CFMEU RESPONSE

TO

DISCUSSION PAPER

Business long stay subclass 457 and related temporary visa reform
Department of Immigration and Citizenship
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Executive summary

The CFMEU welcomes the opportunity to respond to this Discussion Paper canvassing proposed reforms to the 457 visa regime and other temporary visas in the '400 series'.

The CFMEU supports most measures canvassed in the Discussion Paper but has concerns about some. The proposed Bill to amend the Migration Act (1958) in September 2008 should take account of the following.

The Bill must explicitly incorporate the principle that 457 visa workers and all other temporary workers must be employed at market rates of pay and conditions.

The Immigration Minister says the aim of the new laws is "to help prevent the exploitation of temporary skilled foreign workers and ensure the wages and conditions of Australian workers are not undercut."

The CFMEU strongly endorses this principle and objective. This is much more than aiming merely to protect "employment and training opportunities of Australians".

The legislation should specifically acknowledge the sponsor's undertaking to pay the relevant industrial instrument in current and future 457 visa wages rules.

Of the measures canvassed, the CFMEU strongly supports the following (numbering refers to section in DIAC Discussion Paper):

- To not use overseas workers as a means of strikebreaking (1.2.1)
- Improving information sharing, because improving transparency in the program is vital and urgent. (4)

The CFMEU believes the following measures should be strengthened, among others.

- Improved information sharing with the general public (4.3). The CFMEU believes the names of **all** employers using 457 visas should be published, along with other details set out, and can be published now.
- Punitive sanctions (3.2). The CFMEU supports criminal as well as civil penalties.

The CFMEU does NOT support the following measures:

- The possible shift to employer self-reporting as the principal mechanism for employer compliance monitoring, with reduced site visits (2.1). The CFMEU believes site visits should be increased, not reduced.

- Publishing the names of only a limited number of employers found non-compliant with 457 sponsor undertakings (3.3). CFMEU believes the names of **all** non-compliant employers should be published, and the nature of the non-compliance.

The CFMEU also believes a different (and more onerous) set of obligations is needed for those sponsors to be granted accreditation in the new 'fast-track' system for 457 visa processing, following acceptance of the ERG report.

General principles

1. The proposed Bill must explicitly incorporate the principle that 457 visa workers and all other temporary workers must be employed at market rates of pay and conditions.

The Minister's media release on the Discussion Paper says the aim of the new laws is "to help prevent the exploitation of temporary skilled foreign workers and ensure the wages and conditions of Australian workers are not undercut."

The CFMEU strongly endorses this principle and objective. But we note that the Discussion Paper itself does not commit to this objective for the proposed reform. Instead it has a much weaker statement of objectives:

> "The reform is focused on making the program more responsive to labour market needs, while protecting the employment and training opportunities of Australians and the rights of overseas workers." (Discussion Paper, p2)

This statement is not good enough. Aiming merely to protect "employment and training opportunities of Australians" is not enough. The aim must be also to ensure wages and conditions of Australian workers are not undercut, as the Minister has said.

This principle must be embodied explicitly in the proposed Bill and should help guide consideration of the reforms canvassed in the Paper.

2. The CFMEU understands the principle that temporary visa holders should not be entitled to the same rights as Australian citizens and permanent residents, in terms of access to government services and income support while in Australia. It is therefore appropriate that employer sponsors accept responsibilities in this area.

3. Imposing additional obligations on employer sponsors will add to the cost of employing 457s and other temporary workers. The CFMEU considers that any additional costs imposed on employers do not in any way lessen the obligation for employers to pay market rates of pay and conditions to the foreign workers.

Some employers may argue that accepting additional costs associated with temporary workers and their families (as canvassed in this Paper) weakens the case for also paying market rates of pay in these temporary visa programs. According to this thinking, if employers have to pay more for items such as travel fares, recruitment agency fees, income protection insurance, and public education costs etc,

they should not also have to pay market rates to foreign workers. Some may even argue that it justifies a lower MSL in the 457 program.

This argument should be rejected, because it will lead directly to the undercutting of wages and working conditions of Australian workers. Second, obliging employers to cover some additional costs will contribute towards the basic aim of the program, namely that temporary foreign workers should not be used to replace, or in preference to Australian workers, but as a last resort when Australian labour (citizens and permanent residents) is not available.

4. The CFMEU shares the view of the Minister for Immigration that transparency in the 457 and other temporary programs must be greatly improved, and is absolutely critical to community support for these programs.

1.1 Obligations – Subclass 457 and 400 series visas

1.1.1 To keep records (of compliance with all applicable obligations)

The Discussion Paper notes the view of some stakeholders that the scope of this obligation should be kept to a minimum and should not expand substantially the records employers are expected to keep under other Commonwealth, State and Territory legislation.

While the CFMEU does not want excessive record keeping by employers, the fact is that the correct test to apply here is what records need to be kept to document compliance clearly and unequivocally. 457 workers are among the most vulnerable in the workforce. Employer and management convenience must take second place in determining the scope of records needed.

1.1.2 To provide information within a prescribed time-frame

a) The Paper says this obligation "might cover a requirement on the sponsor to provide the contact details for the primary visa holder." p9

The Paper provides no indication of how many 457 workers the department is unable to contact for this reason in 2008, but it could be very large. One 457 visa study indicates it was as high as 60% of all 457 primary visa holders in 2003-04.[1] The proportion not contactable could be even higher now, given the program's massive growth since then and poor regulation.

The CFMEU believes this obligation **must** include providing the visa holder's contact details to DIAC, as a priority.

[1] Khoo, McDonald and Hugo, *Temporary skilled migrants in Australia: employment circumstances and migration outcomes DIMIA*, 2005. This study reports the results of a sample survey of 457 visa holders between November 2003 and 2004. But the sample was drawn from only around 40% of all 457s in Australia at the time, because this was all DIMIA had contact addresses for at the time.

This information is absolutely critical to effective and unbiased compliance monitoring in the program. Without it the department is unable to communicate directly with 457 visa workers themselves and is largely if not wholly reliant on employers' versions of events.

b) The Paper suggests a graduated timeframe - from 2 days in circumstances "where there is an imminent threat to health or safety to one month in routine circumstances".

Comment:
An 'imminent threat to health or safety' requires an immediate response from sponsor to DIAC, and an immediate referral of response from DIAC to relevant OH&S authority. Immediate means same day.

Where the employer concerned is party to a Labour Agreement, DIAC should also immediately notify the union.

Information on wages and working conditions of 457 visa holders must likewise be classified as 'non-routine'. This information should be supplied to DIAC within 7 days, recognizing that 457s are more vulnerable than other workers.

1.1.3 To notify the Department of prescribed changes in circumstances within a prescribed period

The Paper notes that consideration is being given to being more prescriptive about type of changes that must be notified and the timeframe for notifications.

Comment:
Changes that should be notified include –

- Any increase/decrease in 457 visa holder's wages (hourly rate), or change to the job classification of the visa holder.
- Any breaches of workplace relations laws, including OH&S, or actions or notices brought against the employer by regulatory authorities.
- Any increase in workers compensation premium rates for the business.
- Any change in workers compensation insurer.

Sponsors should be required to report quarterly to DIAC on priority compliance issues, including actual wages paid in total, hours worked and hourly rates compared with rates specified in the applicable industrial instrument; any change in job classification or employment circumstances; and training information. (This is similar to reporting requirements in the On-hire Labour Agreement.)

1.1.4 To notify visa holder of certain information, such as information about the rights associated with working in Australia

CFMEU strongly supports this. This information should include advising visa holders of their right to join a trade union in Australia. The name and contact details of the relevant union should be provided to visa holders upon commencement of work.

1.1.5 To cooperate with inspectors

The CFMEU strongly supports this obligation.

1.1.6 To pay the costs of locating, detaining, removing and processing protection visa applications (up to prescribed limits)

The CFMEU strongly supports this for both 457 and 400 series visas, and notes the current 457 limit of $10,000 (location and detention only).

1.2 457 specific – salary-related

1.2.1 To not use overseas workers 'as a means of strikebreaking'

The Paper says this obligation 'would prevent sponsors from utilizing temporary overseas workers during periods of lawful industrial action or to influence enterprise bargaining negotiations'. (p11)

The CFMEU strongly supports this, on the basis that 'utilising' means using 457 visa holders or any other workers on temporary visas supplied by third parties (eg, a labour hire company).

If a collective agreement is in force at the workplace, then all 457 workers at the workplace should be employed under that agreement regardless of how they are sourced.

1.2.2 To pay income protection insurance (premiums) for primary visa holders

CFMEU strongly supports this.

1.2.3 To pay the primary visa holder at least a particular amount

The CFMEU strongly supports inclusion of this obligation in the new legislation, but subject to the following comments.

a) The legislation should specifically acknowledge the sponsor's undertaking to pay the relevant industrial instrument in current and future 457 visa wages, and not simply leave this for mention in a 457 regulation.

The current rule requires employers to pay the MSL or wage specified in the relevant industrial instrument, whichever is higher. That needs to be included in the new legislation, if final government decisions on the reports from the 457 Integrity Review (the Deegan Review) have not been made by that time.

b) The Paper says the MSL is 'currently based on the Average Weekly Ordinary Time Earnings of Australian citizens and permanent residents'. (p11) This statement is not correct. The scope of the AWOTE survey is all employees in the Australian businesses surveyed, regardless of their residency status, ie permanent residents and temporary residents. It is a matter of concern that DIAC is unable to correctly describe the scope of the survey on which the MSL is based.

CFMEU also does not accept that AWOTE for **all** occupations and skill levels (including juniors, semiskilled and unskilled) is the appropriate basis for determining the MSL for a skilled temporary visa program. Our views on the most appropriate basis will be provided to the Deegan Review.

1.3 Obligations - 457 -non salary-related

General comment

The CFMEU believes that subject to some exceptions set out below, **all** the costs canvassed in this section should be borne by sponsoring employers.

We note that there is broad-based support for this position, as the imposition of most of these costs on sponsoring employers was proposed in the *Migration Amendment (Sponsorship Obligations) Bill*[2] introduced into the Federal Parliament under the previous government in June 2007. This Bill was then largely endorsed by the bipartisan Senate Standing Committee on Legal and Constitutional Affairs in 2007, and also welcomed by the Joint Standing Committee on Migration (JSCM) report on temporary visas in September 2007.

They were also included in the Discussion Paper on 457 visas issued in February 2007 by the Commonwealth State Working Party on Migration (CSWP), as part of the COAG process, which formed the basis for the June 2007 Bill.

The CFMEU believes all these obligations should apply without exception to all sponsors recruiting 457 workers:

- in the ASCO occupational classifications 5 (Associate professionals) and below, including ASCO 4 Tradespersons and related workers OR

[2] Including payment of all costs associated with recruitment of the sponsored worker and migration agents fees for the worker and their family; fees for mandatory licence, registration or membership required for the sponsored worker to work; and a number of other costs such as medical and travel costs.

- from low-wage countries – countries not on the ETA-eligible[3] list could be a proxy for these OR
- paid below the MSL (as permitted in Labour Agreements), at the MSL and within a small band above the MSL, eg August 2008 standard MSL plus 10% ($4,444 in 2008 dollars).

The CFMEU also notes that imposing these obligations on 457 sponsors may provide an incentive for more employers to consider sponsoring these workers as permanent skilled migrants, because PR status will shift many costs from employers to the taxpayer. That highlights the importance of closer scrutiny of employer-sponsored PR visas.

1.3.1 To pay travel costs *to* Australia
1.3.2 To pay travel costs *from* Australia

The CFMEU believes it is unreasonable to oblige employers to pay travel costs to Australia for those 457 visa workers who have genuinely travelled independently to Australia before being recruited; or those who move to another employer sponsor. Travel costs ex-Australia raises similar issues.

We understand that around 15% of all 457 visa grants currently are to persons who are already in Australia on temporary visas, including a proportion on 457 visas who are either changing employers or having the duration of their visas extended.

Those already in Australia on visas such as working holiday (subclass 417) and overseas student visas and converting to employer-sponsored 457 visas will have already paid their airfares to Australia as a condition of being granted those visas.

Some employers may offer 457 visa employment to foreign workers on condition that they pay their own (and families) fares to Australia. Any attempt at this kind of duress should not be tolerated and should be firmly dealt with in the non-compliance regime.

1.3.3 To pay the costs associated with recruitment
1.3.4 To pay the costs associated with migration agents services
1.3.5 To pay costs associated with licensing and registration or similar

The CFMEU supports these obligations.

We also note that in the February 2007 Commonwealth-State officials (CWSP) Discussion Paper on 457 visas, several costs were stipulated to be met by employers but have not been included in the June 2008 DIAC Discussion Paper. These were, in relation to the primary 457 visa applicant/holder:

[3] Electronic Travel Authority – some 30 countries are currently on the list of ETA-eligible passports. They are mainly high-wage OECD countries but also include Malaysia.

- Visa fees
- Skills assessment
- English testing
- Health testing

The CFMEU believes sponsors should meet these obligations as well.

1.3.6 To pay certain medical costs OR to pay for health insurance

CFMEU supports an obligation to make sponsors 'liable for insurance premiums for policies which covered medical costs incurred in public hospitals by visa holders.' According to the Discussion Paper, sponsors would be liable should the insurer fail to pay for any reason.

CFMEU believes this obligation is fairer than the alternative of requiring sponsors themselves to be liable for medical costs incurred in public hospitals.

1.3.7 To pay education costs for certain minors

CFMEU supports this obligation, for primary and secondary students of mandatory school age, on the basis that it is restricted to government fees (if any) for secondary 457 visa holders attending public schools only.

2 Expanded powers to monitor and investigate possible non-compliance

General comment

CFMEU supports expanded powers in this area.

But CFMEU does not support any proposed shift to more employer self-reporting for compliance monitoring, with reduced site visits or 'in person' monitoring.

The Discussion Paper does not make it clear if this shift is intended or not. The Paper says that 'under the proposed new arrangements, self-reporting would be the principal monitoring mechanism with site visits employed only in the case of sponsors of particular concern.' p21.

Self-reporting is already the principal monitoring mechanism, based on DIAC data showing only 46% of sponsors subject to paper-based monitoring in 2006-07 and even less only 11% subject to on-site visits.

The Paper provides no evidence to support the view that self-reporting by employers has provided or will provide an effective compliance monitoring regime. For example, no information has been provided in this Paper or elsewhere on the number of 457 visa holders working for the sponsors who were monitored in 2006-07 (ie, whether the sponsor employed hundreds of 457 workers or only one).

Nor is there information on whether the monitoring even investigated, systematically or casually, whether 457 workers were being paid in accordance with the appropriate industrial instrument. The focus of monitoring appears to be mainly on compliance with the MSL, based on DIAC evidence to various inquiries.

CFMEU believes site visits should be increased, not reduced.

Further, CFMEU notes the allocation of nearly $20 million in the last budget toward improving the integrity of the 457 visa scheme and speeding up visa processing. Unions, particularly CFMEU have been instrumental in monitoring and enforcing the rights of 457 visa workers. Unions, in conjunction with the Department, are well placed to assist in minimizing exploitation. The Commonwealth should provide resources to relevant unions as a means of building capacity to assist in compliance monitoring.

2.1 Desktop audit monitoring

The CFMEU supports a legislated power for the department to request specific information within a specified time period, with penalties for non-compliance.

2.2 In person monitoring/inspectors

The CFMEU supports establishment of inspectors with investigative powers as described, 'similar to the powers of workplace inspectors under the *Workplace Relations Act 1996* (the WR Act) to the greatest extent possible'. p22

We note that inspectors would be able to 'interview any persons' (p21) and assume that includes 457 visa holders and their co-workers, as well as management.

The Paper does not explain whether the new inspectors would have the expertise to investigate the crucial issue of whether 457 visa holders are being paid in accordance with the relevant industrial instrument. CFMEU regards this as central.

2.3 Offence for providing false or misleading information (in connection with monitoring and investigating non-compliance)

CFMEU believes there should be a mandatory minimum penalty for this offence, as well as the maximum penalty currently specified.

3 Addressing non-compliance

3.1 Administrative sanctions

The CFMEU supports effective administrative sanctions.

The Paper claims that 'in some circumstances administrative sanctions have proven to be highly effective', but 'have proven insufficient to encourage compliance in all circumstances.'

The paper does not provide any evidence to support this claim. Without any further information, it is impossible to assess whether existing administrative sanctions on 457 sponsors are any use at all.

3.2 Punitive sanctions

The CFMEU supports the introduction of punitive penalties and notes that the appropriate maximum penalty is under consideration; and considers the penalties proposed in the June 2007 Bill as a useful starting point.[4]

The Paper says civil penalties are the preferred option over criminal penalties. CFMEU believes criminal penalties should be provided for in the legislation for the worst breaches, as in current laws concerning employment of illegal workers and forced labour.

Fines of up to $13 200 or two years imprisonment apply for individuals while companies face fines of up to $66 000 per illegal worker, more where an illegal worker is being exploited through forced labour, sexual servitude or slavery.

3.3 Publishing non-compliance

The CFMEU supports publication of the names of all sponsors found in breach of their 457 sponsor obligations, along with the nature of the breach.

Publication should not be limited to sponsors who are repeat offenders or where non-compliance has not been remedied.

This approach is completely in line with the principle of improving transparency in the program, as a means of maintaining community confidence and support in temporary skilled migration.

[4] In the June 2007 *Migration Amendment (Sponsorship Obligations) Bill*, the maximum civil penalties attached to breaches of obligations were $6,600 for an individual and $33,000 for a body corporate for each identified breach.

4 Improving information sharing

General comment
The CFMEU reiterates that it shares the view of the Immigration Minister that greater transparency in the 457 and other temporary programs is absolutely critical.

The CFMEU believes that transparency must apply at all stages in the program, both before sponsorship approval and after.

4.1 Between visa holders, sponsors and the Department

The Paper says the proposed legislation will facilitate full information exchange between these three parties, 'for limited relevant purposes'.

The CFMEU Paper supports information exchange that enables greater protection of the rights of vulnerable workers, and more transparency in the program generally – see our comments above re section 1.1.1.

4.2 Between government agencies

The CFMEU strongly supports formalizing in legislation arrangements to ensure effective two-way sharing of information between DIAC and Commonwealth and State/Territory government agencies, relating to employer applications to become sponsors.

The CFMEU believes the process for assessing employers for approval as sponsors in the first place needs improvement. It is beyond doubt that the existing process has allowed many employers to be approved as 457 sponsors who should never have been granted this privilege.

The CFMEU believes the sponsor approval process needs to include more extensive and rigorous checks on some employers applying to be 457 sponsors, as routine:

- checks with relevant Commonwealth and State/Territory government agencies, to establish eg if the applicant sponsor has been prosecuted or sanctioned by Workcover, OH&S and IR authorities, and other agencies such as Fair Trading that regulate employment agencies in the States.
- checks with other stakeholders, both unions and industry, as is now current policy with Labour Agreements.

The CFMEU is not suggesting any union veto, simply a way of improving the current process consistent with policy on Labour Agreements. This is also the practice used in the NZ temporary visa scheme.

We do not know how many employers apply for approval as sponsors each year. But we do know that nearly 16,000 employers had at least one 457 visa worker in

Australia in April 2007.[5] Not every employer applying to be a sponsor may need to be subject to the pre-approval stakeholder feedback checks described above. Criteria could be established based on say the number of visas sought, the industries (lower wage) and occupations (higher risk). More information from DIAC would help refine the criteria.

Information sharing with ATO:
The CFMEU strongly supports legislative amendments that would allow the Department to receive back from the ATO information on whether a visa holder is being paid 'the correct amount' p25.

This term was not further defined, but the CFMEU does not believe 'the correct amount' should be limited to the MSL amount or the wages approved by DIAC at the time visas are granted.

The CFMEU believes it is essential that:

- the ATO be authorized to provide the department with information on **actual** wages and salaries paid (ie, not simply whether the amount met the MSL or the nominated salary approved by DIAC when the visa was granted), deductions etc, in a form that allows assessment of whether visa holders are being paid in accordance with the relevant industrial instrument and/or with market rates.
- this information be made publicly available urgently

4.3 With the general public

The CFMEU strongly supports legislation providing for the maximum public disclosure of disaggregated data.

The CFMEU believes, again in the interests of transparency, that this information should include at least the following:

- the names of employer applicants for sponsors, and visa application numbers, occupation and salary details etc (the US publishes most of this for its temporary skilled visa program, the H-1B visa)
- the names of employers approved as sponsors (plus details of visa numbers approved) in a gazette or website.
- for each occupation or occupational group, salaries approved by income range and actual salaries paid when available.

We note that the names of approved sponsors and their approved visa grant numbers have already been provided to the Australian Parliament in relation to at

[5] DIAC submission No 86a, 29 June 2007, to Joint Standing Committee on Migration, Inquiry into temporary visas, (DIAC Answer to Question on Notice No 23.

least two jurisdictions: the Northern Territory (sponsors in all industries) and West Australia (the meat industry), in the form of answers to Questions on Notice.[6]

It would therefore appear there is no barrier to this information being provided to the Parliament immediately, for each jurisdiction and industry in Australia.

Other temporary work visas in '400 series'

Regarding the '400 series' visas, CFMEU supports the principle of moving to more consistency in employer-sponsored temporary visas.

But the Discussion Paper provides no information on the size and characteristics of the various visa programs, the regulation of wages in each or compliance problems encountered compared to the 457 scheme. Consequently it is impossible to properly assess these programs.

The Discussion Paper also appears limited mainly to those '400' visas currently involving at least some employer sponsorship (9 out of the 13 visas listed in Attachment B).

Missing from the Paper is any consideration of several other '400' visas with large or otherwise significant labour market impacts, but which currently do not involve employer sponsorship. These include:

- the 417 visa, the Working Holiday Maker visa, and the closely-related Work and Holiday visa, subclass 462 visa.
- the 485 visa, Graduate Skills visa, introduced in September 2007 for foreign students graduating from university and VET courses, including in some trades.

Other 400 visas in Attachment B require sponsorship for stays of more than 3 months, but the 417 and 485 visas involve stays in Australia much longer than 3 months and longer periods of employment.

The 417 visa allows temporary residents full-time work in Australia for up to 2 years, in some circumstances. The numbers in the 417 visa program are now very large and growing – 155,000 visas likely in 2007-08 and 180,000 in 2008-09, according to DIAC estimates (Immigration Minister's media release of 1 July, 2008).

The 485 visa allows temporary residents full-time or part-time work for up to 18 months. As a new visa, the numbers are still relatively small.

[6] The names of NT sponsors approved in 2006-07 (to 31 March 2007) plus approved visa numbers were provided in Answer to Question on Notice 147, Budget Estimates Hearing, 21-22 May 2007. The same information for WA meat industry sponsors was provided in Answer to Question on Notice 145, Supplementary Budget Estimates Hearing, 30 October 2006.

The present and previous government have greatly increased access to the Australian labour market under these visas.

The CFMEU has serious concerns about the regulation of these visas, with evidence of exploitation of workers on them. This includes underpayment of wages and exploitation of these visa holders, and also others on student visas. There are also negative impacts on local and occupational labour markets.

The CFMEU believes these visas need more investigation and attention, and stronger regulation. This is especially so if labour demand generally is softening, because the number of 417 and 485 visas issued takes no account of labour market conditions in Australia (they are driven entirely by demand from visa applicants); and both visas have no labour market testing requirement when the visa holders are competing in the Australian job market.

The CFMEU believes the tighter regulation involved in the new obligations in the 457 program may also need to be applied to other visas.