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27 October 2008

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Via Email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Please find attached the ACTU's submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the *Migration Legislation Amendment (Worker Protection) Bill 2008*.

If you have any queries in relation to this submission, please contact Michelle Bissett, ACTU Industrial Officer, on (03) 9664 7347.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'M Bissett', followed by a long horizontal flourish.

Michelle Bissett
ACTU Industrial Officer

Australian Council of Trade Unions

Submission to the Senate Standing Committee on Legal and Constitutional Affairs

Inquiry into the *Migration Legislation
Amendment (Worker Protection) Bill 2008*

27 October 2008

1. The ACTU welcomes this opportunity to contribute to the Committee's inquiry into the *Migration Legislation Amendment (Worker Protection) Bill 2008*.
2. The ACTU supports the Australian Government's objective in introducing this Bill. If passed, the Bill will facilitate the implementation of practical measures that will afford greater protection to workers on subclass 457 visas.
3. This brief submission explains why this Bill is needed and notes how the measures embodied in the Bill will assist in restoring integrity to the subclass 457 visa program.

Background

4. A number of developments over the past decade have served to undermine the integrity of the 457 visa program. First, there has been a dramatic increase in the number of subclass 457 visas issued. The number of visas granted to primary applicants has more than doubled over the last decade: from 16 550 in 1997-98 to 58 050 in 2007-08.¹ Second, there has been a significant shift in the nature of employer demand for 457 visas, towards a greater demand for people to work in trades and in lower-skilled areas such as hospitality, mining, manufacturing and construction.² Third, there has been a significant increase in the number of workers coming from developing countries, especially from China and the Philippines.³
5. These developments have placed enormous pressure on a program originally designed to facilitate the entry into Australia of relatively small numbers of highly paid executives and IT specialists. Over the past few years, the 457 visa program has proven time and time again to be incapable of protecting temporary overseas workers.

¹ Department of Immigration and Citizenship, *State/Territory Summary Report 2007-08*, 2.

² Paul Maley, 'Call for Low-Skilled Migrants', *The Australian*, 19 March 2008, 7.

³ Paul Maley, 'Developing Countries Go for 457 Visas', *The Australian*, 14 March 2008, 6.

6. As it is currently constituted, the subclass 457 visa program places the rights and interests of Australian workers and temporary overseas workers at risk. The ACTU believes that the current situation must not be permitted to continue.

Vulnerabilities of temporary overseas workers

7. Temporary overseas workers are more vulnerable to exploitation and abuse by unscrupulous employers than permanent residents. The risks inherent in temporary overseas worker programs are widely acknowledged by international organisations and labour migration experts.⁴
8. The vulnerabilities of this group of workers arise because:
- Recruitment agencies in host countries and/or employers in Australia may deliberately misinform a prospective worker about the working and living conditions in Australia and may charge the worker excessive fees for a visa;
 - Many workers who come to Australia may be unable to effectively communicate in English. They may not understand the employment contract that they are asked to sign, and may not be able to communicate in the workplace over important issues such as legal entitlements and occupational health and safety. A lack of English skills also makes it more difficult for workers to make complaints to the relevant authorities;
 - Workers may be unfamiliar with the way in which the Australian legal and administrative systems work;

⁴ See, e.g., Martin Ruhs, 'Designing Viable and Ethical Labour Immigration Policies', *World Migration 2005*, International Organisation for Migration, June 2005; Philip Martin, *Towards Effective Temporary Worker Programs: Issues and Challenges in Industrialised Countries*, International Migration Paper No. 89, ILO, 2007; and Organisation for Security and Cooperation in Europe, International Organisation of Migration and International Labour Organisation, *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* (2006).

- Workers often do not have family or other support networks in Australia; and
 - If workers complain about poor working conditions or low pay, they risk being sacked and subsequently deported. Employers do not have comparable control over workers who are permanent residents.
9. Australia's temporary overseas skilled worker program fails to recognise and make adequate provision for the vulnerabilities of this group of workers. As a result, workers on 457 visas have been subject to appalling treatment by unscrupulous employers. The following are just two examples.

Jack Zhang paid an employment agent in China \$10,000 for a position in the Australian printing industry. He agreed to pay another \$10,000 'lawyer fee' in weekly installments of \$200 from his wages to his employer, Aprint. Mr Zhang's employer also deducted \$120 a week from his pay for rent. Mr Zhang worked more than 60 hours a week and earned around \$751.92 - at least \$388 a week below the award rate and a massive \$1123 a week below the industry standard rate. Immediately after Mr Zhang had repaid his employer the \$10,000, he was sacked and replaced by another worker from China.⁵

Guo Jian Dong came to Australia from Mongolia to work on a timber plantation in outback Queensland. He had minimal English and no prior training in cutting timber. He was trained on the job by use of demonstrations and sign language. Guo Jian Dong was killed when a tree he was felling brushed a dead tree, which fell and crushed him. In the wake of Mr Guo's death, the Department of Immigration and Citizenship determined that his employer, NK Collins, had breached its undertakings and barred NK Collins from employing any more workers under the 457 visa program. However, this sanction was recently overturned by the Migration Review Tribunal.⁶

The Migration Legislation Amendment (Worker Protection) Bill 2008

10. The Migration Legislation Amendment (Worker Protection) Bill 2008 will improve the 457 visa scheme by:

⁵ Michael Bachelard, 'Our Guest Workers Who've Had Enough', *The Age* (Sydney), 6 September 2006.

⁶ Matthew Moore, 'A Lonely Death Among the Pines', *The Sydney Morning Herald*, 29 August 2007. See also Subclass 457 Visa Integrity Review, *Issues Paper #3: Integrity/ Exploitation*, September 2008, 40.

- (i) Providing a legislative structure for strengthened sponsorship obligations on employers;
- (ii) Improving the capacity for information sharing across all levels of government;
- (iii) Expanding powers to monitor and investigate possible non-compliance by sponsors; and
- (iv) Introducing civil penalties for sponsors found in breach of their obligations.

A legislative structure for better defined sponsorship obligations

11. The ACTU recognises that, under the 457 visa program, sponsorship obligations are one of the principal means through which the Government may pursue important policy objectives, including:

- (i) Ensuring that temporary overseas workers are not charged excessive recruitment and migration fees;
- (ii) Affording temporary overseas workers a basic income safety net should they find themselves unable to work or without employment for a short period of time;
- (iii) Ensuring temporary overseas workers and their families – many of which who do not have access to government services such as Medicare – do not incur medical costs or education costs beyond those incurred by permanent residents; and
- (iv) Preventing employers from using the 457 visa program to avoid investing in their permanent workforce or to drive down wages and conditions of employment in Australia.

12. This Bill does not specify the precise sponsorship obligations on employers of workers on 457 visas. It does, however, improve the legislative framework under which these sponsorship obligations will be prescribed.
13. The Government has stated that it intends to prescribe new sponsorship obligations for employers of workers on 457 visas in the *Migration Regulations 1994*.⁷ The Government has argued that the inclusion of the precise sponsorship obligations in regulations rather than in legislation will enable it to respond more promptly to the dynamic nature of the temporary skilled worker visa programs, and provide the Government with the opportunity to consider advice put to it by the various review processes currently underway in relation to the 457 visa program.⁸
14. The ACTU has supported the revised sponsorship obligations proposed by the Department of Immigration and Citizenship (DIAC or the Department) in its Discussion Paper released on 30 June 2008 and look forward to seeing these obligations reflected in the *Migration Regulations 1994* in due course.⁹

Improved information sharing

15. A key weakness of the existing 457 visa program is the failure of government bodies at both the state and federal level to work cooperatively to protect workers on 457 visas from violations of their rights under Australian law.
16. Under the existing arrangements, there are no formal mechanisms through which DIAC may notify relevant state agencies such as WorkCover of the presence and location of workers on 457 visas in their jurisdictions. This severely limits the extent to which these agencies can ensure that temporary

⁷ *Migration Legislation Amendment (Worker Protection) Bill 2008*, Second Reading Speech, Senate Hansard, 24 September 2008, 2-4.

⁸ *Migration Legislation Amendment (Worker Protection) Bill 2008*, Explanatory Memorandum, [114].

⁹ See ACTU, *Response to Discussion Paper – Business (Long Stay) Subclass 457 and Related Temporary Visa Reforms*, 11 July 2008.

overseas workers are being afforded the protections they are entitled to under Australian law.

17. There is also no existing mechanism by which DIAC can confirm the amount being paid to individual workers on 457 visas. Under the current arrangements, sponsors are only required to indicate to DIAC, at the time of making a sponsorship application, the salary they propose to pay the temporary overseas worker.

18. In addition, under the current program, DIAC cannot even lawfully obtain the contact details of workers on 457 visas from sponsors. This severely inhibits the capacity of the Department and other agencies to provide information to temporary overseas workers.

19. The rights of temporary overseas workers are best protected through a high level of co-operation between all agencies involved in the monitoring of workplaces, including employment rights, occupational health and safety, wages and visa inspection.

20. The ACTU strongly supports the measures within the Bill to improve information sharing between sponsors and DIAC, and across all levels of government. In particular, we support those provisions within the Bill that:

- Ensure that an approved sponsor or former approved sponsor may provide personal information about a visa holder or former visa holder to the Minister on request (s 140ZI);
- Enable inspectors to disclose information to the Department of Education, Employment and Workplace Relations where the inspector considers on reasonable grounds that the disclosure is likely to assist in the administration of the *Workplace Relations Act 1996* (s140ZA(2));

- Provide for regulations authorising inspectors to disclose information to prescribed Commonwealth, state or territory departments (s 140ZA(3)); and
- Amendments to the *Tax Administration Act 1953* to allow the Commissioner of Taxation to disclose certain information to an officer of the Department of Immigration and Citizenship, which will enable DIAC to confirm the actual wages paid to workers on 457 visas (Schedule 2).

Expanded powers to monitor and investigate possible non-compliance by sponsors

21. The ACTU views the current arrangements for monitoring compliance by employers with the 457 visa program as inadequate and believes that they have failed demonstrably to prevent the systemic abuse of the 457 visa program.

22. The ACTU welcomes the measures within this Bill that provide the Commonwealth with greater powers to monitor and investigate alleged abuses by sponsors of workers on 457 visas.

23. The ACTU strongly supports measures within the Bill that provide for the appointment of inspectors with powers substantially the same as those available to workplace inspectors under the *Workplace Relations Act 1996*. We also support the provisions within the Bill that make it an offence for sponsors to fail to cooperate with these inspectors.

The introduction of meaningful penalties for sponsors found in breach of their obligations

24. It is critical that the Department has available to it adequate sanctions to encourage compliance with sponsorship obligations and to act effectively against employers who fail to comply with their obligations.

25. At present, where a sponsor breaches his or her sponsorship obligations, the Department may only issue administrative sanctions. The Department may:

- Cancel the sponsorship;
- Bar the sponsor from sponsoring any more workers under the 457 visa program for up to 5 years; and/ or
- Issue a formal warning. This may then be considered when the employer applies to sponsor any more workers under the program.¹⁰

26. The ACTU believes that these sanctions are grossly inadequate in light of the hardship that may be inflicted upon workers on 457 visas where their employer breaches the sponsorship obligations.

27. The ACTU supports measures in the Bill that enable the Commonwealth to pursue financial penalties through the Courts where an employer has breached their obligations.

28. The Bill introduces civil penalty provisions for failure to satisfy a sponsorship obligation, and a supporting civil penalty framework which provides that, in addition to ordering payment of a pecuniary civil penalty, a court may order payment of a debt owed to a person in relation to a sponsorship obligation. The civil penalty amount that may be imposed for contravention of a sponsorship obligation is consistent with the civil penalty provisions in the *Workplace Relations Act 1996*.

29. The ACTU supports the provisions within the Bill that enable certain actions to be brought using the small claims procedure in the Federal Magistrates Court (s140SC(2)). This will facilitate access to the courts in order to recover money owed in relation to a sponsorship obligation.

¹⁰ DIAC, *Subclass 457 – Business (Long Stay) Visa: Employer Sponsorship Obligations*, available at http://www.immi.gov.au/skilled/skilled-workers/_pdf/457-sponsored-requirements.pdf.

Conclusion

30. The ACTU is pleased to support the *Migration Legislation Amendment (Worker Protection) Bill 2008*. We strongly believe that existing regulatory arrangements fail to adequately safeguard the rights and interests of both Australian and overseas workers. This Bill represents a positive and necessary step towards restoring some integrity to Australia's 457 visa program.