

**REPORT OF THE 2010 REVIEW OF THE *MIGRATION AMENDMENT (EMPLOYER SANCTIONS)*
*ACT 2007***

The Report of the 2010 Review of the *Migration Amendment (Employer Sanctions) Act 2007* was prepared by Stephen Howells for the Minister for Immigration and Citizenship

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The Hon Christopher Bowen MP
Minister for Immigration and Citizenship
Parliament House
CANBERRA ACT 2600

2 March 2011

Dear Minister Bowen

Re: The 2010 Review of the *Migration Amendment (Employer Sanctions) Act 2007*

In May 2010 the Government announced the commencement of a Review of the *Migration Amendment (Employer Sanctions) Act 2007* in accordance with indications given at the time of the enactment that it should be reviewed within 2 years to see if its provisions were an effective deterrent and educational tool.

I have conducted consultations with officers of your Department and other Government agencies and with external stakeholders.

I have concluded that the provisions of the Act and in particular sections 245AA to AK of the *Migration Act 1958* have not proved to be an effective deterrent against the small number of employers and labour suppliers who persist in employing or referring non-citizens who do not have permission to work in Australia. I have concluded that the legislation does not operate as an effective educational tool for those employers and labour suppliers.

There is strong evidence suggesting that since at least 1998 there has been a growing number of non-citizens working in Australia when they do not have permission to work and that their presence is very often organised by intermediaries who abuse and exploit these workers. These intermediaries are often involved in what appears to be taxation and welfare fraud, breaches of industrial, health and safety laws and other unlawful conduct. One of your predecessors the Honourable Philip Ruddock MP warned of the emergence of this problem in 1999 but only one of his recommendations was adopted and in a modified form, namely the enactment of very limited criminal sanctions, which have so far failed to secure any convictions against contest.

I have recommended that the Act should be amended to include a civil penalty with a strict liability provision but subject to statutory defences guided by judicial discretion. I also recommend that a system of infringement notices be established. The curbing of this conduct by the implementation of amendments and the imposition of infringement penalties and pursuit of prosecutions will require a substantial allocation of resources which would appear to be beyond the Department's present financial reserves.

I am grateful for the capable and timely support and assistance I have received from officers and staff of the Department and from officers of the Commonwealth Director of Public Prosecutions.

I enclose my Report of the Review.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Stephen Howells', written in a cursive style.

Stephen Howells

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PART A

Terms of Reference for the Review

Review of the Migration Amendment (Employer Sanctions) Act 2007

Unrestricted access to the labour market is a privilege limited to citizens and permanent residents of a country. In Australia, permanent residents, Australian citizens and New Zealand Citizens who enter Australia on a valid New Zealand passport, have an unrestricted right to work. Other people wishing to enter the country face the precondition that they have either no access or restricted access to the labour market.

The incidence of illegal work in Australia is a significant problem that denies Australians the opportunity to gain employment and can result in the exploitation of non-citizens. It is also a concern to the Government because of its close association with cash economy industries, which are characterised by abuses of Australia's tax, employment and welfare laws.

The *Migration Amendment (Employer Sanctions) Act 2007* came into effect on 19 August 2007. It was introduced to protect the Australian labour market, prevent illegal workers from being exploited and preserve the integrity of the Australian visa system.

The Review of the *Employer Sanctions* legislation is responsible for examining and providing advice on:

The Offences

- The extent to which the existing fault-based offences are effective as a deterrent to employing or referring non-citizens to work illegally or in breach of visa conditions;
- The extent to which the existing fault based offences are effective as an education tool;
- The extent to which there is a need for a broader selection of sanctions such as civil penalty provisions (including fines and infringement notices) to apply to employers or referral agencies who breach the Employer Sanctions Legislation;
- The degree of consistency between the Employer Sanctions provisions and other *Migration Act* provisions impacting on employers (specifically, the 2008 Worker Protection provisions);
- The extent to which the existing offences sufficiently capture new and evolving employment-like relationships (e.g. outsourcing, the use of labour hire intermediaries) so as to ensure all people who conduct a business or undertaking are held accountable for the issue of illegal work;
- How a strict liability penalty regime would be applied to employers who have used a labour hire intermediary to procure workers who are identified as working illegally or in breach of their visa; and
- Comparable legislative frameworks in other countries and whether they provide a better framework for responding to serious non-compliance

Operational issues

- Any impediments to DIAC enforcing the *Employer Sanctions* legislation, including the adequacy of evidence gathering powers; and
- Any impediments to facilitating cooperation between DIAC and other government agencies in addressing illegal work and related issues (e.g. sharing information and coordinating workplace visits across government agencies and reducing overlap);

Impact on Business

- The extent to which the *Employer Sanctions* legislation has created a regulatory burden on businesses generally; and
- The extent to which the *Employer Sanctions* legislation has created a regulatory burden on businesses employing non-citizens.

Supporting Systems

- The effectiveness and useability of existing systems to verify a person's entitlement to work on the basis of an existing visa or Australian citizenship.

Community Understanding

- An assessment of the understanding and acceptance within the Australian community of the importance of non-citizens only working in Australia when they have the legal right to do so.

The Reviewer

Stephen Howells is a graduate of the University of Melbourne and is admitted to practice throughout Australia, and in the Solomon Islands and England and Wales. He is a member of the Melbourne Bar and the London Bar and conducts practice as a barrister in Australia and in Britain.

Glossary of Abbreviations and Terms

ACCI: Australian Chamber of Commerce and Industry

ACTU: Australian Council of Trade Unions

AFP: Australian Federal Police

AIG: Australian Industry Group

AWU: Australian Workers Union

CDPP: Commonwealth Director of Public Prosecutions

CFMEU: Construction Forestry Mining and Energy Union

CFCG: Commonwealth Fraud Control Guidelines

DEEWR: Department of Education, Employment and Workplace Relations

DIAC: Department of Immigration and Citizenship

Illegal worker

MBA: Master Builders Association

NFF: National Farmers Federation

NUW: National Union of Workers

OECD: Organisation for Economic Co-operation and Development

PPOC: Prosecution Policy of the Commonwealth

RIWA: Review of Illegal Workers in Australia 1999

RIWA Report: *'Review of Illegal Workers in Australia: Improving immigration compliance in the workplace'* Department of Immigration and Multicultural Affairs 1999.

VEVO: Visa Entitlement Verification Online

Worker Protection Act 2008: Migration Legislation Amendment (Worker Protection) Act 2008

Conduct of the 2010 Review of the *Migration Amendment (Employer Sanctions) Act 2007*

The Review included an examination of the RIWA Report 1999 and its supporting evidence, consultation meetings with the relevant DIAC officers followed by an advertised consultation with key stakeholders, the receipt of submissions and meetings with those stakeholders who wished to present in person.

The Minister for Immigration and Citizenship appointed the Reviewer by letter dated 19 March 2010 and confirmation of acceptance was given in writing on 25 March 2010. Some meetings with DIAC officers were then held.

The Minister announced the formal commencement of the Review on 21 May 2010. Consultations with DIAC were then completed and a discussion paper was circulated to all potential stakeholders. Recipients were given one month to provide any written responses and to indicate if they wished to meet with the Reviewer.

Submissions were received from:

Commonwealth Director of Public Prosecutions
Australian Industry Group
Australian Workers Union
Master Builders Association
Australian Council of Trade Unions
National Farmers Federation
Construction Forestry Mining and Energy Union
National Union of Workers
Australian Catholic Migrant
Bridge for Asylum Seekers
Scarlett Alliance
Fair Work Ombudsman
Australian Federal Police
AusVEG
Growcom
Department of Premier and Cabinet NSW
Department of Premier and Cabinet WA (Office of the Director General)
Department of Premier and Cabinet Victoria
Department of Premier and Cabinet SA, (Safework SA)
Department of Education, Employment and Workplace Relations

Department of Immigration and Citizenship, Serious & Organised Criminal Investigations
Section
Harvest Trail (MADEC)
Taxi Driver's Association

Consultation meetings with stakeholders took place in Canberra from 28 June until 2 July 2010. The time for written submissions was extended for those stakeholders who had not been able to complete them within the time specified. Late submissions were received in August, September and late in October 2010.

The 2010 Federal Election was called on 17 July 2010 and the Government entered the caretaker period and work on the Review was suspended. At the time of the announcement of the 2010 Federal Election not all submissions had been received and not all consultations and research had been concluded.

Prime Minister Gillard announced that she was able to form a Government on 7 September and was formally sworn in on 14 September 2010. The new Minister was appointed on that day and the Review resumed on 15 September 2010.

Executive Summary

1. The *Migration Amendment (Employer Sanctions) Act 2007* was enacted in response to the findings and recommendations of the 1999 Review of Illegal Workers in Australia ('RIWA') commissioned by the Honourable Philip Ruddock MP. The 1999 Review also recommended additional penalty provisions including strict liability offences (Tier 2) and an infringement notice scheme (Tier 3) but following consultation with some stakeholders those measures were deferred in favour of an awareness and education program, the improvement of systems that would enable employers to ascertain the work permission of non-citizens and the enactment of fault based criminal sanctions.
2. Australia has a remarkably effective system of border control but since at least 1998 many of those who enter lawfully then proceed to take jobs and commence work when their visas do not permit work. It is not possible to calculate the total numbers of non-citizens working in Australia when they do not have permission but the minimum must be in the order of 50,000 and the cohort from which the maximum must be drawn is the hundreds of thousands of non-citizens who enter Australia on tourist, business, working holiday-maker and student visas. Although the problem is of relatively recent origin it was not curbed at its commencement and there might now be in excess of 100,000 non-citizens working without permission. In simple numerical terms it is the most significant problem facing Australian migration authorities; albeit a small number when compared with the total number of non-citizens who enter as visitors.
3. The Government is concerned about the consequences of having significant numbers of non-citizens working without lawful permission. Those consequences include the vulnerability of such workers to severe exploitation, the distortion of the labour market and the tendency for their presence to be associated with cash industries and abuses of Australia's taxation, employment and welfare laws.
4. The absence of an effective deterrent against the employment of non-citizens who do not have permission to work is an abrogation of Australian sovereignty and a contradiction of the otherwise orderly pattern of migration and the refugee and humanitarian relief programs. It sends a message that will encourage vulnerable people to take any risk and use any means to enter Australia in the belief that they will be able to work and earn good money. These conclusions were expressed in the RIWA Report in 1999.

5. There are three groups of non-citizens who represent the problem:
 - (1) Non-citizens who have a current visa which does not permit work and who have taken a job and commenced work.
 - (2) Non-citizens who have remained in Australia after the expiry of their visa ('over-stayers') and who have taken a job and commenced work.
 - (3) Non-citizens whose visa permits work subject to certain conditions but who are working in breach of those conditions; for example students whose visa limits them to 20 hours work per week.

Refugees who arrive by sea and who claim asylum are not part of this problem; and they are a very small number by comparison. They are present with the knowledge of the Department and all appear to comply with the conditions of their presence in Australia. They are either in mandatory detention or they have a visa with work rights.
6. The great majority of employers do not employ or engage non-citizens who do not have permission to work. They know what the law requires and they intend to and do comply with that law but there is a very small number of employers and labour suppliers, in particular industry sectors, who persistently use and refer these workers as a cheaper source of labour.
7. Since the commencement of the *Migration Amendment (Employer Sanctions) Act 2007* DIAC officers have considered more than one hundred instances of possible breach. They have thoroughly investigated at least ten matters involving what appears to have been the deliberate and systematic use of these workers in significant numbers at identified workplaces. Some of the groups involved appeared to have connections overseas and some were involved in what appeared to be serious organised rackets. The DIAC files reveal apparent abuse of the workers including sexual exploitation, unsafe work practices, underpayment, taxation and welfare fraud, and associated crime.
8. The DIAC investigations teams are comprised of specially trained officers with relevant experience. They gathered the appropriate evidence and prepared thorough briefs of evidence which were of a uniformly high standard. The unduly complicated structure of the offences and the evidential burdens placed upon the prosecutor by sections 245AA to AK of the *Migration Act 1958* and the Prosecution Policy of the Commonwealth ('PPOC') meant that only four of these were suitable to be referred to the

Commonwealth Director of Public Prosecutions ('CDPP') for the prosecution of the alleged offenders.

9. As at the date of writing the CDPP has determined that only one of these matters could properly be the subject of a prosecution taking into account the evidential requirements of sections 245AA to AK of the *Migration Act* 1958 and the Prosecution Policy of the Commonwealth. The Review concluded, with due respect, that the determinations made by the CDPP were soundly based. There have been no successful contested prosecutions under sections 245AA to AK of the *Migration Act* 1958 resulting in a recorded conviction and sentencing. In December 2010 one offender was convicted and sentenced after entering a plea of guilty and acknowledging a prior criminal record.
10. The principal reason for the failure of the *Employer Sanctions Act* provisions is that the 'best evidence' of breach would almost always come from the workers themselves but their evidence is affected by their complicity or independent culpability under section 235 of the *Migration Act* 1958. They would normally be removed from Australia 'as soon as reasonably practicable' as required by section 198 of the *Migration Act* 1958. The cost and the administrative inconvenience of detaining them pending a trial would be prohibitive.
11. The provisions of the *Migration Amendment (Employer Sanctions) Act* 2007 are wholly ineffective as a deterrent against the small number of employers and labour suppliers who engage or refer non-citizens who do not have lawful permission to work or who work in breach of their visa conditions. The *Employer Sanctions* provisions are also ineffective as an educational tool for recalcitrant employers and labour suppliers.
12. The Visa Entitlement Verification Online ('VEVO') system provides a very effective resource for employers and labour suppliers to check whether non-citizens have permission to work. It is a free service funded by the taxpayer.
13. There is some evidence of labour shortages at particular times of the year in particular industry sectors in particular locations. The shortages are not generalised. There are some alternative sources of labour and considerable support is being provided to employers to access information about those resources. The Review commends the Pacific Seasonal Workers Pilot scheme.
14. The cost and inconvenience to employers of being obliged to ask whether a prospective employee has permission to work and to check whether non-citizens do have

permission must be balanced against the cost being borne by the whole of our society in dealing with global population and displacement issues and international security risks. The inconvenience said to be the likely result of any change to the regime of sanctions does not outweigh the benefits to be gained from having a more secure labour market and the prevention of exploitation and other abuses. The cost will also be borne by the taxpayer through the provision of VEVO and other services. Australian citizens will need to shoulder their part of the inconvenience by being prepared to obtain adequate forms of identification for employment. In the absence of a comprehensive system of identification individuals will have to take responsibility for establishing their identity.

15. The employer organisations expressed concerns about strict liability provisions but these concerns would be addressed by the use of the VEVO service, sensible hiring practices, statutory defences, a 48 hour grace period and the protection afforded by judicial discretion.
16. In the United States, Britain and New Zealand very similar patterns have emerged and the successful responses appear to be those that include civil penalty provisions with strict liability and infringement notices or 'notices of intention to consider the imposition of a penalty'. Traditional criminal offences do not have a history of efficiency or success in this field of regulation.
17. The Review has concluded that, with some modification, the Tier 2 and 3 measures recommended by the RIWA Report 1999 should be enacted now to provide the deterrent and educational tool sought by the Government in the continuing program of action against unauthorised access to Australia's labour market and the consequent exploitation of vulnerable workers, distortion of sectors of the market and the other abuses.
18. The Review recommends that civil penalty provisions with strict liability and maximum penalties of \$10,000 should be enacted for employers who allow non-citizens to work when they do not have permission to do so and for labour suppliers who refer such people for work. The penalty provisions should be subject to comprehensive statutory defences for employers who have made a VEVO check within 48 hours of commencement or are shown what appears to be satisfactory evidence of their workers' Australian citizenship, permanent residency or their visa with a current permission to work. These defences should be underpinned by the protection of judicial discretion to refuse the penalty where in all the circumstances it appears that the employer or labour supplier has taken reasonable steps to satisfy themselves that the

worker has permission to work. The provisions should be supplemented with a system of infringement notices carrying a \$1000 fine (this will be an executive measure only enforceable by application to the Court for judicial sanction) or alternatively a system of 'notices of intention to consider the imposition of a civil penalty'.

19. There is a wide divergence between the provisions of the *Worker Protection Act 2008* and other measures in the *Migration Act 1958* on the one hand and the employer sanctions provisions in section 245AA to AK of the Act and that the penalty provisions and the investigation powers should be made more consistent across the Act.
20. There should be a broad definition of employment including a deeming provision of the kind used in Industrial Relations, Workers Compensation and Health and Safety legislation. The purpose of this provision will be to cover the evasive forms of contractual arrangements and understandings used by unscrupulous intermediaries and labour suppliers.
21. The Review notes that the work in this area is limited by budgetary constraints and it recommends that consideration be given to allocating additional funds to enable the Department to introduce new staff and systems to enable the effective investigation and prosecution of an increased number of offenders and then to proceed to prosecutions and to maintain the newly introduced regime.

PART B

The *Migration Amendment (Employer Sanctions) Act 2007* in context

22. The Migration Amendment (Employer Sanctions) Bill 2006 was introduced to give effect to one recommendation contained in the Report of the 1999 Review of Illegal Workers in Australia ('the RIWA Report')¹. The Minister's second reading speech was given in the Senate on 29 March 2006 and the Bill was passed by the Senate on 6 September 2006. It was passed by the House of Representatives on 7 February 2007. The *Migration Amendment (Employer Sanctions) Act 2007* ('the *Employer Sanctions Act*') received assent on 19 February 2007 but the operative provisions did not commence until 19 August 2007.
23. The substantive provisions of the *Employer Sanctions Act* form sections 245AA to 245AK of the *Migration Act 1958*. Under those provisions a person commits a criminal offence if he or she knowingly allows an unlawful non-citizen ('UNC')² to work or allows a non-citizen to work in breach of a visa condition relating to work. These two groups of workers have been referred to as 'illegal workers' though the expression is a loose one and is not defined in legislation³. A criminal offence is also committed if a person refers such a worker to another for work. An aggravated offence is committed where the employer exploits the worker and where the person referring the worker knows or is reckless as to that prospect; 'exploitation' occurs where the worker is in forced labour, sexual servitude or slavery in Australia.
24. The *Employer Sanctions Act* and sections 245AA to AK of the *Migration Act 1958* are plainly directed to two distinct kinds of conduct which are part of one larger overall problem. First, they sanction the employment of non-citizens who do not have permission to work in Australia at all or who work in breach of visa conditions relating to work. Secondly they sanction examples of severe exploitation of those workers. The

¹ The Report is entitled 'Review of Illegal Workers in Australia: improving immigration compliance' and it is published at www.immi.gov.au. The Report contains the findings and recommendations of the Review and it was adopted by Government upon its publication in 1999. The recommendations were endorsed by Government in 2000.

² 'Unlawful non-citizen' is defined by section 14 of the *Migration Act 1958* to mean a person who is a non-citizen without a visa that is 'in effect', namely current at the relevant time.

³ The expression would on one view be apt to include underage workers or those without the required trade qualification or certificate and it focuses blame upon the worker and not the employer or 'facilitator'. The term appears to have emerged in the late 1990's at least in Australia. It caused some confusion amongst those involved in the employer consultations in 2000.

larger overall problem is unauthorised access to the Australian labour market by non-citizens who do not have permission to work in Australia or who work in breach of such permission as they may have been granted.

25. The Terms of Reference ask whether sections 245AA to AK of the *Migration Act 1958* have been effective as a deterrent against unauthorised access to the labour market and as an educational tool for employers. In order to assess the effectiveness of the provisions it is necessary to understand the nature and incidence of the conduct that they are directed at; that is to say the 'problem', and also the history that gave rise to the enactment of the *Employer Sanctions Act*.
26. There is general acceptance that exploitation of workers including forced labour, sexual servitude and slavery should attract strong condemnation and harsh penalties. Australia has treaty obligations to notice and guard against this kind of exploitation and to criminalise specific instances of behaviour⁴. Condemnation is expressed in sections 245AA to AK of the *Migration Act 1958* by virtue of the offences being criminal rather than civil in form and substance. The maximum terms of imprisonment and the maximum fines are relatively harsh. At least to that extent the provisions are consistent with sections 229 to 234A of the *Migration Act 1958* which create offences in relation to the concealment of unlawful non-citizens and other 'people smuggling' activities. Those offences are criminal and some of them operate with strict liability and even absolute liability⁵. In two cases the obligation of proof is imposed on the Defendant rather than the Prosecutor: that is to say the usual onus of proof is reversed. Section 235 creates a civil penalty offence for workers who work without lawful permission: the offence is one of strict liability. Section 236 of the Act makes a criminal offence of using a visa that has been granted to another person. The significant difference between the people smuggling offences and sections 245AA to AK is that the latter do not have the superadded potency of strict liability, absolute liability or reversed onus of proof

⁴ Australia is a State Party to several relevant international instruments. The UN Convention against Transnational Organised Crime supports the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children. Article 5 embodies the obligation upon State Parties to create relevant criminal offences. The Protocol is one part of a much larger body of instruments in this area which have shaped policy in Australia. Australia's commitment is set out and explained in 'Trafficking in Persons: the Australian Government Response January 2004 to April 2009', the Inaugural Report of the Anti-People Trafficking Inter Departmental Committee. The summary of instruments and obligations is contained in Schedule 1 to this Report.

⁵ Strict liability allows the prosecutor to prove the primary or physical elements of the offence but is not required to prove fault. The Defendant may rely upon a defence of honest and reasonable mistake of fact. Absolute liability does not allow that defence. See *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, December 2007, paragraph 4.5.

provisions. They are subject to the criminal burden and standard of proof imposed upon the prosecution.

27. There is unchallenged evidence of a miserable trade in 'people' being carried on across the world that forces or invites thousands of vulnerable and desperate people and their families to take terrible risks with their own safety. This trade would appear to be the market's response to a global problem confronting wealthy OECD member countries. People suffering war, persecution, discrimination, famine, flood, disease and poverty want to find safety or just a better life for themselves or their families; and they either cannot or will not wait the lengthy periods required for lawful immigration or a grant of asylum or else they believe that they will not be successful as applicants.
28. For those enduring poverty there is a very real imperative to get to one of the wealthy OECD countries, find work and then either remain there or remit the proceeds of their work to their families and communities at home or both. The potency of this incentive cannot easily be overstated. In a poor region of a developing country an Australian dollar will purchase as much as ten times what it will buy in Australia⁶. People from those regions may also be used to working in harsh conditions for little reward and may be prepared to 'live' on far less than we assume for ourselves. The possibility of access to better healthcare, housing, education and economic opportunity is clearly worth great risks. They have options. They may apply to migrate in the normal way or they may seek asylum as refugees and wait until they are brought to the country that accepts them. They may apply through proper channels or they may pay very large sums or enter huge debt to be brought to a western country with the assistance of intermediaries who will use varying degrees of propriety or in the worst case 'people smugglers'. The greater their distress or deprivation the greater the risks they will take. These people are vulnerable to the kinds of exploitation that the 'people smuggling' provisions and the aggravated offences in sections 245AA to AK are aimed to discourage and punish.
29. There are also those who appear to be organised with the specific intention of gaining access for limited periods to the Australian labour market. They may do so with a precise understanding of the gains to be made and without compulsion for third parties. They may have little understanding of the gains they stand to make or the risks involved. They may be forced to enter the scheme to repay debts. One consistent element seems

⁶ See Hugh White 'Power Shift: Australia's Future between Washington and Beijing' Quarterly Essay 39, September 2010.

to be that they all believe that the worst that can happen is that they will be sent home if they are caught, probably at the expense of the Australian taxpayer. These non-citizens invariably enter through the regular channels with a tourist or other short stay visa and they leave within the time specified by the visa. But the visa does not allow them to work and their intention is that they will work and either send the money home or take it home themselves.

30. The number of people who arrive in Australia without a valid visa or other proper permission or a pre-determined legal basis for their entry is relatively small. In 2001 it was 5500 and in 2009 it was 2800. These people are sometimes referred to as 'unauthorised arrivals' or 'irregular maritime arrivals' and they include those arriving by boat with people smugglers and those who have no visa and who arrive by air having somehow managed to board a flight without first establishing their entitlement to enter Australia. The acceptance rate of these people is very high. The majority are found to be genuine claimants for asylum⁷. But they are a very small group within Australia and a tiny handful viewed in the global context of displaced people and those in need of protection and shelter.⁸ These people are not working without permission because they are either held in detention or they are released with a visa that confers permission to work.

The numbers of non-citizens who may be working in Australia without permission

31. A very much larger group of people who want to move away from their homes and their countries of origin apply for and obtain a temporary visa in their home country or they may travel to a country where they can get such a visa. They may submit proper details of identity for their visa or they may use a name or identity that is not their own. They may also try to rely upon false or defective supporting documentation. Alternatively they may not have any real understanding of the legal requirements for travelling to a country like Australia and the paperwork may all be done for them by some kind of agent or other person who tells them that the requirements have been met. They may have only a partial understanding of what has been done in their name. They may well

⁷ Australia has accepted 66.5 per cent of the claims for asylum for the year 2009-10, Annual Report 2009-10 p.113 though the rate for some countries including Afghanistan, Sri Lanka, Iraq, and Iran ranges from 87 to 99 per cent.

⁸ Even in the peak boat arrival years of the 1970s and 1999–2001, the arrival numbers in Australia were small compared to other destination countries. In 2000, for example, when approximately 3000 'boat people' arrived in Australia, Iran and Pakistan each hosted over a million Afghan refugees. In fact, the burden of assisting the world's asylum seekers mostly fell, and still falls, to some of the world's poorest countries: see *'Background Note on Boat Arrivals, 2010 Update'*, Parliamentary Library, citing Edmund Rice Centre for Justice and Community Education, *Debunking the myths about asylum seekers*, September 2001, viewed 2 June 2009, http://www.erc.org.au/just_comments/1029891642.shtml.

have paid large sums or entered substantial debt to the ‘facilitator’. The visa obtained for them may be a visitor visa suitable for tourism or business purposes but which does not permit employment. Once they have a visa they can board a flight. But in all likelihood the visa does not permit the holder to work at all or if it is a student visa it may limit the holder to a certain number of hours of work per week. It is now very easy to travel to Australia by air and it is relatively cheap. There are also many countries where a tourist or student visa can be obtained online without interview or a lengthy application process. But these visas either do not permit the traveller to work in Australia or they limit the number of hours that can be worked. In all such cases the visa limits the time that the holder can remain in Australia⁹. Typically visas for students restrict work to 20 hours per week. Australia also has what are called ‘working holiday’ or ‘work and holiday’ arrangements with many countries. Under the visas granted to working holiday makers the periods of employment are limited.

32. The consequence of this is that we have a very large number of people in Australia whose presence here is governed by a visa that either prohibits any work at all or which limits the amount of work that may be performed. They are no doubt in the main genuine tourists, business people, working holiday makers or students. It would be difficult to overstate the economic, financial, cultural and social contribution they make to Australia and our society and so we accept some level of risk in providing entrance in such large numbers. But it is clear that a significant number have come with the intention of gaining access to the Australian labour market regardless of the terms and conditions of their visas. This gives rise to three categories of possible breach of the visa system. First there are those who intend to work and do work when their visa prohibits any work. Secondly those who have had a visa that may or may not prohibit work but that visa has expired and the holder remains in Australia and continues to work or commences to work (‘the over-stayers’). Third there are those whose visas limit the number of hours they may work and they work in excess of those hours. The people in these three groups are the workers whose employment is the focus of sections 245AA to AK of the *Migration Act 1958*. They do not include refugees who arrive by sea or by air and who claim asylum. The evidence does not suggest that these latter people work in breach of any visa or condition. They are very small in number compared to the numbers of people in the three categories of breach referred to above and they are

⁹ Section 30 of the *Migration Act 1958* provides for only two **kinds** of visa namely permanent visas and temporary visas. Section 31 provides for classes of visa and there are very many of these. A list of them is contained in the *Migration Regulations* and the schedules appended to them. The practice has been to maintain all of the visa categories that are created. The complexity can contribute to confusion amongst visa holders as to their work permissions and reduction of red tape and complexity and see Project finances.

subject to very close supervision. If they are granted asylum then they will have permission to work.

33. In order to appreciate the nature and scope of the issue it is necessary to review the numbers of people in Australia at relevant points in time who are not Australian citizens or permanent residents and who are likely therefore to have no permission to work or a limited permission. The figures set out below represent the total numbers in Australia as at 31 December 2009.

(1) Visitors (Tourist and short stay business visa holders)	365,460
(2) Long stay business visa holders (Sub-class 457 sponsored)	119,017
(3) Working Holiday Makers (Sub-class 417)	116,805
(4) Other temporary visas in special occupational groups	38,282
(5) Students	324,554
Total	964,118 ¹⁰

(This group of temporary residents does not include New Zealanders who are special category visa holders in Australia and who are therefore permitted to work¹¹)

34. Theoretically any of the people in the group of 964,118 may be working without permission. DIAC considers that the great majority are genuine tourists, business people, working holiday makers, special occupational workers and students who are not working in breach. DIAC draws on many sources of information and experience for this conclusion, with which I respectfully agree. They are no doubt in the main genuine tourists, business people, working holiday makers or students. It would be difficult to overstate the economic, financial, cultural and social contribution they make to Australia and our society and so we accept some level of risk in providing entrance in such large numbers. But there is strong evidence to suggest that a significant number are working without a current visa that entitles them the work or else they are working in breach of their visa conditions relating to work. The RIWA Report 1999 specifically refers to this group as a significant.

¹⁰ DIAC Immigration Update, July to December 2009, release date June 2010.

¹¹ Factsheet 17 'New Zealanders in Australia, 31 March 2010 records that during 2008-09 there were 1,354,500 New Zealanders who arrived in Australia and as at 30 June 2009 there were an estimated 548,256 NZ citizens present in Australia.

35. The first piece of evidence concerns over-stayers. DIAC records of these people are accurate because they can identify the numbers of people arriving on temporary visas and those leaving. Since 1998 that number has fluctuated between 46,000 and 60,000. The length of over-stay in the core group tends to be in excess of two months and it may be assumed that at some point the majority will need to work or claim a welfare benefit to support themselves. For this reason DIAC considers the majority of over-stayers to be working without permission. I accept that this would be so.
36. Secondly the compliance and investigations officers report many instances of people who have tourist visas working and claiming that they believed they were entitled to work or having little or no understanding of their position. Often-times these people have very limited English and may also be people who have entered upon a work trip either themselves or with the assistance of an intermediary or facilitator and they may or may not know or understand what their visa requires of them and what it may prohibit. But this second cohort of people working in breach of the conditions of their visas cannot be quantified because we do not and cannot monitor the daily activities of tourists and business visitors. It must be said however that there is a high likelihood that the number is substantial. Many of the people located by DIAC in field visits to work places hold visitor visas which permit presence in Australia for tourism or visiting family and friends; yet they are working. It also appears that these people are well organised and that they leave Australia before their visas expire. Many of them come from countries from which they are able to obtain an ETA.¹² Once they return to their home country they would be able to obtain another ETA and return again. They may not ever come to the notice of DIAC unless their workplace is visited.
37. The third piece of evidence is the record of people actually located by DIAC being people working without a current visa or those working in breach of visa conditions. This record is gathered by DIAC compliance officers on field visits. Over the past several years the numbers of compliance officers and field visits has remained relatively constant. For example in the financial year 2009/10 the compliance officers conducted 3752 field visits and they located some 14,000 unlawful non-citizens. Almost all of these were over-stayers. DIAC identified that some 1400 appeared to be people working without permission, that is to say 10% of those at a minimum¹³. Some 600 Illegal

¹² 2.2 million Electronic Travel Authorities were granted last year, DIAC Annual Report 2009-2010 p2. Citizens of the majority of OECD members and some Asian countries, including Malaysia, Singapore and South Korea are able to access ETAs.

¹³ DIAC Annual Report 2009-2010 p.2

Worker Warning Notices ('IWWNs') were issued to employers. In 2008/09 11,400 unlawful non-citizens were identified of whom 990 were working. It should be noted that these figures are random in the sense that they only reflect the number of visits able to be conducted and they could not therefore be said to be representative of the total numbers; indeed it is the lowest possible number. Some of the stakeholders relied upon this figure. In its thorough and careful written submission the MBA sought to rely upon this figure as an actual total of non-citizens working without permission. For the reasons set out above I cannot accept that submission. Finally the field visit data itself points to the fact that it is not only over-stayers who are working without permission. The fact that some of those located were working while holding a tourist visa indicates the reality that this group will need to be included as part of the group within which those working without permission may be found.

38. These statistics should be seen in their overall context. Some 4,300,000 non-citizens entered Australia in 2009¹⁴ and less than 1% of them did not leave within the time designated by their visas¹⁵. DIAC therefore has managed to ensure a very high level of overall compliance. Since the numbers of people who arrive by sea or air and who have no pre-arranged permission to enter Australia is small and since there is no evidence of any person in Australia without any permission for their initial entry it is plainly the case that Australia's borders are secure and well regulated. Particularly in the sense of individuals by passing the points of entry and gaining entry without clearance. I consider this to be a reasonable conclusion because we simply do not have numbers of such persons coming to the attention of the authorities in the range of circumstances where their entitlement to be present in Australia might be examined. We simply do not have the kind of problem that besets the US or Britain where there are hundreds of thousands of residents who had no permission to enter those countries. Genuine tourists and business visitors make a massive contribution to the economy through spending, investment and by other means. The revenue generated by visa applications in the past year was \$891.7 million; there would not appear to be any net direct financial loss.¹⁶

39. The figures should also be compared with the size of the Australian workforce. As at September 2010 the recorded workforce was 11.3 million. Even if the figure of those working when they do not have permission is 100,000 at any point within the year then

¹⁴ *ibid*

¹⁵ *ibid*

¹⁶ *ibid*

those working without permission form a very small proportion of the workforce either within or without the total. It is less than 0.9% of the Australian workforce.

40. In summary then there are three categories of workers whose employment or referral for employment is the subject of section 245AA to AK of the *Migration Act 1958*.
 - (a) Non-citizens who are not permanent residents and who work when their visa does not permit any work.
 - (b) Non-citizens who are not permanent residents and who work when they have remained in Australia after their visa has expired and who have not obtained another temporary or permanent visa or an extension ('over-stayers').
 - (c) Non-citizens who are not permanent residents and who work in breach of a condition in their visa which limits the number of hours or the period for which or within which they may work.

41. It is possible to provide an estimate of those in category (b) because immigration records reveal the numbers of non-citizens who enter on visas and the period for which the visa entitles the entrant to remain. The numbers of those persons leaving is also recorded. One possible error factor in this group might be persons leaving on a different passport to the one they produced on arrival but that number would be very small. The estimation process involves the comparison of very large numbers of records over many years and so the degree of accuracy must be seen in that context. DIAC officers have sought progressively to refine the numbers and the estimates. One consequence of this is that fluctuations in the recorded numbers in any one period may owe more to the process of data purification than to alteration in the trends and actual presentations. It is estimated that there are some 50,000 UNCs presently in Australia without a current visa or other permission to work but who are working as employees or on their own account¹⁷ (None of these would be people who have arrived by boat seeking refuge and asylum). It is a similar figure to that estimated in 1999. It is those who employ or refer them for employment that are apt to be caught by the effect of the legislation. The legislation targets those employers. The DIAC estimate is in the order of 50,000 and this number has fluctuated between 46,000 and 60,000 over the past 12 years at least.

¹⁷ DIAC Annual Report 2009-10 records 53,900, p 159.

Table 1: Previous Estimates of unlawful non-citizens – Australia

Estimate Date	Female	Male	Total
30 June 2010	19,870	33,990	53,860
31 December 2009	18,800	31,590	50,390
30 June 2009	18,400	30,320	48,720
31 December 2008	18,230	29,600	47,830
30 June 2008	18,530	29,930	48,460
31 December 2007	18,070	29,270	47,340
30 June 2007	17,820	28,730	46,550
31 December 2006	17,680	28,640	46,320
30 June 2006	17,810	28,600	46,410
31 December 2005	18,000	28,400	46,400
30 June 2005	18,710	29,080	47,790
31 December 2004	19,410	30,000	49,410
30 June 2004	20,260	30,690	50,950
31 December 2003	23,540	35,760	59,300
30 June 2003	23,050	36,700	59,750
31 December 2002	23,110	36,810	59,920
30 June 2002	23,670	36,710	60,380
31 December 2001	23,260	36,220	59,480
30 June 2001	23,380	36,720	60,100
31 December 2000	22,720	35,950	58,670
30 June 2000	22,400	36,350	58,750
31 December 1999	20,450	34,400	54,850
30 June 1999	20,200	32,950	53,150
31 December 1998	19,450	31,150	50,600

Note: Estimates prior to 30 June 2004 are considered less reliable due to the different methodology being applied.

Source: DIAC

42. It is not possible to determine or even estimate the numbers of people in categories (a) and (c) because immigration records cannot go further than identifying the numbers of people to whom visas have been issued in the many categories that exist and those who have entered and left Australia on those visas. It is simply impossible to know who is working when their visa does not permit work or who is working in breach of a visa condition relating to the hours of work that may be performed by the visa holder. Tourists are not required to account for their time in any way and students are not required to report their hours of employment though they are required to attend at classes and their school or college is required to make certain written observations about their attendance. So far as category (c) is concerned, in the main these are students and whether they work in breach of the visa conditions will be something only they know or it may be known by an employer who finds out or the authorities if the

person comes to notice for one reason or another. In my opinion the numbers in (a) and (c) are very likely to be far higher than the 50,000 over-stayers. I say this principally because of the numbers of those who are found to be working without permission when they have a current visa.

43. That said however, Australia’s problem with non-citizens who work when they are not entitled to do so or who work in breach of their visa conditions is dwarfed by the problem facing other wealthy OECD countries. Australia is protected by the sheer distances between its borders and those of neighbouring countries and the fact that our real border is ocean. The USA, Canada, France, and Britain are more easily approached and the numbers of people who seek to enter is far greater.

Table 2: Estimates of unlawful non-citizens – selected International Comparison

	Estimate of Illegal Immigrants/ Over-stayers	Population Estimate	% of Population
Australia 2010 Department of Immigration and Citizenship and Australian Bureau of Statistics estimates.	53,900	22,400,000	0.2%
Canada 2009 Canada Encyclopaedia and 2010 Statistics Canada estimates	35,000 to 120,000	34,100,000	0.1 - 0.4%
France 2010 European Commission's EuroStat and Institut national de la statistique et des etudes economiques estimates	76,355	64,600,000	0.1%
Greece 2010 European Commission's EuroStat estimates	106,715	11,200,000	0.9%
United Kingdom 2010 European Commissions' Eurostat/2005 UK Home Study and 2010 UK Home Office estimates	69,750 to 570,000	61,700,000	0.1 - 0.9%
United States of America 2010 US Department of Homeland Security and USA Census Bureau estimates	10,800,000	310,300,000	3.5%

44. Several things may be said about the numbers themselves. First they are small, particularly when compared internationally. Secondly they do not figure at all in the overall workforce planning models of any economic analysis undertaken for the Australian Government or for such private interests as might publish them. Thirdly

Australia has been remarkably successful in maintaining an effective record of non-citizens entering the country and in ensuring that they leave when their visas have expired and no extension is granted. The Department and the collateral agencies have an unbeaten record in this matter among the OECD nations. In effect Australia has very effective control of its borders, for a wealthy country that has a massive perimeter and which is a very popular destination. Fourthly it is noteworthy that two of the largest groups of over-stayers sorted by nation are Americans and Britons, many of them overstay so long that it may be assumed that they are unaware of the truth of their status here. Finally a large proportion of these over-stayers have overstayed for more than a few months so it may be assumed that they are working or that they might possibly have obtained access to a social security benefit without proper entitlement; it is unlikely that they are here on savings or being supported from abroad.

45. The problem of population movement on the scale that it now occurs has troubled public policy makers in the OECD nations since at least 1980¹⁸. Various measures have been adopted and the debate has oscillated around three main propositions. It is asserted that a sovereign nation should maintain its borders and regulate who enters and that the enforcement of the system is the responsibility of Government and not of employers or individuals. It is asserted that unauthorised access to the labour market is unfair to citizens who seek work and that it distorts the labour market and contributes to abuses of the taxation and welfare systems. It is then debated as to whether the response should be permissive and if so in what degree or penal and if so by what measure.
46. The Terms of Reference presuppose that the numbers of workers involved is significant and that it is desirable to curb and reduce the incidence of employment of these people. That is consistent with the findings of the RIWA Report prepared for the then Minister the Honourable Philip Ruddock MP¹⁹. The Minister endorsed the recommendations of the Report and they were adopted in full by the Government of the day in 1999. An education and awareness campaign was commenced in 2000. Although the Government altered course on the matter in 2004 the fact that it did approve the preparation of legislation containing criminal sanctions indicates that the numbers of workers involved was still considered significant. In 2006 the explanatory memorandum

¹⁸ See *The Australian Encyclopaedia Volume 5*, 6th Ed Australian Geographic, at 1725 *et seq*; James Jupp *From White Australia to Woomera* 2nd Ed, Cambridge University Press 2007 Chapter 2; Kevin R. Johnson *Ten Guiding Principles for Truly Comprehensive Immigration Reform*. An occasional Paper for the Immigration Reform Conference for the Wayne Law Review, February 2010;

¹⁹ See RIWA Report 1999, key findings 1.3

for the *Employer Sanctions Act* asserted that the numbers were significant²⁰ and this remains the Government position. The second and third reading debates in both houses seem to have assumed that the numbers of workers involved were significant.

47. There may be some conjecture about the significance of the numbers. Even if the numbers are in the order of 100,000 they reflect less than 1.0% of the putative workforce. They are not a normative factor in macro-economic labour force planning and they do not figure as a special cohort within international criminal regulatory analyses. The decision by an employer to engage a person who does not have permission to work in Australia may be taken for a variety of reasons and those reasons may not be aimed at undermining the law, evading tax or exploiting the worker; they may in fact be the opposite. In that sense the motivation may simply be to give a person some paying work and to fill a job that might otherwise go begging. It is difficult to see how that behaviour even if entered upon 'knowingly' could be said to be criminal in nature. It may be unwise and it may be errant for other reasons but it does not bear the hallmark of ordinary criminality. There must be other better reasons for the offences and for making them more effective if that is necessary.

The arguments about 'employer sanctions'

48. Several justifications have been given for seeking to reduce the numbers of non-citizens working without permission; not all of these propositions rely upon the notion that the numbers of those workers is significant²¹. Chief among the arguments are the following:
- (a) Australia is a sovereign nation and it should determine who enters and the terms upon which they enter²². The international law assumes that this is so²³ as does the Australian Constitution. The specific legislative power of the Commonwealth is extensive. Section 51 of the Constitution empowers the Parliament to make laws for peace, order and good government of the Commonwealth with respect to: (xix) naturalization and aliens²⁴, (xxvii) immigration and emigration, (xxviii) the influx of criminals, (xxix) external affairs and (xxx) the relations of the commonwealth with

²⁰ See Migration Amendment (Employer Sanctions) Bill 2006, Explanatory Memorandum, Outline, paragraph 2

²¹ The propositions have been taken from the RIWA Report, the written submissions provided to this 2010 Review and from representations made during the consultations.

²² RIWA Report 2.1.

²³ The *jus gentium* recognised sovereignty as conferring the capacity to determine rights of entry, control the borders and order the extradition or removal of non-citizens. The system of treaties and conventions auspiced by the United Nations is built upon that assumption.

²⁴ See *Cunliffe v The Commonwealth* (1994) 182 CLR 272

the Islands of the Pacific²⁵. The *Migration Act* 1958 assumes that entry should be regulated and it gives effect to the proposition with one sole stated object. Section 4(1) provides that ‘the object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens’.

- (b) If entry to Australia and access to the labour market were not strictly regulated then it is very likely that larger numbers of temporary entrants intending to work and remain in Australia would arrive without planning and no matter how well intentioned they might be and no matter how sincere might be the welcome extended to them there would be unpredictable demands placed on settlement services, housing, health, education, transport and other facilities. Government and the church, charitable and other voluntary sector organisations would be left to try to manage the settlement of these people; it would not work well. There have been occasions in the past when the lack of adequate settlement services caused problems for migrants and those seeking to provide and manage services.²⁶ The importance of an orderly program of migration is reflected in that fact that Government has an annual program and that it allocates specific amounts to settlement services.
- (c) The failure to curb the employment of non-citizens who do not have permission to work in Australia is an open invitation to those who would exploit vulnerable workers and intending workers. It also encourages both opportunistic and organised criminal activity in employment and labour hire in particular industry sectors. The activities and conduct that has been the subject of formal investigation by DIAC in connection with sections 245AA to AK bear this hallmark.
- (d) The failure to curb the employment of non-citizens who do not have permission to work in Australia sends an unmistakable message to other people who are contemplating traveling to Australia and then working without permission and to people smugglers and intermediaries, that ‘work is available’, that ‘permission is not really necessary’ that ‘you only have to get there and after that you will be able to work and make good money’ and finally ‘that the Australian authorities including

²⁵ See also more generally the observations as to the implied ‘nationhood’ power in *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338.

²⁶ *From White Australia to Woomera: The Story of Australian Immigration* 2nd Ed, James Jupp, page 90 ‘Settlement Policy’

DIAC are toothless and the worst that could happen is that you will be sent home at the expense of the Australian taxpayer'.

- (e) The failure to curb the employment of non-citizens who do not have permission to work in Australia is unfair to those who have waited in their country of origin for orderly entry and managed presence.
 - (f) The presence of significant numbers of non-citizens in Australia who work when they do not have permission to do so distorts the labour market because it tends to undermine standard rates of pay, it may give one trader or employer a competitive advantage over another and it may also give a false impression as to the real level of unemployment or underemployment.
 - (g) The presence of significant numbers of non-citizens in Australia who work when they do not have permission to do so tends to result in sub-standard employment practices, breaches of health and safety laws and it is associated with and encourages abuses of the welfare and taxation systems. Very substantial sums may simply leave the economy.
 - (h) The presence of significant numbers of non-citizens in Australia who work when they do not have permission to do so has the proclivity to take jobs from Australian citizens and permanent residents or at least to deny citizens and permanent residents those jobs.
 - (i) Although education has been successful the remnant of recalcitrant employers and labour hire agents will not respond to persuasion and must be located and punished and that this will be the only effective deterrent both to the operators and the workers who might consider becoming involved.
49. The responses to these justifications were not wholly contradictory of them. Rather they sought to debate what might be the best practical way of dealing with the problem.
- (a) First it is said that it is the responsibility of the Government to protect sovereignty and not employers. Employers should be able to employ whomsoever they choose without fear of being prosecuted because of the status of the person who presents for work. This proposition was not raised expressly in the consultations though the submissions of the MBA and NFF made it by necessary implication.

- (b) It was asserted with considerable force in 1999 that employers had no ready way of finding out whether a person was a non-citizen and if they were whether they had permission to work in Australia. There was no ready way of checking the validity of a visa and no community acceptance of the need for prospective employees to have proof of their identity. Since the development of the VEVO checking system that proposition has lost some of its force but it is asserted that there are still some gaps. For example an employer cannot check though VEVO on a prospective worker who is an Australian citizen born in Australia but who does not have a passport.
- (c) It is then asked whether regardless of knowledge or intention the act of employing a non-citizen who does not have permission to work in Australia is really criminal in nature and whether criminal or any other penal sanctions are appropriate as a matter of principle
- (d) It is asserted that the numbers of non-citizens working without permission is not significant.
- (e) Employers say that regardless of the numbers of employees involved it is a very small number of employers and that the overwhelming majority do not employ or refer such persons. They say with force that serious penal regimes should not be capable of applying to an inadvertent or careless error.
- (f) It is also asserted that there is no real evidence of distortion of the labour market and that there is and has been for a very long time a far more significant problem and that is our inability to fill a very large number of jobs. This is particularly a problem in agriculture and in construction. Harvesting fruit and vegetables has been very difficult for many years. Crops are said to have been abandoned for no other reason than that there were no workers to pick them. The control of prices by supermarkets and other cartel or syndicated buyers is pointed to as the reason why wage rates cannot simply be inflated to attract otherwise uninterested workers.
- (g) Employers have also pointed to the administrative burden and the cost and inconvenience of having to check the identity and work permission or entitlements for every worker they employ and to monitor the status of those employees on a month by month basis. They also point out that any system that requires them to complete forms demonstrating the checks they have done in order to have an

adequate answer to any statutory offence will add to the administrative burden and cost of employing workers and will reduce profitability. Particular attention is directed to smaller operations like restaurants, cafes, and contract builders who may only employ one or two workers and those on an intermittent basis. They may not have internet access and in the regions their profitability may be marginal.

- (h) Employers point to the very particular problem of overseas students who are limited to 20 hours work per week. How is an employer supposed to find out, much less 'know' what work the student may have done with another employer during the week in question.
 - (i) Finally the employer organisations note that the DIAC awareness and education was very successful and they suggest that further effort in that area is warranted.
50. The matters about which there seems to be a good deal of agreement are that Australia should regulate who enters and who has permission to work and that exploitative behaviour should be condemned and punished. It is also agreed that the great majority of employers do not wish to and do not employ non-citizens in breach of their visa conditions. It is also generally accepted that there should be some reasonably adequate means by which employers can check the status of prospective workers.
51. The essential issue in dispute is and has been what kinds of provisions and what kinds of offences should be enacted to stem the use of non-citizens working without permission. Sections 245AA to AK prescribe criminal offences which require proof beyond reasonable doubt of knowledge and intention on the part of the employer to allow non-citizens to work when they do not have permission to do so. But the failure of those provisions to produce any convictions and their failure to amount to an effective deterrent or an educational tool has raised the question whether civil penalty provisions and strict liability together with an infringement notice regime both of which were recommended in 1999 in the RIWA Report and adopted by the Government of the day should be instituted. A number of the employer organisations oppose any alteration of the existing regime. In particular the MBA and the NFF say that there should be no change. The ACCI however could see the basis for some strengthening of the provisions so long as comprehensive statutory defences would be available to employers who have made reasonable enquiries and so long as the integrity of the system could be ensured. The union organisations seek the implementation of the Tier 2 and Tier 3 provisions recommended by the RIWA Report.

52. The history of the enactment of the *Employer Sanctions Act*, the employer awareness and education programs, the VEVO facility and the Pacific Workers Pilot are all relevant to a consideration of whether any change in the regime should be considered and if so what kind of amendments might be appropriate. The Review has also looked closely at the course of investigations conducted by DIAC and the reasons for the failure of all proposed prosecutions.

Brief History of the *Migration Amendment (Employer Sanctions) Act 2007*

53. The *Employer Sanctions Act* provisions were recommended by the 1999 Review of Illegal Workers in Australia commissioned by the Honourable Philip Ruddock MP²⁷. The 1999 Review process was undertaken by DIAC officers under the guidance of an external panel comprised of senior representatives from industry and one ALP member but no representative of unions. The Review included extensive consultation with stakeholders. The Review recommended three tiers of offences and provisions; a fault based criminal offence, a strict liability offence and a strict liability offence underpinned by an infringement notice scheme. But the criminal and strict liability offences and the infringement notices scheme were deferred by the Government in 1999 and 2000 in favour of continuing the employer awareness and education programs and then again in 2004 through to 2006 in favour of the enactment of the fault based criminal sanctions enacted by themselves with no ‘medium level’ sanctions²⁸.
54. The 1999 Review found that there was sufficient evidence to conclude that the extent of what it called ‘illegal workers’ in Australia was a significant problem that was denying ‘many Australians’ the opportunity to access a job²⁹. It found that that ‘illegal work’ placed an additional burden on the Australian tax payer in terms of compliance costs, uncollected taxes and fraudulently claimed social security benefits³⁰ and it also concluded that the opportunity to work illegally encouraged many others to attempt to enter unlawfully, either by boat or air, occasionally with catastrophic results.³¹ The RIWA found that large numbers of people come to Australia every year lured by promises of finding a better life and that very many of these were sex workers who were either aware of what work they would be doing or else were deceived about it.

²⁷ See the RIWA Report, 3.9, page 47.

²⁸ Sections 245AA to AK contain criminal offences with no strict liability provisions.

²⁹ RIWA Report 2.4, page 26

³⁰ *ibid*

³¹ *ibid*

RIWA found that sexually transmitted disease is more prevalent among international sex workers and that many are exploited and held in servitude.³²

55. The RIWA found that at least 50,000 non-citizens were very likely to be working without permission. The Review must have considered the problem to be very grave and the conduct to be worthy of serious condemnation and deterrence because it recommended the creation of criminal offences and penalties. The Review also saw the need for three kinds of sanctions. This would provide flexibility but it may also have reflected the realisation that the criminal sanctions would be difficult to prove.
56. The RIWA Report remains an important foundation of policy in the regulation of migration to Australia and access to the Australian labour market by foreign nationals. It was conducted by way of an examination of the collected statistical evidence, the existing legislative arrangements in Australia and other western countries facing similar problems, the learning from the experience of those other countries and appropriate consultation.
57. In December 1999, the Government decided that it was important to legislate to make the employment or referral for employment of 'illegal workers' the subject of criminal and strict liability offences and it agreed to the three-tiered scheme of sanctions recommended by the RIWA Report:
 - (a) Tier 1 was a fault based offence. The prosecution would be required to prove that the employer had knowingly employed the worker and either knew they were not permitted to work or was reckless as to that person's permission to work. Penalties: up to \$13,200 for an individual and \$66,000 for a body corporate and/or two years imprisonment.
 - (b) Tier 2 was a strict liability offence. The prosecution would not need to prove intent or recklessness, but had to prove the physical elements of the offence. Penalties: up to \$45,500 for an individual and \$27,500 for a body corporate.
 - (c) Tier 3 was a strict liability offence underpinned by an Infringement Notice Scheme. Defendants would have the choice between a penalty (1/5 the sum of a Tier 2 penalty) or prosecution (fined at the Tier 2 rate). Penalties: up to \$1,100 for an individual and \$5,500 for a body corporate.
58. It is likely that that the decision was endorsed by Cabinet because the proposals and the necessary legislation were new and the issues involved had emerged as controversial questions. It is likely that the three tiered structure was considered necessary because of the difficulty that would have been known to attend the proof of fault based criminal

³² RIWA Report 2.2.8, page 23

offences³³ and also because of the need for lower order penalties to suit particular circumstances. It is clear that the Minister and the Government as a whole must have considered the problem to be very grave and the conduct to be worthy of serious condemnation and deterrence because they recommended the creation of criminal offences and penalties. The Minister and the Government as a whole also saw the need for three kinds of sanctions to provide flexibility in enforcement strategy. That may also have reflected the realisation that the criminal sanctions would be difficult to prove.

59. The scheme of offences was consistent with the kinds of measures that had already been introduced in the UK and USA.

Consultation with industry groups; Government agrees to phased introduction of offences

60. The scheme agreed to by the Government was then the subject of further consultation prior to implementation. These consultations took place in 2000 and included the circulation of a discussion paper, face-to-face meetings with key industry groups and employer representatives and a series of public meetings in capital cities and rural areas. Employer representatives were consulted but there appears to be no record of the results of any consultation with unions. The consultations were very extensive and involved senior DIAC officers.

61. The employers' representatives expressed concerns about the possible effects of the proposed measures. The key issues they raised were:
- (a) A perceived lack of clarity between Tiers 2 and 3 in the proposed model.
 - (b) Large amounts potentially payable if fines apply to each illegal worker engaged.
 - (c) Time consuming to complete the Work Rights Declaration Form (WRDF) in order to access statutory defences.
 - (d) Potential employees in rural areas may not carry documentation necessary to ascertain work rights.
 - (e) The process of ascertaining whether a person has work rights is difficult.
 - (f) Penalties for subsequent breaches escalate too rapidly.

³³ It appears that attempts to prosecute employers for accessorial liability pursuant to section 11.2 of the *Criminal Code* 1988 in relation to breaches of section 235 of the *Migration Act* 1958 by workers had been unsuccessful because of the difficulty in obtaining probative evidence from the workers themselves. They would in the ordinary course have been removed and detaining them pending the trial would pose administrative difficulties and costs. The admissibility and weight of their evidence might also be affected by their own culpability for breach of the *Migration Act* 1958.

- (g) Penalties for initial offences perceived as too high, particularly in relation to small businesses.
 - (h) The offences should only apply where a threshold number of illegal workers are engaged.
 - (i) Safeguards for employers (such as Warning Notices being issued for first breaches) are not built into the proposed legislation.
 - (j) Employers may be liable if an illegal worker supplies incorrect information.
 - (k) The need to retain the WRDF for 5 years would be a burden on small business, particularly those in the horticulturalist industry where large numbers of workers are engaged for short periods.
62. In response to these concerns and notwithstanding the perceived seriousness of the problem the Minister agreed to implement the recommendations of the RIWA Report in phases. However during the consultations I was told that the then Prime Minister did not wish to see the Tier 2 and 3 offences deferred indefinitely.
63. The critical concern was the need to find a ready method by which employers could check work permissions if they were going to be saddled with liability for allowing a non-citizen to work if that worker did not have permission to work. Phase 1 commenced on 30 November 2000 and it consisted of developing measures to assist employers and labour suppliers to identify non-citizens working without permission in preparation for the new legislation. The measures included the establishment of a 'Work Rights Information Line', a Fax-back system to allow employers and labour suppliers to check work permission of prospective employees, an Employer Awareness Campaign and a system of administrative warning notices³⁴ to employers and labour suppliers found to have engaged or referred non-citizens who did not have permission to work. Phase 2 was to be the introduction of the new legislation.
64. The Employer Awareness Campaign was revised and improved in 2002. Since commencement it has included workplace visits, distribution of written material, posting of material online, establishment of information lines and services and a continuing consultation with employers and employer representatives. The Campaign was supported and promoted earnestly by the peak employer bodies and by industry sector bodies. It has achieved remarkable success largely due to the support from the employer organisations. Despite the administrative cost and inconvenience the

³⁴ These became known as Illegal Worker Warning Notices (IWWNs) issued under executive authority but only enforceable by judicial authority.

overwhelming majority of employers have built appropriate checks into their employment processes. The degree of awareness of the problem and the need for checks to be made appears to be very high. This was confirmed to me in the consultations and through my examination of the compliance officers' reports of their activities and through my own enquiries and research. The awareness program has continued through to the present; in the financial year 2009 some 2228 employer awareness visits were conducted.

65. By 2004 a preference had emerged in Government for putting to one side the Tier 2 and 3 offences recommended in the RIWA Report and instead proceeding only with the Tier 1 criminal offences.

February 2004: Tier 2 and 3 penalties deferred

66. In February 2004, the Government decided to defer implementing the Tier 2 and 3 strict liability offences and instead to proceed only with the fault based criminal offences. Those involved in the decision making had concluded that in practice, imposing strict liability offences would require employers to check the work entitlements of all prospective employees whether citizens or not in order to avoid liability. This level of checking was perceived to be unduly burdensome, particularly given the practical difficulty of identifying Australian citizens who do not have a passport and the lack of a readily accessible system for checking the validity of a visa and its conditions.
67. Nevertheless, and in spite of these concerns it is said by some stakeholders that the Prime Minister made clear that he did not wish to see the Tier 2 and 3 offences deferred indefinitely.
68. There was no alteration in the view that the problem was grave and the conduct serious. It was also known at that time that proof of the accessorial liability of employers in reliance upon 11.2 of the Criminal Code was fraught with difficulty. The detail of the Tier 2 and 3 strict liability offences had also been the subject of careful thought and revision so that very clear statutory defences would be available to any employer or labour supplier who had taken reasonable steps and formed a reasonable view that the prospective employee had permission to work. Nevertheless the three tiered system of penalties was abandoned.
69. The effect of this was to repose all enforcement capacity in fault based criminal offences that would in all probability in each case require the availability of the non-citizen

workers to give evidence and the acceptance of their evidence by the Court in spite of the fact that they themselves would be liable for the breach of section 235 of the *Migration Act 1958*.

70. By this time the Compliance officers were beginning to report that a very small number of recalcitrant operators were shunning the warning notices and commenting openly that there was no really effective mechanism for enforcement against them. Sadly the misconduct of this very small number prompted the need for legislation and the criminal offences.

Introduction of the Migration Amendment (Employer Sanctions) Bill 2006

71. The Migration Amendment (Employer Sanctions) Bill 2006 was introduced in the Senate on 29 March 2006. It did not contain any strict liability offences and did not require all employers in Australia to undertake work rights checking. The intention appears to have been that an employer would only commit an offence if he or she knowingly or recklessly allowed or referred an illegal worker to perform work. An employer would only be held “reckless” if there was a “substantial risk” that the employee was a non-citizen working without permission. Recklessness would be easier to prove where:
 - (a) the employer operates in an industry where there are a high proportion of illegal workers (e.g. construction, hospitality, cleaning, taxi or sex industries),
 - (b) the Department has previously given the employer administrative warning notices for employing illegal workers and guidance on how to check work rights; and
 - (c) the job applicant says something which indicates they may not be entitled to work (e.g. that they are only visiting Australia).
72. The Bill introduced maximum penalties of 2 years imprisonment and/or fines of up to \$13,200 for individuals, and fines of up to \$66,000 for companies. It also included aggravated offences where the employer or labour supplier knows that, or is reckless as to whether the illegal worker is working in a situation of forced labour or sexual servitude or slavery. The penalty provisions for an aggravated offence would be up to 5 years imprisonment and/or \$33,000 for individuals and \$165,000 for companies.
73. The Explanatory Memorandum emphasised that the proposed scheme would not require routine work rights checking by employers or labour suppliers. Employers would only need to consider doing a work rights check where there is a substantial risk

that the job applicant is an illegal worker. Employers would be assisted in checking work rights: over the internet through the Department's website (VEVO) using the Department's Fax-Back Facility; or by sighting a passport and visa label.

74. The Explanatory Memorandum also explained that it would be unlikely that first time offenders would be prosecuted. However, there would be exceptions for more serious examples, such as where the offence was aggravated or involved an employment racket.
75. When the legislation was introduced in 2006, the Government made a commitment to undertake a review of the provisions and their effect two years after introduction. The Explanatory Memorandum contained a recommendation that the legislation should be reviewed 'no later than two years after commencement to assess its effectiveness as a deterrent and educational tool'. The need for a review was made clear by the Minister in his second reading speech in 2006³⁵.
76. Oddly enough the Explanatory Memorandum also noted that up until that time employers who engaged or referred non-citizens to work when they were not permitted to do so could have been prosecuted under the *Criminal Code* but that this rarely occurred because of three problems, namely difficulty in obtaining supporting witnesses, inadequate proof of intention, incomplete chain of evidence referable to the identified employees and employer. These problems were the result of the criminal standard and the terms of the offences. It is difficult to see why the same problems of proof would not have very apparently applied to the provisions of the *Employer Sanctions Act*.
77. No specific powers to investigate, search and seize documents or otherwise gather evidence were included in the Bill in spite of the fact that extensive powers of that kind had been enacted in relation to people smugglers, detainees, sponsors of 457 visas, migration agents, merchant vessels and education providers.

Contribution of the Senate Legal and Constitutional Legislation Committee

78. On 30 March 2006, the Senate referred the Bill to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 2 May 2006. The Senate Legal and Constitutional Legislation Committee recommended that the Bill proceed following consultations between the Department, the Australian Chamber of Commerce and

³⁵ Hansard, House of Representatives, Wednesday 29 November 2006, page 88

Industry, the Migration Institute of Australia and other interested parties regarding the feasibility of further employer awareness campaigns and the scope to expand access to the online work rights checking facility VEVO. The committee acknowledged that “compulsory and universal work entitlement checks...would, in most cases, be unnecessary relative to the actual risk of an employee being an illegal worker.” It concluded that the “best balance between the costs of compliance and the risk of non-compliance [is] a risk based approach in each specific industry – as proposed by the Bill.”³⁶

Migration Amendment (Employer Sanctions) Act 2007 assented to on 19 February 2007

79. Following the Committee’s report, the Bill subsequently passed unchanged through both houses of Parliament. The Act received assent on 19 February 2007 and the operative provisions commenced 6 months later, on 19 August 2007.
80. While the Labor Party offered bipartisan support for the *Employer Sanctions Act*, concerns were expressed during the second reading debate that it did not go far enough and that the threshold test of “knowingly or recklessly engaging or referring an illegal worker for work” may be too low. Senator Ludwig (ALP Queensland) argued that the legislation had been a long time coming and that it remained to be seen whether it would be tough enough³⁷. The coalition Government agreed that it would be important to evaluate the effectiveness of the legislation and also review the impact of any coercive powers on employers after a period of two years.
81. The legislation commenced on 19 August 2007 and only applies to the employment of workers engaged or referred for employment on or after that date, and those whose contracts were renewed on or after this date.

The Employer Compliance program and the Employer Awareness campaign

82. The Campaign which commenced in 2002 continues to the present time. DIAC undertakes considerable activity to identify and target illegal work and does so based on information from a number of sources. These sources include reports from members of the community and reports from within the Department or provided by other agencies. For example, if visa sub-class 457 monitoring officers uncover information regarding

³⁶ Senate Legal and Constitutional Committee Report on the Migration Amendment (Employer Sanctions) Bill 2006

³⁷ Hansard *Senate* Monday 4 September 2006, page 127

sponsors who are likely to be in breach of Employer Sanctions legislation, this information is passed to the Compliance Section. In 2008-09, the Department located 11,428 unlawful non-citizens of which 990 were found to be working without permission. The Agriculture, Forestry and Fishing sector (largely farming) continues to be where the highest number of illegal workers is being located. Illegal Worker Warning notices are issued to employers or labour suppliers who have employed or referred non-citizens who do not have permission to work. The warning notices advise employers that they have employed an 'illegal worker' and warn of the possibility of further prosecution. In 2008-09, the Department issued 597 of these notices. The compliance officers say that the IWWNs were very effective in the early years of the campaign when awareness was being developed and that they certainly work effectively with employers who have either been careless or who may have thought it was 'worth a try' but that there remains a serious problem with the small handful who are involved in organised rackets. There can be no doubt but that a small number of operators regard the IWWNs as both unenforceable and reflective of a regime that has no teeth.

83. The Department continues to conduct employer awareness training sessions to educate employers, industry peak bodies and unions about immigration status checking with the aim of reducing the number of non-citizens who do not have permission to work. Employer awareness training sessions are conducted by the Department's compliance officer network with complementary sessions provided to employer peak bodies by the Employer Compliance and Trafficking Section located in the Department's National Office. A total of 2223 employer awareness visits were conducted in the 2008-2009 financial year.
84. The effects of the Program and the Campaign are hard to measure but the anecdotal evidence is compelling. The compliance officers report that employer organisations and major employers are all supportive of the programs. Major employers, particularly those in the risk areas have taken responsibility for altering their employment procedures to check for work entitlement.

The Visa Entitlement Verification Online service

85. The RIWA Report noted that it would be unfair to impose an absolute burden on employers to verify the entitlement of their workers to work if there were no readily available system for checking the status of prospective employees. This was the substantial basis laid for the decision taken in 2004 to defer the introduction of the RIWA recommendations and the three tiers of offences. The Department then built the new Visa Entitlement Verification Online ('VEVO') service for employers to ensure that

job applicants who are visa holders are permitted to work in Australia. For those that do not have access to the internet, employers can also use DIAC's toll-free Visa Entitlement Verification Faxback Service to check work entitlements. The number of VEVO checks has been steadily increasing with 595,533 checks conducted in 2008-09. The number was 245,000 in 2007-08.

Table 3: Number of VEVO checks by year

	Work entitlement checks	Total checks made*
2005-2006	15,645	66,122
2006-2007	50,228	125,250
2007-2008	151,000	243,721
2008-2009	250,908	595,533
2009-2010	485,330	813,050

* VEVO allows organisations to check the visa entitlements of a visa holder such as work or study entitlements or whether a person is in Australia permanently or temporarily. Visa holders can use VEVO to view details of their visa.

86. The VEVO system allows a registered employer to ascertain whether a named person has a current visa and whether they are permitted to work. The response is rapid and the satisfaction rating is very high. The fax-back service will not always be as prompt and so where an employer needs to engage workers quickly there may be inconvenience.
87. There is one limitation in the system. The record from which VEVO draws its responses is the record of all current visa holders. The record does not include Australian citizens or permanent residents whose residence was acquired before the mid 1980's. If a prospective employee is a citizen or permanent resident then the employer or labour supplier would need to ask for an accepted form of identification if they wished to check the worker's permission to work. They could seek to examine a passport, a birth certificate or a certificate of permanent residency. Not all Australians have a passport or a copy of their birth certificate to rely upon.
88. Employers have pointed out that the process of checking is a burden and a cost and they point to the limitation in the system. Several examples were given in the submissions. The Restaurant Employers say that when an owner needs to employ a kitchen hand there may not be time to wait for answers on VEVO or by fax-back and they observe that many operators may not have internet access. In agriculture and the pastoral and horticultural sectors the NFF and individual employers note that many young people entering the workforce in regional Australia may not have needed a copy of their birth certificate and have not contemplated getting a passport. The MBA argues cogently

that the largest group of employers by number in construction are sole traders or self-employed builders who engage tradespeople and other workers on short notice and without the use of the internet or the capacity to put in place sophisticated administrative arrangements. These are serious concerns and they carry weight. They are a serious issue for any proposed system of offences in this area. There will certainly be examples of inconvenience but they need to be balanced against the increasing prevalence of access to the internet even by mobile phone and the fact that employers have for a very long time been required to collect tax and superannuation contributions for the Government and bear responsibility for the safety of their workplaces and that any products they produce or sell. Many employers must ensure that their employees are suitably qualified or that they do not, for example, have a criminal record.

89. Successive governments have so far rejected the need for a 'unique identifier' and there has been no general support for a US style 'Green Card'. These systems would solve one of the main problems presented by this Review and they would effectively prevent many instances of fraud on Government systems and private interests. But against this many have expressed concerns about the protection of privacy and the scope and reach of Government control and influence in domestic life.
90. The inconvenience has been substantially ameliorated by the VEVO system and will be addressed by appropriate statutory defences. It is answered by the grave nature of the problem and the seriousness of the conduct that needs to be curbed. The RIWA Report noted that since the VEVO service is available to check the status of non-citizens the only group who pose a difficulty for employers are those who do not have either a passport or a copy of their birth certificate. RIWA concluded that it was reasonable to require employees to obtain a copy of their birth certificate for employment purposes and that there were other occasions when these forms of identification were required.³⁸
91. It will be essential that any new or altered offences specify statutory defences where a VEVO check has been initiated within 48 hours of commencement or referral or an apparently valid passport, certificate of permanent residence or birth certificate has been seen by the employer or labour supplier. There should also be provision for the exercise of judicial discretion where in all the circumstances it appears to the Court that the employer has taken reasonable steps to avoid employing or referring a non-citizen who does not have permission to work.

³⁸ RIWA Report 3.9.3.

Alternatives to employing non-citizens who do not have permission to work in Australia

92. Employer representatives have also pointed to the difficulties faced by employers seeking to fill jobs in the Agriculture, Construction and Restaurant sectors. They ask quite properly where the workers are to be found. There is a good deal of anecdotal evidence that fruit and vegetable crops have been left unpicked or harvested at the end of the season because there were no workers ready and available to do the work. Governments in many OECD countries point to the fact that lower skill level work has for quite some time been done by non-citizens with or without proper permission to work and citizens simply decline to do this work. Domestic and general cleaning work, fruit picking and vegetable harvesting, construction labouring and kitchen work are examples that are regularly given.
93. The MBA and NFF point to a number of sources of evidence. The NFF published its views in April 2010 and pointed to its 2008 analysis which asserted that some 100,000 jobs were not able to be filled and that in extreme cases horticultural farmers were losing \$250,000 per season because fruit and vegetables and other production was not able to be picked³⁹. These sorts of figures have been reflected in media reports and in the records of consultations held with DIAC officers between 2002 and 2007.
94. Unfortunately, the evidence of labour shortages and lost production is largely anecdotal. It is difficult to record, calculate or estimate because the work is often seasonal or episodic and the workers may be itinerant. The evidence that is available must also be balanced against the likely productivity improvements in agriculture and steady historical decline in employment requirements of the sector. There is some suggestion that underpayment of wages has been a problem in certain regions and that conditions may be perceived to be unattractive. Any industry that seeks to attract and retain workers must examine carefully the sorts of conditions under which employers offer work.
95. But the shortages are a serious and complicated problem. Farmers are under severe competitive pressure exerted by supermarkets and wholesalers. It is said that in many cases the supermarkets and wholesalers are able to influence prices and isolate any producer or group of producers who seek to raise prices. Farmers therefore have little

³⁹ NFF Issues Paper 'Population Policy: Labour Pains' page 1; and see NFF Summary of Labour Shortages in the Agricultural Sector 2008.

room to move in terms of wages and it is asserted with some force that increasing wages will not solve the problem.

96. But for the purposes of this argument it should be assumed that the number of jobs unfilled is largely as is asserted by the MBA and the NFF. That fact is not a sound basis for avoiding the problem that is posed by non-citizens working without permission. It does no good to anyone allowing unlawful conduct to continue because of a collateral need or purpose that the conduct might serve. It entrenches those who would exploit the situation and it encourages vulnerable people to put themselves at risk. Labour shortages may be addressed in a number of ways; migration could be increased, the Pacific Island Pilot could be expanded, and new classes of working visas could be allowed. None of this is simply done but neither is that fact a basis for allowing unlawful conduct. If such an approach had any kind of Government endorsement, whether tacit or otherwise, it would amount to an open invitation to unscrupulous operators to bring workers to Australia in deliberate breach of entry requirements and visa conditions.

Special classes of visa for workers

97. DIAC continues to implement and explore visa options for employers that provide a lawful alternative to employing non-citizens who do not have permission to work in Australia. The working holiday programs provide an important source of casual labour particularly in primary production and tourism. Over 190,000 visas were granted in 2008-09. The Working Holiday Maker ('WHM') program was strengthened in November 2005 with the introduction of a second visa, allowing WHM visa holders who work in regional primary industry to stay for a further 12 months. In July 2008, this concession was extended to the construction industry in regional Australia.
98. These initiatives have to be constrained by the need to prevent fraud in the system and by practical considerations. The student visa condition that the holder is allowed to perform 20 hours work per week is reasonable but impossible to monitor and police. One employer cannot know if the student working for them is actually working for one or more other employers. It is not clear from the record whether the DFAT officers who developed the concept considered the simple matter of enforcement in a practical way. There have been cases where non-citizens have come for the purpose of working and have very clearly only entered a course of study in order to meet the entry requirements for the visa. Some colleges have been investigated for offering only cursory tuition and being a vehicle for entry to Australia. The DIAC files reveal several instances of well organised conduct of this kind.

The Pacific Seasonal Worker Pilot Scheme

99. On 17 August 2008 the Minister for Agriculture, Fisheries and Forestry announced a three year Pacific Seasonal Worker Pilot Scheme where growers in the horticulture industry who can demonstrate an inability to meet labour demand through local labour, can access workers under the Pilot. The Pilot is designed to test whether a labour mobility scheme can benefit Australian producers while contributing to Australia's economic development objectives in Pacific Island countries. Up to 2,500 visas will be granted over three years to seasonal workers from participating countries, providing the opportunity to work for up to seven months in every 12 month period. DIAC is responsible for the visa administration.
100. Workers have been placed in Swan Hill (Vic), Robinvale (Vic), Griffith (NSW), Guyra (NSW), Munduberra (QLD) and Gaynda (QLD). Eight organizations from NT, NSW, QLD, VIC and WA have been approved as employers under the Pilot.
101. Phase 2 of the Pacific Seasonal Worker Pilot is now underway. Phase 2 involves the issue of up to 2444 visas to citizens of participating countries (Kiribati, Papua New Guinea, Tonga and Vanuatu) dependent on demand in the horticulture industry.
102. The Program must of course operate under strict supervision. Those responsible must ensure that travel to Australia, transport within Australia, accommodation, domestic and health needs are properly met and that the work involved is safe and properly paid. This involves time and cost; and it will not compete with unscrupulous 'fly by night' operators who are prepared to exploit workers and the employers. But it is expected that the costs will reduce over time and that efficiencies will develop. It appears that those Pacific countries involved value the program and that there is competition to obtain the places. The workers bring valuable currency back to their home countries and the money finds its way directly to families rather than coming through an aid program. It must be said however that at this point the numbers involved would not address the labour shortages to which the MBA and NFF point.
103. DIAC files from the State Offices reveal a number of episodes in regional centres where it appears that non-citizens have been working without permission. In one case a DIAC officer was deployed to provide a periodic presence in the region. The DIAC officer brought the existence of the Pilot Scheme to the attention of those in the region and the reports suggest that one consequence of his has been that labour suppliers connected with such non-citizens have moved out of the area. In one report the

housing that had been used by the labour suppliers was small and squalid and appeared to have been occupied by a large number of people.

104. The program does not provide a ready answer if there are tens of thousands of jobs that cannot be filled in industries like horticulture. However it is a program that has many benefits and as it expands it will provide considerable assistance to the agricultural sector.

Investigations and referral for prosecution

105. In the following sections of the this report I make reference to material from the DIAC files which indicate that non-citizens may have been employed or referred for employment and that there may have been breaches of the *Employer Sanctions* provisions. It should be noted that any observations made here are not intended to assert any formal or final conclusion that breaches have occurred. That would of course be a matter for the Courts. The observations recorded here reflect allegations and conclusions that may be open on the material contained in the files. The files themselves are subject to the requirements of confidentiality that apply to such investigations as have been conducted and locations of the events and the identity of those investigated have been excluded to the extent necessary.
106. Reports from compliance officers reveal that in spite of the Employer Awareness Campaign activities carried out relentlessly over the past ten years and the enactment of sections 245AA to AK of the *Migration Act* 1958 a small number of employers and labour hire agents have continued to employ or refer for employment non-citizens who do not have permission to work. DIAC combines this information with, reports from members of the public and from other government agencies. Since the commencement of the *Employer Sanctions Act* in 2007 DIAC has collected and reviewed this information with a view to referring possible offences for prosecution.
107. DIAC's well-founded concern is that there is evidence of areas of organised conduct involving serious crime and large sums of money, all concentrated in identifiable operations. It is the kind of activity, essentially based upon inequality, in which organised crime settles and from which organised crime grows and is fostered.⁴⁰ As is always the case with organised operations that involve some kind of illegality they

⁴⁰ See: Uslaner, Eric M. (2008) '*Corruption, inequality, and the rule of law: the bulging pocket makes the easy life*' Cambridge University Press. p. 27

themselves encourage and enable other forms of illegal conduct and they can become a vehicle for people who would otherwise be refused entry to Australia and who would not otherwise be able to support themselves in Australia without coming to the notice of one authority or another. One reason for this is that once a person has committed one form of illegal conduct another person who knows of it can use it as a lever to prompt or force other conduct. If the illegal conduct is tacitly accepted it will necessarily grow. That tacit acceptance might be the result of not being able to enforce the law effectively. At present in Australia we are not effectively enforcing the law that prevents non-citizens from working when they do not have permission. That failure lies in the ineffectiveness of the statutory regime and it is allowing organised crime to operate and grow. We have known about the problem since it was pointed out in the RIWA Report of 1999.

DIAC functions and powers in relation to employer non-compliance

108. In deciding what kinds of enforcement provisions should be contemplated in this area it is helpful to examine more generally the functions and powers of DIAC to investigate for the purposes of enforcement. The Terms of Reference ask what impediments there may be to the conduct of investigations posed either by difficulties in securing the cooperation of other departments or agencies or by the effectiveness of evidence gathering powers.
109. DIAC has the principal responsibility for carrying out functions under the *Migration Act* 1958⁴¹ and is assumed to have the primary responsibility for investigation of any conduct that is in breach of the Act or impedes the attainment of its object or purposes. It is conventional that the Australian Federal Police and the CDPP have responsibilities in relation to criminal sanctions like those in sections 245AA to AK. Some of those responsibilities are exclusive. Like all Departments of State DIAC also has a specific obligation to prevent fraud in relation to any of its funds and the benefits it provides and in relation to any of its programs. Unlike some Commonwealth legislation and despite the critical importance of the sole object of the *Migration Act* 1958 and the scope of its operation the Act does not contain a list of the functions and powers of the responsible Department or other agencies. There is no general power to investigate breaches of the Act. Where particular powers are specified they apply in relation to particular classes of visa⁴² or in relation to one particular area of regulation⁴³.

⁴¹ As specified by Administrative Arrangements Order dated 14 September 2010.

⁴² For example section 140 gives DIAC specific investigation powers in relation to sponsors of visa class 457 holders.

110. It may be that some power can be implied from the terms of the Act itself or from section 33 of the *Acts Interpretation Act* 1901 or else reliance may be placed on executive authority⁴⁴ but where investigations can involve forcible entry upon property, the location, detention and removal of people and the preparation of evidence it may be helpful to have the relevant functions and powers enumerated so that the officers are clear about the scope of their authority and so that the task of the Courts and Tribunals dealing with offences is not protracted by questions of construction of powers and the validity of investigative operations. On one view of it the Parliamentary intention may have been to strictly limit the nature and scope of DIAC's investigative and enforcement powers. Perhaps this was because DIAC is not a Police agency and because in a free society it is undesirable that an agency of the executive other than the Police should have such potentially intrusive powers. Perhaps it was because until relatively recently there was not perceived to be an enforcement problem⁴⁵. Alternatively it may have been considered that reliance upon executive authority would give greater flexibility and be less likely to succumb to legal challenge. Either way it would be better that the functions and powers are specified and made consistent across the breadth of the *Migration Act* 1958.
111. The nature and scope of the investigation and enforcement functions and powers may be ascertained from the terms of the *Migration Act* 1958. There is but one object and the three consequential functions are limited. Section 4 provides as follows:
- “Object of Act
- (1) The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens’.
 - (2) To advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain.

⁴³ Migration Agents are the subject of comprehensive regulation under Part 3 of the *Migration Act* 1958 which confers extensive investigative powers.

⁴⁴ Section 7A of the *Migration Act* expresses that reliance; and see *Pape v Commissioner of Taxation* [2009] HCA 23 at [9] and [10]

⁴⁵ The focus of attention in enforcement was customs, drugs and criminals

- (3) To advance its object, this Act requires all persons, whether citizens or non-citizens, entering Australia to identify themselves so that the Commonwealth government can know who are the non-citizens so entering.
- (4) To advance its object, this Act provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act.”

112. The duties, functions and powers set out in the *Migration Act* 1958 are necessarily directed to and limited by that object and those purposes. Part 1 of the Act deals with jurisdictional matters and definitions. Part 2 is concerned with control of the arrival and presence of non-citizens and it commences with definitions of lawful and unlawful non-citizens. The Minister may grant visas under section 29 and there are two kinds under section 30, namely, temporary and permanent. Section 31 requires that there be prescribed classes of visas and there are many. Under sections 38 and 38A criminal justice and enforcement visas may be granted. Section 41(2)(b) provides that the regulations may prescribe conditions relating to work. The Regulations limit the circumstances in which non-citizens will be permitted to work in Australia. The primary assumption is that they are not so permitted. Under section 85 the Minister may set limits on the numbers of visas that may be issued in a particular class in any year. The Minister may cancel a visa on any one of several grounds including that the Minister is satisfied that a condition of the visa has not been complied with. Section 119 provides for a notice of intention to cancel a visa and then provides for hearings with all of the available documents. There are powers to require the production of documents. There is no general power of investigation and the power to enter premises and search and seize documents is strictly confined.⁴⁶
113. Division 3A of Part 2 provides for sponsorship of workers by employers and it sets the requirements that must be met by those employer/sponsors who are seeking to bring in workers from abroad to fill jobs that would otherwise only be available to citizens and permanent residents. Failure to meet the requirements and breaches of the provisions carry criminal and civil penalties and there is a system of infringement notices⁴⁷. The scheme is comparable to the scheme that was recommended to Minister Ruddock in relation to ‘illegal workers’ in 1999 and adopted by Cabinet. There are detailed provisions for inspectors, gathering evidence and investigations.⁴⁸ There is provision for

⁴⁶ Section 251

⁴⁷ Subdivision D Enforcement and section 140K

⁴⁸ Subdivision F

enforcement visas to be issued to enable evidence to be adduced at trial.⁴⁹ The reason for the severity of the penalties, the evidentiary provisions that impose burdens on the defence and the extensive investigation powers may be justified on the basis that employer/sponsors are people who have asked for a special dispensation from the application of the migration system. In doing so they assume a higher burden of responsibility than other employers.

114. Division 12 of Part 2 deals with offences of entry and remaining without permission, people smuggling and unauthorised work, contrived marriages and the employer sanctions sections 245AA to AK. But there are great differences in the way each of these offences are structured. The people smuggling offences are criminal offences but for some of them 'absolute liability' applies so that once the physical elements are established it becomes a matter for the defence to make out any statutory defence that may be prescribed.⁵⁰ They carry very heavy terms of imprisonment and fines. There are powers for boarding vessels and for search and seizure which are directed to gathering evidence of the identity of the non-citizens. There is a criminal offence for non-citizens who work when they do not have permission and 'strict liability' applies. The penalties are heavy.
115. It is in this context that the employer sanctions provisions sections 245AA to AK can be seen to be very differently structured. They are criminal offences but none of them has absolute or strict liability and there is no specific warrant power for gathering evidence. DIAC officers have to rely upon section 251 which is not directed to the sorts of evidence that would be required for the employer sanctions offences. If necessary DIAC officers need to seek a police warrant and the attendance of an AFP officer. There is no general power of investigation. DIAC may be taken to have the power to investigate to the extent necessary to report a matter to the AFP, or to answer a challenge to one of⁵¹ its decisions on Judicial Review grounds but the kinds of powers that would enable an efficient investigation of organised labour hire operations that use non-citizens who do not have permission to work are simply not expressed in the *Migration Act 1958* for the purposes of sections 245AA to AK.
116. It may be argued that employers who have not sought special dispensation under visa sub-class 457 and who are not themselves engaged in bringing non-citizens into

⁴⁹ Sections 164A to D

⁵⁰ See section 228A and following.

⁵¹ Recommended in the RIWA Report 1999

Australia in breach of entry requirements ought to be treated differently and not subjected to absolute or strict liability or civil penalty regimes. This was one of the arguments for the abandonment in 2004 of the Ruddock three tiered system in favour of fault based criminal offences. But on a fair view of it an employer who does not take reasonable steps to guard against employing a non-citizen who does not have permission to work encourages abuse of the migration system that sends the same message abroad that is sent by those who flout their sponsorship obligations and those who conceal illegal entrants. The inadequacy of the investigation powers and the disconformity between the penalty provisions including the evidential burden conditions should be addressed.

117. DIAC has additional obligations that bear upon this question. The Commonwealth Fraud Control Guidelines ('the CFCG') require that each agency covered by the *Financial Management and Accountability Act 1998* ('the FMA') shall be governed by the guidelines. The CFCG requires agencies to develop guidelines and policies to prevent fraud and fraud is said to include among other things 'obtaining a benefit by deception'. Section 5 of the FMA defines Departments of State to be agencies for its purposes. DIAC is a Department of State. DIAC has developed several systems to prevent fraud. Its obligation to investigate breaches is however hampered by uncertainty and inefficiency in relation to its powers of investigation.
118. DIAC has established teams of investigators, arranged its conduct of investigations on a national basis with greater co-ordination and it has developed policy to guide the investigations and the preparation that must precede the referral of a matter for prosecution. This has imposed a new and added burden on staff, it has diverted existing resources and it has stretched available budgets. Every aspect of this work seems to me to have been conducted with sound judgment and appropriate effort albeit with inadequate resources.

The nature of the non-compliance by some employers and labour suppliers who refer and engage non-citizens who do not have permission to work

119. The files examined in the Review reveal that there is a small number of well organised individuals and groups who 'facilitate' the employment of non-citizens who do not have permission to work. Some of these people masquerade as labour hire agents, or contrive to purchase the right to carry out a task or function and then use the non-citizens to do the work. In this way they put some distance between the person who initially needed the workers and the workers themselves. This may be attractive to an employer who is naïve to the real intent of the 'facilitator' and it will certainly be

attractive to an employer who is a participant in the scheme. There are many abuses that follow from these sorts of arrangements. The files also reveal a small number of employers who persistently use and employ or engage non-citizens who do not have permission to work. They may be involved in having the workers brought to Australia or they may rely upon the intermediaries but they very apparently know that the less they 'know' about the workers the easier it will be to avoid any prospect of being prosecuted under sections 245 AA to AK.

120. Investigations and preparation for prosecutions are continuing and some of those who are or have been under investigation make it their business to be well informed about the activities of DIAC, the AFP and other agencies concerned in the matter. For this reason and because our system of law affords some protection against public scrutiny to persons who are under investigation it is not possible to recount in any great detail the contents of the files held by DIAC or the manner in which investigations are undertaken. What is recounted in this part of the report is therefore limited and summary in form, in order to protect those interests.
121. The information held by DIAC suggests that the employment of non-citizens who do not have permission to work is more common in certain occupations and industries than others. It seems far more likely to occur in the construction, general agricultural, horticultural and restaurant industries and amongst taxi drivers and sex workers. It is also more likely to occur amongst certain groups and in certain locations.

Table 4: Number of illegal workers located by industry

Industry Type	2006-07	2007-08	2008-09	2009-10
Agriculture, Forestry and Fishing	340	597	418	599
Construction	133	170	178	272
Accommodation, Cafes and Restaurants	239	254	189	250
Other Services			72	96
Retail Trade	96	85	74	93
Personal and Other Services	83	88	52	84
Manufacturing	119	105	61	75
Personal and Other Services (Sex Industry)	138	57	32	60
Transport and Storage	41	30	34	38
Wholesale Trade	16		38	34
Health and Community Services	28	28	30	20
Communication Services	7	11	9	10
Cultural and Recreational Services	20	8	6	8
Finance and Insurance	4	4	7	8
Education	11	8	5	7
Administrative and Support Services			5	3
Mining		1	7	3
Property and Business	24	8	5	3
Electricity, Gas and Water Supply	3	5	3	2
Government Administration and Defence	3	5	2	2
Professional, Scientific and Technical			3	1
Property and Business (Employment Placement Services)	4	3	1	1
Total	1309	1480	1231	1669

Source: DIAC

122. It appears that there are many people who come to Australia on a tourist visa or some other visa that does not permit the holder to work, but who work to support their stay in Australia or who come for the sole purpose of working to earn money to send home or take home at the end of their stay or both. They either leave before the visa expires⁵² or they remain and become over-stayers. DIAC locates and apprehends many such people and the primary course of action is to cancel their visa if they still have one

⁵² If they leave before their visa expires they will in all probability not come to the notice of DIAC or other relevant authorities. They will have come and gone without event. DIAC files reveal instances of non-citizens who have managed to obtain a series of ETA visas and coming to and going from Australia (within the time limited by their ETAs) over quite long periods and apparently working.

and then to remove them from Australia. They may well have committed an offence against section 235 of the *Migration Act 1958* and other provisions but prosecutions are pointless since they will be removed anyway and the cost and inconvenience of prosecuting them is considerable. This method of gaining access to the labour market in Australia by non-citizens has proved reasonably successful and so it becomes attractive for organisers to arrange for tourist visas and passage to Australia and then to arrange work and some form of accommodation. Tourist visas can be obtained online⁵³ in some developing countries and student visas⁵⁴ were readily obtained in very many countries until recently. If this method of obtaining access to the labour market remains unchecked then the available evidence suggests that 'word' will travel very quickly amongst people who will come to Australia without permission to work and the 'organisers' will be encouraged to further exploit those people.

123. There are many examples of abuse in these categories. For example over several years now, a small number of facilitators have encouraged or arranged for many hundreds of people to obtain visas that do not permit work and then to travel to Australia. A person then meets them on arrival and takes them to a workplace. They may not actually meet the employer, rather they perform work and they are 'paid' by the intermediary. They may move from one workplace to another either as groups being transported by the intermediary or by another person. In the case of work on construction sites and on farms groups of workers may be transported in 'mini-buses' or similar vehicles and they may be accommodated in small motel rooms or in sheds on site⁵⁵. They may simply obtain a mobile phone upon arrival in Australia and then wait for messages to meet at a chosen location and time. DIAC officers have encountered dozens of workers in single rooms and buses of workers who do not appear to know who is employing them, where they are working or staying, who will pay them, whether they are actually entitled to work and what is the proper rate of pay. Similar arrangements have been encountered with workers used on farms to do general labouring or in horticulture for fruit and vegetable picking and in meat works, food processing and brothels. These workers are particularly vulnerable. They may be underpaid, misled about what they are doing, undernourished, beaten and threatened. Their families at home may be threatened.

⁵³ An electronic travel authority 'ETA' may be obtained for the equivalent of \$20 online without interview from at least 30 countries including Malaysia and South Korea.

⁵⁴ Student visas also had the added opportunity of a pathway to permanent residency

⁵⁵ One market garden operation involved a caravan park near the farm. Over 100 non-citizens apparently working without permission were found living at the caravan park. Shortly after those workers were removed DIAC officers found another 100 workers living at the caravan park.

124. There are two very potent threats that can be used to render these workers entirely vulnerable. First the debt that they may have entered to enable their travel might well be exacted from family at home or there may be nothing more than the threat of it. Secondly, they are in all likelihood breaking the law themselves by working without permission and they are liable to be removed. Once they are aware of this the threat is very potent; they may have known it when they embarked or they may only realise the truth when someone in Australia tells them what their visa allows or that they must have a visa. DIAC files reveal that the use of these threats is common. In one example of the practical use of the device an intermediary or facilitator made a habit of paying 'his' workers monthly and then deferred the last payment until just before the workers were due to depart. He reported them himself and they were located by DIAC officers and removed. The workers did not pay for their airfares and nor did he and he did not pay their final wages. By the same token there are examples of workers taking the law into their own hands and punishing an intermediary who sought to swindle them of pay. One report noted that a person suspected of being an intermediary was found dead on a side road apparently having sustained brutal treatment. The matter is the subject of a continuing police investigation. It may be however that those involved or those who know about the matter have since left the country.
125. The real employer may not meet or even see the workers because he or she will deal only with the facilitator who acts as intermediary. This can be done in a number of ways. The intermediary may simply offer to supply some workers to do a particular job and may ask for a particular rate of pay for each worker; or else a lump sum for the job may be negotiated. In one case the intermediary simply offered to buy the farmer's crop and then the question of 'picking' or harvesting the crop became a matter for him. He brought his workers and picked the crop and then 'on-sold' it himself. In most cases the facilitator and/or intermediary move from one location to another rapidly and their workers change regularly. They may keep records or they may not. The intermediary may not even be the employer because he or she may simply be acting on the instructions of another person. That person may not even be in Australia. The intermediary may be the driver or the 'hotelier' or that arrangement may change from day to day. The purpose of these arrangements would appear to be to avoid easy detection of the workers, and then to create confusion as to who is the employer. If this is achieved then basic regulation which we take for granted in almost every employment relationship in Australia may be avoided. The DIAC files reveal many variations on these arrangements and it is not difficult to imagine further variations that could be contrived at in order to deflect and avoid liability.

126. The rate of pay may be well below what should be paid, tax may not be paid, accident and illness insurance and superannuation may be avoided and health and safety laws and regulations may be ignored.⁵⁶ Money may be the subject of prior claims and there may be extortion.
127. There also appear to be many people who come to Australia on a visa that limits their work to a certain number of hours per week but who work in excess of those hours. Students are an example; they are generally limited to 20 hours per week. At first blush this might seem a sensible limit to impose because it enables the student to earn some money to fund their studies and living expenses, but looked at more closely the impracticality of the arrangements can be seen. It could not seriously have been supposed that a limit of 20 hour's work per week would be capable of being monitored, much less policed or enforced. The student may have more than one employer. One employer will not know about the work that a student may be doing with another employer and will have no way of knowing what total number of hours work is being done by the student. A great increase in the numbers of these students and the colleges to provide for them occurred in the late 1990s. There are presently 324,000 overseas students in Australia. They contribute a substantial proportion of the funding that sustains the education sector. The education sector contributes very little towards the monitoring of their activities beyond attendance at classes. It is not clear how much thought (beyond the desire to secure the tuition fees) preceded the increase in this program in the late 1990s. Another influence has been the practice of entering into working holiday maker agreements with some other nations under which some non-citizens can obtain visas without thorough interview checks and they are allowed to perform work over an extended period subject to some conditions. There are no doubt 'diplomatic' advantages to these arrangements, but they necessarily involve an abrogation of sovereignty and they permit access to the labour market on certain conditions. It is not clear from the record what consideration was given to the consequential problems of monitoring and enforcement.
128. In summary, at least since 1998 Australia has had a problem created by the presence of significant numbers on non-citizens working here when they do not have permission to work. This problem is associated with other forms of non-compliance and organised

⁵⁶ Myung Yeol Hwang, 51, died in Sydney in August 2010. He was an unlawful non-citizen working as a tiler in construction and living in desperate circumstances. He arrived in 1998 on a tourist visa. He contracted a respiratory illness but had no access to healthcare. The support of the construction union CFMEU and public sympathy provided a cremation, burial and a memorial.

illegal activity which are concentrated and which involve large sums of money and the exploitation and abuse of vulnerable people. Some of this non-compliance is associated with conduct that the AFP has been treating as serious organised crime.

DIAC Compliance and Investigations structure

129. Where compliance activities and warnings have proved ineffective and where the available information suggests that an offence or offences may have been committed the Department then conducts a formal investigation. It has teams of investigators who are specially trained and prepared for the work. In addition to other qualifications that they may hold all of them have either the Certificate IV or in some cases the Graduate Diploma in Government Investigations⁵⁷. They have been carefully drawn from the Customs, Police and Corrections agencies and from the Compliance and related streams of DIAC. They are dedicated and capable officers and this is reflected in the quality of the reporting and the thoroughness and quality of the 'briefs of evidence' submitted to the CDPP for the determination of the question whether a prosecution will be pursued.
130. The development of the Department was until quite recently based upon state units with operational activities being organised within and for the state region. Overall policy and operational objectives were set nationally from Canberra. Quite some time ago the Department moved to coordinate its operations nationally. In 2009 it was determined that an outside consultant should review and advise on the transition. The recommendations of that Review⁵⁸ confirmed the Department's provisional conclusions and implementation then commenced. There is now a central coordination body under the leadership of a senior officer and it meets with the State/regional groups regularly.
131. The investigators commence with information from various sources including reports from the compliance officers, referrals from other Departments and agencies including the Police and reports from members of the public and non-citizens themselves in some cases. The Review found that DIAC holds a very substantial record of the identities and activities of those employers and labour suppliers who deliberately and persistently refer and engage non-citizens who do not have permission to work. Once the preliminary information is assembled a decision has to be taken as to whether to proceed to formal investigation. This is actually a complicated exercise for several

⁵⁷ The standard qualification is the Graduate Diploma in Government Investigations and it is offered by Charles Sturt University.

⁵⁸ 'Enhancing Program Integrity Risk Management through Investigations: DIAC Review of Information Management and Investigations' conducted by ThinkPlace, October 2009

reasons. First the range of matters that arise for consideration is broad and unpredictable and so the guiding policy needs to be high level and flexible. This means that more discretion is required to apply it. Secondly it is very likely that the conduct in issue involves more than one offence and those additional offences usually attract the attention of other Departments and agencies, for example the Australian Tax Office, Centrelink, the Fair Work Ombudsman, the AFP and State and Territory Police. Thirdly the conduct may be associated with other conduct which will require consideration of other offences. The more serious the conduct and the offences the greater will be the involvement of the AFP and other agencies.

132. Most of the matters that have been under investigation since the *Employer Sanctions Act* came into effect in 2007 have involved disgraceful behaviour and very serious alleged crime. In most cases a number of offences have been involved and not only breaches of the *Migration Act* 1958. This may mean that the Police and other agencies will determine that the *Migration Act* offences while very important are nevertheless secondary in their significance for the enforcement of law and order. It may also mean that charges brought against an alleged offender under the *Migration Act* 1958 may be withdrawn if the alleged offender determines to plead guilty to other offences. It may also happen that those prosecuting form a view that particular offences should be proceeded with and others withdrawn. So the question whether to proceed with an investigation and then with a prosecution can be a complicated one and circumstances will not often conform to one pattern of behaviour and may not lend themselves to one system of guidelines or principles.

DIAC Enforcement Policy

133. The Department has an enforcement policy in which cases of illegal work that fit within seven case profiles will be referred to Investigations, with the aim of referring the matter to the CDPP. These case profiles include: aggravated offences, organised employment rackets, migration agents who refer illegal workers, sponsors of 457 visa holders, employers in high-risk industries, labour hire agencies and those who refer illegal workers for work and where there is clear evidence the person knew the worker was an illegal worker.
134. The enforcement policy for prosecution reflects the Department's commitment to the Senate that it will take a fair and reasonable approach to enforcing the legislation. Over 95% of cases of illegal workers encountered by DIAC post 19 August 2007 do not meet the requirements for prosecution either because the employee was engaged prior to

the legislation commencing, or because the case does not fit within the enforcement policy.

135. Once a decision is taken to refer a matter for investigation and prosecution the available information is reviewed and decisions are taken as to where the investigation should be conducted and by which state office and officers. Interstate coordination is often required and there is an increasing role for the national planners. There is now a senior officer responsible for the national coordination of investigations and referrals for prosecution.
136. Thorough planning has preceded each investigation. Affidavits and proofs of evidence covering each element of the alleged offences have been prepared. Relevant exhibits from the appropriate records have been gathered. Summaries and chronologies have been prepared. The interviews that have been conducted have conformed to all the appropriate norms of practice and careful attention has been paid to questions of admissibility and probative worth of the evidence. Officers have wisely sought advice from officers of CDPP from the earliest stages and then in a timely way thereafter as to the evidentiary requirements, the adequacy of the proofs and the prospects of success. Sadly budgetary constraints in very recent years have forced CDPP officers to significantly limit their availability to assist DIAC in the preparation of matters under investigation.
137. The conduct of an investigation and of the execution of a field operation is complicated and resource intensive exercise. In smaller workplaces numbers of officers will be needed and the assistance of the AFP will often be sought. In agricultural workplaces securing the perimeter may involve large numbers of DIAC and AFP officers. It will also be necessary to interview those apprehended and arrested or detained.
138. A number of the investigations have cost in excess of \$60,000 of officer time and other resources and expenditure. The costs will of course vary markedly depending on the numbers of persons involved, the nature and location of the work and premises, the extent of the field operations required and the volume of evidence. There must be some account taken of the cost of these efforts where the statutory regime prevents successful prosecution.

Referral to the Commonwealth Director of Public Prosecutions ('CDPP')

139. The next step is referral to the CDPP. Before examining this aspect it is imperative to understand the way legal services are arranged and organised. DIAC has many

functions and powers that are controversial and that directly affect individuals and their permission to enter and remain in Australia. One consequence of this is that many decisions are disputed and challenged. DIAC and the Minister are very frequently parties to administrative proceedings and litigation in which judicial review and compensation are often claimed. The Department has a Governance and Legal Division and the provision of legal services is regulated by executive instruction under a Chief lawyer. The legal 'unit' or 'area' as it is variously called deals with a very substantial number of cases of this kind. It also provides advice services to the Department on a range of other matters including procurement, tendering and other contractual matters⁵⁹. The legal unit has access to a panel of external legal service providers.

140. There is a clear difference between these sorts of matters and the expertise that is required for effective prosecution of offences. The legal department does not handle the prosecution of offences under sections 245AA to AK. This is a sensible policy having regard to the volume of work the legal department manages and the limited resources that are presently available. But one consequence of this is that the very important role of the solicitor is missing in the chain that should run between the investigative officers and the CDPP. It is very difficult for the investigative officers to fill this gap and it cannot be asked of the CDPP within present budgetary constraints. Despite this the legal unit does not appear to have provided any advice to the Department about the state of the legal services available to the investigations officers.
141. The Terms of Reference ask whether there are any impediments to the pursuit of prosecutions. There would be good reason for DIAC to appoint a solicitor within the legal department. A solicitor can advise on the suitability of the material to support a proposed prosecution, the adequacy of the material, any special requirements as to form, procedural matters including time limits and the like and the method and process by which a crown prosecution is pursued. This is not a function normally performed by the legal department and it would require special training and an allocation of resources and staff to undertake it. In order to meet that need both DAIC and the CDPP have over a long period made every effort to complete these tasks by cooperation; so that the CDPP had been providing most of the solicitors services on an ad hoc basis and did so with considerable success. Budgetary constraints have now prevented this continuing.

⁵⁹ Advice provided from the DIAC legal unit 28 June 2010 which noted that the legal unit is *inter alia* 'responsible for managing the department's legal risks, services and exposures'.

142. If there is to be a change to the statutory regime of sections 245AA to AK of the *Migration Act 1958* and an increase in legal activity while the new provisions begin to have their deterrent effect it will be important that DIAC have available to it the services of a solicitor experienced in this area. DIAC will be best placed to determine whether those services should be sourced from AGS, the panel of private law firms or by an internal appointment but there would appear to be advantages in an internal appointment because consultations will be frequent and matters of strategy will require regular departmental involvement. The existing infrastructure of the legal unit will be of assistance.
143. During the period 2007 to date more than one hundred matters have been considered for investigation in relation to possible breaches of Division 12 of Part 2 of the Act. Ten have been the subject of comprehensive investigation and the preparation of briefs of evidence for submission to the CDPP. Four have been submitted pursuant to a delegation of power. Under our system of law and Government a decision to prosecute for a criminal offence is one which is taken by a senior crown law officer. It is not possible in the ordinary course for a government department or agency to decide to prosecute for a criminal offence and rely upon its own lawyers or engage solicitors and barristers from the office of the Australian Government Solicitor or the private profession. The prosecution for a criminal offence is of such a serious nature that it has always been considered that it should be one that is subject to the highest degree of scrutiny and care.

CDPP and the Prosecution Policy of the Commonwealth

144. Traditionally the Attorney-General would be the Officer of the Crown responsible for bringing a prosecution of criminal offences of the kind expressed in 245AA to AK of the *Migration Act 1958*. In modern times most common law countries have adopted the practice of legislating for the appointment of an independent office of public prosecution. In Australia we have the Commonwealth Director of Public Prosecution.
145. The CDPP determines whether to proceed with a prosecution on the basis of the Prosecution Policy of the Commonwealth. It is a public document tabled in Parliament which sets out guidelines for the making of decisions in the prosecution process.⁶⁰ It applies to all Commonwealth prosecutions whether or not conducted by the CDPP. The

⁶⁰ The summary of the role of the CDPP and the operation of the PPOC is substantially extracted from the CDPP website www.cdpp.gov.org.au

main purpose of the Prosecution Policy is to promote consistency in the making of the various decisions which arise in the institution and conduct of prosecutions. The decision to institute (or continue) criminal proceedings is an important one, and careful consideration is given to each matter. Under the Prosecution Policy there is a two-stage test that must be satisfied:

- (a) there must be sufficient evidence to prosecute the case; and
- (b) it must be evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the public interest.

146. In determining whether there is sufficient evidence to prosecute a case, the CDPP must be satisfied that there is prima facie evidence of the elements of the offence, and a reasonable prospect of obtaining a conviction. The existence of a prima facie case is not sufficient. In making this decision, the prosecutor must evaluate how strong the case is likely to be when presented in court. This is an important distinction as the decision can only be made based on admissible evidence, not necessarily all the information gathered during the course of the investigation.
147. The evaluation must take into account such matters as the availability, competence and credibility of witnesses and their likely effect on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The prosecutor should also have regard to any lines of defence open to the alleged offender and any other factors that could affect the likelihood or otherwise of a conviction.
148. The possibility that any evidence might be excluded by a court should be taken into account and, if that evidence is crucial to the case, this may substantially affect the decision whether or not to institute or proceed with a prosecution. It is the prosecutor's role to look beneath the surface of the evidence in a matter, particularly in borderline cases.
149. Having been satisfied that there is sufficient evidence to justify the initiation or continuation of a prosecution, the prosecutor must then consider whether the public interest requires a prosecution to be pursued. In determining whether this is the case, the prosecutor will consider all of the provable facts and all of the surrounding circumstances. The factors to be considered will vary from case to case, but may include:
 - (a) Whether the offence is serious or trivial;
 - (b) Any mitigating or aggravating circumstances;

- (c) The age, intelligence, health or any special infirmity of the alleged offender, any witness or victim;
 - (d) The alleged offender's antecedents;
 - (e) The staleness of the offence;
 - (f) The availability and efficacy of any alternatives to prosecution;
 - (g) The attitude of the victim;
 - (h) The likely outcome in the event of a finding of guilt; and
 - (i) The need for deterrence.
150. These are not the only factors, and other relevant factors are contained in the PPOC. Generally, the more serious the alleged offence is, the more likely it will be that the public interest will require that a prosecution be pursued. The decision to prosecute must be made impartially, and must not be influenced by any inappropriate reference to race, religion, sex, national origin or political association. The decision to prosecute must not be influenced by any political advantage or disadvantage to the Government.
151. The DIAC files reveal that officers of the Department have worked together with CDPP to conduct investigations and to prepare prosecutions. CDPP officers have made every endeavour to advise and assist DIAC officers from the earliest stages. Unfortunately the increase in the volume of work undertaken and effective reductions in its budgetary allocations over several years have meant that it has had to reduce the advisory role that it has hitherto played. That has had an adverse effect upon the process of investigation and referral. If there are to be alterations to the statutory regime then additional resources will be required.

No successful contested prosecutions to date

152. Since the enactment of the *Employer Sanctions Act* DIAC officers have examined thousands of pieces of information relevant to possible prosecutions and from these at least 100 matters have been considered for investigation in relation to possible breaches of Division 12 of Part 2 of the Act. Ten have been the subject of comprehensive investigation and the preparation of briefs of evidence for submission to the CDPP. Four have been submitted pursuant to delegation. It is not surprising that the number is small. The allegations and the supporting evidence needed to be strong to discharge the prosecution burden of proof and to meet the criminal standard of proof required by the provisions. They also needed to be such as would answer the standard set by the PPOC. These were new offences not yet tested and controversial; DIAC officers were concerned to ensure that only the strongest of cases would be advanced. Moreover undertakings had been given to the Legal and Constitutional Committee that

care and caution would be exercised in bringing prosecutions, and finally the cost involved in mounting an investigation is considerable and resources are scarce. The investigations were conducted by DIAC's specialist teams.

153. The ten matters (from among the hundred or more considered for comprehensive formal investigation) in which investigations were conducted are outlined below. The descriptions of these matters need to be generic and in some cases very limited to protect the continuing investigations, the prosecution processes and DIAC officers. The matters are as follows:

- (1) A major operation in the meat processing industry where an intermediary operating as a labour hire agency had referred 80 non-citizens from China for work under false identities,
- (2) A major operation in the agriculture/pastoral industries where a group of labour hire intermediaries had referred hundreds of non-citizens from South East Asian countries for work when those non-citizens were not permitted to work. Some 50 workers were located and statements were taken. There was evidence of taxation, benefit and other fraud or irregularities.
- (3) A major operation in the agriculture/pastoral industries where a labour hire intermediary had engaged and referred hundreds of non-citizens predominantly from one South East Asian country for work when they were not permitted to work. Evidence was gathered showing serious abuse and manipulation of the workers and serious exploitation in some cases. There was evidence of very serious violent conduct. There was evidence of taxation, benefit and other fraud or irregularities. The intermediary had established companies through which to run some of his business. The intermediary had been served with a large number of IWWN's but had treated them as mere trifles.
- (4) A series of operations in the construction industry where a large number of intermediaries had been engaging or referring for employment large numbers of non-citizens from China when those workers were not permitted to work and many were using false identities. There was evidence of taxation and benefit fraud.
- (5) A serious instance of alleged sexual servitude.

- (6) A major operation the retail shopping sector where non-citizens who did not have permission to work were engaged by sub-contractors to perform parking area tidying and monitoring work.
 - (7) A major operation in the sex industry in which non-citizens who did not have permission to work were engaged and referred for work.
 - (8) Another operation in the sex industry in which non-citizens who did not have permission to work were engaged and referred for work.
 - (9) A major operation in the agriculture industry in which non-citizens who did not have permission to work were engaged and referred for work.
 - (10) An operation concerning the food processing industry conducted in conjunction with AFP investigations of a range of illegal activity.
154. The investigation of the events relevant to these matters continues. In one matter CDPP has assisted with advice about the content and execution of warrants. In at least two other matters CDPP has provided advice during the course of the investigations notwithstanding the present constraints. As at August 2010 from ten investigations four comprehensive briefs of evidence had been thoroughly prepared. Those four 'briefs' were approved by a senior DIAC officer holding a sufficient delegation of authority to submit them to the CDPP. All four were submitted to CDPP. At that point CDPP conducted its assessment in accordance with the PPOC and determined whether any of the matters was suitable for prosecution. While each of the four matters was received and considered by the Office of the CDPP only one of them was 'accepted' by CDPP for prosecution. That matter was listed for trial in September 2010 and just prior to the hearing the Defendant decided to plead guilty to a charge under section 245AC(1) of the *Migration Act* 1958 of having allowed a non-citizen to work in breach of a visa condition. The Court heard the plea on 8 December 2010⁶¹ at which the Accused admitted a prior criminal record. There has been no contested matter under the provisions.

⁶¹ The Accused TAN was ordered to be released on security of a recognisance in the sum of \$10,000 to be of good behaviour for 4 years under section 20(1)(a) of the *Crimes Act* 1914 (Cth). There was a condition of the Bond that the Accused pay a pecuniary penalty of \$12,000 to the Commonwealth on or before 8 June 2011. The CDPP report notes that the Judge observed, in reliance upon section 6AAA of the *Sentencing Act* 1991 (Vic), that but for the plea of guilty he would have imposed a sentence of 6 months imprisonment with a recognisance release Order in the sum of \$20,000 of 4 years duration and a fine of \$13,000.

155. Two of the three matters that were not accepted for prosecution are now the subject of some further investigation by DIAC to see whether additional evidence might be gathered that would make prosecution possible. Three of the ten identified for investigation continue to be under investigation. One further matter that was the subject of joint investigation with the AFP proceeded to Court and the Defendant indicated an intention to plead guilty but later changed his mind after receiving further legal advice.
156. The CDPP has reported that two 'people trafficking' matters were referred to it by the AFP in which four persons were alleged to have committed offences under the *Employer Sanction* provisions and sexual servitude and slavery offences. One of these matters was apparently discontinued because the victim was no longer available and the other continues.
157. The result is that there have been no contested prosecutions that have resulted in a finding of guilt and a decision of the Court on any aspect of the meaning and application of the employer sanctions offences under sections 245AA to AK. The matter in which the Defendant entered a plea of guilty is helpful to some extent in the sense that it may indicate that an alleged wrongdoer or his or her lawyers may have considered that the offences are capable of being proven, but it can be little more. An accused person may plead guilty for a number of possible reasons. The fact of the plea does not mean that there was evidence that would have justified a finding of guilt or that in any other case it would be possible to mount an evidentiary case that would sustain a conviction.
158. The significance of this for regulation cannot easily be overstated. It should be assumed that this is well known by those engaged in or contemplating conduct that would involve breaches of the 245AA to AK offences. Compliance and Investigations officers recounted to me instances of conversations in which people under investigation had said that they believed that the offences could not be proven; and that they had laughed at the prospect of prosecution. The specificity of the comments and the frequency of them had lead officers to believe that the belief is widespread. The officers are well informed, they conduct hundreds of field visits and interviews and they do so very regularly. They are experienced and they appear to have very good sources of information. This impression is consistent with what has emerged by way of response to the IWWNs. These were a very important part of the education program and a very useful measure when dealing with employers or labour hire agents who have been careless or irresponsible. But with hardened operators they have become a figure

of fun. One brothel owner in NSW has posted dozens of IWWNs on the walls in his lobby apparently regarding them as trophies.

Conclusions as to the ineffectiveness of the Employer Sanctions as a deterrent

159. There is strong evidence that there are well informed and resourced individuals and groups conducting organised operations that employ and refer for employment non-citizens who do not have permission to work. These activities are associated with what appears to be exploitation, abuse, taxation and benefit fraud and racketeering. As I have already said a substantial number of matters have been considered for formal investigation and prosecution. While it would be useful to correct the anomalies in the investigation powers available to DIAC this alone would not change the outcome of the attempts to pursue prosecutions. The offences that are established by sections 245AA to AK cannot be said to be an effective deterrent against the small number of employers and labour suppliers who refer and engage non-citizens who do not have permission to work and they are no longer an effective educational tool. IWWNs have become a figure of fun amongst recalcitrant operators and there is presently no effective sanction to stem what is very likely an increasing tide of the use of these workers.
160. The difficulties posed by the terms of the offences and the need to satisfy the requirements of the PPOC are the reasons for the failure to obtain any final prosecution outcomes in contested trials that would compel the conclusion that the offences are able to be proven and that they will bite. It is neither possible nor appropriate to contest in this Review the requirements of the PPOC or the way it is applied to particular proposed prosecutions. The files reveal that although the section 245AA to AK matters were new and that this may have complicated the process of evaluation they were considered thoroughly by CDPP officers in the context of the PPOC and considered written analyses supporting the determinations were provided by the CDPP.
161. It is very clear that the failure of the regime can be attributed to the structure and terms of the provisions which create the offences. It is only necessary to examine the primary offences in the regime that was established by the *Employer Sanctions Act 2007* to see why they pose an almost insurmountable problem for the prosecution.

The offences created in 245AA and the problems of proof

162. The offences relating to allowing an 'unlawful non-citizen' to work require that the prosecution to prove beyond a reasonable doubt that:
- (a) the defendant intentionally allowed or continued to allow the worker to work, and

- (b) the worker was an ‘unlawful non-citizen’, and
 - (c) the defendant knew or was reckless as to whether the worker was an ‘unlawful non-citizen’, and
 - (d) the work involved either:
 - a. an employment under a contract of service or employment, or
 - b. an engagement under a contract of services, or
 - c. the bailment of a chattel to be used for transportation, or
 - d. the lease or licence of premises for the provision of sexual services.
163. The offences relating to referring a UNC for work require that the prosecution prove beyond a reasonable doubt that:
- (a) The defendant operated a service for reward or otherwise of referring people for work
 - (b) The defendant intentionally referred a worker to another person for work
 - (c) At the time of the referral the worker was an unlawful non-citizen
 - (d) At the time of the referral the defendant knew or was reckless as to whether the worker was an unlawful non-citizen, and
 - (e) the work involved either:
 - a. an employment under a contract of service or employment, or
 - b. an engagement under a contract of services, or
 - c. the bailment of a chattel to be used for transportation, or
 - d. the lease or licence of premises for the provision of sexual services.⁶²
164. The difficulty involved can be seen most starkly when it is appreciated that two very obvious sources of evidence against the defendant in such prosecutions almost certainly will not be available or admissible or probative. The worker may well have been removed before the trial because their status does not allow them to remain and DIAC has an obligation to remove them once they are located. The cost, inconvenience and risks of detaining them are considerable. Even if they remain they themselves will probably have committed an offence and would be entitled to claim privilege and would need to be accorded quarter. Their evidence will be tainted for that reason and the circumstances might give rise to telling cross-examination as to motivation. The problem would not be solved by seeking evidence from co-workers, managers and other. They may also be implicated they may be or become uncooperative and so on. The CDPP has reported in detail in its written submission to the Review on difficulties of this kind in relation to offences involving sexual servitude. Witnesses in these

⁶² Summarised from sections 245AA to AK of the *Migration Act 2007*

circumstances may seek undertakings under the *Director of Public Prosecutions Act 1983* and this carries its own problems.

165. Accepting this, the next source of evidence may be documents but seizure is difficult. A warrant may be issued under section 251 of the *Migration Act 1958* but it requires that the officer concerned has 'reasonable cause to believe' that there may be,
- (a) 'an unlawful non-citizen, a remove or a deportee', or
 - (b) a person holding a 'temporary visa' that limits work, or
 - (c) 'any document, book or paper relating to the entry or proposed entry into Australia of a person in circumstances in which that person' would have become a 'prohibited migrant' or a 'prohibited non-citizen' or 'an illegal entrant' or an 'unlawful non-citizen', or
 - (d) a passport, other identity document or any travel document of an unlawful non-citizen or a remove or deportee.
166. The formation of that belief would require an evidentiary basis that is unlikely to be obtained from a preliminary investigation of suspected or alleged offences under the *Employer Sanctions* provisions. If an officer acts by way of forced entry and seizes documents then that conduct may be challenged and most certainly will be if a prosecution is launched and pursued. The risk of evidence being rejected will prompt the CDPP to recommend against a prosecution in these circumstances. The only part of the section 251 warrant power that is directed to employment focuses on the identification of the worker who may have offended against section 235 of the *Migration Act 1958* and not on the act of allowing a person to work or referring them for work. If there is to be any alteration to the statutory regime then it should be accompanied by a specific provision for gathering documentary evidence. The authority for issuing a warrant should be confined to the Secretary. This will protect the field officers and the integrity of the process sufficiently.
167. There are other problems of proof. It is true that an employment or engagement agreement may be 'oral' and that evidence of payment and presence may be enough. But the criminal standard of proof and the evidentiary burden on the prosecution mean that any documents sought to be relied upon by the prosecution will have to be identified, explained and then connected to the defendant in a probative way. The only people who will be capable of doing this will be the workers and any managers who may be involved. They will be unlikely to want to give evidence against the employer or labour supplier.

168. The other possible source of evidence is the compliance officers. The best evidence will be taken when a field operation is underway. At that time officers are focussed upon securing the perimeter, maintaining order among many vulnerable and frightened people, ensuring no harm befalls those trying to leave the area, recording the details of those located, arranging for detention and removal etc. Thorough notes are taken and these seem to be reliable. But the real employer may make a point of not meeting or even seeing the workers and not being present so it may be very difficult to prove the element of 'allowing' to work.⁶³
169. It is by no means simple to prove that a person has 'allowed' another to work. It is not clear what level of permission is required. What if the employer does not supervise the exercise and expresses no view about whether the work should be done and if so by whom. The intermediary may simply offer to get a job done for a sum of money and then use workers supplied by him or her directed by him or her and paid by him or her. There are many possible variations on these scams; it is undesirable to recount them in detail because it may compromise continuing investigations.
170. An answer to this is that it should be possible where there evidence of UNCs working at premises or a location and there is an owner of those premises who has derived some benefit from the work being done and the records show that the persons were UNCs and the employer declines to comment or co-operate that inferences should be drawn. But even if this were so it would be quite insufficient to satisfy the PPOC. In any event it would have been a very small subset of the possible prosecutions.
171. It may also have been thought that if a recalcitrant employer or labour supplier had been issued repeatedly with IWWNs this might enable a Court to draw inferences for the purposes of sections 245AA to AK. The same assumptions may have been made about the existence of VEVO and whether an employer faced with a prospective employee claiming to have permission to work had made a VEVO check. Inferences may be able to be made but it would be necessary to have additional elements in the foundation for such proof. The fact that IWWNs had been issued would tend to prove that the employer knew that employing a non-citizen who did not have permission to work is unlawful but it would not of itself prove or even tend to prove that a worker other than the one the subject of the notice was not permitted to work. The fact that a VEVO check was not done could tend to prove that the employer was conscious that a

⁶³ This would be so despite the favourable judicial comment about the use of 'allows' as a condition of the offence; see for example *De Kuyper v Crafter* [1942] SASR 238 and *Victor v Chief of Naval Staff* (1992) 115 ALR 716.

particular employee did not have permission to work but it would be necessary to show that the employer knew of the existence of VEVO, knew why it was necessary to check and also knew that the worker was a non-citizen.

172. None of this enables inferences to be drawn that the employer or labour supplier stood in that relation to the worker. It is likely that operators of the kind described above would not keep records on hand. Such records as are kept may be stored online and or offshore. That may force the prosecutor to consider relying upon inferences that may be drawn from observations made by DIAC officers on field visits. If an officer sees the workers working on premises owned by a person who appears to have derived a benefit from the work being done by the worker and if that worker is later found to be a non-citizen who does not have permission to work then an inference may be drawn that there was an employment. The trouble is that each of the elements needs to be proved and this is an unsure foundation upon which to mount a policy of prosecution.
173. When one turns to the offences relating to allowing a non-citizen to work in breach of visa conditions the problems escalate because it is necessary to prove that the employer knew that there was a condition as to the numbers of hours of work and that there had been a breach. The employer could not know what work might be being done by the employee with other employers.
174. Whether a Court would be prepared to draw such inferences will depend upon a number of matters including the way in which the Court construes the offences in the context of the Act as a whole. The provisions are criminal. Proof must extend beyond a reasonable doubt. There is no provision for strict or absolute liability. There are no elements that require the defendant to proceed to proof. There is no relief from the inherent difficulty of proving an employment relationship. There are no statutory defences that would allow a Court to treat the defendant as being obliged to prove some part of the offence. When all of this is compared with the other offences, particularly those under what have been referred to as the *Worker Protection* provisions it is very unlikely that a Court would be persuaded to find a breach in any of the circumstances recounted in this report.
175. This does not mean that no prosecution case would be capable of being proven. Counsel faced with a situation where a prosecution has been issued and it is simply a matter of seeking to prove the offence may consider that there are some prospects of success. If chance favours the drawing of inferences from the circumstances alone then a less sophisticated employer or labour supplier may be convicted. But this is not

enough to satisfy the high standard set by the PPOC. The PPOC governs the question whether a prosecution may even be commenced.

176. It may also be considered that the cost investigating and prosecuting offences with these kinds of problems of proof will always be considerable and will always exceed by multiples the cost of investigating and prosecuting strict liability and absolute liability offences. Viewed from that perspective by far the most economical way of curbing the problem would be by the use of infringement notices issued by executive authority and enforceable as strict liability offences by judicial process and subject to statutory defences and judicial discretion.
177. Prior to 2007 it was possible to prosecute an employer for accessorial liability under section 11.2 of the *Criminal Code*. The explanatory memorandum for the *Employer Sanction Act* notes that the problems of proof set out above had impeded such prosecutions. It is odd that those who promoted the *Employer Sanctions Act* did not see that their proposal would have the same problems of proof and that only in a case where the defendant made a full confession would there be any real prospect of a conviction.
178. Unless the prospective workers can conveniently be detained in Australia pending prosecutions and unless their evidence can be adduced in spite of their complicity and independent culpability the provisions cannot operate effectively.
179. The CDPP has expressed its support for strict liability offences. The CDPP's views must be accorded considerable weight.

The need for additional offences and complementary provisions

180. There is a very substantial case for more effective enforcement measures including measures that will reduce the fighting chance of acquittal for offenders in this area and lengthen the odds against conviction. In a summary way the grounds are as follows:
 - (a) The RIWA Report 1999 recommended Tier 2 and 3 strict liability offences and a regime of infringement notices.
 - (b) Government approved that policy in 1999 and 2000.
 - (c) Even when Government decided to shelve the Tier 2 and 3 proposals in 2004 Government committed itself to the proposition that those measures should not be shelved indefinitely.

- (d) The problem was clearly considered to be a very serious one in 1999 and that position has not altered. If the problem is a serious one then the conduct should be deterred, prevented and punished.
- (e) The conduct involves a compromise of Australian sovereignty and interferes with the otherwise orderly migration and humanitarian entry programs.
- (f) The conduct is unfair to those who wait for authorised entry and access to the labour market and it sends the wrong message to others.
- (g) The failure to curb the conduct invites exploitation of vulnerable people and it encourages abusive employment practices. It encourages organised crime and rackets.
- (h) The presence of non-citizens who work when they do not have permission distorts our labour market and it gives an unfair competitive advantage to employers who use those workers if they are underpaid.
- (i) The conduct is associated with abuses of welfare and tax systems and with fraud.
- (j) There is substantial evidence that a small number of employers, labour suppliers and intermediaries are conducting organised rackets in which large numbers of non-citizens who do not have permission to work are being brought to Australia and used as a cheaper source of labour and that they are being exploited. The evidence indicates organised criminal activity associated with this conduct.
- (k) The VEVO service enables employers and labour suppliers to access information about the visa status and work permission of non-citizens.
- (l) The awareness and education campaigns conducted by DIAC have been very effective. The distribution of information, the workplace visits and the use of IWWNs has achieved a high level of awareness among employers about the problem and their responsibilities. The employer representatives have contributed to this program.
- (m) There are some alternative sources of labour in agriculture.
- (n) The numbers on non-citizens working without permission has certainly not decreased. The numbers of over stayers remains around the 50,000 mark.
- (o) The existing measures do not work. There have been no convictions in contested prosecutions. One offender entered a plea of guilty to a single charge under section 245AC and he admitted a prior criminal record.
- (p) The provisions no longer educate and they do not deter the relevant group of employers and labour suppliers. There is evidence that they are regarded as risible by some of the recalcitrant employers and labour suppliers.
- (q) The proposed Tier 2 and 3 measures would not be subject to the PPOC and they would not necessarily have to be referred to the CDPP.

- (r) There is relevant precedent for the use of civil penalty provisions and strict liability; they appear in the *Migration Act* 1958 and in other Australian legislation. Other OECD countries with similar problems have enacted these kinds of measures.
 - (s) The burden that may be imposed upon employers and labour suppliers was considered in the RIWA and the report regarded it as outweighed by the importance of the deterrent.
 - (t) The existence of fault based offences with no other penalty provision has the tendency to encourage irresponsible operators to avoid gaining any knowledge of the status of their employees.
181. I have read the submissions provided by stakeholders and noted the concerns raised by them in the consultations. I have addressed these matters in greater detail above and I have also addressed the arguments that have been advanced against adopting new measures. In addition to the observations already made about the numbers of non-citizens working when they do not have permission, the nature and extent of the illegal activity associated with this conduct and the availability of the VEVO service to assist employers in checking whether a prospective employer has permission to work I would make the following further comments.
182. The primary concern expressed by employers and those opposed to any alteration of the existing regime is that to add to the range of penalties, particularly by enacting the strict liability provisions and implementing the infringement notices regime recommended by the RIWA Report and Minister Ruddock, would place an added administrative burden on employers and that there were serious labour shortages. It was also urged that it would be unfair to penalise an employer who inadvertently or carelessly employs or refers a non-citizen who does not have permission to work. This was put and continues to be argued as a reason not to consider strict liability or any form of reversal of the traditional criminal standard of proof and evidential burden.
183. These arguments were put forcefully by employer organisations like MBA, NFF, AIG, ACCI and many others. Those employer organisations are registered pursuant to Industrial legislation throughout Australia and have been for very many years. That registration confers upon them legal status and the right and obligation to represent their members in their capacities as employers in relation to any matter that impacts upon their activities and conduct or operations that require the employment of workers. It is to be expected that those organisations would have expressed very serious concern about the prospect that an employer who unwittingly employed a non-citizen who did not have permission to work despite having made reasonable enquiries and despite

exercising reasonable diligence and that such an employer would be vulnerable to a measure of the kind recommended by RIWA and adopted by Government in 1999.

184. But the arguments against this are powerful. Clearly the Government in 1999, 2004 and 2006 considered that the problem of what it called ‘illegal workers’ was a very serious one and one that warranted criminal sanctions. The problem remains and has not been solved. In fact the criminal sanctions may have made matters worse because it appears that they cannot support the kinds of prosecutions that can be mounted by the CDPP under the PPOC. It is clear that there is a small number of recalcitrant employers who are confident to flout the law and to engage in exploitation and illegal activities on an organised basis.
185. The RIWA Report also concluded *‘that while a range of costs and benefits are expected to flow from the imposition of sanctions, it is envisaged that the benefits, particularly to the community and Government, will outweigh the costs to labour suppliers, employers, some new employees and Government’*.⁶⁴ The recommendations that were founded upon those kinds of findings were endorsed by the Government in 1999 and 2000. I understand from some stakeholders that the Prime Minister expressed the view at that time and also in 2004 when the strict liability provisions were again ‘deferred’ that he did not wish to see them deferred indefinitely.
186. I adopt as presently relevant the analysis and conclusions set out in the RIWA Report as to the costs, burdens and benefits that may result from the implementation of measures like those envisaged in Tier 2 and 3 of the RIWA recommendations.⁶⁵
187. It is also clear from the record that in 1999 the Government had decided to introduce a scheme of offences for employers and labour suppliers who employed or referred non-citizens who do not have permission to work and that the scheme would involve strict liability provisions and a regime of infringement notices. Although the consultations in 2000 through to 2004 persuaded Government to defer the strict liability provisions and regime of infringement notices this appears to have been contemplated on the assumption that the criminal offences and penalties would be effective. They have been wholly ineffective.

⁶⁴ RIWA Report 3.9.1.

⁶⁵ *Ibid* at 3.8 and 3.9.

188. It is reasonable to impose some evidential burden on employers and labour suppliers in this instance because it will be peculiarly within their knowledge whether they have taken reasonable steps to establish that their workers have permission to work. This is a test favoured by the Commonwealth Parliamentary Counsel and the Attorney-General⁶⁶ and applied in relation to the Tier 2 and 3 provisions proposed in the RIWA Report.⁶⁷
189. The problems of a mobile world population and the need to control national borders and to curtail organised crime and the exploitation of vulnerable people are features of globalisation. Disparities in wealth and opportunity contribute to this problem. The international security issues that have beset wealthy OECD nations since the late 1990s compound the problem of the mobile world population. No simple solutions have emerged and Governments will need to commit more resources to addressing the problems. While budgetary allocations have been increased from time to time there will be a need for additional allocations if this problem is to be resolved. Preliminary costing of some of the possible legislative measures indicates the need for an additional \$2.4 million per annum to introduce and implement civil penalty with an infringement notice scheme.
190. The single most effective way of stemming the tide of this conduct will be to deter those recalcitrant employers and labour suppliers in a strong and swiftly effective way. Civil penalty provisions with strict liability and a system of infringement notices is the only effective way of achieving the necessary result. Careless or unwitting employers can be protected by a series of statutory defences which should be complemented by the protection of a broad judicial discretion to dismiss a prosecution if in all the circumstances the conduct of the employer was reasonable. The judiciary will give clear indications of their approach so that DIAC and employers and labour suppliers will be able to plan and adjust their arrangements. The judiciary will be best placed to ensure that there is no unfairness.
191. The cost of addressing this problem cannot be borne solely by Government or the taxpayer and it is impossible to impose the cost on the workers themselves. Australian employers must bear some of the cost and inconvenience by taking reasonable steps to identify the workers they engage or employ and by taking reasonable steps to establish whether those workers have permission to work. Australian citizens must be prepared to bear their share of the cost and inconvenience by obtaining and carrying adequate

⁶⁶ See *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* at 4.5.

⁶⁷ RIWA Report at 3.6.15.

identification when they seek work. It is a matter of accepting the conditions under which travel and population movement operate in 2010 and taking steps to address the problems we face within those conditions. In fact many employers already require prospective employees to establish their entitlement and if this practice is generalised it will be accepted within the community.

192. In some of the submissions advanced in the 2000 to 2004 consultations an attempt was made to challenge the introduction of any offence or penalty provision on the basis that they might involve a breach of fundamental rights like the 'right to work' or alternatively that they might be discriminatory because they would 'force' employers to treat prospective workers differently depending upon their race, colour, ethnicity or nationality. These submissions were not fully developed and appear not to have been pressed. The issues they appear to raise are not raised by the terms of Reference for this Review and I do not seek to address them. The processes applied by the Attorney-General, Parliamentary Counsel and the Senate Constitutional committee will address any issues of this kind that may need attention. However in order to identify the issues that have been raised about these kinds of provisions since 2001 and the arguments that they have attracted I have prepared a separate advice for the Minister. This deals with the precise terms of provisions that might be envisaged.

Measures legislated for in other western countries

193. The USA and Britain have comparable problems in this area of the regulation of access to the labour market by non-citizens. The numbers of people involved are far greater than for Australia. In both countries there are both fault based criminal sanctions and strict liability civil penalties with statutory defences.
194. The United States has had legislation in place to tackle the issue of illegal work since 1986. The current legislative structure includes a tiered system of strict liability civil penalties which is complemented by criminal offences for more serious, repeat offenders. Under the *Immigration Reform and Control Act*, hiring or continuing to employ unauthorised aliens results in the following civil penalties: First Offence - not less than US\$275 and not more than US\$2,000 for each unauthorised alien; Second Offence - not less than US\$2,000 and not more than US\$5,500 for each unauthorised alien; and for Subsequent Offences - not less than US\$3,300 and not more than US\$11,000 for each unauthorised alien.
195. As well as introducing higher fines for repeat offenders, the US regime differs from the current Australian system in that it imposes strict liability on employers (in conjunction

with making the completion of an Employment Eligibility Verification Form mandatory) and does not require a finding of 'knowledge or recklessness' to find an employer guilty of the civil offences⁶⁸.

196. Similar to Australia's VEVO, the United States has an internet based checking system called e-Verify. E-Verify allows an employer to determine the eligibility of that employee to work in the United States. For most employers, the use of E-Verify is voluntary and limited to determining the employment eligibility of 'new hires' only.
197. In recent years, the UK Government has adopted a two tiered approach in an attempt to strengthen its 1996 legislation. The *Immigration Asylum and Nationality Act 2006* replaced section 8 of the 1996 Act and introduced a new civil penalty system for employers who employ an illegal migrant worker and a separate criminal offence of knowingly employing an illegal migrant worker.
198. The new provisions were specifically crafted to enable a distinction to be made between employers with less than adequate recruitment practices (who would be liable for the civil penalty tier) and the more serious cases where employers knowingly and deliberately employ illegal migrant workers. The 'knowing' offence (section 21 of the 2006 Act) carries a maximum two year custodial sentence and/or an unlimited fine.
199. Employers are able to establish a statutory defence from payment of a civil penalty by checking specific documents held by prospective employees to demonstrate that they are entitled to undertake the work in question. There is also a continuing responsibility for employers of migrant workers to check their on-going entitlement to work if they wish to retain the statutory excuse. The scope of the scheme and the degree to which it has met the financial and enforcement targets has been assessed by an inspection review which reported in April 2010.⁶⁹
200. The civil penalty regime allows for fines of up to £10,000 per worker while the criminal offence attracts a maximum term of two years imprisonment and an unlimited fine. The civil penalties are administered by executive authority and enforced judicially. The scheme of the legislation is simple.

⁶⁸ <http://www.ice.gov/pi/worksites/index.htm>

⁶⁹ UK Border Agency's Operations in the North West of England: An inspection of the Civil Penalties Compliance Team – Illegal Working, <http://www.ukba.homeoffice.gov.uk/employers/preventingillegalworking>

201. New Zealand has had a three tiered approach to employer sanctions since 2003. The regime includes criminal offences and civil penalties with strict liability. The New Zealand Parliament passed a new *Immigration Act* in November 2009. The provisions of the *Immigration Act 2009* are not yet in force but the changes to the employer sanctions part of the legislation propose that holding an IR330 (tax declaration) form would no longer constitute a 'reasonable excuse' for employing a non-citizen without entitlement to work. Instead, employers would be required to take reasonable precautions and exercise due diligence to establish an employee's work entitlement.
202. Policy guidance on what precise checking process would satisfy 'reasonable precautions' is not yet available although the explanatory documentation indicates the legislation will not require employers to check the work entitlements of existing employees.
203. The penalties in the new *Immigration Act 2009* remain the same as are currently in effect. The penalties are: \$10,000 for tier one strict liability offences; \$50,000 for the 'knowingly employed' offence and \$100,000 and/or 7 years imprisonment for the offence involving exploitation. The provisions are expected to come into force in late 2010⁷⁰.

Examples of the use of civil proceedings in the *Migration Act 1958*

204. The *Migration Act 1958* creates a range of offences and some of these have strict liability and absolute liability provisions. There are also civil penalty provisions including section 140Q and an infringement notice arrangement in section 140R. These have not been the subject of successful challenge and have clearly been considered by the Parliament and its committees to be appropriate and proportional⁷¹ to the matters and problems they address.

Recommendations

205. The Review makes the following recommendations:
206. The *Migration Act 1958* should be amended to include additional provisions comparable to those proposed as the Tier 2 and 3 measures in the RIWA Report. There should be a civil penalty provision that:

⁷⁰ <http://www.dol.govt.nz/actreview/update/immigration-bill-third-reading-summary.asp>.

⁷¹ See *Ryan v Registrar of Motor Vehicles & Ors* (1997) 129 ACTR 4

- (1) Is expressed as a civil penalty for which no conviction is to be recorded but a declaration will be made when relevant findings are made and conclusions drawn by the Court.
- (2) Attaches 'strict liability' to a person who 'allows' two or more non-citizens to work when they each do not have any current permission to work in Australia.
- (3) Defines 'allows' to include (i) being party to an oral agreement for payment (howsoever made) in return for work, and (ii) 'facilitating' or 'enabling' two or more non-citizens who do not have any current permission to work in Australia to enter an agreement and undertake work.
- (4) Uses a broader definition of employment and employer that deems an intermediary to be caught within the scope of the provision.⁷²
- (5) May be satisfied if proven on the balance of probabilities.
- (6) Attracts a maximum penalty for each offence (or each worker involved) of \$10,000.
- (7) Allows a complete defence if the defendant establishes on the balance of probabilities that at the commencement of the work (or prior to the referral in the case of the provision in 6 above) they were shown what reasonably appeared to be:
 - (a) a valid Australian passport for the worker,
 - (b) a valid Australian birth certificate for the worker,
 - (c) a valid certificate of permanent residency in Australia for the worker, or
 - (d) a valid visa permitting the worker to work and that within 48 hours of the commencement of work they conducted a VEVO check of the visa holder which confirmed the permission to work
- (8) Allows a complete defence if in the case of a non-citizen claiming to hold an ETA that permitted the worker to work the defendant conducted a VEVO check of the visa holder within 48 hours of the commencement of work which confirmed the permission to work.

⁷² See for example: ss.4(1) *Sex Discrimination Act 1984*; ss.5(1)(d) *Industrial Relations Act 1999* (Qld) and ss.5(3) *Industrial Relations Act 1999* (NSW).

- (9) Allows a defence where the Court is satisfied that in all the circumstances the defendant took reasonable steps to satisfy themselves that the worker had permission to work.
207. There should be a corresponding provision for 'referring' a non-citizen for work when that person does not have any current permission to work, but which attracts a maximum penalty of \$10,000 which can be imposed for each offence.
208. There should be a corresponding provision for a civil penalty where the non-citizen is allowed to work in breach of a visa condition as to the number of hours they may work but only where the number of hours is exceeded with that employer.
209. The existing regime of criminal offences and the proposed civil penalty provisions should be supplemented by a regime of infringement notices able to be issued by executive authority or alternatively notices of 'intention to impose a civil penalty' similar to that adopted in Britain in its 2009 amendments. Notices should require the authority of the Secretary in order *inter alia* to protect junior officers.
210. There should be amendments to specifically provide for the gathering of documentary evidence in relation to these offences and penalty provisions. The powers should be structured in the same way as those for the Worker Protection provisions and s. 251 should be amended accordingly.
211. The criminal offences in sections 245AA to AK should remain subject to a deeming employment provision.
212. Further research should be done to identify the likely numbers of students who are working in excess of their limited hours and the circumstances in which this work is being performed.
213. Resources should be applied urgently to the continuing work of the Department in, simplifying and reducing the numbers of sub-classes of visas that are able to be granted.

Schedule 1

Extract from: **TRAFFICKING IN PERSONS, The Australian Government Response, January 2004 – April 2009**, (pages 5-6)

Normative frameworks

The main international legal framework to combat trafficking is the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (the Trafficking Protocol). The purposes of the Trafficking Protocol are: to prevent and combat trafficking in persons; to assist the victims of trafficking; and to promote cooperation among State Parties in order to meet those obligations. The Trafficking Protocol has been ratified by more than 100 States Parties.

However, in shaping its national response to trafficking in persons, a country must also observe its binding legal obligations under other international instruments. A body of international human rights and labour treaties form part of the legal framework for trafficking, including the

- *International Covenant on Civil and Political Rights* (arts. 2, 3, 7, 8, 9, 12, 14, 23 and 26)
- *International Covenant on Economic, Social and Cultural Rights* (specifically arts. 2, 3, 6, 7, 10, 11 and 12)
- *Convention on the Elimination of All Forms of Discrimination against Women* (arts. 2, 6, 9, 11, 12, 14, 15 and 16).
- *Convention on the Rights of the Child* (arts. 7, 16, 19, 28, 31, 32, 34, 35, 36, 37 and 39), and its Optional Protocols on: the sale of children, child prostitution and child pornography (arts. 1, 2, 3 and 8); and on involvement of children in armed conflict (arts. 1-4)
- *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (specifically, arts. 1, 3, 13 and 14)
- *International Convention on the Elimination of All Forms of Racial Discrimination* (arts. 2, 5 and 6)
- ILO Convention No. 29 on Forced or Compulsory Labour (arts. 1, 2 and 6)
- ILO Convention No. 105 on Abolition of forced Labour
- ILO Convention No. 182 on Worst Forms of Child Labour (in particular, art. 3 (1))
- *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (arts. 1, 3, 5, 6 and 7)⁷³.

⁷³ In addition to such universal instruments, States may also be party to regional and sub-regional instruments on people trafficking, including the *Council of Europe Convention on Action against Trafficking in Human Beings* which entered into force in February 2008, and the *Convention on Preventing and Combating Trafficking in Women and Children for Prostitution* adopted by the States members of the South Asian Association of Regional Cooperation in 2002.

At its sixtieth session in 2004, the then Commission on Human Rights decided to appoint a Special Rapporteur on trafficking in persons, especially women and children. The Special Rapporteur reports annually to the United Nations Human Rights Council. In 2008 the Human Rights Council also appointed a Special Rapporteur on contemporary forms of slavery, its causes and consequences.

Schedule 2: Sections 245 AA to AK of the *Migration Act 1958*

Subdivision C — Offences in relation to persons who allow non-citizens to work, or refer non-citizens for work, in certain circumstances

Section 245AA Overview

- (1) This Subdivision creates offences to deal with the following situations:
 - (a) where a person allows an unlawful non-citizen to work, or refers an unlawful non-citizen for work;
 - (b) where a person allows a non-citizen to work, or refers a non-citizen for work, in breach of the non-citizen's visa conditions.
- (2) The offences make use of a number of terms that are defined in the following sections:
 - (a) section 14 (defines **unlawful non-citizen**);
 - (b) section 245AG (defines **work** and **allows** to work);
 - (c) section 245AH (defines **exploited**);
 - (d) section 245AI (defines other terms).
- (3) To avoid doubt, section 245AF sets out some circumstances in which this Subdivision does not apply.
- (4) Section 235 also contains offences relating to work by an unlawful non-citizen and a non-citizen in breach of a visa condition.

Section 245AB Allowing an unlawful non-citizen to work

- (1) A person commits an offence if:
 - (a) the person allows, or continues to allow, a person (the **worker**) to work;
and
 - (b) the worker is an unlawful non-citizen; and
 - (c) the person knows that, or is reckless as to whether, the worker is an unlawful non-citizen.
- (2) An offence against subsection (1) is an **aggravated offence** if the worker is being exploited and the person knows of, or is reckless as to, that circumstance.
- (3) An offence against this section is punishable on conviction by whichever of the following applies:

- (a) in the case of an aggravated offence — imprisonment for 5 years;
- (b) in any other case — imprisonment for 2 years.

Section 245AC Allowing a non-citizen to work in breach of a visa condition

- (1) A person commits an offence if:
 - (a) the person allows, or continues to allow, a person (the **worker**) to work; and
 - (b) the worker is a non-citizen and the person knows of, or is reckless as to, that circumstance; and
 - (c) the worker holds a visa that is subject to a condition restricting the work that the worker may do in Australia, and the person knows of, or is reckless as to, that circumstance; and
 - (d) the worker is in breach of the condition and the person knows of, or is reckless as to, that circumstance.
- (2) An offence against subsection (1) is an **aggravated offence** if the worker is being exploited and the person knows of, or is reckless as to, that circumstance.
- (3) An offence against this section is punishable on conviction by whichever of the following applies:
 - (a) in the case of an aggravated offence — imprisonment for 5 years;
 - (b) in any other case — imprisonment for 2 years.

Section 245AD Referring an unlawful non-citizen for work

- (1) A person commits an offence if:
 - (a) the person operates a service, whether for reward or otherwise, referring one person to another for work; and
 - (b) the person refers a person (the **prospective worker**) to another for work; and
 - (c) at the time of the referral, the prospective worker is an unlawful non-citizen and the person knows of, or is reckless as to, that circumstance.
- (2) An offence against subsection (1) is an **aggravated offence** if:
 - (a) the prospective worker will be exploited in doing the work in relation to which he or she is referred, or in doing any other work for the person to whom he or she is referred; and

- (b) the person operating the referral service knows of, or is reckless as to, that circumstance.
- (3) An offence against this section is punishable on conviction by whichever of the following applies:
 - (a) in the case of an aggravated offence — imprisonment for 5 years;
 - (b) in any other case — imprisonment for 2 years.

Section 245AE Referring a non-citizen for work in breach of a visa condition

- (1) A person commits an offence if:
 - (a) the person operates a service, whether for reward or otherwise, referring one person to another for work; and
 - (b) the person refers a person (the *prospective worker*) to another for work; and
 - (c) at the time of the referral;
 - (i) the prospective worker is a non-citizen and the person knows of, or is reckless as to, that circumstance; and
 - (ii) the prospective worker holds a visa that is subject to a condition restricting the work that the prospective worker may do in Australia, and the person knows of, or is reckless as to, that circumstance; and
 - (iii) the prospective worker will, in doing the work in relation to which he or she was referred, be in breach of the condition and the person knows of, or is reckless as to, that circumstance.
- (2) An offence against subsection (1) is an *aggravated offence* if:
 - (a) the prospective worker will be exploited in doing the work in relation to which he or she is referred, or in doing any other work for the person to whom he or she is referred; and
 - (b) the person operating the referral service knows of, or is reckless as to, that circumstance.
- (3) An offence against this section is punishable on conviction by whichever of the following applies:
 - (a) in the case of an aggravated offence — imprisonment for 5 years;
 - (b) in any other case — imprisonment for 2 years.

Section 245AF Circumstances in which this Subdivision does not apply

To avoid doubt, this Subdivision does not apply where:

- (a) a detainee in immigration detention voluntarily engages in an activity of a kind approved in writing by the Secretary for the purposes of this paragraph; or
- (b) a prisoner in a prison or remand centre of the Commonwealth, a State or a Territory engages in an activity as a prisoner; or
- (c) a person engages in an activity in compliance with:
 - (i) a sentence passed, or an order made, under subsection 20AB(1) of the *Crimes Act 1914* (community service orders etc.); or
 - (ii) a community service order, a work order, a sentence of periodic detention, an attendance centre order, a sentence of weekend detention, an attendance order, or a similar sentence or order, passed or made under the law of a State or Territory.

Section 245AG Meaning of *work* and *allows to work*

(1) In this Subdivision:

work means any work, whether for reward or otherwise.

(2) In this Subdivision, a person ***allows*** a person to work if, and only if:

- (a) the first person employs the second person under a contract of service; or
- (b) the first person engages the second person, other than in a domestic context, under a contract for services; or
- (c) the first person bails or licenses a chattel to the second person or another person with the intention that the second person will use the chattel to perform a transportation service; or
- (d) the first person leases or licenses premises, or a space within premises, to the second person or another person with the intention that the second person will use the premises or space to perform sexual services.

(3) In paragraph (2)(d):

premises means:

- (a) an area of land or any other place, whether or not it is enclosed or built on; or

(b) a building or other structure; or

(c) a vehicle or vessel.

Section 245AH Meaning of *exploited*

For the purposes of this Subdivision, a person is being ***exploited*** if the person is in a condition of forced labour, sexual servitude or slavery in Australia.

Section 245AI Meaning of other terms

In this Subdivision:

forced labour has the same meaning as in section 73.2 of the *Criminal Code*.

sexual service means the commercial use or display of the body of the person providing the service for the sexual gratification of others.

sexual servitude has the meaning given by section 270.4 of the *Criminal Code*.

slavery has the meaning given by section 270.1 of the *Criminal Code*.

Section 245AJ Geographical jurisdiction

Section 15.2 of the *Criminal Code* (extended geographical jurisdiction — category B) applies to an offence against sections 245AB, 245AC, 245AD and 245AE.

Section 245AK On a trial for an aggravated offence

- (1) If, on a trial for an offence against section 245AB or 245AC, the prosecution intends to prove an aggravated offence, the charge must allege that the worker has been exploited.
- (2) If, on a trial for an offence against section 245AD or 245AE, the prosecution intends to prove an aggravated offence, the charge must allege either that:
 - (a) the prospective worker has been or will be exploited in doing the work in relation to which he or she was referred; or
 - (b) the prospective worker has been or will be exploited in doing other work for the person to whom he or she was referred.
- (3) If, on a trial for an aggravated offence against section 245AB, 245AC, 245AD or 245AE, the trier of fact is not satisfied that the defendant is guilty of an aggravated offence, but is otherwise satisfied that he or she is guilty of an offence against that section, it may find the defendant not guilty of the aggravated offence but guilty of an offence against that section.

Schedule 3: RIWA Report Executive Summary

1.1 Purpose of the Review

1.1.1 The Review was asked to consider the current approach to combating illegal workers and whether there should be changes made to policy, practices and procedures, and/or legislation settings to improve the level of compliance in the workplace. The Review was also asked to consider what measures could be taken to address the high visitor visa application refusal rates at certain overseas posts and the correspondingly high non-return rates for nationals from those countries, while retaining the integrity of the visitor visa program.

1.2 The Review process

1.2.1 On 1 March 1999, the Minister for Immigration and Multicultural Affairs, the Hon. Philip Ruddock MP, announced that there would be a Review to target illegal workers in Australia and that an external Reference Group would guide the Review. The Reference Group was Chaired by Mr Noel Hicks, and included Ms Nicole Feely, the Hon. Gary Johns, Mr Joseph Assaf and Mr Hugh King.

1.2.2 On 6 May 1999, the Minister launched the Review of Illegal Workers in Australia and a range of measures aimed at helping employers check the work rights of their employees. The centrepiece of the current campaign, *Employing Overseas Workers - doing the right thing*, is an information kit which includes samples of visas and what employers should look for when checking work rights.

1.2.3 In launching the Review, the Minister reiterated the Government's commitment to curb abuse of Australia's visa system by illegal workers and determination to reduce unemployment for Australians. The Minister was keen to see measures developed that would reduce the burden on Australian taxpayers and maintain the integrity of Australia's borders.

- Illegal workers take jobs away from those with the right to work, primarily Australian citizens and permanent residents;
- the cost of physically locating, detaining and removing people who have arrived or remained unlawfully in Australia has been about \$50 million each financial year, until the recent dramatic increase in unlawful arrivals by boat, which will cause a significant increase in cost.

1.2.4 At the launch, the Minister strongly urged all employer and industry representatives to contribute to the Review. An invitation to the public and interested parties to submit their views on the options was published in the following papers on Saturday 8 May 1999:

- Weekend Australian (National);
- Canberra Times (ACT);
- Sydney Morning Herald (NSW);
- Courier Mail (Qld);
- Adelaide Advertiser (SA);

- The Age (Vic);
- The Mercury (Tas);
- West Australian (WA); and
- Northern Territory News (NT).

1.2.5 The Discussion Paper *The Hidden Workforce: Illegal workers in Australia and those that would join them*, was produced to assist people interested in making submissions to the Review. The Discussion Paper, which outlined various options including options about possible employer sanctions and security bond arrangements for close family visitors to Australia, was launched at the same time as the Review.

1.2.6 The invitation and Discussion Paper were placed on DIMA's Internet site.

1.2.7 Key stakeholders were consulted as part of the Review and submissions were invited from a range of peak representative bodies:

- Australian Chamber of Commerce and Industry;
- Australian Industry Group;
- National Farmers' Federation;
- Business Council of Australia;
- Housing Industry Association;
- The Tourism Task Force;
- Tourism Council Australia;
- Inbound Tourism Organisation of Australia;
- Migration Institute of Australia;
- Restaurant and Catering Australia;
- Australian Council of Trade Unions;
- Australian Fresh Stone Fruit Growers;
- Australian Mines and Metals Association Inc;
- Australian Apple and Pear Growers Association Inc;
- Australian United Fresh Fruit and Vegetable Association Ltd;
- Australian Wine and Brandy Producers Association;
- Federation of Ethnic Communities Councils of Australia; and
- Australian Chamber of Fruit and Vegetable Industries Ltd.

1.2.8 In addition, the Review Secretariat also contacted the following organisations:

- QANTAS;
- Ansett Australia;
- Hotel, Motel & Accommodation Association;
- Meetings Industry Association; and
- Committee for Economic Development of Australia.

Summary of submissions received

1.2.9 Of the forty-three submissions received:

- seventeen were from private individuals;
- twenty-four were from companies or other organisations;
- one from the Department of Industry, Science and Resources; and
- one from the Department of Employment, Workplace Relations and Small Business (DEWRSB).

1.2.10 Seventeen of the twenty-five organisations were horticultural/agricultural employer associations. Four submissions came from the Griffith area of NSW, and two from Kununurra in WA. The remainder of the submissions ranged from around Australia.

1.2.11 Most submissions focussed on the possible imposition of sanctions against employers who recruit people without authority to work. Eleven supported the imposition and/or increase of sanctions against employers, twenty opposed the imposition of sanctions, at least in part, and ten were undecided. There was relatively little comment on the introduction of a security bond system for specified visa applicants.

1.2.12 The reasons given by those against sanctions included:

- the perceived administrative burden placed on employers required to check whether their potential employees have work rights;
- the timing of checks - particularly where many employees are recruited quickly, for a short time;
- the likely complexity of the checking process; and
- the possibility of creating a less attractive Australia for tourism.

1.2.13 Further information about the views and issues raised in those submissions is at Attachment B and at paragraph 2.6 in the Consultations summary.

The role of the Reference Group

1.2.14 The Reference Group was asked to guide the Review by:

- ensuring that the Review remained within its Terms of Reference;
- providing informed comment, based upon discussions and examination of issues being considered;
- guiding its progress, drawing upon the experience of the Reference Group members; and
- verifying its findings and recommendations.

1.2.16 In addition to examining submissions and related material, the Reference Group held three formal meetings on 11 June, 21 June, and 27 July 1999. Two teleconferences were also

held on 30 June and 1 September 1999. At these meetings the following Issues Papers were considered:

Issues Paper 1: *The current compliance program against illegal workers and implications for change;*

Issues Paper 2: *Adequacy of information provided to visa holders on work rights;*

Issues Paper 3: *Encouraging compliance: information campaign and penalties;*

Issues Paper 4: *Industry demands for labour and linked government activities; and*

Issues Paper 5: *Use of a security bond for certain visitors.*

1.2.17 Senior officers from DIMA including support staff from the Review Secretariat attended each of the meetings. In addition, officers from the Australian Taxation Office (ATO), DEWRSB and Centrelink attended the second meeting to assist members of the Reference Group examine issues of relevance to the work of those portfolios.

1.2.18 Within DIMA, on-going consultations took place with the ATO, DEWRSB and Centrelink, particularly during the preparation of the Discussion Paper and Issues Paper 4.

1.3 Key Review findings

1.3.1 The key findings of fact included:

Overstayers

- As at 30 June 1999, it was estimated that some 53,000 people had overstayed their visas and were unlawfully in Australia. Of that number, about 27%, or 14,500 people had been here for more than nine years. An unknown number may have also entered Australia unlawfully;
- without access to work over a sustained period, overstayers would find it difficult to support their unlawful extended stay in Australia;
- as well as those working without lawful immigration status (ie some of the 53,000 overstayers), illegal workers also comprise those who are in Australia lawfully but choose to work in breach of visa conditions;
- by employing a person without work rights, employers may close off access to the position to an Australian citizen or permanent resident;
- the presence of some 53,000 overstayers, with the consequent large proportion of illegal workers, is also at odds with an orderly immigration policy;
- to date DIMA has worked episodically to alert intending travellers from overseas of the problems associated with trying to enter unlawfully and/or work in Australia illegally. However, a small number of visitors are not informed that they will not hold work rights or their work rights will be limited;
- the visa label placed in passports may not be clear on whether a visa-holder has a right to work;

- the impact of the Employer Awareness Campaign has been variable. It has proved to be a useful information tool for employers who are interested in assisting the Government to maintain the integrity of its immigration laws. However, it has not been sufficient to discourage those employers who do not wish to comply with immigration law; and
- costs are incurred in both processing visitor visa applications from higher risk sources, and in locating, detaining and removing people who breach visa conditions or overstay their lawful permission to remain in Australia. In part, high refusal rates are a response to high non-return rates by visitors from some source countries.

Unlawful arrivals

- In recent years there has been an increase in the incidence of people smuggling. Large numbers of people attempt to come to Australia each year unlawfully, lured by promises of finding a better life and based on the prospect of working illegally. As at 30 October 1999, 926 people had entered Australia unlawfully by boat since 1 July 1999 – the same number as the whole of the previous year (i.e. 926 arrived in 1998-99). In 1998-99, 2,106 people were refused entry at Australia's airports (36% more than in 1997-98). If the current rate of unlawful arrivals at Australia's airports continues, the number of unlawful arrivals detected at Australian airports is expected to approach 3,000 in 1999-2000;
- In June 1999, the Minister for Immigration and Multicultural Affairs announced a range of new initiatives following an investigation into the increasing number of illegal boat arrivals. Those measures included the introduction of up to 20-years jail and fines for people smugglers, and increasing DIMA's presence at seven overseas posts and five key airports as well as working more closely with Indonesia and Papua New Guinea to help stop people smuggling; and
- In October 1999, the Minister announced more tough new initiatives. These included: excluding unlawful arrivals from accessing permanent residence by giving genuine refugees a three-year temporary protection visa or a short-term safe haven visa; stopping people who already have effective protection overseas from gaining onshore protection in Australia; and, using fingerprinting and other biometric tests such as DNA testing, face, palm or retinal recognition and voice testing to help ascertain the true identity of asylum seekers to ensure, where possible, they do not already have protection elsewhere or have been refused refugee status overseas.

1.3.2 The Review found that the current measures in place to combat illegal workers were insufficient to address the extent of the illegal worker population. In particular, the Review concluded that:

- while DIMA compliance action is increasingly successful, there is little prospect that the workload will diminish. The anticipated increase in visitors who come lawfully to Australia will result in a continued increase in the number who overstay their visas and/or work in breach of visa conditions, even if the rate of overstay remains steady; • an increase in overstayers would ultimately require not only additional compliance staff to deal with the

expected workload but greater capital expenditure on detention facilities and associated costs of removing unlawful non-citizens from Australia;

- to combat attempts to work illegally in Australia stronger measures are needed to discourage people from employing those without work rights, and to encourage the visa-holders to abide by the conditions of their visa; and
- those who support visitors to Australia are often not fully aware of the conditions of the visa issued to their guests and a revised information campaign would increase awareness about work rights.

1.3.3 The Review found that some employers, in particular in regional areas, may find it difficult to satisfy their labour requirements. This can be especially difficult at harvest time, when competition for workers is high amongst the employers, and there may be insufficient numbers of people willing or available to work in what are often arduous conditions.

1.3.4 The Review notes the current Government's initiatives to address these shortfalls of labour in regional Australia, through such measures as 'Project Contracting' and the establishment of a Working Group to oversee the development of a National Harvest Trail. Such initiatives are vital to the supply of legal labour to employers in areas where it has traditionally been hard to find.

1.3.5 The Review also found that there are misconceptions in the community about work rights. For instance, a large number of rural employers who submitted their views to the Review, are under the impression that a large majority of backpackers have work rights as Working Holiday Makers. This is not the case.

1.4 Summary of recommendations

1.4.1 The Review recommended the following measures which would require changes in policy, legislation, practice and procedure:

(a) That an Overseas Information Campaign be developed, in order to discourage people from trying to enter Australia unlawfully and working illegally.

(b) That it be ensured that as many as possible ETA-holders receive information concerning their rights and obligations as visitors in Australia, including information about their work status.

(c) That the appearance of visa labels be revised in order to make it easier for employers to immediately understand whether the visa-holder has work rights.

(d) Alternatively, that a new stamp be introduced to be entered into the passports of all visaholders and ETA-holders on entry into Australia, to advise potential employers of the visa-holder's work status.

(e) That employers be fully informed about their obligations and ways of discharging those obligations, through a revised Employer Awareness Campaign.

- (f) That a Work Right Declaration Form be introduced to enable labour hire agents to more easily and efficiently check employees' work rights, and to evidence that checking, so that an employer can rely on those checks. *(This recommendation is linked to recommendation (k).)*
- (g) That the policy on cancelling Temporary Residence and ETA visas is changed to remove the requirement of giving warnings before cancelling visas of those visa-holders who breach work conditions.
- (h) That a system of sanctions be introduced to discourage business owners, employers and labour suppliers from recruiting illegal workers.
- (i) That the scheme of sanctions has a range of offences and penalties available to reflect the seriousness of the offences committed, including the possibility of issuing an infringement notice for lower level offences.
- (j) That employers and labour suppliers be encouraged to undertake checks of potential employees' work rights by being able to rely on statutory defences based on those checks.
- (k) That the Work Right Declaration Form be used to ensure labour suppliers undertake reasonable checks of a potential employee's work status. The Form will also be useful as evidence for those wishing to rely on the proposed statutory defences. *(This recommendation is linked to recommendation (f).)*
- (l) That steps be taken to improve the efficiency and effectiveness of data-matching, through legislative change to broaden the scope and means of matching, and through increased levels of matching activity and follow-up.
- (m) That a whole-of-Government approach be adopted, including closer cooperation between DIMA, ATO, Centrelink and DEWRSB to address the problem of illegal workers.
- (n) That any system of visitor security bonds be introduced only if there is a strong prospect that it would lead to a reduction in both rejection rates and non-return rates.
- (o) That any system of visitor security bonds be introduced only in conjunction with sponsorship from an Australian close relative or a Commonwealth or State Government instrumentality, with future consideration to be given to Church groups, community leaders (eg Parliamentarians) or community groups.
- (p) To ensure no negative impact on existing approval rates, that any system of visitor security bonds be introduced via a separate and new visa subclass (ie applicants continue to have all the visitor visa options they have currently without a bond).
- (q) To improve compliance with the requirements of a genuine visit, there be a mandatory 'no further stay' condition attached to visas in the new subclass.
- (r) That any new sponsored visa subclass operate in conjunction with limitations on any future sponsorship by persons who sponsor a visitor who contravenes visa conditions or seeks to

remain in Australia beyond the period of the initial visitor visa. The limitation on future sponsorship should be five years.

(s) That the level of any bond be set at a fixed amount and that it be set at a level that will be sufficiently meaningful to encourage compliance.

(t) That all applicants in the new visa subclass be required to provide evidence of an Australian sponsor who is willing to pay the security bond and who has signed an undertaking to ensure that the visitor will abide by visa conditions.

(u) That under any visitor visa subclass with a security bond option, decision-makers have the discretion to either:

- grant a visa with the sponsorship undertaking and mandatory 'no further stay' condition but without a security bond; or
- grant a visa with the sponsorship undertaking and mandatory 'no further stay' condition and a security bond; or
- refuse the application even where there is a sponsorship and security bond offer because of concerns about bona fides or a sponsorship limitation.

(v) Under any security bond arrangement, the security bond be subject to mandatory forfeiture for any breach of visa conditions (eg working illegally) or an unsuccessful application for waiver of the 'no further stay' condition. In cases where a visitor has applied for a protection visa, the release of the security bond be delayed until a decision on the protection visa application is made. If the protection visa is refused, the security bond will be forfeited. If the protection visa is granted the security bond will be released.

(w) The security bond be payable at a range of convenient locations around Australia (eg a major bank with a network of outlets).

(x) Any forfeited bond monies be used to fund the scheme and meet costs associated with compliance action on persons who breach visa conditions or become unlawful.

(y) That information available to potential sponsors and visitor visa applicants be improved by making it more comprehensive, easy to understand and widely available.

Schedule 4: Statistics

Table 5: Composition of Over-stayers by Visa Category and Length of Overstay

Visa category	30 June 2010 Estimate						30 June 2009 Estimate	
	Over-stayed 12 months or less		Over-stayed more than 12 months		Total		Total	
	Number	%	Number	%	Number	%	Number	%
Visitor	5,670	11%	35,430	66%	41,100	76%	40,040	82%
Student	4,480	8%	3,010	6%	7,490	14%	4,430	9%
Temporary Resident	1,350	3%	1,930	4%	3,280	6%	2,360	5%
Other	380	1%	1,620	3%	2,000	4%	1,900	4%
TOTAL	11,880		41,990		53,870		48,730	

Table 6: Composition of Over-stayers by Age (June 2010)

Age	Number	Percentage
Under 10 years old	880	2%
11 to 20 years old	2,300	4%
21 to 30 years old	10,210	19%
31 to 40 years old	10,260	19%
41 to 50 years old	12,350	23%
51 to 60 years old	8,220	15%
61 to 70 years old	4,790	9%
Over 70 years old	4,830	9%
Not Stated	20	0%
Total	53,860	

Table 7: Composition of Overstayers by Length of Overstay (June 2010)

Length of over-stay	Number	Percentage
1 month or less	1,730	3%
> 1 month, <= 2 months	1,130	2%
> 2 months, <= 3 months	1,090	2%
> 3 months, <= 4 months	2,730	5%
> 4 months, <= 5 months	790	1%
> 5 months, <= 6 months	760	1%
> 6 months, <= 7 months	630	1%
> 7 months, <= 8 months	630	1%
> 8 months, <= 9 months	590	1%
> 9 months, <= 10 months	670	1%
> 10 months, <= 11 months	650	1%
> 11 months, <= 12 months	480	1%
> 1 year, <= 2 years	5,600	10%
> 2 years, <= 3 years	3,430	6%
> 3 years, <= 4 years	2,540	5%
> 4 years, <= 5 years	2,070	4%
> 5 years, <= 6 years	1,540	3%
> 6 years, <= 7 years	1,750	3%
> 7 years, <= 8 years	1,400	3%
> 8 years, <= 9 years	1,560	3%
> 9 years, <= 10 years	2,180	4%
> 10 years, <= 11 years	1,930	4%
> 11 years, <= 12 years	1,530	3%
> 12 years, <= 13 years	1,340	2%
> 13 years, <= 14 years	1,260	2%
> 14 years, <= 15 years	900	2%
15 years or more	12,960	24%
TOTAL	53,870	

Table 8: Total New VEVO Registrations by Industry by year

Industry Type	2005-06	2006-07	2007-08	2008-09	2009-10
Other Services	385	505	857	984	1012
Accommodation Cafes and Restaurants	158	304	383	320	631
Health and Community Services	156	302	620	478	467
Retail Trade	93	156	276	332	426
Education	39	65	77	201	388
Manufacturing	154	220	426	284	382
Construction	70	117	214	219	349
Agriculture, Forestry and Fishing	55	102	205	224	306
Communication Services	63	100	145	119	301
Personal and Other Services (Sex Industry)	0	1	0	31	256
Property and Business (Employment Placement Services)	1	1	4	99	248
Transport and Storage	41	54	89	170	179
Finance and Insurance	49	78	140	127	147
Wholesale Trade	40	83	104	89	139
Mining	18	45	95	58	102
Property and Business (excluding Employment Placement Services)	315	393	507	217	97
Electricity, Gas and Water Supply	14	23	29	40	45
Not Recorded	7	5	22	25	36
Arts and Recreation Services	2	2	5	18	34
TOTAL	1660	2556	4198	4035	5545

Table 9: DIAC Budget allocations for compliance activity*

Financial Year	\$'000s
1993-94	15,111
1994-95	17,070
1995-96	23,404
* adjusted for new program structure	55,083
1996-97	52,543
1997-98	18,804
1998-99	20,518
1999-2000	247,369
2000-2001	298,913
2001-2002	327,800
2002-2003	358,682
2003-2004	343,221
2004-2005	23,939
2005-2006	38,968
2006-2007	69,557
2007-2008	72,184
2008-2009	73,644
2009-2010	131,124

Source: Portfolio Budget Statements and DIAC Annual Reports

Note: Data in this table is not directly comparable from year to year due to significant changes in program organisation, Government accounting and outcomes structures over a number of years. In particular, there was a significant change to accounting practices with the introduction of accrual reporting in 1999-2000, and in 2004-05 with a change to outcome and output structure. There is also insufficient detail available in Portfolio Budget Statements prior to 2004-05 to separately identify the budget appropriation for compliance.

Schedule 5: List of stakeholders consulted in the Review

Australian Catholic Migrant and Refugee Office
Australian Chamber of Commerce & Industry (ACCI)
Australian Council of Trade Unions (ACTU)
Australian Federal Police (AFP)
Australian Industry Group (AIG)
Australian Taxi Industry Association (ATIA)
Australian Taxi Drivers Association (ATDA)
Australian Workers Union (AWU)
AusVEG
Bridge for Asylum Seekers
Chamber of Commerce & Industry WA (CCIWA)
Commonwealth Director of Public Prosecutions (CDPP)
Commonwealth Department of Human Services (DHS)
Commonwealth Department of Education, Employment and Workplace Relations (DEEWR)
Commonwealth Department of Immigration and Citizenship (DIAC)
Construction Forestry Mining and Energy Union (CFMEU)
Department of Premier and Cabinet NSW
Department of Premier and Cabinet WA (Office of the Director General)
Department of Premier and Cabinet Victoria
Department of Premier and Cabinet SA, (Safework SA)
Fair Work Ombudsman
Growcom
Harvest Trail (MADEC)
Master Builders Association (MBA)
National Farmers Federation (NFF)
National Union of Workers (NUW)
Recruitment Consulting Services Association (RCSA)
Restaurant and Catering Association (RCA)
Scarlett Alliance
Work Cover NSW