MIA Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the *Migration Amendment (Temporary Sponsored Visas) Bill 2013*.

The Migration Institute of Australia (MIA) is the peak professional organisation for the migration advice profession and through its members has a unique insight into the effect migration legislation can have on Australian businesses which have a genuine need to use Australia's migration program to overcome skills shortages, on migration agents' businesses, and on visa applicants.

The reasons for the referral of this Bill to the Committee, as described the Senate Hansard Tuesday 18 June 2013, in were:

> *The Bill requires further investigation into the regulatory impact the proposed changes will impose on Australian business and industry, together with impacts on labour market efficiency and business productivity from the reintroduction of labour market testing in particular. An inquiry is required to ensure no adverse impacts arise that would prohibit businesses from accessing the skilled labour they need to support Australian jobs and Australian investment*.

The MIA is concerned that there has been no proper examination of the *regulatory impact the proposed changes will impose on Australian business and industry, together with impacts on labour market efficiency and business productivity from the reintroduction of labour market testing in particular.*

The Explanatory Memorandum accompanying the Bill states:

> *The Office of Best Practice Regulation has been consulted and has advised that no Regulation Impact Statement is required for the amendments contained in Schedule 1* [Sponsorship visas: purpose]*and Schedules 3 to 5* [Subclass 457 visa conditions, Sponsorship obligations and Enforceable undertakings by sponsors]*. The advice references are 14826, 14818 and 14884".*
>
> *A Regulation Impact Statement was required for the amendments contained in Schedule 2* [Labour market testing] *to the Bill but the Prime Minister granted an exemption on the basis of exceptional circumstances. A post-implementation review will be required within 1 to 2 years of implementation.*

It is in the matter of labour market testing where the greatest impact may be on Australian businesses and industry, and yet there has been no examination of that because the Prime Minister has granted an exemption.

The MIA would like the Prime Minister's reasons for granting this exemption to be made public.

The MIA notes that following the Minister's announcement on 23 February 2013 of changes to the Subclass 457 visa program The Office of Best Practice Regulation on the15 March 2013 placed on its website the following statement:

> ***Non-compliance with the Australian Government's best practice regulation requirements – Reforms to the Temporary Work (Skilled) (Subclass 457) Visa Program– Department of Immigration and Citizenship***
>
> *On February 23 the Minister for Immigration and Citizenship Brendan O'Connor announced seven changes to the temporary skilled work (subclass 457) visa program. A Regulation Impact Statement (RIS) was required for the first three of these changes, namely:*
>
> - *the requirement for employers to demonstrate that they are not nominating positions where a genuine shortage does not exist;*
> - *raising the English language requirements for certain positions; and*
> - *strengthening the enforceability of existing training requirements for businesses that use the program.*
>
> *The Department of Immigration and Citizenship (DIAC) had commenced the preparation of a RIS to support the three changes noted above. However, this RIS was not completed and assessed as adequate by the Office of Best Practice Regulation (OBPR) prior to the Minister's announcement.*
>
> *The OBPR has therefore assessed DIAC as non-compliant with the Australian Government's best practice regulation requirements. Accordingly, a post-implementation review is to be undertaken within one to two years from the date of implementation of the measures.*
>
> *The remaining announced measures either did not require, or were supported by, a RIS assessed as adequate by the OBPR.*

There is no publicly available information to suggest that there was any real consideration of the regulatory impact of the measures proposed in this Bill on Australian businesses or industry.

The MIA would like to address its issues of concern with the proposed *Migration Amendment (Temporary Sponsored Visas) Bill 2013.*

The overall question that should be raised is will these changes increase the skill level of the Australian workforce when there is currently a well acknowledged shortage of skills in many occupations?

The MIA recognises the importance of the implementation of the Gonski Report, however, is at a loss as to how it will improve the skills base of the Australian workforce, if technical and university education are not supported to provide skills based teaching programmes. Continued investment by both the State and Federal governments in the post-secondary sectors must be maintained to ensure a credible skills base for the future, however, current Budget announcements, both State and Federal, do not appear to support post-secondary skills training.

Whilst there is a skills shortage in Australia, which is not backed up by the training of Australians, then there will always be a need for employers to access overseas workers whether it be via the current 457 scheme or any other scheme. Introducing legislative change to impede, restrict or punish those employers who need to sponsor overseas workers is counterproductive.

Schedule 2 Labour Market Testing (LMT):

The MIA does not believe that the proposed LMT by the Government will achieve the outcomes that the Government intends.

The requirement for companies to undertake LMT as proposed in the Bill is onerous and may extend over a period of six months.

It is also difficult to design an appropriate LMT programme which suits all the 643 occupations listed on the Consolidated Skills Occupation List (CSOL). These occupations range from Professionals/ Managers to trades and non-professionals. Relevant industry groups should be consulted as to the best way in which this can be achieved considering the diversity of the occupations which may be nominated. One LMT scheme may suit some occupations but other occupations may require more discrete LMT.

The purpose of the 457 visa is to meet skilled shortages within the Australian workplace. It is difficult to see how employers will be able to access skilled workers under the 457 programme in a timely manner, if they are required to carry out LMT over a period of six months. In many instances this may either disadvantage the employer because of the critical loss of time involved in carrying out the LMT and/or may disadvantage the visa applicant as they may lose the opportunity of being sponsored because adequate LMT had not been carried out previously by the proposed sponsor.

LMT was abolished in 2009 on the recommendation of a previous *Visa Subclass 457 Integrity Review* conducted by industrial relations expert Barbara Deegan as it was found that LMT had the potential of breaching International Labour Agreements.

The Government is now proposing that LMT be carried out for nominated positions with limited exemptions being allowed including *inter alia* for some ANZSCO Level 1 and Level 2 positions.

As many employers use the 457 visa programme to sponsor workers who may be at ANZSCO Level 3 and below, this will lead to enormous restrictions upon employers to plan their businesses in a competitive global environment. Based on the current DIAC statistics available of the number of primary applications lodged in 2012-13 to 30 April 2013 this would mean a figure of around 27% of total 457 visa applicants.

The costs, not only monetary but also in the loss of critical time involved with the proposed LMT, will be high for employers as it appears that this is required to be carried out for all nominations over a six month period.

The current proposed LMT provisions are cumbersome, costly and there is no evidence that they will assist employers to seek adequate staff to assist in the operations and growth of their businesses. For example, having to obtain "expressions of support from Commonwealth, State and Territory government authorities with responsibility for employment matters" harks back to the old days of having to lodge positions with the then Commonwealth Employment Service (CES) for a month which was most inefficient and recognised by the Government as being so as, not only was the requirement was abolished but so was the CES. As the DIAC does not have any direct control over these government instrumentalities it would lead to a possible blowout in the amount of time it will take for an employer to be able to seek this particular support.

An estimate of the costs involved for advertising alone on the internet and in national/local newspapers can range from $500-$10,000 depending upon the specification of the advertisements. Recruitment agency charges can vary from very low to very high depending upon the position.

The question needs to be raised: will the Commonwealth, State and Territory government authorities charge a fee for service? If so, one may presume that these instrumentalities may charge the same prices as do currently the Regional Certifying Bodies (RCB's) which is within the range of $300-$500 per nomination.

Recommendation 1:

It is recommended that legislating for LMT should only be carried out after direct consultation with the relevant stakeholders as to the best possible way of achieving

the outcome of ensuring that Australians are offered jobs before an overseas worker is sponsored.

Schedule 3 – Subclass 457 conditions:

The extension of time for a visa applicant to seek alternative employment is one which is acceptable in principle. However, the extension from 28 days to 90 days may be excessive unless relevant changes are made to Schedule 3.

The period should only be extended to 90 days if the 457 visa worker is granted a Special Bridging Visa which will allow them to work for another employer who is not their approved sponsor. Otherwise, it is questionable how a person, who is not allowed to work for 90 days without permission, will be able to support themselves.

The sheer mechanics and delay in how a visa is cancelled should also be considered as, depending upon DIAC resources, it often leads to further delays.

Schedule 3 would have to be amended to allow the visa applicant to apply for a fresh sponsorship after the 28 day period has expired.

Recommendation 2:

It is recommended that a Special Bridging Visa be designed to allow visa applicants to continue working with another employer, who is not their sponsor, during the 90 day period to avoid further hardship.

Recommendation 3:

It is recommended that Schedule 3 be amended so that a valid visa application can be made within 90 days of termination of employment.

Schedule 4: Sponsorship Obligations

This legislation appears to be retrospective in mandating currently approved sponsors to meet the new proposed legislative changes. It should be noted that sponsors, at the time of application, have already certified that they undertake their sponsorship requirements. However, the Government now appears to be trying to "add a few extras" or "top up" the previous legislative requirements of these sponsorship undertakings. This would appear to be unfair and applying legislation retrospectively is not sound legal jurisprudence.

It is also of concern that “requiring an approved sponsor or former approved sponsor not to transfer, charge or recover prescribed costs” is a one-way requirement which can significantly disadvantage employers, given the new proposed LMT requirements. For example, an employer may face LMT charges of $5,000-$10,000 which if legislated, would be unrecoverable, if the employee decided to leave before the end of their contract with the employer. Whilst some fees are fair and have been accepted as non recoverable by employers, there are also some employer expenses, which if the visa applicant blatantly breaches their undertaking to remain in the sponsored job, through no fault of their employer, will leave the employer financially disadvantaged.

Recommendation 4:

It is recommended that when prescribing costs which are non recoverable from the employer, consideration must be given to how a blanket approach may disadvantage a responsible employer.

Schedule 5: Enforceable Undertakings by Sponsors

Any administrative action taken against sponsors for breach of their sponsorship undertaking must be done fairly and justly. The penalty must be suitable for the breach. For example, a sponsor should not be banned from sponsoring overseas workers if it appears that they may have fallen short of their 1% or 2% of their training requirements if it can be demonstrated that the employer had an overall commitment and demonstrate record to training Australians.

It should be recognised that barring or cancelling sponsorships will have a significant impact on any visa holders who are subject to the previously approved sponsorship as their visas will eventually be cancelled.

Recommendation 5:

It is recommended that any administrative bars, sanctions or cancellations must be proportionate to the offence committed by the employer having regard to the consequences on current visa holders.

Recommendation 6:

It is recommended that because of the possible economic damage to a business and the possible consequences on employment that the powers of barring, sanctioning or cancelling a sponsorship must not be delegated to a DIAC officer below that of Director.

Schedule 6: Sponsorship Inspection Powers

Employers must accept responsibility for honouring their sponsorship undertaking. However, how any breaches are dealt with must be proportionate to the offence.

The proposed legislation of providing unprecedented access and unfettered powers of Inspectors and Fair Work Inspectors to investigate whether there have been any breaches of an employer's sponsorship agreement is excessive.

Considering the serious consequences of any breaches of a sponsorship, employers must be given adequate notice and a mutually convenient time arranged by Inspectors and Fair Work Inspectors before a workplace visit.

This legislation currently gives Inspectors and Fair Work Inspectors unprecedented powers to use force of entry to inspect premises, search premises, seize documents and interrogate staff. Union officials should not be prescribed as an "Assistant" to the Inspector as any investigation must be transparent and without possible issues of conflicts of interest of the Inspectors.

Recommendation 7:

It is recommended that the powers of Inspectors and Fair Work Inspectors be prescribed in accordance with the requirements of upholding the natural justice provisions under the law.

Recommendation 8:

It is recommended that Inspectors (other than Fair Work Inspectors) must be independently appointed and must not be in the position where they have influence over the workplace, employer or any other outcomes during the normal course of the business.