# Chapter 3

# Issues raised during the inquiry

3.1 The main issue raised by submissions received by the committee related to the increased cost burden the Bill would impose on participating employers. The committee also received evidence that the proposed application of the laws to existing visa arrangements had an unfair retrospective effect and that the severity of the sanctions for non-compliance with a request for information necessitated that employers be granted more time to comply.

## Proportionality of the proposed measures

3.2 Some business organisations expressed the view that the Bill represented a disproportionate and potentially detrimental response to a limited problem. For example, the Australian Contract Professions Management Association (ACPMA) noted:

> Out of 15,000 business sponsorships approved between June 2006 and January this year, 20 employers have been banned or sanctioned from the 457 visa scheme, and 300 are under investigation. That's less than 0.2 percent of all approved sponsorships.[1]

3.3 The Australian Industry Group (Ai Group) said:

> ...these cases of abuse are exceptions and do not justify making the system significantly more difficult to access for the vast majority of employers who fully comply with their legal obligations under the scheme.[2]

## Minimum salary levels

3.4 The National Farmers' Federation (NFF) submitted that the minimum salary and conditions of workers employed under 457 arrangements should mirror those applied to Australian workers under the relevant industrial instrument.[3]

3.5 It also expressed concern that fringe benefits common to agricultural employment arrangements may not be taken into account when calculating minimum salaries under the proposed legislation.[4] The NFF indicated a preference for the explicit recognition of this issue within the Bill:

> The NFF acknowledges that the amendments may allow the Minister, via the legislative instrument, to allow for the inclusion of non-monetary

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1 ACPMA, *Submission 7*, p. 2.

2 Ai Group, *Submission 5*, p. 1.

3 NFF, *Submission 2*, p. 1.

4 NFF, *Submission 2*, p. 2.

> benefits in the method of calculating minimum salaries. However, the NFF would prefer that this matter be expressly confirmed within the legislation.[5]

3.6 ACPMA suggested that the Minister's ability to change, on an ad hoc basis, minimum salary levels for 457 visa holders would be detrimental to employers. It predicted that the uncertainty associated with the 'indeterminable' salary of 457 employees would lead companies to move work offshore at a fixed cost.[6]

3.7 ACPMA proposed the following:

> ACPMA members respect minimum salary levels; however, any change to minimum wage levels should be effective from the date of, and for the term of the agreement and not applicable retrospectively.[7]

3.8 In response to a question on notice DIAC stated:

> The subclause providing that the level of salary could be varied on one or more specified days or at the end of one or more specified periods would allow the Minister to specify within the Instrument a formula to regularly index the level of salary. This could include, for example, indexation of the level of salary by a specified percentage or amount on a particular day each year. This subclause could, for example, obviate the need for the Minister to re-make the Instrument from time-to-time to reflect general wage movements in the specified level of salary.[8]

## Meeting prescribed costs

3.9 Most submissions were concerned about the imposition of new obligations to meet certain costs, and did not take issue with obligations proposed to be enacted that are already imposed by existing undertakings. The committee received submissions outlining concerns over the additional imposition of costs in the following areas:

- health care;
- travel costs;
- migration agent costs; and
- costs associated with non-departure.

3.10 The Association of Consulting Engineers Australia (ACEA) stated that forcing sponsors to meet these additional costs is inequitable:

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5 NFF, *Submission 2*, p. 2.

6 ACPMA, *Submission 7*, p. 3.

7 ACPMA, *Submission 7*, p. 4.

8 DIAC, *Additional information*, Response to question on notice No. 3, Appendix 1.

> If only large firms are able to invest in the skilled migrant program due to the need to meet and pay for all proposed conditions, the labour divide will increase. Only larger companies will be able to make use of the scheme which engages highly skilled migrants to complete tasks that Australia does not have the capacity to complete with Australian employees alone. If the amendments to the Sponsorship Obligations Bill are implemented, small and medium enterprises (SME's) will become so constrained by compliance costs that they will be essentially unable to utilise the scheme at all.[9]

### *Healthcare costs*

3.11 The Ai Group highlighted the obligation on employers to meet employees' health care costs:

> For sponsors this will be a significant cost. Products offered by the insurance industry for temporary foreign workers vary, but it is generally necessary to take out 'private' health insurance. This can range up to as much as $3,000 a year for the principal insurance holder and additional costs for family members.
>
> It should be noted that the obligation for the employer to cover health costs also extends to the visa holder's spouse and dependants. We understand that approximately half of all entrants under the 457 scheme are dependants.

3.12 It suggested:

> We would strongly urge that the new Bill allow employers to require visa holders to pay their own health insurance costs providing the cost would not take the visa holders salary below the MSL.[10]

3.13 ACEA suggested that 457 visa holders should be entitled to the same level of public heath care as Australian citizens a consequence of paying taxes and they should meet their own private health care costs.[11]

3.14 ACPMA also argued that this obligation would lead to discriminatory outcomes:

> [Section] 140IF discriminates against Australian workers by affording rights to their 457 visa holding peers that are denied to them. It also encourages anti-family discrimination to reduce the total cost of employment of 457 visa holders.[12]

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9 ACEA, *Submission 3*, p. 3.

10 Ai Group, *Submission 5*, p. 6.

11 ACEA, *Submission 3*, p. 4.

12 ACPMA, *Submission 7*, p. 6.

3.15 It too recommended that 457 visa holders pay for their own private health insurance and out-of-pocket medical expenses.[13]

3.16 The Department of Immigration and Citizenship (DIAC) informed the committee that this obligation would mirror what is already required:

> It intended that the scope of prescribed medical costs be no wider than what is currently required by the existing undertaking. The Department does not intend to prescribe a monetary limit at this stage.[14]

### *Travel costs*

3.17 Ai Group also criticised the proposed new travel cost requirement:

> For many companies this will be a new expense as the current practice is in many cases for the visa holder to cover their own return airfares.
>
> While this may not seem significant on an individual basis, it will be a major new expense for labour hire companies and other large scale sponsors who are responsible for many hundreds of visa holders.
>
> We believe it is reasonable for visa holders who have worked in Australia in many cases for up to four years to pay for their own travel costs.[15]

### *Migration agent costs*

3.18 The Law Institute of Victoria claimed that the requirement for sponsors to meet the costs of migration agents would unnecessarily inhibit employers from utilising the scheme:

> It is common for people in Australia on working holiday visas or visitor visas to negotiate an offer of employment with employers on the basis that they will be responsible for the costs of engaging professional assistance in relation to the application. Employers who are unfamiliar with the sponsorship process might be reluctant to make an employment offer if they are faced with having to pay professional costs associated with the application. In contrast, the visa applicants have often investigated the issues, obtained a quote for the costs, and are prepared to take on the liability to pay professional and other costs in order to make the decision as easy as possible for the employer. It is unnecessary to prohibit this type of activity with the amendment proposed.[16]

3.19 Ai Group commented that the intended scope of this provision is unclear:

> It is unclear the extent to which this obligation extends to migration agents fees paid by the visa holder. It is often current practice for sponsors to pay

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13 ACPMA, *Submission 7*, p. 6.

14 DIAC, *Additional information*, Response to question on notice No. 6, Appendix 1.

15 Ai Group, *Submission 5*, pp. 6-7. See also ACPMA, *Submission 7*, pp 4-5.

16 Law Institute of Victoria, *Submission 4*, p. 2.

> migration agents in many cases to identify applicants and process their visas. Costs vary widely but it is commonly in the order of $2,500 per applicant but can be more. In some countries, however, individual applicants separately pay their own agent's fees prior to becoming involved with an Australian company's agent. Also, in countries such as the Philippines, visa fees can be based on the applicant paying the local government a levy of a month's salary. Australian sponsors should not be liable for charges outside the direct migration agent's fees of the agent they engage.[17]

3.20 Cloither Anderson and Associates were concerned that the obligation to pay the fees charged by migration agents could have unforseen consequences:

> It ushers in a new set of "Cowboy" rules placing arbitrary requirements on third parties (backed by serious civil sanctions) to pay an immigration lawyer's fees when that lawyer may not even act for the party forced to pay his/her bill.
>
> For example, if the lawyer has overcharged for his/her services or hasn't provided an itemised bill, will this third party (the employer) be allowed any of the rights of a "client" in a solicitor/client relationship – to be able to demand an itemised bill or to otherwise challenge the costs charged and/or paid? Such rights are not contemplated by the Bill at all.[18]

3.21 In response to a question on notice, DIAC indicated that:

> It is intended that this section would apply to fees charged by a foreign recruitment company. The Bill does not prohibit a visa being granted where fees are charged to a visa applicant by a foreign recruitment agency. However, the Bill makes employers rather than employees liable for those fees. In practice, we would intend that employers be liable for such costs where they are aware or ought reasonably to have been aware of them.[19]

3.22 ACPMA suggested that the costs to employers of meeting this obligation may deny visa holders access to legal support. It recommended allowing '457 visa holders to seek and pay for professional migration and legal advice'.[20]

***Non-departure costs***

3.23 With respect to non-departure costs, ACEA argued that sponsoring employees should not be held responsible for meeting the costs of the government's imperfect approval processes or the rogue actions of employees once they have ceased employment with their sponsor.[21]

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17 Ai Group, *Submission 5*, p. 7.

18 Cloither Anderson and Associates, *Submission 6*, p. 2.

19 DIAC, *Additional information*, Response to question on notice No. 5, Appendix 1.

20 ACPMA, *Submission 7*, p. 7.

21 ACEA, *Submission 3*, p. 5

3.24 DIAC clarified for the committee that it intended to prescribe a more widely applied $10,000 limit in respect of these costs:

> The existing undertaking limits the costs to $10,000 in respect of location and detention. There is currently no limit as to the costs of removing the sponsored person or processing an application for a protection visa made by the sponsored person. The Department intends to prescribe a limit of $10,000 in respect of the costs set out in paragraph 140IJ(2)(a) and a limit of $10,000 in respect of the costs set out in paragraph 140IJ(2)(b).[22]

## Application to existing arrangements

3.25 Ai Group expressed concern that the application of the proposed measures to existing 457 visa holders would have a retrospective and detrimental effect on sponsors:

> This apparent retrospectivity is a major concern. Employers could potentially have hundreds of existing visa holders for whom the new obligations will apply. Labour hire companies, for example, will have entered into contracts to supply employees on 457 visas under existing arrangements and the changes will introduce a major unbudgeted expense. One large labour hire company, which is a member of Ai Group, estimates that if the changes are applied to existing visa holders it would potentially cost the company in excess of $2 million.[23]

3.26 It suggested that the legislation, if passed, should only apply to arrangements entered into after the laws have come into effect.[24]

## Obligation to provide information

3.27 While recognising the appropriateness of the requirement to provide information requested by the Secretary, ACEA suggested that the government should allow more time for compliance and provide adequate warning of the consequences of non-compliance:

> ACEA views the obligation for employers to provide information when requested in writing to be feasible. ACEA believes that the Government's obligation in this instance should extend to explaining that between 60 and 300 penalty units apply if the information is not provided and that this should be noted clearly within the correspondence. ACEA would also recommend that a reasonable time period for response from the employer is 21 days.[25]

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22 DIAC, *Additional information*, Response to question on notice No. 7, Appendix 1.

23 Ai Group, *Submission 5*, p. 8.

24 Ai Group, *Submission 5*, p. 8.

25 ACEA, *Submission 3*, p. 5.

## Committee view

3.28 The committee considers that the Bill represents a justifiable measure to better ensure the integrity of the 457 visa system. The obligations contained in the Bill are generally aimed at reflecting, in legislation, the existing undertakings that must be observed by sponsors employing workers under the 457 visa scheme. The Bill further aims to ensure that these obligations are met without being circumvented by employers undermining stipulated minimum salary levels by passing on costs to employees. The committee supports both these objectives.

3.29 The committee also notes that providing departmental officers with greater investigative powers and attaching stronger penalties for non-compliance with sponsorship obligations were not matters of dispute during the inquiry.

3.30 The committee has examined the specific concerns raised during the inquiry below. These generally relate to the obligations on sponsors proposed to be enacted with the passage of this Bill.

### *Setting minimum salary levels*

3.31 The committee notes concerns over the ministerial discretion to alter minimum salary levels, but accepts the department's stated intention to implement a consistent indexation formula to determine minimum salary levels.

### *Prescribed costs*

3.32 The committee rejects the argument that the prescribed costs contained in the Bill are an unreasonable requirement for sponsoring employers. The purpose of the 457 visa scheme is to alleviate skills shortages in industries where domestic workers with the required skills are in scarce supply, rather than to address labour shortages for unskilled jobs or to provide a supply of inexpensive labour. Where costs such as health insurance and return travel provide a direct benefit to the employee, sponsors paying above the minimum wage will inevitably factor those additional costs in to the visa holders' agreed salary. Arguably only employers that intend to pay the minimum wage allowed under the scheme and to offset other employment costs against the employee's salary will be affected by the new requirements. Given the purpose of the scheme does not include providing employers with a source of cheap overseas labour, the committee holds the view that the criticism of the costs imposed by the Bill is not well founded.

3.33 On the specific matter of providing for the healthcare of 457 visa holders, the committee rejects the notion that the Bill imposes a new or unreasonable cost on sponsors. Regulations already require public health costs to be met by sponsoring employers, either directly or via insurance. Furthermore, the practice of sponsors taking out health insurance to meet their obligation under the Bill will not provide 457 visa holders with additional, greater, health care benefits than domestic workers, as domestic workers are already entitled to the free public health care available through Medicare and the Pharmaceutical Benefits Scheme.

3.34 Nonetheless, given the apparent confusion amongst stakeholders regarding the extent this Bill will alter the obligations on sponsoring employers, the committee is of the view that it would be appropriate for DIAC to engage further with sponsors and peak bodies to better explain the intended effect of the Bill.

3.35 Finally, the committee is sympathetic to concerns over sponsors being billed as a third party for migration or recruitment agent services rendered to visa holders. The committee is alert to the possibility that sponsors could be liable for charges stemming from unreasonable billing practices, without adequate recourse to challenge the nature or extent of the charges. The committee is therefore of the view that the government should further investigate this issue to ensure sponsors are not liable for extortionate fees.

**Recommendation 1**

**3.36 The committee recommends that the government investigates the potential for sponsors to be liable for unreasonable or unspecified charges by migration or recruitment agents and, if necessary, amend proposed section 140IG to provide employers with a right to challenge unreasonable costs.**

***Retrospectivity***

3.37 The committee supports the government's attempt to prevent employers undermining minimum salary levels by deducting health care costs, travel costs and other prescribed costs from employee salaries. Although a retrospective application of laws is generally undesirable, the length of time current 457 visas may run makes it impractical to apply the law only to those visas granted since the introduction of the Bill, or some later date. The committee is therefore of the view that the legislation, if passed, should apply to all existing and future 457 visa sponsorship arrangements.

***Obligation to provide further information***

3.38 The committee also recognises that the serious consequences of non-compliance with a request to provide information warrant consideration of ACEA's recommendations. Namely, that:

- employers be allowed more than 7 days to comply with such a request; and
- notices requesting information adequately explain the consequences of non-compliance.

**Recommendation 2**

**3.39 The committee recommends that proposed subsection 140IK(3) and proposed paragraph 140ZJ(2)(c) be amended to provide that sponsoring employers will have a minimum of 14 days within which to respond to a written request for information or documents.**

**Recommendation 3**

**3.40 The committee also recommends that DIAC establishes guidelines in relation to the exercise of the powers in proposed sections 140IK and 140ZJ including a requirement that notices under these sections clearly state the consequences of non-compliance.**

**Recommendation 4**

**3.41 Subject to the preceding recommendations, the committee recommends that the Bill be passed.**

**Senator Guy Barnett**
**Chair**