Response to Discussion Paper – Business (Long Stay) Subclass 457 and related temporary visa reforms

ACCI welcomes the opportunity to comment on the proposed 457 legislation amendments but is concerned by the lack of evidence presented to justify the majority of proposed changes. Before any of these proposed amendments are pursued, ACCI strongly recommends that stakeholders receive a more informative discussion paper or the opportunity to engage in consultations that provide empirical evidence that the suggested measures are warranted. How, for example, can it be proved that making sponsors liable for additional travel costs, income and health insurance, education and recruitment costs, registration and licensing costs, and location and removal costs will improve the integrity of the program? If only a small percentage of employers are misusing the 457 visa but the Government is asking all sponsors to bear significant risk and financial burden to use the system, surely Australian employers are entitled to some tangible justification and statistical evidence for the onerous costs proposed?

The changes outlined in the discussion paper seem disproportionate to the actual scale of sponsorship problems. The Department's own statistics, published in the 2006-07 Annual Report, show that only 1.67 per cent of sponsors of temporary entrants were found to have breached their sponsorship obligations. In the same year, only 0.14 per cent of temporary entrants applied for a protection visa and only 0.61 per cent became unlawful. It seems illogical to impose such burdensome new and expanded obligations on all sponsors when over 98 per cent of sponsors are abiding by their obligations and more than 99 per cent of temporary entrants (which is 68 per cent comprised of 457 visa holders) never seek asylum or become unlawful.

While ACCI appreciates that the motivation behind the suggested amendments is to create greater standardisation of conditions and obligations across the 400 visa series, we have concerns that increasing the number and scope of sponsorship obligations, particularly for the 457 visa, will be prohibitive for business, and especially small-medium business participation in the skilled temporary worker program, and suggests that all sponsors are being penalised in response to the misconduct of a small percentage of sponsors who do not uphold their sponsorship obligations.

Far from increasing confidence in the 457 visa, it is ACCI's concern that the proposed changes will in fact discourage a large number of Australian businesses from using the 457 visa at all. This will place increasing pressure on the (already over-stretched) resident skilled

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workforce, drive up wages (through artificial market interference), and ultimately reduce the ability of Australian businesses to complete in a global market.

Before any legislation is introduced, ACCI would like to see the Regulatory Impact Statement of the legislation made public so that there is clear understanding of the regulatory impact of these suggested changes.

Sponsorship Obligations

A number of the suggested changes to sponsorship obligations amount to prohibitive impositions that will begin to preclude a vast number of small-medium businesses from utilising the 457 visa or any other 400s series visas requiring sponsorship. Almost as soon as this paper was released, ACCI received a call from an employer considering abandoning its plans to use Occupational Trainee visas to bring interns from Europe to Australia if they were going to have to absorb the additional costs proposed, including cost of travel to Australia. The employer suggested that the sponsorship obligations proposed, which add up to significant costs particularly for small-medium businesses but which may also deter larger businesses from sponsoring overseas workers, may generally push more employers to "package" their skilled worker needs into 456 (Business Short Stay) applications which may result in increased inappropriate use of the 456 visa.

Other ACCI members, particularly small-medium businesses, have expressed great concern that the proposed changes only further complicate the significant skill shortage problems facing Australian small businesses, increasing their financial risk in sourcing skilled employees from overseas and acting as a significant barrier to sponsoring workers from overseas.

ACCI questions whether changes to the sponsorship obligations for all 400 series visas are really warranted? Is there sufficient concrete evidence of misuse or other problems in how these visas are currently managed that justifies such radical changes to current sponsorship arrangements?

The general feeling of employers is that compliant sponsors who do not abuse the 457 program are being penalised with increasingly complex and unsustainable sponsorship obligations in order for the Department to curb or deter the activity of a small percentage of employers who use the visa inappropriately or abusively. This perception alone may prove detrimental to the program and to skilled labour shortfalls.

If any of these measures are adopted, ACCI is strongly opposed to their retrospective application. This is grossly unfair to compliant sponsors who have sponsored 457 workers in good faith under the current obligations framework.

1.2 Obligations – Subclass 457 specific-salary related

1.2.1 To not use overseas workers as a means of strike-breaking

The proposal regarding 457 workers and strike activity is of concern to ACCI as it presents a number of practical, legal and human rights concerns which should lead to it not being progressed, or fundamentally reconsidered based on further input from industrial relations policy bodies.

ACCI is concerned that the proposed measure may contravene Freedom of Association principles which state that workers in Australian workplaces are free to choose whether they become, or do not become, members of industrial associations. 457 workers have the same rights as Australian workers to participate in or not participate in any kind of industrial action. Further, there is no legal impediment under federal workplace relations laws for employers to hire temporary labour during periods of industrial action to ensure continuity of business.

"Strike-breaking" – more accurately referred to as "substitute labour" – has very little relevance to the current Australian setting. Few, if any, strikes see the employment of substitute labour. Most strikes in Australia are short run, involving a few hours or days of stoppage, making the link to 457 visa holders irrelevant. Given the length of time it takes to secure a 457 worker, there would seem to be few, if any, bargaining situations which result in industrial action where an employer could reactively use 457 visas to access replacement labour. If the proposed measures are not in relation to new 457 visa holders but rather 457 employees currently in the workplace, it makes little sense to say these workers should be stood down during an industrial action when, under the terms of their sponsorship, they must essentially be working a 38 hour week and being paid the award or the Minimum Salary Level.

If this proposed measure is introduced into migration legislation it may be at odds with the *Workplace Relations Act*: employees withdrawing their labour are not allowed to be paid under ss.507(2) and 507(5) of the *Workplace Relations Act 1996*, but if employers have an obligation to continue paying the 457 visa holder, these two laws will come into conflict. There needs to be a consistent approach under migration laws and workplace relations laws for employers to be confident of their legal obligations.

1.2.2 To pay income protection insurance

ACCI questions the proposed introduction of compulsory income protection insurance as a sponsorship obligation. In addition to the cost which would impact significantly on small businesses, there is concern over the provision of insurance to cover "transition to another visa". This could well mean the employer is effectively paying the visa holder while they are negotiating transfer to the sponsorship of another employer. Given that the proposed changes to the legislation include requiring the sponsor to pay for travel to Australia, visa holders already onshore will already be an attractive prospect for poaching – more so if their income is guaranteed by the first employer's insurance.

Aside from Workers Compensation laws (which have a different character), currently the only form of income protection insurance in Australia is for situations where the worker becomes unable to work due to disability. This insurance is usually taken out by the worker themself. Proposing that foreign workers have a type of income insurance that doesn't currently exist, paid for by their employer, creates yet another disparity between the foreign worker and the Australian worker.

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

ACCI is concerned that in many industries and occupations, the prescribed Minimum Salary Level (MSL) is often considerably higher that the award wage. While we appreciate that the MSL is intended to ensure that employers hire Australians in preference to sourcing cheaper labour offshore, the disparity between MSL and award wages should be minimised.

1.3 Obligations – Subclass 457 non salary-related costs

1.3.1 To pay travel costs to Australia

ACCI does not support the proposal that sponsors pay for travel costs to Australia for the visa holder and dependants. Not only is this an unfair cost to employers, but it will also potentially encourage widespread poaching of workers as employers will prefer 457 visa holders already onshore. Workers may be discouraged by sponsors from bringing their dependants with them to Australia which could not only cause social/family problems but also reduce the pool of unskilled/semi-skilled labour that the dependants of 457 visa holders often constitute in Australia.

Logically where the sponsorship obligation to pay travel costs *from* Australia is supposed to encouraged foreign workers to leave Australia when their visa expires and not overstay, a paid fare *to* Australia surely provides an inexpensive avenue to enter Australia and go underground for those who would seek to remain in Australia illegally or seek asylum.

1.3.2 To pay travel costs from Australia

ACCI objects to the proposal that the sponsor be made liable for costs associated with the location, detention, removal or protection visa application of a 457 employee. Making the sponsor liable for these costs only goes further to disadvantage the sponsor and discourage use of the 457 visa by employers. Unless it can be proved that the sponsor and the visa holder have conspired for the visa holder to fraudulently gain entry to Australia for the purposes of going underground or seeking asylum, the sponsor should not be liable for the above costs. Liability for this cost, especially uncapped, will represent a financial risk that will deter employers from using the 457 or other sponsored visas.

Again, ACCI asks, is there empirical evidence to show that overstay or asylum-seeking are common among 400 series visa holders? What is the breakdown between the 400 series visa holders? Are there certain types of visas within this category that need closer monitoring than others? Is it sensible policy to bundle all 400 class visas under the same obligations? If these are relatively infrequent occurrences then surely the focus should be on better education of the consequences of fraud and on better resourced compliance staff to locate and remove overstayers, rather than threatening all potential sponsors with high costs for a scenario most employers would not engage in (deliberate fraud) or cannot possibly control (overstay or asylum application).

If the Government is to expect employers to be responsible for these costs, sponsors may be inclined to intervene inappropriately in visa holders' affairs including their freedom of movement and other basic human rights.

1.3.3 To pay the costs associated with recruitment

ACCI does not support the notion of sponsors being liable for costs associated with the recruitment of 457 workers, in relation to either recruitment agencies or migration agents. We are particularly concerned about the phrase "costs the employer…ought to have been aware of". How can this reliably be proved? It is unreasonable to make sponsors liable for choices the visa applicant makes in the application process. People using the Department's website can view information about visa application charges and advice about whether or not to use agents. The costs of their subsequent choices should not be passed on to employers. Again, it is small-medium businesses that will be hardest hit by such obligations and will be detrimentally deterred from using the 457 program.

It seems that better education both in Australia and overseas is required to inform 457 visa applicants of their rights, and to inform sponsoring employers of the consequences of trying to charge such costs back to the visa holder. Surely the Department has years' worth of monitoring data and can develop a profile of the nationalities, business types and occupations most likely to engage in this kind of exploitation and can identify and target high risk

sponsors both in terms of preventative education and allocation of investigative/compliance resources.

1.3.4 To pay the costs associated with migration agent services

ACCI does not support the proposal that sponsors be made liable for migration agent costs incurred by 457 visa holders. Placing the onus on employers to solve apparent problems with the behaviour of overseas migration agents is not fair or balanced. What real capacity do employers have to influence this behaviour? If the Australian Government has so far been unable to compel overseas agents to behave ethically or abide by Australian law, how can Australian employers be expected to influence their behaviour? It seems as if the Australian Government expects that making sponsors liable for these costs will be a reliable regulatory measure; however, what is proposed represents an untenable risk for employers and an enormous deterrent from using the 457 system. If there are widespread problems with overseas migration agents, ACCI suggests that Government openly admit this, admit that it does not have the legal capacity to address this, and try to find ways to tackle the issue. Placing the onus on employers who have minimal capability to alter agent behaviour is misplaced, when it is really only the Government which has the ability to influence agents through MOUs and other forms of cooperation.

An expansion of the new "Identified Recruitment Agents" MOU with China seems a logical alternative to the legislative changes proposed. If agreements are pursued with other "high risk" countries and there is widespread publicity about the use of agents who have agreed to the ethical behaviour framework, then there should be no need or justification to make Australian employers liable for the agent costs of 457 workers.

1.3.5 To pay costs associated with licensing and registration or similar

With regard to sponsors being required to pay licensing and registration costs where required for 457 workers, ACCI has reservations. As the discussion paper points out, Australian workers and permanent-category migrants are generally required to pay their own costs; payment by the sponsor for 457 workers' costs in this area, introduces yet another disparity between workers. A business may well end up with foreign workers who are not only better paid than their Australian counterparts on award wages, but also have their licensing and registration paid for, while the Australian worker has had to pay it for themself.

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

While ACCI acknowledges that it is important that 457 visa holders receive adequate health care in Australia, the proposal to make the sponsor liable if the visa holder's insurance company fails to pay seems to be an unreasonable suggestion. One obvious scenario is where the insurance company refuses to pay out because the visa holder/policy holder has provided misleading information. Sponsors can hardly be held responsible in such a situation – it is a

matter entirely out of their control and the costs may be beyond the sponsor's means to bear. This represents yet another substantial risk for Australian employers, especially small to medium business, and may discourage use of the 457 visa.

Further, if sponsors are to pay the health insurance of 457 employees, this will introduce yet another disparity in the workplace: Australian workers do not generally have health insurance paid for by their employer. Why should 457 visa holders receive this preferential treatment?

1.3.7 To pay education costs for certain minors

ACCI does not support the proposal that sponsors should pay the education costs of certain minors. As suggested in relation to paying travel costs to Australia, a measure such as this may push sponsors to seek only single workers or to pressure workers not to bring dependants to Australia with them, potentially creating family/social problems. Paying education costs where the state/territory government does not opt to bear these costs creates another disparity – this time between employers based on which state they operate in. Sponsors in some states but not others will be subject to this cost. Would it not be better to work cooperatively with state/territory governments to encourage those which currently require temporary residents to pay for public education to change their policy? After all, temporary residents pay tax in Australia so surely their children are entitled to public education?

While Migration Program policy claims to be "non-discriminatory", a number of the proposed measures may force employers into discriminatory hiring practices as they will prefer to sponsor young (healthy), single people in order to avoid paying high medical costs or the travel and schooling costs of dependants.

1.4 Obligations – 400 series (incl Entertainment and Superyacht crew visas)

ACCI's position remains the same as for the 457 visa with regard to recruitment and migration costs, and licensing and registration costs for other 400 series visas. Again, we are concerned that solid evidence for the need for any of the proposed changes has not been presented. If there is widespread occurrence of problems or abuses in 400 series visas, why is no evidence presented in the discussion paper to allow stakeholders to understand the severity or magnitude of problems in temporary visa use? If there is no such systemic failure, how can many of the measures proposed be in any way justified to the Australian business community? To conflate similar requirements across the 400 series requires extensive examination and without evidence to suggest where current arrangements are failing, few of the proposed changes seem warranted.

With regard to 400 series visa holders who are not remunerated, ACCI has concerns about how far the sponsor can reasonably be expected to invade the privacy of the visa holder to ascertain their means of support and, more notably, their standard of accommodation.

2. Expanded monitoring powers

With regard to "in person monitoring", ACCI is concerned over the vague terms used in the discussion paper, notably "specially appointed officer". ACCI is concerned as to whom such an officer might be: if they are Government agency staff (eg. Workplace Ombudsman, DIAC Monitoring Team) that is reasonable; but if it is proposed that the designated officer were to be a union official or other interest group representative, ACCI would regard that as inappropriate.

3. Addressing non-compliance

ACCI supports such measures, including punitive sanctions, in cases of proven, intentional non-compliance but reiterates that the Government should recognise that the vast majority of sponsors use the 457 program legitimately and lawfully and any proposed punitive measures should not be perceived as assuming all sponsors are abusing the program.

ACCI is concerned that the lack of detail supplied regarding punitive measures for non-compliance given that the introduction of punitive measures will have a significant impact on employers. Details such as what offences would carry civil pecuniary penalties, who carries the burden of proof, who can institute proceedings and what defences are available to employers should be outlined if there is to be a genuinely consultative process in these proposed reforms.

ACCI advises caution in the proposal to publish the names of repeat or un-remedied non-compliant sponsors. Unless a breach has been a matter of a court action and the sponsorship breach legally proven, publishing the names of non-compliant sponsors may constitute sub judice comment which would be highly inappropriate, potentially influencing future or pending action against a sponsor or implying guilt when it has not been proven. Sub judice comment can often be an offence in itself, leading to contempt of court proceedings.

4. Improving information sharing

ACCI supports the proposed measures provided that they place no additional administrative burden on sponsors. We recommend that the Department be guided by ABS guidelines about the extent to which data can be disaggregated before employers can be identified.

Summary

The majority of the proposed changes suggest an over-reaction to media claims that the 457 visa is being used to create an underclass of foreign worker. If these additional sponsorship obligations are introduced, we may well see the opposite effect with foreign workers earning more and under better conditions than Australian workers. This may have exactly the opposite effect we would hope for our workforce if Australian residents are discouraged from training in skilled demand occupations, perceiving that overseas workers receive far more favourable treatment. This may push more skilled Australians to take their skills overseas and increase our emigration rate which would be disadvantageous for Australian business and the economy as a whole.

The proposed additional costs to sponsors will have a detrimental affect on honest employers seeking to address genuine skills shortages and will have little effect on one-time sponsors or individuals setting out to deliberately abuse the system for the purposes of gaining or facilitating fraudulent entry to Australia. Again, the perception will be that everyone is penalised because of the minority who do not do the right thing.

A number of the proposed additional costs to employers would suggest that sponsors will demand that 457 workers be tied to them for specified periods since they will have had to pay airfares, insurance premiums, and school fees for the 457 visa holder and their family. Far from representing a positive shift in how the 457 program will be perceived, such conditions may result in arrangements that look a lot like indentured labour.

Pushing a raft of additional costs on to all sponsors seems a disproportionate reaction and a flawed short-term measure which would be better replaced with more effective and better-resourced administrative measures, including in areas such as risk-based integrity checking of both sponsors and visa holders, awareness campaigns, streamlined monitoring, and MOUs with “high risk” countries regarding recruitment and migration agents.

Overall, employers (and especially those operating small businesses) may feel entirely discouraged from using the 457 visa which will place increasing pressure on a skilled workforce already under strain, artificially drive up wages, and ultimately reduce the ability of Australian businesses to complete globally. A further consideration should be that an obligations framework which places additional costs on employers will ultimately be borne by the Australian community via price increases which will in turn place inflationary pressures on the Australian economy.

ACCI appreciates that these proposed changes are intended to take form in general terms in the Migration Act and then have the specific measures stated in the Regulations. While this is

encouraging in that it allows for flexibility in how various elements of the proposed changes may be specified or quantified, this flexibility may also create considerable nervousness in the Australian business community about how, when, and in what way the rules may change. Far from fostering renewed confidence in the 457 program, this approach may contribute to a detrimental fall in is usage.