



Submission on the Proposed New Laws to Reform the 457 Visa (DIAC Discussion Paper)

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Executive Summary

The Minister for Immigration and Citizenship, Senator Chris Evans, has announced that the Government will introduce new laws to help prevent the exploitation of temporary skilled foreign workers and ensure the wages and conditions of Australian workers are not undercut.

A Discussion Paper (**the Paper**) has been prepared by the Department of Immigration and Citizenship (DIAC) seeking stakeholder feedback on proposed reforms to the 457 visa regime

It is understood that the Paper is not an exhaustive list of 457 issues, nor is it stated to be a reflection of the Government's position on the issues raised.

The 457 visa has been the subject of intense media criticism much of which AMMA believes is unjustified and all of which has little application to the resources sector. AMMA's analysis of the Paper is that it is a "grab bag" of any and all concerns ever raised about the 457 program. It does not provide any foundation for the issues raised and none of the issues address the difficulties faced by employers under the current 457 program. The issues appear to have been drawn from submission made to:

- The External Reference Group's Final Report to the Minister (April 2008)
- The Report of the Joint Standing Committee on Migration (August 2007)
- The Standing Committee on Legal and Constitutional Affairs (July 2007)
- Council of Australian Governments Discussion Paper (April 2007)

AMMA's comments only relate to the subclass 457 visa regime. The resources sector including the offshore hydro carbons industry primarily use subclass 457/456 visa and do not utilise the other temporary visas available in the 400 series.

Concerns

- A general approach being taken to legislate where isolated issues or industry specific issues have arisen, when the existing or an improved regime of compliance and penalties would be a far simpler and fairer outcome.
- AMMA does not accept that in the resources sector temporary visa holders are vulnerable or inadequately supported. All employees are treated equally and 457 visa holders receive sufficient support inside and outside the workplace.
- The failure to of the Paper to acknowledge that in some sectors the resource sector included, many 457 visa holders are professionally

qualified and receive generous salaries that enable them to comfortably meet the costs of travelling and settling in Australia.

- The compulsory payment of all relocation and settlement costs by the sponsor creates the potential for employers to be exploited.
- Visa holders are subject to the same PAYG taxation requirements as permanent residents yet it proposed that employer sponsors pay for benefits that taxation revenue is meant to provide such as health and welfare benefits.
- Where market rates are required to be paid to visa holders, is not possible to then adjust wages to take into consideration travel, relocation, licensing or health costs that the sponsor is required to pay.

Recommendations

- Legislation should only address significant issues of concern, not isolated examples in particular sectors that can be addressed through compliance penalties such as the cancellation or suspension of an employers' entitlement to sponsor 457 visa workers.
- Any proposed legislation should address those visa holders at risk who fall below a threshold salary which AMMA proposes is \$75,000.
- All issues raised in the Paper need to have a full and detailed justification for their inclusion, to enable stakeholders to respond in a meaningful manner.
- AMMA supports expanded powers to monitor and investigate those employers who are non-compliant with the 457 visa scheme in lieu of increasing the legislative burden on sponsoring employers.
- AMMA supports the concept that 457 visa holders receive the going market rate that applies to their skill, classification and industry provided that all components that go to make up a visa holder's wage are included.
- If relocation and settlement costs are to be the responsibility of sponsors; visa holders must complete a minimum service period of 12 months before the sponsor loses the right to recoup these costs from the visa holder

About AMMA

The Australian Mines and Metals Association (AMMA) represent all major minerals, coal and hydrocarbons producers and associated processing and service industries; as well as a significant number of construction and maintenance employers in the resources sector.

Membership feedback to AMMA indicates that as a result of the skill shortage that the resource sector is experiencing the overwhelming majority of our members has had experience in using 457 visas or has an interest in using 457 visas.

AMMA members operate in the following industry categories:

- Exploration for minerals and hydrocarbons
- Metalliferous mining, refining and smelting
- Non-metallic mining and processing
- Coal mining
- Oil and Gas
- Associated services such as:
 - Construction and maintenance
 - Diving
 - Transport
 - Support and seismic vessels
 - General aviation (helicopters)
 - Catering
 - Bulk handling of shipping cargo

Background

A Bill to amend the *Migration Act (1958)* is planned for September 2008; it is proposed that a range of measures be introduced. This follows a \$19.6m commitment in the 2008-09 Budget to improve the processing and compliance of the temporary skilled migration program.

The Paper proposes a range of issues including:

- Expanded powers to monitor and investigate employer non-compliance with the 457 visa scheme
- A framework for punitive penalties for employers found to be in breach of their obligations
- Improved information sharing between government agencies to improve compliance
- A redefined sponsorship obligations framework for employers of 457 visa workers and a range of other temporary work visas.

The Paper proposes that the legislation enable specially appointed officers with investigative powers to enter and search workplaces to determine whether employers are complying with their sponsorship obligations similar to the powers of workplace inspectors under the *Workplace Relations Act 1996*.

Employers who provide false or misleading information could face penalties of up to 10 years imprisonment or a fine of up to \$110 000, or both.

Administrative sanctions including the cancellation or suspension of an employer's entitlement to sponsor 457 visa workers are to remain.

The proposed legislation will enable the department to publish the names of employers found to be in breach of their obligations where non-compliance has not been remedied or for repeat offenders.

Legislative amendments will allow DIAC to share and receive information with other government agencies where this is currently not possible. This includes the Australian Taxation Office in relation to whether a visa holder is being paid the correct amount.

The Paper acknowledges that temporary visa holders are currently not entitled to a range of government services available to residents and citizens of Australia, such as health and welfare benefits.

The Resources Sector

AMMA believes the resources sector should be considered a best practice user of the 457 visa in that it is characterised by:

- employers with national and international reputations;
- best practice occupational health and safety practices;
- the payment of salaries considerably higher than the 457 minimum salary level. (competition for labour and poaching between resource sector employers ensures salaries remain competitive);
- significant training expenditure and ongoing commitment to employing and skilling Australians including promoting apprenticeships, graduates, indigenous, and female participation; and
- use of overseas recruitment is to source what is essentially a temporary workforce without adversely affecting the long term employment prospects of Australians

The use of the 457 visa in the resources sector is to satisfy a shortage of skilled labour that cannot be sourced from within the Australian workforce it is not seen as a source of inexpensive labour.

The resources sector is not generally opposed to employer sponsors accepting and taking a degree of responsibility for temporary workers from overseas. Existing 457 visa requirements currently impose significant responsibilities on employers and where employer sponsors enter into labour agreements the responsibilities and obligations are even greater.

The following are AMMA's comments on the additional obligations set out in the Paper:

1.1 Obligations

1.1.1 To Keep Records

It is unclear from the Paper as to what additional records the employee sponsor would be required to keep.

Employers are currently required to keep employment records under existing Commonwealth/ State legislation. The Federal *Workplace Relations Act 1996* and Regulations already require employers to keep records relating to hours worked, overtime, superannuation, and leave which would appear to be sufficient without additional obligations being imposed.

1.1.2 To Provide Information

AMMA has no objection to the requirement for employers to provide relevant information within a prescribed time frame to enable DIAC to monitor and investigate for non compliance.

Currently under the 457 visa obligations employer sponsors are required to cooperate with DIAC in its monitoring activities. Again it is unclear from the Paper what additional monitoring or investigative powers DIAC would have under the proposed legislation.

1.1.3 To notify the Department of Prescribed Changes in Circumstances.

The proposal for employer sponsors to notify DIAC of changes of circumstances already exists for 457 employer sponsors. No justification for a more prescriptive regime has been provided in the Paper.

1.1.4 Notify Visa Holder of Certain Information

457 visa holders are already provided with DIAC's *Frequently Asked Questions* information sheet. The upgrading of the information sheet to inform visa holders of their rights and obligations is not objected to; subject to the information being balanced and non political.

1.1.5 To Cooperate with Inspectors

Cooperation with Inspectors is an undertaking already given by employer sponsors utilising the 457 visa and includes a requirement to cooperate with DIAC inspectors.

1.1.6 To pay the Costs of Locating, Detaining, Removing and Processing Protection Visa Applications

This proposed obligation currently reflects the undertakings in the visa subclass 457, other than there is now an upper limit of \$10,000 that employers can be forced to reimburse the Commonwealth, this obligation should remain unaltered.

1.2 Obligations – Subclass 457 Specific –Salary Related

1.2.1 To not use Overseas Workers as a means of Strike Breaking.

It is proposed that an obligation exists to prevent employer sponsors utilising their 457 visa holders during periods of lawful industrial action or to influence enterprise bargaining negotiations.

AMMA is unaware of circumstances that would require such an obligation in the resources sector. No details as to how this obligation would operate in terms of its content or implication are provided or how it fits with existing laws on freedom of association.

AMMA would oppose any suggestion that 457 visa holders are required to take part in lawful industrial action, should they choose not to do so. Where there is a lawful right to strike it should be exercised freely and democratically irrespective of whether employees are 457 visa holders. The resources sector utilise the 457 visa to assist in remedying short term skill deficiencies in the Australian workforce, not as an attempt to recruit during periods of lawful industrial action.

1.2.2 To pay Income Protection Insurance.

When the 457 visa holder is unable to attend work due to illness or injury that is not otherwise covered by workers compensation they can potentially be in a position where they are unable to support themselves. For Australian residents, they can rely on either their accumulated sick leave entitlement, personal insurance policies or welfare payments.

Presently it is not possible for a 457 visa holder to receive anything less than the prescribed minimum salary level per week as there is no ability for an employer to place 457 visa holders on unpaid leave where they have not accrued any sick leave to warrant payment during the absence.

AMMA would support the concept that 457 visa holders who are unable to work for reasons beyond their control should be able to support themselves. The Commonwealth pays welfare benefits to permanent Australian residents where they are unable to work due to illness or injury. No details are provided as to how long a sponsor should take out the insurance for or what period of time should elapse before a visa holder is eligible to access the income protection policy. Income protection policy's normally have a minimum period

to be served before an employee is eligible to claim under the policy. This is to prevent employees abusing the policy and to keep the cost of the policy at a reasonable level.

While 457 visa holders are required to pay the same income tax as permanent residents, they can not access the same welfare benefits as permanent residents, this is a clear inequity that needs to be addressed.

It is not appropriate to place this additional cost on employer sponsors who already bear the wage cost for a minimum of 28 days following notification to DIAC that that the visa holder is no longer employed.

An obligation on employer sponsors to pay income protection insurance would result in an additional cost to the employment of 457 visa holders which is not required for permanent Australian residents. AMMA do not support this proposed change to the legislation.

1.2.3 To pay the Primary Visa Holder at least at Particular Amount.

The minimum salary level is currently based on Average Weekly Ordinary Time Earnings, other than IT specialists and visa holders covered under a labour agreement.

It is suggested to retain a similar market based price signal, but to await the review of Ms Deegan.

Where visa holders are covered by industrial awards or industrial agreements the sponsoring employer is bound to pay the rates of pay contained in these instruments, which are normally higher than the minimum prescribed salary levels.

AMMA supports the concept that 457 visa holders receive the market rate that applies to their skill, classification and industry provided that all components of a visa holder's wage are included.

1.3 Obligations – Subclass 457- Non Salary –Related Costs

1.3.1 To pay Travel Costs to Australia

The Paper proposes that the sponsoring employer is liable for the travel costs of the 457 visa holder and accompanying family members for the travel costs to Australia.

While in many instances resources sector employers pay the travel cost to Australia of the visa holder and any dependents; employers contractually reserve the right to recoup the costs of travel where the employee does not complete a service period of up to 12 months.

The 457 visa holder on arrival is entitled under the *Migration Act 1958* to obtain another sponsor and to enter into another 457 sponsorship with another employer.

Without the ability to recoup the travel and recruitment costs there remains the ability for other sponsors to recruit the visa holder without incurring the costs imposed on the initial sponsor. The initial sponsor must be able to recoup these costs from the visa holder where a minimum period of 12 months service is not completed.

On this basis should the visa holder obtain a new sponsor and there is an agreement with the initial sponsor to allow reimbursement of travel and recruitment costs if 12 months service is not provided then the new sponsor can consider paying out any travel and recruitment costs incurred by and owed to the initial sponsor by making this payment on behalf of the visa holder.

1.3.2 To pay Travel Costs from Australia.

Currently there is an obligation for sponsoring employees of 457 visa holders to pay for the return travel of the primary visa holder and any members of their family should they be required to leave the country, however there is no prohibition on the employer seeking to recoup this cost from the visa holder.

While it is not unusual in the resources sector for an employer sponsor to pay for the return cost of airfares to the visa holder's home country, this is always subject to satisfactory performance or completion of a project assignment.

It would unreasonable to expect the employer to have to pay these cost without the ability to recoup those costs from the visa holder when the visa holder leaves prior to the expiry of their visa or because they have breached *Migration Act 1958* and or regulations.

An inability to recoup these costs would allow 457 visa holders to in effect have a paid holiday to and from Australia, i.e. they could return to their home country after two weeks in Australia all at the expense of the sponsoring employer. There at least needs to be a qualifying period of employment of no less than 12 months before the employer is unable to recoup the travel costs of the visa holder and dependents.

1.3.3 To pay the costs associated with Recruitment.

The proposition is that the sponsoring employer is liable for the recruitment costs associated with the primary visa holder in an effort to avoid those costs being charged back to the visa holder.

The illustration provided is where a 457 visa applicant pays \$10,000 to an offshore migration agent to secure the opportunity to apply for a visa and the employer proceeded with the recruitment. It is suggested that the sponsoring

employer should be liable to pay the \$10,000, this is an extraordinary obligation to place on an sponsoring employer.

A potential visa applicant paying money to an offshore agent is beyond the control and knowledge of sponsoring employer. Even where it may come to the knowledge of a sponsoring employer it should not become the responsibility of that sponsor. Such payments should only be reimbursable by the sponsoring employer where the employer has participated in/condoned or been an accessory to the arrangement.

Where such events occur without the employer's knowledge there should be no adverse consequences on the sponsoring employer. Labour agreements currently require the employer to declare that they have no knowledge of such arrangements.

1.3.4 To pay the costs Associated with Migration on Agent Services.

Ordinarily resource sector employers pay the recruitment costs associated with bringing a visa holder to Australia including the costs of using an agent. AMMA is however opposed to an obligation on sponsors being billed as a third party for migration or recruitment agent services rendered to visa holders. This is particularly the case where there are exorbitant/unreasonable billing practices that sponsors cannot challenge. These difficulties were raised by the Standing Committee on Legal and Constitutional Affairs in July 2007.

1.3.5 To pay costs associated with Licensing and Registration or Similar.

As stated in the Paper, Australian permanent residents are liable for their own licensing costs in employment unless they negotiate for the payment of these costs in their employment contract with their employer.

It is suggested that making the sponsoring employer liable for the licensing costs, could be offset by reducing the employee salary by the appropriate amount so long as it did not fall below any applicable minimum standard. This would not be possible under labour agreements where employers must pay the market rate, thus any reduction for licensing fees would result in a rate less than the market rate.

The compulsory payment of these fees by the sponsor provides the visa holder with an additional benefit over permanent residents. There should be no requirement on a sponsor to pay for membership of any body/association where this is not a legal requirement before the visa holder can commence work.

1.3.6 To pay certain medical costs or to pay for Health Insurance.

Currently there is an obligation on sponsoring employers to pay medical costs incurred by visa holders in public hospitals. This is often mitigated by sponsoring employers either taking out insurance to cover such costs or

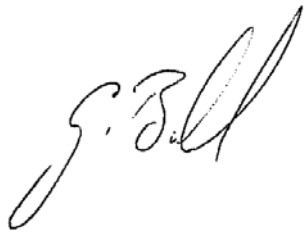
requiring the visa holder to do so. There is no justification provided in making sponsors liable directly for insurance premiums. AMMA does not support such an obligation.

1.3.7 To pay Education costs for certain Minors.

Generally speaking in the resource sector and in particular on construction projects, 457 visa holders are not accompanied by their spouse or dependents. This is due to the remote locations worked and the 7 day/24 hour day shift arrangements.

The proposal to make sponsors liable for the education costs of visa holders who are required to attend schools under Australian law appears to have application in a discriminatory fashion. Sponsors will only be required to pay these fees in states and territories which require the visa holders to pay for school fees (these do not apply to the children of permanent residents). This then provides sponsors with different cost structure depending on the visa holder's employment location which creates an unsatisfactory and discriminatory situation.

AMMA is pleased to expand or clarify any of the above matters raised.



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