Hamiltons Migration Law

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Sir/Madam,

Re: Inquiry into the framework and operation of subclass 457 visas

I welcome the establishment of this inquiry following recent Government announcements and statements by various interested parties.

I am solicitor specialising in migration law and a former member of the Migration Review Tribunal (MRT).

I make the following submissions regarding the Inquiry's terms of reference regarding 457 visas in particular, noting that some of these comments will also have application to 457s granted under EMAs and RMAs:

(a) their effectiveness in filling areas of identified skill shortages and the extent to which they may result in a decline in Australia's national training effort, with particular reference to apprenticeship commencements;

In my experience 457 visas are, subject to my comments on item (d), an effective means of filling identified skills shortages experienced by employers. I have had the opportunity to interview many employers in a range of industries and they all stress that the choice to sponsor a 457 visa applicant was due to necessity to fill a current vacancy with a qualified candidate that they had not been able to source locally. Often they are seeking to employ a number of skilled persons and will do so with a mix of local and 457 workers.

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As an uncapped program of temporary visas the 457 is designed to rise and fall with demand in particular sectors and has done so, for example a fall in visas for the construction sector coincided with a downturn in that industry in the wake of the GFC.

I note that another submission has stated that cooks should no longer be on the skilled occupations list. I don't know whether that is because he regards them as unskilled or not in demand, but I can say that for my clients skilled hospitality workers are still in short supply.

I am aware of no evidence that 457 visas lower the national training effort. The national training effort is a responsibility attributable to government, industry groups and the training sector with a view to identifying the areas of skills shortage and the training, including training places and careers guidance, appropriate and available to fill that shortage. In the modern era of career mobility employers have the right to make their own economic decisions about the amount that they allocate to training, given the expectations they may have of being able to retain a promising employee. However 457 sponsoring employers already have a statutory obligation to contribute a percentage of payroll to training of their local staff or, if a start-up, to a relevant industry training fund or scholarship.

Similarly there is no sound practical basis to speculation that 457s reduce available apprenticeships. The 457 is for filling vacancies for already qualified employees. Businesses are entitled to, and do, make decisions as to whether to employ a qualified (whether local or foreign) or a training candidate for a particular position, these decisions involve different cost-benefit considerations and indeed many companies employing 457s also have apprentices.

(b) their accessibility and the criteria against which applications are assessed, including whether stringent labour market testing can or should be applied to the application process;

While the proposals of the Government to "crack down" on the program are noted, there is no obvious need to tighten the accessibility of 457 visas or the criteria against which sponsors, their nominated vacancies and the visa applicants themselves, are assessed. The criteria are already quite stringent and the proposed changes are merely fine-tuning of a program that already works fairly well.

Labour market testing is already conducted by employers with a range of means as set out in the submission from Consult Australia. Employers are entitled to determine how best to recruit to fill a vacancy given the workforce available in their particular area. The statutory

form of labour market testing has already been rejected as a feature of the 457 regime as it was seen to be incompatible with the purpose of the program which is to flexibly and quickly fill short-term vacancies.

Moreover, sponsoring employers often identify their 457 candidate because the person is already working for them, either as a working holiday maker, an international student gaining work experience, or another temporary visa holder. If in the sponsor's view that particular person is the best person to fill the role on-going, they should be allowed to sponsor that person without lengthy and unreliable local recruitment processes (I note the recent comments of the Business Council of Australia regarding the deficiencies in our job-matching services).

(c) 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;

On the listing of occupations on the CSOL or the monitoring thereof, I note that there are different lists for independent skilled migration than for sponsored (temporary and permanent) migration and the former is best placed to address Australia's projected longer term skilled migration needs. The breadth of the sponsored list of skilled occupations enables the visa program to respond flexibly and promptly to the needs of employers as they see them and doesn't need constant review. That said, if it established through thorough consultation with industry groups that certain occupations are genuinely and for the foreseeable future over-supplied, there is no need for them to be on the list. But I anticipate that will likely be the exception rather than the rule. It is true that a national list doesn't take into account that a certain trade may be short in one part of the country but oversupplied in another. The fact is, in this country we don't force people to move interstate in order to obtain work. It is probably impracticable to have skilled shortage lists suitable for all places and times.

On the adequacy of Departmental enforcement of sponsor's obligations, insofar as this relates to the capacity of the Department of Immigration, it is a fact of life that the Department has limited resources to monitor compliance of both sponsors and visa holders across ALL visa subclasses. Monitoring of necessity has to be targeted on the basis of risk analysis relating to particular countries of origin or, in the case of work visas, industry sectors, and even then cannot encompass all sponsors. Enforcement also occurs as a result of reports made to the Department by concerned individuals.

There is no evidence that I am aware of that the 457 program is subject to less enforcement that other visas. Nor is it justified, from a national policy point of view, that it be subject to GREATER enforcement than other visas, given the Department's capacity limits. There is no evidence that it is subject to more fraud than other types of visas, or that fraud in the 457 program is more harmful to the national interest than other migration fraud.

A most significant reform improving compliance with sponsor's obligations, and indeed visa compliance across the migration program as a whole, will be the proposed introduction of data-sharing with the ATO.

(d) the process of granting such visas and the monitoring of these processes, including the transparency and rigour of the processes;

The quality of decision making in the 457 area is mixed. Many visas are granted without issue (possibly some that would have merited greater scrutiny of the sponsors and the nominated occupations at least). But there is a pattern of poor reasoning among the refusals, particularly when assessing visa applicants' qualifications. Decisions makers sometimes misapply the descriptors for entry level into the skilled occupations (as defined in the ANZ Standard Classification of Occupations), leading to perverse outcomes that cause immense frustration and cost for legitimate businesses and genuinely skilled workers; these decisions are often overturned. The issue then, is not lack of rigour, but an absence of nuance and sound business sense including at the supervisory level in the processing areas.

(e) the adequacy of the tests that apply to the granting of these visas and their impact on local employment opportunities;

As previously submitted, the tests are already adequate. Sponsors have to demonstrate that they are legitimately in business and have a sound reputation as an employer. They have to demonstrate expenditure on training local staff. The position already has to be genuine, offering market salary, i.e. what they pay their existing workers or, if no existing worker in the same job, the salary the occupation would command in the market. Thus employers are required to pay their workers equal pay for equal work. They should not be required to pay more, indeed to do so would make relationships among their staff untenable. I make this particular comment in response to the submission of the Centre for Employment Law which states that if market salary is higher than what the individual employer is offering, he should be required to pay that higher amount. As a practical matter sensible employers competing for skilled workers whether local or migrant, will want to calibrate all salaries to the market.

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Also, under the Regulations, the market salary has to be above the threshold known as the TSMIT currently $51,400 (incidentally there is no justification for lowering the TSMIT as suggested in another of your submissions – it is above "award" because the award rates are a bare minimum well exceeded by the current market rates in almost all skilled occupations). Deductions other than for tax are not allowed. Terms and conditions (e.g. leave, overtime, etc) have to be equivalent to what would be offered to Australian employees and in practice are set by reference to the relevant modern industry award.

Visa applicants must demonstrate that they have a functional level of English at least, that they have the requisite skills for the position and pass health and character checks, and carry private health insurance just like most other temporary residents.

Concerning impact of 457 visas on local employment opportunities my above comments on other terms of reference apply. I would stress as well that businesses that are helped to thrive and grow through the ability to employ skilled workers will in turn, in principle, be able to employ more local workers and/or through growing the national and regional economy contribute to employment growth in general.

(f) the economic benefits of such agreements and the economic and social impact of such agreements;

I have no particular comments on EMAs and RMAs.

(g) whether better long-term forecasting of workforce needs, and the associated skills training required, would reduce the extent of the current reliance on such visas;

Probably not, refer to (c) above. Hopefully Australia will always have more jobs available than skilled workers to fill them, otherwise we would have wasted training and disappointed aspirations.

(h) the capacity of the system to ensure the enforcement of workplace rights, including occupational health and safety laws and workers' compensation rights;

Workplace rights for temporary workers are in part the domain of the Fair Work regime and the unions, as much as the Department of Immigration. I note that Fair Work inspectors have recently been given formal authority in relation to employers of migrant workers and this is a welcome move.

No doubt there are unscrupulous employers who seek to short-change 457 visa holders and curtail their terms and conditions, and while this Inquiry does relate to 457 visa holders it remains pertinent to note this context: 457 visa holders are not the only temporary

residents working in Australia – students, working holiday makers, temporary spouse visa holders, and indeed, to some extent even permanent migrants, suffer the same sorts of vulnerabilities to exploitation described in the submission of the Centre for Employment Law regarding the 457 scheme. At least the 457 visa holders' sponsors have a defined set of obligations toward them, under Statute, and in the case of my clients, under contract. Some of the worst instances of worker exploitation, including domestic and sexual servitude, occur as a result of fraudulently-obtained spouse and student visas.

It must also be said that rhetoric about 457 visa holders taking jobs of Australians is only likely to exacerbate these workers' sense that they have a second-class set of rights.

(i) the role of employment agencies involved in on-hiring subclass 457 visa holders and the contractual obligations placed on subclass 457 visa holders;

I have no particular comment on this item.

(j) the impact of the recent changes announced by the Government on the above points;

Is likely to be negligible.

(k) any related matters.

Recent commentary about the 457 visa has included a number of fallacious themes. One being that 457 visas drive down the wages and conditions of local workers, another being that they take jobs away from local workers, and the third that they are a form of slave labour. None of these are based in reality. It is especially illogical to suggest that a comparison of numbers of visas being granted with the national unemployment rate proves there is rorting.

Many 457 visa holders will go on, through the pathways allowed in the Migration Regulations, to become skilled permanent residents of Australia, to the benefit of the economic and social fabric.

Moreover the Government has promoted 457 visas: for example, this time last year it participated in a jobs expo in Texas and announced fast-tracking of skills assessments for American workers to encourage them to come and work in the resources sector. In November 2011 it made provision for proven employers to sponsor workers for six years instead of the usual four. That completes my submission.

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