ASSOCIATION OF CONSULTING ENGINEERS AUSTRALIA

# MIGRATION LEGISLATION AMENDMENT (WORKER PROTECTION) BILL 2008

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Recommendations for inclusions and amendments

ACEA SUBMISSION

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# INTRODUCTION

## ABOUT THE ACEA

The Association of Consulting Engineers Australia (ACEA) is an industry body representing the business interests of firms providing engineering, technology and management consultancy services.

There are over 260 firms, from large multidisciplinary corporations to small niche practices, across a range of engineering fields represented by the ACEA with a total of some 46,000 employees.

The ACEA presents a unified voice for the industry and supports the profession by upholding a professional code of ethics and enhancing the commercial environment in which firms operate through strong representation and influential lobbying activities. The ACEA also supports members in all aspects of their business including risk management, contractual issues, professional indemnity insurance, occupational health and safety, procurement practices, workplace/industrial relations, client relations, marketing, education, sustainability and business development.

# ACEA'S SKILLED MIGRATION STRATEGY

The ACEA's policy objectives on skilled migration are:

- Increase the consulting engineering resource in Australia to meet current and future demand.
- Improve access to engineering and technical skills from overseas.
- Improve the mobility of Australian engineers and their capacity to work internationally.
- Ensure the migration system remains responsive to labour force issues.
- Support the establishment of a labour force mapping and forecasting exercise to inform future policy decisions.
- Ensure a flexible ceiling approach on the number of business migrants, with the capacity to accept above-planned numbers.
- Support an approach which concentrates on improving the commercial and economic opportunities in Australia, effective and efficient skills recognition processes, simplification/streamlining of visa application and ensuring the temporary movement of people with professional skills to Australia.

# ENGINEERING SHORTAGES

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

The ACEA's 2008 Skills Survey (Attachment 1), which surveyed our member firms on skills shortages, found that on average, two-thirds of firms across Australia are delaying projects and some are even declining projects outright because they simply don't have the available staff. This is the third year in a row this has been reported.

According to the survey, 3 out of 5 firms are experiencing critical shortages causing around half of firms to restrict business growth in 2008. Civil and structural engineering firms are the worst affected because they are in highest demand with 50 per cent of firms indicating shortages.

*Engineers Australia* has estimated that in the next five years to the 2011 Census, "70,000 engineering professionals will have retired. At current rates, the expected 45,000 graduates will not even cover the losses over the same period. It is possible that current professional engineering skills shortages will double by 2011: the numbers are unnerving for Australia's future."[1]

Skilled migration will be a critical part of ensuring that in the short to medium term Australia has the ability to meet the skills gap and deliver record infrastructure works. A responsive and flexible skilled migration system, supported by good legislation will ensure that Australia positions itself well to be able to meet demand for infrastructure and design into the future.

[1] Engineers Australia weekly newsletter, 30 June 2008:
http://www.quivamail.com/go/?474C47435F555F40455446574247584847

We attach for the Senate Legal and Constitutional Affairs Committee our recent submission to the Business (Long Stay) Subclass 457 and Related Temporary Visa Reforms Discussion Paper released by the Department of Immigration and Citizenship (Attachment 2).

We ask the Committee to consider our recommendations along with our comments on the Bill to ensure any amendments to the Migration Act 1958 in this instance do not inadvertently create an environment where excessive red-tape exists and increases costs to employers. If the business visitor visa scheme becomes too difficult and expensive for Australia's business to utilise, this will undoubtedly constrain the nation's economic potential and international competitiveness.

# WORKER PROTECTION BILL 2008

The ACEA views that any changes made to the Migration Act 1958 should in fact be conducive to modern business practices.

The ACEA also views that in order to further enhance and streamline the 457 visa process, better cooperation between departments, particularly between DIAC and the Workplace Ombudsman could yield more comprehensive outcomes.

Many breaches that occur are, in actual fact industrial relations breaches, and as such, should be dealt with through the appropriate department agency and process.

The ACEA views that the 457 visa holder has a level of obligation to meet the terms of their visa and not act unlawfully. If a visa holder breaches their visa conditions they have committed an unlawful act requiring government action to penalise/deport the person, none of which should require the role of industry, including providing funds. Increasing penalties and costs for potential and unforeseen circumstances will make the 457 visa migration scheme unusable as employers will become too burdened by cost.

Legislation which places too many restrictions and burdens on employers essentially makes the 457 visa scheme unusable. The ACEA encourages a flexible approach to the 457 visa scheme which recognises the different groups employing skilled migrants in Australia, namely the distinction between high-level, highly-skilled professionals versus low-level, semi-skilled workers. Sponsorship obligations, although an important part of ensuring visa holders do not impinge on Australians, must be realistic and distinguish between government and business responsibilities rationally.

We see a 457 visa framework, supported by modern legislation, where the temporary visa holder is treated like all other employees, where employers are not penalised for circumstances that are out of their control, and open lines of appropriate communication exist between the Department and employers.

# RETROSPECTIVITY

The ACEA notes that there a number of references within the Bill to sponsors; previous and current. For example in Subsection *140H Sponsorship Obligations*:

(1) A person *who is or was* an approved sponsor must satisfy the sponsorship obligations prescribed by the regulations.

We note the use of this language also in Part 2, *Transitional matters* Sections 45 and 46.

We take this to mean that a previously approved sponsor can still be liable for penalties where they have not previously adhered to sponsorship obligations.

The ACEA views that the Bill should not be inclusive of retrospective language such as 'was' when referring to sponsors, particularly as it is currently unknown what the regulations or sponsorship obligations will be amended to include. The ACEA understands that the draft regulations will be released within the next six months however, without understanding the content of these, the ACEA fears that retrospective legislation which changes any sponsorship obligations for 457 visa holders already on the scheme will be an unbearable cost on business.

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

***Recommendation: That references to retrospectivity in the form of" a person who is or was an approved sponsor" which have the potential to amend regulations for existing visa holders should be removed from the Bill.***

# EVIDENCE BASED PENALTY DETERMINATION

The ACEA views that it is important that the Department (the Minister) use evidence based determination when deciding on penalty actions.

The ACEA views that there must be an inclusion within Subdivision D - Enforcement, *140L Regulations may prescribe circumstances in which sponsor may be barred or sponsor's approval cancelled* within the Bill to ensure the inclusion of a requirement for the Minister's judgment to be evidence based, rather than the Minister being 'reasonably satisfied' a breach has occurred.

The paragraph is for amendment is included directly below.

*Circumstances in which the Minister may take action*

(1) The regulations may prescribe:

(a) either or both of the following:

(i) circumstances in which the Minister may take one or more of the actions mentioned in section 140M in relation to a person who is or was an approved sponsor

if the Minister is *reasonably satisfied* that the person has failed to satisfy a sponsorship obligation in the manner (if any) or within the period (if any) prescribed by the regulations;

(ii) other circumstances in which the Minister may take one or more of the actions mentioned in section 140M; and

(b) the criteria to be taken into account by the Minister in determining what action to take under section 140M.[2]

The ACEA views this inclusion necessary on the basis that there are undoubtedly instances where sponsors breach the sponsorship obligations inadvertently. In these instances, evidence should reveal that it was not the intention of the sponsor to breach their obligation. In these cases the Minister should withhold the penalty and allow the sponsor to rectify the breach.

Using factual evidence also means that sponsors who inadvertently breach their obligation(s) can be separated from those who deliberately seek to breach sponsorship obligations.

***Recommendation: That the Bill be amended to include a reference to evidence based determination in Subdivision D - Enforcement, 140L Regulations may prescribe circumstances in which sponsor may be barred or sponsor's approval cancelled.***

# AMOUNTS PAYABLE IN RELATION TO SPONSORSHIP OBLIGATIONS

Subsection 140J - Amounts payable in relation to sponsorship obligations states that:

(1) If an amount is payable under the regulations by a person who is or was an approved sponsor in relation to a sponsorship obligation, the person is not liable to pay to the Commonwealth more than the lesser of:

(a) if a limit is prescribed by the regulations—that limit; and

(b) the actual costs incurred by the Commonwealth.

The example used within the Bill states that "if the Commonwealth incurs costs in locating and detaining a person, the person who is or was an approved sponsor is not liable to pay to the Commonwealth more than the total amount of those costs or a lesser amount (if a limit is prescribed in the regulations and that limit is less than the actual costs incurred by the Commonwealth)."[3]

The ACEA contends that if a 457 visa holder absconds, Australian employers require support from the Department, rather than being penalised for circumstances out of their control.

The ACEA sees a clear distinction between the roles that government and business play regarding obligations surrounding 457 visa holders. The employer's obligations extend to ensuring the 457 applicant/holder has the appropriate skills to perform the role and is remunerated sufficiently. In the ACEA's view it is the obligation of the government to perform the relevant checks prior to the visa holder being granted temporary visa status and if required, to detain and remove absconded temporary visa holders using the relevant bodies, like ASIO to do so. These costs cannot be absorbed by business, particularly small to medium enterprises that would simply be unable to afford to pay for the location, detention and removal of an absconded visa holder.

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[2] Migration Legislation Amendment (Worker Protection) Bill 2008, pp. 10,11.

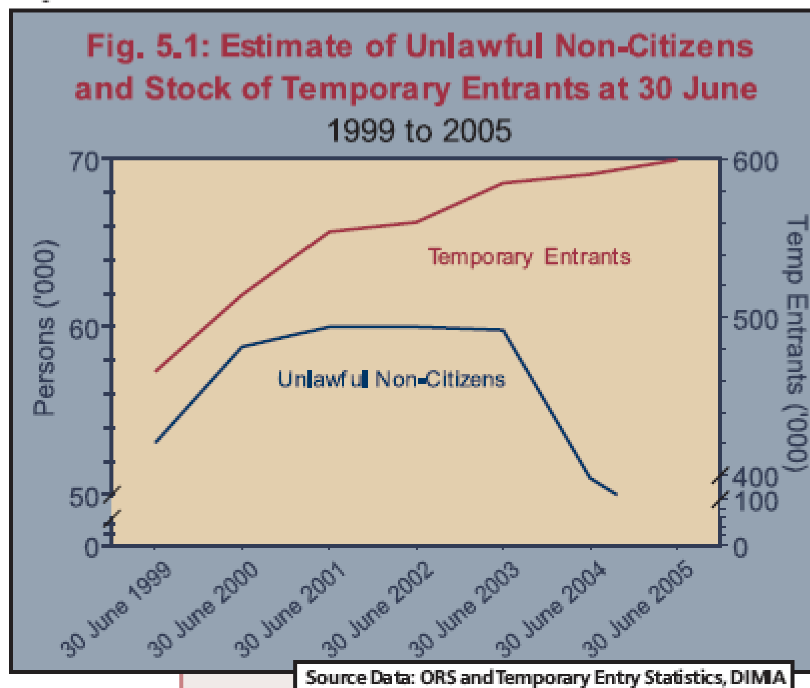
[3] Migration Legislation Amendment (Worker Protection) Bill 2008, pp. 8,9.

The ACEA contends that a level of onus must apply to the 457 visa holder; Australian businesses cannot monitor or be accountable for 457 visa holders when they are not in the workplace and cannot afford to bear the burden of rogue employees once they are no longer employed by the sponsoring employer.

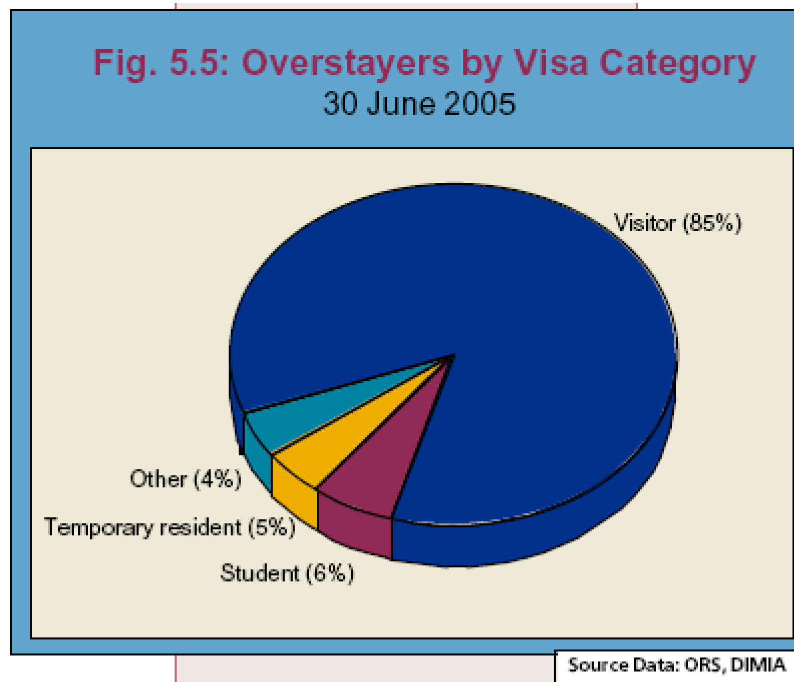
The current prescribed limit for location and detention costs of $10,000 that employers may be liable for places an unrealistic burden on the employer. This acts as a potential penalty for employers who have no control over such an instance occurring.

We contend that these instances are extremely rare in the case of highly skilled, highly paid 457 visa holders and that the employer has no way of speculating as to whether or not a 457 visa may abscond. The costs, if these instances occur, should not be the responsibility of employers.

Figures 5.1 and 5.5 are extracts from the Department's *Managing the Border: Immigration Compliance* report, 2004-2005 Edition[4] and highlight the rarity of absconding 457 visa holders.




[4] Managing the Border: Immigration Compliance 2004 - 2005 Edition. Chapter 5: Dealing with Overstayers. Department of Immigration and Citizenship. http://www.immi.gov.au/media/publications/compliance/managing-the-border/pdf/mtb-chapter5.pdf




Subclass 457 visa holders fall under the 'temporary resident' category, representing 5% of all overstayers. This is clearly such a small proportion that employers should not be disincentivised from using the scheme in fear that they may become liable for exorbitant costs should a 457 visa holder employed by them abscond.

The obligation in its current and proposed form is another disincentive for employers to utilise a visa that is intended to meet the needs of employers, allow Australia access to international expertise and help grow the Australian economy.

***Recommendation: The ACEA contends that the Migration Act 1958 should be amended to remove this existing requirement which places an unfair level of burden onto employers of 457 visa holders, given the infrequency of these situations.***

# PRODUCING A DOCUMENT OR THING

### 140Y – Requirement to produce a document or thing

The ACEA views the obligation for employers to provide information when requested in writing to be feasible. The ACEA believes that the Government's obligation in this instance should extend to explaining that penalty units apply if the information is not provided and that this should be noted clearly within the correspondence. The ACEA would also recommend that a reasonable time period for response from the employer is 21 days in cases of standard monitoring information requests.

The ACEA view that the references to 'thing' in section 140Y of the Bill are ambiguous and should be better defined. References to 'thing' should be amended to outline more specifically the types of items the Department or inspectors will be able to request from approved sponsors.

***Recommendation: The ACEA recommends that references to 'thing' within the Bill should be removed and better defined to reflect specific items.***