

### 3.1 Overseas Information Campaign

- 3.1.1 Until the launch of the Overseas Information Campaign on 29 October, 1999, DIMA has worked episodically to alert intending travellers overseas of the problems associated with trying to enter and/or work in Australia illegally.
- 3.1.2 In the face of increasing evidence of people smuggling efforts, DIMA has developed an overseas information campaign which aims to alert people in various countries to the problems and penalties they face in breaching Australian immigration law. The main purposes of this strategy is to:
- target source countries of unlawful arrivals;
  - spell out to people who may attempt to enter and/or work illegally in Australia the problems they will face; and
  - send the signal to people-smuggling groups that their operations are not likely to succeed.
- 3.1.3 Facilitating better overseas media coverage of cases where illegal workers are located, detained and removed could be relatively inexpensive and effective, and will complement existing investigative measures.

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#### *Recommendation*

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

### 3.2 Information to ETA-holders

- 3.2.1 People who complete visitor and temporary resident visa application forms sign a declaration that points out that if the visa is granted, they will not hold work rights or their work rights will be limited. However, the visa label placed in passports may not be clear on whether a visa-holder has a right to work.

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- 3.2.2 This information is also not available to people who enter Australia travelling on an Electronic Travel Authority (ETA). An ETA is an electronically generated visa which provides authority to travel to Australia for a short stay. A person granted an ETA has no evidence of a visa in their passport. The record of grant is stored on DIMA's computer system which airlines and travel agents use to confirm that the holder may enter Australia. An ETA is available from a participating travel agent or airline. A traveller can arrange a visit to Australia and apply for a visa at the same time, simply by asking an agent for an airline ticket or obtaining an ETA prior to making travel arrangements.
- 3.2.3 The ETA became necessary to enable cost effective processing of the increasing number of visitors to Australia, while maintaining a sound universal visa system. As at 30 June 1999, 79% of visitors and short term business travellers obtained an ETA in preference to a traditional visa evidenced on a label in a passport.
- 3.2.4 ETA-holders are not required to complete an application form to obtain an ETA and do not receive a standard letter explaining the conditions that are attached to their electronic visa. Since mid-1999, DIMA has distributed a standard information sheet, titled *Electronic Travel Authority System – Information for ETA Holders*, to advise ETA-holders that they are not permitted to work in Australia. It is being distributed by DIMA's overseas missions to participating travel agents, airlines, and other service providers, who are being strongly encouraged to distribute them to ETA-holders.
- 3.2.5 Before contemplating action against those working illegally, who entered on valid visas, we should be satisfied that they can be advised on work restrictions. By identifying and removing confusion or doubt, we may be able to reduce the incidence of some people working illegally.
- 3.2.6 The Review endorsed the continuing distribution of the leaflet, and to promote its distribution, in order to ensure that information is available to as many ETA-holders as possible.

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### *Recommendation*

- (b) That it is 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.

### 3.3 Supply of information to employers and visa-holders

#### *Revising the appearance of a visa label*

- 3.3.1 Generally, non-citizens who enter Australia, except ETA-holders and New Zealand citizens, must hold a visa which appears as a label in their passport. The label currently includes details about the visa, including the length of permitted stay and any applicable conditions, including access to work.
- 3.3.2 The Immigration Records Information System (IRIS), which is the visa processing system used at overseas posts, currently limits the amount of information that can be printed on the visa label. It allows up to six conditions to be displayed. The first four conditions can display the four digit code plus up to forty characters. The remaining two conditions can display the four digit code only. It is possible, that with reprogramming of the IRIS system, the layout of the visa label could be revised.
- 3.3.3 Even so, the information printed on the visa label may be unclear. For example, the Migration Regulations 1994 list twelve different visa conditions for temporary residents and visitors that relate to work, and while one condition code appears as “No Work” when printed on the visa label, all of the other conditions which limit work appear as “Work Limitation”. There is no explanation about the nature of the work limitation.
- 3.3.4 Overall, the format of the visa label is cryptic, difficult to read and understand. It could be improved by removing technical jargon and using short plain-English sentences. For example, by saying “*Visitor visa permitting stay for up to 6 months. No employment allowed and must not study for more than 3 months*”, instead of “*Class TN Visitor P Subclass 686, Conditions Mig Regs Sched 8, Visitor Long Stay, 8101 No Work, 8201 Max 3 Months Study*”.
- 3.3.5 It is important that the conditions that apply are clearly expressed, as this may be the only way that the conditions are communicated to the visa-holder.
- 3.3.6 It is important that the visa label in the passport can be readily understood by an employer and the visa-holder, as well as DIMA officers. Anecdotal evidence suggests that employers do not find it easy to read and understand the existing visa label. The fact that so much of the existing Employer Awareness Campaign kit is devoted to explaining how to read and understand the visa label underscores this point.
- 3.3.7 The Review recommends the revision of the appearance of the visa label so it clearly communicates important information, particularly about visa conditions. For example:
- the size and location of the existing text fields on the label could be changed to allow for a message such as “*The holder of this visa may not work/must not be employed in Australia*” to appear on all visas not allowing work;

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- the revised label could also be in plain English and/or the language of the visa-holder, and use field titles so that everyone, including employers, can readily understand them;
  - the possible introduction of a different colour visa label for people who do not hold work rights, which is readily recognisable by the Australian community as an indicator of work status.
  - alternatively, a second label could be used to print the full wording of the work conditions and some individual details that would better enable the enforcement of the condition (eg, specify the employer or occupation that the holder must not change from without permission of the Secretary); however
  - it is recognised that either of these options would require significant changes to computer systems, and operational processes at overseas posts and regional offices;

#### *Using a new stamp in the passport*

3.3.8 Alternatively, the Review recommends that a large “NO WORK” be stamped in the passports of all visitor visa and ETA-holders as they pass through immigration clearance on entering Australia. This would ensure that:

- both the holder and any employer would know the person is not authorised to work in Australia; and
- it is easy for an employer to check a non-citizen’s work rights, which will be of increased importance if sanctions are imposed on employers.

3.3.9 To ensure this measure does not place an additional burden on Australian Customs Service and immigration clearance officers, it would need to be combined with the existing port of entry stamp. The new stamp may need to be larger to accommodate the additional text and to make it easier for an employer to read. The main disadvantage would be that clearance officers would need to be constantly changing between two arrival stamps, one for those with work rights and another for those without work rights. This could lead to slower clearance rates, which would be unacceptable to travellers, DIMA and the Australian Customs Service. If the stamp were misapplied, the integrity of the stamp would be diminished and could lead to complaints from both visa-holders and employers.

#### *Informing employers and the community who can and can’t work*

3.3.10 The Employer Awareness Campaign commenced in 1992. Its purpose has been to ensure that employers recruit only those people with work rights and to provide information on what documents should be seen to check on the right of a person to take a job. DIMA compliance officers distribute information kits to employers during employer awareness sessions and community meetings and information briefings. The message of the campaign is also included in information distributed by other agencies, including the ATO’s Employers’ Payment Book.

- 3.3.11 The Employer Awareness Campaign was revised in 1999. The new strategy includes a change in design and content of the information kit, a new quick-guide pamphlet, and a new method of delivering the information. Employers are contacted directly by DIMA. Information kits and quick-guide pamphlets are being distributed to major employers, employer groups, certain professional associations, professional, business and community groups and industries. Ready access to the information kit and quick-guide pamphlet is also available on DIMA's Internet site.
- 3.3.12 It is proposed that the campaign be revised further to reflect the options that may be implemented following the Review of Illegal Workers in Australia. For example, if the option to impose sanctions on employers and labour hire companies is implemented, the Employer Awareness Campaign strategy would need to be revised to ensure that all affected parties are adequately informed of the changes in a timely fashion.
- 3.3.13 Moreover, it is important that the new Employer Awareness Campaign is designed to help DIMA build and strengthen its relationship with businesses that would be affected by the changes.
- 3.3.14 If employers are expected not to employ people without work rights, the methods for checking whether those rights exist should be straightforward. The number of documents available in Australia to demonstrate work rights already makes checking for work rights comparatively simple. In contrast, twelve types of documents can be used in the United Kingdom, and some twenty-seven different types of documents can be used in the USA. A summary of employer sanctions in other countries is at Attachment D.
- 3.3.15 In Australia, there are five types of documents that can be presented as evidence of identity and permission to work. They are:
- Australian birth certificate (if born in Australia before 26 August 1986);
  - Australian citizenship certificate;
  - Australian or New Zealand passport;
  - evidence of permanent resident status (ie permanent residence visa and residence stamps, or Certificate of evidence of resident status – Form 283); and
  - temporary visa with entitlement to work.
- 3.3.16 Some additional methods to make it easier for employers to check work rights include:
- changing the format and/or size of the words describing work rights or restrictions printed on visa labels, in order to make them more prominent and more easily identifiable;

- having one document which would amount to a separate working permit, aside from it being specified on the visa label. This would have the advantage of also being able to be issued separately to people who hold an ETA but the disadvantages would include educating employers about a new document and ensuring that it was no more susceptible to fraud than a passport; and
- the proposed introduction of a short and simple Work Right Declaration Form (Attachment C), which would allow the administrative burden to be shared by labour hirers and potential employees.

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### *Recommendations*

- (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 visa-holders and ETA-holders on entry into Australia, to advise potential employers of the visa-holder's work status.
- (e) That employers are 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).))*

## **3.4 Visa cancellation policy**

3.4.1 Current practice is that an officer should not consider cancelling a visa on the grounds that the holder has breached a condition, unless the visa-holder had been notified that the condition applied to their visa. The officer should inform the visa-holder of the condition and warn them that if they breach the condition again, their visa may be cancelled. If that person breaches the condition again, visa cancellation action can be pursued.

3.4.2 It is proposed that this policy be changed so that those who breach a "No Work" condition are not given a warning the first time they are found in breach of this condition. Visa cancellation should be considered without a warning being given.

- 3.4.3 An ETA is not generally cancelled for breach of a work condition for a first offence because it could be viewed as unreasonable to expect a visa-holder to comply with a condition when the visa-holder has never been given any physical evidence indicating the conditions to which they are subject. However, an ETA visa may also be cancelled because the holder is *not a genuine visitor*, for example, where the holder is located working without permission, or where the airport clearance officer reasonably suspects the ETA-holder of intending to work.
- 3.4.4 The merits of a decision to cancel is reviewable by the Migration Review Tribunal (MRT), which may consider the “fairness” of the decision. It is therefore important for the visa-holder to be aware of the conditions that have been imposed.
- 3.4.5 An information sheet has recently been developed for ETA-holders. It is being distributed by participating airlines and ticketing agencies to those clients who ask about conditions or when the agent thinks it appropriate. While it cannot be guaranteed that every ETA-holder will be given the information sheet, it is a reasonable measure towards educating holders about the conditions attached to their visa. Under the agency arrangements in place (whereby travel agents and others process ETAs), it is not possible to make it mandatory for the sheets to be handed out.
- 3.4.6 The people that would be affected by this option would be those who are not adequately notified of the “No Work” condition on their visa. As a result, any enhancement of cancellation powers must be accompanied by appropriate guidance on the use of those discretionary visa cancellation powers.
- 3.4.7 Changes to the visa cancellation policy will affect some classes of visa-holders differently from others. The classes of people who may be affected include:
- some Temporary Residence visa-holders (because not all subclasses are clearly advised in the relevant form of the work condition that would apply, they do not get a standard letter at the time of grant explaining the conditions related to working and the visa label may only say “Work Limitation”); and
  - ETA-holders (because they do not fill out an application form, or get a standard letter of grant and do not get a visa label placed in their passport. While some may be given a recently introduced information leaflet, which states that the holder may not work, it cannot be assumed that all will have had access to the leaflet).
- 3.4.8 The proposed policy change will not affect:
- non-ETA visitor visa-holders (because the application form and visa label clearly states that the holder may not work);
  - bridging visa-holders (because although the relevant application forms may not specifically state if the holder can work or not, the new standard letter advising of the visa granted, introduced on 1 June 1999, does clearly state whether the holder can work or not); and

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- student visa-holders (because their work rights are clearly stated on the applications forms, in the letter of grant and on their visa label).

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### *Recommendation*

- (c) That the policy on cancelling Temporary Residence and ETA visas be changed to remove the requirement of giving warnings before cancelling visas of those visa-holders who breach work conditions.

## **3.5 Current sanctions**

- 3.5.1 It is an offence under section 5 of the *Crimes Act 1914* (the Crimes Act) to knowingly aid or abet, directly or indirectly, the commission of an offence against a law of the Commonwealth. Since it is an offence under the *Migration Act 1958* (Migration Act) for a foreign national to work without appropriate permission, it follows that it is an offence to aid or abet (by employing) foreign nationals working illegally in Australia.
- 3.5.2 Prosecutions have, however, rarely occurred under this provision, because of:
- difficulty in obtaining supporting witnesses;
  - insufficient evidence to prove an element of knowledge on the part of the employer; and
  - the chain of evidence required to meet prosecution standards.
- 3.5.3 If DIMA finds non-citizens working in breach of their visa conditions, it may cancel their visa and require them to leave Australia. They are expected to repay publicly funded detention and removal costs, and will not be permitted to return to Australia until they have done so, or made appropriate arrangements to repay.
- 3.5.4 The Employer Awareness Campaign has proved to be a useful information tool to aid those employers who are willing to comply with immigration law. But it has not discouraged those employers who are not interested in cooperating with the Government. Imposing penalties on employers could minimise the job prospects of people without work rights.
- 3.5.5 Penalties against employers who recruit people without work rights already exist in a number of western European countries, the USA, Canada, New Zealand and the United Kingdom.
- 3.5.6 In the USA, Canada and New Zealand the offence is described in terms of the employer being guilty of an offence if, using Australian terminology, the employer has knowingly employed, or continues to employ, a non-citizen or non-permanent resident, who either does not hold a visa that allows him or her to work or does not hold a visa at all.

- 3.5.7 The alternative to using the “knowingly” test, is to introduce an absolute offence (strict liability), ie an employer would be guilty of the offence if they employed such a person, regardless of their state of knowledge. This approach was adopted in the United Kingdom in conjunction with a “defence” that relies upon the employer being able to produce a record of having sighted one of 12 types of listed documents which evidence employment rights.
- 3.5.8 In countries using the “knowingly test” the defence relates to the steps the employer is expected to undertake in checking the right of the potential employee to undertake employment. In Canada, the defence is to be able to show “due diligence” in checking the two documents that must be shown as being genuinely held by the bearer of the identity card. In the USA, the employer is required to produce a signed form certifying that the employer has checked the necessary document(s) which evidence the person’s right to undertake employment. In New Zealand, the employer needs to check one or more of six forms of evidence. A more detailed description of employer sanction schemes in Canada, the USA, New Zealand and the United Kingdom can be found at Attachment D.
- 3.5.9 Other countries that impose sanctions on employers to curb illegal employment include Japan, Norway, Austria, Belgium, Finland, France, Germany, Greece, Netherlands and Spain. While most of these countries impose either fines and/or imprisonment, four also impose measures such as ineligibility for public contracts; suspension of activity; withdrawal of trading licence; closure; disbarment from activity; and repayment of the cost of repatriating the illegal worker, unpaid taxes and expenditure on social security benefits.
- 3.5.10 A system of sanctions against employers has the potential to promote their compliance with migration law. A sufficiently sensitive system should distinguish between serious and less serious breaches, and would provide a defence where employers make a genuine attempt to establish their employees’ work rights.

### **3.6 Proposed scheme of sanctions**

- 3.6.1 Following consultations with the Criminal Justice Branch of the Attorney-General’s Department, a three-tiered scheme of sanctions is proposed. The scheme would allow a range of offences and penalties to be used with the most appropriate being chosen in the circumstances. This will also ensure that penalties are appropriate to the culpability of the offender. An employer or labour supplier found to have employed or supplied for employment a non-citizen to work illegally would be liable to be prosecuted or fined for each illegal worker.

### ***TIER ONE – a fault offence prosecuted before a court***

#### Option A

- An owner of a business is guilty of an offence if the owner has allowed a non-citizen without work rights to work for the business, reckless as to whether the person had the right to undertake such work; and
- a labour supplier is guilty of an offence if they supplied a non-citizen for employment, and was reckless as to whether the person did not hold a visa permitting the work offered or undertaken or did not hold a valid visa.

#### Option B

- An employer or labour supplier is guilty of an offence if they employ or supply a person for employment, reckless as to whether the person was a non-citizen without the right to undertake the work offered or undertaken.

#### Points in common for Options A and B

- The prosecution would be required to prove the owner had allowed the person to work for the business/employment, or the labour supplier had supplied for work, and their recklessness as to the person's right to work;
- an appropriate maximum penalty would be \$13,200 for an individual and \$66,000 for a body corporate and/or two years imprisonment; and
- the monetary value of a penalty unit is set by section 4AA of the Crimes Act and is currently \$110. Section 4B of the Crimes Act provides that financial penalties for a body corporate are automatically five times higher than for individuals.

### ***TIER TWO – a strict liability offence prosecuted before a court***

- The offence would impose strict liability for those found to have employed or supplied for employment non-citizens without a right to either undertake any work or the work offered or undertaken;
- the prosecution would not be required to prove intention or recklessness, but must prove the physical elements of the offence; and
- an appropriate maximum penalty would be \$5,500 for an individual and \$27,500 for a body corporate.

### ***TIER THREE – an infringement penalty***

- The Tier Two offence would be underpinned by an infringement notice scheme. Instead of being prosecuted, the offender would be given the choice of either paying an infringement penalty (set at one-fifth of the penalties at Tier Two) or in default of paying the fine, being prosecuted. If prosecuted, the offence would be the same as Tier Two; and
- an appropriate penalty in lieu of prosecution would be \$1,100 for an individual and \$5,500 for a body corporate.

- 3.6.2 With regard to the expected use of the proposed sanctions, it is envisaged that there may be:
- a significant number of infringement notices issued under Tier Three (the least serious offence);
  - a much smaller number of Tier Two offences prosecuted; and
  - only a low number of Tier One offences prosecuted (the most serious offence).
- 3.6.3 Those who are liable under Tier Two or Three for the first time, will be issued with a written warning instead of the sanction being imposed. As the imposition of sanctions would be aimed at encouraging a change in behaviour, the use of a warning for first-time offenders and the most appropriate sanctions will be important in motivating voluntary compliance.
- 3.6.4 It is proposed that the policy guidelines supporting the new scheme of offences will state that the sanctions should only be applied to illegal workers who started work on, or after, the commencement of the legislation containing the sanctions. The proposed offences cannot be committed in respect of an employee who started work before the legislation commences, unless they were re-employed after that date.
- 3.6.5 The implementation of these sanctions would require the introduction of provisions granting wider inspection powers to DIMA compliance officers, for instance the power to access and inspect documents.
- 3.6.6 In order to ensure that employers and labour suppliers are given every reasonable opportunity to become aware of their obligations and the new offences and penalties, it is proposed that policy instructions be issued, to the effect that only a written warning be given to first-time offenders. The policy would apply only to those who may be subject to a Tier Three infringement notice. Officers issuing fines will also need a discretionary power to be able to withdraw a notice, for example, where it is discovered after the fine has been issued that an employer or labour supplier had made an honest and reasonable mistake about a non-citizen's right to work.
- 3.6.7 The above option of having explicit sanctions combined with a policy on warnings is preferred. The alternative of not having effective sanctions, describes the current situation, which has to date has not proved to be an effective deterrent in combatting the problem of illegal workers.
- 3.6.8 Current difficulties prosecuting employers for recruiting illegal workers have already been discussed at paragraph 3.5.2. Illegal workers, once located, are almost never willing to cooperate with the Department by providing statements against their employers because of the fear of retribution by the employer or other stake-holders who trade in illegal workers against themselves or members of their families. There have been no briefs to the Director of Public Prosecutions (DPP) in respect of employers who knowingly employ illegal workers since 1996.

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- 3.6.9 The Employer Awareness Campaign encourages employers to check the work rights of prospective employees and provides them with information on how to do so. The Employer Awareness Campaign has been a valuable tool used to help responsible employers to ensure that they employ only Australians and others with the right to work. However, under current law there is no obligation on employers to check the work rights of employees. The imposition of a strict liability offence, with appropriately penalties attached, would discourage employers from recruiting workers without the right to work.
- 3.6.10 The Tier One penalty has been set appropriately high to allow a heavy fine or imprisonment for the most blatant offences by employers and labour suppliers. An example of the type of act that would be prosecuted under Tier One would be where visitors have applied for a visa solely to undertake prearranged work. The organisers arrange transport and accommodation, with the workers' annual travel to suit the particular needs of the employer.
- 3.6.11 At Tier Two, the use of a strict liability offence is necessary to ensure that employers and labour suppliers can be effectively sanctioned for supplying or recruiting illegal workers. The current regime relies on the prosecution proving an employer's state of mind, and it has been ineffective, as explained above, in addressing the problem of illegal workers.
- 3.6.12 Given that there are over 850,000 employers and less than 5,000 labour supply agencies across Australia, the burden of completing the required form has been placed on labour suppliers, and not on employers. While there are no recent figures available on the percentage of vacancies filled by labour hire firms (ie recruitment agencies in the public and private sector), it is estimated that labour suppliers currently facilitate the filling of approximately 20 to 30% of vacant positions annually.
- 3.6.13 Employers who recruit through labour suppliers will be able to raise the defence of "having checked the right to work", where the labour supplier has duly completed the Work Right Declaration Form. Labour suppliers themselves would also be able to raise this defence where they have carried out the same checks. Completion of the form will be in the interest of the supplier and their client, the employer. The defence of honest and reasonable mistake may also be raised, particularly where the checks have been carried out and the employer or labour supplier were deceived by fraudulent documents.
- 3.6.14 The provision will place an evidential burden on the defendant in respect of the defence of "having checked the right to work". To raise this defence, the defendant has only to adduce or point to evidence that suggests a reasonable possibility that the defence is applicable. The defendant is not required to establish this defence on the balance of probabilities. The legal burden of proof remains with the prosecution, who must establish that the accused is guilty beyond reasonable doubt, taking into account any defence in respect of which the evidential burden has been discharged.

- 3.6.15 The evidential burden is properly placed on the defendant in the case because the question whether an employer or labour supplier checked a potential employee's entitlement to work:
- will be peculiarly within the knowledge of the defendant; and
  - will be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.
- 3.6.16 The Tier Three infringement notice (ie fine) will create a cost-effective way of enforcing the law, while still giving those who wish to fight the allegation a chance to do so before a court. The discretion for officers of the Department to gather evidence and prepare a brief for the DPP so they can consider prosecution under Tier Two, or issue an infringement notice to an employer or labour supplier under Tier Three, is appropriate. For example, where an employer or labour supplier has previously been fined on more than one occasion and continued to commit the offence, then it may be more appropriate to have the matter considered by a court where higher level penalties may be imposed.

### **3.7 What defence should employers and labour suppliers be able to rely upon?**

- 3.7.1 There will be three statutory defences available:
- that the labour supplier or employer had completed the Work Right Declaration Form; or
  - the employer relied upon, at the time of employing the non-citizen, the labour supplier having completed the Work Right Declaration Form; or
  - that the employer or labour supplier had made an honest and reasonable mistake;
- 3.7.2 In doing so, the employer and labour supplier must have sighted the required documents confirming that the person appeared to be permitted to undertake the work offered or undertaken. The word "appeared" is used because it is expected that employers and labour suppliers may not detect the use of fraudulent documents in all cases.
- 3.7.3 To rely on a statutory defence an employer or labour supplier will be required to produce the original or a copy of the Work Right Declaration Form. The labour supplier will be obliged to provide a copy or the original of the form, completed by the employee and labour supplier (see Attachment C), to the employer. The form should be retained by the employer for production to the court, if necessary.
- 3.7.4 The rationale for having three statutory defences available includes the expectation that:
- the labour supplier, where one is used, will have completed the Work Right Declaration Form and the employer can rely upon the checks made;
  - where the employer chooses to complete the Work Right Declaration Form, he or she will be able to rely upon those checks; and

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- some employers and labour suppliers will make mistakes, for example, by being deceived by fraudulent documents, despite reasonable attempts to check the documents presented by the employee.

3.7.5 The above defences will ensure that the employer can rely on the checks of the labour supplier, where the employee had been supplied by a labour supplier who had undertaken the required checks. The Work Right Declaration Form requires the labour supplier to have sighted the required documents and considered that the person appeared to be permitted to undertake the work offered or undertaken. The availability of such defences will increase the motivation of employers and labour suppliers to undertake and record their checking of work rights - a major objective of the scheme proposed - without penalising employers and labour suppliers for not doing so.

3.7.6 Earlier in the Review process, the Review had looked favourably upon requiring all employers to complete the Work Right Declaration Form. However, after considering the following points the Review decided to recommend that they not be required to do so, but be left with the choice of doing so:

- the cost to business, particularly small business and those businesses with a high staff turnover, would be significant (estimated to be about \$13 million nationally per annum). In contrast, only a small number of employers were expected to benefit from having access to the additional defence;
- an alternative to having all employers complete a Work Right Declaration Form for each employee, is for DIMA to improve the efficiency and effectiveness of data-matching with agencies, particularly the ATO. The ATO already gathers similar information on the Employment Declaration Form, and its replacement on 1 July 2000, the Taxation Declaration Form, will be completed by a wider group of people, in a shorter time-frame;
- in deciding to recommend that employers not be required to complete the Work Right Declaration Form, the Review is relying on the proposed heightened levels of data-matching being successful in ensuring illegal workers are identified, located and removed as quickly as possible;
- employers who wish to document their checks of an employee's status can choose to complete the Work Right Declaration Form, so they could then rely on the defence of having made the required checks; and
- employers and labour suppliers wishing to be certain of a non-citizen's work rights can avail themselves of an existing DIMA service, by forwarding by facsimile a one page statement in which the employee authorises release of information on his or her status, by DIMA, to the employer.

- 3.7.7 There would also need to be an effective campaign aimed at employers and other related parties, to ensure awareness and understanding both on how to check work rights and warning them of the penalties if they fail to do so. That campaign could build on the existing Employer Awareness Campaign. Consideration should also be given to providing DIMA contact numbers so that employers can immediately find out whether or not a person has the right to work.
- 3.7.8 The revised Employer Awareness Campaign would need to ensure that any risk of racism is countered. Australia has a very ethnically diverse population. As most people from ethnic minorities in Australia are either citizens or residents of Australia, it is expected that employers and labour suppliers will not attempt to discriminate on grounds of race, colour, ethnic or national origin or nationality. If they refuse a person a job for a reason linked to race, colour, ethnic or national origin, this is likely to be considered discrimination under the *Racial Discrimination Act 1975*. Employers and labour suppliers will be asked to treat all applicants in the same way at each stage of the recruitment process.
- 3.7.9 In addition to the above, it is proposed that increased data-matching checks be put in place to ensure that employees have the right to work. The current data-matching program with the ATO is restricted to matching with “persons who are unlawfully in Australia”, who are now known as unlawful non-citizens. This option was preferred to having to ask all employers to complete the proposed Work Right Declaration Form, as it would avoid a significant burden for business, particularly small business.
- 3.7.10 The ATO’s existing Employment Declaration Form, which will be replaced on 1 July 2000 with the Taxation Declaration Form, will provide for the collection of personal and address details. The possibility of improving the effectiveness of matching, by the inclusion of a question to gather a passport or visa number, for people other than Australian citizens and permanent residents, is currently being discussed with the ATO.
- 3.7.11 It is proposed that the scope for matching be expanded to cover lawful non-citizens, ie those who hold visas, so that those who are still lawfully in Australia, but with restricted or no work rights, can also be the focus of scrutiny and compliance, where necessary. The implementation of this recommendation will require amendment of the *Income Tax Assessment Act 1936*, specifically section 16(4)(hd), and the Memorandum of Understanding between DIMA and ATO on data-matching, to include lawful non-citizens with restricted or no work rights.
- 3.7.12 The data from those employees and employers lodging Taxation Declaration Forms from 1 July 2000, which are required to be lodged within 14 days of the commencement of employment, will be matched against those granted visas to Australia. Matches will be followed up by compliance officers where it appears individuals do not have the right to work. It is proposed that the data-matching be done either by an on-line data-link or periodic and regular down-load.

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3.7.13 Identity fraud by non-citizens is a major part of illegal work and other immigration fraud, and possibly there needs to be a stronger emphasis across all levels of Government and business on checking proof of identity at key points, including the obtaining of drivers' licences. While the focus of this Review was on data-matching with ATO, DIMA should continue to pursue other possible sources of data-matching at all levels of Government, including utilities and traffic authorities, for the purpose of detecting illegal workers and preventing identity fraud by non-citizens.

### 3.8 Who will be affected by the proposed scheme of sanctions?

#### 3.8.1 Employees

The changes proposed by the Review will be prospective: all employees who commence, or re-commence, employment on or after the date that the legislation containing the proposed sanctions commences will be affected. It was considered too burdensome, particularly to the very many large employers in the Australian community, to require checks to be made for all employees, ie new and old employees.

#### 3.8.2 Employers and labour suppliers

Employers and labour suppliers would be affected where they take on or supply employees. They would be required to set aside a couple of minutes to check the work rights of the employee, which employers have been encouraged to do since 1992. Labour suppliers would be required to carry out the checks prior to or within 48 hours of employment commencing but will not be subject to any penalty for not doing so and to complete the required form, the Work Right Declaration Form, and provide a copy or the original to the employer. A fine will not be issued if the illegal worker is located working before the 48 hours has expired and where the checks have not yet been carried out.

#### 3.8.3 DPP

While the DPP may experience a small and sustained rise in the number of cases put forward for prosecution, such a rise is unlikely to be significant because:

- those employers not already aware of their obligations and the possible consequences will soon become aware;
- the proposed policy of not enforcing the penalties for first-time Tier Two and Tier Three offenders, should ensure that there is no sudden increase in the number of prosecutions; and
- the discretion to enforce a Tier Two offence by use of an administrative fine under Tier Three should ensure that the DPP's caseload is not unduly affected by the proposed imposition of sanctions.

- 3.8.4 The proposed Work Right Declaration Form has purposely been designed as a short, simple and hence a quick form to fill in, with the burden of doing so being shared by employees and labour suppliers. No penalty has been considered necessary for those who do not choose to complete it, as the prospect of a fine or worse, was considered sufficient motivation. This would also ensure DIMA's compliance activities would remain focussed on locating illegal workers rather than on vetting the paper work of businesses and labour suppliers.
- 3.8.5 The period that the Form would be required to be retained by the employer or labour supplier will be short, to minimise the administrative impact on employers. It is proposed that employers and labour suppliers be required to retain the Form for one year from the cessation of employment, unless proceedings under these provisions have commenced, in which case the Form may be required as evidence and to prove a defence. While the Department would have up to one year from the time the employment ceases to act against the employer or labour supplier, it is expected that current practice would continue, where compliance activities focus on the employees employed at the time of the compliance action being taken.

### **3.9 Likely benefits and costs and who will experience them**

- 3.9.1 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.
- 3.9.2 The benefits to the community will be improved access to employment opportunities for those with a right to work; and protection of the Australian community by maintaining the integrity of the visa system for controlling the entry of non-citizens.
- 3.9.3 The costs to the community will be that every member of the community seeking employment will need to have the required documentation available to show to labour suppliers and potential employers. Those who gained their Australian citizenship as a birth-right, may need to pay for a copy of their birth certificate. This would only be necessary where their parents have not retained the initial copy supplied at the time the birth was registered. The average cost of an Australian birth certificate is between \$20 and \$30. Almost all Australians, by the time they reach the age of employment, will have already obtained their birth certificate in order to open a bank account, get a Tax File Number, driver's licence or passport. Many Australians will also already hold an Australian passport, which is valid for 10 years, at a cost of \$126, and/or a driver's licence at an approximate cost of \$13-23 per year of validity, depending on the state/territory and period of validity.
- 3.9.4 The benefits to business will be the sharing of the administrative burden between labour suppliers and the employees they supply for recruitment; and the reduced risk of an employer suddenly losing valuable, but illegal labour, due to immigration field activities.

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- 3.9.5 The costs to business may include increased difficulties faced by employers in attracting labour. This may especially be the case in the fruit and vegetable growing sector, where some employers may not pay the minimum wage or other benefits that they are obliged to; and the addition of an administrative burden, albeit a small one, to the business operations of employers and labour suppliers.
- 3.9.6 The benefits to Government could include:
- lower compliance costs for Government due to arresting the growth of numbers of illegal workers and reduction in the number of attempts to enter Australia illegally;
  - lowered costs of unemployment benefits for supporting those unable to get work because of illegal workers taking jobs;
  - increased revenue by legal workers paying taxes, and spending their earnings in Australia;
  - maintenance of the integrity of the visa system for controlling the entry of non-citizens, including potential benefits from health checks; and
- 3.9.7 There would also be a reduction in the costs to taxpayers associated with illegal workers and protection of the Australian community by ensuring the integrity of Australia's borders. The cost of a revised information campaign would also need to be considered.
- 3.9.8 There will need to be an information campaign to ensure that employers and those that support them, such as peak representative bodies, recruitment agencies, unions and registration boards, know and understand their obligations. The parties affected, either directly or indirectly, need to understand:
- the aim of the measures;
  - why the new measures are necessary;
  - what action they should be undertaking (eg by way of checks);
  - how to get assistance;
  - what steps will be taken against those who do not comply; and
  - ensure that any risk of racism is countered.
- 3.9.9 It is anticipated that this function would be fulfilled by the revised Employer Awareness Campaign, as discussed at paragraph 3.3.10.

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*Recommendations*

- (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 employees' 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.

### 3.10 Cooperation with other Government agencies and departments

- 3.10.1 The United States General Accounting Office report on the Attorney-General's strategy to deter illegal entry into the United States of America states that one of the key problems of enforcing workplace immigration laws has been the limited support given by the Department of Labor to identifying employers suspected of hiring unlawful workers.
- 3.10.2 It is proposed that, in order to avoid facing a similar problem in Australia, there be developed closer working relationships between Commonwealth agencies, particularly DEWRSB, the ATO and Centrelink. In particular, it is proposed that joint field operations be carried out with DEWRSB officers who visit work sites to check on employment related conditions and that those officers be involved in the proposed revised Employer Awareness Campaign. Initiating a joint information campaign between DIMA and DEWRSB to ensure that contact by DEWRSB field officers with employers reinforces the "no illegal work" message will be an important measure. The Review endorsed this "whole of Government" approach to resolving the problem

of illegal workers in Australia. The Review is aware that working across a range of Government agencies, with due respect paid to privacy principles, would improve effectiveness and efficiency.

- 3.10.3 To reinforce this measure, there should be a much closer working relationship developed by DIMA and ATO field teams. Employers would be much more wary about employing illegal workers if they thought the ATO may investigate them as a consequence of their having come to the attention of immigration officials.

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### *Recommendation*

- (h) That a whole-of-Government approach be adopted, including closer cooperation between DIMA, ATO, Centrelink and DEWRSB to address the problem of illegal workers.

## **3.11 Problems with the existing visitor visa arrangements**

- 3.11.1 The purpose of Australia's visitor program is to enable the rapid entry of genuine visitors whilst closely scrutinising applications from persons who have a high risk of either:
- breaching visa conditions (eg engaging in work); or
  - remaining in Australia beyond the validity of their visa, either by becoming illegal or seeking to change status whilst in Australia.
- 3.11.2 Visitors to Australia are expected to depart before their visa expires. A key issue in deciding whether a visitor visa should be granted is to determine if the applicant intends a genuine visit. If a decision-maker cannot be satisfied that a genuine visit is intended, then the application must be refused.
- 3.11.3 The Migration Act does allow visitors to apply for a further visa after arrival. This is to enable visitors whose circumstances have changed after arrival to extend their stay or to apply to remain permanently. However, where visitors from some source countries have a very high propensity to extend their stay in Australia, the veracity of the original evidence presented to DIMA decision-makers regarding a genuine visit must be questioned. It should be noted that visitors from some 'high risk' countries have a non-return rate that is ten times higher than the global average and a hundred times higher than the non-return rates of very low risk countries such as Japan (see Table 8 below).
- 3.11.4 The non-return rate is the percentage of persons who enter Australia on a visitor visa and, on the date that visa expires, are still in Australia whether on another visa, on a bridging visa or on an unlawful basis.

*Table 8: Non-compliance rates*

Year	Total Arrivals (1 Jul 97 - 30 Jun 98)	Non-return %
Global average as at 24/7/99		2.18
FYR of Macedonia	1 357	44.72
Vietnam	4 036	24.29
Lebanon	2 806	20.70
Tonga	3 492	19.13
Egypt, Arab Republic of	1 688	18.04
Japan	758 739	0.17
Singapore	180 192	0.50
Taiwan	144 837	0.57
Germany	128 678	1.12
United States	320 449	1.37

Data source: Visitor Profile by Country of Citizenship visitor visa Subclasses 456, 676, 686, 956, 976, 977.  
As at 24 July 1999.

- 3.11.5 It is in these circumstances that DIMA decision-makers must scrutinise visitor visa applications more closely. In other words, experience with high non-return rates tend to lead to a higher rate of refusal for applications for visitor visas.

*Why high non-return rates are a concern*

- 3.11.6 The structure of Australia’s immigration system requires that persons seeking to come to Australia on a long-term or permanent basis should, as a general rule, apply for the appropriate visa from overseas. If their true intention is a long-term stay or permanent residence, they should not mislead DIMA decision-makers into granting a visitor visa and then seek to change status onshore.
- 3.11.7 There are a number of very good policy reasons behind this long-standing approach.
- 3.11.8 The first is that a lax approach to visitor visa processing, combined with the provisions that are in place for persons to apply for other visas onshore, increases the chances that people will abuse the visa system, thus undermining the integrity of Australia’s migration program.
- 3.11.9 Another reason for insisting that visa applicants declare their true intention up front and apply for the appropriate long-term or permanent visa relates to public health. The health requirement for short-term visitors is generally met by a self-declaration that they do not suffer from any form of communicable diseases, particularly tuberculosis. This is a risk management approach which assumes that because visitors will be in Australia for only a short time, the risks to

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public health can be managed. However, for persons coming to Australia on a long-term or permanent basis, DIMA undertakes extensive health testing overseas before a visa is granted. This enables DIMA to ensure that any relevant disease is treated offshore and, once the disease is stabilised, that the person undertakes to report to health authorities on arrival in Australia.

- 3.11.10 Another reason for trying to ensure that visa applicants apply for the appropriate visa offshore relates to character checking. Character checking for visitors is based essentially on the Movement Alert List (MAL) and self-declaration. For persons applying for permanent residence, more extensive penal and other checks are undertaken. A person seeking to hide a criminal background and obtain a lengthy stay in Australia could most readily do so by obtaining a visitor visa and then applying for a change of status after arrival in a category with lengthy processing times.
- 3.11.11 There are clearly benefits from achieving a reduction in non-return rates. Moreover, a reduction in non-return rates may also enable a reduction in refusal rates. The question for the Review was whether a system of bonds for certain visitors might help to achieve this.
- 3.11.12 The Review noted that this challenge is not isolated to Australia. Many other countries experience similar problems and have introduced a system of security bonds or are considering such a system. These countries include New Zealand, the United Kingdom, Singapore, South Africa and Canada.
- 3.11.13 A system of visitor bonds should only be introduced if it would lead to:
- a reduction in non-return rates; and
  - a reduction in visa application refusal rates.
- 3.11.14 A reduction in refusal rates should lead to a decrease in the correspondence about visa applications and personal distress caused by refusals.

### **3.12 How a visitor security bond system might operate**

- 3.12.1 To ensure that any system of bonds did not reduce existing opportunities for persons to visit Australia, the Review recommended that a totally separate and additional visa category should be created where the possibility of payment of a security could be a feature. This would ensure that the system could only have a positive impact on the number of people who can visit Australia.
- 3.12.2 Most visitor bond systems currently operating overseas, or being considered for introduction, operate in conjunction with a sponsorship requirement.

- 3.12.3 The number of attempted unlawful boat arrivals recently has highlighted the (perceived) value placed by many foreign nationals on securing entry to Australia. Indications are that payments to people smugglers range up to \$USD25,000.
- 3.12.4 A bond available to independent visa applicants of similar or less value than \$USD25,000 would be seen as a better alternative, and this alone is a strong argument against a bond that overseas applicants could put forward independently. Most respondents to the Review who considered the matter, thought that bonds should only be payable by an Australian party. The Review agreed with this view.
- 3.12.5 The Review recommended that while it should be mandatory for the sponsor of an applicant in the proposed new category to offer a bond, the visa decision-maker should have discretion as to whether a bond is accepted. It was proposed that the ability to sponsor rest with an Australian close relative, or a Commonwealth or State Government instrumentality. Further consideration should be given to examining the potential involvement of community groups, church groups and community leaders (eg parliamentarians). Furthermore, the Review suggested that the Australian relative sponsor should have some seniority, such as “head of family” status.
- 3.12.6 The Review concluded there should be a mandatory “no further stay” condition attached to the new visa subclass so that the visa-holder would not be eligible for the grant of a further visa in Australia other than a protection visa. The condition would therefore align with the purpose of a bond arrangement.
- 3.12.7 The Review recommended that the Australian sponsor sign an undertaking indicating that they understand the consequences of the person they sponsor not abiding by the conditions of their visa, eg forfeiture of the bond, to ensure that the visitor will abide by all visa conditions.

*Amount of the security bond*

- 3.12.8 The Review considered that the amount would need to be sufficient so as not to represent “good value” to those (including the Australian sponsor) who might see the bond simply as an expense worth risking in achieving access to the Australian labour market by hoping to stay and work long enough to recover the bond. The bond system should be seen as complementary to other measures to reduce illegal access to the labour market.
- 3.12.9 This would suggest that the bond should be set at a relatively high level. On the other hand, the level of the bond should not be so high that it would exclude Australians from being able to provide genuine sponsorship. On balance, the Review considered that a bond set at between \$5,000 and \$10,000 may be appropriate.

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- 3.12.10 The Review considered whether the bond should be set at a fixed amount or varied. They recommended that the bond be set at a fixed amount and at a sufficient level to encourage compliance. It was pointed out that this would lead to more consistency in the implementation of the bond.
  - 3.12.11 Administratively, particularly in terms of correspondence and ease of understanding, a fixed amount bond would be more efficient in the context of applications lodged overseas with Australian sponsors lodging bonds.
  - 3.12.12 The bond would be payable at a range of convenient locations throughout Australia.
  - 3.12.13 The Review examined and discussed the sanctions that could be used against a sponsor if the visitor they sponsored breached their visa conditions. The objective of decreasing non-return rates will be assisted where release of the bond is available only where the visa-holder departs before the expiry of the original visa, other than in exceptional circumstances.
  - 3.12.14 The Review recommended that under any bond arrangement, the bond be subject to mandatory forfeiture for any breach of visa conditions (eg working unlawfully) or an unsuccessful application for waiver of the 'no further stay' condition. It was further recommended that in cases where a visitor applied for a protection visa, the release of the bond be delayed until a decision is made on the protection visa application. If the protection visa application is refused, the bond would be forfeited.
  - 3.12.15 The Review also recommended that where a sponsored visitor does not comply with visa conditions and bonds are forfeited, the associated sponsor would lose the right to sponsor for a period of five years.
  - 3.12.16 If a sponsored visitor breached their visa conditions, there would be the 'loss of face' suffered by the sponsor.
  - 3.12.17 While the Reference Group did not discuss review options, it is proposed that the initiative be closely monitored with a view to ongoing reporting on the impact on refusal rates and non-return rates of visitors.

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*Recommendations*

- (n) That any system of visitor bonds be introduced only if there is a strong prospect that it would lead to a reduction in both refusal rates and non-return rates.
- (o) That any system of visitor 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 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 bond and who has signed an undertaking to ensure that the visitor will abide by visa conditions.

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## *Recommendations*

- (u) That under any visitor visa subclass with a 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 bond; or
  - grant a visa with the sponsorship undertaking and mandatory ‘no further stay’ condition and a bond; or
  - refuse the application even where there is a sponsorship and bond offer because of concerns about bona fides or a sponsorship limitation.
- (v) That under any bond arrangement, the 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 bond be delayed until a decision on the protection visa application is made. If the protection visa is refused, the bond will be forfeited. If the protection visa is granted the bond will be released.
- (w) That, if a bond arrangement is introduced, the bond be payable at a range of convenient locations around Australia (eg a major bank with a network of outlets).
- (x) That 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 (eg by production of an application booklet similar to the migration application booklets that is available on the Internet, from all immigration offices and via the mail).



## Part C

### *summary of key findings and recommendations*

#### 4.1 Key findings

##### 4.1.1 The key findings of fact include:

###### *Non-Return Rates for Visitors*

- The average non-return rate for all visitors was 2.18% as at 30 June 1999. At an average non-return rate of 2.18%, some 67,000 people are staying on in Australia, with nearly 14,000 of those becoming unlawful during 1998-99.

###### *Number of illegal workers*

- As at 30 June 1999 it was estimated that some 53,000 people had overstayed their visa 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 also have entered 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 legal 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 deny an Australian citizen or permanent resident a position; and
- the presence of some 53,000 overstayers, with the consequent large proportion of illegal workers, is also at odds with an ordered migration policy. In 1998-99 Australia granted nearly 68,000 migrant visas through its migration program, however, almost the same number of people were in Australia unlawfully, as those who chose to settle here lawfully.

###### *Extent of people smuggling*

- In recent years there has been an increase in the evidence of people smuggling. Large numbers of people attempt to come to Australia each year unlawfully, lured by promises of finding a better life, funded by illegal work;

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- during 1998-99, 926 people arrived without authority on forty-two boats, compared with 157 on eight boats in 1997-98 (an increase of 490%). As at 10 November 1999, 1,620 people (plus 108 crew) had entered Australia on thirty four boats in the 1999-2000 financial year; and
  - during 1998-99, 2,106 people were refused entry at Australian airports (36% more than the 1,555 in 1997-98). The majority of these peoples' attempts to enter Australia are arranged by people smugglers.

#### *Information campaigns*

- To date DIMA has worked episodically to alert intending travellers overseas of the problems associated with trying to enter unlawfully and/or work in Australia illegally. However, not all visitors are informed that they will not hold work rights or their work rights will be limited. Moreover, 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 migration law. However, it has not been sufficient to discourage those employers who do not wish to comply with migration law; and
- 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. Any information strategy needs to address and correct these misconceptions.

#### *Inadequacy of current measures*

- Overall, the Review found that the current measures in place to combat illegal workers were insufficient to address the extent of the illegal worker population;
- 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 who will work in breach of visa conditions, even if the rate of overstay remains steady;
- addressing this problem would require additional compliance staff to deal with the expected workload but greater capital expenditure on detention facilities and associated costs of removing people from Australia; and
- to combat attempts to work illegally in Australia, stronger measures are needed to discourage people from employing such workers, and to encourage visa-holders to abide by the conditions of their visas.

### *Other measures being taken*

- The Review also notes that some employers, in particular in regional areas may find it difficult to satisfy their labour requirements. The Government is to be commended for its current initiatives to address these shortfalls of labour in regional Australia; and
- measures such as 'Project Contracting' and the establishment of a Working Group to oversee the development of a National Harvest Trail are vital to improve the supply of legal labour to employers in areas where it has traditionally been hard to find.

## 4.2 Recommendations

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

- (a) 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 visa-holders 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 be 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.

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- (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 employees' 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 bonds be introduced only if there is a strong prospect that it would lead to a reduction in both refusal rates and non-return rates.
  - (o) That any system of visitor 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 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 bond and who has signed an undertaking to ensure that the visitor will abide by visa conditions.

## *Summary of key findings and recommendations*

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- (u) That under any visitor visa subclass with a 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 bond; or
  - grant a visa with the sponsorship undertaking and mandatory 'no further stay' condition and a bond; or
  - refuse the application even where there is a sponsorship and bond offer because of concerns about bona fides or a sponsorship limitation.
- (v) Under any bond arrangement, the 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 bond be delayed until a decision on the protection visa application is made. If the protection visa is refused, the bond will be forfeited. If the protection visa is granted the bond will be released.
- (w) The 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.