SUBMISSION TO THE SENATE LEGISLATION AND CONSTITUTIONAL AFFAIRS COMMITTEE INTO THE MIGRATION LEGISLATION AMENDMENT (WORKER PROTECTION) BILL 2008

BY

RESTAURANT & CATERING AUSTRALIA (THE RESTAURANT AND CATERING INDUSTRY ASSOCIATION OF AUSTRALIA INC.)

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1. Restaurant & Catering Australia is the peak national Association representing the interests of the 19,000 employing restaurant and catering businesses in Australia.

2. Restaurant & Catering Australia operates on behalf of State / Territory Associations in each State / Territory of Australia.

3. The Act refers to the Migration Act 1958 (Cth.).

4. Restaurant & Catering Australia and its member Associations provide a range of services to restaurant and catering businesses. These including conducting industry consultation, issues research and surveys, policy formulation, compiling formal submissions and evidence, attending hearings, devising and executing industry strategy, provision of legislative advice and updates to members, development of resources to assist businesses with legislative compliance, PR and media management and direct representation on key government-industry standing committees, councils, boards, taskforces, and forums.

5. To assist its members (State Restaurant & Catering Associations) in providing advice to individual restaurateurs and caterers in relation to immigration matters, R&CA has in the past signed a Labour Agreement with DEST and then DIMA to import 300 Cooks and Chefs into Australia, undertaken an extensive promotion of this opportunity and other immigration options, hosted an officer from the Department of Immigration and Citizenship to support business migration programs, conducted information sessions on immigration compliance, participated in the Immigration Expo series in Australia, and engaged in the immigration policy debate with Government and Industry.

6. Restaurant & Catering Australia recognises that migration programs have the capacity to significantly reduce skills shortages in the hospitality sector. As noted above, the industry has used a range of migration programs and has experienced a number of frustrations with the systems that negatively impact on the supply of appropriately skilled staff for restaurant and catering businesses.

7. It is understood that Migration Legislation Amendment (Worker Protection) Bill 2008 is designed to increase system integrity and counter the perceived vulnerability of overseas workers. These are laudable objectives. The content below is designed to illuminate the issues relating to the content of the Bill and the associated Regulations and to offer suggestions as to ways in which these objectives may be achieved in other ways.

8. The Bill refers to regulations that underpin many aspects of the proposed legislation. This submission refers to a number of concerns in relation to matters that may be specified in the Regulations on the basis that the Bill may impact of the nature of the Regulations.

Sponsorship Criteria

9. Restaurant & Catering Australia (R&CA) has been concerned for some time that the criteria for businesses to become a approved sponsor, as determined by the Minister under s140E of the Act are not consistent with the objectives of the scheme.

10. The requirements, in summary, for a Nominating Employer are to demonstrate financial viability, a satisfactory industrial relations record and a commitment to training.

11. R&CA contends that the latter of these three tests does little to progress the objectives of the skilled migration program, other than to apply significant additional process requirements to the vetting of employers (other than vetting out smaller employers which may be the intention). In addition, the vetting process does little to actually determine a commitment to training as this is almost impossible to assess through any demonstrable criteria.

12. Restaurant & Catering Australia believes that the commitment to training, in a sector such as hospitality, should be measured on an industry wide basis as the application of such a test to individual small employers imposes significant additional administrative load and does not contribute to the objectives of the migration program.

13. The Association also believes that the financial viability test does not achieve any good purpose. To begin with, the test is not really a test of viability. It is understood that meeting a threshold time period of having been established and having provided a set of accounts is sufficient to meet the requirement. This does not assess viability nor is the information presented sufficient to make any assessment of such sustainability. Further, R&CA would question the qualifications of DIAC or DEEWR officers to make an assessment of a businesses viability. If the test is more targeted to whether an approved sponsor can meet their obligations, it is similarly flawed. The continuity of income is addressed by the part of the Bill (or the Regulations) requiring income protection insurance to be paid. The financial viability of the sponsors businesses, let alone the capacity of Departmental officers to assess said viability, is immaterial.

14. R&CA submits that satisfactory Industrial Relations record should be the only requirement for acceptance as an approved sponsor as referred to in s140E of the Act. Each employer should be vetted as to their IR record. There should be a 'zero tolerance' approach to this issue and any employer that has been breached for any reason should be disallowed from employing overseas workers for a period of time.

15. R&CA contends that the objectives annunciated in the Business (Long Stay) Subclass 457 and temporary visa reform will only be achieved if the Bill requires that the selection of sponsors / nominating employers is undertaken effectively. Simply raising the cost of each nomination will not necessarily improve practice.

The Risk of Changed Practice

16. The capacity to shift employer activity from the Employer Nomination Scheme (ENS) to the General Skills Migration Scheme (GSM) is real. The reforms present a significant additional cost burden on ENS (of between $15,000 and $20,000) per annum per employee. No such burden will exist for migrants entering through the GSM scheme.

17. The reform objectives will both fail to be achieved if this alternative path to skilled workers is not considered as part of the solution. There is no means through which the proposed reforms can be applied to the to the General Skilled Migration Scheme as there is no employer-employee relationship through which the sponsorship obligations can be enforced.

18. R&CA suggests that the General Skilled Migration Scheme should be scaled back and additional places be made available from the Employer Nomination Scheme, on the proviso that the operation of the ENS is enhanced and improved in a manner similar to that detailed in this submission.

19. It is understood that of the 3,674 cooks and chefs that entered Australia in 2006/07, 1,340 were in the temporary migration program on 457s. Of permanent visa grants 252 were engaged on the employer nomination scheme and 2082 in the General Skilled Migration program. This bias toward the GSM is of concern to Restaurant & Catering Australia because the number of cooks and chefs working in the hospitality industry, through the GSM compared to the ENS is vastly lower.

20. Data shows that participation rates in the workforce with Employer Sponsored workers is 90%, compared with 80% for overseas Independent Skilled Migration, 60% for onshore Independent Skilled Migration and 70% for Family Stream Migrants. Whilst all categories are statistically high, the statistics are based on overall workforce participation. Employer Nomination Scheme workers report in two thirds of cases working in a less skilled job than that for which they are trained.

21. In the event that the proposed reforms result in a shift from the Employer Nomination Scheme to the General Skilled Migration Scheme it is likely that far fewer cooks and chefs will be working in the occupations on which their entry to Australia relied.

22. Restaurant & Catering Australia recommends that, in the event that the Migration Legislation Amendment (Worker Protection) Bill 2008 is enacted, reforms need to be progressed to the General Skilled Migration Scheme or visa allocations be shifted toward the ENS.

Sponsorship Obligations

23. In is understood that the additional requirement on sponsors will be of the order detailed in the following table:

Cost	Notional Value
Travel Costs to Australia	$3,000
Travel Costs from Australia	$3,000
Recruitment Costs	$3,000
Migration Agents Costs	$7,000
Licencing and Registration Costs	NIL
Medical Costs / Health Insurance	$1,500 per annum
Income Protection Insurance	$1,800 per annum
Education Costs of Minors	Up to $9,000 per annum

24. The question is whether the additional costs of sponsorship will mean that the value proposition ceases to exist for overseas workers. Worse still, will the value of the program only cease to exist for some workers in some occupations, distorting the labour market?

25. One way to reduce the burden the new sponsorship obligations, enforced through the Migration Legislation Amendment (Worker Protection) Bill 2008, place on business, is to remove the requirement for businesses to pay superannuation for overseas workers or to redirect the 9% compulsory superannuation to meet some of the sponsorship obligations. Based on an average salary of $45,000 per annum, this would amount to $4,000 which may reduce the additional burden to a level where value still exists in recruiting overseas workers.

26. In the past Restaurant & Catering Australia has advocated the removal of the superannuation obligation for overseas workers as the funds are not directed to retirement savings (the objective of superannuation). This proposal was rejected on the basis that the 9% remained as a means of ensuring there was not an incentive to engage overseas workers. These proposals certainly provide a sufficient disincentive that would in part be offset by removing the superannuation requirement.

27. The development by the Rudd Government of the Superannuation Clearing house enables the option of reallocation of the Superannuation payment for overseas workers to be realised. Given that the two insurance-based additional cost areas are close to the superannuation amount, it is suggested that the superannuation payment could be used to cover the costs of income protection and health insurance.

Travel Costs to Australia

28. There are many 457 visa holders that are recruited on shore. Employers access a 457 visa holder from a range of sources including from other employers. In these circumstances there will not be travel to Australia to reimburse. Whilst the requirement needs to be flexible enough to ensure that airfares to Australia need not be paid in these circumstances, some arrangement needs to be made to allocate a proportion of travel costs to employers that source workers from other employers.

29. The regulations must ensure that they do not facilitate an 'open market' for second employers of 457 visa holders. Such a practice will lead to the system becoming unusable for most employers.

Travel Costs from Australia

30. As with travel to Australia there are a range of situations where payment for repatriation costs are not required to be reimbursed. In many cases visa holders that (as detailed above) had their travel costs covered by others or themselves, do not require a return ticket (in many cases because they purchased a return fare in the first instance).

31. Imposing a requirement to reimburse these costs for the sake of it is unnecessary.

Recruitment Costs

32. It is understood that the standard recruitment cost is of the order of $3,000 to $4,000 per employee. This is, on average, double that for local employees in positions at the skilled level. This additional cost is, in itself sufficient to make many employers reconsider the recruitment of employing from offshore as opposed to engaging an Australian in Australia.

33. To some extent services offered by the Department of Immigration and Citizenship keep this cost at this price point (e.g the skills matching data base). The service should be continued in the event this requirement is imposed.

Migration Agents Costs

34. If employers are to be made liable for the fees imposed by migration agents, R&CA contends that the Australian Government should take responsibility for vetting their performance. In so doing the Government would provide some protection for the Australian consumers of these services.

35. It is understood that 52.2% of visas granted in the Accommodation, Cafes and Restaurants sector have involved a migration agent[1]. The cost of this service varies dramatically but averages $7,000 per employee.

[1] DIAC Review of the Migration Advice Profession, DIAC (then DIMA) 2007

36. Both practically and from a regulatory perspective the services of a migration agent should be retained as an option for employers and employees. To some extent this will be facilitated by the efficiency reforms that the Department is currently undertaking (because individual employers and employees can understand and access the system without the need for a migration agent). This outcome should be articulated as an objective of the reform process.

Licensing and Registration Costs

37. At this stage there are no licencing requirements for Cooks and Chefs. This being the case it is unlikely that restaurateurs and caterers will be exposed to this additional cost. It is possible, if not likely, that in future either front of house staff will be regarded as 'skilled' given they are tradespeople in the Federal Awards (and Responsible Service of Alcohol Training will be required as a part of licencing arrangements) or Safe Food Handling will be required as part of a occupational licensing for cooks.

Medical Costs / Health Insurance

38. It is understood that the standard current practice was for sponsors to ensure that employees have relevant insurance cover. In the Restaurant & Catering Australia Labour Agreement, for example, the obligation is to ensure that the Commonwealth does not incur the cost of health expenses for 457 visa-holders.

39. In the event that the sponsor themselves covers these expenses, they cover a vast range of services. What is not clear at this stage is what is required to be covered. For example, it is the responsibility of the employer to cover the cost of that would fall to the Commonwealth under Medicare or is other costs to be roped in (such as those covered by private health cover).

Income Protection Insurance

40. As stated above, the objective of this requirement should be clear. That is, if the intention is to ensure continuity of employment, this should be clear so that a Work Agreement can make other arrangements to cover the continuity of employment. This principle should be applied to all aspects of the Bill – the principles behind the requirements should be articulated to make the spirit of the reforms clear.

Education Costs of Minors

41. Restaurant & Catering Australia understands that Governments do not want to wear the costs of education associated with family members of 457 visa-holders. Whilst R&CA is committed to the family aspect of the skilled migration program, the Association believes that, if this requirement is included, due to its high cost, 457 visa-holders with children will not be sponsored.

42. In the event that a visa-holder wants to pay for the education of their children, it seems impractical that they should then not be considered for a visa. If this option is to be included in the requirements, it should be open for the employee to pay for the education costs for their children should they wish to do so.

Work Agreements

43. It is important that the principle of a Work Agreement being able to be used to negotiate conditions of sponsorship for a large employer or group of employers is retained as an option to discharge sponsorship obligations. In order to achieve this it is suggested that the principles behind each of the reforms be expressed (e.g. to protect the employee in the case of displacement or to protect the Commonwealth against the possibility of incurring health care costs of overeats workers or their families).

44. If the principle behind each of the obligations were detailed it would enable a Work Agreement to deal with these obligations in a different manner. For example, a large employer (or group of employers) may choose to guarantee payment of wages upon displacement, rather than paying income protection insurance. This flexibility would not be to the detriment of the employee but may allow the employer / group of employers a more effective means of meeting their obligations.

45. Dealing with these changing obligations in the context of the Work Agreement will retain the control of meeting the obligations with both DIAC and DEEWR.