CEPU

CEPU SUBMISSION

to the

Joint Standing Committee on Migration

Inquiry into

Eligibility requirements and monitoring, enforcement and reporting arrangements for

temporary business visas

26 February 2007

Terms of Reference

Inquiry into eligibility requirements and monitoring, enforcement and reporting arrangements for temporary business visas

1. Inquire into the adequacy of the current eligibility requirements (including English language proficiency) and the effectiveness of monitoring, enforcement and reporting arrangements for temporary business visas, particularly Temporary Business (Long Stay) 457 visas and Labour Agreements; and;

2. Identify areas where procedures can be improved.

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Introduction

The CEPU welcomes the opportunity to make this submission to the Joint Standing Committee on Migration regarding its inquiry into the eligibility requirements, monitoring, enforcement and reporting arrangements for 457 temporary business visas.

The CEPU represents the interests and concerns of 120,000 members in a range of occupations and industries spanning:

- Electrical contracting and construction
- Plumbing and mechanical services
- Manufacturing
- Energy and power
- Public and private sector communications

The CEPU has serious concerns with aspects of the 457 visa scheme as our members work in two out of the four "at risk" industries identified by DIAC where it more frequently encounters breaches of sponsorship undertakings.[1] These industries are "Construction" and "Manufacturing".

1 - Summary of Issues of Concern

The CEPU is concerned about the following problems with temporary business visas and in particular the 457 visa scheme in its current form.

- The scheme creates a downward pressure of Australian wages and conditions by allowing employers to import cheaper labour.

- 457 visaholders are not paid at market rates. They need only be paid either the MSL or award rate, whichever is higher. If 457 visaholders are not paid at the market rate this scheme operates as a government subsidy.

- No-one checks the rates paid under an AWA. Under the Government's Workchoices changes to the Workplace Relations Act employers can by-pass the award rate altogether and enter into individual workplace agreements (AWA) with the 457 visa holder which can contain any wage rate as long as it is at least the gazetted minimum. It may not even contain the gazetted minimum because the content of an AWA is not monitored.

[1] Supplementary Budget Estimates Hearing, Immigration and Multicultural Affairs Portfolio, Questions taken on Notice, 30 October 2006, Q15.

- Labour market testing is not required at all for non-regional applicants and is inadequate with respect to regional applicants. Labour market testing should be required for all temporary migrant visas (not just in regional areas) and there should be clear guidelines as to what constitutes acceptable labour market testing practices. Jobs should first be offered locally at market rates not the award or MSL rate.

- The scheme has a negative flow on effect on training as it removes the need or imperative for local employers to train.

- 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. They are not required to submit documentary evidence of their investment in training. They are not required to submit evidence of the number of apprentices (if any) they have employed for a period of time prior to the visa application. Currently, the employer is not required to substantiate any of their claims unless investigated by DIAC.

- Skills assessment is not done by an independent body, such as the local and central trades committees, with the relevant experience assessing overseas qualifications and work experience for the range of occupations for which an overseas workers can apply for a visa.

- Too much reliance is placed by DIAC on the assertion of the sponsoring employer that the applicant's skills and training matches a relevant ASCO group.

- Regional certifying bodies are not qualified for their role. 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.

- The current level of monitoring by DIAC is insufficient particularly site based monitoring. Paper based monitoring should require the employer to produce documentary evidence to support the statements made in the monitoring form.

- Visa applicants should be given notice that site based monitoring is to take place even if DIAC compliance officers do no intend to interview the person. This affords the

visaholder the opportunity to approach DIAC officers without having to do it independently which they may find difficult.

- There should be clear guidelines as to interviews with visaholders should take place. Interviews should not be conducted in the presence of the employer. Visaholders should be given protection of privacy from the employer's presence.

- DIAC does not have the same power as the Office of Workplace Services (OWS) to demand access to examine a company's books[2]. The CEPU believes that DIAC should have the same powers as the OSW to demand access to company information particularly where it relates to pay rates and conditions.

Enforcement and Sanctions _____pp16-18

- Referral to other agencies – it should be mandatory for DIAC to follow up matters it has referred onto other government agencies. Other government agencies should also have to give DIAC regular report backs within a set time frame on the progress of their investigations into the matter/s referred. Investigations should not have an unlimited time framenor should they disappear into the ether.

- There are gaps in the enforcement powers of DIAC. If a person is underpaid because the employer is not paying the MSL, neither the OWS nor DIAC can recover the money. This is because the OWS do not have jurisdiction with respect to the MSL as it is administered by DIAC under the migration laws and the only sanctions DIAC can impose relate to the employer's capacity to sponsor 457 visa holders in the future. DIAC can only try and persuade the employer to pay the lost wages. It can't actually rcover the money legally.

- DIAC should be given the power to fine sponsoring employers who abuse the visa scheme.

Occupational health and safety _____

- Where 457 visaholders are to work in "high risk industries" they should be required to complete an induction course before they commence employment.

English proficiency _____

- 457 visaholders should also be required to be proficient enough in English to understand the hazards of their occupation and the industry in which they will be working. The industries in which CEPU members work are not safe industries and if visaholders do not fully understand the occupational, health and safety considerations of their work they are a hazard to themselves, their fellow workers and the public.

[2] Senate Estimates, 30 October 2006, p.31

2 - Growth of 457 visa scheme

2.1 The growth in the issue of 457 visas has been so rapid that in 2006-2007 for the first time it is likely there will be more temporary skilled 457 visas granted than skilled permanent resident visas.[3] The actual number of 457 visas granted in 2005-2006 was 37,527[4] (primary applicants only), a huge increase of 34% over 2004-05 when 28,000 457 visas were issued. For the first half of the 2006-2007 to 31 December 2006, 21,464 visas have been issued, indicating that further growth in the issue of these visas is likely in 2006-07. Clearly this scheme is becoming more attractive to both sponsoring employers and visa applicants. It is growing beyond being a stop gap measure to fill a temporary skills shortage to becoming a permanent feature of the labour market.

2.2 The growth of the 457 visa scheme has created two major areas of concern to the union. The first relates to the impact that the 457 visa scheme is having on wages and conditions of employment in the local market. Second, we are concerned about the flow on effect on training as it removes the need or imperative for local employers to train.

3 - Rates of pay and conditions

Basis of payment of wages and conditions

3.1 There is no requirement for an employer employing a 457 visaholder to pay that person a market based rate of pay. Nor is there any right for the 457 visaholder to a parity of conditions with Australian workers doing the same work. The main requirement reagrding conditions of employment are that they are at least equal to those provided under relevant Australian laws and awards. This is not the same as saying that visaholders will receive the same conditions of employment as local workers doing the same work because Australian workplace laws and awards contain minimum not industry conditions. It is possible for 457 visaholders to be working side by side with local workers who are not only on better pay but receiving better conditions.

3.2 An applicant under the 457 visa scheme must be paid at least the Australian award wage or the minimum salary level (MSL) set under the Migration Act, whichever of the two is higher. The MSL is derived from the ABS survey of Average Weekly Earnings which includes average earnings for all employees in all skill categories (including

[3] Kinnaird B (2006) "Current Issues in the Skilled Temporary SubClass 457 visa" 14(2) People and Place 49, Monash University

[4] Senate Standing Committee on Legal & Constitutional Affairs Estimates (Additional Budget Estimates) 12 February 2007, p.28

unskilled workers not eligible under the 457 visa scheme)[5] and part-time workers (when 457 visas are restricted to full-time workers).[6]

3.3 Before approving visa nominations DIAC officials must be satisfied that the sponsoring employer is paying either the MSL or the relevant award rate whichever is higher. However, with respect to the relevant award rate how does DIAC check this rate? It is not clear whether DIAC simply relies on the employers undertakings that the pay rate corresponds with the award or whether some independent checking is done to establish what the pay rate should be.[7] We suspect that DIAC does not independently check every wage rate for every visa application that does not match the MSL.

There should be greater transparency with respect to this process and more effort put into establishing what the actual rate should be. A clear process should be in place for cross checking the rates being paid with award rates.

3.4 The gazetted minimum salary for 457s is reviewed annually. From 3 May 2006, there are 4 minimum salaries applicable. These minimum salaries apply only to 457 visas approved after a specified date. All 457 visa holders approved in earlier years at lower minimum salaries can continue to be paid at the lower rates.

These rates only apply to 457s approved after a specified date. All 457 visaholders approved in earlier years at lower minimum salaries can therefore be lawfully continue to be paid at those lower rates.

3.5 Through its paper based compliance monitoring DIAC asks employers for the base and total remuneration paid to 457 visa holders. However, where it is provided nothing seems to be done with this information. It is therefore not possible to determine if actual salaries paid are in line with market rates or even award rates.

Khoo and MacDonald Research

3.6 The only published data about salaries actually paid comes from a 2003-04 survey of 457 visa holders and a follow up survey in 2005-06.[8]

3.7 We have concerns about the representativeness of the follow up work. Only 267 people replied to the follow-up survey of which 196 (over 73%) were "Managers and Professionals", 32 were "Associate Professionals" (12%) and only 15 were "Tradespersons" (5%). In addition, respondents from the UK and other European

[5] Which would pull the average down

[6] Which would also pull the average down. The result of including employee earnings in all skill categories and part-time employees is that the average on which the MSL is based is lower than it would be if an adjustment were made to include only the 457 visa skill categories and only full time employees.

[7] Kinnaird (2006) p.59

[8] Khoo S, McDonald P and Hugo G (2006) Temporary Skilled Migrants' Employment and Residence Outcomes: Findings from the follow-up survey of 457 visa holders Third report on the Australian Research Council Linkage project "Temporary Overseas Migration to Australia" prepared for DIMA August <www.immi.gov.au/research/publications/index.htm>

countries, North America and South Africa were hugely over represented (over 78%) when compared with respondents from Asian countries (11.6%)[9].

3.8 We believe the findings regarding tradespeople in particular must be treated with some caution. Breaking down the responses of 15 people into various categories means that conclusions are being drawn on the basis of very small numbers. Further, lumping in the responses of the tradespeople with managers and professionals will mean any differences in the response of the tradespeople will be swamped by the response of the managers and professionals. For instance, the study concluded that a significant proportion experienced some advancement in their work and income situation during the year but some 10% moved to a lower income group. The study applies its findings equally to all occupational groups. Any conclusions drawn about the group as a whole must be viewed with caution, for instance the finding that; "overall job satisfaction remains high", as the 5% trades group is so small any differences that may exist can easily be absorbed into the other groups.

3.9 We would also treat with caution statements such as; *"Migrants were mainly of the view that foreign workers were treated the same as locals in terms of pay and work conditions although about 15 per cent thought otherwise"*[10]. The specific experience of the 5% trades group can't be ascertained in the aggregated result.

3.10 A problem with the aggregated statistics on income is that they are distorted by the top end. There are highly skilled and highly paid, highly satisfied 457 visaholders who distort the figures. It is much more instructive to disaggregate the figures to get a clearer picture emerging.

3.11 The reason we have dealt with our concerns about this research in such detail is that DIAC itself is using the survey to bolster its arguments concerning its satisfaction with the operation of the current 457 visa scheme. During the October Senate Estimates, Deputy Secretary Mr Rizvi stated:

> *"From the research conducted by Professor McDonald, we also know that a significant proportion of them (457 visaholders), during the two surveys that he conducted, obtained promotions within their own companies and obtained higher levels of pay within their own companies. This is a highly mobile group. They have the capacity to negotiate better pay and salary for their own skills."*[11] *[emphasis added]*

This doesn't square with the experience of the CEPU and other unions with respect to 457 visaholders working in the trade area and in regional areas in less skilled occupations.

[9] Excluding 4.9% for India – who are more likely to have good English skills.
[10] Khoo et al, (2006) at p.12
[11] Senate Estimates, 30 October 2006, p.47 referencing the work by Khoo, McDonald and Hugo (2006), "Temporary Skilled Migrants' Employment and Residence Outcomes: Findings from the follow-up survey of 457 visa holders" Third report on the Australian Research Council Linkage project "Temporary Overseas Migration to Australia" prepared for DIMA August <www.immi.gov.au/research/publications/index.htm>

3.12 Despite our reservations about the aggregate conclusions drawn from the follow-up survey results, it is still instructive to note some observations on disaggregated data from the 2005 survey. In that survey, Khoo and MacDonald found that the median salary paid to tradespersons was $41,100 and that:

> *"…it would appear that many 457 visaholders in occupations other than managerial or prfoesional were paid a salary that was rather close to the minimum required by DIMIA for the 457 visa sub-class."*[12]

Further, some 457 visaholders reported relatively low incomes. For example, 25% of the trades group reported incomes of less than $35,000; and one third of professionals reported incomes under $50,000, including 3% below $35,000.[13]

3.13 In the follow-up survey, some 60% of the trades group experienced no change in income between this survey and the previous survey conducted 12 months prior, while 20% moved to a higher income and 20% moved to a lower income. Clearly, the bulk of these people do not seem to have the capacity to negotiate better pay and salaries for their skills.

3.14 With the table below we have attempted to bring some facts into the debate about wage rates. We believe that the 457 visa program would not be increasing in popularity to the extent that it is, if DIAC was correct in saying that it is more expensive to bring in trade labour from overseas. We believe that in fact, in some instances, it is cheaper to bring in skilled *trade* labour from overseas and the benefits to the employer of having a more compliant workforce far outweigh any disadvantages.

The table sets out the MSL rates and compares them with the relevant award rate and market rate (determined by reference to enterprise agreements operating in Victoria) for an Electrician working in the electrical contracting industry. In industries in which CEPU members work, market rates/enterprise bargaining agreement rates are well above award rates[14] which are above the 457 visa MSL rates.

This table is an attempt to show the difference between a 457 visaholder and an average CEPU member working as an Electrician. It does not include provision for overtime, penalty rates, redundancy pay and so on. It is easy to see why employers and the Howard Government is so keen to use the 457 visa scheme.

[12] Khoo et al, (2006) at p.15
[13] Khoo et al as quoted by Kinnaird (2006) p.59
[14] Which now form the Australian Fair Pay and Classification Scales

GAZETTED MINIMUM (MSL) 457 SALARIES		INDUSTRY/MARKET RATES[15] Electrician (Gde 5 - Licensed) Electrical contracting industry		
Metropolitan rates – From 3 May 2006		From 1 July 2006		
$57,300	Selected information & communications technology occupations (ICT)			
$41,850	minimum rate for all other occupations	VIC - Workshop rate $55,130	VIC - Construction (excl site allowance) $59,744	
Regional Australia – From 1 July 2006				
$51,570	ICT			
$37,655	All other fields – representing 90%	VIC - Country work $48,750		

Impact of Workchoices

3.15 Under the Government's Workchoices changes to the Workplace Relations Act employers can by-pass the award rate altogether and enter into individual workplace agreements with the 457 visa holder which can contain any wage rate as long as it is at least the gazetted minimum. The content of an AWA is not monitored by any independent body. The employer is simply required to lodge the AWA with the Office of the Employment Advocate who is not required to check that the agreement contains fair and reasonable wages. No-one is oversighting the process to ensure the AWA contains "at least the gazetted minimum."

3.16 While the Government is quite happy for wages to be lower in an oversupplied labour market, it is not happy to let the labour market set the appropriate pay rates in a tight labour market. By not requiring sponsoring employers to pay market rates, the 457 visa scheme is an intrusion into the 'free' labour market which exerts downward pressure on local wage rates. It acts to suppress local wages and conditions as the market is boosted by a pool of lower paid workers.

3.17 The Government has admitted that importing foreign workers helps suppress wage claims stopping unions from pushing excessive wage demands[16].

[15] Based on a typical enterprise bargaining agreement

[16] M Shaw (2006) "Guest Workers Cut Wages: Vanstone" The Age, June 8, quote by Senator Amanda Vanstone

With its lower cost structure and a balance of power tipped firmly in favour of the employer, the scheme encourages employers to substitute Australian workers for overseas labour. By allowing employers to pay below market rates:

> *"... the visa is in effect giving these businesses an unfair competitive advantage over other employers, and is in effect a form of government subsidy*."[17]

4 - Labour market testing

4.1 With one exception, the visa rules do not require employers to undertake any labour market testing to see if there is local labour to do the work. At the May 2006 Senate Estimates Hearing, a DIMAC Deputy Secretary claimed that *"bringing skilled workers in from overseas involves very significant costs for the employers"* and that; *"employers are unlikely to incur these costs if they can find the skills locally."*

4.2 At the 2007 Senate Estimates, DIAC Deputy Secretary, Mr Rizvi explained the rationale for the dumping of labour market testing as follows:

> *"The assumptions on which the labour market testing were abolished were that accessing high-skill, high-salary labour from overseas is generally significantly more expensive than accessing it locally. If the local labour was readily available at those high skill levels then most Australian employers, as they as they have demonstrated to us repeatedly, would prefer to access it locally."*.[18]

4.3 While this may be true for the high-skill, high-salary end of the labour market, it is by no means true of occupations at the less skilled end of the labour market who, while still being eligible to enter Australia under the 457 visa scheme, are paid less than market rates.

4.4 Instead of relying on anecdotal statements and averaged statistics, we believe the table above effectively debunks this statement by showing real life wage comparisons with the gazetted minimum. Clearly, it can be more cost effective for employers to bring in workers on 457 visas.

4.5 The exception to not requiring labour market testing applies with respect to regional Australia. A form of labour market testing supposedly applies to employers in regional Australia who are seeking exemptions from the 457 minimum skill level (this allows them to recruit from ASCO groups 5-7). The spread of this exemption is greater than might be thought from the term "regional Australia". For 457 visa purposes all areas of Australia are classed as 'regional' except Sydney, Newcastle, Wollongong, Melbourne, Brisbane, the Gold Coast and Perth. This leaves all of Western Australia bar Perth,

[17] Kinnaird B (2006) "Current Issues in the Skilled Temporary Subclass 457 visa" published in 14(2) People and Place 45 at 53.
[18] Senate Standing Committee on Legal and Constitutional Affairs Estimates (Additional Budget Estimates) Proof Committee Hansard, 12 February 2007, p.34 per Mr Rizvi.

South Australia and all of the other State outside the main metropolitan areas within the scope of "regional Australia" and subject to the exemption.

4.6 This "regional" labour market testing takes the form of a statement from the Regional Certifying Board (RCB - see below) that "the position cannot reasonably be filled locally". What this so-called test means in practice in unclear as there are no guidelines as to how the local labour market may be tested. It seems to be sufficient that in the opinion of the RCB the position can't be filled.

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.

5 - Training

5.1 Occupations for which 457 visas can be granted are eligible occupations in major groups 1 to 4 of the ASCO[19] classifications. These groups are: Managers and administrators, Professional and Associate professionals, and tradespersons and related workers with some exceptions. The list of eligible occupations is known as the Employer Sponsored Temporary Entry List. The basis for inclusion in this list are occupations with an entry level requirement of a trade certificate (Australian Qualifications Framework Certificate III) or higher level qualification, usually requiring at least 3 years study.

DIAC officers have some discretion to grant visas for occupations not on the list. Generally speaking, this means the visa applicant must be at least trained to the level of a skilled tradesman[20].

5.2 The 457 visa scheme is essentially an employer-demand driven visa. An applicant cannot get a visa without an employer sponsor. There is no cap on the number of visas that can be issued or an annual government target for the 457 visas[21]. The 457 visa scheme provides an attractive alternative to investing in training by employers faced with the skills shortage. Rather than investing in training or taking on apprentices, employers can simply poach trained employees at lower rates from overseas.

5.3 When the Howard Government talks about the cost of sponsoring overseas workers, it does not take into account the cost savings being made by Australian employers who are failing to invest in training or the social cost incurred by the Australian community by this training not taking place. Lip service is paid to this with those employers who

[19] Australian Standard Classification of Occupations
[20] Unless the employer has been granted a regional concession to bring in people with lesser skills or the employer has entered into a Labour Agreement with the Government
[21] Kinnaird B (2006) "Current Issues in the Skilled Temporary Subclass 457 Visa", published in 14 (2) People and Place 49.

are monitored having to fill in a form[22] saying they are training and what their training commitment is. A flat figure on training expenditure plus a brief outline of training provided and future training to be provided is all that is required. No real detail about the nature of the training or who is doing it is required of the employer. DIAC includes a warning that the "department may seek evidence" of this training effort but clearly no real evidence is required at this stage, and in most cases is never required.

6 - Skills Assessment

6.1 Unlike skilled migration in the permanent resident visa program, 457 applicants do not have their qualifications assessed by an Australian accreditting body such as the Local or Central Trades Committees of Trades Recognition Australia which operate with respect to trade visa applications. This is of particular concern to the CEPU especially in view of the fact that the growth in visa approvals in the trades in growing much higher than the scheme average.[23]

6.2 During the October Senate Estimates in response to a question by Senator Carr as to how DIAC ascertains whether visaholders who claim to hold certain skills actually hold those skills Deputy Secretary Mr Rizvi replied:

> *"Mr Rizvi—There are a number of things that we will look at as to whether the applicant has the skills relevant for the position that they will be filling …. When the visa application is made we will look at the information provided by the visa applicant to test whether the skills of the applicant match the skills of the position and the skills described in ASCO.*
>
> *There are a number of ways you can do that. Firstly, you might look at the qualifications that the people hold. Secondly, you might look at an assessment that has been done in respect of the applicant by an appropriately registered organisation as to whether they hold those skills. A third thing that can be looked at is whether an appropriate skills assessing body has made a determination in respect of the applicant and whether the applicant holds such a determination. Finally, and in particular where the employee asserts that they have various levels of skilled work experience, the matter can be referred to one of our overseas posts that will undertake an investigation. That might be an investigation simply by ringing the relevant employer to check those things or they may actually do a site visit of the employer to check whether the person indeed has the skilled work experience that they say they have."*

This sounds good in theory but when this statement is more closely examined none of the things listed may in fact have occurred. There is no requirement that an "appropriately registered organisation" has assessed the skills of the visaholder or has made a determination. When this is removed from the assessment equation it becomes clear that the assessment of occupational matching is largely done within

[22] Form 1110 "Business Sponsor Monitoring"
[23] Kinnaird (2006) p.56

DIAC by DIAC officers with information provided by the employer and to a lesser extent, by the visaholder.

6.3 We believe the skills testing arrangements for 457 visaholders is of a lower standard than the skills testing for permanent skilled migration because much more weight is put on the employer's own assessment of the visaholders skills. With respect to applicants for visas for migration using the points tested categories, DIAC relies much more on skills assessment bodies.

> *"Where we have the benefit of the judgement of a sponsoring employer we tend to take a different process. We look at the qualifications put forward. We look at the experience put forward and we make an assessment ourselves, and we take a risk management approach as to whether we will require further testing. With the points tested categories it is mandatory that the relevant skills assessing body make the skills assessment".*[24]

6.4 One of the issues which arises with this is that 457 visaholders often apply for permanent residency under a different visa category. The 457 visa is used to get into the country more easily and then once in, application is made under another category. It is possible in this process that the skills of the visa applicant are not properly assessed.

6.5 In response to a question about this during the Senate Estimates, DIAC maintained that the evidence is that the performance of points tested migrants ranks below that of employer sponsored migrants[25]. Putting aside objections to this statement on the basis of how "performance" ranking is actually done in practice, we believe that if a distinction is drawn between the occupational categories of visa holders a different picture may emerge.

It is not helpful to lump the 'success' of highly skilled, highly paid 457 visaholders in with skilled trades 457 visaholders. Where an employer is sponsoring a specific, highly paid and skilled foreign employee for a specific job, it is self evident that person will do well. However, where an employer is in effect cruising the world market for cheap labour to fill a supposed skills gap, then it is not an automatic success story for the foreign workers.

6.6 This is why 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.

[24] Senate Estimates, 30 October 2006, p.54
[25] Senate Estimates, 30 October 2006, p.54

7 - Problems with the Regional Certification Process

7.1 To access regional concessions with respect to wage and/or skill levels, before lodging a nomination with DIMAC for assessment the employer must seek certification of the nomination by a Regional Certifying Body (RCB). According to DIMAC; *"RCBs are State/Territory bodies based in regional Australia which through their local knowledge, certify that:*

- *The tasks of the nominated position correspond to the tasks of an occupation in the ASCO major groups*
- *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 are at least the level required under the relevant Australian laws and awards and at least the 'minimum salary level' that applied at the time of nomination (whichever is higher)*
- *The working conditions are at least equal to those provided for under relevant Australian laws and awards."*[26]

7.2 We have briefly inspected the types of bodies that are representative of a typical RCB and have found they are a mixture of bodies. In the larger States they tend to be either local councils or local chambers of commerce or local business development boards whose charter is to foster local businesses. We have three major concerns about RCBs.

7.3 First, we believe there is a conflict of interest in having the certifying body comprise representatives of many of the same businesses that may apply for sponsorship. They have a vested interest in approving local business applications for sponsorship. Their mandate is to help local business develop and grow. It is not in their interest to refuse an application by a local for 457 certification.

7.4 Second, we believe that RCBs are not qualified to certify that the tasks of the nominated position correspond to the tasks of an occupation in the ASCO major groups. RCBs lack the expertise, experience and knowledge to assess occupational experience and qualifications.

To assess whether the tasks of the nominated position correspond to the the tasks in a 457 visa occupation requires a broad range of expertise across a broad range of occupations. Keeping in mind that most of the people on these Boards run their own businesses or work in other positions in the community it would be unrealistic to expect each RCB to have the knowledge and expertise of specialist bodies such as the local and central trades committees operating under the Tradesman's Rights Act.

7.5 The CEPU believes that the responsibility of ensuring the tasks of the nominated position correspond to the tasks of the occupations approved for 457 visa applications,

[26] DIMAC Sponsoring a Temporary Overseas Employee to Australia Information Book 11, 01/07

should reside with the same bodies responsible for assessing occupational qualifications and experience under the general migration scheme. This responsibility rests in the first instance with the relevant Government department and in more complex cases, with the local trades committee with specific expertise in the occupation under review.

Although this will slow down the approval process it is more likely to ensure there is a proper match between the skills required and the skills on offer. There is no point in importing inadequately skilled migrants.

7.6 It is particularly important to get this right in regional areas because it in these areas where employers can apply for 457 visa sponsorships for reduced skill levels.

7.7 A final area of concern about certification from an RCB is its capacity to certify that the wages and working conditions are at least equal to those under relevant Australian laws and awards. Once again, such an assessment is well beyond the scope of expertise of such bodies. Such an assessment requires specialist industrial relations knowledge and experience well beyond the capabilities of regional business development boards.

8 - Monitoring

8.1 The 457 visa scheme involves a considerable amount of self regulation. DIAC monitored fewer 457 employers in 2005-2006 than in 2004-2005 despite the number of 457 visas granted growing from 28,000 to 37,527.[27]

8.2 The 457 visa program is supposed to be limited to skilled workers. Putting aside our problems with the lack of proper skills assessment, once the visaholder is here there is no real control or monitoring over what they do. Site monitoring is ad hoc and paper based monitoring simply requires that the employer fill out a form. No further follow up is required unless something about the form raises alarm bells with the DIAC officer checking off the form. Yet somehow the most public of cases of employers abusing the system involves workers such as kitchen hands, farm hands and labourers, all positions which are either not eligible under the 457 visa scheme or have been allowed as a regional or special exemption and should therefore be monitored more closely because they are an exception to the general rule.

[27] The Senate Standing Committee on Legal & Constitutional Affairs; Senate Estimates 30 October 2006, p.27 er Mr Rizvi

Paper based monitoring

8.3 The bulk of compliance monitoring comprises paper-based monitoring with sponsoring employers receiving a tick box form questionnaire[28] to fill in and return. Some documentary evidence regarding pay rates is supposed to be attached to the form[29] and the form warns the employer that they "may" be required to show evidence that their employees have a licence, registration or relevant membership if this is a requirement of their stated occupation. However, the information relies on the honesty of the employer and the documentary evidence may never be required.

Site Visits

8.4 As part of the monitoring process, site visits are made by DIAC compliance officers where the employer is not only given advance warning of the visit but a meeting time is organised prior to the visit based on a mutually agreed time between the DIAC compliance officer and the employer. The visaholder is only given notice of the visit if the visaholder is also going to be interviewed[30]. .Ony 63% of employers were subject to any monitoring (down from 96%)[31] and the proportion monitored by site visits fell from 25% to 18%. In 2005-2006 DIAC made only 1,790 site visits to 457 employers down from 1,845 for the previous year. This was despite the number of 'active' 457 employers growing from 8,000 to 10,000.

8.5 The CEPU believes the employer should not be forewarned of these visits. Advance warning of the visit allows the employer to get organised and remove potentially incriminating paperwork and even ensure the 457 visaholder is off site for the day. The Department claims it is more efficient to give the employer advance warning of a visit so the employer can ensure the necessary paperwork is available for the compliance officer at the visit. The CEPU however, believes that the convenience of the compliance officer is less important than getting a true picture of the employment situation. This is best achieved by not allowing the employer to prepare for the visit. This will make the monitoring potentially slower but less open to "cover-ups".

Problems with the Interview Process

8.6 DIAC should also be interviewing the visaholder as part of the monitoring process. It is not sufficient to be satisfied that all is well purely on the say-so of the employer. Given that a site visit is to check on the *employer's* compliance with his/her sponsorship undertakings the visaholder should also be given notice that the site meeting is to take place. This will provide the visaholder with an opportunity to come forward if there is a

[28] Form 1110

[29] The last 2 pay slips and the most recent PAYG payments summary or a bank statement can be provided as evidence of remuneration being paid. A proper check would involve checking the time and wages records going back further than 2 pay periods.

[30] Senate Estimates 30 October 2006 p.28 & p.41

[31] This doesn't seem to square with the figures

problem without having to independently approach DIAC which may be quite daunting for some.

8.7 Interviewing both parties will lead to a more accurate picture of the conditions under which the visaholder works. This is an additional reason for not giving advance warning of a visit. Advance warning allows the employer to "prepare" the 457 visa holder to only say what the employer wants him or her to say. The ever present threat of deportation will ensure the visaholder toes the line.

8.8 As has been discussed elsewhere in this submission, it is vital that the interview with the visaholder is not conducted in the presence of the employer. The visaholder is not likely to complain or criticise the employer in his or her presence.

8.9 CEPU members working in the electrical contracting industry will be working on sites which are geographically separate from the employer's office. It would be appropriate for the DIAC compliance officer to visit the visaholder at the site rather than the employer's office. This is because the employer's office bears no relation to the conditions under which the visaholder works.

Examining company books

8.10 DIAC does not have the same power as the OWS to demand access to examine a company's books[32]. The CEPU believes that DIAC should have the same powers as the OWS to demand access to company information particularly where it relates to pay rates and conditions.

Current level of monitoring is insufficient

8.11 The CEPU believes the current level of monitoring is insufficient. The bulk of the monitoring relies on a potentially unreliable employer ticking a box to say they are complying with their undertakings. Unless a sponsored employee comes forward with information or a complaint is made through some other avenue such as the union, a non-complying employer could slip through the cracks for years.

8.12 There is no doubt that the majority of employers can be relied upon to at least be paying the 457 visaholder the relevant pay rate and to be employing the visaholder to work in the occupation for which they sponsored them. However, there is equally no doubt that a number of employers cannot be relied upon for their honesty and that number will be growing.

8.13 The rapid growth of the scheme makes it inevitable that abuse of the scheme will also be growing. This is why we believe that monitoring of the scheme needs to be greatly improved and the number of site visits greatly increased especially to employers in

[32] Senate Estimates, 30 October 2006, p.31

industries which have been identified by DIAC as "at risk". It seems paradoxical that as the scheme has grown the number of actual site visits has decreased.

8.14 We are aware that the Government has announced an extra $24 million to go towards employer compliance but a closer look at this commitment reveals it will mainly go towards extra DIAC staff – ultimately 40 throughout Australia – and it is to be spread over the next 4-5 years. This is grossly inadequate. If the Government is serious about monitoring compliance with the 457 sponsorship undertakings, far greater resources must be committed this area of the DIACs operations.

9 - Enforcement

Referral to other agencies

9.1 DIAC compliance officers do not have the same investigative powers as many other officers in similar government agencies such as the OWS, the various Offices of Fair Trading and so on. Its mobile strike teams in effect act as referral agencies to gather information and refer the invesigation onto the relevant agency that is responsible to investigate a potential breach of that agency's area of responsibility.[33]

> *"For example, if from the answers we have received there is a concern that there is underpayment, that the workers are being required to work excessive hours, that there is an occupational health and safety issue, or that there is an issue of deductions being inappropriately made and they do not meet the requirements of the relevant fair trading agency, we would refer that matter to those agencies to then investigate."*[34]

Of concern to the CEPU are the delays inherent in referring various parts of an investigation to different government agencies. According to DIAC Deputy Secretary, Mr Rizvi;

> *"the cooperation we get from the Office of Workplace Services is excellent. They are very responsive and very quick in keeping us up to date with how they are progressing. With other agencies it varies from case to case. In a number of instances the agencies have indicated to us: 'Thank you for the referral. We will investigate,' and they will decide whether they will actually let us know the outcome of their investigation or not." [emphasis added]*

9.2 DIAC do not currently see it as the Department's responsibility to ensure that problems referred to other agencies are followed up and appropriately dealt with. If there is a breach of another agency's laws the primary responsibility rests with that particular agency and DIAC seems to eschew any further responsibility to the visaholder[35]. In some instances, such as a referral to the Tax Office, DIAC has been advised by those

[33] Senate Estimates, 30 October 2006, p.31
[34] Senate Estimates, 30 October 2006, p.31 per Mr Rizvi, Deputy Secretary
[35] Senate Estimates, 30 October 2006, p.34 per Mr Rizvi

agencies that the relevant agency cannot provide DIAC with the outcome of their investigations.

9.3 This is plainly inadequate. It is incumbent on the Government to ensure:

- investigations are fast;
- government agencies fully cooperate
- that investigations are not broken up into compartments and parcelled around various government agencies without DIAC having overall responsibility. It's not good enough for a matter to be referred on and that is the end of things as far DIAC is concerned. There is no accountability in this porcess and no impetus on the other government agency to proceed swiftly with its investigations.
- That progress reports are made back to DIAC; and that
- No 457 visaholder is deported while invesigations are on-going.

10 - Enforcement

The specific problem of pay rates

10.1 Legally, the responsibility in respect of the enforcement of the MSL, as opposed to the enforcement of the industrial instrument, rests with DIAC. If a person is found to be underpaid under an award the matter is referred to the Office of Workplace Services (OWS). However, if it is an award-free area, or it is an area where, because of the way the industrial legislation operates, incentive payments cannot be taken into account the OWS cannot investigate it.

10.2 If a person is underpaid because the employer is not paying the MSL, neither the OWS or DIAC can recover the money. This is because the OWS do not have jurisdiction with respect to the MSL as it is administered by DIAC under the migration laws. DIAC can only try and persuade the employer to pay the lost wages. Sanctions that may be imposed on the employer only affect the employer's capacity to be a 457 visa employer. This involves either a sanction against the employer by either cancelling their sponsorship or barring their ability to recruit in the future.

10.3 There is no provision under the Workplace Relations Act to recover lost MSL wages or to an employer who pays less than MSL wages. The only sanction available is in the Migration Act, and that is to bar the company from further sponsoring.

10.4 The CEPU believes that either DIAC should be given the power to recover underpaid wages under the migration laws or that provision should be made under the workplace laws for the OWS to recover the money. It would be more efficient and time effective for DIAC to be given power to recover the money as DIAC would be the instigator of the investigation in the first place and to hand it over to another agency would involve delay in the recovery of the wages. However, DIAC would also have to assess whether the visaholder should be paid the MSL or an award wage which may mean the

investigation should be referred to OWS as the body with the expertise in such investigations.

Suffice to say that the current position where an employer underpaying the MSL to a visaholder cannot be compelled to pay up the underpayment, is totally wrong.

11 - Deductions

11.1 It seems fairly common practice for some employers to deduct payments for things such as rent, transport, meals and so on. As far as the Department is concerned provided the employer is paying the minimum salary level or the award, then provided the employer and employee have "freely" entered into a "fair and reasonable arrangement to have certain payments deducted from that salary by the employer then that is permissible."[36]

11.2 There is a judgement to be made by DIAC officers as to whether or not the deductions have been entered into freely and whether they are fair and reasonable. To decide this they sometimes (but not always) interview the employee, sometimes (but not always) independently of the employer. Given that these interviews are likely to be quite stressful for the employee, it is absurd that they take place in front of the employer. This seems an unsatisfactory process where many of these employees do not speak English and may be frightened if they speak up that they will be deported.

11.3 Under the Workplace Relations Act there are strict provisions in place regarding the interviewing of employees with respect to investigations. Similar provisions should be made with respect to the interview of 457 visaholders for any reason. As an absolute minimum these interviews should not be conducted in the presence of the employer.

11.4 The responsibility to investigate suspected problems with a deduction from salary in relation to rent, or meals or transport is referred by DIAC to already overworked state and federal departments. We believe that DIAC should have this power to investigate rather than referring the issue onto other departments. DIAC officers should carefully scrutinise deductions to ensure they are 'fair and reasonable'.

11.5 There is also a fairly common practice of overseas agents, particularly in China and sometimes India (we refer to our Case Study), charging prospective visa applicants exhorbitant fees to "facilitate" their application. We agree with the submission of the CFMEU that regulations and a system of licensing should be introduced for migration agents involved in the process of bringing temporary workers to Australia under the 457 scheme and other similar schemes. A condition of gaining such a licence should be a prohibition on exhorbitant fees being charged by the agents and their associated companies. Perhaps a system of preferred agents could be advertised on the DIAC website of agents who do ont "rip off" visa applcants.

[36] Senate Estimates, 30 October 2006, p.37 per Deputy Secretary Mr Rizvi

11.6 We agree this is a difficult area to police but believe it is imperative something be done about such unscrupulous practices that can lead to the visa holder working in almost slavelike conditions to repay a debt to an agent or someoene else they have borrowed money from to pay the agent.

12- The Deportation Fear Factor

12.1 People on 457 visas have very little protection. They have few rights or workplace protections AND the employer wields the ultimate stick of deportation. The employee is a long way from home without the support of family, has no understanding of local laws and sometimes has a large debt to repay to an agent or the employer who organised the visa application. Without the employer's support the 457 visa holder is out the door back to where they came from. This is a powerful disincentive to complain about anything no matter how legitimate the complaint may be.

12.2 There are insufficient protections in place. The visaholder is tied to the sponsoring employer in a relationship based on fear. If the visaholder complains they lose their sponsorship and are sent back to their country of origin.

12.3 It is no coincidence that the number of 457 visaholders has grown so fast. It is a much easier path to migrate to Australia on a 457 visa than through the general skilled stream of migration. The employer simply has to vouch for the qualifications and experience of the visa applicant unless seeking a regional concession. Regional concessions don't seem to present a problem. There is no doubt that these visas are attractive to workers from overseas making them even less likely to complain about sub-standard wages and conditions.

13 - Sanctions

13.1 As of January this year DIAC was only investigating 300 employers of 457 visa holders for possible breaches of their 457 visa undertakings[37]. Between July 1 2006 and Jan 31 2007, only 20 employers had been sanctioned by DIAC for beaches of their undertakings.

13.2 Under the Migration Act the main sanctions for an employer breaching their sponsorship undertakings is a warning followed by a bar or suspension on the further use of 457 visas either for a set period of time or indefinitely.

13.3 We note that DIAC are currently getting advice from the Attorney General's Department on the question of whether a fines regime could also be a possible sanction. The CEPU strongly supports the imposition of fines on employers who breach their undertakings and otherwise abuse their 457 visa privileges.

[37] This represents an increase of 110 on the October 2006 figure of 190! Taking into account the December wind-down and the Xmas/January holiday break, such an increase in activity in such a short space of time is remarkable.

Sanctions and phoenix companies

13.4 In the contruction industry a particular problem arises with what are called "phoenix companies". These companies regularly go out of business and later "pop-up" under a different company name. These companies are notoriously hard to police. If a sanction is imposed on them such as being barred or suspended from sponsoring furthert 457 visa holders there is little to stop that company re-creating itself under another guise andn seeking to employ 457 visaholders in its new incarnation. The prevalence of this practice would suggest that DIAC must pay particular attention to new applications for sponsorship especially in the construction industry. In particular, DIAC should focus on the company''s directors to see if there are connections between this new company and previusly sanctioned companies.

14 - Should the Scheme be wider?

Originally targetted at high skills occupations such as IT and health, pressure is mounting for entry to a wider range of people by employers who see it as a low cost option. This pressure should be resisted. If there is an increasing need for less skilled workers, employment programs should be targetting these areas. This pressure should be seen for what it is – the desire on the part of employers to be able to import cheap guest labour from countries such as China who are desperate (and therefore vulnerable) to come to Australia.

15 - How could the Scheme be better?

- Employers should only be allowed to import 457 visa labour where there is no Australian labour available to do the work.
- Employers should pay market rates not the gazetted 457 minimum salary or the out-of-date award wage.
- The practice of paying market rates should be adopted because the current system unfairly prejudices local workers as it more attractive for employers to be able to pay less than local rates and conditions.
- DIAC should be given the power to query the rates in AWAs to ensure they are at least the MSL. The AWA should be appended to the sponsorship application so that DIAC officers have the opportunity to investigate the rates and conditions prior to the visa being issued.
- DIAC should collect and publish regularly data on actual salaries paid to 457 visa holders.
- A process should be implemented where tax office data can be cross matched with data from the monitoring forms sent to sponsoring employers by DIAC. This will ascertain the

level of complliance with the wage minimums and allow us to assess the impact on the Australian labour market of the scheme.

- Employers should be required to submit documentary evidence of their investment in training their local employees, including any appentices employed with their sponsorship monitoring questionnaire. If a licence or some form of occupational registration is required by the visaholder, a copy of this should also be appended to the questionnaire. This should be done as a matter of course not jusrt when further inquiries are made.

- Assessment of visaholders's skills, training and experience should be done by assessing bodies such as the local and central trades committees administered by the Tradesman's Rights Act. DIAC should not be relying on the employer's say-so that the visa applicant has the skills that match the relvant ASCO group.

- Regional certifying bodies should not be assessing the applicant's skills and training or that the wages and conditions to be paid are at least equal to those under relevant laws and awards.

- Visaholders working in "high risk" industries such as construction should complete an occupational, health and safety induction course prior to commencing employment.

- CEPU members often work in unsafe enviroments. Visaholders employed in the same work should be sufficienctly proficient in English so as not to pose a hazard to themselves, their fellow workers and the general public.

- Visaholders should always be notified that a site monitor will be taking place and be given an opportunity to speak with DIAC officers separately to the employer.

- A report back processes from other agencies must be implemented. It should be mandatory for DIAC to follow up cases it has referred onto other agencies. Other agencies should also have to report back within a set period of time on their progress with the actioning a complaint.

- DIAC should ultimately be responsible for the welfare of the 457 visa holder. It's not good enough to refer a problem to another agency and have no idea what the outcome of the investigation of the matter was or indeed if there even was an investigation. For instance, someone should follow up an underpayment claim with the OWS to ensure something is done about the matter other than it being referred.

16 - CEPU - Case Study of a 457 Visa Applicant

Mr X answered an advertisement in India calling for Electricians in Australia. The contact was a migration agent in India who said he was acting on behalf of a company in Australia who needed to fill vacancies. The agent said the job would be about 3 years in duration and that 'electricians earn good money in Australia'.

The migration agent said he could help Mr X migrate for a fee of USD$15,000 for airfares, paperwork and to "facilitate" the process. Mr X borrowed the money locally in India in reliance on getting a well paid job in Australia. A cheque was made payable and sent to a company in the US. He was shown the bank transfer details.

There was a connection between the company in Australia and the principal of the migration agent. DIAC is supposed to check on these companies. We don't know what level of monitoring there has been of this company by DIAC.

The agent assisted him to make an on-line application for a 457 visa. His application was granted. However, just as Mr X got on the plane to come to Australia, the company contacted DIAC saying the work had fallen through and they cancelled the sponsoring application.

The problem was that the visa was already issued and Mr X was on his way to Australia. The company relied on the administrative delay involved in the various parties being informed of the changed circumstances.

Mr X arrived in Australia with a contact phone number for the company who told him there was no longer a job. He tracked the company address and was told again there was no job. The company reported him to DIAC who were looking for him to deport him. Stranded, he turned to the Anglican Church who contacted the union.

At this point he was stressed, depressed and fearful of returning to India where he had a huge debt to repay and no prospect of repaying it.

DIAC gave him the normal 28 days to find another sponsor. How was he supposed to find a sponsor on his own in a foreign country?

He had not been though a skills assessment to assess his fitness to work as an Electrician because this is not a requirement for 457 visa. He does however need the equivalent of a trade certificate to work in Australia. He didn't have this because the application for a 457 visa circumvents the assessment process that an applicant applying for immigration through the usual channels must complete.

A major stumbling block to anyone taking him on is that the sponsoring employer is responsible for his medical insurance and no-one is prepared to take this on. Eventually the union organised for him to be employed by the Group Training Company in Queensland.

He is finally trade tested where he is found to not have the skills required to work as an Electrician. He commenced work as a less skilled Electrical Linesman and is currently working in a workshop to fill in his skill gap.