The Senate

Standing Committee on Legal and Constitutional Affairs

Migration Legislation Amendment (Worker Protection) Bill 2008

November 2008

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

Recommendation 2

3.76 The Committee recommends that the Senate pass the Bill.

CHAPTER 1

Introduction

Purpose of the Bill

1.1 On 14 October 2008 the Senate, on the recommendation of the Selection of Bills Committee, referred the provisions of the Migration Legislation Amendment (Worker Protection) Bill 2008 (the bill) to the Standing Committee on Legal and Constitutional Affairs for inquiry and report by 7 November 2008.

1.2 The objectives of the bill are to:

- provide the structure for better defined sponsorship obligations for employers;
- improve information sharing across all levels of government;
- expand powers to monitor and investigate possible non-compliance by sponsors; and
- introduce meaningful penalties for sponsors found in breach of their obligations.

1.3 The bill also seeks to make minor, machinery and technical amendments.

Background

1.4 The most extensively used program for employers to sponsor overseas workers to work in Australia on a temporary basis is the *Temporary Business (Long Stay) – Standard Business Sponsorship (Subclass 457)* visa program.[1]

1.5 The subclass 457 visa allows businesses to respond quickly to skills gaps by sponsoring skilled workers to work in management, professional and skilled tradesperson positions.[2] Workers entering Australia under a subclass 457 visa are entitled to bring family members, known as secondary visa holders.[3]

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1 Department of Immigration and Citizenship Temporary Business (Long Stay) – Standard Business Sponsorship (Subclass 457) document: see http://www.immi.gov.au/skilled/skilled-workers/sbs/index.htm (accessed 16 October 2008)

2 Department of Immigration and Citizenship 2006-07 Annual Report, p. 69.

3 Phillips, J., 'Temporary (long stay) business visas: subclass 457', *Research Note no. 15 2006-07*, 21 February 2007.

1.6 In 2006-07, 89 384 subclass 457 visas were granted,[4] and in 2007-08 more than 100 000 visas were granted.[5]

1.7 The Minister for Immigration and Citizenship, Senator Chris Evans, announced in June 2008 that he would introduce new laws:

> …to help prevent the exploitation of temporary skilled foreign workers and ensure the wages and conditions of Australian workers are not undercut…The intention of the Bill is to clarify sponsor obligations and provide further fair and transparent mechanisms for temporary workers from overseas.[6]

1.8 The bill is part of the government's broad reform agenda for the temporary skilled migration program. There are several review processes still being undertaken that are related to the bill. Commencement has been set at 9 months after Royal Assent in recognition of the interrelationship of these review processes.

Conduct of the inquiry

1.9 The committee advertised the inquiry in *The Australian* newspaper on 18 October 2008. Details of the inquiry, the Bill and associated documents were placed on the committee's website. The committee also wrote to 47 organisations and individuals.

1.10 The committee received 24 submissions, which are listed at Appendix 1.

Acknowledgement

1.11 The committee thanks those organisations and individuals who made submissions.

Note on references

1.12 References in this report are to individual submissions as received by the committee, not to a bound volume.

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4 Department of Immigration and Citizenship 2006-07 Annual Report, p. 68. This figure includes primary and secondary visa holders.

5 Minister for Immigration and Citizenship, Senator Chris Evans, media release dated 30 June 2008. This figure includes primary and secondary visa holders.

6 Minister for Immigration and Citizenship, Senator Chris Evans, media release dated 30 June 2008

CHAPTER 2

Overview of the bill

2.1 This chapter briefly outlines the main provisions of the bill.

Approval as a sponsor

Current arrangements

2.2 The current section 140D has the effect that a person (the first person) is an 'approved sponsor' in relation to another person (the second person) once the first person is approved as a sponsor and has consented in writing to sponsor the second person.

Proposed arrangements

2.3 The government proposes to significantly change the process for approval as a sponsor. Item 1 of the bill will replace the existing definition to provide that a person is an 'approved sponsor' if they meet one of two descriptions: that the person is approved as a sponsor under the new 140E arrangements in relation to a class of approved sponsor or is a party to a work agreement.

2.4 A person becomes an 'approved sponsor' when they have met the approval criteria in section 140E. This brings forward the point at which a person becomes an 'approved sponsor'. The purpose of this approach is to trigger compliance obligations earlier to ensure:

> … that a person can be required to satisfy a sponsorship obligation from the time they meet the sponsorship approval criteria under section 140E (i.e. before a visa is granted).[1]

2.5 Approval as a sponsor can cease or be cancelled by the Minister (depending on the section 140G terms or under section 140M respectively).

2.6 Item 18 of the bill proposes to establish a structure for the Minister to be able to vary sponsorship approval processes and criteria. The purpose of this approach is:

> …so that a person who is already approved as a sponsor does not have to lodge another sponsorship application to do something more than their current terms of approval allow them to do.[2]

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1 Explanatory Memorandum, p. 6.

2 Explanatory Memorandum, p. 15.

Classes of sponsor

2.7 Item 13 of the bill proposes to formalise in legislation the practice of identifying in regulations one or more classes of approved sponsor for certain visa subclasses. For example, a 'standard business sponsor' is a person who is approved as a sponsor for subclass 457 (business (long stay)) visas.

2.8 This provides the foundation for the new approved sponsor framework to be specifically structured around classes of approved sponsor. It is proposed that a number of provisions be amended to reflect this approach and consequential amendments are needed to a number of other provisions. See, for example, elements of items 15-19, 21, 23 etc.

Work agreements

2.9 The second way in which a person becomes an 'approved sponsor' is by being a party to a work agreement. Item 8 inserts a definition of work agreement by reference to satisfaction of prescribed requirements. Generally, a work agreement is an agreement between the Commonwealth, represented by one or more ministers, and another person or organisation, detailing arrangements for the other person to sponsor temporary visa holders to perform work. It is envisaged that the regulations will prescribe 'work agreements' to include a kind of existing agreement. The proposed amendments mean that a party to a work agreement other than a minister is an approved sponsor.[3]

2.10 Proposed section 140GC (Item 18) provides that the regulations may prescribe requirements that a work agreement must satisfy.

Nominations

2.11 Because the framework for approval as a sponsor will be changed, proposed subsection 140GB(1) will make consequential amendments to establish that an approved sponsor may nominate, in relation to a visa of a prescribed kind:

- a person who is a visa applicant, or proposed visa applicant, in relation to a proposed occupation, program or activity to be undertaken by the person; or
- a proposed occupation, program or activity.

2.12 Proposed subsection 140GB(2) then provides that the Minister *must* approve an approved sponsor's nomination if prescribed criteria are satisfied. Different processes and criteria may be prescribed for different kinds of visa or different classes of approved sponsor (proposed subsection 140GB(4)).

3 Explanatory Memorandum, pp 6, 7 and 9.

Sponsorship obligations (item 19)

2.13 Currently, sponsorship obligations can apply if an applicant for approval as a sponsor is required to give prescribed undertakings. The undertakings then take effect once a visa is granted to the person whom the sponsor has consented in writing to sponsor.[4]

2.14 Under the proposed arrangements an approved sponsor or former approved sponsor will be required to satisfy sponsorship obligations prescribed in the regulations. Prescribed sponsorship obligations will apply by operation of law to a person to whom the sponsorship obligation applies. A note following proposed subsection 140H(1) gives examples of the kinds of sponsorship obligations that may be prescribed in the regulations. For example, it could be prescribed that an approved sponsor or former approved sponsor is required to provide particular information to the Department of Immigration and Citizenship.

2.15 The bill proposes that, as an approved sponsor, a party to a work agreement must satisfy the sponsorship obligations prescribed under subsection 140H(1), unless a sponsorship obligation is varied by a term of the work agreement. In this case, the sponsorship obligation must be satisfied in accordance with the obligation set out in the work agreement rather than in the regulations. The bill also provides for circumstances in which an obligation in a work agreement is in addition to satisfying sponsorship obligations imposed by the regulations.

2.16 The bill also seeks to provide that:

- obligations can apply to each visa holder or generally (for example a requirement to notify the department of any change in circumstances that may affect the sponsor's capacity to honour its sponsorship);
- the regulations may prescribe the manner in which, and period of time within which, the sponsorship obligation must be satisfied; and
- different kinds of sponsorship obligations may be prescribed for different kinds of visa and different classes in relation to which a person may be, or may have been, approved as a sponsor.

2.17 The Explanatory Memorandum notes that sponsorship obligations prescribed in the regulations could be prescribed to apply to sponsors existing at the time the new obligation commences. The argument is made that:

> It is intended that the nature and purpose of the obligation will be assessed to determine whether it is necessary and appropriate to apply the new sponsorship obligations to existing sponsors at the time of commencement of the new sponsorship obligation.[5]

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4 Explanatory Memorandum, p. 18.

5 Explanatory Memorandum, p. 21.

2.18 The Explanatory Memorandum also argues that it is necessary for the detail of the sponsorship obligations to be prescribed by regulation rather than in the *Migration Act 1958* (the Act) to provide flexibility for the efficient and effective operation of the program; to allow for additional visa classes as are included in the new sponsorship framework; and to allow advice from the various review processes to be considered before the detail of each sponsorship obligation is finalised.[6]

Amounts payable in relation to sponsorship obligations

2.19 The proposed scheme for amounts payable in relation to sponsorship obligations will retain the existing approach of limiting an amount to be paid by an approved sponsor to the actual costs of the Commonwealth or to a limit prescribed in the regulations (subsection 140J(1)). The current approach is that a limit can be prescribed in relation to the costs of locating and detaining another person – the proposed approach expands this by providing that a recovery limit for sponsorship obligations can be prescribed in the regulations in relation to any kind of sponsorship obligation.

2.20 The bill also proposes to retain the ability for the Minister to specify methods for calculating the actual costs incurred by the Commonwealth in relation to a sponsorship obligation. However, this needs a new subsection in the Act as the previous ability was framed in terms of sponsorship undertakings, which approach is being removed in the new framework.

2.21 A wholly new aspect to the scheme for amounts payable in relation to sponsorship obligations is proposed in subsection 140J(3). This subsection has the effect that an approved - or former approved - sponsor is liable to enforcement action if they require a current or former visa holder to reimburse them, directly or indirectly, for costs which the prescribed sponsorship obligations require the sponsor to pay.

Sanctions for failing to meet sponsorship obligations

2.22 In proposed subsection 140K the bill seeks to take into account the proposed sponsorship framework, and to expand, the range of sanctions that can be applied to a sponsor for failing to satisfy a sponsorship obligation. The sanctions of cancelling approval as a sponsor; barring approval as a sponsor; and requiring, taking and enforcing a security are existing sanctions. The sanctions of civil penalty proceedings and issuing an infringement notice are new sanctions introduced by items 29 and 42.

2.23 It is also proposed that relevant sanctions will apply to former approved sponsors who do not meet their sponsorship obligations.

2.24 The bill envisages that the detail of the circumstances in which a sponsor may be barred or have their approval cancelled may be prescribed in regulations, including criteria to be taken into account by the Minister is determining which action to impose

6 Explanatory Memorandum, p. 21.

on a sponsor (subsection 140L(1)). This is similar to the current approach, but is reframed to take into account the proposed new sponsorship framework. The bill also proposes that the circumstances may be in relation to a failure to satisfy a sponsorship obligation and other circumstances.

2.25 The bill seeks to introduce in subsection 140L(2) the option for the regulations to prescribe circumstances in which the Minister *must* take one or more cancelling or barring actions under section 140M. Again, the bill also proposes that the circumstances may be in relation to a failure to satisfy a sponsorship obligation and other circumstances.

2.26 New section 140M deals with actions the Minister may or must take (in the circumstances prescribed under regulations under section 140L) in relation to an approved sponsor or former sponsor. The proposed section is similar to the existing approach in 140L, but takes into account the new framework for approval as a sponsor.

2.27 The bill proposes to repeal existing section 140R, which provides that a visa holder is jointly and severally liable to pay a debt which relates to an amount required by an undertaking to be paid by the sponsor on behalf of the visa holder. The Explanatory Memorandum explains that:

> The purpose of repealing existing section 140R and not replacing it with a similar provision is to reflect the policy intention of sponsorship obligations. The purpose of the new sponsorship obligations which are prescribed under new section 140H (inserted by item 19) is to place responsibility on a person who is or was an approved sponsor for certain costs. It is not intended that a visa holder is jointly and severally liable for any of the costs which are the subject of a sponsorship obligation.[7]

Enforcement

Civil penalty provisions and infringement notices

2.28 The Second Reading Speech for the bill noted in relation to sanctions that:

> The existing administrative sanctions…have proven insufficient to encourage compliance in all circumstances, particularly amongst sponsors who only ever intend to use the relevant visa program once.
>
> The amendments proposed in the bill introduce a civil penalties framework to actively discourage non-compliance.
>
> This will allow civil legal action to be taken against sponsors who are found in breach of the redefined obligations found in the Migration Regulations.
>
> …Alternatively the bill provides for the issuing of infringement notices in lieu of taking civil legal action.

7 Explanatory Memorandum, p. 30.

> …These new tools will complement existing tools utilised by the Department in enforcing sponsorship obligations.[8]

2.29 The implementation of these tools is proposed in sections 140Q (civil penalty provisions) and 140R (infringement notices in respect of civil penalty provisions).

2.30 The bill seeks to introduce penalty provisions for any approved sponsor who fails to meet a sponsorship obligation (whether as a person or a party to a work agreement). The civil penalty is proposed to be 60 penalty units for an individual and 300 penalty units for a body corporate. The Explanatory Memorandum notes that this is the same as the civil penalty provisions in the *Workplace Relations Act 1996*.[9]

2.31 The proposed effect of section 140R is that in accordance with a regime to be established by the regulations, an approved - or former approved – sponsor who allegedly contravenes a civil penalty provision may be issued with an infringement notice to pay an amount as an alternative to civil penalty proceedings being commenced. The amount cannot exceed 12 penalty units for an individual and 60 penalty units for a corporation.

2.32 Proposed section 140S is similar to existing arrangements for debt recovery, but takes into account the new framework and expands and clarifies the process for debt recovery action. Proposed sections 140SA and 140SB deal with interest up to and on judgment. Proposed section 140SC seeks to allow section 140S actions to be brought using a small claims procedure.

Expanded investigation powers - inspectors

2.33 The proposed legislative changes that will implement the inspectors scheme are the introduction of the following sections:

- 140V – provides that the Minister may, by written instrument, appoint a person or a class of persons to be inspectors;
- 140W – sets out rules for the issue and use of inspectors' identity cards;
- 140X – outlines the purposes for which inspectors can exercise their powers, and outlines the specific powers;
- 140Y – requirement to produce a document or thing;
- 140Z – establishes an offence if a person fails to comply with a requirement of an inspector to produce a document or thing; and
- 140ZA – provides for the disclosure of information obtained by inspectors to the Department of Immigration and Citizenship or to a department administered by a Minister who administers the *Workplace Relations Act 1996*.

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8 Second Reading Speech, *Senate Hansard*, 24 September 2008, p. 4.

9 Explanatory Memorandum, p. 32.

2.34 The specific powers proposed in subsection 140X(2) are modelled on the powers set out in section 169 of the *Workplace Relations Act 1996*. They do not accord with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. The Explanatory Memorandum offers the explanation that this is necessary as:

> It is probable that Workplace Inspectors will also be appointed as inspectors under new section 140V.[10]

2.35 The powers proposed in subsection 140X(2) include the power for an inspector to enter a place of business or other place without force. Entry is permissible when the inspector has reasonable cause to believe that there is information, documents or any other thing relevant to the purposes for which the powers may be exercised.

2.36 Proposed paragraph 140X(2)(b) provides that once an inspector has entered a place he or she may:

- inspect any work, material, machinery, appliance, article or facility;
- interview any person;
- require a person who has custody of, or access to, a document or thing, relevant to the purpose for which the inspector is exercising the power, to produce the document to the inspector within a specified period;
- require a person to tell the inspector who has custody of a document or thing.

2.37 Proposed paragraph 140X(2)(c) seeks to provide that inspectors are also able to require a person, by written notice, to produce a document or thing to the inspector at a specified place within a specified period (of not fewer than seven days).

2.38 The proposed subsection 140Y(4) seeks to provide that a person must give information or produce a document or thing when requested or required to do so under section 140X even if doing so would tend to incriminate them or expose them to a penalty. The justification offered for this proposed approach is:

> It would be unacceptable for a sponsor who is exploiting non-citizen temporary workers to legitimately rely on the privilege against self-incrimination to produce documents or information to an inspector that relate to that exploitation…the interests of sponsors, however, are also provided for through the limited use and derivative use immunity.[11]

10 Explanatory Memorandum, p. 40.

11 Explanatory Memorandum, p. 44.

Partnerships and unincorporated associations

2.39 The Explanatory Memorandum provides the following explanation for the proposed new sections relating to partnerships and unincorporated associations:

> New Subdivision G sets out how sponsorships obligations, civil penalties, and offences included in Division 3A of Part 2 of the Migration Act are to apply in relation to partnerships and unincorporated associations. It is necessary to include these specific application provisions for partnerships and unincorporated associations because unlike a natural person, or a body corporate, partnerships and unincorporated associations do not have the status of a separate legal entity.
>
> New Subdivision G differs to existing Subdivision C in the following ways:
>
> - It does not provide for a new partner or member of an unincorporated association to elect whether they wish to be bound by a sponsorship obligation or to be able to exercise a sponsorship right. Rather, it provides that all existing partners of a partnership at any given time are required to satisfy a sponsorship obligation and can exercise a sponsorship right;
> - It does not provide that the regulations may prescribe when and for how long a retiring partner remains bound by a sponsorship obligation. Rather, it provides that all existing partners of a partnership at any given time are required to satisfy a sponsorship obligation and can exercise a sponsorship right. If a partnership ceases to exist, and consequently there are no existing partners, all the persons who were partners immediately prior to the partnership ceasing to exist continue to be required to satisfy a sponsorship obligation as if they were an existing partner and the partnership had not ceased; and
> - It includes provisions which set out how offences and civil penalty provisions included in Division 3A of Part 2 of the Migration Act apply to partnerships and unincorporated associations.[12]

Miscellaneous

Information sharing

2.40 The bill seeks to authorise the Minister to disclose personal information of a prescribed kind about certain types of persons to other types of persons. The second reading speech outlined the problem the bill seeks to address and the scope of the proposed changes in the following way:

> The existing provisions for the disclosure of information have proved insufficient for effective and efficient operation of the temporary skilled migration program. For example, the Department at present cannot lawfully collect contact details of Subclass 457 visa holders from larger employers for the purpose of providing those visa holders with information about their rights and entitlements in Australia.

12 Explanatory Memorandum, p. 47.

> The amendments will ensure that the three parties involved in the program will be adequately informed of each others circumstances.
>
> The bill also makes provision for the sharing of information about sponsors and visa holders with prescribed Commonwealth, State and Territory agencies.
>
> This will facilitate a cooperative whole of government approach to business compliance.[13]

Proposed part 8D - Civil Penalties

2.41 Proposed part 8D seeks to insert a new civil penalty framework into the Act. At this stage the bill proposes that subsections 140Q(1) and 140Q(2) are the only the only civil penalty provisions proposed. (These subsections relate to a person or a party to a work agreement who fails to satisfy an applicable sponsorship obligation.) However, the Explanatory Memorandum explains that the part 8D framework (which may otherwise seem overly complex):

> … is designed so that it can apply to any future civil penalty provisions which may be included in the Migration Act in the future…[14]

Transitional matters

Standard business sponsors and former standard business sponsors

2.42 The proposed effect of items 45 and 46 is that a person who is bound by an undertaking in relation to a subclass 457 visa (Business (Long Stay)) visa holder or former visa holder at the time of commencement will be required to satisfy sponsorship obligations, rather than undertakings.

2.43 The Explanatory Memorandum states that this approach is 'necessary' and outlines four supporting reasons:

- the nature of the sponsorship obligations which will be required to be satisfied will not be significantly different from the existing undertakings;
- the possible transitional period if these existing former approved sponsors are not transitioned into the new sponsorship framework is impractically long (up to six years) for the large caseload;
- the administrative complexity for sponsors, the Department of Immigration and Citizenship, and other stakeholders of administering two sponsorship frameworks makes the alternative unworkable for the large caseload; and
- existing sponsors will have sufficient notice to terminate the sponsorship of their Subclass 457 (Business (Long Stay)) visa holder if

13 Second Reading Speech, *Senate Hansard*, 24 November 2008, p. 3.

14 Explanatory Memorandum, p. 59.

they are not prepared to satisfy the new sponsorship obligations in relation to those visa holders.[15]

15 Explanatory Memorandum, p. 73.

Chapter 3

Issues

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

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

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

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

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

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

Need for the Bill

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

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

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

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

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

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

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

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

3 *Committee Hansard*, p. 27.

4 *Committee Hansard*, p. 16.

5 *Committee Hansard*, p. 9.

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

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

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

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

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

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

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

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

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

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

10 *Committee Hansard*, p. 43.

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

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

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

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

11 *Committee Hansard*, p. 43.

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

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

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

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

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

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

Figures rounded to the nearest 10

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

Note 1: Excludes Independent Executives

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

13 Information provided by the Department of Immigration and Citizenship.

14 Information provided by the Department of Immigration and Citizenship.

Table 3.3 Subclass 457 Departmental monitoring[15]

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

A two tiered approach?

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

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

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

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

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

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

Effects on industry

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

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

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

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

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

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

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16 *Committee Hansard*, p. 8.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Obligations and Enforcement

Sponsor obligations framework

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

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

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

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

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

24 Explanatory Memorandum, p. 2.

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

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

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

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

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

3.32 The department has explained that:

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

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

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

26 *Committee Hansard*, p. 35.

27 *Committee Hansard*, p. 36.

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

Enforcement

Civil penalties

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

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

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

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

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

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

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

3.39 The concerns about the proposed civil penalty framework include:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Administrative sanctions

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

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

3.50 Fragomen Global noted:

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

3.51 The department maintains that:

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

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

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34 *Explanatory Memorandum*, p. 2.

35 *Committee Hansard*, p. 17.

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

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

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

39 *Committee Hansard*, p. 34.

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

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

Inspectors

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

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

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

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

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

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

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

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

43 *Committee Hansard*, pp 36-37.

44 Explanatory Memorandum, p. 40.

45 *Committee Hansard*, p. 32.

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

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

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

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

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

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

The application of new obligations to existing sponsors

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

53 *Committee Hansard*, p. 35.

54 *Committee Hansard*, p 16.

55 *Committee Hansard*, p. 33.

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

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

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

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

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

3.72 This view is also held by the ACEA:

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

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

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

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

57 *Committee Hansard*, p. 35.

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

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

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

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

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

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

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

Committee view

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

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

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

61 *Committee Hansard*, p. 18.

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

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

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

Recommendation 1

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

Recommendation 2

3.82 The Committee recommends that the Senate pass the Bill.

Senator Trish Crossin

Chair

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

ADDITIONAL COMMENTS BY LIBERAL SENATORS

1.1 The Coalition has grave concerns about the issues highlighted by the lack of availability of the regulations attached to the Migration Legislation Amendment (Worker Protection) Bill 2008. Whilst the Coalition is conscious of the various instances of exploitation of workers, it is important that legislation defining obligations be upfront and specific.

1.2 It is very important that the reputation of Australia and Australian sponsors of temporary labour be maintained and this good reputation not be eroded.

1.3 In this respect, the Coalition believes that a framework for sponsor obligations is necessary. Indeed, it was a process that the Coalition commenced through the Migration Amendment (Sponsorship Obligations) Bill 2007. Then Minister for Immigration and Citizenship, the Hon Kevin Andrews MP, allocated additional resources to ensure implementation of more streamlined processes in this area.

1.4 We share the concerns that have been highlighted by the majority of the submissions to this Inquiry. In particular, the imposition of obligations on sponsors which are yet unknown and which are contained in regulations which the government has not yet introduced and the potential for ongoing changes of obligations by regulation in the future are of great concern. Indeed, a number of witnesses actually advocated that the Bill be deferred until the regulations are presented and considered so that passage of the Bill and regulations could be effected together.

1.5 The Coalition is very disappointed that the Deegan Report is not yet available. The Government has made much of the consultation process, although the adequacy of this consultation process was questioned by a number of witnesses in this Inquiry.

1.6 The Coalition takes at face value the Government's indications about sponsor obligations. However, the Coalition places on record its concerns about the enactment of legislation which imposes obligations which are not available for scrutiny at this point but are to be contained in regulations which will be available at some stage in the future.

1.7 The Coalition, notwithstanding its concerns, does not want to delay the protection of workers and therefore will support the passage of the Bill.

Senator Guy Barnett
Deputy Chair

Senator Fierravanti-Wells

Senator Mary Jo Fisher

Senator Trood

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Ethnic Community Council of Queensland Ltd
2	Restaurant and Catering Australia
3	V and V Walsh Pty Ltd
4	Association of Consulting Engineers Australia (ACEA)
5	The Association of Professional Engineers, Scientists and Managers, Australia (APESMA)
6	Australian Chamber of Commerce and Industry (ACCI)
7	Construction Forestry Mining and Energy Union National Office (CFMEU)
8	Australian Mines and Metals Association
9	Thinking Australia
10	Minerals Council of Australia (MCA)
11	Fragomen Global
12	Australian Industry Group
13	Riverina Regional Development Board
14	The Chamber of Minerals and Energy WA in conjunction with APPEA
15	Name Withheld
16	Paul Ridley
17	Name Withheld
18	Department of Immigration and Citizenship
19	Australian Council of Trade Unions
20	Nolan's Interstate Transport
21	Australian Contract Professional Management Association (ACPMA)
22	Office of the Privacy Commissioner
23	Migration Institute of Australia
24	Pastoralists and Graziers Association of WA (PGA)

ADDITIONAL INFORMATION RECEIVED

1 Document titled "State/Territory Summary Report – Subclass 457 Business (Long Stay) 2007 – 2008" tabled by the Department of Immigration and Citizenship at public hearing in Sydney Friday 31 October 2008

2 Document titled "AI Group Comments on DIAC Discussion Paper: Business (Long Stay) Subclass 457 and related temporary visa reforms" request for document taken on notice by the Australian Industry Group at public hearing in Sydney Friday 31 October 2008

3. Association of Consulting Engineers Australia - Answers to Questions on Notice received Tuesday 4 November

4. CFMEU documents received Tuesday 4 November:

- 457 visa worker awarded $96k kidnapping compensation Sep 21, 2007
- Sydney Morning Herald article "Exploitation of skilled migrants exposed" 28 August 2008
- Wagga Wagga Daily Advertiser article "Injured ‘Mack’ dies" 11 September 2008
- Rajan Kandasamy & other Guest workers sacked after refusing AWA’s that cut pay 261006
- Record fine for Hanssen over exploitative treatment of 457 visa workers 12 March 2008
- Workplace Ombudsman - Just $9650 for 18 months restaurant work, so the boss faces court 13 October 2008
- Workplace Ombudsman - NSW Restaurant to Pay More than $18,000 for Exploiting Overseas Worker 17 March 2008
- Workplace Ombudsman - Filipino 457 visa nursing assistants treated shabbily, says workplace watchdog August 15, 2008
- Filipino 457 visa worker unfairly sacked over illness union Jan 20, 2008
- Emily Bourke - Deaths prompt calls for 457 visa inquiry Aug 28, 2007
- Company ordered to pay 457 visa migrant workers $650,000 Oct 31, 2006

- Workplace Ombudsman - Company fined $40,000 for underpaying Chinese employees 18 September 2008

- Kate Scanlan - Dartbridge Welding sacked 457 visa Filipino workers Oct 19, 2006

- Workplace Ombudsman - 457 visa sponsor West Australian Company Found Guilty of 21 Workplace Breaches 12 March 2008

- The Office of Workplace Services - $93K Recovered from Aprint (Aust) Pty Ltd for four 457 visa workers 30 October 2006

- Calls for state migration policy by Anna Moreau the WA Business News (Australia), October 30, 2008

- Bob Kinnaird – "Temporary foreign workers – cheap labour?" A PowerPoint presentation.

5. Fragomen – Answers to Questions on Notice received Wednesday 5 November

6. Australian Industry Group – Answers to Questions on Notice received Wednesday 5 November

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Sydney, Friday 31 October 2008

BACKHOUSE, Mr Nathan, Manager, Trade & International Affairs
Australian Chamber of Commerce and Industry

BROWN, Mr Ray, Director
Migration Institute of Australia

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

CHAO, Ms Laurette, Director
Migration Institute of Australia

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

KESSELS, Mr Ron, Special Counsel
Fragomen Global

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

MCDONALD, Ms Kerrie, Senior Legal Officer
Department of Immigration and Citizenship

MELVILLE, Mr Tony, Director, Public Affairs & Government Relations
Australian Industry Group

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

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

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

ROOCKE, Ms Nicole, Director
Chamber of Minerals and Energy

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

WALSH, Mr Robert, Managing Partner
Fragomen Global