Submission to Senate Legal and Constitutional Affairs Committee

Inquiry into the *Migration Legislation Amendment (Worker Protection) Bill 2008*

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EXECUTIVE SUMMARY

The Minister for Immigration and Citizenship, Senator Chris Evans, has introduced *the Migration Legislation Amendment (Worker Protection) Bill 2008* (the Bill) into the Senate. The proposed new laws are said to help prevent the exploitation of temporary skilled foreign workers and ensure the wages and conditions of Australian workers are not undercut.

A copy of the proposed Bill was released last month. The Bill is noteworthy for its focus on employer obligations; there are no complementary provisions placing any obligations on visa holders. While the Bill itself is unremarkable, the ability for the Minister to introduce regulations in a range of areas leaves open for question what is intended to be introduced through the regulation process.

A guide on the potential content of the regulations can be derived from the Discussion Paper released by the Minister on June 30, 2008. The Minister stated that the Discussion Paper would form part of the broad reforms currently being pursued by the Government in relation to the temporary skilled migration program.

The Bill provides for regulations on a variety of topics relating to sponsor obligations. These obligations will for the first time be imposed by operation of law.

The details of the obligations to be specified in the regulations are not known. The Minister has said that they will be the subject of consultation with stakeholders and finalised in the coming months.

AMMA CONCERNS

Existing 457 visa requirements currently impose significant responsibilities on employers and where sponsors enter into Labour Agreements the responsibilities and obligations are even greater. The resources sector is not opposed to the principle of employer sponsors accepting and taking a degree of responsibility for temporary skilled workers.

AMMA is however concerned that the proposed regulations have the potential to introduce a regime so draconian that the 457 temporary skilled visa will no longer be a viable and practical solution to a temporary shortage of skilled Australian workers.

Prior to the promulgation of any regulations the various subject matters require a full and detailed justification for their inclusion.

AMMA does not accept that in the resources sector temporary visa holders are vulnerable or inadequately supported. All employees are treated equally and 457 visa holders receive sufficient support inside and outside the workplace.

The legislation and regulations should only address significant issues of concern, not isolated examples in particular sectors that can be addressed through compliance penalties such as the cancellation or suspension of an employers' entitlement to sponsor 457 visa workers.

As with the Governments proposed industrial relations legislation the worker protection legislation and regulations should only target those workers said to be at risk of exploitation.

Where possible the worker protection aspects of the legislation and regulations should address those visa holders who may be at risk of exploitation. This can be achieved by introducing a threshold salary ($75,000 per annum) where visa holders earning above this amount are not subject to the full extent of the legislation and regulation protection regime.

BACKGROUND

The 457 visa has been the subject of intense media criticism much of which AMMA believes is unjustified and all of which has little application to the resources sector. There have been numerous internal and external inquiries into the operation of the 457 visa. Commissioner Deegan of the Australian Industrial Relations Commission is conducting the latest of these inquiries and is due to report to the Minister this month.

Other enquiries have included:

- The External Reference Group's Final Report to the Minister (April 2008)
- The Report of the Joint Standing Committee on Migration (August 2007)
- The Standing Committee on Legal and Constitutional Affairs (July 2007)
- Council of Australian Governments Discussion Paper (April 2007)

On AMMA's analysis of these enquiries no evidence of systematic or widespread exploitation of 457 visa holders has been demonstrated.

ABOUT AMMA

The Australian Mines and Metals Association (AMMA) represent all major minerals, coal and hydrocarbons producers and associated processing and service industries; as well as a significant number of construction and maintenance employers in the resources sector.

Membership feedback to AMMA indicates that as a result of the skill shortage that the resource sector is experiencing the overwhelming majority of our members has had experience in using 457 visas or has an interest in using 457 visas.

AMMA members operate in the following industry categories:

- Exploration for minerals and hydrocarbons
- Metalliferous mining, refining and smelting
- Non-metallic mining and processing
- Coal mining
- Oil and Gas
- Associated services such as:
    - Construction and maintenance
    - Diving
    - Transport
    - Support and seismic vessels
    - General aviation (helicopters)
    - Catering
    - Bulk handling of shipping cargo

BACKGROUND

The *Migration Legislation Amendment (Worker Protection) Bill 2008* follows a $19.6m commitment in the 2008-09 Budget to improve the processing and compliance of the temporary skilled migration program.

The Bill proposes a range of issues including:

- Expanded powers to monitor and investigate employer non-compliance with the 457 visa scheme
- A framework for punitive penalties for employers found to be in breach of their obligations
- Improved information sharing between government agencies to improve compliance
- A redefined sponsorship obligations framework for employers of 457 visa workers and a range of other temporary work visas.

The Bill proposes that the legislation enable specially appointed officers with investigative powers to enter and search workplaces to determine whether employers are complying with their sponsorship obligations similar to the powers of workplace inspectors under the *Workplace Relations Act 1996.*

Employers who provide false or misleading information could face penalties of up to 10 years imprisonment or a fine of up to $110 000, or both.

Administrative sanctions including the cancellation or suspension of an employer's entitlement to sponsor 457 visa workers are to remain.

The proposed legislation will enable DIAC to publish the names of employers found to be in breach of their obligations where non-compliance has not been remedied or for repeat offenders.

Amendments will allow DIAC to share and receive information with other government agencies where this is currently not possible. This includes the

Australian Taxation Office in relation to whether a visa holder is being paid the correct amount.

THE REGULATIONS

As discussed above, the Bill makes continual reference to matters being subject to regulation, which at this point are yet to be prescribed.

What is known, are the contents of the Minister's June 2008 Discussion Paper which contains potential issue for the regulations. Below are AMMA's comments on the Discussion Paper.

1.1 Sponsor Obligations

1.1.1 To Keep Records

It is unclear what additional records the employer sponsor would be required to keep.

Employers are currently required to keep employment records under existing Commonwealth/State legislation. The Federal *Workplace Relations Act 1996* and Regulations already require employers to keep records relating to hours worked, overtime, superannuation, and leave which would appear to be sufficient for monitoring purposes without additional obligations being imposed.

1.1.2 To Provide Information

AMMA has no objection to the requirement for employers to provide relevant information within a prescribed time frame to enable DIAC to monitor and investigate allegations of non compliance.

Currently under the 457 visa obligations employer sponsors are required to cooperate with DIAC in its monitoring activities. The Bill provides for powers of DIAC inspectors based on those of inspectors appointed under the *Workplace Relations Act 1996*.

1.1.3 To notify the Department of Prescribed Changes in Circumstances.

The proposal for employer sponsors to notify DIAC of changes of circumstances already exists for 457 employer sponsors. No justification for a more prescriptive regime has been provided.

1.1.4 Notify Visa Holder of Certain Information

457 visa holders are already provided with DIAC's *Frequently Asked Questions* information sheet. The upgrading of the information sheet to inform visa holders of their rights and obligations is not objected to; subject to the information being balanced and non political.

1.1.5 To Cooperate with Inspectors

Cooperation with Inspectors is an undertaking already given by employer sponsors utilising the 457 visa and includes a requirement to cooperate with DIAC inspectors.

1.1.6 To pay the Costs of Locating, Detaining, Removing and Processing Protection Visa Applications

This proposal reflects the existing undertakings in the visa subclass 457, other than there is now an upper limit of $10,000 that employers can be forced to reimburse the Commonwealth, this obligation should remain unaltered.

1.2 Obligations – Subclass 457 Specific –Salary Related

1.2.1 To not use Overseas Workers as a means of Strike Breaking.

The Discussion Paper refers to an obligation to prevent sponsors utilising their 457 visa holder employees during periods of lawful industrial action or to influence enterprise bargaining negotiations.

AMMA is unaware of circumstances that would require such an obligation in the resources sector. No details as to how this obligation would operate in terms of its content or implication are provided or how it fits with existing laws on freedom of association.

AMMA would oppose any suggestion that 457 visa holders are required to take part in lawful industrial action, should they choose not to do so. Where there is a lawful right to strike it should be exercised freely and democratically irrespective of whether employees are 457 visa holders. The resources sector utilise the 457 visa to assist in remedying short term skill deficiencies in the Australian workforce, not as an attempt to recruit during periods of lawful industrial action.

1.2.2 To Pay Income Protection Insurance.

When the 457 visa holder is unable to attend work due to illness or injury that is not otherwise covered by workers compensation they can potentially be in a position where they are unable to support themselves. For Australian residents, they can rely on their accumulated sick leave entitlements, personal insurance policies or welfare payments.

Presently it is not possible for a 457 visa holder to receive anything less than the prescribed minimum salary level per week as there is no ability for an employer to place 457 visa holders on unpaid leave where they have not accrued any sick leave to warrant payment during the absence.

AMMA would support the concept that 457 visa holders who are unable to work for reasons beyond their control should be able to support themselves. The Commonwealth pays welfare benefits to permanent Australian residents where they are unable to work due to illness or injury.

No details are provided as to how long a sponsor should take out the insurance for or what period of time should elapse before a visa holder is eligible to access the income protection policy. Income protection schemes normally prescribe a minimum period before an employee is eligible to make a claim. This is to prevent employees abusing the policy and to keep the cost of the policy at a reasonable level.

While 457 visa holders are required to pay the same income tax as permanent residents, they cannot access the same welfare benefits as permanent residents.

It is not appropriate to place this additional cost on employer sponsors who already bear the wage cost for a minimum of 28 days following notification to DIAC that that the visa holder is no longer employed.

An obligation on employer sponsors to pay income protection insurance would result in an additional cost to the employment of 457 visa holders which is not required for permanent Australian residents.

1.2.3 To pay the Primary Visa Holder at least at Particular Amount.

The minimum salary level is currently based on average weekly ordinary time earnings, other than IT specialists and visa holders covered under a Labour Agreement.

It is suggested to retain a market based price signal, but to await the review of Ms Deegan.

Where visa holders are covered by industrial awards or industrial agreements the sponsoring employer is bound to pay the rates of pay contained in these instruments.

A market rate concept is extremely difficult to manage with employers assessing many factors when remunerating their workforce. Any market rate proposal should only consider the base wage that applies to an employee's skill, classification and industry.

1.3 Obligations – Subclass 457- Non Salary –Related Costs

1.3.1 To pay Travel Costs to Australia

The Discussion Paper proposes that the sponsoring employer is liable for the travel costs of the 457 visa holder and accompanying family members for the travel costs to Australia.

While in many instances resources sector employers pay the travel cost to Australia of the visa holder and any dependents; employers contractually reserve the right to recoup the costs of travel where the employee does not complete a service period of up to 12 months.

The 457 visa holder on arrival is entitled under the *Migration Act 1958* to source another sponsor and to enter into another 457 sponsorship with an alternate employer.

Without the ability to recoup travel and recruitment costs there remains the ability for alternate sponsors to recruit the visa holder without incurring the costs imposed on the initial sponsor. The initial sponsor must be able to recoup these costs from the visa holder where a minimum period of 12 months service is not completed.

On this basis should the visa holder obtain a new sponsor and there is an agreement with the initial sponsor to allow reimbursement of travel and recruitment costs if 12 months service is not provided then the new sponsor can consider paying out any travel and recruitment costs incurred by and owed to the initial sponsor by making this payment on behalf of the visa holder.

1.3.2 To pay Travel Costs from Australia.

Currently there is an obligation for sponsoring employees of 457 visa holders to pay for the return travel of the primary visa holder and any members of their family should they be required to leave the country, however there is no prohibition on the employer seeking to recoup this cost from the visa holder.

While it is not unusual in the resources sector for an employer sponsor to pay for the return cost of airfares to the visa holder's home country, this is always subject to satisfactory performance or completion of a project assignment.

It would unreasonable to expect the employer to have to pay these cost without the ability to recoup those costs from the visa holder when the visa holder leaves prior to the expiry of their visa or because they have breached *Migration Act 1958* and or regulations.

An inability to recoup these costs would allow 457 visa holders to in effect have a paid holiday to and from Australia, i.e. they could return to their home country after two weeks in Australia all at the expense of the sponsoring employer. There at least needs to be a qualifying period of employment of no less than 12 months before the employer is unable to recoup the travel costs of the visa holder and dependents.

1.3.3 To pay the costs associated with Recruitment.

The proposition is that the sponsoring employer is liable for the recruitment costs associated with the primary visa holder in an effort to avoid those costs being charged back to the visa holder.

The illustration provided in the Discussion Paper is where a 457 visa applicant pays $10,000 to an offshore migration agent to secure the opportunity to apply for a visa and the employer proceeded with the recruitment. It is suggested that the sponsoring employer should be liable to pay the $10,000, this is an extraordinary obligation to place on an sponsoring employer.

A potential visa applicant paying money to an offshore agent is beyond the control and knowledge of sponsoring employer. Even where it may come to the knowledge of a sponsoring employer it should not become the responsibility of that sponsor. Such payments should only be reimbursable by the sponsoring employer where the employer has participated in/condoned or been an accessory to the arrangement.

Where such events occur without the employer's knowledge there should be no adverse consequences on the sponsoring employer. Labour agreements currently require the employer to declare that they have no knowledge of such arrangements.

1.3.4 To pay the costs Associated with Migration Agent Services.

Ordinarily resource sector employers pay the recruitment costs associated with bringing a visa holder to Australia including the costs of using an agent. AMMA is however opposed to an obligation on sponsors being billed as a third party for migration or recruitment agent services rendered to visa holders. This is particularly the case where there are exorbitant/unreasonable billing practices that sponsors cannot challenge. These difficulties were raised by the Standing Committee on Legal and Constitutional Affairs in July 2007.

1.3.5 To pay costs associated with Licensing and Registration or Similar.

As stated in the Discussion Paper, Australian permanent residents are liable for their own licensing costs in employment unless they negotiate for the payment of these costs in their employment contract with their employer.

It is suggested that making the sponsoring employer liable for the licensing costs, could be offset by reducing the employee salary by the appropriate amount so long as it did not fall below any applicable minimum standard. This would not be possible under Labour Agreements where employers must pay the market rate, thus any reduction for licensing fees would result in a rate less than the market rate.

The compulsory payment of these fees by the sponsor provides the visa holder with an additional benefit over permanent residents. There should not be a requirement on a sponsor to pay for membership of any body/association

where this is not a legal requirement before the visa holder can commence work.

1.3.6 To pay certain medical costs or to pay for Health Insurance.

Currently there is an obligation on sponsoring employers to pay medical costs incurred by visa holders in public hospitals. This is often mitigated by sponsoring employers either taking out insurance to cover such costs or requiring the visa holder to do so. There is no justification provided in making sponsors liable directly for insurance premiums. AMMA does not support such an obligation.

1.3.7 To pay Education costs for certain Minors.

Generally speaking in the resource sector and in particular on construction projects, 457 visa holders are not accompanied by their spouse or dependents. This is due to the remote locations worked and the 7 day/24 hour day shift arrangements.

The Discussion Paper proposes that sponsors should be responsible for the education costs of visa holders who are required to attend school. However sponsors will only be required to pay these fees in states and territories which require the visa holders to pay for school fees (these fees do not apply to the children of permanent residents). This then provides sponsors with a different cost structure depending on the visa holder's employment location which creates an unsatisfactory and discriminatory situation.

AMMA is pleased to expand or clarify any of the above matters raised.

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27 October 2008