ANU COLLEGE OF LAW Legal Workshop Migration Law Program

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Legal and Constitutional Affairs Committees

Parliament House

Canberra ACT 2600

Australia

Via email:< legcon.sen@aph.gov.au

Dear Secretary

Submission The Framework and operation of subclass 457 visas,Enterprise Migration Amendment and Regional Migration Agreements in Australia

We welcome the opportunity to make this brief submission in relation to the Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements in Australia. We are happy to provide further elaboration on any of the matters raised herein if requested. Our contact details are above.

Yours sincerely

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Introduction

We make this submission from the Australian National University College of Law Legal Workshop Migration Law Program which specialises in developing and providing courses which enable people to obtain the necessary knowledge, skills and qualifications to register as Migration Agents. The Legal Workshop also provides Continual Professional Development opportunities for Registered Migration Agents and professional short courses in migration law and New Zealand Immigration law. The Legal Workshop has also been engaged in developing research in the practical operation of migration law and administration in Australia, and has previously provided submissions and presented evidence to a number of Parliamentary Committee inquiries, conferences and seminars.

Summary

Because of the work and research of the Legal Workshop, this submission focuses on immigration law and policy and the implications this has for practice

It would appear that current concerns relating to misuse of the 457 visa program are closely related to political response to public perceptions of a highly successful program that has become central to the overall migration program.

Our experience and research run contrary to the current political debate which is focused on alleged 'rorting of a system'. Whilst we have been able to identify several key issues affecting the implementation of the 457 visa program, these issues arise from structural and policy elements within the program rather than deliberate misuse by employers or employees.

Recommendations

1. **The 457 visa program would be best served by the implementation of rigorous monitoring and compliance after visa grant. This would be preferable to a more onerous application process as a means of addressing concerns about rorting within the program and would avoid placing increased unnecessary and complex administrative requirements into the application process.**

2. **Capability within the Department should be strengthened to address the ongoing problem with DIAC manipulation of legislation which has the effect of refusing visa applications instead of refusing nominations. This is exacerbated by:**

- **the lack of capability in DIAC to understand occupations and how they fit into a business.**
- **the large scale outsourcing of decisions with respect to skills assessment.**

3. **The fragmentation of occupational information does not assist consistent Departmental decision making on occupations. A single source which defined occupations for use in migration decision making would produce more consistent and equitable results, and would reduce attempts to manipulate the occupation by applicants.**

4. **The introduction of stringent labour market testing within application processes of the 457 visa program would be inefficient and ineffective. Greater transparency around setting of the CSOL could assist in ensuring that the 457 visa program better meets identifiable skills shortage.**

5. **In order to address concerns surrounding the potential of the exploration of for migrant workers; organisations such as Fair Work Australia must be adequately resourced to ensure that all migrant workers know their rights and the processes they can follow to enforce these rights. This should apply to all categories of migrant worker on temporary visas, including student and working holiday visas.**

6. **The on-hire industry is subject to significant controls beyond that which applies to the balance of the 457 program. The congestion points of administration and decision making should be improved so as not to discourage negotiation of such labour agreements.**

Economic Benefits Temporary Skilled Migration

The economic impact of the ageing population and low birth rate of the Australian population is well documented and has been deliberately addressed by successive governments through adaptation of Australia's Migration Program.

> 'Net migration into Australia is strongly biased towards persons of prime working age (25-50). The year-upon-year effect is to nudge up the labour force participation rate. This in turn is offset by an ageing population which has the net effect of shifting people into age brackets that are historically those with lower participation rates.'[1]

The Government reviews and adjusts the number of places available for migrants on an annual basis according to political, social and economic considerations. As a result the annual intake and numbers of both permanent and temporary migrants fluctuate markedly from program year to year. However the focus on skilled migrants who are of prime working age has ensured that both employer sponsored migrants and independent skilled migrants retain extremely high workforce participation rates.[2]

The selection of permanent skilled migrants within Australia's Migration Program is based on a system characterized by both supply and demand.

> 'The 'supply' model is based on points-testing designed to assess a migrant's capabilities and attributes, whereas 'demand' driven migrant incorporates employer sponsorship of skilled migrants.'[3]

Unlike the permanent migration program the level of temporary migration to Australia is customarily not determined by government but for the most part demand influenced.

Successive failures since the early 1990's of both Government and business to provide adequate support through training to the emerging labour force has seen an increasing demand for temporary migrant workers.

In his 2011 paper[4], Richard Sweet provided an overview for the National Centre for Vocation Education Research, of the implications and causes of labour mobility and job

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[1] Cully, M 2012, *More than Additions to Population: The Economic and Fiscal Impact of Immigration*, Department of Immigration and Citizenship,p3 Canberra, viewed 22 April 2013, <http://www.immi.gov.au/media/publications/research/_pdf/economic-fiscal-impact-of-immigration.pdf>

[2] Department of Immigration and Citizenship 2012, *Population Flows: Immigration aspects 2010-11 edition*, Department of Immigration and Citizenship, Canberra, viewed 22 April 2013, <http://www.immi.gov.au/media/publications/statistics/popflows2010-11/pop-flows.pdf> Only 0.5% of 'employer sponsored' migrants are found to be unemployed and their participation rate is 99.1%. Points tested 'independent' migrants have very high participation rates of over 96.3%, and low unemployment rates approx. 3.0%."

[3] Ibid p154

[4] The mobile worker: concepts, issues, implications, Richard Sweet, Sweet Group Pty Ltd

tenure. He found that Australia's labour force is more mobile than almost all other OECD[5] countries. Each year, approximately 10% change their industry, occupation or both, and geographic labour mobility appears to be around 3% to 5% of the Australian labour force.

This is supported in further studies. The 2012 AWPA[6] and Industry Skills Councils' Future of Work Conference report stated that *"there has been a shift from the conventional employer–employee relationship towards a new demand driven model. This is where businesses source the skills they need, as and when they need them, to projects as required in order for them to be completed on time"*.

Over the next four decades, the number of people aged over 65 will almost double. Within just seven years, approximately 85% of labour market growth will come from people over the age of 45.[7] This inevitably suggests there is growing competition for the available workforce and a constant and continuing need to replace those employees who are retiring with employees of similar qualifications and experience.

These factors may explain why temporary migrants now play such a significant role in the broader economy. Increasingly employers expect immediate and flexible access to skilled workers as a countermeasure to the lack of highly skilled or trained workers.

As a consequence the 457 program has been one of the key categories contributing to the rise in temporary migration in recent years. Initially identified by the Keating government as a possible visa category to address emergent training gaps in the Australian workforce, the 457 visa, introduced by the Howard Government in 1996, remains the most common visa subclass used to sponsor temporary skilled migrants to Australia.

The current government policy regime underpinning the subclass 457 is an uncapped temporary visa program influenced by employer demand for personnel, ostensibly allowing employers to sponsor overseas workers to fill skilled vacancies in identified occupations for up to four years as a circuit-breaker for existing and emerging labour market shortages. There is no cap set on the number of 457 visas which may be granted in a particular program year. Rather, the number of visas granted is related to the level of demand by employers for temporary workers and their willingness to sponsor such workers to fill skilled vacancies in identified skilled occupations.

At the same time the Government has maintained very tight control over those 457 visas approved through the Labor Agreement framework ,[8] regulating only not only approved occupations but also capping the number able to be sponsored through a nomination

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[5] Organisation for Economic Co-operation and Development

[6] Australian Workforce and Productivity Agency

[7] http://www.justice.qld.gov.au/fair-and-safe-work/industrial-relations/mature-aged-employment/about-the-ageing-workforce. Accessed 23/04/13

[8] The Labour Agreement Framework includes temporary visas (under the 457 visa program) and permanent visas. During 2010-2011 there were 2510 sucblass 457 visas granted – an increase of 25/2% p19 Population flows:Immigration aspects

ceiling. This is a separate policy to the Standard Business Sponsorship framework from which the requirement of a ceiling and approved occupations were removed following review in 2009.

There are currently two frameworks within the Temporary Work (Skilled) 457 subclass under which an employer can sponsor a temporary worker.

- Those that are part of a Labour Agreement [457.233(2)]
- Those that come under a Standard Business Sponsorship [Sub-clause 457.223(4)]

The most common type of subclass 457 visa applications is one that comes under a Standard Business Sponsorship ("SBS").

A Standard Business Sponsorship (typically non-contractual) is a lawful 'application'9 evaluated through means of overarching codified legislation. A request to access a Labour Agreement (typically contractual), in contrast is a 'submission'[10] solely directed by guiding principles of government policy of the day.

Both however, have binding migration law sponsorship obligations pursuant to Commonwealth legislation. It is those binding obligations [in part] that differentiate the two in terms of benchmark criteria and the execution under which the business can sponsor and maintain the employment of a 457 individual.

In order to provide 457 labour to an unrelated business there are significant controls for on-hire firms operating under an on-hire labour agreement that do not apply to Standard Business Sponsorship business sponsors.

Not surprisingly given the significant controls and related administrative burden only 50 to 60 agreements have been approved for an industry with more than 3,500 businesses. The very nature of administration and extended consultation associated with Labour Agreement negotiations hamper flexibility in the sector significantly.

An On-hire Labour Agreement also requires businesses to meet stricter DIAC/DEEWR training benchmarks (2% of gross wages) compared to the Standard Business Sponsorship framework (1%), with a little justification.

The restrictions on the sector would seem to have significant impacts in respect to labour force accessibility. If the industry is to continue to operate under these controls, as a minimum, the congestion points of administration and decision making should be improved so as not to discourage negotiation of such labour agreements.

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[9] Standard Business Sponsorship application - maintains formal independent legal review process
[10] Labour Agreement submission – has no formal review recourse

Term of Reference (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;

Central to the political concern that employers and visa holders are not using the program as intended is the concept that temporary workers may be taking up positions that should be available to Australian citizens and permanent residents.

Edith Cowen University recently concluded an investigation into 457 visa workers in the Western Australian resources industry, including the benefits and costs for business, migrant families, and the community. The report focused on issues such as the benefits, costs and support for skilled workers on subclass 457 visas and the apparent reluctance of Australian citizens and residents to relocate to remote areas for work (specifically Western Australia).
The report found that the inability to source Australian workers willing to relocate has resulted in industry initiatives to recruit skilled migrant workers on subclass 457 visas.[11]

> *"the resources industry is challenged by sharp demands for experienced skilled workers, the limited pool of Australian skilled labour who are willing to relocate, the reducing numbers of workers taking up apprenticeships and traineeships, and the lack of experience of new graduates."*[12]

As a result of the demand for skilled personnel coupled with the domestic shortfall of willing participants; employment opportunities for significant numbers of workers from countries such as Ireland and the UK have increased.

The ECU report is further supported by the latest Skill Shortage Data Report released by DEEWR, that states "*that employers that are seeking to recruit highly experienced workers and those with specialist skills, generally have markedly greater difficulty than those employers recruiting less experienced workers*." [13]

To attempt to combat the unwillingness of Australian employees to move interstate or to a regional area for work, amongst other initiatives, the Commonwealth government has established a $6,000 grant to entice unemployed to relocate to regional areas to gain work. Figures reported for May 2012[14] suggest that less than 40 individuals had taken up this offer.

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[11] Final Research Report, *457 visa workers in the Western Australian resources industry*, Bahn, S et al, Edith Cowen University 2012
[12] Ibid p5
[13] Pg 5 http://foi.deewr.gov.au/system/files/doc/other/skillshortagesaustralia.pdf
[14] Ibid.

The public and political the perception[15] of a skill that is in shortage could be defined here as a skill that is:

- business critical
- economically beneficial to Australia
- located in regional Australia
- highly specialised
- unable or extremely difficult to be filled by Australian citizens and permanent residents

However, the public perception of the skills shortages that the 457 visa program are intended to fill appears to be a much narrower definition than the DEEWR definition of 'shortage' and what had historically been implied in legislation.

DEEWR provides the following definitions in its 2012 Skills Shortages Australia report:

> *Shortage: Skill shortages exist when employers are unable to fill or have considerable difficulty filling vacancies for an occupation, or significant specialised skill needs within that occupation, at current levels of remuneration and conditions of employment, and reasonably accessible location.*
>
> *Recruitment Difficulty: Recruitment difficulties occur when some employers have difficulty filling vacancies for an occupation. There may be an adequate overall supply of skilled workers but some employers are unable to attract and recruit sufficient, suitable workers for reasons which include: specific experience or specialist skill requirements of the vacancy; differences in hours of work required by the employer and those sought by applicants; or particular location or transport issues.*
>
> *No Shortage: Research has not identified widespread significant difficulty filling vacancies. This does not mean individual employers in some locations or those seeking specialised skills will readily fill their vacancies.*[16]

While the term 'skills shortage' has not been defined in the legislative history of the 457 visa program, the concept of skills shortage has been framed to include a much wider ambit than the DEEWR definition of shortage. Under previous versions of the 457 visa program, a skills shortage has been implied by requirements that:

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[15] The Prime Minister, Julia Gillard in her address to the Australian Council of Trade Unions Community Summit in 2013 stated:
"The widely held assumption that the typical person on a 457 visa is performing urgently needed work for economic expansion in remote Australia – on a project where a tough combination of specialist skills and extreme conditions make labour impossible to come by – is just not supported by the facts."[15]

[16] Department of Education, Employment and Workplace Relations 2012, *Skills Shortages Australia*, Department of Education, Employment and Workplace Relations, Canberra, viewed at 23 April 2013, <http://foi.deewr.gov.au/documents/skills-shortages-australia>

- a suitably qualified Australian citizen or Australian permanent resident was not readily available to fill the position[17]
- the position could not be reasonably filled locally[18]

Apart from addressing skill shortages, and labour mobility issues, the 457 program would seem to have other advantages for Australia's economy. These worker cohorts contribute techniques and experience through knowledge transfer and international best practices to an Australian employer's skills pool.

If it transpires that employers continue to use the 457 visa (despite increased fiscal outlay and intensified Commonwealth obligations), it would seem contradictory to conclude that any significant proportion of employers are motivated in doing so primarily by a desire to exploit overseas workers they employ.

Factors influencing Apprenticeships

The visa regime is designed to provide skilled workers quickly. It is not a panacea for training requirements of the general population. Built into the visa requirements is the need for an employer to demonstrate that they "have a commitment towards the training of Australian citizens and permanent residents." However this is not a requirement to provide apprenticeships.

The data within the DEEWR 2012 Skills Shortages report reveals a continued need for workers, and a drop in suitable applicants, within specific occupations traditionally associated with apprenticeships such as cooks, chefs, panel beaters, air conditioning mechanics, automotive trade workers and hairdressers.

However it must be stressed that whlst there are areas of employment that are traditionally considered to be those that can be filled by new apprenticeships, this is not a common factor across all areas of employment within the visa category.

Apprenticeship programs continue to be actively influenced by economic cycles. A period of slow growth would likely indicate that employers do not wish to take on apprentices. Conversely, retention of existing apprentices may rise during a buoyant economy.

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[17] This is based on the Reg 1.20B definition of labour market testing that came into effect on 1 August 1996 when the subclass 457 visa was introduced. Based on the original inception of the 457 visa, the position had to undergo mandatory labour market testing if it was not a 'key activity' of the business and the employment period was more than 12 months. As 'key activity' was defined quite broadly under Reg 1.20B to include activities that were essential to business operations and required specialist or professional skills or specialised knowledge of the business operations, the scope in which labour market testing could be applied was limited. See *Migration Regulations (Amendment) 1996* (Cth).

[18] This is based on the regional concessions to 457 visas that were introduced on 1 November 2002. Pursuant to Reg 1.20GA employers seeking to sponsor a foreign worker in a position based in regional Australia were required to undergo labour marketing testing undertaken by a Regional Certifying Body. See *Migration Amendment Regulations (No.5) 2001* (Cth) sch 1 item 29.

The DEEWR 2012 Skills Shortages report states;

- Overall, the number of apprenticeship and traineeship commencements and completions has increased over the last five years (up by an estimated 43.3 per cent and 32.5 per cent, respectively, between 2007-08 and 2011-12).
- However, for a number of trades there was a pronounced drop in the number of commencements in 2011-12 compared with 2010-11. Continued falls in the number of those commencing an apprenticeship or traineeship in these trades, could place pressure on the supply of skilled workers when activity levels in related industries recover from the slump[19].

In April 2012, COAG[20] signed reforms to the national training system. This agreement included a revised National Agreement for Skills and Workforce Development and a new National Partnership Agreement on Skills Reform. [21]

Further reforms were also agreed to under the Trade Training Schools program for secondary school aged children as a means of encouraging apprenticeships.

With the recent government initiatives and commencement and completion rates for apprentices increasing over the past 5 years, the evidence presented here challenges the theory that 457 visa grants have a link to the perceived lack of commencement of apprenticeships.

These factors reveals that the need for workers in this area continues regardless of the visa program that has been put in place to address it and enforce the need for government initiatives in supporting apprenticeship and training.

We would speculate that the Departmental mismanagement of student visas in several fields of study since 2007 has assisted to exacerbate the current shortage, through a reduction in the number of job applicants who have gained permanent residency through study who are now available to employers.

Term of Reference (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;

Labour Market Testing has been a feature of employer sponsored visas in the past. It generally involved the requirement to advertise a position for a period of time, and report those results as part of the application process. It is our understanding that Labour Market Testing is not proposed to be introduced to the 457 program as part of the package of changes. DIAC have suggested that Labour Market Testing:

[19] Pg10 http://foi.deewr.gov.au/system/files/doc/other/skillshortagesaustralia.pdf
[20] Council Of Australian Governments
[21] http://www.coag.gov.au/skills_and_training

> "may constitute a restrictive practice in the context of [some of Australia's] international trade agreements." [22]

Our concern is more generally that Labour Market Testing is inefficient, and too open to manipulation to be effective. The mode, timing and response to advertising vary widely, and businesses who do not want a response to their advertising can manipulate factors to ensure they do not get it. Given this, Labour Market Testing becomes a burden to all businesses participating in the 457 program, but does not weed out those who wish to manipulate the system.

Every single business in Australia is better placed to understand the availability of the particular labour skills they require in their geographic area than any government body. Compliant employers are therefore burdened by Labour Market Testing, and employers who would rather get around the system are in a position to easily circumvent it. If genuine Labour Market Testing was as easy as placing an ad and sorting through the responses, every business would do exactly that and the entire recruitment industry would not exist.

The preferable approach to factor labour market testing concerns into the 457 Visa program is through the process of listing permissible occupations on the Consolidated Sponsored Occupations List.

Term of Reference (c): the process of listing occupations on the Consolidated Sponsored Occupations List, and the monitoring of such processes...

The current CSOL represents a broader definition of 'skills shortage', as discussed above, and consequently allows a more flexible response to skill shortages. Support for the CSOL might be stronger if the processes around the setting of the list were more transparent and better understood.

In the 2008 report *Visa Subclass 457 Integrity Review*[23] by Barbara Deegan, it was noted that

> "there is a perception that the current list of occupations is prepared on the basis of a degree of 'labour market testing (LMT)'. The proposed list should make that perception a reality."[24]

Canada's temporary foreign workers program incorporates stringent labour market testing where employers must first obtain a Labour Market Opinion prior to submitting

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[22] Migration Institute of Australia notice Issue 2013.15 - 28 February at http://send.fatpublisher.com.au/t/y-D0A7241284A00C58 accessed 24 April 2013

[23] The Deegan report was commissioned as part of the overhaul and eventual reform to the 457 visa program in 2009.

[24] Deegan, B 2008, *Visa Subclass 457 Integrity Review*, Department of Immigration and Citizenship, Canberra, viewed at 23 April 2013, <http://www.immi.gov.au/skilled/skilled-workers/_pdf/457-integrity-review.pdf>

an application for a work permit (except in certain exempted situations).[25] The Labour Market Opinion is a form of labour market testing where the Canadian federal government department Human Resources and Skills Development Canada (HRSDC)/Service Canada must provide an opinion that hiring a foreign worker to a fill that particular position in Canada will have a positive or neutral effect on the Canadian labour market.[26]However Citizenship and Immigration Canada have recognised that obtaining a Labour Market Opinion is a 'time-consuming process' and in September 2012 introduced an Accelerated **Labour Market Opinion program** As demonstrated by the case in Canada, the efficacy of a stringent labour market testing regime as part of any temporary foreign work program is questionable if the 457 visa program is to be responsive to both the demands of the Australian labour market and employers.

However it is pointed out that historically the CSOL and its previous incarnations have largely been lists of static occupations. Since the 2009 reform of the 457 visa program, there have been four versions of 457 occupational lists including introduction of the CSOL on 1 July 2012[27], where one occupation (Security Consultant) was removed and approximately 30 occupations were added including Migration Agent, Flight Attendant and Real Estate Representative. The current version of the CSOL which came into effect on 23 March 2013[28] contained no changes to the list of occupations available for nomination.

As the CSOL is specified under legislative instrument, the CSOL is adaptable to change and, if rigorously set, can act as a good reflection of the skills needed in Australia.

A further critical issue however is *how* the jobs listed on CSOL are described.
The job descriptions are based on ANZSCO, the Australian and New Zealand Standard Classification of Occupations, a publication of the Australian Bureau of Statistics. As such, ANZSCO was primarily developed as a statistical tool, and its use for migration purposes is not entirely appropriate. The ABS state that:

"The primary purpose of this product is to aid in the interpretation of ABS and Statistics New Zealand occupation statistics ..."[29]

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[25] Citizenship and Immigration Canada 2013, Citizenship and Immigration Canada, Ottawa viewed 22 April 2013 <http://www.cic.gc.ca/english/work/employers/apply-who.asp>

[26] Citizenship and Immigration Canada 2013, Canada Immigration News, Ottawa viewed 22 April 2013 <http://www.cicnews.com/2012/09/bring-workers-canada-faster-accelerated-labour-market-opinion-091778.html>

[27] Commonwealth, Migration Regulations 1994 - Specification under subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba) and sub-subparagraph 5.19(4)(h)(i)(A) and item 4(a) of the table in subitem 1137(4), item 4(a) of the table in 1138(4) and item 4(a) of the table in subitem 1230(4) and subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) of Schedule 1 and paragraph 186.234(2)(a) of Schedule 2 - Specification of Occupations, a Person or Body, a Country or Countries - June 2012, IMMI 12/039, 28 June 2012.

[28] Commonwealth, *Migration Regulations 1994 - Specification under subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba) and sub-subparagraph 5.19(4)(h)(i)(A), item 4(a) of the table in subitem 1137(4), item 4(a) of the table in 1138(4) and item 4(a) of the table in subitem 1230(4), paragraphs 1229(3)(e) and 1229(3)(k), subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) and paragraph 186.234(2)(a) - Specification of Occupations, a Person or Body, a Country or Countries*, IMMI 13/020, 19 March 2013.

[29] See Australian Bureau of Statistics at http://www.abs.gov.au/ausstats/abs@.nsf/mf/1220.0 accessed 25 April 2013.

An example is that common occupations may be described in different or oddly similar ways. It is difficult to distinguish a Diesel Motor Mechanic (ANZSCO code 321212)[30] from a Diesel Fitter-Mechanic (ANZSCO 323211), a specialist position under Fitter (General)[31]. The Government has attempted to deal with this issue by the use of related tools such as Australian Skills Recognition Information (ASRI)[32], Job Outlook[33] (both of which only list Diesel Mechanics under 'Mechanics') and also occupation specific advice in DIAC Procedure Advice Manuals (PAMS)[34] which describes in detail the following diverse occupations:

- Medical Practitioners
- Academic and Scientific positions
- Chefs and Cooks
- Fast Food Store Managers
- Ministers of Religion
- Child care group leader
- Senior Stockperson (Piggeries)

While most ANZSCO occupations are described on the basis of the tasks involved, some of the specific advice attempts to define the occupation according to the type of establishment the person works in.

In addition, the multitude of skills assessing bodies have their own ideas of occupations and may apply different criteria from those set out in ANZSCO to decide. For example, if a person is a General Manager (an occupation assessed by the Australian Institute of Management), the assessing body applies very different criteria to those found in ANZSCO. The definition of a Medical Administrator is another example. The definition applied by VETASSESS requires them to be a medical practitioner, which varies considerably from the description in ANZSCO.

This fragmentation of occupational information does not assist consistent decision making on occupations. A single source which defined occupations for use in migration decision making would produce more consistent and equitable results, and would reduce attempts to manipulate the occupation

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[30] ANZSCO - Australian and New Zealand Standard Classification of Occupations, First Edition, Revision 1 Australian Bureau of Statistics

[31] ANZSCO - Australian and New Zealand Standard Classification of Occupations, First Edition, Revision 1 Australian Bureau of Statistics

[32] Australian Skills Recognition Information at http://www.immi.gov.au/asri/ accessed 25 April 2013

[33] Job Outlook, at http://joboutlook.gov.au/pages/default.aspx accessed 25 April 2013 Department of Education, Employment and Workplace Relations

[34] DIAC Procedure Advice Manuals Part D 19

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

The broad processes involved with granting a 457 visa (apart from under a labour agreement) are:

1. The company must apply for sponsorship approval;
2. The company must nominate a position to be filled; and
3. The visa applicant must lodge a visa application showing they have the skills to do the job.

Sponsorship Approval

The sponsorship application process involves an assessment of the company's status and commitment to training Australian citizens and residents.[35] In order to be approved as a sponsor, a company needs to meet the following requirements:

- *It is a lawfully operating business*.
- *It has a commitment towards the training of Australian citizens*.

The Company must demonstrate that their Australian business operations have a satisfactory record of, or a demonstrated commitment towards, training Australian citizens and Australian permanent residents in their business operations. Businesses which have been established for 12 months or more must show a record of training activities, as opposed to demonstrated commitment. The minimum requirements are as follows:

- The business must be able to evidence that they have spent at least 1% of gross payroll on training; or for businesses which cannot meet this requirement;
- The business can make a payment of 2% of gross payroll into an industry-training fund.

Start-up companies need to evidence how they will meet these benchmarks with an auditable training plan.

- There must be no adverse information about the business

[35] Migration Act 1958 s140E and Migration Regulations 1994 Regulation 2.59 and 2.61

- They must agree to abide by the relevant sponsorship undertakings.
- The business must also attest that they have a strong record of, or a demonstrated commitment to:

1. Employing local labour; and
2. Non-discriminatory labour practices.

Nomination of position to be filled

The purpose of this part of the application is to identify the position to be filled by the visa holder, and the skills and experience required for the position.[36] When making a decision on the approval of the nomination application, DIAC will assess whether:

- The position is for a role within the sponsoring business or a related entity, unless it is an exempted occupation;

The position is in relation to an approved occupation. (A minimum skill level applies to all positions to be filled by overseas employees). DIAC will assess the nominated

- position according to gazetted occupational classifications in order to determine whether roles and responsibilities of the nominated position meet the skills threshold for the corresponding occupation);
- The position enjoys the same terms and conditions as Australian employees and is remunerated at market salary rates. (The position must be remunerated at least at the Temporary Skilled Migration Income Threshold (TSMIT) of $51,400. Where the market rate is less than the TSMIT then the nomination cannot be approved.)

Visa Application

The third and final step in the application process is the completion of the visa application by the applicant.[37] In order for the visa to be granted, the visa applicant must demonstrate that they:

- have the skills, qualifications, experience and an employment background which match those required for the position;
- meet English language requirements;
- meet all necessary health and character requirements; and
- hold the required level of private health insurance.

[36] MA s140GB and MR 2.72
[37] MR (Sched. 1 Item 1223A and Sched 2 Part 457).

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

Migration practitioners report that businesses have difficulty with three particular parts of the process:

- providing evidence of meeting the training benchmark, (typically because the evidentiary requirements are complicated and onerous)
- proving that the salary is a 'market salary'
- aligning the position in the business with an occupation on the CSOL

The third issue is an area where DIAC obviously struggles as well, and they have identified it as an area requiring attention:

> "The measures being brought forward include:...
>
> introducing a requirement for the nominated position to be a genuine vacancy within the business. Discretion will be introduced to allow the department to consider further information if there are concerns the position may have been created.specifically to secure a 457 visa without consideration of whether there is an appropriately skilled Australian available."[38]

This element is already required by Regulation 2.72(10)(e) of the Migration Regulations 1994 and it is not clear why DIAC does not enforce it.

Instead, where they suspect any mismatch between the nominated position and the person's skills, it is their practice to approve the nomination, and then refuse the application on the basis of Reg 457.223 (4)(d) which states:

the Minister is satisfied that:

(i) the applicant's intention to perform the occupation is genuine; and

(ii) the position associated with the nominated occupation is genuine.

Since the middle of April 2013 DIAC has begun to question a large number of applications on this basis. This misuse of the legislative provisions has been overturned

[38] DIAC "Strengthening the Integrity of the 457 program" at http://www.immi.gov.au/skilled/strengthening-integrity-457-program.htm accessed 25 April 2013

at review in a significant number of cases at the Migration Review Tribunal. See for example 1204887 [2013] MRTA 298 (22 January 2013)[39]

In this case, DIAC refused an application under Reg 457.223 (4)(d) after approving the nomination. The approved nomination related to a Community Centre which ran four community programs, each supported by a Program Administrator. The applicant held a Diploma of Community Services Work and had worked at the centre for more than a year. When the Australian undertaking the Program Administrator's job in one program left the position, the Community Centre wished to sponsor the applicant into the position on a 457, but the delegate decided that she did not genuinely intend to do the job, misapplying Reg 457.223 (4)(d).

DIAC's approach has the effect of refusing applications related to positions where what should actually be being considered is the nomination.

Extra powers in this area might have the advantage of allowing DIAC to make a decision on the nomination at the appropriate time, rather than after it is approved. However it seems unlikely to result in better decision making without a complementary improvement in DIAC's capabilities to understand how particular occupations fit into a business.

A significant difficulty for businesses is the lack of capability in DIAC to understand occupations and how that occupation fits into a business. This problem has been exacerbated in recent years by the large scale outsourcing of decisions with respect to skills assessment. Generally these decisions are now made by the 50 odd skills assessing authorities, and as a result there is a lack of capability in DIAC to understand the occupational needs of business.

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

A dominant component of the current debate surrounding Temporary Work (Skilled), subclass 457 visas is the concept that employers are using the 457 visa program beyond the intention from which it is designed. In April 2013, the Minister for Immigration and Citizenship, the Hon Brendan O'Connor stated:

> *"The 457 visa program is a valuable visa when used as it is intended - to fill temporary skills shortages in some sectors and some regions."*[40]

The 457 visa program and the issue of skill shortages is predicated on the presumption that employers will only participate in the 457 visa program as a last resort (when no

[39] http://www.austlii.edu.au/au/cases/cth/MRTA/2013/298.html accessed 24 April 2013

[40] O'Connor, B 2013, *Reforms needed to curb 457 rise*, Minister for Immigration and Citizenship, Canberra, viewed 18 April 2013, <http://www.minister.immi.gov.au/media/bo/2013/bo194799.htm>

Australian workers can be sourced) due to the expense associated with sponsoring a foreign worker on a 457 visa.

> *"We made substantial changes to the 457 program in 2009 to make it more expensive to recruit overseas workers and to strengthen the infringement regime for businesses that were abusing the system."*[41]

On the whole the statistical evidence available does not suggest that these changes have failed. Employers participating in the 457 visa program appear to have responded in accordance with market demand with both the number of primary 457 visa applications lodged and the number of primary 457 visa workers in Australia dropping during the Global Financial Crisis.

The Department of Immigration and Citizenship ('DIAC') notes in its latest Subclass 457 State/Territory summary report for February 2013 that there has been "a general downward trend in growth since the peak in August 2012"[42]. The February 2013 report also shows that primary 457 visa applications lodged have decreased by 5.4% in the Construction industry, 8.4% in the Information Media and Telecommunications industry and 18.0% in the Mining industry.[43] In comparison primary 457 visa applications lodged have increased by 100% in the Accommodation and Food Services industry[44]; an industry in which the Department Education, Employment and Work Relations ('DEEWR') has found to suffer from skills shortages[45].

DIAC has recently announced some rationale for the proposed changes, including:

> " Within the program, significant growth in applications was recorded in 2011-12 from working holiday maker and student visa holders. Many of these subclass 457 visa applicants were nominated to work in occupations and regions which are not experiencing wide spread skills shortages, and in some industries they accounted for over half of total grants. This trend suggests that usage of the program is being increasingly driven by temporary visa holder seeking to remain in Australia instead of the demands of the Australian labour force."[46]

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[41] O'Connor, B 2013, *Reforms to the temporary work (skilled)(subclass 457) program*, Minister for Immigration and Citizenship, Canberra, viewed 18 April 2013, <http://www.minister.immi.gov.au/media/bo/2013/bo193683.htm>

[42] Ibid.

[43] Ibid.

[44] Ibid.

[45] Department of Education, Employment and Workplace Relations 2012, *Skills Shortages Australia*, Department of Education, Employment and Workplace Relations, Canberra, viewed at 23 April 2013, <http://foi.deewr.gov.au/documents/skills-shortages-australia>

[46] DIAC "Strengthening the Integrity of the 457 program" at http://www.immi.gov.au/skilled/strengthening-integrity-457-program.htm accessed 25 April 2013.

It is also important to understand that for most businesses, certainty is a highly valuable commodity. A very common scenario for businesses sponsoring 457 workers is that the potential employee has already been working with the employee (perhaps on a working holiday visa, or a student visa) and is a known quantity. The employer understands their work capabilities, work ethic and knows what value they can add to the business. They will therefore sponsor them on a 457 with some certainty on what they are getting, compared to a new hire. It is difficult to understand why this should be seen as being a rort, in some ways beyond the scope of the scheme. Certainty is a natural motivator to a business. It is what enables investment.

Example

A regional air services company specialising in large capacity fixed wing firebombing aircraft employ a young Irish technician on a working holiday visa. He is involved in fitting subassemblies of aircraft frames and panels including fabricating aluminium panels. Having worked for the employer for some time on his working holiday visa, they understand his skills and capabilities. With the prospect of new work for the business, they want to keep him on after his working holiday visa finishes and consider a subclass 457. This would seem to fit within the objectives of the 457 program to address skills shortages.[47].

If simply being 'onshore' is considered an indicator of rorting, it would seem to be a simple matter to deal with by ceasing to accept onshore applications, although this would increase costs and reduce certainty for some businesses. It should not however be described or addressed in policy as a rort. Appropriately skilled non-residents who are in Australia should be considered suitable candidates to filled skilled positions where a suitable Australian cannot be found, and should not be subject to additional scrutiny or suspicion by governments or media.

Post study visas for international students completing a degree or higher qualification were recently introduced as proposed by the Knight Review. This will inevitably lead to a significant increase in the population of young Australian University qualified skilled persons circulating in the workforce. If employers find that these workers add value to their business, it would seem to be appropriate and economically beneficial that the business sponsor them for a visa. If applying for a 457 in these circumstances is considered a rort, then it would seem that the issue is about to become much larger. The government also appears to intend to make changes to address other areas of perceived problems, according to press reports of Immigration Minister Brendan O'Connor's announcement:

[47] (although the facts are correct, the parties have not been identified to preserve their privacy).

> "He released new figures on Sunday showing the number of 457 visa holders on low incomes had doubled in the past year, while the number of 457 visa holders had grown overall by 19 per cent.
>
> The highest growth rate was for people holding accommodation and food services visas, which grew by 99 per cent, and those holding retail visas, which recorded 75 per cent growth.
>
> The average wage for accommodation and food workers was $55,000, and the average wage for retail workers was $69,000.
>
> "When we see evidence that something is not right with the program - such as spikes in particular sectors that are out of step with growth in those industries - we must take action to stamp out any rorts," Mr O'Connor said."48

It is important to take a wider view on such statistics however. The hospitality industry has identified skill shortages in their industry for many years. But in part, demand for these skills has been met by international students on student, post study, and bridging visas. But as the government has closed those avenues, that demand does not disappear – it is re-channelled into the 457 stream, where it is more appropriate. The spike in application may still reflect skill shortages, it may simply be a change of visa subclass.

This submission supports the concept that appropriate legislative tools be available to DIAC to make decisions on 457 applications, however there is significant evidence that those tools already exist. Changes cannot be supported in the absence of any real evidence that the system is not working, as such change has the potential to add extra burden to genuine participants in the 457 program without improving the quality of decision making in the process.

The system is sufficiently complex already for employers, applicants and DIAC. It is certainly complex enough to discourage employers from using the scheme in the absence of any urgent need.

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48 **http://www.theage.com.au/opinion/political-news/457-visas-more-than-10000-are-rorting-system-says-minister-20130428-2imcy.html#ixzz2RolxCGEL** accessed 29 April 2013.

Appendix

Total number of primary 457visa	2007 -2008	2008-2009	2009-2010	2010-2011	2011-2012	1 Jul 2012 – 28 Feb 2013
applications lodged	61,390[49]	54,830[50]	38,910[51]	54,360[52]	71,840[53]	48,220[54]
applicants onshore	N/A[55]	77,330[56]	68,400[57]	72,030[58]	91,050[59]	107,510[60]

[49] Department of Immigration and Citizenship 2009, *Subclass 457 Business (Long Stay) State/Territory Summary Report 2008-09 Financial Year to 30 June 2009*, Department of Immigration and Citizenship, Canberra, viewed at 22 April 2013, <http://www.immi.gov.au/media/statistics/pdf/457-stats-state-territory-june09.pdf>

[50] There is a slight discrepancy in numbers between the 457 State/Territory Summary Report of 2008-09 which reports a figure of 54,810 and the 457 State/Territory Summary Report of 2009-10 which reports a figure of 54,830. For the purposes of this submission, the higher figure of 54,830 was utilised. See Department of Immigration and Citizenship 2010, *Subclass 457 Business (Long Stay) State/Territory Summary Report 2009-10 Financial Year to 30 June 2010*, Department of Immigration and Citizenship, Canberra, viewed at 22 April 2013, <http://www.immi.gov.au/media/statistics/pdf/457-stats-state-territory-jun10.pdf>

[51] There is a slight discrepancy in numbers between the 457 State/Territory Summary Report of 2009-10 which reports a figure of 38,900 and the 457 State/Territory Summary Report of 2010-11 which reports a figure of 38,910. For the purposes of this submission, the higher figure of 38,910 was utilised. See Department of Immigration and Citizenship 2011, *Subclass 457 Business (Long Stay) State/Territory Summary Report 2010-11 Financial Year to 30 June 2011*, Department of Immigration and Citizenship, Canberra, viewed at 22 April 2013, <http://www.immi.gov.au/media/statistics/pdf/457-stats-state-territory-jun11.pdf>

[52] There is a slight discrepancy in numbers between the 457 State/Territory Summary Report of 2010-11 which reports a figure of 54,360 and the 457 State/Territory Summary Report of 2011-12 which reports a figure of 53,850. For the purposes of this submission, the higher figure of 54,360 was utilised. See Department of Immigration and Citizenship 2011, *Subclass 457 Business (Long Stay) State/Territory Summary Report 2010-11 Financial Year to 30 June 2011*, Department of Immigration and Citizenship, Canberra, viewed at 22 April 2013, <http://www.immi.gov.au/media/statistics/pdf/457-stats-state-territory-jun11.pdf>

[53] Department of Immigration and Citizenship 2012, *Subclass 457 State/Territory Summary Report 2011-12 to 30 June 2012*, Department of Immigration and Citizenship, Canberra, viewed at 22 April 2013, <http://www.immi.gov.au/media/statistics/pdf/457-stats-state-territory-june12.pdf>

[54] Department of Immigration and Citizenship 2013, *Subclass 457 State/Territory Summary Report 2012-13 to 28 February 2013*, Department of Immigration and Citizenship, Canberra, viewed at 22 April 2013, <http://www.immi.gov.au/media/statistics/pdf/457-state-territory-summay-report-feb13.pdf>

[55] No figures are available as the 457 State/Territory Summary Report 2007-08 did not report along these lines.

[56] Department of Immigration and Citizenship 2009, *Subclass 457 Business (Long Stay) State/Territory Summary Report 2008-09 Financial Year to 30 June 2009*, Department of Immigration and Citizenship, Canberra, viewed at 22 April 2013, <http://www.immi.gov.au/media/statistics/pdf/457-stats-state-territory-june09.pdf>

[57] Department of Immigration and Citizenship 2010, *Subclass 457 Business (Long Stay) State/Territory Summary Report 2009-10 Financial Year to 30 June 2010*, Department of Immigration and Citizenship, Canberra, viewed at 22 April 2013, <http://www.immi.gov.au/media/statistics/pdf/457-stats-state-territory-jun10.pdf>

[58] Department of Immigration and Citizenship 2011, *Subclass 457 Business (Long Stay) State/Territory Summary Report 2010-11 Financial Year to 30 June 2011*, Department of Immigration and Citizenship, Canberra, viewed at 22 April 2013, <http://www.immi.gov.au/media/statistics/pdf/457-stats-state-territory-jun11.pdf>

[59] Department of Immigration and Citizenship 2012, *Subclass 457 State/Territory Summary Report 2011-12 to 30 June 2012*, Department of Immigration and Citizenship, Canberra, viewed at 22 April 2013, <http://www.immi.gov.au/media/statistics/pdf/457-stats-state-territory-june12.pdf>

[60] Department of Immigration and Citizenship 2013, *Subclass 457 State/Territory Summary Report 2012-13 to 28 February 2013*, Department of Immigration and Citizenship, Canberra, viewed at 22 April 2013, <http://www.immi.gov.au/media/statistics/pdf/457-state-territory-summay-report-feb13.pdf>