

# Memorandum of Understanding

In relation to exchange of information concerning Labour Agreements and  
Subclass 457 visa monitoring and compliance

(**'MOU'**)

between

**The Commonwealth of Australia, as represented by the Australian  
Building and Construction Commissioner**

and

**The Commonwealth of Australia, as represented by the Department of  
Immigration and Citizenship**

## 1. Signatories – Roles of Parties

- 1.1 The Australian Building and Construction Commissioner (**'ABCC'**) is responsible for administering and ensuring compliance with the *Building and Construction Industry Improvement Act 2005 ('BCII Act')*, *Fair Work Act 2009 ('FW Act')*, *Fair Work (Registered Organisations) Act 2009*, *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, *Independent Contractors Act 2006 ('IC Act')* and associated Regulations. The ABCC is committed to providing an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.
- 1.2 The Commonwealth Department of Immigration and Citizenship (**'DIAC'**) is responsible for administering and ensuring compliance with the *Aliens Act Repeal Act 1984*, *Australian Citizenship Act 2007*, *Australian Citizenship Act (Transitionals and Consequentials) Act 2007*, *Immigration (Education) Act 1971*, *Immigration (Education) Charge Act 1992*, *Immigration (Guardianship of Children) Act 1946*, *Migration Act 1958*, *Migration Agents Registration Application Charge Act 1997*, *Migration (Health Services) Charge Act 1991*, *Migration (Sponsorship Fees) Act 2007* and the *Migration (Visa Application) Charge Act 1997* and associated Regulations. DIAC is committed to building Australia's future through the well-managed entry and settlement of people.

## 2. Definitions

- 2.1 **'ABCC'** means the Australian Building and Construction Commissioner. The ABCC is appointed by way of administrative provisions provided under section 15 of the BCII Act. Sections 25 and 26 of the BCII Act provides the ABCC is the Head of the Office of the ABCC.
- 2.2 **'ABCC Material'** means any Material provided by the ABCC to DIAC in accordance with this MOU.
- 2.3 **'DIAC'** means the Department of Immigration and Citizenship. References to the term **'Secretary'** means the Secretary of DIAC who is appointed by way of section 58 of the *Public Service Act 1999*.
- 2.4 **'DIAC Material'** means any Material provided by DIAC to the ABCC in accordance with this MOU.
- 2.5 **'Intellectual Property'** means all rights and interests arising from intellectual activity in the scientific, literary, artistic and industrial fields, including those in the nature of copyright, patents, designs, trade and service marks, and trade and business names, whatever they are called and wherever and however they arise.
- 2.6 **'Interagency Guidelines'** mean the guidelines set out in the Schedule and are specific guidelines that govern the relationship between DIAC and the ABCC and set out the role of each Party where there is an overlap of legislative responsibilities, duties or powers under the Relevant Legislation.
- 2.7 **'Labour Agreement'** means a formal agreement entered into between:
- (a) the Minister, or the Employment Minister; and
  - (b) a person or organisation in Australia;
- under which an employer is authorised to recruit persons to be employed by that employer in Australia.
- 2.8 **'Material'** includes, but is not limited to, documents, equipment, information, property and data stored by any means. Examples include MOU Material, DIAC Material, and ABCC Material.
- 2.9 **'MOU'** means this memorandum of understanding, including the Interagency Guidelines, any attachments, annexures, schedules or other documents expressly incorporated.

2.10 **'MOU Material'** means Material that is created for the purposes of this MOU or which is copied or derived from MOU Material.

2.11 **'Party'** means a party to this MOU.

2.12 **'Personal Information'** carries the meaning as defined in the *Privacy Act 1988*.

2.13 **'Privacy Legislation'** means laws relating to the protection of Personal Information, specifically the *Privacy Act 1988*:

2.14 **'Relevant Legislation'** means the legislation that each Party has responsibility for administering and ensuring compliance with, as outlined in paragraphs 1.1 and 1.2 of this MOU for the ABCC and DIAC, respectively.

2.15 **'Subclass 457 Visa'** means a Temporary Business (Long Stay) (Subclass 457) visa, within the meaning of the *Migration Act 1958*.

### 3. Purpose

3.1 The purposes of this MOU are to:

(a) facilitate the exchange of information between the Parties in relation to Labour Agreements and Subclass 457 Visa monitoring and compliance in order to:

(i) assist investigations conducted by ABCC into alleged contraventions of the BCII Act, IC Act, the FW Act, related legislation, Federal awards and enterprise agreements;

(ii) assist with the monitoring of compliance conducted by the ABCC with the National Code of Practice for the Construction Industry; and/or

(iii) refer matters, where appropriate and agreed between the Parties, to the Commonwealth Director of Public Prosecutions or the Australian Federal Police.

(b) outline the responsibilities of the Parties in relation to the exchange of information; and

(c) set out a framework to govern the collaborative relationship between the Parties.

#### **4. Interagency Guidelines**

4.1 The Interagency Guidelines form part of this MOU and are specific to the relationship between DIAC and the ABCC.

#### **5. Status of this MOU**

5.1 The Parties agree to implement this arrangement in accordance with the terms and conditions of this MOU.

5.2 This MOU is a voluntary statement of the intent of the Parties at the time of signing this MOU and is not intended to create, and does not create, any legally binding obligations between the Parties, and is not enforceable in any court or tribunal.

5.3 This MOU represents the entire agreement between the Parties in relation to its subject matter and replaces all previous agreements, whether oral or in writing with respect to the subject matter of this MOU.

5.4 Both Parties understand that Relevant Legislation and other law, as amended from time to time, takes precedence over any terms in this MOU to the extent of any inconsistency. Any ambiguity or uncertainty arising out of a reading of this MOU is to be resolved in a way that is consistent with the Relevant Legislation and any other laws.

5.5 In the event of any conflict between the paragraphs of the MOU and any part of schedules and attachments (if any) the paragraphs of the MOU will take precedence.

5.6 All Attachments and Schedules to this MOU form part of this MOU.

#### **6. Exchange of information**

6.1 To the extent permitted by law, and in accordance with this MOU, the Parties agree to:

- (a) work co-operatively to exchange information relating to Labour Agreements and the Subclass 457 Visa program for the purposes outlined under sub-paragraph 3.1 of this MOU;
- (b) work together to ensure that this information is exchanged in a timely manner and by the methods set out in the Interagency Guidelines;
- (c) take reasonable measures to ensure that information exchanged is accurate and up-to-date; and
- (d) inform each other of changes to their respective Relevant Legislation that may impact on the operation of this MOU.

6.2 Specifically, DIAC agrees to provide the following information to the ABCC when requested by the ABCC:

- (a) any document related to the purposes outlined under sub-paragraph 3.1 of this MOU (document means any paper or other material on which there is writing; any paper or other material on which there are marks, figure, symbols or perforations having a meaning for persons qualified to interpret them; any article or material or record of information from which sounds, images or writings are capable of being reproduced (including any electronic files held on computer hard drives, compact discs, DVDs or other storage media); any letter, facsimile, email, memorandum, file note, briefing note, diary, industrial instrument, recommendation, advice, report, circular, agenda, minutes, review, appraisal, form, notebook, journal, message slip, receipt, ledger, payment slip, invoice or account; and any map, plan, drawing or photograph); and
- (b) information about approved business sponsors and related visa holders authorised to be provided under the *Migration Act 1958* and in accordance with the *Privacy Act 1988*.

6.3 Specifically, the ABCC agrees to provide the following information to DIAC:

- (a) any document related to the purposes outlined under paragraph 6.4 of this MOU ('document' has the same meaning described in paragraph 6.2(a) of this MOU); and
- (b) information required to be provided under the *Migration Act 1958* and associated regulations.

6.4 The ABCC agrees that information it provides to DIAC under the terms of this MOU may be used by DIAC for the purposes of:

(a) assessing an application:

- (i) to be an approved business sponsor under the *Migration Regulations 1994*; or
- (ii) for a Subclass 457 Visa or for forming a Labour Agreement; or

(b) for considering whether to cancel:

- (i) the approval of a business sponsor; or
- (ii) a Subclass 457 Visa or a Labour Agreement.

## 7. Use and disclosure of Material

7.1 Each Party will ensure any Material of the other Party, or MOU Material, in its possession or control is used, copied, supplied, disclosed, modified or reproduced only for the purpose for which the Material has been provided and in accordance with this MOU.

7.2 A Party may only disclose to a third party the particulars of this MOU, MOU Material, or Material of the other Party, if that disclosure:

- (a) does not breach any law, including the *Privacy Act 1988*;
- (b) is made to its responsible Minister or in response to requests for information from Parliamentary committees or inquiries;
- (c) is made with the prior written approval of the other Party, and in accordance with any requirements of the other Party providing that approval;
- (d) is required by law; or
- (e) is in accordance with any applicable government direction, policy or law.

## 8. Intellectual Property

8.1 Intellectual Property in Material, including MOU Material, brought into existence by or on behalf of the Parties in connection with this MOU will be owned by, and held by, the Party primarily responsible for bringing it into existence as custodian for the Commonwealth, unless otherwise provided for in this MOU.

## 9. Privacy and Confidentiality

9.1 The Parties:

(a) will not disclose, store, transfer or handle Personal Information collected in connection with this MOU except in accordance with applicable Privacy Legislation or as otherwise authorised by law.

(b) will co-operate with any reasonable request of the other Party relating to the protection of Personal Information or any investigation of a complaint in relation to the handling of Personal Information.

9.2 Each Party will comply with the applicable Privacy Legislation, and is responsible for its own role in any acts or omissions made under this MOU that may give rise to claims made against them by third parties under the Privacy Legislation.

9.3 The ABCC will comply with the provisions of the *Freedom of Information Act 1989 (ACT)*, *Listening Devices Act 1992 (ACT)*, *Information Act 2002 (NT)*, *Telecommunications (Interception) Northern Territory Act 2001 (NT)*, *Privacy and Personal Information Act 1998 (NSW)*, *Freedom of Information Act 1989 (NSW)*, *Workplace Surveillance Act 2005 (NSW)*, *Right to Information Act 2009 (Qld)*, *Invasion of Privacy Act 1971 (Qld)*, *Freedom of Information Act 1991 (SA)*, *Listening and Surveillance Devices Act 1972 (SA)*, *Personal Information Protection Act 2004 (Tas)*, *Right to Information Act 2009 (Tas)*, *Listening Devices Act 1991 (Tas)*, *Information Privacy Act 2000 (Vic)*, *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, *Freedom of Information Act 1982 (Vic)*, *Surveillance Devices Act 1999 (Vic)*, *Freedom of Information Act 1992 (WA)*, *Surveillance Devices Act 1998 (WA)* and any relevant directions issued under those statutes.

9.4 DIAC will comply with the provisions of the *Privacy Act 1988 (Cth)* and the associated Information Privacy Principles and any relevant Direction issued under that Act.

9.5 In certain circumstances, s140ZH of the Migration Act 1958 and Regulations 2.103 and 2.104 of the Migration Regulations 1994 provide for the disclosure by DIAC of the personal information of approved sponsors and related visa holders. Disclosure of personal information that complies with the requirements in s140ZH and Regulations 2.103 and 2.104 is 'authorised' for the purposes of Information Privacy Principle 11.1(d).

9.6 The Parties will comply with all other requirements regarding the disclosure of information under the Relevant Legislation.

## 10. Security of Information

10.1 Each Party will ensure that all information and other Material received from the other Party under this MOU will be kept secure and will be protected by such security safeguards as is reasonable to prevent loss, unauthorised access, unauthorised use, modification, disclosure or other misuse, including unauthorised reproduction by any means.

10.2 The level of protection provided by the Parties will be equivalent to the protection the Commonwealth accords to such information under the *Privacy Act 1988*.

10.3 The level of protection provided by the Parties will be in accordance with, and fulfil the requirements of:

(a) the Australian Government Protective Security Policy Framework 2010 as amended from time to time, as it applies to the classification of the information, including the application of the "need-to-know" principle specified in paragraph 2.4 of the PSM; and

(b) the Australian Government Information and Communications Technology Security Manual (ISM) (ACSI 33).

10.4 If the Parties intend to share electronic information via dedicated network connectivity, they will provide mandatory security documentation in compliance with the Australian Government ICT Security Manual.

## 11. Conflicts of Interest

11.1 Each Party:



- (a) confirms that no conflict of interest exists or is likely to arise in relation to the performance of its obligations under this MOU;
- (b) will endeavour to ensure that no such conflict of interest arises; and
- (c) agrees to promptly notify the other Party if such a conflict arises or becomes likely to arise.

11.2 Where a Party notifies the other of an actual or potential conflict of interest, the Parties will discuss and agree to the necessary actions they are to take to ensure that the conflict of interest is avoided.

**12. Term**

12.1 This MOU takes effect from the date of signing by the final signatories and continues to operate until terminated in writing by the Contact Liaison Officer of either Party.

12.2 Where this MOU is terminated, the Parties are to take all reasonable steps to mitigate the impact of the termination, including the following:

- (a) each Party will, on request, return to the other Party any Material obtained from the other Party in connection with this MOU; and
- (b) unless otherwise agreed between the Parties, each Party will stop work conducted in accordance with this MOU; and
- (c) each Party will take other steps agreed between the Contact Liaison Officers.

**13. Review**

13.1 The Parties will review this MOU within the first twelve months of it being signed and then annually thereafter.

13.2 The scope of the review will consist of:

- (a) the steps the parties take to protect information each Party to this MOU acquires against loss, unauthorised access, use, modification or disclosure and against other misuse; and

(b) any other matter, as agreed between the Contact Liaison Officers.

#### **14. Amendment**

14.1 Amendment of any term in this MOU may occur only with the written agreement of the Contact Liaison Officers.

#### **15. Notices**

15.1 Notices under this MOU must be in writing, and provided to the other Party's Contact Liaison Officer or a nominated person receiving the notice on behalf of the Contact Liaison Officer, at the postal address, facsimile number or email address set out in paragraph 17.

15.2 A notice is taken to be received:

(a) if hand delivered, on delivery;

(b) if sent by pre-paid post, 3 business days after the date of posting unless it was actually received earlier;

(c) if transmitted by facsimile before 5pm on a business day (at the place of receipt), on the day it is sent and otherwise on the next business day, as long as in either case the sender's facsimile machine issues a report confirming the transmission of the number of pages in the notice; or

(d) if transmitted electronically before 5pm on a business day (at the place of receipt), on the day it is sent or otherwise on the next business day, as long as the sender receives an electronic receipt of delivery.

#### **16. Dispute Resolution**

16.1 Where there is dispute over any matter related to this MOU, the Parties will seek to resolve the issue by direct negotiation between:

(a) the Contact Liaison Officers in the first instance;

(b) if negotiations between the Contact Liaison Officers do not reach resolution after a reasonable period of time being not less than 30 days, the matter will be referred and negotiation between the Assistant Secretary, Labour Market Branch, DIAC National Office and the Group Manager – Field Operations, Office of the ABCC; and

(c) if negotiations between the Assistant Secretary, Labour Market Branch, DIAC National Office and the Group Manager – Field Operations, Office of the ABCC do not reach a resolution after a reasonable period of time being not less than 30 days, the matter will be referred to the Secretary of DIAC and the ABCC.

16.2 Notwithstanding the existence of a dispute, the Parties will continue to comply with their obligations under this MOU.

## 17. Contact Liaison Officers

17.1 DIAC's Contact Liaison Officer is the Director of the Labour Agreements and 457 Policy Section, Labour Market Branch, currently:

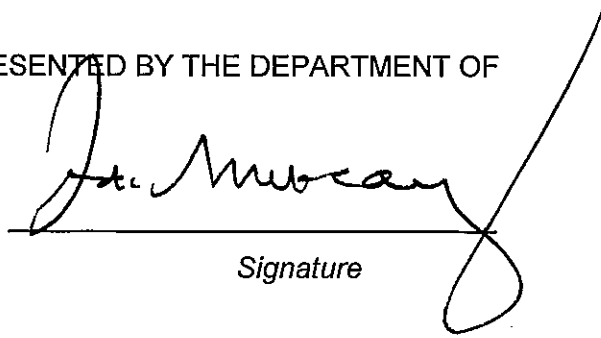
Brendan Dowling  
Director, Labour Agreements and 457 Policy Section  
6 Chan St Belconnen ACT 2617  
02 6264 2129  
02 6264 2632

17.2 The ABCC's Contact Liaison Officer is the Executive Director – Field Operations (Eastern), Field Operations, Office of the ABCC, currently:

Mr Murray Gregor,  
Executive Director – Field Operations (Eastern), Field Operations, Office of the ABCC,  
Level 2, 553 St Kilda Road, Melbourne, VIC, 3004.  
Telephone: (03) 8509 3014.  
Facsimile: (02) 6204 2159.

17.3 Each Party agrees to promptly advise the other Party of any change in the identity or contact details of the Contact Liaison Officer (or any person acting on behalf of the Contact Liaison Officer).

SIGNED on behalf of the  
COMMONWEALTH OF AUSTRALIA AS REPRESENTED BY THE DEPARTMENT OF  
IMMIGRATION AND CITIZENSHIP by



Signature

Andrew Metcalfe, Secretary

in the presence of

K. Nadurak  
Signature

KIM NAOURAK  
Please print name

6 17 11  
Date

SIGNED by THE AUSTRALIAN BUILDING AND CONSTRUCTION COMMISSIONER



Signature

Leigh Johns, the Australian Building and Construction Commissioner

in the presence of

Warren Cruise  
Signature

WARREN CRUISE  
Please print name

22 13 2011  
Date