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Committee Secretary
Senate Legal and Constitutional Affairs Committee
P. O. Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam

This is the first of our two submissions made to the Senate Committee.

Ernst & Young is agreeable to publication of this submission on the Senate Committee's website.

Response to the Senate's Legal and Constitutional Affairs Committee Inquiry
Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements

Ernst & Young appreciates the opportunity to provide comments on the inquiry into the "Framework and Operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements". Thank you for the extension of time in which to respond to the inquiry.

In this submission we provide our views primarily on the Temporary Work (Skilled) subclass 457 visa program.

We support the Australian Government's efforts to strengthen the integrity of the 457 visa program building on the significant overhaul of this program on 14 September 2009 following the Deegan Review. We represent some of Australia's largest employers as well as hundreds of medium and smaller businesses. As Australia's second largest immigration service provider we are well placed to comment on this topic. Ernst & Young is also an approved sponsor and sponsors a number of subclass 457 visa applicants each year.

Our submission focuses on those terms of reference that have particular relevance to Ernst & Young and our clients. Accordingly, we have commented on selected terms of reference only.

Recent sensational media reports about the subclass 457 visa program are unhelpful to a rational public dialogue and discussion about the appropriateness of Australia's skilled migration program. The program is important to the needs of business to fill temporary vacancies with skilled foreign workers. Records published by the Department of Immigration and Citizenship indicate that there are rare and isolated instances of concern in the program. It is essential that the current sanctions regime deal with inappropriate use of the program.

Our specific comments on some of the terms of reference for the inquiry are set out below.

Effectiveness in filling areas of identified skill shortages and the extent to which the 457 visa program may result in a decline in Australia's national training effort, with particular reference to apprenticeship commencements

Ernst & Young is an approved sponsor. We sponsor a number of subclass 457 visa holders to fill occupations of the Skilled Occupation List (SOL) and the Consolidated Sponsored Occupations List (CSOL), in particular, Accountants, Management Accountants, External Auditor and Management Consultant. But for the subclass 457 visa program we would not be able to meet client demands at peak times for qualified professionals with the requisite skills and experience. For further details in relation to the skill shortages in the accountancy and related professional services occupations you should refer to the Accounting Bodies Joint Submission to the Australian Workforce and Productivity Agency (AWPA).[1]

It is our view that, contrary to some views, the requirement for subclass 457 sponsors to meet training benchmarks is contributing strongly to national training initiatives. The training benchmarks are the only government regulated requirement for employers to pay staff training.

Accessibility to 457 visas and the criteria against which applications are assessed, including whether stringent labour market testing can or should be applied to the application process

Occupations which can be sponsored for subclass 457 visa purposes are set out in a single gazetted list of occupations for both the SOL and the CSOL.[2] The SOL is compiled by AWPA. We understand the CSOL is prepared by the immigration department in consultation with the Department of Education, Employment and Workplace Relations (DEEWR), AWPA and other relevant organisations. We support this approach.

Ernst & Young does not support labour market testing for subclass 457 visa occupations as this will impose unnecessary burdens and costs on businesses when bodies such as DEEWR, AWPA and relevant employer associations have already confirmed the existence of skills shortages.

It is our experience that Australian employers choose to hire locals first not the least because there are significant disincentives in place to discourage resorting to the employment of foreign workers. These costs include expenses associated with hiring foreign workers such as overseas recruitment and relocation costs, compliance costs, associated sponsorship obligations including the continuing need to meet training benchmarks, immigration department lodgement charges and related professional costs as well as the cost of repatriating the foreign worker and family at the end of their temporary employment in Australia.

The process of listing occupations on the Consolidated Sponsored Occupations List, and the monitoring of such processes and the adequacy or otherwise of departmental oversight and enforcement of agreements and undertakings entered into by sponsors

As indicated above, Ernst & Young supports the current approach of listing occupations on the CSOL in consultation with DEEWR, AWPA and other relevant organisations.

We consider that monitoring by the immigration department has been undertaken with vigour; the department's Annual Report indicates roughly 10% of sponsors are monitored. In our experience, this is done on a risk analysis basis with particular industries (construction, hospitality, shipping and information technology) being targeted as well as many small businesses. Despite recent media stories that the subclass 457 visa program is full of rorts there appears to be a very high level of compliance with sponsorship obligations.

The process of granting such visas and the monitoring of these processes, including the transparency and rigour of the processes

Ernst & Young is of the view that the 1 – 4 week period for decisions made in Australia is acceptable. This timeframe should not be exceeded as business has, typically, already tried to fill positions with locals and further delays in on-boarding a foreign worker can have an adverse impact on business.

However, in our experience, decisions in relation to applications in the subclass 457 visa program lodged by overseas businesses at some overseas posts are taking up to three months. This should be improved.

[1] http://awpa.gov.au/our-work/labour-market-information/skilled-occupation-list/documents/AccountantsJointSubmission.pdf
[2] Legislative Instrument F2013L00547 19 March 2013

In addition, decision timeframes in the Labour Agreement Section based in Canberra need to be significantly improved. Applications for both new Labour Agreements and visa numbers for each successive year are taking around ten months. Any such delays have an adverse impact on business and, for some of our clients, have resulted in some projects not proceeding.

The adequacy of the tests that apply to the granting of these visas and their impact on local employment opportunities

Ernst & Young is of the view that existing criteria for the grant of subclass 457 visas are appropriate.

We consider the use of the SOL and CSOL as the best means to determine which occupations should be sponsored. The disincentives associated with additional costs of hiring foreign workers outlined above have the effect of ensuring employers try to fill positions locally if that is possible.

The capacity of the system to ensure the enforcement of workplace rights, including occupational health and safety laws and workers' compensation rights

The recently announced proposal to have 300 inspectors employed by the Fair Work Ombudsman (FWO) monitor sponsors' compliance with foreign workers entitlements is welcome. This will see many more inspectors on the ground and will ensure that foreign workers are not at risk of being underpaid or undertake work not approved by the immigration department. This initiative is overdue.

The impact of the recent changes announced by the Government on the above points

The Minister for Immigration and Citizenship recently announced a suite of changes to the subclass 457 visa program to come into effect from 1 July 2013.[3] Ernst & Young does not endorse the following changes:

a) *introducing a requirement for the nominated position to be a genuine vacancy within the business. Discretion will be introduced to allow the immigration department to consider further information if there are concerns the position may have been created specifically to secure a subclass 457 visa without consideration of whether there is an appropriately skilled Australian available*

   See our comments above in relation to the absence of the need for labour market testing. This was tried previously in an earlier incarnation of the subclass 457 visa program and found to be deficient. It did not work then and will not work now. This applies especially in relation to intra-company transfers where a subclass 457 visa holder has proprietary knowledge having worked with associated entities overseas.

b) *strengthening the market salary rate requirements to provide discretion to consider comparative salary data for the local labour market when deciding whether a nominated position provides equitable remuneration arrangements*

   Measures to test this are already in place.

c) *the market salary exemption threshold will be increased from $180,000 to $250,000 to ensure that higher paid salary workers are not able to be undercut through the employment of overseas labour at a cheaper rate*

   Ernst & Young has not seen evidence that this is necessary.

d) *strengthening the English language requirements by removing exemptions for applicants from non-English speaking backgrounds who are nominated with a salary less than $92,000 and requiring applicants who were exempt from the English language requirement when granted a visa to continue to be exempt from, or to meet the English language requirement when changing employers*

[3] DIAC website http://www.immi.gov.au/skilled/strengthening-integrity-457-program.htm

Ernst & Young has not seen evidence that this is necessary.

e) *aligning the definition of English language with the permanent employer sponsored program*

Ernst & Young has not seen evidence that this is necessary.

f) *strengthening the requirement for sponsors to train Australians by introducing an ongoing and binding requirement to meet training requirements for the duration of their approved sponsorship*

Measures to test this are already in place.

g) *clarifying that 457 workers may not be engaged in unintended employment relationships by requiring workers to be engaged on an employment contract (as opposed to a business contract for services) and not on-hired to an unrelated entity unless they are sponsored under a labour agreement, or in an exempt occupation.*

Refer to our comments above in relation to the importance of avoiding the need to labour market test. This applies especially in relation to intra-company transfers where a subclass 457 visa holder has proprietary knowledge having worked with associated entities overseas.

Any related matters

Ernst & Young believes the following matters are worthy of consideration by the Committee:

A. Repeal of ss. 280(5B) – 280(5C) of the *Migration Act 1958* and reg. 3C of the *Migration Agents Regulations 1998*

There is a need to consider repealing ss. 280(5B) – 280(5C) of the *Migration Act 1958* (the Act) reg. 3C of the *Migration Agents Regulations 1998* (the Migration Agents Regulations).

Together these provisions provide an exemption from the requirement that immigration assistance is only provided by a Registered Migration Agents (RMA): it allows employers to provide immigration assistance to migrating employees. Our practice has encountered numerous instances where sponsored employees have not received copies of the immigration department's approval notification of their subclass 457 visa approval; not only are they unaware of the exact terms of approval of the notification but they are also unaware of the conditions that attach to their visa and of links to the website of FWO for information in relation to their work rights in Australia. This has become evident when a sponsored employee seeks to change employer as the holder of a subclass 457 visa or to apply for permanent residence nominated by a new employer.

The current exemption in ss. 280(5B) – 280(5C) of the Act and reg. 3 of the Migration Agents Regulations should, in our view, be repealed for a number of reasons. Firstly, employers are not adequately versed with the law, policies and procedures in relation to migration and related areas of law. They are also not held accountable under the Code of Conduct regulated by the Office of the Migration Agents Registration Authority (OMARA) should they fail to meet professional and ethical standards. Presently, it can be difficult to determine whether employers provide sufficient advice to prospective employees about their rights and obligations under immigration and workplace law, and there is clearly a conflict of interest between an employer advocating for their best interests and those of a prospective employee. Finally, foreign nationals are presently disadvantaged as they are unable to access OMARA's assistance should they be dissatisfied with the services of their employer acting in the capacity of a migration agent.

B. Greater publicity and information sharing with other Commonwealth and State agencies

It was recently announced that the immigration department will share information in relation to all subclass 457 visa holders with the Australian Taxation Office (ATO). To date, there has been limited sharing of information the ATO as well as the FWO and State and Territory Government agencies that have

responsibility for occupational health and work safety. Greater publicity in the Annual Reports of all these bodies should be encouraged about the outcome of such cross-referral and subsequent sanctions, if any.

Ernst & Young also suggests the immigration department consider publishing the names of sponsors who are successfully prosecuted. We consider it is appropriate that such information about sponsors acting unlawfully is available to foreign workers and the public. At present, the only way to find about an employer who is sanctioned is if the sponsor challenges a sanction in a Court or at the Migration Review Tribunal.

C. Acknowledgement of achievements of the immigration department's engagement with business

The immigration department has made considerable efforts to work with business through holding multiple information sessions in various regional areas, placing Industry Outreach Officers with employer associations and through engaging with stakeholders at its Client Reference Group forum across the country. These efforts are to be commended.

Conclusion

Clearly, the subclass 457 visa program is working as it should albeit there is a need for some fine tuning. Sponsors who are compliant with program requirements and who use the program to benefit the Australian economy should not be adversely impacted by the inappropriate behaviour of a very small minority. Any inappropriate activity should be sanctioned.

Skilled foreigners may be less interested in travelling to Australia if comparable countries have more favourable migration pathways. Australia already has issues with international competitiveness due to the strong Australian dollar and high labour costs relative to some of our competitors. Further disincentives for skilled foreigners should not be allowed to limit Australia's access to workers that will encourage innovation and growth.

It is important that the indiscriminate and uninformed demonization of subclass 457 visa holders be arrested so that the program's objectives are not undermined.

Yours faithfully

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