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Department of Immigration
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Memorandum of Understanding



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Date

1. This Memorandum of Understanding (MOU) is made on Tuesday, 2 July 2013.

Parties

2. This MOU is made between the Office of the Fair Work Ombudsman (FWO) and the Department of Immigration and Citizenship (DIAC).

Status of MOU

3. The Parties do not intend this MOU to create legal relations or constitute a legally binding contractual agreement between them. Notwithstanding this clause, the Parties will comply with the terms of this MOU.

Purpose

4. DIAC and the FWO (the Agencies) acknowledge the complementary nature of their work.
5. DIAC is responsible for ensuring compliance with the *Aliens Act Repeal Act 1984*, *Australian Citizenship Act 2007*, *Australian Citizenship Act (Transitional and Consequential) Act 2007*, *Immigration (Education) Act 1971*, *Immigration (Education) Charge Act 1992*, *Immigration (Guardianship of Children) Act 1946*, *Migration Act 1958*, *Migration Agents Registration Application Charge Act 1997*, *Migration (Health Services) Charge Act 1991*, *Migration (Sponsorship Fees) Act 2007* and the *Migration (Visa Application) Charge Act 1997* and associated Regulations. DIAC is committed to enriching Australia through the well-managed entry and settlement of people in to Australia.
6. The FWO is established by the *Fair Work Act 2009* (the FW Act) and is responsible for providing education, assistance and advice about the Commonwealth workplace relations system. The FWO is also responsible for impartially enforcing compliance with the FW Act, the Fair Work Regulations, and fair work instruments.
7. The FWO consists of the Fair Work Ombudsman, the staff of the Office of the Fair Work Ombudsman (FWO staff) and Fair Work Inspectors appointed under section 700 of the FW Act. The Fair Work Ombudsman is a Fair Work Inspector by force of section 701 of the FW Act. The Fair Work Ombudsman may delegate all or any of their functions and powers under the FW Act or any other Act to FWO staff or to a Fair Work Inspector.
8. The FWO has been delegated responsibility to assist in monitoring three subclass 457 sponsor obligations, as detailed in clause 17 of this agreement. The FWO is committed to working cooperatively with DIAC in order to discharge this function within the existing program of field visits which are already undertaken in accord with the FWO's role under the Fair Work Act (which includes national system employers and employees other than those in the commercial construction industry).
9. The FWO's methodology in relation to the responsibilities will comprise a combination of proactive and reactive compliance activities. Each agency will report on their performance under this agreement, measured in relation to the number of referrals to DIAC resulting from the FWO's activities, or in relation



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to the outcomes of those referrals. In addition, the FWO undertakes to conduct at least one targeted campaign each year in an industry that engages a high proportion of subclass 457 employees.

10. This MOU establishes an agreed framework regarding the:

- 10.1. appointment of Fair Work Inspectors as Migration Inspectors
- 10.2. FWO's role in monitoring three Temporary Work (Skilled) subclass 457 - Standard Business Sponsorship (Subclass 457) obligations;
- 10.3. sharing of, and ready access to, operational information between the FWO and DIAC; and
- 10.4. mutual agreement regarding the scope of education and compliance activities.

Personnel

- 11. The MOU Managers are the incumbents of the following positions:
 - 11.1. FWO – Group Manager, Infoline, Dispute Resolution and Compliance
 - 11.2. DIAC - Global Manager, Operational Integrity
- 12. The MOU Managers will confer on an as-required basis.
- 13. Each MOU Manager may appoint a Liaison Manager to perform functions under this MOU. Formal interactions between the FWO and DIAC should occur through the following relevant Liaison Managers in the first instance:

<i>Role</i>	<i>Functions</i>	<i>Phone</i>	<i>E-mail</i>
Director, Overseas Workers Team	Investigation referrals Requests for information Technical advice requests Joint operations	13 13 94	diacreferrals@fwo.gov.au

<i>Role</i>	<i>Functions</i>	<i>Phone</i>	<i>E-mail</i>
Director, Operational Integrity Program Lead	457 Sponsor Monitoring	(03) 9235 3600	vic.sponsor.monitoring@immi.gov.au

14. MoU liaison managers to meet as required in person or by teleconference.

Appointment of Fair Work Inspectors as Migration Inspectors

15. Both parties acknowledge that Fair Work Inspectors will be appointed as inspectors for the purposes of the Migration Act by operation of section 140V. This appointment will occur on 1 July 2013. Any Fair Work Inspectors appointed after 1 July 2013 will also be appointed as inspectors for the purposes of the Migration Act on the day that they are appointed as a Fair Work Inspector.

Monitoring 457 visa obligations



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16. DIAC is responsible for the administration of visas, and is responsible for enforcing compliance with sponsorship obligations and visa conditions.
17. In addition to the FWO's functions under the FW Act, the FWO is empowered, by Ministerial Direction no. 58, to monitor three key aspects of sponsor's compliance with the sponsorship obligations, specifically:
 - 17.1. The obligation to ensure equivalent terms and conditions of employment (regulation 2.79 of the *Migration Regulations*), specifically the obligation contained at regulation 2.79(3)(a) which requires sponsors to ensure that the Subclass 457 visa holders are receiving at least the same salary as that which was approved at nomination;
 - 17.2. The obligation to ensure the primary sponsored person works or participates in the nominated occupation (regulation 2.86 of the *Migration Regulations*), specifically that the sponsored person is performing duties consistent with the relevant ANZSCO code occupation that was approved at nomination; and
 - 17.3. The obligation to cooperate with inspectors (regulation 2.78 of the *Migration Regulations*).
18. Fair Work Inspectors will not undertake monitoring activities in relation to any obligations outside of those listed above in clause 17, or in relation to any visa other than the 457 subclass.
19. Fair Work Inspectors will not be undertaking any investigations in relation to potential breaches of the Employer Sanctions legislation.
20. Fair Work Inspectors will have no role in the setting, assessment or determination of whether a Subclass 457 visa holder is receiving the market salary rate as defined in regulation 2.79(2) of the *Migration Regulations*.
21. Fair Work Inspectors will be appointed as Migration Inspectors; however, they will operate independently of the Secretary or DIAC's direction and report directly to the Fair Work Ombudsman.
22. Fair Work Inspectors will be responsible for the identification of prima facie contraventions relating to the obligations detailed in clause 17. Fair Work Inspectors will refer the following outcomes to DIAC:
 - 22.1. Compliance with nominated salary and/or nominated position is satisfactory;
 - 22.2. Compliance with nominated salary and/or nominated position cannot be confirmed;
 - 22.3. Concerns with salary and/or nominated position identified;
 - 22.4. Sponsor advised that no 457 visa holders are employed; and
 - 22.5. Sponsor refused to cooperate with Inspectors.
23. Fair Work inspectors will refer matters to DIAC using a referral template that has been approved by both Liaison Managers.
24. DIAC will be responsible for conducting all additional monitoring or enforcement action associated with referrals relating to suspected contraventions of migration legislation. FWO inspectors will not be delegated to take any enforcement action to bar, cancel, infringe or apply for a civil penalty (or any other sanction action that may be taken against approved sponsors).



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25. FWO staff will not be responsible for providing information to the public regarding obligations under the migration legislation, and will refer any enquiries to DIAC. In addition, any complaints received by the FWO that solely relate to migration laws or visa obligations will be referred to DIAC.
26. The agencies acknowledge that compliance activities may involve contraventions of both Commonwealth workplace laws and migration laws. For clarity, the agencies agree to the following arrangements:
 - 26.1. Contravention of the FW Act – FWO is responsible for investigation and enforcement action;
 - 26.2. Contravention of migration laws – FWO will refer findings of monitoring activities to DIAC, who is responsible for any compliance or enforcement action;
 - 26.3. Contravention of both the FW Act and migration laws – FWO and DIAC will conference and agree on who is responsible for ensuring the appropriate enforcement outcome is achieved, and the timeframes within such outcomes will be delivered. Any disagreements may be dealt with in accordance with clause 50 of this agreement.
27. The FWO will consider the use of 457 visa arrangements and any intelligence provided by DIAC regarding levels of non-compliance in particular industries when developing future education and compliance activities.
28. Fair Work Inspectors who are appointed as Migration Inspectors will only undertake assessments relating to the obligations set out in clauses 17 of this MOU, and will undertake activities in accordance with any legislative Directions issued by the FWO or an appropriate authority.

Access and resources

29. DIAC will provide designated FWO staff access to necessary data and information to enable the FWO to fulfil its 457 visa monitoring functions. At a minimum DIAC will provide the following information in a transferrable and accessible format:
 - 29.1. A list of all employer sponsors, including (where known) legal name, trading name, ABN/ACN, address and contact details;
 - 29.2. Visa holder approval information, including position description and approved salary for 457 visa holders; and
 - 29.3. Pro-forma templates.
30. Each Agency may make additional requests for information directly through the relevant Liaison Manager. Such requests will be made on an ad-hoc basis and will be processed in accordance with legislative disclosure provisions and operational guidance. Request may relate to (but not be limited to):
 - 30.1. Visa holder details;
 - 30.2. Visa class status;
 - 30.3. Monitoring or Site Visit outcomes;
 - 30.4. Documentary evidence; and
 - 30.5. Compliance history checks.
31. Requests will be made in writing, and must specify the purpose of the request, including the law or program the Agency is seeking to enforce or administer.



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32. Liaison Managers will agree on the content, format and delivery of each request. Liaison Managers will also agree on which of these requests are to be considered urgent. Urgent requests will be actioned and finalised by Liaison Managers, or a nominated officer, within 3 working days. All other requests will be provided within a time period agreed to by the Liaison Managers.
33. If for any reason, an Agency declines a request, a response will be issued in writing, including a reason for non-disclosure, within 3 working days.

Exchange of information

34. In accordance with relevant legislation, directions and/or delegations on sharing official information, personnel from the Agencies are authorised to share information that relates to the proper conduct of operational activities provided in this MOU.
35. Where information regarding operational activities is required to be exchanged, this will occur pursuant to legislative information disclosure provisions, and generally without recourse to a formal notice.
36. The Agencies will provide information about the outcome of any referrals or relevant matters as soon as practicable after finalisation or prior to initiating legal proceedings.
37. The Agencies agree to secure all Official Information received as a result of the operations of this MOU against loss and unauthorised access, use, modification or disclosure.
38. If either Agency becomes aware of any act or practice which may breach an Information Privacy Principle, the Agencies will communicate the nature of the issue to the MOU Manager within two working days or as soon as practicable.

Shared obligations of the Agencies

39. For all other purposes, including but not limited to remuneration, occupational health and safety, and insurance, personnel will continue to be considered an employee of their engaging agency.
40. The Agencies will exchange information regarding the operation of this MOU on a regular basis, including prior to Senate Estimates hearings in February, May and October. An annual report will be prepared at the end of each financial year prior to the release of each Agency's annual report.
41. Reporting arrangements, including delivery dates and formats will be agreed between MOU Managers or their representatives on each occasion.
42. The Agencies will consult prior to making any public statements that may impact the operations of the other agency.
43. The Agencies must advise each other of any formal complaints against any personnel that are, or have been, engaged in operational activities resulting from this MOU. This includes, but is not limited to, any allegations, inquiries, investigations and breaches of the *Public Service Act 1999 (Cth)* and applicable APS values and code of conduct. If such circumstances arise, the Agencies will communicate the nature of the issue to the MOU Manager within two working days or as soon as practicable.



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Training and Support

44. DIAC will consult with FWO and provide necessary training for Fair Work Inspectors appointed as Migration Inspectors in order to fulfil the terms of the legislated functions.
45. In addition, DIAC will provide the FWO with copies of relevant learning and development and operational guidance materials upon commencement of this MOU, and as they are created or updated.
46. DIAC will provide legislative or technical advice, through an appropriately qualified Liaison Manager, to assist the FWO fulfil its obligations in relation to 457 visas. This advice may be provided upon request from FWO, or initiated by DIAC in relation to technical issues.

Administrative and Governance Arrangements

Costs

47. Unless otherwise agreed between the Parties, each Agency will pay its own costs of and incidental to the preparation, negotiation, completion and performance of this MOU.

Security

48. Each Agency agrees to notify the other Agency immediately if it becomes aware that a Security Incident has occurred in relation to the performance of this MOU.

Indemnity

49. Each Agency indemnifies the other from and against any:

49.1. cost or liability incurred

49.2. loss of or damage to property, or

49.3. loss or expense incurred in dealing with any claim against it including legal costs and expenses on a solicitor/own client basis and the cost of time spent, resources used or disbursements paid arising from either an act or omission in connection with the conduct of operational activities described in this MOU.

Dispute resolution

50. In the unlikely event that a dispute arises, the Agencies will convene a meeting of the MOU Managers who will attempt to settle the dispute by direct negotiation. Should the MOU Managers fail to settle the dispute within 14 calendar days, the matter will be referred to the Fair Work Ombudsman and the Secretary.
51. If the Fair Work Ombudsman and the Secretary are unable to resolve the dispute, the dispute will be referred to an independent third person with power:
 - 51.1. to mediate and recommend some form of non-binding resolution, or
 - 51.2. to intervene and direct some form of resolution, in which case the Agencies will be bound by that resolution.



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52. In the unlikely event that a dispute is referred to an independent third person, each Agency shall;

52.1. pay its own costs of complying with clauses 50 and 51; and

52.2. pay 50% of any costs charged by the independent third person.

53. Despite the existence of a dispute, the Agencies will (unless requested in writing by the other agency not to do so) continue to operate in accordance with this MOU.

Duration, termination & variation

54. This MOU commences on the date referenced in clause 1, and continues to operate unless terminated by either Agency.

55. There is to be a formal annual review of the MoU.

56. Either Agency may, by 30 days' notice, for any reason and in its absolute discretion, terminate this MOU. Termination must be in writing addressed to either the Fair Work Ombudsman or the Secretary.

57. Alternatively, the MOU may be terminated by written agreement, effective the date specified in that agreement.

58. This MOU can be varied by the Agencies at any time. Variations become operative when they are in writing and signed by the MOU Managers and appended as an Attachment to this MOU.



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SIGNED for and on behalf of)
The Commonwealth Department of)
Immigration and Citizenship)
 by Louise Smith)
 Global Manager Operational Integrity)
 State Director South Australia)

..... Signed

2 July 2013 Date

In the Presence of:

.....[WITNESS' SIGNATURE]

Francis Raymond Lodge [PRINTED NAME OF WITNESS]

SIGNED for and on behalf of)
The Fair Work Ombudsman)
 by Tom O'Shea)
 Executive Director)
 Policy and Media)

..... Signed

5 July 2013 Date

In the Presence of:

.....[WITNESS' SIGNATURE]

ROBERT HORTLE [PRINTED NAME OF WITNESS]



APPENDIX A – DEFINITIONS

In this MOU, unless the context indicates otherwise:

The Agencies	means: a. the FWO, and b. DIAC.
Attachment	means a document attached to this Memorandum of Understanding and includes the Attachment as amended or replaced from time to time by agreement in writing between the Parties.
ANZSCO	means the Australian and New Zealand Standard Classification of Occupations as defined by the Australian Bureau of Statistics.
Employer Sanctions Legislation	refers to the offences and civil penalty provisions contained in Subdivision C of Division 12 of the Migration Act.
Fair Work Act	means the <i>Fair Work Act 2009</i>
Fair Work Inspector	means a person appointed an inspector pursuant to section 700 of the <i>Fair Work Act 2009</i> .
Liaison Manager	means those persons who occupy the roles set out in clause 11 of this MOU.
Market rate	has meaning from regulations 2.72(10)(c) and 2.79(2) which relevantly provides that the terms and conditions of employment are no less favourable than the terms and conditions that are provided, or would be provided, to an Australian citizen or Australian permanent resident to perform equivalent work in the person’s workplace at the same location.
Migration Act	means the Migration Act 1958
Migration Regulations	means the Migration Regulations 1994
Official Information	means any information developed received or collected by or on behalf of a Party to which the other Party gains access under or in connection with this Memorandum of Understanding, and includes the Contract Material and the terms of the Memorandum of Understanding.
Office of the Fair Work Ombudsman	means the Office of the Fair Work Ombudsman established under section 696 of the <i>Fair Work Act 2009</i> .
Operational Activities	includes all functions, powers and activities of Fair Work Inspectors and DIAC Inspectors associated with conducting investigations, audits and campaigns.



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Migration Inspector	means a person appointed an inspector pursuant to section 140V
Monitoring	means those activities set out in clauses 17, 18, 19, 20, 21 and 22 of this MOU.
MOU Managers	means the persons specified (by name or position) or any substitute notified to the FWO.
Secretary	means the Secretary of the Department of Immigration and Citizenship.