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457 visa eligibility requirements: key issues and improved procedures

Introduction

2.1 Chapter 2 covers a range of key issues relating to the eligibility requirements of the 457 visa program, particularly concerning minimum salary and skill requirements and regional concessions to those requirements. The central role played by the Australian Standard Classification of Occupations (ASCO) system in defining what constitutes a 'skilled' occupation under the program is also discussed. Other topics include Regional Certifying Bodies (RCBs), labour market testing, and training and English language requirements.

2.2 The chapter concludes with a discussion on the on-hire and recruitment industry and its interface with the 457 visa program, and on Labour Agreements as a mechanism to address identified skills shortages in Australia.

Salary requirements

2.3 An eligibility requirement of the 457 visa is that visa holders must be paid either the award wage or the minimum salary level (MSL) gazetted by the Department of Immigration and Citizenship (DIAC),

whichever is higher.[1] As the former Minister for Immigration and Multicultural Affairs stated:

> The minimum salary requirements do not override requirements that workers are paid in accordance with Australian standards and conditions of employment (including awards, workplace agreements, superannuation and taxation).[2]

2.4 The MSL is adjusted annually. From 1 July 2006 the MSL was set at $57,300 for Information and Communication Technology (ICT) occupations and $41,850 for all other gazetted occupations, for a 38-hour week.[3] A 10 per cent concession can apply to the MSL for locations classed as 'regional'.[4] The current average salary for 457 visa holders is $71,000 per annum.[5]

2.5 The Committee received mixed evidence across sectors and interest groups about the effect of DIAC's salary structure for the 457 visa on visaed and Australian workers, and industry development generally. Most contributors to the inquiry acknowledged that it was necessary to have a fair and equitable method of calculating a base salary for 457 workers, to provide them with the monies necessary to live in Australia and contribute to the economy, and protect Australian workers.[6] Debate focused on whether under the current arrangements 'market rates' were paid to visa holders, the impact of regional concessions, the exclusion of non-salary benefits from the MSL, confusion over salary deductions, and the enforcement of wage payments.

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1 DIMA website, http://www.immi.gov.au/skilled/skilled-workers/sbs/eligibility-nomination.htm (accessed 28 May 2007). See also *Frequently Asked Questions* (July 2007), 'an annual salary which is at least the Minimum Salary Level … or the required salary level under the instrument or other industrial agreement (under Australian law) … the larger of these amounts', DIAC website, http://www.immi.gov.au/skilled/skilled-workers/pdf/FAQ_457_visa_holders.pdf.

2 Media release by Senator the Hon Amanda Vanstone, former Minister for Immigration and Multicultural Affairs, 'New minimum salaries for temporary overseas skilled workers', 1 May 2006.

3 Minister for Immigration and Multicultural Affairs, *Immigration Facts No. 4*, 'Salary levels for temporary skilled migrants', http://www.minister.immi.gov.au/media/factsheets/fact-sheet-4-temp-salary-levels.pdf (accessed 5 June 2007).

4 DIMA website, http://www.immi.gov.au/skilled/skilled-workers/sbs/eligibility-regional.htm (accessed 28 May 2007).

5 Mr Parsons, DIAC, in Transcript of Senate Standing Committee on Legal and Constitutional Affairs, Estimates, 21 May 2007, p. 53. Salary breakdown from 1 July 2006 to 17 June 2007: ASCO major group 1 to 3—average salary $77,600; major group 4—average salary $49,200; and major group 5 to 7—average salary $45,700, DIAC, *Submission No. 86a*, p. 24.

6 Migration Institute of Australia, *Submission No. 9*, p. 12.

Establishing rates of pay

2.6 Some industries, notably those paying above the minimum gazetted amount, deemed the current wage arrangements as satisfactory. For example, the Recruitment and Consulting Services Association (RCSA) stated that:

> Throughout discussions with our Members there was constant agreement that the standard wage gazetted by DIAC is not an issue and that many Members are in fact paying above the specified rate.[7]

2.7 However, as will be discussed below, evidence to the Committee tended to be divided between those who argued the MSL was too high and those who believed it was too low and not sufficiently monitored.

2.8 The Migration Institute of Australia (MIA) noted that the MSL exceeded the salary rate of Australian workers for certain occupations.[8] Indeed, it was suggested that for some professions, such as nursing, hairdressing, motor mechanics and welding, and in certain sectors, particularly agriculture, tourism and hospitality, visa holders were paid more than Australian workers.[9] According to the Law Institute of Victoria, to protect small businesses it was vital that the MSL did not exceed the wage rates payable to Australian employees.[10]

2.9 The National Farmers Federation (NFF) commented that the MSL would 'have a significant negative impact on the capacity for the regional migration program to assist regional employers'.[11] It was felt that, even with the regional salary concession, the MSL had been set too high for the agricultural industry. The NFF further observed that:

- the Australian Bureau of Statistics (ABS) did not include agricultural statistics in their calculation of the MSL;
- non-monetary benefits, which are not included in the MSL, can make up 20 to 25 per cent of workers' salaries in the industry;

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7 Recruitment and Consulting Services Association, *Submission No. 11*, p. 2.

8 Migration Institute of Australia, *Submission No. 9*, p. 12.

9 Law Institute of Victoria, *Submission No. 46*, p. 5; Migration Institute of Australia, *Submission No. 9*, p. 12; National Farmers Federation, *Submission No. 22*, p. 3; Restaurant and Catering Australia, *Submission No. 50*, p. 16; Printing Industries Association of Australia, *Submission No. 18*, p. 7; Commerce Queensland, *Submission No. 25*, p. 4; and Australian Tourism Export Council, *Submission No. 36*, p. 2.

10 Law Institute of Victoria, *Submission No. 46*, p. 4.

11 National Farmers Federation, *Submission No. 22*, p. 3.

- the industry has dispensation to employ workers from ASCO 5 to 7—however, the lower skills level is not adequately reflected in the MSL; and
- the average salary for the industry was $30,000, inclusive of overtime and non-monetary benefits, well below the MSL.[12]

2.10 Restaurant and Catering Australia (RCA) also suggested that the MSL was above the award rate for the industry and was increasing at a disproportionate rate to Australian salaries:

> The Minimum Salary Level … gazetted by the Minister for Immigration and Citizenship (currently $41,850) is significantly higher than the award rate of pay for positions that qualify for migration under the business migration program. In addition, the increase in the salary level in the last 12 months was significantly higher than for commensurate Australian rates. In 2006 the Australian Fair Pay Commission granted an increase of $22.04 per week for rates of $700.00 per week and above. In the same period the Minister for Immigration increased the MSL for skilled migrants by $80.48 per week.[13]

2.11 The Australian Council of Trade Unions (ACTU) agreed that there should not be differential rates of pay between Australian employees and visa holders. However, a central tenet of their argument, which was supported by other union bodies, was that 457 workers were being paid less than Australian workers performing equivalent duties.[14] It was suggested that this had occurred because the MSL does not reflect market rates of pay.

2.12 In addition, the ACTU noted that the current wages system 'is not subject to any adjustment and is extremely difficult to enforce'.[15] Despite DIAC annually increasing the MSL, visa holders' salaries are not adjusted once they commence employment, and remain for the duration of their employment at the amount they were originally sponsored.[16] DIAC stated that currently 10,000 visa holders are not

12 National Farmers Federation, *Submission No. 22*, pp. 3-5.

13 Restaurant and Catering Australia, *Submission No. 5*0, p. 16.

14 Australian Council of Trade Unions, *Submission No. 39*, p. 20; Australian Rail, Tram and Bus Industry Union, *Submission No. 8*, p. 2; Australasian Meat Industry Employees Union, *Submission No. 23*, p. 19; Australian Manufacturing Workers Union, *Submission No. 40*, pp. 63-64; and Communications, Electrical and Plumbing Union of Australia, *Submission No. 61*, p. 4.

15 Australian Council of Trade Unions, *Submission No. 39*, p. 20.

16 Australian Council of Trade Unions, *Submission No. 39a*, p. 5.

paid the updated MSL rate.[17] However, the Minister for Immigration and Citizenship has proposed that the program be amended so that visa holders' salaries are compulsorily indexed.[18]

2.13 In summary, the ACTU argued that the current conditions undercut the wages of Australian workers, afford subsides to companies with 457 visaed employees and exploit overseas workers.[19] Similarly, the Media, Entertainment and Arts Alliance, as the professional organisation representing workers in the media and entertainment industries, argued that:

> … the Alliance shares the concerns of other commentators who note that the minimum salary requirements are not in line with market rates nor even, in some instances, the minimum award rates that apply to the positions in question. It is therefore difficult to see how the general $41,850 minimum rate of pay would necessarily drive the skill focus the visa class is intended to address. Rather, it offers a mechanism that some employers might utilise to avoid paying Australian market rates.[20]

2.14 The Australian Chamber of Commerce and Industry (ACCI) acknowledged the difficulties associated with establishing a mechanism to determine wages:

> A single model which can deliver streamlined processing and protect visa holders while not impairing the efficiency of the visa class is proving difficult to tailor for all users.[21]

2.15 A number of participants to the inquiry recommended alternative mechanisms for setting salary levels for visaed employees. These included:

- basing the rate on the 'appropriate industrial instrument' specified at the time of nomination;[22]

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17 DIAC, *Submission No. 86a*, p. 31.

18 Hon Kevin Andrews MP, Minister for Immigration and Citizenship, Second reading speech on the *Migration Amendment (Sponsorship Obligations) Bill 2007*, 21 June 2007, http://www.minister.immi.gov.au/media/speeches/2007/ka04-21062007.htm.

19 Australian Council of Trade Unions, *Submission No. 39*, p. 5 and p. 21. See also Liquor, Hospitality and Miscellaneous Union, *Submission No. 20*, p. 7.

20 Media, Entertainment and Arts Alliance, *Submission 5*5, p. 8.

21 Australian Chamber of Commerce and Industry, *Exhibit No. 6*, p. 4.

22 Australian Chamber of Commerce and Industry, *Exhibit No. 6*, p. 4; and Western Australian Chamber of Commerce and Industry, *Submission No. 53*, p. 13.

- ensuring that wage rates are consistent with the current workplace and industrial relations arrangements and laws;[23]
- using the rate of pay stipulated in the relevant enterprise agreement—in the absence of an enterprise agreement, a body, independent of government and employers, should determine the annually adjusted base rate in 'excess of award rates' and including the going rate in an area;[24]
- paying the market rate (based on the rates other employers are paying) or the enterprise rate, whichever is higher;[25] and
- establishing the market rate for each eligible occupation.[26]

2.16 RT Kinnaird and Associates commented that:

> The single most important change needed to 457 visa rules is to require all 457 employers to pay 457 visa-holders at least the market (or 'going') wage rates for the occupation and geographic area in question; and to increase wage rates annually for all 457 visa-holders, in line with market movements in the relevant Australian wages.[27]

2.17 The proposed options for calculating the market rate were to determine:

- the wages and conditions of Australian workers doing equivalent work;
- the median, or the '75th percentile', of the salary of Australian workers in the occupation concerned; or
- the advertised rate for vacancies in the relevant occupations.[28]

2.18 In response to questions about using the MSL or 'market rate' to determine salary levels, the Department of Employment and Workplace Relations (DEWR) told the Committee:

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23 Restaurant and Catering Australia, *Submission No. 50*, p. 3; Printing Industries Association of Australia, *Submission No. 18*, p. 9; and Commerce Queensland, *Submission No. 25*, p. 4.

24 Australian Council of Trade Unions, *Submission No. 39*, pp. 20-21; and Australian Rail, Tram and Bus Industry Union, *Submission No. 8*, pp. 9-10.

25 Construction, Forestry, Mining and Energy Union, *Submission No. 21*, p. 11.

26 Liquor, Hospitality and Miscellaneous Union, *Submission No. 2*0, p. 7; Queensland Government, *Submission No. 65*, p. 4; and Townsville Enterprise Ltd, *Submission No. 1*, p. 1.

27 R T Kinnaird and Associates, *Submission No. 80*, p. 2.

28 R T Kinnaird and Associates, *Submission No. 80*, p. 4.

> We are aware of the debate around whether there should be market rates or not, and I think it raises a bunch of issues. Firstly, it goes to complexity: what is the market rate? No-one has reliable market rate data down to the level of the precise occupation, let alone the precise area where the precise occupation might be. So if you were going to move in the direction of market rates, you could only do it at an industry level or at a broad ASCO category level, which would raise issues and at the same time create a plethora of rates. One of the things that we are all trying to balance in the discussion about further refining and reforming this visa subclass is not to create a more complex red-tape-burdened system but one that is fair and sensible. So the position that we would adopt at this point in time, subject to all the caveats about further government consideration and so on, is that the MSL—which is essentially derived from average weekly ordinary time earnings with a concession in regional areas plus a specific MSL for the IT industry—is about the right formulation. But we are aware that the debate on that issue can continue.[29]

2.19 The Committee acknowledges that central to the debate about salary requirements under the 457 visa program is the tension between finding a fair and equitable wage system that provides parity with Australian working conditions, and the practicalities of developing a system that can be effectively implemented and administered.

2.20 While taking on board DEWR's views on this issue, the Committee cannot ignore the dissatisfaction of submitters in relation to the current system, underpinned by the MSL. The Committee believes that the determination of an appropriate salary threshold (for example, at market rates) is crucial to ensuring that the employment opportunities and working conditions of Australians are protected. Similarly, where the salaries of 457 workers are significantly above those of their Australian counterparts, this would appear to impose an unreasonable cost on Australian employers and businesses. The Committee therefore urges the Minister for Immigration and Citizenship to continue to refine the policies underpinning the 457 visa program in regard to salary levels and give consideration to workable alternatives to the current system.

29 Mr Manthorpe, DEWR, *Transcript of Evidence*, 1 June 2007, p. 83.

Recommendation 6

2.21 **The Committee recommends that the Department of Immigration and Citizenship, together with the Department of Employment and Workplace Relations, investigate and report to the Minister for Immigration and Citizenship on the adequacy of the salary system under the 457 visa program, underpinned by the minimum salary level, to identify if viable alternatives exist for calculating salary levels.**

2.22 As previously noted, the Committee also urges the Australian Government to proceed with proposed legislative changes to employer sponsorship obligations. In particular, the Committee supports the proposal to pay the 'salary level in place at any particular time' (that is, to index the salaries of visa holders to reflect changes to the gazetted MSL), not necessarily the amount specified at the time of sponsorship.[30]

Recommendation 7

2.23 **The Committee recommends that the Australian Government proceed with its proposal to index the salaries of 457 visa holders in line with increases to the minimum salary level or, alternatively, the award conditions under which the visa was granted.**

Regional salary concession

2.24 In recognition of the special skill needs of regional Australia, there are arrangements in place to allow regionally based employers to access reduced skill and salary requirements where the business has sought certification by a local RCB. (The role of RCBs is discussed later in this chapter.)

2.25 While not advocating 'wholesale change' to salary levels, the MIA argued that 'some additional flexibility is warranted, especially in regional Australia'.[31] The Committee received mixed evidence from other inquiry participants, with some indicating that the regional salary concession should be abolished and others arguing that it should be increased.

30 Hon Kevin Andrews MP, Minister for Immigration and Citizenship, Second reading speech on the Migration Amendment (Sponsorship Obligations) Bill 2007, 21 June 2007, http://www.minister.immi.gov.au/media/speeches/2007/ka04-21062007.htm.

31 Migration Institute of Australia, *Submission No. 9*, p. 12.

2.26 Currently, the regional minimum salary level is gazetted at 90 per cent of the full MSL. For 2006-07 (to 17 June 2007), DIAC granted 880 visas with the regional MSL.[32] The Chamber of Commerce and Industry WA explained that:

> To qualify for regional salary concessions, a Regional Certifying Body … must certify that the nominated salary is at least the regional minimum salary level that applied at the time the nomination was made and is not less than the level of remuneration provided for under relevant Australian legislation and awards.[33]

2.27 The Western Australian Government has removed the regional salary concession, and it is only granted under 'exceptional circumstances'.[34] According to the Peel Development Commission: '[t]his decision was made to assist with disparity in local workplaces'.[35]

2.28 The ACTU, with the support of other union bodies, concluded that regional exemptions for both skills and salaries should be removed.[36] The Australasian Meat Industry Employees Union (AMIEU) commented that the meat industry provides an example of why the regional salary concession is not justified:

> The industry is characterized by its almost exclusively regional base and the fact that all processors compete for the same commodity (livestock), compete in a labour market for the same skilled employees and, generally, all compete for the same markets. There appears to be no good reason in this environment as to why different provisions based on regional/metropolitan distinctions should exist, nor should any labour costs regime (by way [of] stipulated minimum salaries) be the subject of differing regulation.[37]

2.29 As previously discussed, the NFF commented that one of their concerns with the visa program was the regional MSL of $37,000: '[t]his amount is not only above award wages but it is also above market rates for our sector'.[38] This sentiment was echoed by the tourism and

32 DIAC, *Submission No. 86a*, p. 24.

33 Western Australian Chamber of Commerce and Industry, *Submission No. 53*, p. 12.

34 Western Australian Chamber of Commerce and Industry, *Submission No. 53*, p. 12.

35 Peel Development Commission, *Submission No. 2*, p. 1.

36 Australian Council of Trade Unions, *Submission No. 39*, p. 9. See also Australian Manufacturing Workers Union, *Submission No. 40*, p. 7.

37 Australasian Meat Industry Employees Union, *Submission No. 23*, p. 20.

38 Mrs Wawn, National Farmers Federation, *Transcript of Evidence*, 1 June 2007, p. 25.

hospitality sectors.[39] For example, the Cairns Chamber of Commerce argued that, even with the 10 per cent regional concession: '[w]e are in fact seeing a 2 tiered wage structure starting to exist with overseas workers being paid more than their Australian counterparts'.[40] Both Commerce Queensland and the Cairns Chamber of Commerce recommended that the regional concession be increased to reflect a 20 or 25 per cent reduction in the full gazetted wage, respectively.[41] Snedden, Hall and Gallop Lawyers suggested that:

> … a return to the old system, where regional certifiers could certify at a reasonable salary level, was much more appropriate. Lower salaries do not per se mean that an Australian is being deprived of employment.[42]

2.30 The Committee is aware that some regions are experiencing labour shortages and that certain sectors are finding it difficult to recruit and retain staff. However, it is the Committee's view that the 457 visa is, and should remain, a means through which Australian businesses can employ 'skilled' overseas workers. Whilst acknowledging that the application of the 457 visa is inherently limited for sectors whose operational requirements are for lower salaried and lower skilled workers, the Committee views the regional concession made in relation to salary levels as sufficient. In the section on RCBs later in this chapter, however, the Committee recommends that DIAC review the functions of the RCBs, which would also take in the regional concession regime.

Non-salary benefits, deductions and other expenses

Non-salary benefits

2.31 DIAC provides a list of non-salary benefits, such as a Living-Away-From-Home-Allowance and bonus shares, that can be afforded to a visa holder but should not contribute to meeting the minimum salary threshold.[43]

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39 Australian Tourism Export Council, *Submission No. 36*, p. 2.

40 Cairns Chamber of Commerce, *Submission No. 27*, p. 4. See also Western Australian Chamber of Commerce and Industry, *Submission No. 53*, p. 12.

41 Commerce Queensland, *Submission No. 25*, p. 4; and Cairns Chamber of Commerce, *Submission No. 27*, p. 5.

42 Snedden, Hall and Gallop Lawyers, *Submission No. 17*, p. 3.

43 DIAC website, http://www.immi.gov.au/skilled/skilled-workers/sbs/eligibility-nomination.htm (accessed 13 June 2007). See also Western Australian Chamber of Commerce and Industry, *Submission No. 53*, p. 11.

2.32 The Committee received some evidence suggesting that salary packaging should be allowed so that non-salary benefits contribute to the minimum salary.[44] The NFF claimed that up to 20 per cent of a farm worker's salary could be made up of non-monetary benefits, such as accommodation and meals.[45] The Australian Mines and Metals Association (AMMA) commented that the minimum salary threshold should recognise payments common in the resource sector:

> International assignment remuneration circumstances such as:
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> - tax equalisation on salaries,
> - cost of living/assignment allowances,
> - salary gross ups,
> - field bonuses, and
> - regular penalty payments
>
> should be recognized as contributing toward the minimum salary calculation.[46]

2.33 Entity Solutions argued that it was in the visa holder's interest to be able to salary package for tax purposes:

> Whilst we certainly support the need for a minimum taxable salary level to exist as part of the eligibility requirements, we note that if this cash component of the salary package is raised higher, these individuals essentially become unable to claim tax free allowances to which they would otherwise be entitled—and therefore their transition to Australia for the purpose of short term work, will ultimately become less attractive. In this manner, we may then lose the 'cream of the crop' resources to other countries that also require their skills. Our suggestion would be that the entire salary package, including both cash and non-monetary components are recognized at both application and monitoring stages.[47]

2.34 In light of the broad scope of the 457 visa program, the Committee does not recommend that non-salary components contribute to visa holders' salaries. The Committee's concern would be that such an initiative could further exacerbate the issue of pay parity between 457 workers and Australian workers. However, with the future refinement of the

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44 Tourism and Transport Forum Australia and Infrastructure Partnerships Australia, *Submission No. 28a*, p. 4; and National Farmers Federation, *Submission No. 22*, p. 5.

45 National Farmers Federation, *Submission No. 22*, p. 5.

46 Australian Mines and Metals Association, *Submission No. 30*, p. 14.

47 Entity Solutions, *Submission No. 44*, p. 11.

program, it may become possible for DIAC to grant companies paying significantly above both the MSL and the industrial instrument some salary exemptions.

Salary deductions and sponsor obligations

2.35 The Committee noted confusion about what constitutes a sponsor's obligation versus a valid salary deduction. The Committee heard that responsibility for health care costs was an area of particular concern.[48] For example, the letter that DIAC currently provides to visa holders does not define who ultimately pays for health insurance and health care costs:

> The sponsoring employer has also undertaken to meet the health and medical costs for sponsored visa holders while the primary visa holder works for them, *or* has undertaken to ensure that all sponsored visa holders have accepted medical insurance arrangements [emphasis added].[49]

2.36 In his second reading speech on the proposed legislative changes to the 457 program, the Minister for Immigration and Citizenship stated that sponsors' obligations include:

- paying the return travel costs from Australia of overseas workers and their family;
- paying certain medical costs on behalf of the overseas worker and his or her family which may involve the employer taking out insurance on their behalf;
- paying any fees that must be paid for the overseas worker to work in the nominated activity and other fees associated with recruitment and migration agents;
- keeping adequate records of compliance with these obligations and providing information to my department when requested in writing.[50]

2.37 The Committee notes that further clarification of this area would be useful, particularly to identify which medical costs are covered and by

48 Australian Industry Group, *Submission No. 57*, p. 2.

49 DIAC, *Submission No. 86a*, p. 5.

50 Hon Kevin Andrews MP, Minister for Immigration and Citizenship, Second reading speech on the *Migration Amendment (Sponsorship Obligations) Bill 2007*, 21 June 2007, http://www.minister.immi.gov.au/media/speeches/2007/ka04-21062007.htm.

whom.[51] The Committee urges DIAC to clearly define who pays for medical costs.

2.38 On the issue of deductions, DIAC commented that:

> … the only allowable deduction that reduces the salary below the Minimum Salary Level (MSL) is Pay-As-You-Go (PAYG) tax. All other deductions must be authorised by the visa holder in accordance with Australian law and can only be made from payments that are above the rate of the MSL.[52]

2.39 The Committee acknowledges that wage deductions are not an imposition for visaed employees when they are being provided with a good or service, at a fair price, that they have agreed to. This also assumes that such negotiations must be free from coercion and profiteering.[53] Issues arise when:

- visaed employees are charged for deductions that they have not authorised;
- a deduction is included as a component of the MSL; [54]
- a visa holder is charged for a cost that is the sponsor's responsibility/obligation; [55] and/or
- a visa holder is coerced into paying for a good or service above the market rate.[56]

2.40 Engineers Australia and the Association of Professional Engineers, Scientists and Managers Australia (APESMA) recommended that DIAC:

> … regulate and monitor deductions from the salaries of skilled migrants including accommodation, airfares and recruitment

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51 Hon Kevin Andrews MP, Minister for Immigration and Citizenship, Second reading speech on the *Migration Amendment (Sponsorship Obligations) Bill 2007*, 21 June 2007, http://www.minister.immi.gov.au/media/speeches/2007/ka04-21062007.htm.

52 DIAC, *Submission No. 86a*, p. 25.

53 Mr Rizvi, DIAC, in Transcript of Senate Standing Committee on Legal and Constitutional Affairs, Estimates, 30 October 2006, p. 37.

54 Engineers Australia and Association of Professional Engineers, Scientists and Managers Australia, *Submission No. 54*, p. 13; and Johninfo Lawyers, *Submission No. 38*, p. 3.

55 Australian Council of Trade Unions, *Submission No. 39*, p. 6. For a list of employer obligations, see the DIAC website, http://www.immi.gov.au/skilled/skilled-workers/sbs/obligations-employer.htm (accessed 15 June 2007).

56 Queensland Government, *Submission No. 65*, p. 5.

> costs to ensure that reported salary levels are the actual salaries paid rather than salaries prior to the deduction of costs.[57]

2.41 The issue of deductions was an area of some concern to the ACTU. The ACTU argued that:

> A temporary skilled overseas worker should not have any deductions made from their pay for rent or any other living costs without express written agreement of the worker. An employer should not be able to deduct money from the pay of a temporary skilled overseas worker for the payment of airfares, migration or recruitment costs.[58]

2.42 It would appear that DIAC's requirements with regard to deductions are not the primary issue. Rather, the concern lies with the sponsor's understanding and interpretation of them. As is discussed in Chapter 3, the Committee believes that a communication strategy needs to be developed to ensure that 457 workers and sponsors understand what deductions are allowable and the implications of impending legislative change in this area.[59] As is recommended in Chapter 3, such guidelines should provide clarity on issues such as health care costs, airfares, and migration and recruitment costs.

2.43 The 457 visa program eligibility criteria specify that the MSL 'must not include':

- accommodation or rental assistance, board, upkeep, meals or entertainment
- incentives, bonuses or commissions
- shares or bonus shares
- travel, holidays, health care/insurance
- vehicles or vehicle allowances
- communications packages
- Living-Away-from-Home-Allowance
- superannuation contributions (either voluntary employee or compulsory employer contributions)

57 Engineers Australia and Association of Professional Engineers, Scientists and Managers Australia, *Submission No. 54*, p. 13.

58 Australian Council of Trade Unions, *Submission No. 39*, p. 9.

59 Hon Kevin Andrews MP, Minister for Immigration and Citizenship, Second reading speech on the *Migration Amendment (Sponsorship Obligations) Bill 2007*, 21 June 2007, http://www.minister.immi.gov.au/media/speeches/2007/ka04-21062007.htm.

- any other non-salary benefits not included in the above, with the exception of Medicare benefits received as a fee for service by medical practitioners.[60]

2.44 Further, as is discussed in Chapter 3, the Migration Amendment (Sponsorship Obligations) Bill 2007 seeks to prohibit certain deductions from the wages of 457 visa holders, such as recruitment costs and migration agent fees (see Figure 3.1).

2.45 The Committee supports these undertakings and, as discussed above, notes that 'the only allowable deduction that reduces the salary below the MSL is PAYG tax' and that '[a]ll other deductions must be authorised by the visa holder in accordance with Australian law and can only be made from payments that are above the rate of the MSL'.[61] The Committee supports the principle, as raised above by the ACTU, that written consent be sought from visa holders prior to such deductions being made.

Ensuring minimum wage standards are met

2.46 The Committee heard evidence that alleged that some 457 sponsors were underpaying their employees and/or requiring they work without remuneration beyond a 38-hour week.[62] DIAC informed the Committee that 40 per cent of breaches during 1 July 2006 and 30 April 2007 involved the MSL.[63] Submitters were concerned about how such breaches were dealt with. Key concerns included:

- perceived inadequacies in DIAC's program for monitoring salary levels and payment, with DIAC placing emphasis on sponsors' responses to paper based questionnaires seemingly to the detriment of random site based monitoring and the independent verification of salary levels;
- the resources available for monitoring (as will be further discussed in Chapter 3); and

60 DIAC website, http://www.immi.gov.au/skilled/skilled-workers/sbs/eligibility-nomination.htm (accessed 10 August 2007).

61 DIAC, *Submission No. 86a*, p. 25. However, it is noted that these provisions are the subject of legislation currently before the Parliament.

62 See, for example, Liquor, Hospitality and Miscellaneous Union, *Submission No. 20*, p. 5; and Dr Wise, Macquarie University, *Transcript of Evidence*, 1 June 2007, p. 61.

63 DIAC, *Submission No. 86a*, p. 36.

- limitations on the powers of both DIAC and the Workplace Ombudsman (previously the Office of Workplace Services) to enforce wage requirements and rectify breaches.[64]

2.47 DIAC acknowledged that they do not 'currently have the power to enforce the recovery of lost wages'.[65] Under proposed legislative changes to the program, 'where DIAC is litigating against an employer, the court would have the power to order the employer to pay a person monies owed under an obligation in addition to imposing a civil penalty'.[66] Additionally, Commonwealth and state workplace inspectors would be empowered to enforce industrial relations legislation and relevant awards and agreements, and visa holders would be able to pursue restitution in the courts.[67]

2.48 Mr Bob Kinnaird, a prominent commentator on the 457 visa program, noted a number of technical problems with monitoring 'employer compliance' in this area: if initially the salary is not properly calculated, then DIAC would be monitoring the incorrect salary; for visaed employees covered by an Australian award, their salaries are not annually indexed, as they would be for Australian employees; and that DIAC does not collect information on the 'actual base salaries' paid by employers.[68] Mr Kinnaird recommended that DIAC collect and publish data on 'actual salaries paid to 457 visa-holders'.[69]

2.49 The Committee was pleased to see the Minister's recent announcement flagging improved compliance arrangements in terms of sponsorship obligations, including minimum salary levels.[70] The Committee believes these changes, particularly the increased powers to monitor sponsors and penalise non-compliance, will substantially strengthen the integrity of the 457 visa program. Until the on-ground effects of the proposed changes can be assessed, the Committee does not feel substantive recommendations in this area are warranted. However, the

64 See, for example, Mr Fary, Association of Professional Engineers, Scientists and Managers Australia, *Transcript of Evidence*, 1 June 2007, p. 20; Communications, Electrical and Plumbing Union of Australia, *Submission No. 61*, pp. 21-22; Australasian Meat Industry Employees Union, *Submission No. 23*, p. 14; and Australian Manufacturing Workers Union, *Submission No. 40,* p. 61.

65 DIAC, *Submission No. 86a,* p. 8.

66 DIAC, *Submission No. 86a*, p. 8.

67 DIAC, *Submission No. 86a*, p. 8.

68 Mr Kinnaird, *Exhibit No. 8*, p. 59.

69 Mr Kinnaird, *Exhibit No. 8,* p. 64.

70 Hon Kevin Andrews MP, Minister for Immigration and Citizenship, Second reading speech on the *Migration Amendment (Sponsorship Obligations) Bill 2007*, 21 June 2007, http://www.minister.immi.gov.au/media/speeches/2007/ka04-21062007.htm.

Committee maintains that DIAC should endeavour to provide greater transparency by collecting and publishing data on the actual base salaries of visaed employees. The Committee makes a recommendation on this matter in Chapter 3.

Comparison between 457 visa and H-1B visa in the United States

2.50 The Committee received comparative information on the 457 visa and H-1B visa in the US as part of the Commonwealth Government submission to the inquiry.[71] The H1-B visa is briefly discussed below.

2.51 The H-1B visa provides for temporary employment in the US of a person in a specialty occupation for a maximum of six years. 'Specialty occupations' under the H-1B program include 'engineers, teachers, computer programmers, medical doctors, and physical therapists'.[72] The H-1B visa has an annual limit of 65,000 visas.[73] DIAC noted that, unlike the family members of 457 workers, the 'spouses and dependants of H-1B workers do not have automatic work rights'.[74]

2.52 The US Department of Labor H-1B Specialty (Professional) Workers website specifies the conditions under which an individual may be employed on an H-1B visa.[75] The employer must submit a completed Labor Condition Application (LCA) which, amongst other things, aims to ensure that the employer is not paying less than the 'prevailing wage'. In this regard, the employer must request that a State Workforce Agency (SWA) prevailing wage determination is made:

> The prevailing wage rate is defined as the average wage paid to similarly employed workers in the requested occupation in the area of intended employment. This wage rate is usually obtained by contacting the State Workforce Agency … having jurisdiction over the geographic area of intended employment or from other legitimate sources of information such as the Online Wage Library.

71 Commonwealth Government, *Submission No. 33*, pp. 11-12.

72 See US Department of Labor website, http://www.dol.gov/compliance/guide/h1b.htm (accessed 14 August 2007).

73 See US Department of Labor website, http://www.dol.gov/compliance/guide/h1b.htm (accessed 14 August 2007).

74 Commonwealth Government, *Submission No. 33*, p. 12.

75 See US Department of Labor website, http://www.foreignlaborcert.doleta.gov/h-1b.cfm.

> The Immigration and Nationality Act … requires that the hiring of a foreign worker will not adversely affect the wages and working conditions of U.S. workers working in the occupation in the area of intended employment. To comply with the statute, the Department's regulations require the wages offered to a foreign worker must be the prevailing wage rate for the occupational classification in the area of employment.
>
> The requirement to pay prevailing wages, as a minimum, is true of most employment based visa programs involving the Department of Labor. In addition, the H-1B, H-1B1, and E-3 programs require the employer to pay the prevailing wage or the actual wage paid by the employer to workers with similar skills and qualifications, whichever is higher.[76]

2.53 By completing and signing the LCA, the employer agrees to several attestations regarding an employer's responsibilities, including the wages, working conditions and benefits to be provided to the H-1B visa holder. According to a US Department of Labor fact sheet, the regulations implementing the H-1B provisions of the US *Competitiveness and Workforce Improvement Act* require all H-1B employers to:

- Offer benefits to H-1B workers on the same basis as offered to their U.S. workers;
- Pay full wages to any H-1B worker placed in a non-productive status by the employer;
- Comply with whistleblower provisions that protect employees—including former employees and applicants—who disclose information about potential violations or cooperate in an investigation or proceeding; and,
- Refrain from requiring an H-1B worker to pay the employer's petition filing fees or imposing a penalty for early cessation of employment.[77]

2.54 The US Government grants 'foreign labor certification' on the condition that the above requirements are met.[78] More details on the working

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76 US Department of Labor, 'Foreign Labor Certification Prevailing Wages', http://www.foreignlaborcert.doleta.gov/wages.cfm (accessed 14 August 2007).

77 US Department of Labor, 'Fact Sheet 42: Publication of Final H-1B Regulations', http://www.dol.gov/esa/regs/compliance/whd/whdfs42.htm (accessed 14 August 2007).

78 See US Department of Labor website, http://www.dol.gov/compliance/topics/wages-foreign-workers.htm.

condition requirements of H-1B workers are set out in the Code of Federal Regulations:

> *Establishing the working conditions requirement.* The second LCA requirement shall be satisfied when the employer affords working conditions to its H-1B non-immigrant employees on the same basis and in accordance with the same criteria as it affords to its U.S. worker employees who are similarly employed, and without adverse effect upon the working conditions of such U.S. worker employees. Working conditions include matters such as hours, shifts, vacation periods, and benefits such as seniority-based preferences for training programs and work schedules. The employer's obligation regarding working conditions shall extend for the longer of two periods: the validity period of the certified LCA, or the period during which the H-1B non-immigrant(s) is (are) employed by the employer.
>
> *Documentation of the working condition statement.* In the event of an enforcement action pursuant to subpart I of this part, the employer shall produce documentation to show that it has afforded its H-1B non-immigrant employees working conditions on the same basis and in accordance with the same criteria as it affords its U.S. worker employees who are similarly employed.[79]

2.55 The Wage and Hour Division of the Department of Labor maintains a list of employers who have been disbarred or disqualified from obtaining approval for future H-1B petitions.[80] The US Department of Labor also has the power to:

> … investigate when the Secretary of Labor personally certifies that there is reasonable cause to believe that the employer is not in compliance and authorizes the investigation, or when a credible source provides information that includes allegations that within the past 12 months an employer has willfully failed to meet an LCA condition, has engaged in a pattern or practice

79 US Department of Labor, 'Code of Federal Regulations Pertaining to US Department of Labor', http://www.dol.gov/dol/allcfr/Title_20/Part_655/20CFR655.732.htm (accessed 14 August 2007).

80 See US Department of Labor website, http://www.dol.gov/esa/whd/immigration/H1BDebarment.htm (accessed 14 August 2007).

> of violations or has committed a substantial failure to meet an LCA condition that affects multiple employees.[81]

2.56 Where there are violations of the H-1B visa conditions:

> … the Administrator of the Wage and Hour Division may assess civil money penalties with maximums ranging from $1,000 to $35,000 per violation, depending on the type and severity of the violation. The Administrator may also impose other remedies, including payment of back wages.[82]

2.57 There is some debate evident regarding the 'prevailing wage' under the H-1B visa. On the one hand, for example, the US Center for Immigration Studies, as part of a study on the US information technology sector, noted that:

> According to the applications filed in 2005, it appears that employers may be significantly understating what U.S. computer workers are earning in order to justify paying low wages to H-1B guest workers in those occupations. In 2005, H-1B employer prevailing wage claims averaged $16 000 below the median wage for U.S. computer workers in the same location and occupation.[83]

2.58 However, on the other hand, the US Labor Secretary, Elaine L Chao, in a press release on 7 June 2007, stated that:

> The department is committed to vigorously enforcing the H-1B provisions that guard against employers undercutting American workers by underpaying temporary foreign workers.[84]

2.59 As discussed earlier, the 457 visa is underpinned by a gazetted minimum salary regime rather than a 'prevailing wage' rate that is individually determined on an occupational basis, region-by-region.

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81 See US Department of Labor website, http://www.dol.gov/esa/regs/compliance/whd/whdfs59.htm (accessed 14 August 2007).

82 See US Department of Labor website, http://www.dol.gov/compliance/guide/h1b.htm (accessed 14 August 2007).

83 J Miano, 'Low salaries for low skills wages and skill levels for H-1B computer workers, 2005', Center for Immigration Studies, April 2007, p. 1, http://www.cis.org/articles/2007/back407.pdf.

84 Media release by the US Labor Secretary, Elaine L Chao, 7 June 2007, http://www.dol.gov/opa/media/press/esa/ESA20070698.htm (accessed 14 August 2007).

Skill requirements

2.60 The ASCO system, as compiled by the ABS, plays a central role in defining what constitutes a 'skilled' occupation under the 457 visa program. The system classifies occupations into nine broad categories (see Appendix F for the major occupations under ASCO 1-9).

2.61 A minimum skill level applies to all positions to be filled by overseas employees under the 457 visa program. The list of approved occupations that meet the minimum skill level requirement is gazetted under the Migration Regulations 1994.[85] This gazetted list is currently based on most of the occupations identified under ASCO levels 1-4 (managerial, professional, associate professional and trade).[86] Under concessional arrangements in designated regional areas, ASCO levels 5-7 can also be sponsored, with certification from an RCB. ASCO levels 8-9 fall outside the 457 visa program.

2.62 The focus of the 457 visa program is on filling vacancies in skilled occupations covering the top four ASCO levels. For example, in 2006-07, the top five occupations for primary 457 visa grants were computing and IT professionals, nurses and doctors—see Table 2.1. Table 2.2 sets out the number of 457 primary visa grants in 2006-07 by industry classification of sponsor.

85 See Gazette Notice Minimum Salary Levels and Occupations—Temporary Business Long Stay (457) visa, DIAC website, http://www.immi.gov.au/skilled/skilled-workers/sbs/occupations.pdf (accessed 20 June 2007).

86 Australian Bureau of Statistics, Catalogue 1220.0—ASCO Second Edition, 1997, ABS website, http://www.abs.gov.au/ausstats/abs@.nsf/0/E32817571E32A167CA25697E00185235?opendocument (accessed 25 June 2007).

Table 2.1 Top 15 occupations for primary 457 visa grants in 2006-07 (to 31 March 2007)[87]

Occupation	2005-06	2006-07
Computing Professionals NEC[88]	1 690	2 350
Registered Nurse	1 880	2 170
General Medical Practitioner[89]	730	1 290
Business and Information Professionals NEC	1 080	1 130
Medical Practitioner In Training	570	1 120
Management Consultant	650	880
Applications and Analyst Programmer	660	790
Chef	740	750
Cook	600	740
Metal Fabricator	650	640
Marketing Specialist	550	640
Specialist Managers NEC	660	640
Welder (First Class)	530	630
Software Designer	310	610
General Manager	600	570
Others	17 480	19 230
Total	**29 370**	**34 170**

Source Commonwealth Government, *Submission No. 33b* , p. 10.

87 Comparative data 2005-06 (to 31 March 2006) and 2006-07 (to 31 March 2007), see Note 1, '[t]his report is based on … data recorded for visa subclass 457 in the 2006-07 financial year and provides a comparison with the same period in the previous year', Commonwealth Government, *Submission No. 33b*, p. 4.

88 Not elsewhere classified.

89 Until 1 April 2005, medical practitioners applied for a visa in Medical Practitioner visa (subclass 422). From that date, medical practitioners have been encouraged by DIAC to apply for a 457 visa.

Table 2.2 Primary 457 visa grants in 2006-07 (to 31 March 2007) by industry classification of sponsor[90]

Industry Classification	2005-06	2006-07
Accommodation, Cafes and Restaurants	1 620	1 960
Agriculture, Forestry and Fishing	880	610
Communication Services	2 450	3 350
Construction	2 620	3 120
Cultural and Recreational Services	520	520
Education	1 480	1 480
Electricity, Gas and Water Supply	600	560
Finance and Insurance	1 070	1 500
Government Administration and Defence	330	610
Health and Community Services	4 250	5 820
Manufacturing	3 030	3 100
Mining	2 090	2 740
Personal and Other Services	2 060	2 160
Property and Business Services	3 670	3 500
Retail Trade	840	870
Transport and Storage	460	580
Wholesale Trade	890	640
Not Recorded	510	1 060
Total	**29 370**	**34 170**

Source Commonwealth Government, *Submission No. 33b* , p. 9.

90 Comparative data 2005-06 (to 31 March 2006) and 2006-07 (to 31 March 2007), see Note 1, '[t]his report is based on … data recorded for visa subclass 457 in the 2006-07 financial year and provides a comparison with the same period in the previous year', Commonwealth Government, *Submission No. 33b*, p. 4.

Australian and New Zealand Standard Classification of Occupations

2.63 As noted above, the ASCO system is central to defining what constitutes a 'skilled' occupation under the 457 visa program. The ABS defines five skill levels across the nine ASCO categories in terms of the Australian Qualification Framework levels—see Table 2.3.[91]

Table 2.3 Major ASCO groups and skill level

ASCO level	Occupational group	Skill level
1	Managers and Administrators	1
2	Professionals	1
3	Associate professionals	2
4	Tradespersons and related workers	3
5	Advanced clerical and service workers	3
6	Intermediate clerical, sales and service workers	4
7	Intermediate production and transport workers	4
8	Elementary clerical, sales and service workers	5
9	Labourers and related workers	5

Source *ABS*, 1220.0—Australian Standard Classification of Occupations (ASCO) Second Edition, 1997, http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/FFE8817575A7F191CA25697E001851F5?opendocument and http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/176EB288428057F3CA25697E00184D40?opendocument (accessed 19 June 2007).

2.64 A new standard classification of occupations, the Australian and New Zealand Standard Classification of Occupations (ANZSCO), has been developed as a joint project between the ABS, Statistics NZ and DEWR, in consultation with stakeholders. ANZSCO will replace ASCO but has not yet been implemented for use under the 457 visa program. Table 2.4 provides a comparison between ANZSCO and ASCO.

2.65 As set out in Table 2.4, the ABS define five skill levels across the eight ANZSCO categories in terms of the Australian Qualification Framework levels.[92] As this table demonstrates, the introduction of ANZSCO may have implications for the definition of a 'skilled' occupation under the 457 visa program, given the change in the classification of skill levels.

91 See Australian Bureau of Statistics, 1220.0—ASCO Second Edition, 1997, http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/176EB288428057F3CA25697E00184D40?opendocument (accessed 19 June 2007).

92 See Australian Bureau of Statistics, 1221.0—*Information Paper: ANZSCO – Australian and New Zealand Standard Classification of Occupations*, 2005, http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/C4BECE1704987586CA257089001A9181?opendocument (accessed 19 June 2007).

2.66 For example, while it appears that ASCO 1-4 might translate directly across as ANZSCO 1-3, as Table 2.4 indicates, the translation of ASCO 5-7 (the regional skills concessions levels for the 457 visa program) is not quite so clear. ANZSCO could potentially allow a broader range of occupations to be defined as 'skilled' and 'semi-skilled' under the regional concession, with the relatively high ANZSCO 4-6 groups incorporating lower skill levels.

Table 2.4 Comparison between ANZSCO and ASCO groups and skill levels

Skill level	ANZSCO	ASCO Second Edition	Skill level
1, 2	1 Managers	1 Managers and Administrators	1
1	2 Professionals	2 Professionals	1
2, 3	3 Technicians and Trades Workers	3 Associate Professionals	2
2, 3, 4, 5	4 Community and Personal Service Workers	4 Tradespersons and Related Workers	3
2, 3, 4, 5	5 Clerical and Administrative Workers	5 Advanced Clerical and Service Workers	3
2, 3, 4, 5	6 Sales Workers	6 Intermediate Clerical, Sales and Service Workers	4
4	7 Machinery Operators and Drivers	7 Intermediate Production and Transport Workers	4
4, 5	8 Labourers	8 Elementary Clerical, Sales and Service Workers	5
		9 Labourers and Related Workers	5

Source ABS, *Information Paper: ANZSCO—Australian and New Zealand Standard Classification of Occupations*, September 2005, http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/1675E61E8AD9F6F9CA257089001A2BC1?opendocument (accessed 19 June 2007).

2.67 The Committee draws attention to the fact that the implementation of the new ANZSCO system might therefore have significant implications for the definition of a 'skilled' occupation under the 457 visa program and the current occupations included and excluded under the regional skills concession, as this system is central to how occupations are classified under the program.

2.68 Several issues were raised with the Committee regarding the ASCO system. Firstly, many contributors to the inquiry commented on the limited flexibility of the ASCO system in defining new/emerging occupations and specialisations. For example, a tourism industry representative pointed out that the ASCO system did not cater for what was essentially a 'new academic discipline' of 'tourism managers, event managers, project facility and property facility managers and tourism

attraction supervisors'.[93] Overall, it was felt that ASCO does not allow for changes that have occurred in occupational descriptions over recent years, where job descriptions and functions cross the boundaries of traditionally understood occupations:

> ASCO is not a comprehensive list of skilled occupations and lags well behind the establishment of new classifications such that employers are forced to either modify the duties of a classification to match an ASCO classification or to claim exceptional circumstances and request the Department of Employment and Workplace Relations to establish the skill rating.[94]

> … with advances in technology, certain occupations have become more diversified and specialised while new occupations have also emerged and evolved. Reliance on the ASCO classification structure which had its second (latest) edition finalised more than a decade ago (in mid-1996), is no longer plausible as it does not adequately account for certain more specialised occupations within industry.[95]

2.69 In particular, representatives from the agricultural industry were concerned that ASCO did not reflect skilled roles in the sector:

> The ASCO codes used within Australia's skilled migration programs, including the temporary business visas, are difficult to use in relation to the horticulture industry. The types of specialisations and roles of skilled workers within this industry do not usually fall within the classifications set out in the ASCO code.[96]

> … many agri-food businesses are finding the current system frustrating as it does not have the flexibility required to meet the needs of the industry. This is due to many agricultural skills not being recognised by Australian and New Zealand Standard Classification of Occupations …[97]

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93 Ms Davidson, Tourism and Transport Forum Australia and Infrastructure Partnerships Australia, *Transcript of Evidence*, 17 May 2007, p. 42.

94 Australian Mines and Metals Association, *Submission No. 30*, p. 18.

95 Western Australian Chamber of Commerce and Industry, *Submission No. 53*, p. 11. See also Migration Institute of Australia, *Submission No. 9*, p. 11; and National Farmers Federation, *Submission No. 22*, p. 4.

96 Growcom, *Submission No. 6*, p. 2.

97 WA Department of Agriculture and Food, *Submission No. 77*, p. 2.

2.70 The MIA pointed out that recent policy changes in employer sponsored permanent residence arrangements had enabled presentation of a combination of ASCO classifications to more appropriately describe the nature of the occupation and appropriate skill level, with this regarded as providing 'a more genuine and realistic presentation of occupational descriptions for visa purposes'.[98] As the Cairns Chamber of Commerce commented, for example:

> … employers in our region are generally small and micro level businesses. Staff are required to undertake a range of roles. This multi-skilling if you like is not well suited to the ASCO definitions and the limitation in using only one code for a position. We find that some occupations are not covered at all within ASCO and the skill level for positions not adequately reflecting the current situation.[99]

2.71 Secondly, other inquiry participants pointed to a disconnect between the industry endorsed national training packages and the ASCO system:

> The reality is that there are national training packages in Australia, which I think is being overlooked in this whole debate. We talk about skills yet there is very little talk about national training packages. There is a lot of talk about ASCO and ANZSCO occupational codings, which really bear no relationship to employment issues and are there for statistical purposes; yet they are being used by the department of immigration for a completely different and totally unrelated purpose.[100]

2.72 Finally, in commenting on the outdated nature of the ASCO system, several participants were concerned that, while the new updated ANZSCO had been released in September 2006, it had not yet been implemented by DIAC:

> AMMA understands that there is a proposal to replace ASCO with a more contemporary system the Australian and New Zealand Classification of Occupations … This should occur as a matter of priority.[101]

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98 Migration Institute of Australia, *Submission No. 9*, p. 11.

99 Cairns Chamber of Commerce, *Submission No. 27*, p. 6.

100 Mr Tame, Australia Meat Holdings Pty Ltd, *Transcript of Evidence*, 16 April 2007, p. 62.

101 Australian Mines and Metals Association, *Submission No. 30*, pp. 18-19. See also Migration Institute of Australia, *Submission No. 9*, p. 11.

2.73 The Committee notes that the list of approved occupations that meet the minimum skill level (ASCO 1-4) for the 457 visa are gazetted under the Migration Regulations 1994. However, it is unclear to what extent DIAC and DEWR customise this list to maintain the integrity of the 457 visa program in terms of listing only 'skilled' occupations and migration occupations in demand.[102] The Committee views the gazetted list of approved occupations as representing an opportunity in this regard, particularly with the impending implementation of ANZSCO.[103]

Recommendation 8

2.74 **The Committee recommends that the Department of Immigration and Citizenship and the Department of Employment and Workplace Relations:**

- **work with stakeholders to review the impact on the 457 visa program of the transition from the Australian Standard Classification of Occupations to the Australian and New Zealand Standard Classification of Occupations (ANZSCO);**
- **regularly review the list of approved occupations gazetted under the Migration Regulations 1994 that meet the minimum skill level for the 457 visa as defined under the new ANZSCO to ensure that this list maintains the integrity of the 457 visa program in listing only 'skilled' occupations; and**
- **communicate to stakeholders and the Australian public what impact the adoption of the ANZSCO system will have on the definition of a 'skilled' occupation under the 457 visa program in terms of ensuring a continued benefit to Australia.**

102 For example, DIAC comment that occupations in 'over supply in Australia may be deleted from the list of occupations able to be filled', *Sponsoring a Temporary Overseas Employee to Australia*, Booklet No. 11, July 2007, p. 37.

103 DIAC confirmed that the adoption of the ANZSCO scheme 'is on the department's forward work programme where relevant IT changes are scheduled to support this change', *Submission No. 86a*, p. 10.

Recommendation 9

2.75 **The Committee recommends that the Department of Immigration and Citizenship and the Department of Employment and Workplace Relations work with stakeholders to improve the flexibility of the Australian Standard Classification of Occupations and the Australian and New Zealand Standard Classification of Occupations in defining new/emerging occupations and specialisations.**

2.76 A number of contributors to the inquiry felt that 'too much' was being asked of the 457 visa:

> Where a temporary resident needs to enter Australia on assignment, in almost all cases it is the one visa option available, regardless of their background or potential risk to the labour market. This visa category therefore aims to meet the needs of senior executives of multi national organisations, as well as … people who recently finished an apprenticeship in a trade.[104]

2.77 This led to a call from some for the program to be divided into two separate visa classes for 'higher' and 'lower' ASCO levels.[105] As Dr Davis from ACCI commented:

> We have an open mind about creating a separate visa class for ASCO 5 to 7. We can see some merit in that. It is quite clear-cut. You can preserve the integrity of the 457 program more clearly.[106]

2.78 There was a view that there had been fewer problems with the ASCO 1-3 classifications under the program. For example, Professor McDonald commented, with regard to detailed research that he and other academics had conducted on the 457 visa program:

> In general, our assessment from our research is that the results have been very good indeed, but there have been problems at the edges, especially as the skill level of the immigrant has moved downwards. The 457 visa was originally designed for meeting urgent needs at higher skill levels. It may not be the

104 Tourism and Transport Forum Australia and Infrastructure Partnerships Australia, *Submission No. 28a*, p. 2.

105 See, for example, Tourism and Transport Forum Australia and Infrastructure Partnerships Australia, *Submission No. 28a*, p. 2; and Fragomen Australia, *Submission No. 13*, p. 8.

106 Dr Davis, Australian Chamber of Commerce and Industry, *Transcript of Evidence*, 1 June 2007, p. 43.

> most appropriate way of dealing with demand at lower skill levels.[107]

2.79 Similarly, another witness stated:

> We only deal in ASCO group one to three occupations and primarily groups one and two, which are degree qualified or management level. We feel that a lot of the changes that are being suggested as a result of things being reported in the media simply do not apply to the people that we are dealing with.[108]

2.80 The Committee sees some merit in this proposal that the program be divided into two parts but believes that, with the impending implementation of ANZSCO and the fast-tracking initiative announced by the Minister for employers with a demonstrated record of compliance under the program,[109] the current single visa class should remain in place for now. However, the Committee maintains that this matter should be further investigated by DIAC. There may be some benefit for the broader program in having one visa class for higher ASCO classifications and another visa class for lower ASCO classifications—for example, some parts of ASCO 4 and those that currently constitute what is often termed as the 'regional 457 visa'.[110]

Recommendation 10

2.81 **The Committee recommends that the existing 457 visa subclass be maintained in its current form and not be divided into two visa subclasses for higher and lower (regional) Australian Standard Classification of Occupations classifications. However, the Committee recommends that the Department of Immigration and Citizenship and the Department of Employment and Workplace Relations further investigate this area, with a view to enhancing monitoring and reporting, and improving arrangements for regional areas of Australia.**

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107 Professor McDonald, ANU, *Transcript of Evidence*, 1 June 2007, p. 35. This research, undertaken by Dr Khoo, Professor McDonald and Professor Hugo, has been published in a series of reports, the most recent of which is entitled, *Temporary Skilled Migrants' Employment and Residence Outcomes: Findings from the Follow-up Survey of 457 Visa Holders*, DIMIA, Canberra, 2006.

108 Miss Northover, Entity Solutions, *Transcript of Evidence*, 14 March 2007, pp. 51-52. See also Mr Ware, Australian Contract Professions Management Association, *Transcript of Evidence*, 16 May 2007, p. 62.

109 The fast-tracking initiative essentially creates a two-tiered system but at the enterprise level rather than at the occupational/sectoral level.

110 See, for example, the Cairns Chamber of Commerce on this point, *Submission No. 27*, p. 3.

Regional skills concession

2.82 In recognition of the special skill needs of regional Australia, there are arrangements in place to allow regionally based employers to access reduced skill and salary requirements where the business has sought certification by a local RCB. Under concessional arrangements in designated regional areas, ASCO levels 5-7 can be sponsored (see Appendix F for the list of major occupational groups that can be sponsored under this arrangement). The regional concession does not extend to unskilled positions. (The role of RCBs is discussed later in this chapter.)

2.83 The implementation of ANZSCO, as discussed above, will also clearly have a major impact on the regional concession regime under the 457 visa program—for example, if ANZSCO levels 4-6 are used to define the new regional concessional occupations, as is clear from Table 2.4 some of these occupations may previously have been classified as lower than ASCO 7 (that is, outside the current regional concession).

2.84 The Committee heard of the usefulness of the regional skills concession from a number of participants. For example, the Cairns Chamber of Commerce commented that the 'regional 457 visa' had been 'an important resource for regional employers' in addressing particular issues affecting such employers.[111] However, others argued that the regional skills concession should be abolished:

> … there is no justification for exemptions from skill requirements. Unemployment levels in many non-major city areas of Australia are well above 5 per cent (the overall national unemployment rate). Youth unemployment is as high as 40% in some regional areas. In addition under-employment is currently at six per cent of the labour force. These are the people that the government and employers should be attracting to the positions in regional areas.[112]

2.85 The Committee notes the implications of the implementation of ANZSCO for both the regional skills concession and the role of RCBs. The Committee also acknowledges comments from some regional representatives about there being 'scope for further refinement of the regional program, particularly the regional 457 visa'.[113] Accordingly,

111 Cairns Chamber of Commerce, *Exhibit No. 34*, p. 2.

112 Australian Council of Trade Unions, *Submission No. 39*, pp. 26-27. See also Australian Manufacturing Workers Union, *Submission No. 40*, pp. 22-23.

113 Cairns Chamber of Commerce, *Exhibit No. 34*, p. 2. Professor McDonald, an ANU researcher on the 457 visa program, also commented that research on the 'lower level

the Committee regards it as important that there be a review of this area as part of a broader review of the role of RCBs and the 'regional 457 visa'. A recommendation on this matter is made later in this chapter, in the section on RCBs.

Sectoral difficulties in obtaining visas—skill issues

2.86 The Committee received evidence that some sectors, such as transport and meat processing, were experiencing difficulties in obtaining 457 visas for certain occupations.

2.87 In the case of the transport industry, there was debate about use of 457 visas in the sector, particularly for road transport drivers. The Committee heard that, while some parties were interested in pursuing this option, a number of structural issues had been identified in the sector relating to the training, recruitment and retention of Australian workers.

2.88 The Transport Workers Union (TWU) advised that it was not aware of any 457 visa holders working as drivers in the industry.[114] However, road transport drivers are classified at ASCO 7[115] and so could theoretically be sponsored under the regional skill concessions of the visa. Further, where Australian registration or licensing is required to undertake the nominated position, DIAC would have to be satisfied that the worker would be eligible for the relevant licence before a visa would be approved—that is, whether the relevant state/territory licensing authority would grant such a licence to the visa applicant.

2.89 Both the TWU and Australian Trucking Association (ATA) commented that the industry was facing significant skills shortages:

> The basis of our submission is that by 2020 freight volumes will double. The industry needs 77,000 extra drivers. To get these we need to train 3,850 drivers each year. In contrast, our research has shown that the number of drivers has fallen by 4,700 since 2004 to 2007.[116]

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occupations' is a 'high priority' as most research to date has only focused on the higher occupational levels, *Transcript of Evidence*, 1 June 2007, p. 39.

114 Mr Crosdale, Transport Workers Union, *Transcript of Evidence*, 13 June 2007, p. 10.

115 See Australian Bureau of Statistics, Catalogue 1220.0—ASCO Second Edition, 1997, ABS website, http://www.abs.gov.au/ausstats/abs@.nsf/0/E32817571E32A167CA25697E00185235?opendocument (accessed 25 June 2007).

116 Mr Crosdale, Transport Workers Union, *Transcript of Evidence*, 13 June 2007, p. 1. See Australian Trucking Association, *Submission No. 64*, p. 2. Infrastructure Partnerships

2.90 However, while there was consensus on this point, a difference of opinion was evident on how this skills shortage should be addressed. The ATA was pursuing migration options in combination with training, recruitment and retention strategies for Australian workers. For example, the Committee heard that the ATA had negotiated a draft Labour Agreement with DIAC and DEWR to 'source 100 persons', as a way to 'test the market in this area'.[117]

2.91 In contrast, the TWU drew attention to the 'poor safety outcomes and low rates of pay' in the industry as barriers to recruitment and retention of Australian workers and emphasised that 457 visas were 'not the answer'.[118] Instead, the TWU pointed to the need for an increased investment in training Australian workers and targeted recruitment strategies, to make the industry more attractive to new entrants.[119]

2.92 In response, the ATA pointed to the aims and objectives of the National Industry Skills Initiative report, *Driving Australia's Future: A Report and Action Plan Addressing the Skills Needs of the Road Freight Transport Industry*[120], in seeking to improve the 'recruitment and retention of skilled employees' and develop an 'effective training culture within the industry to encourage the skilling of employees'.[121]

2.93 The Committee notes that the discussion here arguably relates more to systemic domestic problems in the industry than to issues relevant to the temporary skilled migration program. The Committee also recognises that there are crucial safety, training and skills qualification issues relating to this industry and to road transport drivers in particular. The announcement by the Minister for Immigration and Citizenship of a separate review of skills needs of this sector and use of the 457 visa program was therefore welcomed by the Committee:

> In response to consultations with members of the industry, a trucking industry working group will assess the need and

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Australia and Tourism and Transport Forum also highlighted this point—see *Submission No. 28*, p. 5.

117 Mr Gow, Australian Trucking Association, *Transcript of Evidence*, 13 June 2007, p. 14.

118 Mr Crosdale, Transport Workers Union, *Transcript of Evidence*, 13 June 2007, p. 1.

119 Transport Workers Union, *Submission No. 87*, p. 8. See also the study conducted by Globe Workplace for the Transport Workers Union, *Workforce Challenges in Road Transport: Truck Driver Recruitment, Retention and Retirement Research Project*, January 2007, *Exhibit 30*.

120 *Driving Australia's Future: A Report and Action Plan Addressing the Skills Needs of the Road Freight Transport Industry*, Canberra, August 2003.

121 Australian Trucking Association, *Submission No. 64*, p. 3.

> circumstances in which the use of the skilled temporary 457 visa provisions may or may not be appropriate.[122]

2.94 It is also noted that the Senate Standing Committee on Employment, Workplace Relations and Education Committee is currently undertaking an inquiry into workforce challenges in the transport industry.[123]

2.95 In the case of the meat processing industry, a similar debate emerged about a range of structural issues in the sector relating to training, recruitment and retention of Australian workers and the use of 457 visas in the industry, particularly concerning the classification of 'skilled' occupations within the sector.[124]

2.96 For example, the AMIEU held the view that, excepting 'some parts of Queensland', there had been 'no real requirement' to bring in 457 workers from overseas as sufficient numbers of Australian workers were available to work in the industry.[125] The AMIEU also claimed that the use of the 457 visa in the industry was affecting the career path of Australian workers.[126] Wages and conditions in the industry were highlighted as a further barrier to the recruitment of Australian workers: 'there is very little evidence of any difficulty in employers getting sufficient people to work if they are prepared to pay what we regard as proper wages and conditions'.[127]

2.97 The AMIEU also raised concerns about the skills assessment process for 457 workers in the industry, particularly regarding offshore training and skills assessment practices involving some TAFE colleges:

> An area of extreme difficulty in the meat processing industry is migrant workers being accredited to the requisite AQF qualification for nomination when in practice the worker does

122 Media release by the Minister for Immigration and Citizenship, 'Working group to examine skill needs of trucking industry', 30 May 2007, http://www.minister.immi.gov.au/media/media-releases/2007/ka07048.htm.

123 Senate Committee website, http://www.aph.gov.au/Senate/committee/eet_ctte/transport_employment/index.htm (accessed 25 June 2007).

124 The Committee heard that there are currently some 2,000 workers on 457 visas in the industry—see Mr Bird, Australasian Meat Industry Employees Union, *Transcript of Evidence*, 16 April 2007, p. 1.

125 Mr Bird, Australasian Meat Industry Employees Union, *Transcript of Evidence*, 16 April 2007, p. 1.

126 Mr Smith, Australasian Meat Industry Employees Union, *Transcript of Evidence*, 16 April 2007, p. 3.

127 Mr Bird, Australasian Meat Industry Employees Union, *Transcript of Evidence*, 16 April 2007, p. 4.

> not truly posses the skill level … The net result is that the workers inevitably need further training when they arrive in Australia …[128]

2.98 However, this claim was contested in other evidence to the inquiry:

> … the Institute stands by the quality of its training and assessment services provided offshore … our offshore training has been subject to considerable internal and external scrutiny and found to meet the requirements of both the training package and Australian quality standards. Given that a large number of our offshore students have subsequently been granted temporary visas to work in Australia, the training would also seem to [be] meeting industry demand for workers in Australia meat processing plants.[129]

2.99 Further, the AMIEU alleged that, while some employers had nominated the allowable occupation of 'slaughterperson' (ASCO 4) in their 457 visa application, 'there is a widespread practice of meat processing employers making this nomination and then utilizing sponsored employees in clearly impermissible activities such as boning (ASCO classification 9213-13) and slicing (ASCO classification 9213-13)'.[130]

2.100 The Australian Meat Industry Council (AMIC) refuted this claim:

> There have been certain allegations made about the use and abuse of 457 labour, some of which have been leveled at the meat industry. Information provided from various sources has not supported these allegations as they apply in the meat industry. Some of these allegations relate to an error in the Australian Standard Classification of Occupations … particularly that known as Boners and Slicers. It is believed that DIMA stopped processing 457 labour applications partly because of the allegations and partly about other unspecified concerns about the type of labour used in the meat industry.[131]

2.101 AMIC argued that, while boners and slicers have been classified at ASCO 9, they should be classified at ASCO 4, as at least equal in competency to a slaughterperson: '[t]he skill requirement, it would be

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128 Australasian Meat Industry Employees Union, *Submission No. 23*, pp. 11-12.

129 South West Institute of Technical and Further Education, *Submission No. 83*, p. 2.

130 Australasian Meat Industry Employees Union, *Submission No. 23*, p. 10.

131 Australian Meat Industry Council, *Submission No. 26*, p. 1.

argued I think by most employers, for boner and slicer would be ahead of slaughterperson'.[132]

2.102 Tabro Meat Pty Ltd, Midfield Meat International Pty Ltd and T&R Pastoral Pty Ltd similarly commented that, over recent months, their 457 visas had not been processed by DIAC and reinforced that they had not breached their employer sponsorship obligations under the program and there were 'no 457 visa holders performing unskilled work'.[133]

2.103 AMIC and Australia Meat Holdings Pty Ltd also pointed to training initiatives in the industry directed towards Australian workers and efforts to make the sector more attractive to new entrants from the Australian workforce:

> … we have an extensive range of training programs which are implemented and which have proven to be very effective over a long period of time. If the industry can get the appropriate people then it will continue to train. It will obviously train people to get them to move through the ranks to become slaughtermen, boners and slicers.[134]

2.104 As discussed in Chapter 1, the scope of this report does not allow for detailed industry case studies and investigation of sectoral impacts of the 457 visa. However, the Committee maintains that this is an important area of investigation for DIAC in further refining temporary skilled migration policy and the 457 visa program, and a recommendation on this matter was outlined in Chapter 1. Given the range of issues raised during this inquiry by a number of parties involved in the meat processing sector, the Committee believes that DIAC should accordingly prioritise the meat processing industry for early attention in this regard. (The section on Labour Agreements later in this chapter also revisits some of the concerns raised by the meat processing sector.)

2.105 Importantly, the Committee also acknowledges that recent announced changes to the 457 visa program include enshrining in law key

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132 Mr Cottrill, Australian Meat Industry Council, *Transcript of Evidence*, 17 May 2007, p. 11. See also Mr Tame, Australia Meat Holdings Pty Ltd, *Transcript of Evidence*, 16 April 2007, p. 63.

133 T&R Pastoral Pty Ltd, *Submission No. 75*, p. 1. See also Midfield Meat International Pty Ltd, *Submission No. 12*, p. 2; and Tabro Meat Pty Ltd, *Submission No. 78*, p. 3.

134 Mr Cottrill, Australian Meat Industry Council, *Transcript of Evidence*, 17 May 2007, p. 14. See also Mr Tame, Australia Meat Holdings Pty Ltd, *Transcript of Evidence*, 16 April 2007, p. 58.

obligations of the business sponsor—that is, elevating them from the Migration Regulations to the Migration Act, as a reflection of their importance. One of these obligations is 'not to employ a visa holder in a position that requires lesser skills than the position in respect of which the visa was granted'. As the Minister noted, 'this obligation protects against the Subclass 457 visa programme being used to bring overseas workers to Australia to carry out unskilled jobs'.[135]

Skills assessment

2.106 Under the 457 visa program, applicants must satisfy DIAC that they have the skills required for the vacancy for which they have been nominated:

> If there are doubts about the visa applicant's skills and/or experience to fulfil the duties of the position, a skills assessment may be required. Where Australian registration or licensing is required to undertake the nominated position, applicants may be asked to provide evidence that they are eligible for the relevant registration or license.
>
> Medical practitioners are required to provide evidence of registration to practise in the state or territory in which they will be working ...[136]

2.107 The Committee heard a range of views about skills assessment under the 457 visa program. Some argued that there should be skills assessments for all 457 visa applicants:

> According to material produced by the Department of Immigration … a skill assessment of a visa applicant is not necessarily required as a pre-requisite for the grant of a 457 visa … The lack of proper skills assessment creates a risk for both 457 visa holders and employers … Temporary skilled overseas workers … should … be required to actually possess, and have assessed as adequate for the Australian environment, the skills they are purportedly recruited for. To fail to do so

135 Hon Kevin Andrews MP, Minister for Immigration and Citizenship, Second reading speech on the *Migration Amendment (Sponsorship Obligations) Bill 2007*, 21 June 2007, http://www.minister.immi.gov.au/media/speeches/2007/ka04-21062007.htm.

136 DIAC, *Sponsoring a Temporary Overseas Employee to Australia*, Booklet No. 11, January 2007, p. 18.

> leaves the system, and temporary skilled overseas workers, open to abuse.[137]

2.108 In this regard, the Communications, Electrical and Plumbing Union (CEPU) were particularly concerned about the trades area: 'the occupational skills and experience of 457 visa applicants, working as tradespeople particularly in the "at risk industries", should be scrutinised carefully and subject to objective skills assessment'.[138] Similarly, Engineers Australia and APESMA raised concerns about the skills assessment of engineers under the program:

> Given that a comprehensive registration system does not exist in Australia for engineers, Engineers Australia and APESMA believe that individuals should not be eligible for a 457 visa unless they have successfully undergone a skills assessment to confirm the level of their engineering experience.[139]

2.109 However, others argued that the existing skills assessment procedures were working well:

> Ai Group is of the view that the current mechanism whereby the assessment of skills is carried out by the potential sponsor should be retained, in preference to a more formal (and more unwieldy and time-consuming) skills assessment process. Where doubts exist as to the accuracy of claims regarding qualifications, the Department of Immigration and Citizenship … should investigate such breaches.[140]

2.110 In the Committee's previous inquiry into overseas skills recognition, DIAC (then DIMA) advised that formal skills assessments for 457 visas are required 'only if the decision-maker believes they are not able to decide the application based upon the information provided in the application'. In these cases 'the applicant is directed to approach the relevant skills assessing authority for their occupation to obtain a formal assessment'.[141] DIAC further commented:

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137 Australian Council of Trade Unions, *Submission No. 39*, pp. 14-15. See also Australian Manufacturing Workers Union, *Submission No. 40*, p. 59.

138 Communications, Electrical and Plumbing Union of Australia, *Submission No. 61*, p. 15.

139 Engineers Australia and Association of Professional Engineers, Scientists and Managers Australia, *Submission No. 54*, p. 12.

140 Australian Industry Group, *Submission No. 57*, p. 2. See also Western Australian Chamber of Commerce and Industry, *Submission No. 53*, pp. 10-11.

141 DIMA, *Submission No. 80* (to the Joint Standing Committee on Migration inquiry into overseas skills recognition), p. 5.

> We have also tightened up our sponsorship approval process by seeking confirmation from potential sponsors that the skills are in fact to the level stated, and we have been doing a lot of work on that. We also think there is scope for improvement, and we are looking at whether there is any scope for requiring further skills assessment, particularly offshore for the 457 visa holders.[142]

2.111 The Committee maintains that, in consultation with relevant skills assessing bodies, DIAC should review its risk analysis for referring specific cases for formal skills testing or integrity checking of claims of relevant work experience, particularly for trade occupations.

Regional Certifying Bodies

2.112 The key role of RCBs in relation to the 457 visa program is to assess and certify skills and salary concessions for the 'regional 457 visa'.[143] (These concessions were discussed earlier in this chapter.) Regional concessions can apply to most of Australia, with the exception of the Gold Coast, Newcastle, Sydney, Wollongong, Melbourne and Perth.[144] Prior to granting a regional concession, an RCB certifies that:

- the tasks of the nominated position correspond to the tasks of an occupation in the Australian Standard Classification of Occupations … major groups 1-7, as Gazetted
- the position is a genuine, full-time position that is necessary to the operation of the business
- the position cannot reasonably be filled locally
- the wages or salary for the position will be at least the minimum level required under the relevant Australian laws and awards and at least the minimum salary level that applies to the position (whichever is higher)
- the working conditions will meet the requirements under relevant Australian laws and awards.[145]

2.113 For the financial year 2006-07 (to 17 June 2007), 457 visa grants to primary applicants totalled 40,720 for Standard Business Sponsorship (excluding Labour Agreements). Some 1,200 of these grants were

142 Mr Fox, DIMA, *Transcript of Evidence* (to the Joint Standing Committee on Migration inquiry into overseas skills recognition), 27 March 2006, pp. 38-39.

143 Commonwealth Government, *Submission No. 33*, p. 16.

144 Commonwealth Government, *Submission No. 33*, p. 69.

145 Commonwealth Government, *Submission No. 33*, p. 69.

provided under the regional concession.[146] Accordingly, regional concessions currently represent some three per cent of the 457 Standard Business Sponsorship visa program. The 'regional 457 visa' therefore constitutes a relatively small part of the overall program. As outlined below, the Committee heard varied evidence on the adequacy of the structures and functions of RCBs.

Organisational structures

2.114 The organisational structures of RCBs vary within and between states and territories. RCBs include state, territory and local government authorities, chambers of commerce, shire councils and regional development boards.[147] It was suggested that the differing structures of RCBs could result in inconsistent interpretations of DIAC's certification criteria. The Queensland Government was concerned that there was potential for a conflict of interest when privately run RCBs, particularly the chambers of commerce, were certifying exemptions for their members.[148] It recommended that:

> Any conflicts of interest must not be allowed to influence decision-making and strict protocols need to be developed to ensure regional certifying bodies are accountable for their decisions.[149]

2.115 It was also put to the Committee that the fee structures for RCBs varied widely. The implication was that RCBs were profiting off regional concessions and that certification could perhaps be 'bought'. As the Queensland Government stated:

> When the fee for service goes beyond cost recovery and becomes a potential source of revenue, the transparency of the decision making process can be brought into question.[150]

2.116 Similarly, the MIA had heard:

> … of some RCBs charging high fees for their services with some RCBs seemingly having conflicts of interest. Any change in this area needs to ensure that there can be no perception that

146 DIAC, *Submission No. 86a*, p. 24.

147 DIAC website, http://www.immi.gov.au/skills/regional-certifying-bodies.htm#act (accessed 25 June 2007).

148 Queensland Government, *Submission No. 65*, p. 3. See also Migration Institute of Australia, *Submission No. 9*, p. 12.

149 Queensland Government, *Submission No. 65*, p. 3.

150 Queensland Government, *Submission No. 65*, p. 3

> it is possible to 'buy a certificate' from a RCB. This role also needs to be resourced for fast turnaround and consistent approach.[151]

2.117 The Committee heard that not obliging sponsors to use the RCB in their local region could further exacerbate any 'conflicts of interest' and disparity in the implementation of DIAC's certification criteria.[152]

2.118 The Western Australian Government commented that they were able to ensure a consistent approach by coordinating visa activities via a state administered department:

> In Western Australia, it is the State Migration Centre, located within the Small Business Development Corporation … which is responsible for coordinating skilled migration initiatives. The advantage of a central coordinating body means that the State's position in relation to regional waivers and concessions is consistently applied by all regional certifying bodies.[153]

2.119 The ACTU recommended that RCBs be restructured:

> The current Regional Certifying Bodies … should be restructured, have the same composition regardless of their location, and have a clearly defined area of responsibility such that their role can be properly fulfilled and there can be confidence in the outcomes of their deliberations.[154]

2.120 It was further recommended that RCBs should include representatives from local councils, employer bodies, unions, employment agencies, training providers and state/territory government.

Operational issues

2.121 As outlined earlier, prior to certifying a concession an RCB must ensure a number of criteria are met. It was put to the Committee that the capacity of some RCBs to undertake the job with which they were tasked was limited. The skill levels of some RCBs, the absence of clear operating guidelines and the lack of relevant information provided by DIAC were all factors.

2.122 With regard to the skill levels of RCBs, the CEPU commented that:

151 Migration Institute of Australia, *Submission No. 9*, p. 12.

152 See Queensland Government, *Submission No. 65*, p. 3; and Australian Council of Trade Unions, *Submission No. 39*, p. 30.

153 WA Government, *Submission No. 68*, p. 4.

154 Australian Council of Trade Unions, *Submission No. 39*, p. 29.

> They are not skills assessors or industrial relations experts, yet part of their role requires that they certify that the applicants skills and training match a relevant ASCO group and that the wages and salary to be paid and the working conditions are at least equal to those under relevant Australian laws and awards.[155]

2.123 Despite labour market testing no longer forming part of general 457 visa requirements, prior to certifying a regional concession RCBs must ensure that 'the position cannot reasonably be filled locally'.[156] Both the CEPU and Mr Kinnaird noted that the implications of this stipulation were ambiguous.[157] As Mr Kinnaird commented:

> It is not clear what that test means in practice: for example, whether 'locally' means only the area covered by the RCB or other regional areas, or within Australia, nor what 'reasonably' means.

2.124 Consequently, the CEPU observed that:

> Given the fact that this opinion can be attached to a nominated position that is lower than the minimum skill level, the CEPU believes there should be an objective basis for the RCB deciding the position can't otherwise be filled.[158]

2.125 A number of submissions, including from RCBs, noted that RCBs would benefit from DIAC providing them with more relevant information in terms of both general procedural material and updates, and statistical data. The Western Australian Government stated that privacy laws, which limited the data the Commonwealth could provide regarding the 457 visas, inhibited the ability of RCBs to make informed decisions about concessions.[159]

2.126 Similarly, the Peel Development Corporation acknowledged that:

> Currently there is no mechanism available that allows the Commission to know the numbers of 457 visa holders in the region nor does it know what occupations are being filled by the visa holders.[160]

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155 Communications, Electrical and Plumbing Union of Australia, *Submission No. 61*, p. 5.

156 Commonwealth Government, *Submission No. 33*, p. 69.

157 Communications, Electrical and Plumbing Union of Australia, *Submission No. 61*, p. 13; and Mr Kinnaird, *Exhibit No. 8*, p. 52.

158 Communications, Electrical and Plumbing Union of Australia, *Submission No. 61*, p. 13.

159 WA Government, *Submission No. 68*, p. 5.

160 Peel Development Corporation, *Submission No. 2*, p. 2.

2.127 RCBs certify applications and DIAC makes the final decision about whether to approve an application and grant a visa. The Committee is not aware of a mechanism which provides RCBs with feedback from DIAC as to whether a certification has been approved and therefore a visa granted.

2.128 To improve communication between RCBs and DIAC, Townsville Enterprise recommended that DIAC provide regular updates—for example, a monthly newsletter—to inform RCBs of procedural and legislative changes.[161]

2.129 Finally, some inquiry participants questioned how the definition of 'regional' was determined. ACCI told the Committee:

> … just about all of Australia is regional anyway, bar the Sydney basin, south-east Queensland, Melbourne and I think metropolitan Perth—I think Canberra is regarded as regional. So the regional concession is rather curious.[162]

2.130 The NFF highlighted that DIAC's use of postcodes to delineate an area's status as 'regional' had problems, as some agricultural producers are located on the outskirts of cities and therefore 'cannot utilise the regional concession classification levels'.[163]

2.131 The Committee was pleased to hear that DIAC's Regional Outreach Officers were assisting RCBs and sponsors to understand migration requirements.[164] However, with only 10 officers providing coverage to rural Australia, limitations in their capacity are acknowledged.[165]

2.132 The issues raised above are by no means exhaustive. However, they do highlight concerns about RCBs and their operations. While recognising that RCBs may be well placed to assess the needs of local labour markets and disseminate information about business migration, the Committee is concerned about the varied structures of RCBs and the apparent lack of clear guidelines to define their role and operations. It is the Committee's belief that the structure and role of RCBs should be comprehensively reviewed by DIAC.

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161 Townsville Enterprise, *Submission No. 1*, p. 2.

162 Dr Davis, Australian Chamber of Commerce and Industry, *Transcript of Evidence*, 1 June 2007, p. 51.

163 National Farmers Federation, *Submission No. 22a*, p. 1.

164 Mr Whyte, Cairns Chamber of Commerce, *Transcript of Evidence*, 3 July 2007, p. 15 and p. 32.

165 Mr Whyte, Cairns Chamber of Commerce, *Transcript of Evidence*, 3 July 2007, p. 15 and p. 32.

Recommendation 11

2.133 **The Committee recommends that the Department of Immigration and Citizenship commission an independent review of the structure and roles of Regional Certifying Bodies (RCBs), with particular regard to:**

- **the capacity of RCBs to fulfil their specified functions;**
- **the differing organisational structures of RCBs; and**
- **the adequacy of the 'regional' 457 visa and associated concessions.**

In addition to reporting on the issues outlined above, this review should aim to:

- **produce clear operational guidelines for RCBs; and**
- **identify mechanisms for the communication of relevant procedural, legislative and statistical information to RCBs.**

Labour market testing

2.134 Current 457 visa requirements (except where regional concessions are sought) do not require employers to undertake labour market testing to demonstrate that the labour they require cannot reasonably be sourced within Australia. As Mr Kinnaird observed:

> The fundamental point about the 457 visa is that employers can sponsor skill migrants without any reference to whether there is a skill shortage in the field or not.[166]

2.135 Similarly, Ms Bissett, from the ACTU, commented that 'once a skill gets onto the skills list to which this program is applicable, access to the program occurs nationwide. So it is not actually a targeted program'.[167]

2.136 Labour market testing used to be part of the 457 visa program. A 2002 review of Australia's temporary residence program, including the 457 visa, recommended the abolition of such testing through 'streamlining'

166 Mr Kinnaird, *Exhibit No. 8*, p. 51.

167 Ms Bissett, Australian Council of Trade Unions, *Transcript of Evidence*, 14 March 2007, p. 3.

visa requirements so that they 'rely instead on skill and salary thresholds'.[168]

2.137 The Committee heard a range of views on whether labour market testing should be reintroduced for the 457 visa. Some contributors maintained that such testing should not be reintroduced, particularly given Australia's current buoyant labour market conditions, where there are well-known skills shortages in many occupations:

> ACCI believes that labour market testing is without merit on the grounds that it is an additional imposition and financial burden on employers and experience clearly indicates it is an unwieldy, labour-intensive, ineffective and wasteful process.[169]

> AMMA contends that there is no demonstrated need to introduce labour market testing in the resources sector and that such a process would result in further unnecessary delays to the 457 visa process.[170]

2.138 Others believed that labour market testing was essential to the integrity of the program and that such testing should require positions to be advertised at the market rate:

> Protection for on-going permanent employment for Australian workers is best achieved … by ensuring a rigorous process of labour market testing is undertaken prior to approval being given to employers to sponsor temporary skilled overseas workers … Such testing should require that positions are advertised at least at the regional level—but preferably more broadly—and advertised at the appropriate skill level under appropriate wages rates and conditions of employment … The lack of requirement to undertake labour market testing can and does result in the approval of visas in circumstances where there clearly is labour available.[171]

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168 External Reference Group, *In Australia's Interests: A Review of the Temporary Residence Program*, DIMIA, Canberra, June 2002, p. 30.

169 Australian Chamber of Commerce and Industry, *Exhibit No. 6*, p. 4.

170 Australian Mines and Metals Association, *Submission No. 30*, p. 5. See also Information Technology Contract and Recruitment Association, *Submission No. 62*, p. 8; Migration Institute of Australia, *Submission No. 9*, p. 12; and National Farmers Federation, *Submission No. 22*, p. 7.

171 Australian Council of Trade Unions, *Submission No. 39*, p. 14.

> Employers seeking to sponsor migrant workers should be required to clearly demonstrate that Australian workers are not available to perform the work at current market rates.[172]
>
> Prior to approval to sponsor a temporary skilled overseas worker an employer should be required to demonstrate to the relevant authority that they have sought to fill the vacancy within Australia. Evidence must include advertising the position Australia wide and advertising the position at the market rates, that is the average rate paid by similar employers, or the prevailing agreement rate, whichever is higher. Advertising at the award rates or minimum wage level should not be acceptable.[173]

2.139 The Committee acknowledges the impost on business of undertaking labour market testing. Reintroducing such testing across the program could also contribute to 'red tape' and delays in the system.

2.140 Participants further commented that the considerable expense involved in recruiting 457 workers from overseas, with the employer signing up to potentially costly financial obligations in relation to the worker, acted as a form of 'labour market testing', with the cost incentive being to source workers locally. As the Victorian Government commented, current safeguards under the program to ensure that Australians are not disadvantaged by the use of 457 visas include 'setting a price signal that favours hiring and training Australians by requiring employers to meet additional costs such as return airfare, health costs (or insurance), visa and recruitment costs for the migrant'.[174]

2.141 The cost of sponsorship was variously estimated as between $14,000 and $31,000,[175] around $25,000,[176] some $15,000[177] and about $10,000.[178] Accordingly, the Committee was not surprised to hear from some

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172 Queensland Government, *Submission No. 65*, p. 4.

173 Australian Manufacturing Workers Union, *Submission No. 40*, p. 5. See also Mr Sutton, Construction, Forestry, Mining and Energy Union, *Transcript of Evidence*, 16 May 2007, p. 68 and p. 73; and Communications, Electrical and Plumbing Union of Australia, *Submission No. 61*, p. 5.

174 Victorian Government, *Submission No. 72*, p. 4.

175 Dr Davis, Australian Chamber of Commerce and Industry, *Transcript of Evidence*, 1 June 2007, p. 44.

176 Mr Bamborough, Baker Hughes Australia, *Transcript of Evidence*, 30 April 2007, p. 34.

177 Mr Bull, Australian Mines and Metals Association, *Transcript of Evidence*, 30 April 2007, p. 54.

178 Mr Murdoch, Austal Ships, *Transcript of Evidence*, 30 April 2007, p. 66.

participants that there was no cost incentive for them to source workers from overseas:

> Policy settings need to recognise that overseas recruitment is a last resort for most Australian employers. Recruiting an overseas person is usually much more costly than recruiting locally.[179]
>
> Clearly, there are strong market (price) signals for Australian employers to look to employ locally-sourced employees first …[180]

2.142 The Committee believes it would be inefficient to require employers to test the market and advertise to demonstrate proven skill shortages in certain high-skilled occupations and specialisations, particularly given the current low unemployment rate for skilled workers. The Committee also acknowledges the significant efforts by some sectors, such as the resources industry, to commission research into their future labour force requirements to guide the development and implementation of appropriate industry initiatives to address skills shortages.[181]

2.143 Accordingly, it is acknowledged that there are situations where labour market testing is not warranted, particularly 'where there is agreement that shortages exist in particular sectors, supported by objective evidence'.[182] As Mrs Devereux from Austal Ships stated: '[w]e are trying everything within our power to try and advertise and get people but it is just not working, so we do not have much choice here'.[183] Similarly, representatives from the resources sector commented:

> … in putting this research to the committee in respect of the skills shortage in the resources sector we are saying: 'Look, it is well demonstrated, really in our submission beyond question, that there is a skills shortage in our industry. Despite the fact that our large member companies, whether they be BHP, Rio Tinto or Woodside, spend a lot of money on training and

179 Mr Waters, Migration Institute of Australia, *Transcript of Evidence*, 16 May 2007, p. 24.

180 Australian Chamber of Commerce and Industry, *Exhibit No. 6*, p. 1. See also Johninfo Lawyers, *Submission No. 38*, p. 3.

181 The Chamber of Minerals and Energy WA and the Minerals Council of Australia highlighted several research studies commissioned in collaboration with the Department of Education, Science and Training to identify key skills requirements for the industry to 2015—see *Exhibit No. 35*.

182 Mr Kinnaird, *Exhibit No. 8*, p. 64.

183 Mrs Devereux, Austal Ships, *Transcript of Evidence*, 30 April 2007, p. 63.

> promote careers in the resource sector … we are still experiencing a shortage of labour'.[184]
>
> Notwithstanding that we have a view that Australians should be employed first and foremost—and certainly my organisation and the members are doing a tremendous amount of work in the education system, particularly at the secondary level within the VET-TAFE sector and in the university sector—I think it is quite apparent that the sector will grow by an additional 42,000 jobs in WA, that people with those skills are not to be found in Western Australia and, arguably, are not to be found elsewhere in Australia.[185]

2.144 However, significant variations in employment levels across regions[186] and perceived declining training opportunities for Australians or oversupplies of Australian workers in some sectors[187] suggest that a limited form of labour market testing for certain identified occupations could be of benefit, to ensure that job and training opportunities for Australians are not compromised. The Committee also highlights the need for improved, more timely data on occupational skills shortages on a region by region basis, particularly for rural areas.

2.145 As discussed earlier, the occupations gazetted under the Migration Regulations for which 457 visas can be granted (outside of the regional exemptions) simply reflect those listed in ASCO groups 1-4. These gazetted occupations do not necessarily represent a temporary skilled occupations in demand list.[188]

2.146 It is unclear to the Committee to what extent DIAC and DEWR customise the gazetted list in terms of listing not only 'skilled' occupations but also migration occupations in demand. The Committee

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184 Mr Bull, Australian Mines and Metals Association, *Transcript of Evidence*, 30 April 2007, p. 49.

185 Mr Howard-Smith, Chamber of Minerals and Energy, Western Australia, *Transcript of Evidence*, 30 April 2007, p. 2.

186 See, for example, Ms Bissett, Australian Council of Trade Unions, '[w]e believe that there are regional variations in unemployment rates and underemployment rates, and the Australian Bureau of Statistics figures support that … a shortage [of welders] in Western Australia and Queensland caused by the resources boom, then leaves it open to an employer in Ballarat in Victoria to bring in welders under the program, even though there may be no shortage of welders in Ballarat', *Transcript of Evidence*, 14 March 2007, p. 2. See also Australian Manufacturing Workers Union, *Submission No. 40*, p. 35.

187 See, for example, Mr Kinnaird on the alleged negative impact of 457 visas on employment and training opportunities for Australians in ICT occupations, *Submission No. 80*, pp. 2-3.

188 DIAC, *Submission No. 86a*, p. 12.

views the gazetted list of approved occupations as representing an opportunity in this regard.

Recommendation 12

2.147 **The Committee recommends that, to ensure the 457 visa program is limited to skilled occupations where there are demonstrated skills shortages and there is no negative impact on Australian jobs, the Department of Immigration and Citizenship and the Department of Employment and Workplace Relations:**

- **regularly review the gazetted list of approved occupations and give consideration to ensuring that it lists only skilled migration occupations in demand—for example, through the possible implementation of a Temporary Migration Occupations in Demand List; and**
- **work with industry and other stakeholders to trial a limited labour market testing process to agreed standards for a narrow range of identified occupations.**

2.148 In summary, the Committee emphasises that the key to ensuring that the 457 visa program is not used by 'rogue' employers to undercut Australian jobs and drive down the wages and conditions of Australian workers is through an appropriate salary level that is robust and effectively monitored for compliance. As set out in the Minister's recent announcement, this key employer obligation has recently been reinforced through its proposed elevation to the Migration Act:

> The first obligation is to pay visa holders at least the minimum salary level which is set out in a legislative instrument. This obligation also acknowledges the fact that Australian employers must look first to employing and training Australians and that the Subclass 457 visa programme will not be used to erode the salaries and conditions of Australian employees.[189]

2.149 As noted earlier, under regional concessions for ASCO levels 5-7, RCBs have to ensure that a 'position cannot reasonably be filled locally'.[190] This requirement is, in effect, a form of labour market testing. The NFF recommended that, if there were concerns about this area, 'a review be

189 Hon Kevin Andrews MP, Minister for Immigration and Citizenship, Second reading speech on the *Migration Amendment (Sponsorship Obligations) Bill 2007*, 21 June 2007, http://www.minister.immi.gov.au/media/speeches/2007/ka04-21062007.htm.

190 Commonwealth Government, *Submission No. 33*, p. 69.

undertaken of the RCBs process of how they test the "position cannot be reasonably be filled locally" criteria and then, if necessary, strengthen the process of that particular criteria'.[191] The review of RCBs recommended earlier in this chapter should also encompass an investigation of their labour market testing processes.

English language requirements

2.150 Late in the inquiry process, the Minister announced a higher English language requirement for the 457 visa. As DIAC had noted in their submission, with the growth of the 457 visa into the ASCO 4 (trade) groups, concerns about English language had emerged, relating 'mainly to occupational health and safety matters' but also to:

- an inability of some Subclass 457 visa holders being able to understand their rights and their ability to stand up for these;
- difficulties operating effectively in the community; and
- limits on pathways to permanent residence due to not being able to meet the English requirements for skilled permanent visas.[192]

2.151 The new arrangements are as follows:

> From 1 July 2007, overseas workers must have English language skills equivalent to an average band score of 4.5 in an International English Language Testing System … test, unless exempted in certain special circumstances …
>
> Applicants will not be required to meet the English language requirement if;
>
> - their first language is English and they are a passport holder from Canada, New Zealand, the Republic of Ireland, the United Kingdom or the United States of America; or
> - their nominated occupation is within the highly skilled major groups 1-3 of the Australian Standard Classification of Occupations … comprising managers, administrators, professionals and associate professionals; or
> - they have completed at least five years of continuous full time secondary and/or tertiary education at an institution

191 National Farmers Federation, *Submission No. 22b*, p. 2.

192 Commonwealth Government, *Submission No. 33*, p. 9.

where at least 80 percent of instruction was conducted in English; or

- they are to be paid at least a salary specified in a legislative instrument (initially a gross base salary of $75 000 excluding all allowances and deductions).[193]

2.152 The requirement for applicants to have higher English language skills where this is necessary for licensing, registration or membership of a professional association in their nominated occupation remains unchanged under the new arrangements.

2.153 To put this new International English Language Testing System (IELTS) level of 4.5 in perspective, the threshold level of English language proficiency for the General Skilled Migration program (the permanent migration stream), from 1 September 2007, will be raised from IELTS level 5 (vocational) to 6 (competent)—except for applicants applying for trade occupations, who continue to be required to meet IELTS level 5.[194]

2.154 The bulk of the evidence to this inquiry was provided prior to the implementation of these new arrangements. At the time of commencing the inquiry, there was 'no explicit English language requirement under subclass 457 visa'[195] (except where a higher English language level was specified for licensing or registration processes). Rather, employers were required to ensure that the people they recruited had the appropriate language skills to undertake the nominated skilled occupation to Australian standards.

2.155 However, a number of participants spoke in support of the program stipulating a higher level of English language proficiency. In particular, it was emphasised that this would allow for better awareness of occupational health and safety (OH&S) requirements in the workplace and more effective communication and skills transfer in the workplace:

> … where employers recruit workers with poor English for lesser-skilled occupations, some problems may arise. These

193 Media release by the Hon Kevin Andrews MP, Minister for Immigration and Citizenship, 'New English language requirements for employer sponsored temporary business visa (the subclass 457) programme commence on 1 July 2007', 26 June 2007, http://www.minister.immi.gov.au/media/media-releases/2007/ka07052.htm.

194 DIAC website, 'Changes to the General Skilled Migration Programme', http://www.immi.gov.au/skilled/general-skilled-migration/changes/index.htm (accessed 25 June 2007).

195 Commonwealth Government, *Submission No. 33*, p. 9.

> include the risk that 457 visa holders may not understand health and safety information …[196]
>
> The current English language requirements must be reviewed to ensure they are set at a level that ensures a 457 visa holder is competent to read and understand technical specifications relevant to the job and work environment, to receive health and safety instructions and induction training, to be capable of receiving and passing on instructions and have the capacity to converse generally with others in the workplace.[197]

2.156 Other participants were not supportive of an increase in the English language requirement, believing this would also add to visa processing times. It was felt that this was an individual workplace matter—that each employer should be responsible for assessing whether an employee has appropriate language skills for the workplace:

> There is a strong argument that it should be left to the employer to determine what level of English language proficiency is necessary for the tasks to be performed by the 457 visa applicant.[198]
>
> These requirements for English at this level in the meat industry are unreasonable and ill founded and will limit access to skilled labour from certain countries.[199]
>
> Commerce Queensland is concerned about ramping up formal English language requirements. This could compromise the flexibility and defeat the intent of the temporary visa arrangement.[200]

2.157 In particular, there was caution about going too far in implementing across-the-board English language testing, particularly if there was no flexibility for concessional arrangements under certain circumstances:

> While we understand the rationale for the introduction of English language requirements in some areas, the MIA is seriously concerned about suggestions in some places that the standard of English language proficiency be raised for all 457

196 Australian Chamber of Commerce and Industry, *Exhibit No. 6*, p. 3.

197 Australian Council of Trade Unions, *Submission No. 39*, p. 16. See also Australian Mines and Metals Association, *Submission No. 30*, p. 18; and the Victorian Government, *Submission No. 72*, p. 4.

198 Migration Institute of Australia, *Submission No. 9*, p. 9.

199 Australian Meat Industry Council, *Submission No. 26a*, p. 4.

200 Commerce Queensland, *Submission No. 25*, p. 3.

> visa applicants. We submit that English language proficiency should not be a mandatory prerequisite for all such applicants as that would seriously stifle the adequacy of the overall temporary resident program.[201]

2.158 The terms of reference for the inquiry specifically referred to English language proficiency as an area of particular interest, so the Committee was pleased to note that the concerns raised during the inquiry in this area were acted on by the Minister. The Committee supports the higher English language requirement of IELTS 4.5, combined with the flexibility to exempt certain applicants from this requirement. Setting a higher English language proficiency for 457 workers will help to ensure that such workers are aware of their rights and obligations, including OH&S requirements.

2.159 However, the Committee is concerned that some 457 visa holders who came in under the existing provisions of the visa may lack fundamental English language skills. As the section on Communication in Chapter 3 will discuss, DIAC should identify these workers and ensure they receive suitable follow-up information on their rights under the program and OH&S obligations in the workplace.

2.160 The Committee notes that the new exemptions to the higher English language requirement will not accommodate those who called for such exemptions for:

- regional areas; and
- lower ASCO classifications (below ASCO 3) in the tourism and hospitality sectors, such as a specialist cook in the ethnic restaurant industry.[202]

2.161 On an exemption for regional areas, the Cairns Chamber of Commerce recommended that, if English language testing is introduced for the 457 program, 'a regional waiver option be introduced'.[203] As another individual from the Cairns area commented:

> We are basically concerned about the regional programs. Our major shortage is in occupations which, in our view, do not require the level of 4.5 on the IELTS test in order for a visa to be granted. That is our main concern because it is going to

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201 Migration Institute of Australia, *Submission No. 9*, p. 7.

202 Chefs are classified at ASCO 3 and are therefore exempt from the higher English language requirement.

203 Cairns Chamber of Commerce, *Submission No. 27*, p. 6.

> preclude a lot of people from applying, and therefore sponsors are obviously not going to be able to recruit the staff they need for a lot of positions they have on offer and cannot fill.[204]

2.162 On an exemption in this area for the tourism and hospitality sectors, Mr Hart, from the RCA, commented:

> In terms of the level of English language skill required for people such as cooks who are working in a kitchen and who may be supervised and managed by someone who has their own native tongue as their first language, I cannot see why that employment arrangement cannot function effectively with the level of foreign language skill rather than the level of English language skill that might be required of general skill migrants.[205]

2.163 The Committee appreciates the concerns raised in this regard but emphasises that the need for 457 workers to have a higher level of English language proficiency for OH&S and communication reasons remains relevant, regardless of the sector or region. However, a solution here might be for the sponsoring employer to provide assistance for intensive English language classes for such workers on arrival such that they must attain the required level of English over a certain specified period, along with there being additional OH&S safeguards. The Committee believes there could be merit in DIAC further investigating such options, in consultation with representatives from regional areas and the tourism and hospitality sectors.

2.164 In terms of ensuring compliance with the new higher English language requirement, the Minister stated that all applicants 'will need to detail their English language skills on their visa application form'. In addition, 'applicants may be asked to undertake an IELTS test to demonstrate their English language skills.'[206] It is presumed that DIAC will refer specific cases for formal English language testing on a risk management basis.

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204 Ms Shipway, *Transcript of Evidence*, 3 July 2007, p. 52.

205 Mr Hart, Restaurant and Catering Australia, *Transcript of Evidence*, 16 May 2007, p. 17. See also Migration Institute of Australia, *Submission No. 9*, p. 8.

206 Media release by the Hon Kevin Andrews MP, Minister for Immigration and Citizenship, 'New English language requirements for employer sponsored temporary business visa (the subclass 457) programme commence on 1 July 2007', 26 June 2007, http://www.minister.immi.gov.au/media/media-releases/2007/ka07052.htm.

Recommendation 13

2.165 **The Committee recommends that, in referring specific cases for formal English language testing with a focus on occupations with a high occupational health and safety (OH&S) risk or history of sponsor non-compliance, the Department of Immigration and Citizenship also take into account that the need for 457 workers to have a higher level of English language proficiency for OH&S and broader communication reasons remains relevant, regardless of the sector or region in which they work.**

International English Language Testing System delays

2.166 Where evidence of English language proficiency is required under the existing eligibility requirements, visa applicants are required to undergo testing under IELTS.[207] The Committee is concerned that delays in the IELTS system may add to processing times for the 457 visa—for example, the MIA commented that:

> There are long and unacceptable delays between exam dates, crowded exam facilities and frustrating administrative arrangements for people wishing to access IELTS testing opportunities … IELTS organisations are simply not geared to cope with the demand … any change that is made should take account of the limited capacity and long delays inherent in the IELTS system.[208]

2.167 The Committee emphasises that DIAC should ensure the higher English language requirement and delays in the IELTS system do not impede faster processing times under the program.

Occupational health and safety

2.168 The Committee recognises the critical importance of OH&S in the workplace—if visa holders do not understand their OH&S obligations or are forced to work in an unsafe environment, this poses a hazard to themselves, their fellow workers and the public.

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207 IELTS provides an assessment of whether candidates are ready to work in an English-speaking environment. The test can be taken at centres around the world. Results are graded across nine bands, from band 1 (non-user) to band 9 (expert user).

208 Migration Institute of Australia, *Submission No. 9*, p. 9. See also Cairns Chamber of Commerce, *Submission No. 27a*, p. 5.

2.169 As discussed above, a number of participants supported the requirement that 457 workers have a higher level of English language proficiency for OH&S reasons:

> Cases of 457 workers being subject to considerable OHS risks and incidents are characterised by limited English and workers not comprehending local OHS legislation.[209]

> Work at the tissue-paper mill was closed down by WorkCover after 39 safety infringements. The Chinese guest workers were unable to communicate with other workers or read safety signs …[210]

2.170 A common theme across a number of case studies alleging serious breaches of 457 workers' conditions of employment, as provided in evidence to the inquiry, was that these individuals were 'not particularly fluent in English'[211] — their 'English was very basic' and they 'appeared not to have enough English to be able to function effectively in an Australian work place'.[212]

2.171 Another issue raised with the Committee concerned insurance coverage for a 457 worker who had received a workplace injury, with there being some ambiguity about coverage under the relevant state and Commonwealth legislation should an injured worker then have their employer sponsorship terminated.[213]

2.172 The Committee notes that the higher English language requirement will allow for better awareness of OH&S requirements in the workplace. The recent legislative changes announced by the Minister will also give DIAC officers greater investigative powers relevant to monitoring employer compliance with their OH&S obligations. Importantly, the legislation:

> … authorises disclosure of personal information regarding sponsors and visa holders to prescribed agencies of the Commonwealth or of a State or Territory.

> For example, where in the course of performing his or her functions, an inspector finds a workplace that obviously appears to fall short of basic occupational health and safety

209 Victorian Government, *Submission No. 72*, p. 7.

210 Australian Manufacturing Workers Union, *Submission No. 40*, p. 52.

211 Dr Wise and Dr Velayutham, *Submission No. 85*, p. 10.

212 South Metropolitan Migrant Resource Centre, *Submission No. 35*, p. 1.

213 Mr Harris, Construction, Forestry, Mining and Energy Union, *Transcript of Evidence*, 16 May 2007, pp. 89-91.

> standards, he or she would be able to make such an observation known to the State or Territory body responsible for monitoring such standards.
>
> I would expect my Department to be informed of the outcome of any such investigation so consideration could be given to bar the sponsor for breach of a law of the Commonwealth, State or Territory.[214]

2.173 The associated importance of 457 visa holders receiving workplace orientation and induction training in OH&S prior to commencing work is further noted, particularly where they are to work in 'high risk industries'.[215] The Committee also recognises the importance of providing a mechanism to support 457 workers in speaking out when they believe their workplace is unsafe or have other concerns about the program. Accordingly, the Committee makes a recommendation on this area in Chapter 3.

Training requirements

2.174 Under the 457 visa program, as part of being approved as a sponsor, businesses must demonstrate a commitment to training Australians:

> The employer must … demonstrate that their Australian business operations will meet one of the following requirements:
>
> - introduce, use or create new business skills
> - introduce, use or create new or improved technology
> - have a satisfactory record of, or a demonstrated commitment towards training Australian citizens and Australian permanent residents.[216]

2.175 As part of their application to sponsor overseas workers, employers are required to provide detailed information about their training record or commitment to training—for example:

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214 Hon Kevin Andrews MP, Minister for Immigration and Citizenship, Second reading speech on the *Migration Amendment (Sponsorship Obligations) Bill 2007*, 21 June 2007, http://www.minister.immi.gov.au/media/speeches/2007/ka04-21062007.htm.

215 See Communications, Electrical and Plumbing Union of Australia, *Submission No. 61*, p. 25; and Australian Manufacturing Workers Union, *Submission No. 40*, p. 8.

216 DIAC website, 'Employer eligibility', http://www.immi.gov.au/skilled/skilled-workers/sbs/eligibility-employer.htm (accessed 25 June 2007).

- details of number of employees in the business with breakdown of how many Australians, apprentices/graduates/trainees and sponsored employees
- details and evidence of training expenditure
- training plan and/or strategy
- other documents that support the application.[217]

2.176 This training commitment is currently monitored by DIAC through 'targeted monitoring checks', requiring 'sponsoring employers to complete a detailed questionnaire and provide supporting documentation'.[218] The questionnaire (form 1110) has a section relating to monitoring of training, which seeks information about the number of apprentices and trainees employed, future training plans for Australian employees, expenditure on training on Australian employees and an outline of the training provided to Australian employees in the past 12 months.[219]

2.177 DIAC advised that in 2005-06, 'over 6,400 employers were checked in this way', through the questionnaire. The department also advised that it undertakes targeted site visits of employers to verify responses provided and/or additional checks. In 2005-06, some 1,790 sponsors were site visited.[220]

2.178 The Committee heard a range of views on the training requirements under the 457 visa program. Some felt that the current training requirements were adequate or that these arrangements should in fact be more flexible in recognising the kinds of training appropriate to particular sectors or types of business:

> The MIA believes the current policy settings for employer training arrangements are appropriate and do not need to be tightened. Australian employers experiencing difficulty in competing locally or internationally often have limited training budgets and little room to manoeuvre.[221]
>
> Commitment to training must continue to be assessed in a flexible way to ensure it does not disadvantage any sector or occupation. Commerce and industry would be opposed to

217 DIAC website, 'Sponsorship application checklist', http://www.immi.gov.au/skilled/skilled-workers/sbs/checklist-sponsor.htm (accessed 25 June 2007).

218 Commonwealth Government, *Submission No. 33*, p. 12.

219 Commonwealth Government, 'Business sponsor monitoring', Form 1110, reproduced in *Submission No. 33*, pp. 73-78.

220 Commonwealth Government, *Submission No. 33*, p. 13.

221 Migration Institute of Australia, *Submission No. 9*, p. 13.

> mandated formal levels of training or assessing compliance by quantitative measures of numbers of qualifications obtained or money spent on training.[222]

2.179 Others, however, commented that the training requirements under the program needed to be strengthened:

> The ACTU has … major areas of concern with the current temporary skilled migration program [including] … the relationship between the use of temporary business visas and investment by business and government in the training and skill development of the Australian workforce.[223]
>
> The use of temporary skilled overseas workers should not be permitted unless the employer can demonstrate:
>
> - A history of accredited training;
> - A successful outcome (measured in employment outcomes) of the training;
> - Retention of trained workers within workforce;
> - On-going program of and commitment to training;
> - Demonstrated financial investment in training in the identified skill shortage area.[224]

2.180 Monitoring of training requirements was also raised as an issue:

> There is little monitoring of the sponsoring employer's commitment to training in the local market. The bulk of 'monitoring' involves the employer filling in a form giving a very brief outline of their history of investment in training and history of training … Currently, the employer is not required to substantiate any of their claims unless investigated by DIAC.[225]
>
> We are not convinced that monitoring by the department is rigorous enough in terms of the checking that is done on investment in training. We also think that it needs to be more than just their past investment; the 457 approval process has to be in conjunction with ongoing training.[226]

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222 Australian Chamber of Commerce and Industry, *Exhibit No. 6*, p. 3. See also National Farmers Federation, *Submission No. 22*, p. 7.

223 Australian Council of Trade Unions, *Submission No. 39*, pp. 4-5.

224 Australian Manufacturing Workers Union, *Submission No. 40*, p. 6. See also Mr Hartley, Engineers Australia, *Transcript of Evidence*, 1 June 2007, p. 16.

225 Communications, Electrical and Plumbing Union of Australia, *Submission No. 61*, p. 5.

226 Ms Bissett, Australian Council of Trade Unions, *Transcript of Evidence*, 14 March 2007, p. 5. See also Liquor, Hospitality and Miscellaneous Union, *Submission No. 20*, p. 3; and Australian Manufacturing Workers Union, *Submission No. 40*, p. 41.

2.181 The Committee further heard that some felt there was 'little consistency in what is regarded by DIAC as acceptable in terms of meeting the training requirement' and that this was contributing to a 'lack of certainty as to what constitutes an acceptable level of training'.[227] Specific suggestions in this regard included:

- the inclusion of 'industry-wide group training arrangements' as acceptable evidence of commitment to training Australians in some sectors;[228]
- recognition being given to 'on the job' training;[229] and
- the introduction of a training levy or sectoral/regional training fund.[230]

2.182 The use of 457 visas assists in overcoming short-term skills shortages but is not a substitute for investment in the training and skills development of Australians. A strong commitment by employers to the training of Australian workers is therefore critical, and the Committee agrees that training should be an essential 'threshold' eligibility requirement of the 457 visa program. As discussed in Chapter 1, several industry participants commented on their training efforts to build the skills base of Australian workers for the temporary skill sets they required:

> The majority of our employees are local Australian employees. We do a number of advertising campaigns and participate in career fairs and things like that to attract personnel to our business. The issue lies where the need is for highly technical specific skills which employees within Australia do not actually have. They have been trained up overseas. The idea of them coming in short term is also used as a training mechanism to train our current people so we do not need that in the future.[231]
>
> Over the couple of years that we have employed 457 visa holders, we have increased our work force by around 35 per cent, so they have contributed to the increase in our work force

227 Australian Contract Professions Management Association, *Submission No. 76*, pp. 9-10. See also Mr Sutton, Construction, Forestry, Mining and Energy Union, *Transcript of Evidence*, 16 May 2007, p. 69.

228 Australian Chamber of Commerce and Industry, *Exhibit No. 6*, p. 3.

229 Australian Contract Professions Management Association, *Submission No. 61*, p. 9.

230 Cairns Chamber of Commerce, *Submission No. 27*, p. 7.

231 Ms Sutherland, Baker Hughes Australia, *Transcript of Evidence*, 30 April 2007, p. 27.

> but they have not been our prime source. We currently have 262 apprentices undergoing full-time training. We intend to grow that by the end of the calendar year up to 300. We are very proud of the fact that we have a long history of identifying and training Australians.[232]

2.183 The key to ensuring that the 457 visa program does not undermine the commitment of business to training Australians is in monitoring this area for compliance, with significant penalties for breaches. As will be discussed in Chapter 3, the compliance regime for the program has been strengthened through the recent announcement of legislative changes to the Migration Act in this area. The Committee emphasises the importance of DIAC committing appropriate resources to these compliance arrangements, particularly to ensure that training requirements under the program are closely monitored.

Recommendation 14

2.184 **The Committee recommends that the Department of Immigration and Citizenship:**

- **work with stakeholders to develop best practice benchmarks for training requirements to be met by sponsoring employers—this should ensure effective training objectives under the 457 visa program that uphold the commitment to training Australians;**
- **implement mechanisms to ensure improved communication of training requirements under the program and training outcomes; and**
- **ensure that appropriate resources are committed to monitoring compliance with training requirements under the program.**

Labour hire industry

2.185 Many employees who come to Australia under the 457 visa program do so through the labour hire industry. This industry includes:

- recruitment firms;
- on-hire firms; and

232 Mr Murdoch, Austal Ships, *Transcript of Evidence*, 30 April 2007, p. 62.

- contract management companies.

2.186 These groups were described as follows:

- Recruitment firms working for a client that recruit offshore for the client. In this arrangement it is the client who is the employer/sponsor of the worker.[233]
- On-hire firms that recruit and employ offshore skilled workers using 457 visas and then place workers in client sites but otherwise remain in an employer/employee relationship.[234]
- Contract management companies that recruit contractors on behalf of a client and then manage the contract between the employee and client.[235]

2.187 The central issue to arise throughout the inquiry in relation to labour hire was whether the industry in general had met its obligations under the 457 visa program and whether tighter controls were required. Industry bodies, such as the RCSA and the Australian Contract Professions Management Association (ACPMA) sought to reassure the Committee that their members were not only meeting but in many cases exceeding their obligations, particularly in relation to minimum salary levels and training requirements.[236]

2.188 In addition, RCSA highlighted to the Committee that its members are bound by a code for professional practice that includes disciplinary proceedings for members who are in breach of the code.[237] Similarly, ACPMA and the Information Technology Contract and Recruitment Association (ITCRA) also have in place a code of conduct and rules governing members' activities and business operations.[238] Further, RCSA told the Committee: '[w]e have no examples of abuse within our membership'.[239] This was echoed by ITCRA:

> Our own code of conduct for this industry is such that we would not countenance the membership of an organisation

233 Recruitment and Consulting Services Association, *Submission No. 11,* p. 2.

234 Recruitment and Consulting Services Association, *Submission No. 11,* p. 2.

235 Recruitment and Consulting Services Association, *Exhibit No. 4,* p. 1.

236 Recruitment and Consulting Services Association, *Submission No. 11,* p. 2 and p. 3; and Australian Contract Professions Management Association, *Submission No. 76,* p. 7.

237 Recruitment and Consulting Services Association, *Submission No. 11,* p. 3.

238 Australian Contract Professions Management Association, *Submission No. 76,* p. 2 and Information Technology Contract and Recruitment Association, *Submission No. 62,* p. 3.

239 Ms Mills, Recruitment and Consulting Services Association, T*ranscript of Evidence,* 14 March 2007, p. 22.

> who was in breach or behaving in a way that put them in breach of the laws of the land. We believe it is important that compliance is looked at and that non-compliance is identified and punished.[240]

2.189 Labour hire arrangements operate across a diverse range of industries, including mining, engineering, health care, financial markets, information communications technology, manufacturing, retail, motor vehicles and publishing.[241] In many industries, labour hire through the 457 visa program is an important source of employees. Commerce Queensland argued that restricting the access of labour hire companies to the 457 visa program would adversely affect the resources and mining sector in both Queensland and Western Australia, and that numerous small to medium sized business rely upon these companies to locate suitably skilled labour.[242] Mr Howard-Smith from the Chamber of Minerals and Energy, Western Australia, commented that:

> … generally labour hire firms of the type that operate in the resources sector should be able to continue to utilise section 457 visas within the sector. The sector is heavily reliant upon contractors… [E]ntire operations are operated by contractors in some instances, particularly in mining.[243]

2.190 The labour hire groups expressed concern to the Committee at any suggestion that they be excluded from the 457 visa program. ACPMA, for example, commented that '[t]he labour hire industry provides a valuable contribution to Australia's economy by simplifying access to skilled persons in short supply'[244] and that any decision to restrict labour hire entities from sponsoring overseas employees 'will have an extensive and highly detrimental effect on large sectors of industry and government across Australia.'[245]

2.191 The RCSA supported obliging on-hire recruitment companies to enter into either industry based or individual Labour Agreements, which it

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240 Mr Lacy, Information Technology Contract and Recruitment Association, *Transcript of Evidence,* 14 March 2007, p. 59.

241 Fragomen Australia, *Submission No. 13,* p. 4.

242 Commerce Queensland, *Submission No. 25,* p. 3.

243 Mr Howard-Smith, Chamber of Minerals and Energy, Western Australia, *Transcript of Evidence,* 30 April 2007, p. 6.

244 Australian Contract Professions Management Association, *Submission No. 76,* p. 4.

245 Australian Contract Professions Management Association, *Submission No. 76,* p. 11.

considered would provide effective monitoring arrangements and swifter 457 visa nomination approvals:[246]

> If the Department is concerned about a specific Member's history of compliance a Labour Agreement will afford stricter obligations to be imposed in turn for concessions in other areas.[247]

2.192 However, ACPMA submitted that Labour Agreements are unnecessarily restrictive and unresponsive to the needs of business, and that any imposition of mandatory requirements to enter into Labour Agreements would disadvantage the industry.[248]

2.193 The Committee received evidence that the labour hire industry has, in general, consistently shown itself to be willing to self regulate and act in accordance with both legislation and policy.[249] In spite of this, RCSA commented that there was a need for increased monitoring of 'who can actually sign up and bring in 457 visa holders'.[250] RCSA argued that '[w]e need to make sure that those companies that are allowed to action 457 visas have some credibility around them'.[251]

2.194 It was suggested to the Committee that offshore recruitment and on-hire firms have a higher incidence of non compliance.[252] However, the Committee received limited evidence in this area to fully examine these claims. Nevertheless, the Committee believes it is an issue that should be examined by DIAC.

2.195 More broadly, the Committee acknowledges the general support of the industry for a strong monitoring, compliance and enforcement regime where required. Improved monitoring, reporting and enforcement arrangements are discussed in Chapter 3.

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246 Recruitment and Consulting Services Association, *Submission No. 11,* pp. 3-5.

247 Recruitment and Consulting Services Association, *Submission No. 11,* p. 3.

248 Australian Contract Professions Management Association, *Submission No. 76a,* pp. 1-2.

249 Australian Contract Professions Management Association, *Submission No. 76,* pp. 15-16.

250 Ms Mills, Recruitment and Consulting Services Association, *Transcript of Evidence,* 14 March 2007, p. 23

251 Ms Mills, Recruitment and Consulting Services Association, *Transcript of Evidence,* 14 March 2007, p. 29.

252 Migration Institute of Australia, *Submission No. 9,* p. 3; and Australian Contract Professions Management Association, *Submission No. 76,* pp. 5-6.

Overseas labour hire industry

2.196 Alleged abuses under the 457 visa program have received considerable media attention. The MIA acknowledged this attention and, in their submission, stated:

> We believe much of what has happened in this regard is related to the activities of overseas recruitment agents, who are unregulated and have acted with impropriety in bringing workers to Australia on 457 Visas.[253]

2.197 The Committee was informed by DIAC that:

> In the offshore context DIAC has no legislative powers covering the operation of recruitment agents, contract management services or labour hire companies.
>
> Onshore however, where these organisations are sponsors of skilled workers they are bound by the undertakings all sponsors agree to.[254]

2.198 The CEPU highlighted that there is a common practice amongst some overseas agents, particularly in China and India, of charging prospective visa applicants 'exorbitant fees to "facilitate" their application.'[255] Dr Wise and Dr Velayutham from the Centre for Research on Social Inclusion at Macquarie University highlighted the practice of 'aggressive' agents in Singapore, targeting Indian workers.[256] In some cases, the visa applicant then arrives in Australia to find that there is no job available[257] or that the job has been misrepresented and they are expected to take a less skilled position.[258] Sometimes 457 workers also find themselves signing two employment contracts, one in their home country and another, with less favourable conditions, when they arrive in Australia.[259] Another alleged activity includes contracts being executed overseas that impose conditions that are illegal in Australia, such as union bans or deductions from workers' wages.[260]

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253 Migration Institute of Australia, *Submission No. 9,* p. 3.

254 DIAC, *Submission No. 86a,* p. 26.

255 Communications, Electrical and Plumbing Union of Australia, *Submission No. 61,* p. 22.

256 Dr Wise and Dr Velayutham, *Submission No. 85,* p. 7.

257 Communications, Electrical and Plumbing Union of Australia, *Submission No. 61,* p. 26.

258 Dr Wise and Dr Velayutham, *Submission No. 85,* p. 8.

259 Dr Wise and Dr Velayutham, *Submission No. 85,* p. 8.

260 NSW Government, *Submission No. 51,* p. 3.

2.199 There were consistent calls throughout the inquiry for the conditions under which overseas migration agents and labour hire companies operate to be tightened. The MIA told the Committee that:

> The government should fast-track its regulation of overseas agents, give the immigration department the power to be able to say, 'We are not going to deal with you because you are not a registered agent,' and, in effect, cut them out of the process. If you are dealing with registered agents—and I would be the first to say that they are not all perfect—at least they are regulated, they are bound to a code of conduct and there are penalties involved where their registration can well and truly be cancelled if they do the wrong thing.[261]

2.200 The Committee is concerned that the overseas labour hire industry may be exposing 457 workers to potential abuses and believes this is an issue that necessitates prompt attention from DIAC.

Labour Agreements

2.201 Labour Agreements provide a formal arrangement within the 457 visa program to recruit, either temporarily or permanently, a number of skilled overseas workers. The Committee limited its focus in this inquiry to temporary recruitment through the Labour Agreement mechanism.

2.202 The parties to a Labour Agreement include the sponsoring organisation, the Australian Government (represented by DEWR and DIAC), and the employees. The sponsoring organisation may be an Australian business, a group of employers acting collectively or part of an industry association, or an Australian Government agency.[262] Unions and state governments can also be party to a Labour Agreement.

2.203 DIAC outlined to the Committee the usual content of a Labour Agreement:

- The range of occupations approved, listed by ASCO code;
- The number of persons approved for entry on a permanent and/or temporary basis for the first year of the agreement;

261 Mr Waters, Migration Institute of Australia, *Transcript of Evidence,* 16 May 2007, p. 31.

262 DIAC website, 'How this program works', http://www.diac.gov.au/skilled/skilled-workers/la/how-this-program-works.htm (accessed 27 June 2007).

- The minimum base salary that is expected to be paid to nominees, by occupation where there are salary differences;
- The minimum qualifications and experience that nominees are expected to hold, by occupation;
- The minium licensing/registration requirements;
- Agreed length of stay in Australian for the nominees;
- Expectations in relation to a company's training achievement and expenditure; and
- Expectations of information provision to enable DIAC and DEWR to monitor compliance with the terms and conditions of the agreement.[263]

2.204 DIAC noted that Labour Agreements are generally utilised in circumstances where:

- large number of workers are needed for short term projects;
- ongoing skill shortages in an occupation are evident;
- the occupation is unusual and not found in ASCO;
- a number of different occupations are needed for the same company or project; or
- concerns exist about aspects of industry practice that could be best addressed through the controls of a Labour Agreement.[264]

2.205 To be an eligible party to a Labour Agreement, a sponsoring organisation must meet a number of criteria, including demonstrating efforts made to recruit from the Australian labour market and commitments to training.[265] The Committee heard that one of the potential advantages of Labour Agreements is that they:

> … allow companies to have stable, on-going arrangements in place to employ appropriately skilled migrant workers over time, as part of their workplace planning strategies.[266]

2.206 The Committee received evidence that reflected very disparate views about the benefits and limitations of Labour Agreements. While there seemed to be a level of agreement about the potential advantages of Labour Agreements, the Committee received mixed evidence as to the actual benefits or otherwise of these agreements across different

263 Commonwealth Government, *Submission No. 33,* p. 10.

264 Commonwealth Government, *Submission No. 33,* p. 9.

265 DIAC website, 'Sponsoring organisation eligibility', http://www.diac.gov.au/skilled/skilled-workers/la/eligibility-sponsor.htm (accessed 27 June 2007).

266 Commerce Queensland, *Submission No. 25,* p. 4.

industries. It became clear to the Committee that some employers believed there were distinct disincentives to becoming party to such an agreement. The Committee also received evidence that highlighted a number of procedural issues impeding effective operation of this facet of the 457 visa program, including the lengthy time frames involved in concluding Labour Agreements.

Industry experiences

2.207 Some industries, notably those that recruit highly skilled 457 workers across ASCO 1-3 and whose salaries are generally well above the minimum salary level, considered the current Labour Agreement system to be working well. For example, since 1989, the Australian Financial Markets Association (AFMA) has been party to a Labour Agreement designed to facilitate entry of an agreed number of overseas banking industry professionals. Under the terms of the agreement, only executive, managerial and specialist positions are approved and, in 2005-06, the agreement was used by 17 AFMA members, with 64 visas approved.[267] AFMA observed that:

> Our experience, as a party to a Labour Agreement and also the representative of major financial market institutions who utilise this visa subclass, is that current eligibility requirements for visa applicants and arrangements for the monitoring, enforcement and reporting for the financial services industry is working well.[268]

2.208 The Committee heard that the skills and competencies of the financial services sector workforce are of a very high standard, with average salaries well above the industry average and the average for the 457 visa subclass.[269] In addition, nearly half of approved applicants fall within the ASCO 1 grouping.[270]

2.209 During the hearings, AFMA also told the Committee that it had not experienced either the inefficiencies in concluding a Labour Agreement or the extended processing times that have affected other sectors.[271]

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267 Australian Financial Markets Association, *Submission No. 66*, p. 2.

268 Australian Financial Markets Association, *Submission No. 66*, p. 2.

269 Ms Hang, Australian Financial Markets Association, *Transcript of Evidence,* 17 May 2007, p. 25.

270 Ms Hang, Australian Financial Markets Association, *Transcript of Evidence,* 17 May 2007, p. 25.

271 Ms Hang, Australian Financial Markets Association, *Transcript of Evidence,* 17 May 2007, p. 25.

2.210 Other evidence to the Committee portrayed a vastly different picture of Labour Agreements. In particular, the considerable delay experienced in negotiating a Labour Agreement was identified as a key impediment to their uptake. The DIAC website notes that the standard processing time for Labour Agreements is considered to be 6 to 12 weeks.[272] AMIC commented that in its experience, '[i]t was suggested that this would take between 6 and 8 weeks but in fact 28 weeks later the industry remains without a Labour Agreement despite many meetings and versions of draft documents'.[273]

2.211 AMIC also stated:

> The Labour Agreement under negotiation has been delayed by matters included in the draft document which should have been covered by standard DIMA procedures. This would support a conclusion that a procedures review may be necessary to ensure appropriate controls are in place and matters of concern in relation to 457 labour are appropriately addressed.[274]

2.212 Similarly, Mrs McMullen from ACPMA told the Committee:

> To date, I have tried to negotiate four labour agreements, and in every case the employer has said to me, 'This is too hard; let's just do a business sponsorship' and we have gone through the business sponsorship process and the visas have been granted.[275]

2.213 A lack of transparency as to DIAC's requirements appeared to be contributing to these difficulties. ACPMA highlighted to the Committee its difficulties in obtaining clear direction from the department and stated that DIAC had rejected its proposed Labour Agreement almost in its entirety.[276] ACPMA further commented that:

> Labour Agreements, in our experience, appear to constitute essentially, a list of demands by DIAC which reveal scant

272 DIAC website, 'Step 1 – Sponsoring organisation applies for a labour agreement', http://www.diac.gov.au/skilled/skilled-workers/la/step-1.htm (accessed 2 July 2007).

273 Australian Meat Industry Council, *Submission No. 26,* p. 2.

274 Australian Meat Industry Council, *Submission No. 26,* p. 2.

275 Mrs McMullen, Australian Contract Professions Management Association, *Transcript of Evidence*, 16 May 2007, p. 64.

276 Australian Contract Professions Management Association, *Submission No. 76a,* p. 1.

> understanding of the employer's situation and little appreciation of commercial realities.[277]

2.214 The MIA also observed that Labour Agreements would be used to a greater extent if the 'bureaucratic excesses in trying to achieve such agreements were significantly less':

> It is very difficult for our members to recommend to their clients that Labour Agreements should be applied for where they are clearly desirable, if the hurdles to cross in securing same are too high due to the ongoing administration and onerous requirements. We have no doubt that Labour Agreements would be more popular with employers if they were easier to secure and easier to report on.[278]

2.215 In order to provide a streamlined approach and facilitate the effective use of the 457 visa program, the Committee believes it is essential that employers are able to negotiate a Labour Agreement in an effective and timely manner.

2.216 The Committee also notes that Labour Agreements have been used by some industry bodies in an attempt to tailor the requirements of the broader 457 visa program to their industry. For example, the Printing Industries Association of Australia commented that, from its perspective, Labour Agreements offered the potential for customised agreements designed to meet specific industry needs outside the broader 457 visa provisions and, '[w]hile they may take longer to initiate, they have the advantage of being tailored to the specific needs of the industry concerned and are more flexible once in place'.[279]

2.217 Similarly, the RCA, which had negotiated a Labour Agreement to import 300 cooks and chefs into Australia, observed that the purpose of the agreement was to streamline the process of engaging an overseas worker for small restaurant and catering businesses.[280] The RCA told the Committee that it:

> … valued a number of aspects of the agreement including, a lower minimum salary level, the flexibility to have employees cover repatriation and health care costs should they wish to do so, a streamlined nomination process for employers … and the

277 Australian Contract Professions Management Association, *Submission No. 76a,* p. 3.

278 Migration Institute of Australia, *Submission No. 9,* pp. 10-11.

279 Printing Industries Association of Australia, *Submission No. 18,* p. 8.

280 Restaurant and Catering Australia, *Submission No. 50,* p. 16.

> recognition of an industry-wide contribution (and commitment) to training …[281]

2.218 However, only 12 of the 2,058 cooks and chefs that entered Australia in 2006 ended up doing so through the Labour Agreement.[282] The RCA submitted that there were a number of reasons why the Labour Agreement had not been utilised. These included the restrictions and administrative burdens placed upon employers seeking to become party to the Labour Agreement and that the MSL under the agreement resulted in a 19.5 per cent increase for the 457 workers compared with the salary that applied to an Australian cook or chef.[283]

2.219 The RCA also argued that the administration of the Labour Agreement was highly inconsistent, with the 'commitment to training' requirement being the most inconsistently assessed area. The general experience in this industry was that as the benefits of the agreement were eroded it became more effective to simply utilise the broader 457 visa program.[284]

2.220 Many participants commented that Labour Agreements resulted in closer monitoring from DIAC. For example, Australia Meat Holdings told the Committee that prior to its Labour Agreement there had been 'no monitoring on site by the department'.[285] Similarly, Ms Sutherland of Baker Hughes Australia Pty Ltd commented that they were 'monitored quite closely' because they were on a Labour Agreement.[286]

2.221 A further interesting case study in this area involves the meat processing industry. The Labour Agreement concluded for the Queensland meat industry does not allow access to the regional concession to the minimum salary level. The Committee heard that this would result in 457 workers receiving a higher salary level than local Australian workers. Tabro Meat Pty Ltd commented that the Labour Agreement had not been accepted by most parties in the industry as it would inflict greater costs upon regional small business and make them uncompetitive in the 'export market place'.[287]

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281 Restaurant and Catering Australia, *Submission No. 50,* p. 18.

282 Restaurant and Catering Australia, *Submission No. 50,* p. 17.

283 Restaurant and Catering Australia, *Submission No. 50,* p. 17.

284 Restaurant and Catering Australia, *Submission No. 50,* pp. 17-18.

285 Mr Tame, Australia Meat Holdings, *Transcript of Evidence,* 16 April 2007, p. 59.

286 Ms Sutherland, Baker Hughes Australia Pty Ltd, *Transcript of Evidence,* 30 April 2007, p. 28.

287 Tabro Meat Pty Ltd, *Submission No. 78,* p. 3.

2.222 Similarly, AMIC expressed the view that there would be only three companies in Queensland able to sign the agreement, because their operations were of a sufficient size that costs could be 'spread across the board'.[288] Further, according to Midfield Meats International Pty Ltd, the Labour Agreement had driven 'costs of the process to a point where it is essentially unviable'.[289]

2.223 The Committee notes that the meat industry in Western Australia is considering a Labour Agreement to try and address the issue of worker shortages. However, according to the WA Small Business Development Corporation:

> … if you look at the award rates, they are sub $41,850. When that median salary level is adjusted this year, that will really challenge the industry in terms of how they are going to pay for those people. What it will effectively mean is that they will need to raise the wages of the local workforce to match the wages of the imported labour.[290]

2.224 While it is beyond the scope of this inquiry to provide detailed sectoral case studies, it is apparent that there is considerable dissatisfaction surrounding the operation of the Labour Agreement process. The Committee is concerned by this evidence suggesting there are major difficulties with both the process of negotiating Labour Agreements and the operation and transparency of such agreements. As the RCA rightly questioned:

> If the operation of a labour agreement imposes the same if not more onerous requirements on employers, why would they use such agreements?[291]

2.225 Employers are finding themselves in a situation where they must balance the advantages of gaining access to a number of overseas workers against the conditions being imposed under a Labour Agreement. For example, AMMA told the Committee that DIAC's standard template for a Labour Agreement includes obligations that are not generally required in the broader 457 visa program.[292]

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288 Mr Johnston, Australian Meat Industry Council, *Transcript of Evidence,* 17 May 2007, p. 10.

289 Mr Kelson, Midfield Meats International Pty Ltd, *Transcript of Evidence,* 14 March 2007, p. 37.

290 Mr Moir, Small Business Development Corporation, WA, *Transcript of Evidence,* 30 April 2007, p. 16.

291 Restaurant and Catering Australia, *Submission No. 50,* p. 18.

292 Mr Bull, Australian Mines and Metals Association, *Transcript of Evidence,* 30 April 2007, p. 52.

2.226 The Committee also noted concern from some participants that Labour Agreements could be used to erode conditions and pay for Australian workers. For example, the New South Wales Government commented that 'labour agreements are increasingly being promoted by the federal government to undercut the existing limited protections for workers and market rates'.[293]

2.227 However, the Western Australian Government indicated to the Committee that it will continue to be a party to Labour Agreements, as they:

> … provide employers with a faster and more effective means of recruiting skilled workers from overseas while at the same time protecting the interests and welfare of foreign workers and their families. This involvement in the negotiation of Labour Agreements provides State Government agencies with greater access to workplaces and employee records, and hence enhanced powers to monitor and investigate employer compliance with the scheme as well as with State law.[294]

2.228 RCSA also indicated its support for an industry based Labour Agreement on the basis that it could provide improved monitoring and a faster approval process and that stricter obligations might be imposed in some areas in exchange for concessions in others.[295]

2.229 The Committee notes that AFMA, which provided the Committee with very positive evidence about its experiences with Labour Agreements, was wary of any increased administrative burden, particularly as it argued that Labour Agreements should not impose additional regulatory requirements.[296] This point was echoed by the representative from Fragomen Australia, who told the Committee:

> My concern would be the loss of flexibility for those businesses where there are no real compliance concerns at all. General concerns we have had about the drift of policy discussions over the last year have been the focus on the problems areas and that any changes may adversely affect companies that to date have been absolutely compliant and are needing, desperately in some cases, to recruit people from overseas.[297]

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293 NSW Government, *Submission No. 51*, p. 2.

294 Western Australian Government, *Submission No. 68,* p. 5.

295 Recruitment and Consulting Services Association Ltd, *Submission No. 11*, pp. 3-4.

296 Australian Financial Markets Association, *Submission No. 66,* p. 3.

297 Dr Crawford, Fragomen Australia, *Transcript of Evidence,* 1 June 2007, p. 14.

2.230 While it is clear that a number of issues concerning Labour Agreements need to be resolved, the Committee considers there are potential advantages to industry wide Labour Agreements. Primarily, they could provide consistency and certainty for all parties within an industry, as well as transparency to alleviate concerns about unfairness, to either the sponsored employees or Australian workers. Further, all interested parties, including employers, industry groups and unions, within an industry could be involved in negotiations. The agreement could then clearly set out the conditions that are to apply across an industry.

2.231 The Committee therefore believes that Labour Agreements potentially offer a useful alternative mechanism to address demonstrated skills shortage in certain areas—for example, through industry wide agreements with customised arrangements, as agreed by key stakeholders.

Recommendation 15

2.232 **The Committee recommends that the Department of Immigration and Citizenship and the Department of Employment and Workplace Relations work with stakeholders to improve:**

- **the process of negotiating Labour Agreements;**
- **the consistency of such agreements with aspects of the overall 457 visa program; and**
- **the operation and transparency of such agreements.**