chair, I think what Mr Kessels might be getting might be worthwhile—if we just have a look at the powers under the tax legislation. There are some similar 'go in, demand' type powers.

**ACTING CHAIR**—That might be a good suggestion. I have never heard anyone suggest the ATO is a toothless tiger.

**Mr Kessels**—It has been thought of before in other areas.

**ACTING CHAIR**—On this subject, the wording of 140(X)(2)(b) is 'documents or any other thing relevant'. I have to confess that wording does not trouble me. Imagining the worst, as I am required to do, I can imagine an inspector needing to look at material that could range from anything from accommodation circumstances, cooking facilities—I can imagine an awful lot. Do you really think it is necessary to codify that or do you have any real trouble with these words?

**Mr Kessels**—It is not part of our submission but I was picking up on the senator's lead.

**ACTING CHAIR**—It is a rhetorical opportunity.

**Senator FIERRAVANTI-WELLS**—I will take the opportunity, Acting Chair, because another one of the employers picked up the question about 'thing' and that is why I was asking the lawyers.

**ACTING CHAIR**—We are all looking for the 'thing'.

**Mr Kessels**—It is not that we have a problem with them but to be honest, it just creates—we are not looking for opportunities but lawyers look at those words and go, 'Wow.'

**ACTING CHAIR**—You have an inspector producing material—a relevant court; I cannot imagine it being tried.

**Mr Kessels**—I don't know.

**ACTING CHAIR**—Mr Walsh, you touched upon the question of retroactive—I think that is the term you used—to describe new obligations arising on existing arrangements. You made the point that it is difficult to contemplate an employer working then with different systems contemporaneously. What sort of solutions, if any, do you offer to this conundrum? Do you say that the transitional provisions should insulate existing arrangements from change?

**Mr Walsh**—As I said, that is a difficult area of public administration but there must be other pieces of legislation that are not dissimilar from this, for example, the tax legislation or the workplace relations legislation, where there has been some reasonable transitional arrangements put in place whereby there is still certainty but it does not have this sort of unknowingness about it that we seem to have at the moment. The department and its resources may well be able to come up with something that does address that point. It is not something that we can immediately identify a solution for.

**Mr Kessels**—Although it is one of our two questions on notice so we might put that in our submission by Tuesday afternoon.

**ACTING CHAIR**—There goes your Sunday afternoon.

**Senator FIERRAVANTI-WELLS**—Thank you very much, Mr Walsh and Mr Kessels; that was really very good.

**ACTING CHAIR**—Thank you very much.

**Proceedings suspended from 2.15 pm to 2.20 pm**

**SUTTON, Mr John, National Secretary, Construction, Forestry, Mining and Energy Union**

**ACTING CHAIR**—Welcome. The CFMEU has lodged submission No. 7 with the committee. Mr Sutton, do you wish to make any amendments or alterations to the submission you have lodged with us?

**Mr Sutton**—No.

**ACTING CHAIR**—In that case, I now invite you to make a short opening statement, at the conclusion of which either I or my colleague may ask you some questions.

**Mr Sutton**—Thanks for the opportunity to appear before your committee. The CFMEU has been campaigning for many years around the issue of the exploitation and mistreatment of migrant workers in Australia. In particular, we have been campaigning very hard in recent years around the growing issues in the area of the mistreatment and abuse of temporary migrant workers. The trend to bring temporary migrant workers into the country has grown rapidly since 2002, and the number of abuses has grown during that period of time. Our union has been particularly active in exposing abuses and both tackling them at the workplace and bringing these issues to the attention of the public and the government of the day.

Our campaigning, I believe, led in large measure to the decision of the Howard government, with Minister Kevin Andrews at the time in the immigration portfolio, to announce that they would introduce legislation which they were calling sponsorship obligation legislation, which was brought into the parliament in May 2007 with some fanfare, legislation that we did believe would help somewhat in this whole policy area but that was by no means a full answer. Subsequently, that legislation lay on the table for the rest of 2007 and was never dealt with by the parliament in terms of becoming law—primarily, in our view, because the employer lobby set to work and made sure that that bill was never processed. Upon Labor coming to government, we lobbied the Labor government hard to resurrect the bill that was lying in the parliament. We were of the view that many of the aspects of that legislation would be of assistance to the kinds of migrant workers that we are concerned about here.

There is a fair bit of similarity between the sponsorship obligation legislation that the Liberals were talking about last year and the bill that we are looking at today, although there are some changes, and Labor proposes to deal with the issues in a somewhat different manner. Labor has done a number of things in this area of temporary migrant workers that are improvements or major advances, in our view. They include the establishment of the Deegan inquiry and the establishment of a stakeholders panel, which I am on on behalf of our organisation. Labor has done a number of things in this area that are useful, although I would also criticise some things Labor has done in this area as not being particularly helpful. But, on balance, Labor's changes have been beneficial to the kinds of workers that we are concerned about, and the bill before us today, which primarily deals with four matters, is heading in the right direction.

The first of those four matters, dealing with sponsorship obligations, is an area upon which I cannot say a lot at this moment because the bill proposes to deal with this detail by way of regulation. We have no problem with the proposition that the minister deal with it by regulation. In fact, it makes a lot of sense to wait for the outcome of the Deegan inquiry and to wait for the stakeholder processes to run their course before government finalises its view about the precise sponsorship obligations. Some of the big-ticket issues from our point of view are market rates, labour market testing, transparency, flexibility in terms of movement between sponsors, and of course the upfront obligations which I anticipate would be dealt with in the regulations. We certainly hope that, when that is finalised, all of that detail is beneficial in helping the migrant workers involved, and of course the other element of all this is trying to protect standards in the Australian labour market and protect prevailing standards amongst Australian workers.

The second dot point is about improved information sharing across all levels of government. We support the measures in the bill before us. However, we would like to see something that the minister often talks about—namely, transparency—not just between different tiers of government and different government departments but outside government. We believe that one of the best ways to ameliorate a lot of the exploitation in this area is to shine a light on it and reveal a lot of valuable information that can lead parties to where there are serious problems with exploitation of workers.

The third dot point is one that we can strongly support—that is, expanding the powers to monitor and investigate noncompliance. The measures in the bill to strengthen the inspectorate and give inspectors more rights are something that we have argued for and support.

The fourth and last dot point is about the penalties that are outlined in the bill. We think that these civil penalties are okay as far as they go, but we have argued in earlier submissions and we continue to argue that there should be criminal penalties in this bill. The regime that was adopted in relation to the area of illegals, which was a separate piece of legislation that passed the parliament in the last year, does provide for both civil and criminal penalties. The criminal penalties are reserved for the worst cases of exploitation, akin to slavery, where workers are deprived of their liberty and have their bank accounts controlled by others. A range of different exploitative measures should be subject to criminal sanctions, in our view, and that is an area that we would continue to argue for.

On balance, we do think that the bill is heading in the right direction, but of course we are very anxious to see the detail in the regulations, which will ultimately tell the story about how far this particular bill and these amendments to the Migration Act go in cracking down on what are pretty deplorable abuses that are currently going on in many Australian workplaces. That will do me.

**ACTING CHAIR**—Thank you very much. I will start off. Mr Sutton, you said at the outset that there have been significant levels of abuse of the visa 457 program. We have heard in evidence that there is a level of breaches—according to the department—in the range of 1.67 per cent. I was wondering if you could perhaps expand on the wide spread of breaches you have encountered—presumably in the construction industry, but wherever you encountered them—and perhaps make any comments you might have about systems or patterns or any particular attributes that these breaches have in common in your experience.

**Mr Sutton**—I have taken a close personal interest in a lot of the abuses in recent years and monitored it all fairly closely. I am highly critical of the department in terms of their failure to address the exploitation in a serious enough manner. It does not surprise me that the department would continue to try to paint the picture that it is a tiny minority of breaches. I am critical of the fact that the department do very few random inspections. Most on-site inspections the department do are announced. In other words, the sponsor gets prior warning that they are coming. There are very few unannounced. In my view, the actions of the department, particularly under the Howard government, left a lot to be desired in the days when this whole area was exploding in terms of abuse.

There are abuses in construction, hospitality, engineering workshops and nursing homes. I have seen abuses in a whole variety of industries. The area of work that I would draw the inquiry's attention to is at the ASCO 4 level, from skilled down to semiskilled grades. The 457 visa was meant to be a skilled visa, but you probably know that in the regions you can go down, I think, as far as ASCO 9, although I am prepared to be corrected on that. Anyway, you certainly can have semiskilled workers in the regions. The meat industry is another industry where there have been a lot of abuses as well.

I have seen all manner of abuses in the last three or four years and publicised many of them. I have seen workers killed at workplaces where they did not have English language capacity. Workers were sent to do jobs they were patently not trained to do. I have seen all manner of abuse. I have seen workers put up in accommodation that is appalling and that no Australian would live in. I have seen middlemen who control the bank accounts of these workers. I have seen middlemen take huge fees off these workers. I have seen workers that are in fear that if they ever disagree with the boss or they ask for a day off that the sponsorship may well be cancelled and they can be tossed out of the country. I would be here for a long time if I wanted to put before you all of the examples that I have personally seen, and I know the detail of many of them.

Our principal complaint of course is in the area of manual labour. I am not here carrying a torch for professionals, the Dr Haneefs and other doctors, highly skilled professionals, semiprofessionals or engineers. I am not here raising concerns about them. I am raising concerns about the manual worker at the trade and below-trade level. These workers are particularly coming from developing countries. There is a growing trend for these kinds of manual workers to be coming from developing countries in our region, in particular from China, Philippines, India, Bangladesh, Korea and those sorts of countries. Korea may be a developed country, but there are a lot of Koreans here who may or may not have language abilities. Wherever there are manual workers coming from a developing country, a poor country, and they are under a sponsorship arrangement where they have the knowledge that, if the sponsorship is terminated, the department will ask them to leave the country in 28 days, there are some pretty powerful forces at work that not in all instances but in many instances lead to pretty serious exploitation.

**ACTING CHAIR**—Let me touch on a couple of points you made there. Firstly, with respect to inspectors and their powers, we have heard evidence from other submissions today that the powers of inspectors set out in section 140X of the bill are too onerous—that an inspector has the power to enter a premises without

notification and that an inspector has the capacity to enter a premises without necessarily having already formed a view that there is a breach in progress. That evidence went to the idea that the system could be made more practicable for Australian businesses by having a regime for announced visits rather than giving the inspectorate such wide capacities to enter a premises. Do you have any comment about that and about trying to find a balance between, on the one hand, the need for a strong regulatory regime to stop abuse and, on the other hand, a regime that is practicable and understanding of the needs of the business community?

**Mr Sutton**—I have been in industrial relations for nearly 30 years, and I spent a lot of that time in my early years chasing up employers who were underpaying workers. Workers were being ripped off. One thing I can tell you for sure is that, if you give notice of the problem to an employer and come out to have a look at their premises on a particular date in the future, your chances of actually getting the evidence needed to nail down whatever the alleged breach is are much diminished. I have never been an inspector for the Workplace Ombudsman or any government department, but I have a feeling that the same principle applies: if you give people who you believe are doing the wrong thing and ripping people off advanced notice of when, where and what you want, in my opinion it would be a pretty rare employer that would sit pat and not do something to try to cover their tracks or to ensure that the evidence was not available to fix up the alleged breach. That is one comment. The other comment I would make is that it would be interesting to know who has put before your committee this evidence that inspectors should not have this right. I suspect it might be an employer group who has put that to you.

**ACTING CHAIR**—To be fair, they did not say an inspector should not have the right. I think they were trying to make the point that inspectors should not make unannounced visits as a matter of course.

**Senator FIERRAVANTI-WELLS**—The evidence, as I understood from the lawyers, was that, if you are going to have a framework which includes the powers of inspectors, there should be a proper framework for powers and reasons for inspection as opposed to reasonable belief and simply going in. I think it was clarifying the powers and the belief leading to the inspection rather than an objection to the inspectors coming in.

**Mr Sutton**—I am not across all of that detail or nuance, but I certainly support the thrust of the legislation. The inspectors should have much stronger powers. They are government officials. They are answerable at the end of the day to public processes. They are accountable in the public domain. I support stronger rights for them to go in and inspect.

**ACTING CHAIR**—There are two other areas where we have heard evidence today. The first goes to the various penalties that exist in the act for a sponsor who has not met their obligations. I think you have articulated the view that those enhanced penalties are welcomed by your organisation. Do you have a view about whether there should be in the legislation more expansive appeal mechanisms for employers or sponsors to appeal decisions made in the course of their sponsoring a person to work under the visa?

**Mr Sutton**—I am not sure what the legislation says about appeal mechanisms. Naturally, I support the right of people in our judicial system to have appeal rights. If you are prosecuted for something, our legal system normally permits you appeal rights. My concerns have been and remain at the other end of the spectrum—we are only talking civil penalties here, and I believe that we should be talking criminal penalties for the worst examples of exploitation, servitude, slavery or whatever you want to call it.

The other thing that I have been banging on about for years with politicians, who have never bothered to listen—and I have not had a breakthrough for years—is that employers have been caught out doing the wrong thing in the last five or six years, or longer, and have simply received a notice from the department generally warning them and that maybe a second time or third time round they could be told that they will not be allowed further sponsorships. It did not matter how grave the particular exploitation, mistreatment or whatever. There have been no penalties up until now. I am anxious to find out when the line in the sand is drawn for employers who have a past record of abuse and who have received previous warnings from the department.

**ACTING CHAIR**—When does their track record kick in?

**Mr Sutton**—When does their track record kick in or not kick in? I still fear that it does not matter how many times in the past they have been counselled or given a warning letter from the department, this legislation starts afresh, which is something I have been raising for some time.

**ACTING CHAIR**—You are obviously familiar with the abuses that have transpired. You touched upon the power imbalance between an employer and a worker working on one of these visas and the withdrawal of the

offer to work could involve that worker being deported from the country. Earlier today we were given some evidence about sponsored workers coming to Australia and then effectively 'employer shopping' upon arrival in search of a new sponsor who could provide them with perhaps more lucrative terms of employment—that is to say, that the power and equality have a few different dimensions to it. If such a person, when employer shopping or sponsor shopping, found a new sponsor then of course the person who made the original investment bringing that worker to this country had essentially, to speak colloquially, done their dollars. I am interested in hearing more from you about that power imbalance. To what extent do you think it exists on both sides of the ledger?

**Mr Sutton**—I have not heard too many real examples of that and there is good reason for that. As the law currently stands, if the employer chooses to terminate the sponsorships, strictly speaking, that person cannot stay in the country. They have to leave the country. There is also the 28-day rule. If the person indicates they are trying to find another sponsor then the department will give them latitude. I have heard of 457 visa workers finding other sponsors, but I have not heard of too many in the area that I am concerned about—at the trade and below the trade level—where the worker has so much power that they are able to mistreat the employer. I think it would be a pretty rare situation. Most of these workers who we come across are paid at the MSL, which is \$43,000. Many are not even paid that. They are supposed to be paid the \$43,000. In most instances that is a long way below market rates in Australia, but often the \$43,000 will be well above what a worker would get for that class of work in the Philippines, in China or wherever. Very often the worker does not feel empowered or will not have a sufficient knowledge of our laws, our society, our culture to just walk away from a sponsorship and go elsewhere. It would be a pretty rare situation where that would happen.

Often the worker has come here because a migration agent or a labour hire agency has been involved in the whole relationship. Often there are middlemen who are very powerful in setting up these relationships. They are often of the same ethnicity as that worker. I repeat: it is almost unheard of, in my experience, for that worker to be able to tear up the relationship, walk away and go somewhere else. I am not saying it has never happened, but I do not personally know of such examples.

**ACTING CHAIR**—One of the core principles underpinning this whole program is the notion that these foreign workers will be more expensive than Australian workers and that that premium drives employers to look first in Australia for Australians. Are you satisfied that there is in fact that premium and this is not being used to bring low-cost labour into Australia?

**Mr Sutton**—The premium has not been there. Again, I will keep saying it: at the level I am talking about—the trade level—where the MSL is \$43,000, that means an electrician, a skilled metal trades person or a skilled building trades person coming here from wherever is to work for \$43,000. You will not get a carpenter, or a fitter and a turner, or a boilermaker, an electrician or a plumber to work in Australia for \$43,000. Their wages are not within cooeee of \$43,000. I read an employer article a couple of days ago in one of those employer newsletters where an employer was boasting that he could get 457 workers to work on the mining projects in Western Australia for \$60,000—which was what he called a realistic wage rate—rather than for the outrageous amounts that are being paid to the workers working up there at present. That was that particular employer's perspective. I will table the document if you would like, just to show you that it is not a figment of my imagination.

**ACTING CHAIR**—That would be useful.

**Mr Sutton**—I do not regard the statement, which he boasts, that he can have 457 workers do the work for \$60,000, as anything other than an employer knowing that he can use these temporary foreign workers to substantially undercut the prevailing pay rates for those workers who are working up on the mine projects. By the way, those workers who work on the mine projects are away from home for three or four weeks, many of them work seven days a week, 60 hours a week, in outrageous conditions. The work is dangerous, it is very hard work so, if they get \$120,000, \$150,000, or whatever, then they have worked very long, hard hours for it. I know of many employers who believe that they can use 457 workers to undercut prevailing rates in those industries. So the answer to your question is very often the premium has not been there and many employers have used the 457 visa to undercut local wage rates—in other words, used the scheme as a cheap labour scheme.

**ACTING CHAIR**—Another of the core principles underpinning this program is the idea that it fills skills gaps and that, in certain parts of the economy where Australians are not willing or able to be employed, foreign workers can fill that gap. Yet you seem to have touched upon examples where these persons are being

brought into the country to work in preference to Australians rather than in the absence of Australians. Can you tell us more about that?

**Mr Sutton**—Of course, the labour market is not uniform. There are places in our labour market where skills are in short supply. There are other places where skills are abundant and the work is in short supply. Consider the construction industry and look at where we are at the moment. The biggest economic unit in the country, the construction industry in Sydney or in New South Wales, has been dreadfully quiet for three or four years. There are unemployed building workers here. Some younger unemployed workers choose to fly to the west or the north and go chasing the work where there are skills shortages, but not everyone can do that. Some people have families and reasons why they cannot be mobile and travel to places where there are skills shortages. The labour market is not uniform and skills shortages are not uniform across these various occupations. All too often you hear commentators announce that there is a skills shortage, but the picture is more complex than that. Many of the temporary migrant workers are brought into places such as Sydney where there are no skills shortages or, as a broad principle, the skills shortages are not acute. If you look at the raw statistics, you will see that there are more 457 workers coming into New South Wales than anywhere else.

**Senator FIERRAVANTI-WELLS**—The New South Wales government is the highest user of 457 visas.

**Mr Sutton**—I am well aware of that. Health departments all over the country are high users of them, but I repeat to your committee that I am talking about at the manual worker level, skilled and semi-skilled workers. There are no shortages in the trades in this state, but there are plenty of places here where 457 workers have been brought in and have effectively displaced local workers—not just in the construction industry but in the meat industry and in a range of different industries I could point to.

**Senator FIERRAVANTI-WELLS**—On that note, Mr Sutton, I thank you for coming because I was insistent that you did come to give evidence today. In fact, Mr Hallihan can attest to that. Your union and other unions have made assertions about various things, and indeed today you have made them. I think it is really important for this committee to have as part of its record the specific instances that you have referred to. I know you have made various references to the fact that you have been going on about this for some time. I would really be grateful if you could table some of those statistics for us.

**Mr Sutton**—Absolutely. Do you doubt what I say?

**Senator FIERRAVANTI-WELLS**—I do not, Mr Sutton.

**Mr Sutton**—I will give you plenty of evidence.

**Senator FIERRAVANTI-WELLS**—And I will take you to the statistics. Yes, we have seen the use of 457s growing and I will actually quote the figures out of the ACTU submission—16,000 in 1997-98, up to 58,000 in 2007-08. How many of those in those years do you allege in a given year have been cases of abuse? And I am not talking about the general skilled migration category; I am actually talking about 457s, which is what we are here to discuss.

**Mr Sutton**—Nobody can sit here and say some scientific number to you about the number of abuses. The department is supposed to have been monitoring this 457 regime.

**ACTING CHAIR**—That is what Donald Rumsfeld would call a ‘known unknown’.

**Senator FIERRAVANTI-WELLS**—The reason I ask is that, in fairness, Mr Sutton, you bandy around many Australian workplaces and your submission is full of overuse et cetera. I recognise that there are instances and, taking aside the ideological component of this, that there is need for a framework. That need was recognised by the previous government and by this government as well. If you are going to make assertions like ‘many’ and ‘extensive’ and ‘gross’, I would appreciate if, for the benefit of this committee, you could substantiate those sorts of assertions. It is important for us to understand the extent and the evidence of systematic or widespread exploitation. If you say on the one hand that there is 1.6 and you are not happy with what the department is doing and we have the employer groups saying that there is not this systematic exploitation and you, Mr Sutton, are coming in and giving evidence, I would appreciate the statistical and the actual concrete evidence of that. If you could take that on notice—

**Mr Sutton**—Could I answer now?

**Senator FIERRAVANTI-WELLS**—Sure.

**Mr Sutton**—Senator, I reckon we would have put at least eight high-quality submissions to government, to both the previous government and the current government, in the last three years. I would stand by the quality of all those submissions in terms of the ability of any organisation outside government to go to the specificity

that you are talking about. We are a trade union. You may know that in recent years trade unions have not had as many rights to enter workplaces and obtain information. We have had industrial laws, Work Choices et cetera—and even the Reith laws—which, compared with earlier times, have constrained our ability to get in there and crack open a lot of cases of exploitation.

Notwithstanding the difficult industrial regime we have had to work under, I would challenge that anybody has put better quality submissions outside government. The people who have had the capacity to go in and get detail have been the government, the bureaucracy, Immigration, and I do not think they have done a good job in that regard. I am happy to furnish examples to you. In all of these submissions, we have lodged many particular flesh and blood examples.

**Senator FIERRAVANTI-WELLS**—I think that would be useful, if it does not trouble you.

**Mr Sutton**—I would be very glad to do so.

**Senator FIERRAVANTI-WELLS**—My question is really—

**Mr Sutton**—I was going to say they are the tip of the iceberg. Because we are not the bureaucracy, we cannot get to the iceberg, Senator.

**Senator FIERRAVANTI-WELLS**—Some are 457s and some are general skilled migration, which are covered by state OH&S. This is some of the evidence that we have heard as well. How much of these abuses are just 457s? That is what we are really here to discuss. How many of them are from general skilled migration or people who come in not under 457s but are part of the general skilled migration pool?

**Mr Sutton**—The bill we are dealing with today is dealing with temporary migration visas—is it not? We are not talking about permanent migrants here.

**Senator FIERRAVANTI-WELLS**—We are talking 457s. In the material that you produce, I would be particularly appreciative if you could say which one is 457.

**Mr Sutton**—The submissions I will give you copies of, on their face, make it clear what they are. A lot of them deal with 457s but not exclusively 457s.

**Senator FIERRAVANTI-WELLS**—Thank you. That is the point I was getting at.

**ACTING CHAIR**—If you could provide that to the committee by close of business Tuesday. We are dealing with dreadful time lines.

**Senator FIERRAVANTI-WELLS**—I am going to China on Sunday, but I will do my best to get the stuff to you.

**ACTING CHAIR**—I appreciate that very much.

**Senator FIERRAVANTI-WELLS**—Part of the discussion here has been the potential of a two-tier system—one is the higher skilled end, the executive end, and the other is the unskilled and semiskilled level that you are talking about. The possibility of a two-tier system has been canvassed. Do you have a view on that?

**Mr Sutton**—How do you mean? I am not familiar with that.

**Senator FIERRAVANTI-WELLS**—For example, the assertion has been made that those at the top end, if I can put it that way, the higher skilled end, the executive level, have good English skills and are in a good position to negotiate their circumstances well. The category of people that we are talking about is at the semiskilled level. Is there is some merit in a two-tier framework? In effect, they are the ones we are seeking to afford greater protection.

**Mr Sutton**—I think you will find Commissioner Deegan, who is doing that inquiry, is somewhat open to that kind of thinking. I know she has discussed that idea of different standards at the professional level and it is something that she is contemplating. I have seen a trend in the statistics that say that, even at that upper level, a lot of the 457s are not paid in accordance with local standards. I am not here today worrying too much about that; I am more worried about the manual workers and I am particularly worried about the manual workers who are coming from developing countries. That is where the thrust of my concerns are. One other thing I will point out is that there has been a lot of use of temporary migrant workers in the IT area. I think you will find that many of those have not got local standards and very often they have been used to undercut local standards in the IT market. Again, I will leave that to others to worry about.

**Senator FIERRAVANTI-WELLS**—One of the real concerns is that the bulk of the obligations, from an employer's perspective, are going to be contained in regulations that we have not yet seen. I think you touched on this in talking about some of the work that has been done. Do you believe that, given the extensive obligations that will be contained in the regulations, we really should be seeing the bill and the regulations together and that they should be passed as a package?

**Mr Sutton**—I would certainly like to see them before they pass into law; that is about all I can say.

**Senator FIERRAVANTI-WELLS**—Thank you. So would I. We are in agreement on that.

**ACTING CHAIR**—There is a unity ticket on that then?

**Senator FIERRAVANTI-WELLS**—I think there might be.

**Mr Sutton**—The stakeholder panel, which I am on, has had the opportunity of interfacing with Commissioner Deegan. The stakeholder panel includes employer interests, union interests and state governments. I am not quite sure but I am hopeful that we may have some role to play in looking at the draft regulations. I am hopeful of that, anyway.

**Senator FIERRAVANTI-WELLS**—You will see them before we do. I guess that is a real concern and certainly a concern from a legal perspective in terms of employers undertaking obligations blind, if I can put it that way, given that there is the question of retrospectivity or 'retroactivity', as it has been referred to in the legislation.

Another issue that has been raised is the possibility of sponsors finishing off their obligations under current arrangements and then making any new sponsorship obligations under the new regime, so that you may have a period of time where you have a contract under the old regime alongside contracts or agreements under the new regime. Do you have a view in relation to that?

**Mr Sutton**—Yes. I would not support that. Again, at the level I am talking about, employers have had a very easy ride for a long time, and I do not support any kind of grandfathering or something that says this will be phased in over time. With regard to the bill that you say your party supported last year, unfortunately, while the then minister announced it in May, it got shelved and was never dealt with.

**Senator FIERRAVANTI-WELLS**—There was an election coming up too.

**Mr Sutton**—I followed that very closely, Senator, and your party ultimately chose not to put the bill into the parliament and deal with it. We have had to wait another 18 months from that point. I was critical that that kind of legislation had not come in a year or two earlier than that. There has been all the notice in the world that some of these new obligations are coming in, so I do not support any kind of phased or delayed introduction. They are long overdue, in our submission.

**Senator FIERRAVANTI-WELLS**—I will ask you something for the record, Mr Sutton. It is clear from your objections that you and the union movement really do not like the 457 system and would like to see it phased out. Is that your view, or are you still happy to keep it?

**Mr Sutton**—Once I give you all our submissions and you read what we have to say, you will see that the historical approach we have had is that there was a niche scheme in this country whereby, if there was a demonstrated skills shortage, labour market testing occurred and it was demonstrable that that skill could not be found locally, we would support it. We still support that. What we do not support is a completely deregulated system, with no labour market testing and no market rates—really, a major deregulation and an explosion of the use of temporary migrant workers—which it has become. The number of temporary work visas now dwarfs the permanent program. We believed that has things out of whack. The permanent program should remain our central thrust, with a temporary scheme in only genuine situations. All too often the temporary scheme has unfortunately become completely misused and abused on a broad scale.

**ACTING CHAIR**—I have no further questions, so thank you very much, Mr Sutton, both for your submission and for making yourself available to the committee today.

**Mr Sutton**—No problems.

[3.05 pm]

**KUKOC, Mr Kruno, First Assistant Secretary, Principal Advisor Migration Strategies, Department of Immigration and Citizenship**

**POHL, Ms Amanda, Acting Director, Legislation, Department of Immigration and Citizenship**

**McDONALD, Ms Kerrie, Senior Legal Officer, Department of Immigration and Citizenship**

**ACTING CHAIR**—I welcome representatives from the Department of Immigration and Citizenship. The department has lodged submission No. 18 with the committee. Do you wish to make any amendments or alterations to the submission lodged by the department?

**Mr Kukoc**—No.

**ACTING CHAIR**—I now invite you to make a short statement. At the conclusion of that we will ask you some questions.

**Mr Kukoc**—First, I would like to thank the committee for the opportunity to appear before this inquiry. I would like to highlight three key aspects of the department's submission to the committee that I understand are of most interest to you and many other stakeholders. The first is the supposed retrospectivity of the bill raised by a number of stakeholders in their submissions to this committee and at the hearing today. As explained in our submission, this bill is not retrospective. All provisions will apply prospectively from the date of commencement at the earliest.

The bill does not reach into the past and change the law. What it will do is bring all existing sponsors into the new framework. This will not, however, mean that the status of any acts or omissions prior to commencement will be subject to the rules of the new framework. The bill does preserve rights and responsibilities under the old framework for any acts or omissions that occurred prior to commencement. The department is planning for the new scheme to take effect from 1 July 2009. All of our standard business sponsors will be properly and timely informed of the new rules and will have sufficient notice of the change to adjust to the rules.

Given the alternative arrangements—the so-called transitional provisions suggested by some stakeholders that effectively mean introducing grandfathering provisions in the bill—it is necessary to elaborate on the reasons against such an approach. To begin with, the transitional period under any proposed alternative approach would be impractically long. Temporary work visas can be valid for up to four years and sponsorship approvals for up to two years. As a result, employing sponsors would need to understand how the two different regimes apply to their employees, perhaps through to the year 2015. The department would need to administer two regimes until 2015. The resulting complexity for employers, the department and other stakeholders makes this alternate difficult to administer, confusing and costly. It also carries the potential at having two classes of 457 visa holders in the country with different rights, obligations and levels of protection. The proposed legislation ensures that all 457 visa holders in the country enjoy the same level of protection available from the date of commencement of the legislation.

The second major issue before the committee is the question of the bill creating additional red tape. The bill, together with the associated regulations and administrative processes, has been created with reducing red tape in mind. Let me illustrate this point with an example. Under the proposed legislation, the employer may need to apply—that is, fill out a form and pay a fee—to be approved as a sponsor only once, rather than every two years as is required under the current arrangements.

The approval can be for one to many sponsors—that is, one approval only to sponsor many visa holders. The approval could also be for the employer to be the sponsor of many different kinds of visas. For example, the employer who is an approved 457 sponsor may automatically be able to sponsor a subclass 442 occupational training visa holder, rather than having to apply separately as is required under the current arrangements. The reduction in red tape will be more significant for employers who sponsor more than one temporary worker from overseas. However, we are expecting that a reduction in processing costs for our department will allow resources to be internally allocated to better help one-off sponsors through the process.

Finally, I would like to make a few comments in relation to compliance costs. Compliance costs are clearly related to the amount of red tape involved in the process. As explained earlier, the bill will streamline the sponsorship process and accordingly reduce compliance costs. Of particular concern to stakeholders appearing before the committee is the cost of associated with obligations that might be set out in the regulations. The

substantive obligations that will be prescribed under regulations will be a result of a broad consultation process that has involved a number of key stakeholders, including business, unions and state governments. Indeed, some of the stakeholders that have appeared before this committee have had an opportunity to comment on the departmental discussion paper released in June this year and have an ongoing opportunity to make their views known through either or both their membership of the consultative panel on 457 or the consultations conducted by Ms Barbara Deegan as part of her integrity review into 457.

There is strong awareness among all stakeholders involved in this review that the final set of obligations will need to achieve a proper balance between the cost of compliance for sponsors and the integrity of Australia's temporary migration programs. The overall objective of the bill and supporting regulations is to increase the cost of serious and deliberate noncompliance without unnecessarily burdening the business community. The department will also be consulting closely with the Office of Best Practice Regulation in analysing the compliance costs associated with any proposed regulations. I thank the committee for the opportunity to make all these comments and trust they have addressed some of the more significant concerns raised before the committee. I am now happy to answer any questions.

**ACTING CHAIR**—Thank you. You have spoken about the penalty provisions that pertain to a serious and deliberate noncompliance. What happens to non-serious and non-deliberate noncompliance? In particular, I am interested to hear from you about why it is that officers of the department or more inspectors are not empowered in the bill with the discretion to waive, amend or change any of the various time lines or regulatory obligations that apply. In particular, I am concerned that if a business is struck by lightning, hit by a tsunami or has a plane crash on it then no-one in the system has a discretion to give that entity an extension of time. What do you say about that?

**Mr Kukoc**—The discretion does exist under the legal system. The civil penalties prescribed under the proposed legislation are the maximum penalties that can be imposed by the court. There are a number of steps in this process and there is a discretion available both to the courts and to the department not to pursue civil penalties in cases of non-severe or inadvertent breaches of the law. That is how the normal court system operates. The civil penalties provisions in the proposed legislation mirror the civil penalties provisions in the Workplace Relations Act 1996, which has been in operation for the last 10 years in the protection of Australian workers. We believe there is no reason not to apply the same level of protection to migrant workers.

In cases of breaches, I think there are a number of steps involved in the process. I must admit I am not a legal expert but I have been advised that the department, firstly, needs to establish whether the breach occurred or not. If the breach occurred, the delegate takes into account whether the breach was severe or deliberate or inadvertent and then makes a decision whether to pursue the civil penalties provisions.

There are a number of steps. The offending sponsor could be offered the opportunity to correct the mistake. Also under the proposed legislation there is an option of an infringement notice before any court action can be taken. Even when court action is taken, the court can have guidance as to the maximum penalty provisions. It is only the maximum penalty provisions that the court can impose. The court can decide to impose a lesser penalty and may not in fact impose any penalty depending on how severe or deliberate the breach was.

**ACTING CHAIR**—Where in the bill is the discretion? Where is it codified in the bill?

**Senator FIERRAVANTI-WELLS**—Where in the bill is it?

**ACTING CHAIR**—You can get some legal advice if you like.

**Mr Kukoc**—Section 486S in the bill, page 30, schedule 1 of the Migration Act.

**Ms McDonald**—My apologies, it is 486R, subsection 2, and the determining factors are 486R, subsection 3. To address the question of where the discretion exists for civil penalties in terms of the court action, it is in the bill at proposed section 486, subsection 2.

**ACTING CHAIR**—Can you give us the page?

**Ms McDonald**—Page 29. It is in schedule 1, part 1. That is a standard civil penalty provision—

**Senator FIERRAVANTI-WELLS**—I think that Senator Feeney's question goes to the discretion within the department. I appreciate that there is discretion once the proceedings go to court. I think that Senator Feeney's question goes to the discretion before this matter goes to civil proceedings. That is really the issue and that is the question I also have. Nothing that we have seen allows for discretion. For example, when somebody has to produce something in seven days and their accountant is not available to give you the information or whatever, where is the discretion? Is this a mandatory failure to meet an obligation? Where is

the discretion? Is there any discretion available for the department to exercise? Can they say, 'Okay, you cannot do it in seven days; give it to us in 10 days'? Where is that written in the bill? The answer is: there is no discretion. That is the situation.

**Ms McDonald**—I think it is probably best if I take this on notice to be able to give you a correct legal response. There is a concept in the Acts Interpretation Act that where the minister has an ability to do something he has the ability to undo it. I say this on the basis that, to give you a correct legal answer, I do not have the correct information in front of me.

**Mr Kukoc**—It involves a number of legal issues, so we would like to take this on notice.

**ACTING CHAIR**—That is no trouble at all. The only thing I would beseech of you is that you get us the answer by close of business on Tuesday. I know that is an onerous obligation—that is a phrase I have been using a lot today—but we have to meet the report deadline.

**Ms McDonald**—The point that I would make in relation to where there is an offence provision in there is that the offence provision is there but, as my colleague Kruno mentioned earlier, there are a number of steps that need to occur before an offence provision ultimately ends up in somebody having a criminal offence—

**Senator FIERRAVANTI-WELLS**—That is not in the act, and that is our point—that is really what we are getting down to. You are imposing on prospective sponsors legal obligations but you are not putting them in the act. They are in regulations and we have not seen them. My basic question is: if you have done all this consultation, and you say it has been great consultation, why can't we have the regs? Can we not wait a little bit longer and just get these regs so that we can consider the whole thing together? A lot of these things may well go away and a lot of the concerns that have been raised may not be concerns anymore if we had the regulations. I am echoing this out of frustration more than anything.

**ACTING CHAIR**—I think we are chasing the same rabbit down the same burrow. It might very well be that the regulations in fact have covered all these matters off. That is entirely possible. We just do not know.

**Ms McDonald**—I think the issue that was raised before about the notice being issued, the period of time available and the offence that attaches is a separate issue to the regulations.

**Senator FIERRAVANTI-WELLS**—Since we have not seen what is in the regulations, we do not know if it is a separate matter for the regulation. Do you see what I am getting at? We have a bill that sets out a framework. It says: 'I, prospective sponsor, will have certain obligations that are contained in regulations which I am yet to see. I may have discussed them with a whole lot of people. I may have had extensive consultation. But today, if I have to consider my position, I don't know what those regulations are going to be,' and that is our point. In the end, is it more effective at this point in time to give certainty to get regulations rather than waiting—

**ACTING CHAIR**—To be fair to the witnesses, this is not a matter for them.

**Senator FIERRAVANTI-WELLS**—I appreciate that. I am actually putting this on the record. We are here to look at the problems with this bill. One of the basic problems with this bill is the fact that we do not have the regulations.

**ACTING CHAIR**—I might resume my line of questioning. Hopefully continuing my education, can you identify for me what appeal rights a sponsor has? Let's say that they have committed an alleged breach which may involve civil penalties. What capacity do they have to appeal the finding that they have made a breach?

**Ms McDonald**—To clarify the question, where you said 'the finding that there has been a breach', the start point is that there is a suite of sanctions that are available if there is an alleged breach. In terms of the administrative sanctions, which are cancelling and barring sanctions, that is something that is determined by the minister. If there is a decision made by the minister to cancel or bar a person for an alleged breach, there is merits review available currently. That is intended to be continued under the bill. So that is in relation to that.

In relation to civil penalties, a finding of a breach can only be made by the Federal Magistrates Court or the Federal Court. That is happening. That is part of the legal process anyway and, of course, if somebody is unhappy with the court process then there is the appeals process that attaches to the Federal Court and Federal Magistrates Court decisions.

**ACTING CHAIR**—I want to move on to talk about inspectors. We have heard some evidence—indeed I think you will have heard it yourself—about the operations of the department's inspectors. I am wondering what you might be able to tell us about the regime of inspections going forward. Can you tell me a little bit about how it is organised and on what basis they conduct unannounced and announced inquiries of sponsors?

**Mr Kukoc**—The proposed provision for inspectors in the bill again mirrors the powers and the provisions under the Workplace Relations Act 1996. We do have Workplace Ombudsman inspections—unannounced inspections—on a regular basis in protection of the Australian workers. This bill essentially introduces the same provisions to enable inspection powers in protection of the migrant workers. It is an intention that one person, on most occasions, will conduct the inspections for both Workplace Relations Act purposes and Migration Act purposes.

**ACTING CHAIR**—Thank you. I comprehend all of that. What percentage of sponsors will be visited by the inspectorate over the course of, say, a calendar year—or maybe even what percentage of sponsors full stop?

**Mr Kukoc**—This will be subject to a new risk management model that is currently being developed in the department as part of the reform process. It may involve accreditation and better targeting of risk. The percentages of visits and the criteria for targeting various sponsors will largely depend on that new risk management model.

**ACTING CHAIR**—So that work is being done and there will be transparent targets; they are just not set at this time.

**Mr Kukoc**—It is not yet defined. This is part of the broader reform process that is currently going on. As you know, the government has accepted the recommendation from the external reference group on 457 to introduce accreditation. This is now being considered as part of the broader reform process of the consultative panel and the IDC that the government has formed to advise the government on the long-term reform package for 457. A new risk management model accreditation process will likely be part of that model.

**Senator FIERRAVANTI-WELLS**—I have some concerns with the partnership and the unincorporated associations—the collective responsibility. No maximum limit is proposed for the partnership or unincorporated association as a whole. Is that something that you propose to remedy or were you just going to leave it open-ended?

**Mr Kukoc**—This is again a very common provision on the statute books. It applies in other legislation. The legislation will be targeting the wrongdoing partners. The maximum penalty for each contravention which can be imposed on each partner or committee member is one-fifth of the maximum penalty which could be imposed on a body corporate. If there are more than five wrongdoing partners then the maximum penalty that could be imposed for the breach could conceivably exceed the maximum penalty that could be imposed on a corporation. We believe this is entirely appropriate, as the wrongdoing partner member should be liable for a civil penalty if their conduct led to the contravention. We do not think it is unfair to levy civil penalties on all wrongdoers. As I said, this is a common provision on the statute books.

**Senator FIERRAVANTI-WELLS**—Can you give me an example of other legislation that is in?

**Ms McDonald**—We can take that on notice and provide you with something.

**Senator FIERRAVANTI-WELLS**—With respect to employers bearing the financial costs in relation to visa holder breaches beyond their control—we are talking location and detention costs, the 457s that abscond—some of these are going to be beyond the control of the sponsor. What underpins the requirement for that provision?

**Mr Kukoc**—This newly proposed provision essentially mirrors the current undertakings for 457 sponsors. We are not proposing any changes; essentially, this will be translated from the current undertakings into the new legislation. We do have a cap, I think, of \$10,000 in the proposed legislation.

**Ms McDonald**—Currently, to paint the full picture, there is a provision in the Migration Act, a requirement, to pay to the Commonwealth an amount in relation to locating and detaining not just 457 visa holders but sponsored visa holders that come under the regime. The provision that is proposed to be included in the bill will expand that provision to the extent that there will now be an ability in the regulations to prescribe a limit on an amount in an obligation that is required to be paid to the Commonwealth not only in relation to locating and detaining costs but something broader—and I do not know what that may be.

**Mr Kukoc**—The current practice is that we can recover up to the maximum costs that are really actually incurred by the Commonwealth, and there is a cap on that of \$10,000. I think that will be the case with the newly proposed legislation and regulations.

**Senator FIERRAVANTI-WELLS**—It would be useful if you could set out in table form what the current undertakings are and the extent of transposing over in the bill. In other words, if undertakings are going to be

codified and that is the objective, can we have a table that sets out what the current undertakings are, where that undertaking is transposed to a statutory obligation, where the full extent of that obligation is to be put and where it is going to be in the regulations. I think that might be worth while for us.

**ACTING CHAIR**—I just wonder if it is possible to do that in the absence of the regulations. If it is, I am sure you will find a way.

**Senator FIERRAVANTI-WELLS**—That at least identifies for us, Senator Feeney, in an easy-to-read format, what is left to be determined under regulation.

**ACTING CHAIR**—Where an existing obligation exists, point out where it is in the existing act and where it is in the forthcoming bill.

**Senator FIERRAVANTI-WELLS**—And what is then left under regulation. Is that quite easy to do?

**Mr Kukoc**—Most of the current undertakings may be reflected later in the regulations. Most of them will not be reflected in the legislation.

**ACTING CHAIR**—So only a small number of those things will be found in the bill?

**Ms McDonald**—I am just trying to pick up on your point, which followed on from the point about the ability to set limits. The content of the obligations will certainly be in regulations and, as has been much discussed, that content is not in the bill. The provisions in the bill, such as the one that we were just discussing in relation to the ability to set a limit—and I am happy to outline those provisions—I guess place limits on what can actually go into the regulations. I am not sure if I am answering your question.

**Senator FIERRAVANTI-WELLS**—No, I understand what you mean. So if there is a current undertaking that says A, B, A—you shall—

**Ms McDonald**—You must do A, B and C.

**Senator FIERRAVANTI-WELLS**—You must do A, B and C. What you are saying is that somewhere in the migration legislation or in other legislation there is the statutory obligation for you to currently impose that undertaking.

**Mr Kukoc**—I would like to take that one on notice.

**ACTING CHAIR**—As long as you understand the question!

**Ms Pohl**—You asking about current undertakings; is your question whether—

**Senator FIERRAVANTI-WELLS**—Your evidence is that you are taking a set of undertaking that sponsors currently give in relation to 457 visas and other visas.

**Ms McDonald**—Correct.

**Senator FIERRAVANTI-WELLS**—Okay. You are then setting up the framework whereby those undertakings plus others are going to be codified in a set of regulations which we are yet to see. Correct?

**Ms Pohl**—That is correct.

**Senator FIERRAVANTI-WELLS**—Right. All that you are doing here is setting out a framework pursuant to which those undertakings will be established and codified into regulations yet to come.

**Ms Pohl**—That is correct.

**Senator FIERRAVANTI-WELLS**—That is correct. Right. Now, my question to you is: you start with the undertakings in column 1, in column 2 you set out pursuant in the bill. What part of the bill enables you to then put that undertaking in the regulation, because I do not think there is going to be much in the regulation column because you are not going to be able to point and say to me if that regulation is actually going to be in the regulations because you have not determined that yet. Is that the situation?

**Mr Kukoc**—It is not up to us to determine their obligations, and the bill provides the framework, as you correctly outline.

**Senator FIERRAVANTI-WELLS**—Please do not get me wrong: I am trying to understand the number of obligations a prospective sponsor has or any other obligations that may be imposed under regulation. That is what I am trying to understand. I am also trying to understand where your proposed legislative framework gives you the head of power to then enable you to put that regulation into something that is going to happen in the future.

**Ms Pohl**—We have the power under the act to actually make regulations and include obligations in the regulations.

**Senator FIERRAVANTI-WELLS**—I appreciate that. The ‘head of power’ was perhaps the wrong terminology. Where in this bill can I find the origin of your proposed regulation?

**Ms Pohl**—Yes, I take your point that the content of the obligations is not set out in the bill and it is yet to come in regulations.

**Senator FIERRAVANTI-WELLS**—That is right, and it is a policy decision ultimately for the content of those regulations. You are now just setting out the framework. I am concerned on two fronts: I am concerned about where your framework enables you to put the regulations in and then ultimately what those regulations are. If you do not know whether a certain undertaking that now exists is going to be a regulation, then just put that you do not know; that it is not yet determined. That is my point.

**Ms Pohl**—The department is involved in ongoing consultation, and we are certainly working on drafting instructions at the moment. But until all of the reviews are complete—

**Mr Kukoc**—I must admit that I am not sure that I understand your question. We do have powers under the current act to create regulations—

**Senator FIERRAVANTI-WELLS**—Yes.

**Ms Pohl**—Yes.

**Mr Kukoc**—These regulations will be designed after the outcome of the reviews that will report to the minister and the government, and the government will be making that decision. Of course, the regulations will be subject to proper Senate scrutiny. They will be subject to the Office of Regulation Review regulatory impact statement and subject to Senate disallowance. In the lead-up to the government deciding on those regulations there has been a process going on since June this year.

**Senator FIERRAVANTI-WELLS**—I appreciate that, but my point is: if you have gone through all this consultation why we are not seeing the regulations with the bill?

**Mr Kukoc**—Because the review process has not been finalised yet. As you know, Barbara Deegan’s review process is currently going on and I understand she will be making her report. There is a consultative panel review going on and they are likely to report to the minister by the end of November. There is an interdepartmental committee that will put together a reform package for government consideration in the next budget. So a number of reviews are going on and until these reviews are finalised—

**Senator FIERRAVANTI-WELLS**—You have been here for most of the evidence today and I would ask you to have a look in particular at the submission given to us by Fragomen because I think they raise some very serious legal issues. I would appreciate it if you could take on notice to address some of those. As you can appreciate, they will no doubt be raised as part of the process of the bill. I will not take that any further now.

In relation to general inspection, your statistics show there has been a very low percentage—in fact, Mr Sutton from the CFMEU criticised you for this—of only about 1.6 per cent of sponsors who have breached their obligations. If this is correct, what is the case for imposing a new set of undertakings—I appreciate the issue about the undertakings—and new obligations on all sponsors?

**ACTING CHAIR**—Your question is asking what is the policy motivation for the bill.

**Mr Kukoc**—Senator, I am not sure that I can respond to the policy matters.

**ACTING CHAIR**—I think that is quite right.

**Senator FIERRAVANTI-WELLS**—All right.

**Mr Kukoc**—I think I can help you with some statistics.

**Senator FIERRAVANTI-WELLS**—So is the 1.67 per cent correct?

**Mr Kukoc**—The statistics I have available here with me show that for the 2007-08 program year we monitored around 5,300 sponsors. We had 1,759 sponsors site visited, 192 sponsors sanctioned and 1,353 sponsors formally warned. If we compare this to the previous year, in 2006-07 we monitored 6,858 sponsors and visited 1,680 sponsors and we had only 95 sponsors sanctioned and 313 sponsors formally warned. So there was a significant increase in sponsors sanctioned and formally warned. This needs to be considered in the context that the department has implemented a better risk management strategy, so we are targeting a more risky caseload and that can explain to some extent that increase. The other part is obviously the increase in the

number of 457 visa holders generally and their sponsors. But there has been an increase in the number of sponsors sanctioned.

**ACTING CHAIR**—Can you endure my ignorance for a moment and explain to me what ‘formally warned’ entails?

**Mr Kukoc**—Essentially, we find that there is a breach but then we issue a formal warning offering the opportunity to the sponsor to correct the breach. This is in cases of non-severe or inadvertent breaches.

**ACTING CHAIR**—That is issued in writing and the sponsor has the opportunity to correct the conduct?

**Mr Kukoc**—Yes, that is correct.

**ACTING CHAIR**—Thank you. I am sorry to have interrupted.

**Senator FIERRAVANTI-WELLS**—The explanatory memorandum notes that the intended approach is for the department to initially obtain information from the ATO for verification and that further information will be sought only if it is needed. Should this approach not be reflected in the bill?

**Ms McDonald**—I understand what you asking. Can I have a moment.

**Senator FIERRAVANTI-WELLS**—Yes. I was about to go on to say that the Privacy Commissioner has raised some concerns in relation to taxation and in relation to 140ZA. Could you comment on those? Have you consulted with the Privacy Commissioner?

**Mr Kukoc**—We did consult with the Office of the Privacy Commissioner. At that stage, the Office of the Privacy Commissioner did not have any concerns, so we were not aware of the submission.

**Senator FIERRAVANTI-WELLS**—Perhaps you might take that on notice and have a look at what the Privacy Commissioner has submitted.

**ACTING CHAIR**—Do you have a copy of the submission we are talking about?

**Ms Pohl**—We do.

**Mr Kukoc**—We will take this on notice. Can I provide a preliminary response. The proposed amendment to the Taxation Administration Act will insert a new exception to the taxation secrecy provision. This will be just one of several exceptions to the taxation secrecy provisions that are currently contained in the Taxation Administration Act. The drafting of this provision is absolutely consistent with these other exceptions to the taxation secrecy provision.

**Senator FIERRAVANTI-WELLS**—I am not making an objection. The Privacy Commissioner has raised some concerns.

**ACTING CHAIR**—If we could dispel that concern in our report then all the better.

**Senator FIERRAVANTI-WELLS**—Yes, that is my point. You were here when Mr Sutton gave evidence about the mini this and the mini that. He was quite critical of the department and its conduct. I would like to afford you the opportunity to respond if you so wish to some of those criticisms.

**Mr Kukoc**—All I can say is that the process is currently going on in terms of reforming the protections available for 457s and the way we conduct our business on 457s. That process has commenced with the external reference group recommendation. The fact is that the government has accepted a number of these recommendations, and the department was actually quick to implement all of those improvements, as has been recognised by a number of stakeholders here. We are continuing to work on improving the monitoring and processing arrangements for 457s and the objective of this is obviously to have better protections and still ensure responsiveness to the needs of the labour market and business.

**Senator FIERRAVANTI-WELLS**—You obviously keep statistics, could you give us a snapshot of the nature of the breaches? If you have those statistics in relation to breaches of 457 visas over the period of time since they have been in operation, they would be appreciated. I understand that providing it before Monday is going to be onerous.

**ACTING CHAIR**—Are they published anywhere now?

**Mr Kukoc**—I am advised that we do have them on our website. It is called monitoring and compliance supplementary information.

**Senator FIERRAVANTI-WELLS**—May I ask, for the record of this committee, if you could provide to us—perhaps for Monday—the history of breaches to put into context some of the more dramatic assertions that were made by Mr Sutton in relation to the many breaches. I think you understood that I was trying to

pinpoint him specifically on breaches to do with 457 visas, which is what we are looking at, and the visa categories that we are looking to expand.

**ACTING CHAIR**—You are not looking for particulars of individual cases, are you?

**Senator FIERRAVANTI-WELLS**—No, I am looking at the nature of the breaches—there have been breaches and perhaps sanctions—to give a snapshot of the statistics which have underpinned these changes.

**ACTING CHAIR**—You do not have to create a new document for us. If that material exists on your website, you can just give it to us.

**Mr Kukoc**—There is a very comprehensive document with statistics on 457. It is the *State/territory summary report* for the financial year to 30 June 2008. It is available on our website, but I am happy to table it here.

**Senator FIERRAVANTI-WELLS**—Thank you very much. That would be very useful.

**ACTING CHAIR**—I think we are done. Thank you very much for both your submission and making yourselves available to us for questions today.

**Mr Kukoc**—Thank you very much.

**ACTING CHAIR**—If you could provide us with the answers to the questions on notice by 9 am on Wednesday we would be very grateful. I apologise for the truncated time line.

**Committee adjourned at 3.53 pm**