



**RECRUITMENT AND CONSULTING
SERVICES ASSOCIATION
AUSTRALIA & NEW ZEALAND**

Submission Inquiry into the
Migration Amendment (Temporary Sponsored Visas) Bill 2013

Submission of
The Recruitment and Consulting Services Association (RCSA)

20 June 2013

Recruitment and Consulting Services Association
Australia and New Zealand
RCSA Head Office
PO Box 18028 Collins St. East
Melbourne Victoria 8003
T: + 61 3 9663 0555
E: info@rcsa.com.au
W: www.rcsa.com.au

Introduction to RCSA

The Recruitment and Consulting Services Association Australia & New Zealand (RCSA) is the leading industry and professional body for the recruitment and the human resources services sector in Australia and New Zealand. It represents over 4,400 Corporate and Individual members.

RCSA members provide permanent full time, permanent part time, casual and on-hire workers to a range of businesses across almost all industries throughout Australia and New Zealand. On-hire workers are often referred to as 'labour hire workers', 'agency workers', 'temporary employees' and a range of other titles. The term on-hire has been incorporated into Modern Awards and will be used for the purpose of clarity.

Members of RCSA provide advice, information, support and guidance in relation to recruitment and employment matters to employers and workers from small and medium sized businesses to multinationals.

The RCSA membership is focused on ensuring the most positive outcomes for business, workers and workplace relations across Australia. The RCSA sets the benchmark for industry standards through representation, education, research and business advisory support so Members may concentrate on their core business. All RCSA Member organisations and Accredited Professionals agree to abide by the ACCC authorised RCSA Code for Professional Conduct.

RCSA members work first hand with the Fair Work Act and Modern Awards on a day to day basis. Their knowledge, understanding, interpretation and support of the aims of the Act are evident in dealings that they have with their clients and employees on a day to day basis.

RCSA Code for Professional Conduct

The RCSA has a [Code for Professional Conduct](#) which is authorised by the ACCC. In conjunction with the RCSA Constitution and By Laws, the Code sets the standards for relationships between Members, best practice with clients and candidates, and general good order with respect to business management, including compliance. Acceptance of, and adherence to, the Code is a pre-requisite of Membership. The Code is supported by a comprehensive resource and education program and the process is overseen by the Professional Practice Council, appointed by the RCSA Board. The Ethics Registrar manages the complaint process and procedures with the support of a volunteer Ethics panel mentored by RCSA's Professional Practice barrister.

RCSA's objective is to promote the utilisation of the Code to achieve self-regulation of the on-hire worker services sector, wherever possible and effective, rather than see the introduction of additional legislative regulation.

Submission

In respect to the *'Migration Amendment (Temporary Sponsored Visas) Bill 2013'* before the House of Representatives, the RCSA would like to present the following submission concerning one particular aspect of that Bill i.e.

"requirement of sponsors participating in the Temporary Sponsored Work Visa Program to undertake labour marketing testing in relation to nominated occupations".

Statement

RCSA does not support the re-introduction of labour market testing in the 457 temporary sponsored work visa program.

Labour Market Testing

Given the recruitment sector is driven by the demand of businesses for human capital across the entire spectrum of commerce, there is unilateral acceptance throughout that the recruitment industry is responsive and indispensable to the requirements of a resilient labour market as a significant factor of labour pipeline supply.

A dominant constituent of the current debate surrounding Temporary Work (Skilled) subclass 457 visas is the concept that the 457 visa program is intended to fill skill shortages in Australia. It is clear that government concern is that employers are using the 457 visa program beyond the parliamentary intention for which it is designed. The 457 visa program and the issue of skills shortages are predicated on the presumption that employers will only participate in the 457 visa program as a last resort (when no Australian workers can be sourced).

While the term skills shortage has never been defined in the legislative history of the 457 visa program, the concept of skills shortage has been framed to include a much wider ambit than the Department of Education, Employment and Workplace Relations ('DEEWR') definition of shortage. Under previous versions of the 457 visa program, a skills shortage has been implied by requirements that:

- a suitably qualified Australian citizen or Australian permanent resident was not readily available to fill the position¹
- the position could not be reasonably filled locally².

The concept of skills shortages within the 457 visa framework has arguably encapsulated the DEEWR definitions of skills which are in 'shortage', 'experiencing recruitment difficulty' and in 'no shortage' given that legislation, at very most, has only required that the position could not be readily filled or reasonably filled.

A re-examination of the Consolidated Skilled Occupations List ('CSOL') i.e. the approved list of occupations available for nomination under the 457 visa program is one possible approach to better address the issue of skills shortages.

In the 2008 report *Visa Subclass 457 Integrity Review*³ by Barbara Deegan, it was noted that "there is a perception that the current list of occupations is prepared on the basis of a degree of 'labour market testing (LMT)'. The proposed list should make that perception a reality."⁴ However the current CSOL holds little parity with the Skills Shortage List - Australia recently published by DEEWR⁵. While all 43 occupations on the DEEWR Skills Shortage List - Australia appear on the CSOL, the CSOL comprises of approximately 649 occupations in total. Nor does the CSOL correspond with the Specialised Occupation List 2012⁶ developed by the Australian Workforce and Productivity Agency. This suggests that the settings behind the CSOL are not based on any identifiable skills shortages or labour market testing.

¹ This is based on the Reg 1.20B definition of labour market testing that came into effect on 1 August 1996 when the subclass 457 visa was introduced. Based on the original inception of the 457 visa, the position had to undergo mandatory labour market testing if it was not a 'key activity' of the business and the employment period was more than 12 months. As 'key activity' was defined quite broadly under Reg 1.20B to include activities that were essential to business operations and required specialist or professional skills or specialised knowledge of the business operations, the scope in which labour market testing could be applied was limited. See *Migration Regulations (Amendment) 1996* (Cth).

² This is based on the regional concessions to 457 visas that were introduced on 1 November 2002. Pursuant to Reg 1.20GA employers seeking to sponsor a foreign worker in a position based in regional Australia were required to undergo labour market testing undertaken by a Regional Certifying Body. See *Migration Amendment Regulations (No.5) 2001* (Cth) sch 1 item 29.

³ The Deegan report was commissioned as part of the overhaul and eventual reform to the 457 visa program in 2009.

⁴ Deegan, B 2008, *Visa Subclass 457 Integrity Review*, Department of Immigration and Citizenship, Canberra, viewed at 23 April 2013, <http://www.immi.gov.au/skilled/skilled-workers/_pdf/457-integrity-review.pdf>

⁵ Department of Education, Employment and Workplace Relations 2013, *Skills Shortage List – Australia*, Department of Education, Employment and Workplace Relations, Canberra, viewed at 23 April 2013, <<http://foi.deewr.gov.au/documents/skill-shortage-list-australia>>

⁶ Australian Workforce and Productivity Agency 2012, *Specialised Occupation List 2012*, Australian Workforce and Productivity Agency, Canberra, viewed at 23 April 2013, <[http://www.awpa.gov.au/our-work/labour-market-information/specialised-occupations-list/Pages/Specialised-Occupation-List-\(SpOL\)-2012.aspx](http://www.awpa.gov.au/our-work/labour-market-information/specialised-occupations-list/Pages/Specialised-Occupation-List-(SpOL)-2012.aspx)>

By global comparison, at one end of the spectrum, the New Zealand temporary work permit program utilises the Essential Skills in Demand Lists⁷ (similar to the CSOL). The skills requirements specify the minimum qualifications and/or work experiences required (which can be notably different to the Australian and New Zealand Standard Classification of Occupations) and are region specific for occupations on the Immediate Skill Shortage List. Unlike the CSOL, the Essential Skills in Demand Lists clearly incorporates labour market testing where if a visa applicant meets the skills requirements on these lists then it is accepted that no New Zealanders are available for the positions.⁸

Whilst at the other end, Canada's temporary foreign workers program has incorporated labour market testing for many years where employers must first obtain a Labour Market Opinion prior to submitting an application for a work permit (except in certain exempted situations).⁹ The Labour Market Opinion is a form of labour market testing where the Canadian federal government department Human Resources and Skills Development Canada (HRSDC)/Service Canada must provide an opinion that hiring a foreign worker to fill that particular position in Canada will have a positive or neutral effect on the Canadian labour market.¹⁰ Citizenship and Immigration Canada have recognised that obtaining a Labour Market Opinion is a 'time-consuming process' and in 2012 the Canadian Government introduced an Accelerated Labour Market Opinion program.¹¹ However, not surprisingly the Canadian Accelerated Labour Market Opinion was temporarily suspended April 2013.

However labour market testing has not prevented significant and actual roting of the Canadian temporary foreign worker program, which has included the retrenchment of Canadian IT workers at the Royal Bank of Canada whose jobs were then subsequently outsourced to foreign workers¹² and the Federal Court in Canada determining that labour market testing had correctly identified a shortage in a situation the employer required workers to speak Mandarin¹³.

⁷ Immigration New Zealand 2013, Immigration New Zealand, Wellington viewed 22 April 2013 <<http://www.immigration.govt.nz/migrant/stream/work/worktemporarily/LinkAdministration/ToolboxLinks/essentialskills.htm?level=2>>

⁸ Ibid.

⁹ Citizenship and Immigration Canada 2013, Citizenship and Immigration Canada, Ottawa viewed 22 April 2013 <<http://www.cic.gc.ca/english/work/employers/apply-who.asp>>

¹⁰ Citizenship and Immigration Canada 2013, Canada Immigration News, Ottawa viewed 22 April 2013 <<http://www.cicnews.com/2012/09/bring-workers-canada-faster-accelerated-labour-market-opinion-091778.html>>

¹¹ Ibid.

¹² Dobby, C, Ottawa concerned about report that says RBC replacing Canadian staff with temporary foreign workers, Financial Post, viewed 19 June 2013 <<http://business.financialpost.com/2013/04/07/ottawa-concerned-about-report-that-says-rbc-replacing-canadian-staff-with-temporary-foreign-workers/>>

¹³ Cohen, T, Court uphold B.C. mining company's use of temporary foreign workers from China, Financial Post, viewed 19 June 2013 <<http://business.financialpost.com/2013/05/22/court-upholds-b-c-mining-companys-use-of-temporary-foreign-workers-from-china/>>

Nonetheless as the CSOL is specified under legislative instrument, the CSOL is more adaptable to change and, if rigorously set, can act as a good reflection of the skills needed in Australia.

It is essential that the 457 visa program is sufficiently flexible to accommodate the needs of the Australian workforce. In some industry sectors it is suggested that the 457 visa program may not be adequately supplementing Australia's skills shortage needs. Migration, including temporary migration, is only one small component in the solution to assuaging Australia's skills shortage.

Education plays an essential role in skilling our current and future domestic workforce. Deficiencies in Australia's educational systems only exacerbate an employer's necessary dependency on 457 visa workers to meet skills shortages (including labour shortages skills and training gaps) within the Australian workforce.

RCSA Members are uniquely positioned to reduce the volume of immigrants coming to Australia under 457 visas while addressing critical skills shortages and stamping out the scourge of sham contracting.

Our members, who work to a strict code for professional conduct, are in the business of, and have significant experience in, providing an individual across multiple roles and organisations. They bring this unique capability to drive efficiencies and compliance to the 457 Visa program.

Often the actual critical skill requirement by an organisation is either for a fixed term – often less than two years – or to undertake tasks which do not make up a full time equivalent position. Instead of 'topping up' up to a full time equivalent position with tasks which require locally available skills, an organisation can access critical skills under the 457 Visa subclass via RCSA Members who hold a 457 Labour Agreement. The RCSA member places the individual on a 457 Visa across multiple organisations and roles ensuring they are gainfully employed and remunerated in line with 457 Visa regulations.

The net result is therefore:

- Reduced number of 457 immigrants
- Increased work available to Australian citizens and permanent residents
- Increased productivity due to tasks being undertaken by specialists in their field
- Increased compliance by making RCSA membership a condition of holding a 457 Visa Labour Agreement.

Conclusion

Within the 457 visa context, RCSA is concerned that any introduction of labour market testing must be based on a quantifiable and objective methodology to avoid scenarios as in other global markets (e.g. Canada) where labour market testing supported the lawful routing of the temporary foreign worker program.

Labour market testing which requires an employer to provide justification of its recruitment attempts pursuant to s 140GB(3) in Schedule 2, Part 1 of the *Migration Amendment (Temporary Sponsored Visas) Bill 2013* is vulnerable to subjectivity and, in the worst case, manipulation by unscrupulous employers. As such, Ministerial delegates will be required to make decisions of labour market requirements in an administrative capacity which may or may not reflect or appropriately measure the economic impact of migration on the Australian labour market, labour force, employment, employers and/or the national accounts.

RCSA contends that the introduction of stringent labour market testing within the 457 visa program would be inapposite to the principle of good regulation. Instead, a more targeted approach to the CSOL could assist in ensuring that the 457 visa program better meets identifiable skills shortage needs without requiring the introduction of stringent labour market testing.

RCSA would like to offer to be part of a working party to undertake a more targeted approach to the CSOL.