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Submission to the Legal & Constitutional Affairs Committee

On

Migration Amendment (Sponsorship Obligations) Bill 2007:

EXECUTIVE SUMMARY

The 457 or Temporary Business (Long Stay) visa scheme is invaluable to Australian businesses, government and non-government agencies, acting as a pressure release on the skills crisis.

The Australian Contract Professions Management Association (ACPMA) represents Contract Management Companies who play a critical role in solving this problem by using the 457 visa scheme to source highly skilled professionals from overseas to meet the specific needs of an employer.

Employers also have the capacity to directly sponsor foreign nationals on a 457 visa.
Sadly, a few employers have not done the right thing by their employees, or the 457 visa system that helps support the Australian economy.

Out of 15,000 business sponsorships approved between June 2006 and the end of January this year, 20 employers have been banned or sanctioned from the 457 visa scheme, and 300 are under investigation. That's less than 0.2 percent of all approved sponsorships.

(Source: Parliament of Australia Joint Standing Committee on Migration)

Not one of these employers is an ACPMA member. ACPMA members do not tolerate abuse of 457 visa workers and support tough action against people who do the wrong thing.

However, the proposed, **retrospective** changes to the 457 visa system will hurt decent Australian employers particularly small businesses.

The *Migration Amendment (Sponsorship Obligations) Bill 2007*:

"… changes the time that undertakings come into effect from the time that the visa is granted to the sponsored person to the time the sponsor becomes an approved sponsor. This will make the time that undertakings come into effect consistent with when the new obligations are imposed, i.e. on a sponsor becoming an approved sponsor."

It is the position of the ACPMA that this Bill directly challenges the integrity of the Australian labour market. Retrospective application to all existing 457 visa holders and their employers can directly challenge the employment rights and financial wellbeing of many Australian businesses.

The ACPMA is drawing the following provisions of the Bill to your attention to demonstrate how it will impact on:

- bottom line and decision-making processes of business;
- the rights of employers and the cohesiveness and productivity of workforce
- Your contribution to the Australian economy

140 (i) c Obligation to pay minimum salary

"New paragraph 140IC(1)(a) provides that an approved sponsor of a person for a visa must pay a salary to the person that is at or above the level that is worked out in a way specified from time to time by the Minister in a legislative instrument for the purposes of this subsection. This makes it clear that the level of salary may be varied from time to time and that it is the salary level in place at any particular time that that must be paid by the approved sponsor not the salary level that was in place when the sponsor became an approved sponsor."

Practical application:

140IC empowers the Department of Immigration and Citizenship and the Minister to determine an appropriate minimum salary level for any profession or occupation and apply that minimum salary without market testing and enforce that salary to be paid to all 457 visa holders. It removes the ability of any Australian employer of 457 visa holders to effectively budget the cost of their employment. It could also lead to Australian workers being paid a lower salary for the same job. There is no precedent for a government to mandate a company-wide pay increase and certainly not on an ad hoc basis at any time of its choosing.

Example:

Company A is a large retail bank that is redeveloping its core banking system. To ensure the quality of the development a decision was made to conduct the project on-shore. A development team of 400 staff has been hired on a 12-month contract to realise the project. 250 of these staff are domestic Australian workers, 150 have been hired from overseas under the 457 visa scheme.

DIAC increases the minimum salary level for software developers forcing Company A to increase pay to 457 visa holders by 8 percent. Australian workers then demand a pay increase in line with their peer level 457 visa holder colleagues. Company A cannot afford to increase across-the-board salary levels by 8 percent, nor can it terminate the employment of the 457 workers as such an action would deny them the ability to re-hire into the same roles. Any such action could also expose Company A to an unfair dismissal action.

Consequences:

Companies embarking on large-scale projects knowing that the full contingent of staff will not be available locally will look to move work offshore at a fixed cost, as the retrospective application of minimum salary levels makes domestic project management subject to increasing and indeterminable budget risks.

Any Australian employer perceived to be 'shipping jobs overseas' – despite the compelling business case for such a decision in the face of the financial uncertainty this provision entails – faces intense media and public scrutiny; union campaigns and a divided workforce. The potential damage to your corporate reputation is difficult to predict and yet, but more difficult to repair.

ACPMA seeks the following solution:

ACPMA members respect minimum salary levels; however, any change to minimum wage levels should be effective from the date of, and for the term of the agreement and not applicable retrospectively.

140 (i) e – Obligation to pay travel costs of visa holders and family

"New section 140IE deals with the obligation of an approved sponsor to meet the return travel costs of the primary person (defined in new section 140IB inserted by item 7) and any secondary person (defined in new section 140IB inserted by item 7). This will normally be after the primary person completes the employment (nominated activity) for which he/she was granted a visa to come to Australia but it may also be at an earlier time or in circumstances where they are otherwise required to leave Australia."

Practical application:

140IE move the expense of repatriation from the 457 visa holder to the employer. Regardless of whether the 457 visa holder was already in the country at the time they were hired, the 457 visa holder and their noted family members must be relocated to their home country either at the end of their contract, the end of their visa term or when they resign. This clause does not take into to account the ability of the 457 visa holder to meet these costs directly.

Example:

A State Government begins a public-private partnership on a large road infrastructure project. Chronic local skills shortages, particularly in the engineering and geology disciplines, mean 54 staff are recruited from interstate and 46 from overseas on 457 visas. The project lasts for 24 months, and all 100 staff relocate their families. At the project's conclusion, the partners are obliged to pay the cost of repatriating the 457 visa holders and their families to their country of origin; but do not assist with the relocation of the domestic Australian workers and their families to their home states.

Consequences:

140IE imposes a cost that has not been budgeted for with the hire of existing 457 visa holders and cannot be budgeted for with the hire of additional 457 visa holders. It also fosters an environment where domestic workers would receive less favourable employment conditions than their overseas peers. 140IE effectively invites employers to discriminate against 457 candidates with families as their repatriation costs will be significantly higher.

Australian employers have always been obligated to pay costs of repatriating delinquent visa holders, thus protecting Australian taxpayers from this unfair burden. Making it mandatory for Australian employers to repatriate 457 visa holders and their families regardless of their ability to pay delivers no net benefit to the Commonwealth or Australian taxpayers.

ACPMA seeks the following solution:

Australian taxpayers and Australian businesses can be safeguarded by:

- Removing mandatory employer-funded repatriation requirements with the exception of the existing obligation for Australian employers to repatriate delinquent 457 visa holders;
- Requiring 457 visa applicants to demonstrate the financial means to repatriate themselves (adopting similar principles to the 417 visa)
- Removing retrospective application of any mandatory repatriation provision.

140 (i) f Obligation to pay medical costs

"New subsection 140IF(1) provides that an approved sponsor of a primary person for a visa must pay the prescribed medical costs of the primary person.

"Similarly new subsection 140IF(2) provides that an approved sponsor of a secondary person must pay the prescribed medical costs of the secondary person.

"It is intended that the regulations specify to what extent sponsors are responsible for medical costs which may include, but are not limited to public hospital costs, costs normally covered by Medicare and the cost of pharmaceuticals.

"Subsection 140IF(4) provides that for the purposes of subsections (1) and (2), an approved sponsor is taken to have satisfied the obligation in subsections (1) and (2) if another person (whether or not the primary person or secondary person) has paid some or all of the costs concerned and the approved sponsor fully reimburses that person for the costs paid within 14 days after being given a receipt. It is intended that this provision will operate even if the payment by the primary person has been an indirect payment. The primary person will be taken to have paid the costs the approved sponsor is obligated to pay under this section where the approved sponsor has made a deduction from his or her salary to facilitate direct payment of those costs by the approved sponsor. In this case the sponsor will not be taken to have satisfied this obligation until the primary person is reimbursed an amount equivalent to those deductions."

Practical application:

140IF moves medicals costs or the costs of medical insurance from the 457 visa holder to the employer. This can provide a huge cost to employers as specific health insurance must be used. Further complication will be added on 1/4/08 when the Health Act specifically removes temporary overseas residents from Health Fund cover.

Examples:

- Company D is a small firm of Chartered Accountants. Liam is an Irish resident who worked for them for 6 months on a 417 (working holiday visa) before being offered sponsorship. Once his sponsorship is approved his partner joins him on a 417 visa for 6 months before becoming his 457 visa de-facto. Company D attempts to add her to Liam's health insurance but this is declined as she is 2 years into remission from breast cancer. Company D is then faced with the decision to illegally terminate the employment of Liam based on his de-facto's pre-existing condition (that they have no right to ask about) or to meet the costs of her treatment for the duration of Liam's employment.
- Company E is interviewing staff through a recruitment company to fill a Financial Analyst role. Only 1 valid candidate is found after an exhaustive interview process and they need to assume the sponsorship status on his pre-existing 457 visa. During the interview process Company E is prohibited by law in asking personal questions about family. It is only after his acceptance and at the stage of visa lodgment that they discover that he has 4 children, and the cost of his employment raises by $2,000 p.a. Domestic employees discover that peer level 457 employees are in receipt of health benefits they are denied and initiate a discrimination suit against their employer.

Consequences:

140IF discriminates against Australian workers by affording rights to their 457 visa holding peers that are denied to them. It also encourages anti-family discrimination to reduce the total cost of employment of 457 visa holders.

140IF also applies an unfair and unforeseen budget burden to the employers of existing 457 visa holders who will have to be insured.

Amendments to the Health Act that come into effect on 1/4/08 could force some insured people to change health funds, only to find they are uninsurable due to pre-existing conditions.

Forcing Australian employers to pay medical costs such as private health insurance for overseas professionals and their families is unfair to Australian workers who have to pay their own medical expenses and insurance costs.

This provision also ignores the fact that many 457 visa holders come from countries that have reciprocal medical agreements with Australia – and that visa holders are paying tax and Medicare levies.

ACPMA seeks the following solution:

The Government can protect the health budget and Australian families by making it mandatory for 457 visa holders to pay for full private health insurance and meet their own out-of-pocket medical expenses.

140 (i) g Obligation to pay other costs

"New section 140IG deals with additional costs that must be paid for by an approved sponsor.

"New paragraph 140IG(1)(a) provides that an approved sponsor of a primary person for a visa must pay any fees imposed under a law of the Commonwealth, State or Territory that must be paid in order for the primary person to work in the nominated activity in respect of which the visa is granted. This might include such things as licensing, registration or membership fees for example.

"New paragraph 140IG(1)(b) provides that an approved sponsor must meet the costs (if any) associated with recruiting the primary person who is to be employed in the nominated activity in respect of which the visa is granted. In the past some employers have sought to impose recruitment costs on the visa holder. This will no longer be allowed and will be a breach of this obligation.

"New paragraph 140IG(1)(c) provides that an approved sponsor must pay the costs of a migration agent (if any) involved with the visa application of the primary person. That is, the migration agent's costs of obtaining a visa for the primary person must be met by the approved sponsor."

Practical application:

140IG has the potential to be extremely damaging to the 457 visa community as it denies visa holders or visa applicants legal advice or support from a migration agent unless their employer is willing to meet the costs. The ACPMA is very concerned that this clause will effectively deny many 457 visa holders access to legal support.

Example:

Company F hires many 457 visa candidates each year and on-costs a $1,000 fee to the new employees in respect of these costs. By using a registered Migration Agent Company F ensures both compliance with all relevant legislation and efficient visa approval in the fastest possible time frame. To comply with new legislation, Company F lodges all future applications in-house. Without the professional expertise of a registered migration agent, Company F fails to comply with some legal provisions. These errors result in the loss of business sponsorship status, remove the right to continue to employ of existing 457 staff and incur a $30,000 fine per offence.

Consequences:

Companies will seek to reduce costs whilst trying to comply with tougher legislation. This will remove legal support to many visa applicants and holders and cause many approved business sponsors to lose this status. Prohibiting visa holders from paying for professional legal and migration advice threatens the welfare of the people the Government says it wants to protect.

ACPMA seeks the following solution:

Allow 457 visa holders to seek and pay for professional migration and legal advice.