Law Institute Victoria

16 February 2007

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The Secretary
Joint Standing Committee on Migration
PO Box 6021
Parliament House
Canberra
ACT 2600

By email and post (jscm@aph.gov.au)

Dear Secretary,

Inquiry into Eligibility Requirements and Monitoring, Enforcement and Reporting Arrangements for Temporary Business Visas

The Law Institute of Victoria (LIV) welcomes the opportunity to provide a written submission to the Joint Standing Committee on Migration on the *Inquiry into eligibility requirements and monitoring, enforcement and reporting arrangements for temporary business visas*.

Our submission is attached.

If you would like to discuss any of the matters raised in the submission, please contact Alison Brooks, Acting Solicitor, Administrative Law and Human Rights Section on (03) 9607 9381.

Yours sincerely,

Geoffrey Provis
President
Law Institute of Victoria

Attach.

Law Institute Victoria

Submission

Administrative Law & Human Rights Section

Inquiry into Temporary Business Visas

To: Joint Standing Committee on Migration

A submission from the Administrative Law & Human Rights Section of the Law Institute of Victoria

Date 16 February 2007 (extension granted)

Queries regarding this submission should be directed to:

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1 Introduction

The Law Institute of Victoria (LIV) is the professional association for lawyers in Victoria. A number of our members are registered migration agent lawyers and have experience working in the area of citizenship and migration law.

The LIV welcomes the opportunity to make this submission in response to an invitation from the Joint Standing Committee on Migration (Committee) to provide comments to the Inquiry into Temporary Business Visas.

2 Background

Temporary Business Visas are an important part of Australia's Migration Program, operating to allow businesses to meet skills shortages they have been unable to fill from the Australian labour market on a temporary basis. The visas operate in a wide range of industries and occupations, and benefits which have resulted for Australia broadly include economic benefit, and creating better understanding and training of new ideas, skills and technology.

The LIV submits that in evaluating the requirements for temporary business visas, it needs to be recognised that any scheme or program will be subject to some level of exploitation, and that investigation and punishment of these abuses needs to occur without impacting on the smooth processing of legitimate applications.

LIV members have reported processing times "blow out" in recent times due to more stringent processing requirements, and a fear prevalent amongst case officers of having their files "audit ready" as opposed to focusing as to what might be required in order for an application to be approved.

With this in mind, the LIV provides comments on the terms of reference identified by the Committee.

3 Adequacy of current eligibility requirements

3.1 English language requirement

The LIV considers current eligibility requirements regarding English language skills to be adequate for the purposes of temporary business visas. In the experience of LIV members, sponsoring employers already vet employees on the basis of English language proficiency where this is necessary to carry out the functions of the employment position.

The LIV submits that a mandatory English language requirement would be unnecessarily onerous on sponsoring employers where a real need exists for employees hired overseas and a high level of English is not necessary to undertake the role. For example, often hospitality establishments depend heavily on the skills of chefs from a specific region famous for a particular cuisine. A 457 Visa serves a specific purpose: that is, to overcome a temporary skills shortage. Given the temporary nature of the visa, employers should be allowed discretion to decide who will best suit the needs of their business.

Therefore, the LIV submits that the current flexibility regarding English language proficiency should be retained. Where an employee on a 457 visa applies for permanent residency, they will then have to meet the proscribed levels of English language proficiency.

3.2 Employer eligibility – Advancing skills of existing workforce

The LIV submits that the current requirement for sponsoring employers to demonstrate how their business operations 'advance the skills of the existing workforce' can be overly burdensome.

Given that many small businesses are unable to show that they introduce, use or create new business skills or improved technology, they must demonstrate that they are training Australian citizens and/or permanent residents. In the experience of LIV members, many small businesses have problems satisfying this requirement, because of the expense involved and the lack of Australian citizens or permanent residents willing to partake in such training schemes.

This problem is exacerbated by the current minimum salary levels for sponsored positions, which in many cases will be far in excess of award rates. This has a two-fold effect: firstly, burdening employers with higher than average salary costs where they rely on skills from overseas employees, and secondly discouraging Australian citizens or permanent residents to learn these skills because under an award rate they will earn substantially less than their co-workers.

The LIV therefore submits that this training requirement be relaxed to allow more flexibility for small businesses.

3.3 Position requirements – minimum salary levels

The LIV submits that the concept of 'minimum gazetted salaries' needs to be reviewed and updated so that it more accurately reflects wage conditions in Australia. Whilst the LIV recognises that many overseas workers may need a higher level of remuneration than Australian employees, (e.g. due to the lack of access to Centrelink and other government services), it submits that any minimum salary level should nevertheless have some relationship to the industry it applies to.

This is particularly important for employers in typically low paid occupations, such as hairdressing, motor mechanics and welding, many of which are currently on the list of Migration Occupations in Demand. The current broad brush approach to minimum salary levels creates wage push factors in these occupations, in addition to ordinary market forces, which can have a detrimental affect on employers and small businesses.

The LIV submits that while employers should be free to offer incentives to employees from overseas, the minimum salary levels detailed in the regulations should be pegged to award rates payable to Australian employees. This would still further the objective of ensuring that workers from overseas can afford to live in Australia, whilst creating a more equitable system that will have a less negative impact on small businesses. This new system should properly account for differentials in rural, regional and metropolitan areas.

4 Adequacy of monitoring, enforcement and reporting

In general, the LIV believes that the eligibility requirements for a 457 visa are adequate. Rather, it is the inadequacy of monitoring, enforcement and reporting provisions of the regulations that need to be addressed.

4.1 Monitoring

LIV members report vast inconsistencies in monitoring of their clients by DIAC. This seems to vary depending on the type of job or occupation nominated by the sponsor, the size of the company and the home country of the sponsored employee. Thus, it appears that where the employee is from a 'high risk' country (from a DIAC perspective), increased attention is paid to employment checks, agent visits, interviews and cross examination. This has a particularly burdensome affect on small businesses, which are also excessively targeted, causing disruption and costs associated with supporting the employee. In contrast, LIV members representing large companies report almost no monitoring by DIAC.

One solution to remove such discrimination would be to introduce some form of mandatory reporting on all sponsoring employers. DIAC could then randomly audit a percentage of these reports, ensuring a more efficient use of monitoring resources and a less discriminatory approach. Whilst LIV members are also concerned that sponsoring employers should not be overburdened with additional red tape, a concise form could be created for completion annually which would only require further attention should the company be selected for audit. This would also go some way to address the problem of worker exploitation by increasing the deterrent effect of monitoring, so that all sponsoring employers would be subject to the same risk of audit. (This would also need to be coupled with more adequate enforcement mechanisms so as to protect vulnerable employees – see below.)

Objections have also been voiced over the DIAC practice of overseas reference checks. LIV members report that virtually all applications from countries not eligible for an Electronic travel authority (ETA) are reference checked, despite the total lack of facilities at DIAC to conduct these checks in the volume required. Examples raised by LIV members of poor conduct include contacting business premises out of hours, speaking to security guards and then reporting that the referenced workers are not known at the company, or calling businesses posing as a friend or associate and attempting to obtain confidential information. This type of conduct is particularly objectionable given that it is prohibited in Australia under Australian privacy law. It is unacceptable that DIAC officials can base negative reports on answers received given that overseas companies that are contacted have no obligation to respond.

Many questions have also been raised about the efficiency of the Melbourne Business Centre (MBC). This is an important issue given that it was established in an attempt to facilitate the needs of Australian businesses, not to unnecessarily obstruct the genuine need for overseas workers in many businesses. Given the volume of temporary business visas now granted, the resources available to the MBC seem totally inadequate to effectively monitor the 457 visas. This has led to frustration at the lack of feedback given by MBC staff, who claim that persistent enquiry regarding a case file merely slows down the application.

4.2 Enforcement

The LIV submits that enforcement arrangements for Temporary Business visas are inadequate. This is especially notable in the area of employee obligations.

LIV members report a relatively high incidence of 'moonlighting', particularly in the hospitality industry, whereby an employee will be sponsored by one employer to come to Australia and work, only to be 'poached' by another establishment. The employee is then able to apply for a new sponsored visa. This can be unfair on the original sponsoring employer, who has had to expend considerable sums in order to bring the worker to Australia. Furthermore, until the employee applies for a new visa, the original sponsorship obligations remain so that the sponsor remains responsible for of all medical and hospital

expenses and any costs paid by the Australian Government associated with the employee's stay. This seems particularly onerous given member reports that DIAC does not appear to follow up reports of moonlighting where the employee is in breach of his visa conditions. Failure to investigate reports of breaches may also leave employees without access to benefits and services which the sponsoring employer is obligated to provide.

The LIV submits that this burden could be mitigated by a clause in the sponsored employee's visa, restricting him to stay with the original sponsoring employer for at least one or two years. This could operate in a similar way to student visas, whereby if the employer terminates the employee's employment (or goes out of business), the employee would be afforded reasonable time to secure a new sponsoring employer. Where an employee voluntarily left the original employer before the restricted period, his or her visa would be cancelled subject to an appeals process, where mitigating circumstances (such as a grave breach of workplace relations laws by the sponsor) for leaving the employment could be considered. Otherwise, a system could be put in place enabling the original sponsor to recover the reasonable costs of repatriation from any new sponsor within the restricted period.

4.3 Reporting

There are currently no reporting requirements under the present regulations. The LIV submits that a system of reporting, as outlined above, could alleviate many of the inadequacies of the current monitoring and enforcement mechanisms.

5 Areas where procedures could be improved

5.1 E-visas system

There has been widespread criticism of the e-Visa system: it is unstable, constantly crashing and losing documents. Clearly this must be addressed, particularly given that DIAC is trying to encourage electronic applications by drastically reducing the time frame for an application compared to a paper application.

5.2 Document receipt policy

Current DIAC policy is not to acknowledge the receipt of documents. This creates much anxiety for applicants, who spend a considerable amount of time collating and sending documents requested by DIAC. This anxiety is exacerbated by the refusal of DIAC case officers to respond to enquiries about the progress of visa applications. Therefore, applicants can be unaware for several weeks or months that part or all of their application is missing (an increasingly frequent occurrence). Contrary to the aim of 457 visas - to address current business needs - these constant and unnecessary delays can have a considerable negative effect on the sponsor's business.

The LIV submits that this could be alleviated to a large extent by acknowledgment of receipt of an application and the immediate assignment of a file number. Applicants should then be advised on the progress of an application, including the assignment of a case worker and an estimate of the time frame for the application to be processed, including contact when documents are outstanding.

The LIV understands that many of the current procedural problems are caused by the sheer volume of applications received by DIAC, with the result that the work load of case workers is extremely high. This is exacerbated by the high turnover of staff in DIAC, which

raises concerns over whether case workers are receiving adequate training. Clearly, these issues need to be addressed to ensure processing times are kept to a minimum, allowing the 457 visa to function as it is supposed to. This requires a more accountable process that will benefit all parties involved.

6 Conclusion

The LIV submits that the 457 visa is an important tool for expanding Australian businesses and nothing should be done to increase the burden on sponsoring businesses. Rather, we submit that the aim should be to facilitate the ability to bring highly skilled temporary workers from overseas. We note that the well publicised problems that arise in the 457 area would be alleviated by better resourcing of Business Centres so that monitoring of all sponsoring businesses is regularly undertaken.