Australian Government
Department of Immigration and Citizenship

DIAC Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Temporary Sponsored Visas) Bill 2013

June 2013

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The Department of Immigration and Citizenship welcomes the opportunity to provide comment to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the *Migration Amendment (Temporary Sponsored Visas) Bill 2013*, following the introduction of this Bill into the House of Representatives on 6 June 2013.

1. BACKGROUND ON THE SUBCLASS 457 VISA PROGRAM AND THE MIGRATION AMENDMENT (TEMPORARY SPONSORED VISAS) BILL 2013

Since its commencement in 1996, the Temporary Work (Skilled) (Subclass 457) visa program has played an important role in the Australian economy. It is an employer demand-driven program, enabling Australian employers to address workforce needs by sponsoring skilled workers to fill vacancies where an appropriately skilled Australian cannot be found to fill the position. The Subclass 457 visa program aims to support and complement existing domestic education, training and skills development by allowing businesses to sponsor overseas workers over the short term to address labour needs, while they invest in training and skills development of Australian citizens or permanent residents to meet longer-term needs. The program is not intended to address longer-term workforce needs.

The program is underpinned by two fundamental tenets:

- to enable a business to sponsor a skilled overseas worker if they cannot find an appropriately skilled Australian citizen or permanent resident to fill a skilled position; and
- to ensure that the working conditions of a sponsored visa holder are no less favourable than those provided to an Australian worker and that overseas workers are not exploited.

A major reform of the Subclass 457 visa program was conducted in 2008-09, resulting in the *Migration Legislation Amendment (Worker Protection) Act 2008* (the Worker Protection Act), which amended the *Migration Act 1958* (the Act). The Worker Protection Act took effect from 14 September 2009 and introduced a range of sponsorship obligations to ensure the working conditions of sponsored visa holders meet Australian standards and that visa holders are not exploited.

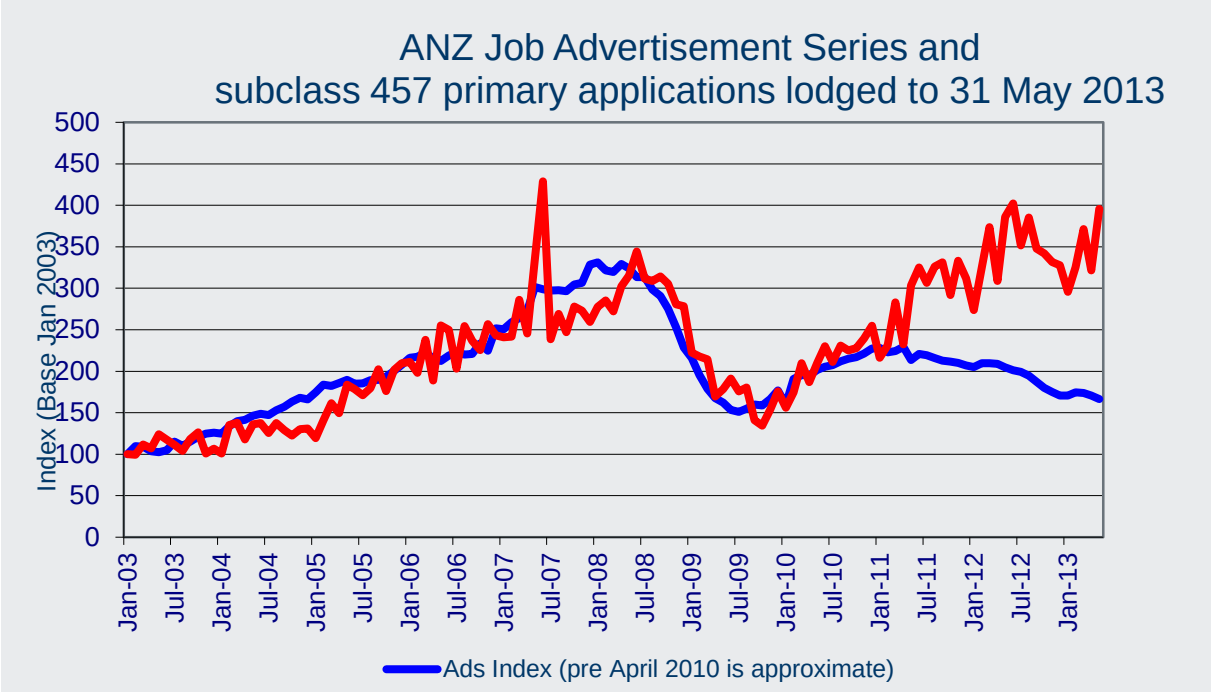
This legislation introduced strong economic incentives for employers to employ Australian workers first. Costs to the employer of sponsoring a Subclass 457 visa holder include:

- paying sponsorship and nomination fees;
- costs of recruitment;
- providing equal terms and conditions including paying market rate;
- maintaining a financial commitment to training levels;
- being liable for the cost of return travel to the person's country of origin; and
- meeting training expenditure benchmarks.

These costs, in addition to the provision of equal terms and conditions of employment for overseas workers, make sponsored Subclass 457 visa holders more costly to employ than Australian workers, provided that there are Australian workers available and that employers abide by the intent of the legislation.

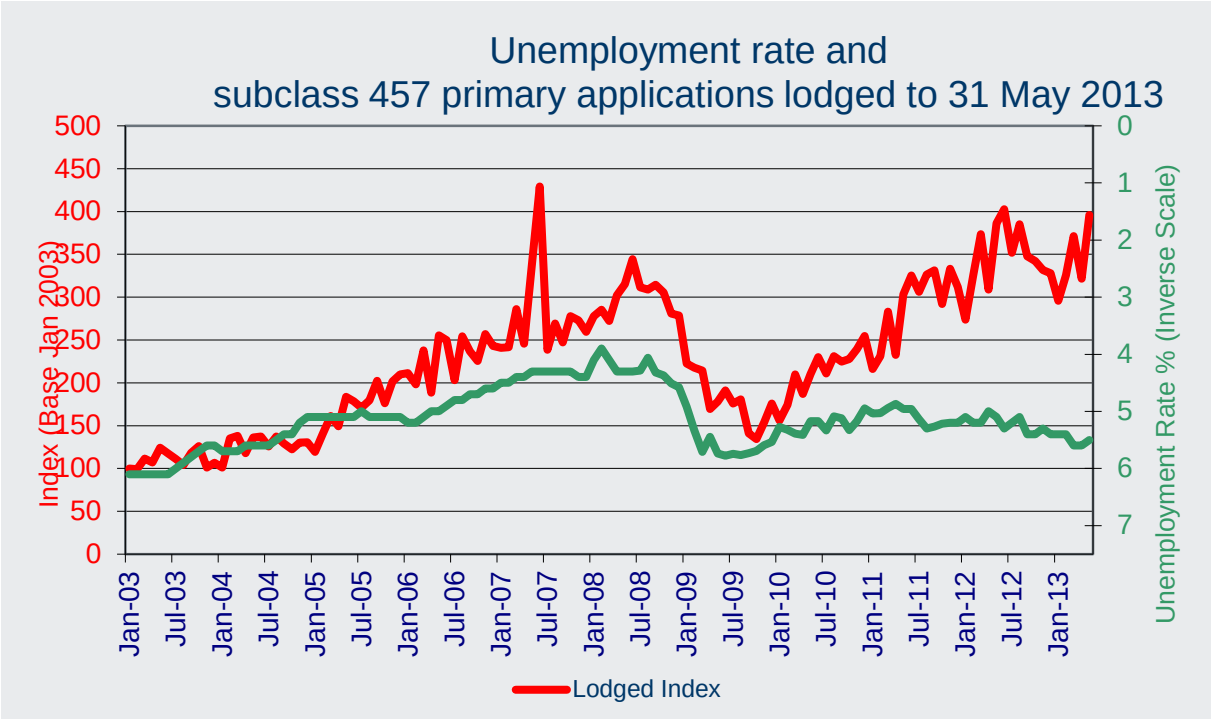
Since 2004-05, the Subclass 457 visa program has been growing strongly. A record number of primary Subclass 457 visas (68 310) [1] were granted in 2011-12, although this number decreased in the first half of 2012-13. Graph 1 represents the correlation between job advertisements (blue line) and Subclass 457 primary visa applications (red line) lodged in the ten-year period to May 2013. Graph 2 represents the correlation between the unemployment rate (green line) and Subclass 457 primary visa applications (red line) lodged during the same period. (Note that the sharp increase in lodgements in June 2007 coincided with the introduction on 1 July 2007 of an English-language requirement for trades-level occupations).

Graph 1: ANZ Job Advertisement Series and Subclass 457 Primary Applications lodged to 31 May 2013.



[1] http://www.immi.gov.au/media/statistics/pdf/457-stats-state-territory-june12.pdf

Graph 2: Unemployment rate and Subclass 457 Primary Applications lodged to 31 May 2013



As the above graphs demonstrate the Subclass 457 visa program has continued to grow since July 2011 to mid-2012 despite a softening of the Australian labour market. While most employers are using the Subclass 457 visa appropriately, it is possible under the current program settings for employers to source skilled workers from offshore without sufficient commitment to recruiting or training locally by using loopholes in the current legislative framework.

Further, there has been growing evidence of the mistreatment of workers either through underpayment, employers not fulfilling their obligations in regards to broader conditions of employment and cases where 457 workers are not working in the roles prescribed in their visa outcomes.

The Migration Amendment (Temporary Sponsored Visas) Bill 2013 is being proposed to address the current shortcomings in the program. The package of measures in the Bill will allow for greater rigour to be applied in the assessment of Subclass 457 visa nominations. These measures will strengthen the integrity framework, and importantly, do so without adversely impacting on those businesses which are using the program as it was designed to address genuine skill needs.

2. ELEMENTS OF THE BILL

The Migration Amendment (Temporary Sponsored Visas) Bill 2013:

- requires prescribed occupations and skill levels to undertake labour market testing in relation to a nominated occupation to ensure sponsors have considered Australian citizens and permanent residents;
- enshrines sponsors' obligations in the Migration Act, building on the amendments made by the Worker Protection reforms of 2009; and
- enables Fair Work Inspectors to undertake monitoring of 457 sponsors in relation to wages being paid in accordance with their visa conditions and whether they are employed in the job in which they have been engaged.

The Bill builds upon the sponsorship framework introduced in 2009 as a result of the Worker Protection Act. It will incorporate in the Migration Act the kinds of sponsorship obligations to be prescribed in the Migration Regulations.

The Bill will extend the current enforcement regime by expanding the suite of options available to the Department to take action against sponsors who are found not to be meeting their obligations. In addition to the civil penalty provisions introduced in 2009 and the administrative sanctions to bar a sponsor or cancel the approval of a person as a sponsor, the Minister may now also consider enforceable undertakings. This will be an important tool to encourage sponsor compliance.

Finally, the Bill expands the capacity of the Government to monitor and investigate compliance with the temporary work sponsored visa program by extending inspector powers to the Fair Work Ombudsman to confirm Subclass 457 workers are receiving the appropriate rate of pay and working in the nominated position.

3. LABOUR MARKET TESTING

Background

Labour market testing means testing the Australian labour market to demonstrate whether a suitably qualified and experienced Australian citizen or Australian permanent resident is readily available to fill the position.

The purpose of the labour market testing element of the Bill is to ensure that the Subclass 457 visa is only used to meet genuine skill needs, and cannot be used by businesses that do not make genuine efforts to provide employment opportunities to Australian citizens and permanent residents.

The labour market testing condition will be a requirement at the stage of nomination approval, so the introduction of this measure will have no impact on visa processing times. The evidence that sponsors must provide in support of labour market testing will be prescribed in the Migration Regulations. Sponsors will be required to provide evidence of advertising and outcomes of any recruitment action that identified that Australian citizens or permanent residents were not available or suitably skilled for the nominated position.

If a sponsor has undertaken labour market testing prior to the commencement of the labour market testing requirement, evidence of this testing can be considered, provided that it occurred within the period determined by the Minister for that nominated occupation.

The Bill does not require a sponsor to undertake labour market testing prior to commencement of the Bill, but provides a benefit to sponsors who are already testing the Australian labour market.

The Bill

Sponsors will now be required to demonstrate that they have undertaken labour market testing in relation to the nominated position, prior to nominating the position to be filled by a Subclass 457 visa holder.

Labour market testing must have been undertaken within the period specified in a legislative instrument, proposed to be within the 6 months prior to making a nomination application. The intention of the amendment is to provide a balance between giving Australian citizens and permanent residents an opportunity to apply for jobs and ensuring that Australian businesses do not experience undue delays in filling skilled labour needs which would negatively impact on their businesses.

A nomination must be accompanied by evidence in relation to labour market testing. This evidence will be prescribed in the Migration Act to include:

- information about the approved sponsor's attempts to recruit suitably qualified and experienced Australian citizens or Australian permanent residents to the position and any other similar positions
- copies of, or references to, any research released in the previous six months relating to labour market trends generally and in relation to the nominated occupation;
- expressions of support from Commonwealth, State and Territory government authorities with responsibility for employment matters;
- any other type of evidence determined by the Minister, by legislative instrument.

Information provided as part of this evidence may include:

- details of any advertising (paid or unpaid) of the position, and any similar positions, commissioned or authorised by the approved sponsor;
- information about the approved sponsor's participation in relevant job and career expositions;
- details of fees and other expenses paid (or payable) for any recruitment attempts; and/or
- details of the results of such recruitment attempts, including details of any positions filled as a result

In providing details of the result of recruitment attempts, sponsors can provide reasons, if having undertaken labour market testing in relation to the nominated position, and having received an application/s from suitably qualified Australian citizens or permanent residents, why the applicants for the position were not recruited.

It is proposed that the requirement to labour market test take effect in November 2013. While noting that many sponsors already test the market as part of their normal recruitment practices, the delayed introduction gives sponsors adequate time to undertake labour market testing and meet the new requirement before lodging further nominations.

Exemptions

The Australian Government has made commitments, under the World Trade Organisation (WTO) General Agreement on Trade in Services and a number of Free Trade Agreements, on the issue of temporary entry of skilled foreign workers (as opposed to the visa system more broadly). Any changes to the general visa system must ensure Australia continues to satisfy these obligations.

The Subclass 457 visa gives effect to Australia's trade obligations which relate to the temporary entry of natural persons under the World Trade Organisation General Agreement on Trade in Services and in Free Trade Agreements. The labour market testing condition will not apply if it would be inconsistent with any international trade obligations determined by the Minister in a legislative instrument.

In these agreements, Australia has commitments not to apply labour market testing to specific categories of service providers. The Bill introduces a requirement that sponsors must undertake labour market testing in relation to nominated occupations, in a manner consistent with Australia's relevant international trade obligations.

The Bill will allow the Minister for Immigration and Citizenship to determine by legislative instrument which relevant international commitments should be exempted from the application of the labour market testing condition.

Major Disaster

The Minister may exempt, in writing, a sponsor in the event that a major disaster occurs, naturally or otherwise, in order to assist disaster relief or recovery. In deciding whether a major disaster has occurred, the Minister must have regard to matters including:

- the number of individuals affected; and
- the extent to which the nature or extent of the disaster is unusual.

Major disaster exemptions can be made in relation to a specified nomination by the sponsor (i.e. a particular nomination lodged by the sponsor), or a specified class of nominations by the sponsor (i.e. a particular group of nominations lodged by the sponsor), but not to a class of sponsors. This will enable the department to facilitate the entry of overseas workers to assist in recovery work at short notice, as it did following the Queensland floods in 2011.

Sponsors who are unable to satisfy the labour market testing condition at the time of lodging the nomination will have their nomination refused. This will not affect their sponsorship status and they will have the opportunity to undertake labour market testing before lodging another nomination for the same position.

A decision to refuse to approve a nomination is a Migration Review Tribunal reviewable decision. Therefore, a sponsor has the right to seek merits review of a nomination refusal if they fail to satisfy the labour market testing requirement.

4. SPONSORS' OBLIGATIONS

The measures announced by the Minister for Immigration and Citizenship in February 2013 include:

- introducing a requirement for the nominated position to be a genuine vacancy within the business. This will provide discretion to consider further information if there are concerns the position may have been created specifically to secure a Subclass 457 visa without consideration of whether there is an appropriately skilled Australian citizen or permanent resident available;

- introducing a provision to allow DIAC to take action against sponsors who engage in discriminatory recruitment practices;

- strengthening the market salary rate requirements to provide discretion to consider comparative salary data for the local labour market when deciding whether a nominated position provides equitable remuneration arrangements. Additionally, the market salary exemption threshold will be increased from $180 000 to $250 000 per annum to ensure that higher paid salary workers are not able to undercut local wages through the employment of overseas labour at a cheaper rate;

- strengthening the English language requirements by removing exemptions for applicants from non-English speaking backgrounds who are nominated with a salary less than $92 000 per annum and requiring applicants who were exempt from the English language requirement when granted a visa to continue to be exempt from, or to meet the English language requirement when changing employers. Additionally, the definition of the English language requirement will be better aligned with the permanent Employer Sponsored programs;

- strengthening the requirement for sponsors to train Australians by introducing an ongoing and binding requirement to meet training requirements for the duration of their approved sponsorship; and

- clarifying that Subclass 457 workers may not be engaged in unintended employment relationships by requiring workers to be engaged under a written contract of employment and not on-hired to an unrelated entity unless they are sponsored under an approved labour agreement or in an occupation specified as exempt in the relevant instrument.

These measures will be introduced in Regulations.

The Bill amends the Migration Regulations to extend the period in which a Subclass 457 visa holder, who is subject to visa condition 8107, can seek new sponsored employment from a period of 28 consecutive days to 90 consecutive days.

At present all primary Subclass 457 visa holders are subject to a visa condition which requires them to depart Australia within 28 days of ceasing employment with their current sponsor or find a new employer willing to sponsor them. If a visa holder does not comply with this condition they are liable for visa cancellation. Extending the period beyond 28 days would potentially provide a more socially just outcome for the visa holder as they would have more

time to arrange their personal affairs to depart Australia, or obtain alternative sponsored employment, at the conclusion of sponsored employment.

The obligation for the previous sponsor to pay return travel costs to their home country would remain and any secondary visa holders would continue to have full work rights throughout this extended period.

The changes will not adversely affect the vast majority of employers who are using the program appropriately to fill genuine skill requirements. The changes will strengthen the Government's capacity to identify and prevent employer practices that are not in keeping with the purpose of the Subclass 457 visa program. This reform package together with the proposed expansion of the monitoring powers to Fair Work inspectors will send a strong message to employers that they must fulfil their sponsorship obligations or run the risk of being sanctioned.

5. FAIR WORK INSPECTORS

Background

Sponsors of overseas workers under the Subclass 457 visa program are required to adhere to a number of sponsorship obligations. This includes obligations to provide overseas workers with the same terms and conditions of employment as Australians performing equivalent work in the business.

These obligations help ensure that overseas skilled workers are protected from exploitation. Sponsorship obligations also help ensure that the program is being used to meet genuine skills needs, and is not being used to undercut local labour wages and conditions. If a sponsor fails to satisfy a sponsorship obligation they may be subject to sanction action, infringement notices or civil court action.

DIAC has 35 inspectors across Australia who have the power to:

- enter a premises or place without force
- require a person to produce a record or documents
- inspect and make copies of any number of documents
- interview people while at a premises or place.

There has been a significant increase in the number of infringement notices served since the obligations framework was introduced in September 2009. In 2010-11 a total of eight infringement notices were served by the department; 49 were served in 2011-12; so far in 2012-13 (until 31 May 2013) 66 infringement notices have been served. The total infringement amount of the 66 notices served so far in 2012-13 is $273,720 (average of $4,147 per notice).

In addition, on 2 July 2012, DIAC successfully litigated against one standard business sponsor, with the court ordering a pecuniary penalty of $35 000 plus costs. It sent a strong signal to sponsors that they must fulfil their sponsorship obligations. Fair Work inspectors have delegations under the Migration Act, however these are currently limited. Extending the

powers of Fair Work Inspectors to those of DIAC inspectors will broaden the reach of monitoring activities.

The Bill

The Government is proposing to expand the monitoring powers to Fair Work inspectors in the Migration Amendment (Temporary Sponsored Visas) Bill 2013 and through a Memorandum of Understanding to ensure that Subclass 457 visa holders are:

- being paid at the market rates specified in their approved visa, and
- that the job being done by the Subclass 457 visa holder matches the job title and description approved in their visa.