

457 VISAS, SKILL SHORTAGES AND WORKER PROTECTION

■ Maria Jockel

The author, a specialist in immigration law, outlines the legal framework of the 457 visa program for temporary workers and the aims that it was set up to serve. She then discusses recent legal reforms which have been instituted in order to counter abuses in the program.

INTRODUCTION

The government's migration program ('migration program') encourages employers to permanently sponsor workers in occupations where skill shortages cannot be met by local labour on the basis that labour force growth is a key driver of economic growth and that only immigration will provide net labour force growth.

According to the Minister for Immigration and Citizenship, Senator Chris Evans, Australia is facing a 'demographic shift that fundamentally changes the way we must consider our Migration Program. In Australia over the period 2010 to 2020 more people will retire than will join the workforce ... Over the coming decades we will have a shrinking native-born labour force to supply a growing economy and an ageing population'.¹

This article covers the subclass 457 visa program, which has played an increasingly important role in the government's aims to ameliorate skill shortages in Australia. The 457 visa is designed to support the Australian economy by providing a mechanism for the temporary entry to Australia of skilled persons to top-up the available domestic workforce and contribute to growth in the Australian economy.²

Yet recruiting foreign workers to work in Australia on a temporary basis to meet skill shortages continues to be the subject of controversy and more so because of the recession and concerns to protect Australian jobs, wages and conditions and also to pro-

tect temporary foreign workers from being exploited. There is little awareness among commentators on the 457 visa about the complexity of the legislation covering the visa and the range of measures available to the Department of Immigration and Citizenship ('the department') to ensure that the law is complied with.

APPLYING FOR A 457 VISA

There are three parts to the application process: the sponsorship application; the nomination (which are both lodged by the employer); and the visa application (which is lodged by the visa applicant).

There is an obligation to lodge complete applications with all supporting documents. The department's aim is to 'deliver efficient, fair and reasonable services using an evidenced and risk-based approach to maintain the integrity of the department's programs and systems'.³

While the department offers streamlined processing of well documented low-risk applications, which meet the criteria, many sponsors and applicants lodge their own applications with little regard to, or knowledge of, what is required. Each application must be considered on its merits. The nature and extent of the documents that must be provided in support of an application depends on the nature of the case.

The employer's application to sponsor

To be approved as a sponsor, employers must provide details to:

- show their business is of good standing
- explain how Australia benefits from their business employing overseas personnel
- demonstrate the commitment of their business to training Australian residents or introducing new technology or business skills.

Overseas personnel can be sponsored on a temporary basis of not less than three months and up to four years. With the softening of the local labour market, there is increased emphasis on ensuring that the recruitment of temporary skilled overseas workers, to meet skill shortages, is to the 'benefit of Australia'.⁴

Sponsors seeking to recruit temporary skilled workers must demonstrate that their employment is of benefit to Australia. This must be demonstrated in at least one of the following ways:

- i the creation or maintenance of employment for Australian citizens or Australian permanent residents; or
- ii expansion of Australian trade in goods or services; or
- iii the improvement of Australian business links with international markets; or
- iv competitiveness within sectors of the Australian community.⁵

Sponsors must also disclose whether their business has retrenched or significantly reduced the hours of any employees in their workforce. Where this has occurred, details of the type of positions and numbers involved must be provided.⁶ The recruitment of temporary skilled overseas workers cannot be used to the detriment of the Australian workforce and Australian wages and conditions.

The employer's application to nominate

The employer must nominate each position they wish to fill with a temporary resident. The nomination must:

- relate to an occupation which meets a minimum skills threshold covering managerial, professional, associate professional and trade occupations
- show that the position to be filled is on the occupations list specified in a legislative instrument for this visa
- show that the nominated position must be remunerated at least at a minimum salary level (MSL), also specified in a legislative instrument for this visa.

Assessment of the visa applicant

The visa applicant must show that:

- the applicant has suitable personal attributes including educational qualifications and work experience for the position
- the applicant can demonstrate that they have the necessary skills to perform the duties of the position
- the applicant will be paid at least the gazetted minimum salary that applies when the nomination was approved (and as specified in the nomination) or, if nominated by a regional employer under regulation 1.20GA, that the salary specified in the nomination, accords with Australian legislation and awards
- the position is not being created solely so the applicant can obtain a visa
- the applicant is nominated for the position by the sponsor who is an approved sponsor.

The nomination application requires the employer to specify the gross annual base salary and the total remuneration package. Salaries and conditions must be in line with the relevant industrial instrument (e.g. award or collective agreement), or the MSL, whichever is the greater.

The MSL is specified in a legislative instrument and is based on a 38-hour week. Overseas workers who are paid at the MSL and work overtime must have that overtime calculated in accordance with the gazetted method and formula. The MSL excludes

all allowances and deductions (except for pay-as-you-go [PAYG] taxation and fringe-benefits-tax-exempt items, for example reimbursement for work tools and safety/work wear).

All other deductions must be authorised by the 457 visa holders in accordance with industrial law and must not reduce the salary level below the MSL. All authorised deductions must be disclosed in the nomination application, including recruitment and agents' fees and any other payment.

Sponsors and visa holders are required to notify the department of any changes in their circumstances that may affect the basis upon which the sponsorship, nomination and visa application may have been approved.

Approved sponsors are monitored by the department to ensure that they comply with their sponsorship obligations. Increasingly, the department's visa processing arrangements, monitoring and compliance activities are being aligned so as to support the integrity of the 457 visa program and to enable the department and other agencies to identify and respond to breaches of immigration law or other irregularities.

Departmental policy provides considerable guidance to officers as to the action to be taken, even if some minor and technical breaches have been identified in the sponsorship undertaking. These can result in breach notices being issued against the sponsor. The nature of the action taken depends on the severity of the breach, the past conduct of the sponsor and any mitigating circumstances. There is a graded approach to sanctions. A serious breach can, for example, result in the cancellation of the sponsorship and the imposition of a bar on making further applications for approval as a sponsor. Where the sponsored worker has breached the basis upon which the application has been approved, that person's visa and any accompanying family members' visas may be cancelled.

457 VISA PROGRAM REFORMS

During the economic boom, when Australia experienced both labour and skill shortages, there was a dramatic growth in the 457 visa program. In response to concerns in regard to the 457 visa program and the exploitation of foreign workers, the Minister for Immigration and Citizenship commissioned a number of reviews.

Since 15 October 2007, the 457 visa program has been progressively re-engineered to ensure that overseas workers are not exploited, that there is parity with local wages and conditions and that sponsors meet their sponsorship obligations.

The government is progressively implementing the recommendations made in the Deegan 457 Integrity Review Report (Deegan Report)⁷ which aim to ensure that temporary skilled workers are not exploited in a tighter labour market and that Australian jobs are safeguarded.

The current policy settings require:

- strict assessment of the 'benefit to Australia' criterion
- comparison of the nominated salary against the market salary
- greater scrutiny of the skill level of the visa applicant.⁸

This aims to ensure that the program delivers a better targeted and demand-driven outcome which meets identified skills gaps in a tighter labour market and that it safeguards Australian jobs.

On 1 April 2009, the Minister for Immigration and Citizenship announced that the government is developing training benchmarks to clarify the existing requirement on employers to demonstrate a commitment to training local labour. The government has introduced a requirement that employers seeking access to the 457 visa program 'have a strong record of, or demonstrate a commitment to, employing local labour'⁹ and adopt non-discriminatory employment practices. This is in response to a concern 'that some employers may

discriminate against local labour in hiring overseas workers'.¹⁰

On 1 July 2009, the MSL for all new and existing 457 visa holders increased by 4.1 per cent, in line with all employees' total earnings last year as reported by the Australian Bureau of Statistics. This 'ensures that the wages of overseas workers keep pace with local wages'.¹¹

As at July 2009, the MSL is \$61,920 per year for specific information and communications technology occupations and \$45,200 for all other occupations. For regional employers, it is \$55,725 for information and communications technology occupations and \$40,705 for all other occupations. For trade occupations where the English language exemption is sought the MSL is \$81,040.

All overseas workers are expected to have vocational English. On 1 July 2009, the minimum language requirement was increased from 4.5 to 5.0 under the International English Language Test (IELTS) for all 457 applicants in trade occupations and chefs. This is in response to concerns about the exploitation of workers from non-English-speaking countries and to align the English language standard of the 457 visa with the permanent sponsored visa for migrants in trade occupations.¹²

From 1 July 2009, there will be a progressive introduction of formal skills assessments for 457 visa applicants from high risk immigration countries in trade occupations and chefs. The government has announced that: 'it will consult with stakeholders in finalising an assessment framework that reflects Australian Standards and meets the expectations of the Australian workplace'.¹³

As part of the recommendations of the Deegan Review, from 14 September 2009 a market-based minimum salary will be implemented for all new and existing 457 visa holders. This aims to ensure parity with the salaries paid to local labour and seeks to

further protect Australian jobs, wages and conditions and to ensure overseas workers are not exploited.¹⁴

As part of these reforms, the GAZETTED List of Occupations available under the Standard Business Sponsorship has changed with regional employers now prohibited from nominating certain low-skill occupations in the standard subclass 457 visa program.¹⁵ This is in response to a concern that regional employers using the 457 visa program to access lower level skills should focus instead on training the local workforce and protecting Australian jobs. Regional employers wishing to fill positions relating to these semi or unskilled occupations are not eligible for standard business sponsorship. With effect from 25 May 2009, occupations in the Australian standard classification of occupations (ASCO) major groups 5 to 7 are only eligible to be sponsored under a labour agreement. Labour agreement provisions are onerous and further seek to protect Australian jobs and conditions and to protect sponsored workers from exploitation.

SPONSORS' OBLIGATIONS AND UNDERTAKINGS

All approved sponsors must comply with their sponsorship obligations in respect of the sponsored overseas worker and any accompanying family members. The sponsor's undertakings are outlined on Form 1196 and in Regulation 1.20CB of the Migration Regulations 1994 ('Migration Regulations'). By completing and signing the Form 1196 sponsors agree in writing to abide by obligations. Section 140H of the Migration Act 1958 ('Migration Act') enables the migration regulations to prescribe the undertakings in Regulation 1.20CB. The obligations comprise:

- Regulation 1.20CB(1)(a) to ensure that the cost of return travel by a sponsored person is met
- Regulation 1.20CB(1)(b) not to employ

a person who would be in breach of the immigration laws of Australia as a result of being employed

- Regulation 1.20CB(1)(c) to comply with the sponsor's responsibilities under the immigration laws of Australia
- Regulation 1.20CB(1)(d) to notify the Department of Immigration and Citizenship of any change in circumstances which may affect the business's capacity to honour its sponsorship undertakings or any change of the information that contributed to the applicant's being approved as a sponsor or the approval of the nomination
- Regulation 1.20CB(1)(e) to cooperate with the department's monitoring of the applicant and the sponsored person
- Regulation 1.20CB(1)(f) to notify the department, within five working days, after a sponsored person ceases to be in the applicant's employment
- Regulation 1.20CB(1)(g) to comply with laws relating to workplace relations that are applicable to the applicant and any workplace agreement that the applicant may enter into with the sponsored person, to the extent that the agreement is consistent with the required undertaking
- Regulation 1.20CB(1)(h) to ensure that a sponsored person holds any licence, registration or membership that is mandatory for the performance of work by the person
- Regulation 1.20CB(1)(i) to ensure that if there is a gazetted minimum salary in force in relation to the nominated position occupied by the sponsored person, then the person will be paid at least that salary
- Regulation 1.20CB(1)(j) to ensure that if it is a term of the approval of the nomination of a position that a sponsored person must be employed in a particular location, the applicant notify the department of any change in loca-

tion which will affect the nomination approval

- Regulation 1.20CB(1)(k):
 - for an application made prior to 1 November 2005 the sponsor is to pay all medical or hospital expenses for a sponsored person (other than those met by health insurance arrangements), or
 - for an application made on or after 1 November 2005 the sponsor is to pay all medical and hospital expenses for treatment administered in a public hospital (other than expenses that are met by health insurance or reciprocal health care arrangements)
- Regulation 1.20CB(1)(l) to make superannuation contributions required for a sponsored person while in the applicant's employment
- Regulation 1.20CB(1)(m) to deduct tax instalments, and make payments of tax, while the sponsored person is in the applicant's employment
- Regulation 1.20CB(1)(n) to pay to the Commonwealth an amount equal to all costs incurred by the Commonwealth in relation to the sponsored person.

Section 140I of the Migration Act deals with undertakings to pay amounts payable to the Commonwealth in regard to the Migration Regulations 1.20CB(1)(n), 1.20CB(2) and 1.20CC.

Section 140H(3) of the Migration Act provides that the sponsor's obligations commence once the sponsored person's 457 visa is granted. Under policy, the obligations in relation to the person do not commence until the person enters Australia.

Section 140D of the Migration Act defines when a person is considered to be an approved sponsor.

The sponsor's obligations cease in accordance with Regulation 1.20E of the Migration Regulations on the earliest of the following:

- at the end of 28 days after the sponsor notifies the department that the spon-

sored person has ceased to be in their employ, or

- if the sponsored person ceases to hold the visa for which they were sponsored—when the person leaves Australia, or
- if the sponsored person ceases to hold the visa for which they were sponsored—when the person is granted another substantive visa.

Under Section 140Q of Migration Act the sponsor's undertakings remain enforceable against the sponsor until either:

- the sponsored person ceases to hold the 457 visa for which he or she was sponsored, or
- the approval of the sponsor ceases under Regulation 1.20E of the Migration Regulations.

Some undertakings, separately prescribed in Regulation 1.20CB of the Migration Regulations such as undertakings relating to cooperation with monitoring, payment of medical and hospital expenses and costs to the Commonwealth, may continue to be enforceable until a later date. As the obligations made in respect of the sponsored person continue to apply until the end of 28 days after the day on which the sponsor notifies the department that the person has ceased to be in its employment, it is in the sponsor's interests to notify the department as soon as the person is no longer employed by them.

If the visa holder departs Australia during this 28 day period, the visa may be cancelled after departure although, as previously stated, some obligations may continue to be enforceable.

Monitoring and sanctions

The 457 visa program provides streamlined entry requirements for approved sponsors needing to recruit skilled personnel from overseas on a temporary basis. The streamlined entry arrangements are supported by a robust monitoring, compliance and sanctions scheme.

Sponsors are monitored by the department to ensure that they comply with their obligations in relation to the sponsored person (including any sponsored family members). The law and policy in regard to monitoring, compliance, sanctions and enforcement provisions is complex. It gives considerable scope to departmental officers as to the course of action to be taken in particular circumstances. Sponsors can be monitored routinely while their sponsored persons are in Australia.

Sponsors are required to cooperate fully with the department including by providing monitoring reports (Form 1287–Business Sponsor Audit of Undertakings), as required, to establish that:

- there have been no significant changes in regard to the business ownership or the nature of the business since the sponsorship was approved
- there are no adverse findings or penalties imposed against the business
- the person is still in the business's employ and is being remunerated in accordance with the details provided to the department for the purposes of the approval of the application
- the person is still working in the nominated position and not in a lower position
- documents are provided evidencing the remuneration paid including pay slips, PAYG payment summary, bank statements and such like.

Sponsors must also provide evidence that they are complying with Australian industrial laws, levels of remuneration and conditions of employment, that the tax instalments and superannuation contributions in respect of the sponsored person have been made, and that the sponsor has an ongoing commitment to training its Australian citizen- and permanent-resident staff. Sponsorship status allows certain personal information about the sponsored person to be disclosed to the sponsor.

Secondary visa holders are not permitted to remain in Australia if the sponsored 457 visa holder leaves Australia permanently. Under policy, they must either leave before or with the sponsored person or apply for another class of visa. Sponsors should notify the department of such circumstances.

Site visits can be announced and unannounced (in industries of concern). Where there is a concern in regard to the information provided by the sponsor, officers can seek to interview visa holders or others at site visits.

Imposing sanctions

Imposing sanctions is generally considered after the sponsor has been monitored or where a possible breach has been investigated. Where monitoring is finalised by the department and it is found that a breach of the obligations has occurred, the sponsorship can be cancelled under Section 137B of the Migration Act.

A sanction can be imposed by way of a sponsorship bar under the terms of one or more existing approvals for temporary visas under Section 140L(c) of the Migration Act. A nomination bar barring the sponsor from nominating a person or activity for a specified period can be effected under Section 140L(g). Cancelling the approval of a sponsor for all temporary visas or for specified kinds of temporary visas can be affected under Section 140L(b) and (a).

Section 140J of the Migration Act allows for cancelling or barring approval as a sponsor, if a sponsor breaches the obligations. Section 140L of the Migration Act specifies what actions may be taken in relation to a sponsor who has breached their obligations. Regulation 1.20HA describes the circumstances and criteria to be taken into account when considering action under Section 140L in the event of a breach of obligations.

Division 3, Subdivision GA deals with cancellation of approval as a business sponsor for breach of obligations, which must be considered under Section 137B of the Migration Act.

Regulation 1.20HB of the Migration Regulations enables one or more of the cancelling or barring actions specified in paragraphs 140L(a), (c), (d), (e), (f) or (g) of the Migration Act to be taken if the sponsor has given false information in relation to the sponsorship, the sponsor's compliance with the Migration Act and Migration Regulations or in relation to the assessment of the sponsored person's compliance with their 457 visa conditions.

The consequences of the sponsor providing incorrect or false information in relation to an application for approval as a sponsor, the nomination approval, or in relation to any other matter relating to the sponsor, depends on the severity of the breach. Criminal prosecution may eventuate where it is determined that the general principles of criminal responsibility are met, in accordance with the strict liability provisions of the Criminal Code and the Crimes Act 1914 which have been incorporated into the relevant provisions under the Migration Act.

COMPLIANCE WITH VISA CONDITIONS AND VISA CANCELLATIONS

Similarly, the sponsored person's visa can be cancelled if there is a breach of the visa conditions or if there are circumstances which justify such actions. The cancellation of visas is part of the department's extensive compliance and enforcement regime. The sponsored person's (and secondary visa holder's) visa can be cancelled under Sections 109, 116, 128 and 140 of the Migration Act.

A visa holder's visa may be cancelled if any circumstances which permitted the grant of the visa no longer exist. Such

circumstances may include those where sponsors advise that the visa holder has ceased employment with them and withdraw support of the visa holder, or where the visa holder has not complied with a condition of the visa. This may happen, for example, where the visa holder has breached condition 8107 in that they have changed their occupation or employer or have become unemployed. There are clear legal and policy criteria which govern visa cancellations. Departmental policy provides guidance to officers as to the circumstances where visa cancellation is appropriate. Visa cancellation is a substantial and complex area of migration law.

The sponsored person's visa may be cancelled as a consequence of the cancellation of the business sponsorship or nomination, or as a result of a breach of the visa conditions by the sponsored person.

Regulation 2.43(1) of the Migration Regulations relates to the case of the holder of a 457 visa who is granted a visa on the basis of being employed in Australia by a sponsor in a nominated occupation, and the business sponsor of the 457 visa holder:

- has not complied, or is not complying with obligations as an approved sponsor, or
- fails to continue to meet the requirements for approval as a business sponsor, or
- gave incorrect information to the department in relation to the approval as a business sponsor or any other matter relating to the business sponsor, including:
 - any matter relating to the approval of the business sponsorship, nomination or visa application, and
 - 'that the Minister reasonably suspects that the visa has been obtained as a result of the fraudulent conduct of any person'.

A breach of Regulation 2.43(1) of the Migration Regulations may result in the

sponsored person's visa being cancelled. Also the employer/sponsor may be liable to sanctions including substantial pecuniary penalty and/or imprisonment depending on the severity of the breach.

Further, all applicants for 457 visas who are onshore at the time of the decision in respect of their visa must have complied substantially with the conditions that apply or that applied to the last of their substantive visas and any subsequent bridging visas. All 457 primary applicants, regardless of whether they are applying for the visa onshore or offshore, have their visas granted subject to Condition 8107.

Condition 8107 is a work limitation and provides that the holder must not:

- cease to be employed by the sponsoring employer
- work in a position inconsistent with the position in the visa application
- engage in work for another employer.

Condition 8107 would generally be breached where the visa holder:

- moves to a lower position than the nominated position or occupation while working for the sponsoring employer, or
- undertakes secondary employment while working for the sponsoring employer.

If a 457 visa holder is found to have become unemployed, ceased employment, changed employer or changed position or occupation with the sponsoring employer, to a position which is inconsistent with or lower than the approved position or occupation, then their visa may be cancelled under Section 116(1)(b) of the Migration Act, on the basis of failure to comply with Condition 8107. Further, the sponsoring employer may be liable to sanctions under the Migration Amendment (Employer Sanctions) Act 2007 where the sponsor allows the 457 visa holder to work in breach of Condition 8107.

**MIGRATION AMENDMENT
(EMPLOYER SANCTIONS) ACT
2007**

Only Australian citizens and permanent residents and New Zealand citizens (who have entered Australia on a valid passport) have unrestricted work rights. All other non-citizens must hold a valid current visa with work rights. Work rights may be unrestricted or limited, depending on the visa.

Whilst it is an offence under the Criminal Code 1995 to aid or abet the commission of an offence against the law of the Commonwealth, such as aiding a non-citizen to work without work rights, for many years there had been a concern that non-citizens were working without work rights or in breach of their work rights. There was no obligation on employers to check the work rights of workers, even where there was a substantial risk that they are not entitled to work.

The Migration Amendment (Employer Sanctions) Act 2007 commenced on 19 August 2007, with the purpose of imposing sanctions on persons who are connected with work by unlawful and lawful non-citizens or work that is in breach of the non-citizen's visa conditions and for related purposes to do with such work.

Relevantly, it created new criminal offences for:

- allowing a non-citizen to work or referring a non-citizen for work in breach of the non-citizen's visa conditions
- knowing or being reckless as to whether the non-citizen worker holds a visa with a condition that restricts their work
- knowing or being reckless as to whether the non-citizen worker is in breach of that condition.

Section 245AC(1) of the Migration Act means that employers/sponsors should ensure that a primary 457 visa holder is not allowed to work in breach of the conditions of their visa. Paragraph 245AC(1)(c) of the Migration Act intends that a person would

be reckless where he or she is aware of the possibility that the overseas worker holds a visa subject to a condition restricting the work that the worker may do in Australia. Section 245AC(1)(d) intends that a person would be reckless where he or she is aware of the possibility that the overseas worker is in breach of a condition of their visa.

Employers/sponsors must ensure that they do not allow primary 457 visa holders who are subject to Condition 8107 to work in breach of a condition of their visa. Further, employers/sponsors leave themselves open to penalty if they are reckless as to the possibility that the worker holds a visa subject to a condition which restricts the work that the worker may do in Australia. Also, they leave themselves open to a finding that they are reckless as to the circumstances in which they are aware of the possibility that the overseas worker is in breach of that condition.

Sections 5.2 and 5.3 of the Criminal Code define the fault element of intention and knowledge. Section 5.4 of the Criminal Code deals with the concept of being reckless. The concept of knowledge means that the person knew that the relevant circumstance existed. The concept of recklessness means that the person was aware of a substantial risk that the circumstance existed.

Where a sponsor of a 457 visa holder knowingly allows the worker to work in a lower-skilled position which is inconsistent with the nomination approval, departmental policy provides that such a sponsor may be considered for enforcement action for breach of Section 254AC of the Migration Act, namely allowing a non-citizen to work in breach of a visa condition.

Further, the approved sponsor may be liable to compliance action, including barring and cancelling the sponsorship approval.

The Migration Amendment (Employer Sanctions) Act aims to deter employers and labour suppliers from employing illegal

workers or referring them for work. It also aims to encourage the verification of work entitlements of potential employees where there is a substantial risk that they may be illegal workers or that they may be seeking to work in breach of their work rights.

Where the department has previously issued a warning notice and recommended that the company institute the checking of work rights as part of their recruitment protocols and that they have failed to do so, this may result in corporate liability. This can happen if it can be established that the company participated in behaviour which was reckless or that there was a substantial risk of the behaviour, such that the offence would apply to the company.

It is also a serious offence under the Migration Act to present false or forged documents or to make a false or misleading statement in connection with the entry or stay in Australia of a non-citizen. There are criminal penalties under the Migration Act where a document which is forged or false or a statement that, to the person's knowledge, is false or misleading in a material particular, is provided to the department with the intent that the document be used to aid a person to gain entry into, or to remain in, Australia.

Worker protection reforms

The government's reform agenda is to make the 457 visa program more responsive to market needs while protecting the employment and training opportunities of Australians and the rights of overseas workers.

The Migration Legislation Amendment (Worker Protection) Act 2008 is to come into effect on 19 September 2009 (at the latest). It aims to maintain the 'integrity' of the 457 visa program by redefining sponsorship obligations, expanding powers to monitor and investigate possible non-compliance of those obligations, enhancing measures to address identified breaches of obligation, and improving information sharing between

Government agencies and levels.

The critical changes effected by the Migration Legislation Amendment (Worker Protection) Act 2008 are outlined below.

Sponsors must pay recruitment and visa costs

Approved sponsors will be prohibited from seeking to have any costs relating to the recruitment or visa application of the sponsored worker reimbursed by the worker, and will be deemed not to have satisfied their sponsorship obligations if they seek to have any costs reimbursed by the sponsored worker. Penalties will be imposed if a sponsor seeks to recoup any costs from the sponsored worker.

Payment of the worker's salary and other costs

The Migration Legislation Amendment (Worker Protection) Act 2008 makes it clear that the sponsor must pay the sponsored worker at least the MSL and that this obligation lasts for the period of employment.

The sponsor is obliged to pay any costs, to a maximum of \$10,000, incurred by the Commonwealth Government in locating and/or removing the sponsored worker and their family members from Australia, should they fail to leave, at the expiration or cancellation of the visa.

Sponsors must pay the necessary and reasonable travel costs to enable the sponsored person to leave Australia and return to the country from which they came to Australia. The sponsored person must make a written request to the sponsor to pay the travel costs and this request must be made within 'a reasonable period'. The request can only be made while the primary sponsored person holds a 457 Visa.

Keeping records

The Migration Legislation Amendment (Worker Protection) Act 2008 requires sponsors to keep records relating to a primary

sponsored person, of a kind to be specified by the regulations (which are still to come into effect) and which must be in an auditable and reproducible format.

The department can require the sponsor to provide these records and information to the department as required by the sponsorship obligations and Commonwealth or State/Territory law.

Appointment and powers of inspectors

Inspectors may enter and inspect any business premises and interview any person, if the inspector believes that there may be information or any other relevant thing relating to whether the sponsorship obligations have been complied with. The inspectors may require any documents or thing relating to sponsorship obligations to be produced within a specified period.

Sponsors must cooperate with the inspectors. They cannot hinder or obstruct an inspector, conceal or attempt to conceal from the inspector a person, document or thing, or prevent or attempt to prevent another person from assisting the inspector and such like.

Inspectors will have the power to:

- enter the sponsor's business or other place without force where the inspector has reasonable cause
- inspect any work, material, machinery, appliance, article or facility
- interview any person at the place of business or other place, including the sponsored worker
- require a person who has custody of, or access to, a document or thing relevant to the inspection, to produce the document to the inspector at a specified place and within a specified period (not less than seven days), even if the production of such information would incriminate them or expose them to a penalty. Failure to comply with the requirement of the inspector to produce a document or thing is an offence.

Failure to produce information or documents required by an inspector is a criminal offence punishable with a maximum penalty of imprisonment of six months.

New civil penalty provisions

For the first time, the Migration Legislation Amendment (Worker Protection) Act 2008 inserts into the Migration Act two 'civil penalty provisions'. If, for example, a sponsor fails to satisfy a sponsorship obligation in the manner (if any) or within the period (if any) prescribed by the Migration Regulations, the person contravenes a civil penalty provision under these provisions which include a maximum penalty of \$6,600 for an individual and \$33,000 for a body corporate.

Under the Migration Legislation Amendment (Worker Protection) Act 2008 provisions, the Minister for Immigration and Citizenship can commence civil penalty proceedings against any person who contravenes a civil penalty provision or against others involved in a contravention under the Migration Act. A court may make an order to pay a pecuniary penalty for each contravention (as specified under the law).

An amount owed, to the government or another person, by the sponsor in relation to a sponsorship obligation may be recovered as a debt in an 'eligible court'.

Information sharing about the visa holder

The sponsor, or the former approved sponsor, is also required to disclose personal information about the visa holder or former visa holder to the department. Further, any person whom the department suspects on reasonable grounds may give information relevant to an application for a civil penalty order must give all reasonable assistance in connection with such an application.

As part of the information sharing powers the secretary of the department will have new information gathering powers. The

secretary may require a person (other than the wrongdoer) who the secretary suspects on reasonable grounds can give information relevant to an application for a civil penalty order, to give all reasonable assistance in connection with such an application. A court may enforce compliance with such a request and impose a maximum penalty of \$3,300 for failing to give assistance.

Information obtained by inspectors may also be disclosed to the Department of Education, Employment and Workplace Relations (DEEWR) where it will assist in the administration of the Workplace Relations Act 1996.

The sharing of information across government agencies including DEEWR, the Workplace Ombudsman and Workplace Agency aims to ensure that workplace laws are met as a sponsor must comply with both immigration law and industrial law.

Taxation Administration Act 1953 Amendment

The Taxation Administration Act 1953 has also been amended to enable the Commissioner for Taxation to disclose a sponsor's/ former sponsor's or a 457 visa holder's/ former holder's tax information to the department for monitoring of sponsorship obligations and to assess whether a person should be approved as a sponsor.

Enforcement provisions

In order to enforce these new worker protection reforms the department's powers in regard to the enforcement of the sponsor's obligations continue to be strengthened. Furthermore, the department's powers to sanction sponsors for a breach of the obligations will be extended to include:

- new civil penalties that apply to sponsors for the breach of obligations
- the issue of infringement notices instead of civil penalty proceedings, so as to effect a penalty in the event of a breach of the obligations.

The Migration Legislation Amendment (Worker Protection) Act 2008 will have retrospective effect. All current 457 sponsors will have to satisfy the new laws.

The Migration Legislation Amendment (Worker Protection) Act 2008 is part of an ongoing reform program which aims to ensure that Australia's skills needs are met, that sponsored workers are protected from exploitation and that the law is complied with.

As with the Migration Amendment (Employer Sanctions) Act 2007, the Migration Legislation Amendment (Worker Protection) Act 2008 requires sponsors to create a corporate culture requiring compliance with the legislation so as to protect themselves from the liability created by their high managerial agent's actions and inactions.

CONCLUSION

The expected decline in the rate of growth of the Australian workforce, as highlighted by the current Minister for Immigration at the beginning of this article, means that Australia will continue to rely on the migration program and the temporary economic entry program to meet skill shortage needs.

The subclass 457 visa program is a robust and sophisticated legislative program which enables Australia to meet its short-term skill needs.

The recruitment of temporary overseas skilled workers continues to be the subject of ongoing controversy, particularly in a recession and with the increased concern to protect Australian jobs, wages and conditions and to protect foreign workers from exploitation.

The provisions contained in the Migration Act, the Migration Regulations, the Migration Amendment (Employer Sanctions) Act 2007 and the Migration Legislation Amendment (Worker Protection) Act 2008 (and the regulations, which are yet

to be prescribed) increase the requirements for business sponsorship and visa applications, extend sponsors' obligations and enhance the department's already extensive powers in regard to monitoring, sanctions and the enforcement of the law.

The intention of these provisions is that the subclass 457 visa program should achieve the aims which it was created to serve. These provisions are part of an

ongoing reform program which seeks to ensure that Australia's skill needs are met while enhancing training and employment opportunities for local labour and protecting foreign workers from exploitation.

It is expected that this fast-paced area of law will continue to be subject to review and ongoing reform measures so as to ensure that the aims of the subclass 457 visa program meet Australia's skill needs.

References

- ¹ The Hon Senator Chris Evans MP, Minister for Immigration and Citizenship, 'Keynote Address, John Curtin Institute of Public Policy: Sustaining the boom—the role of skilled migration in the WA economy'; see also The Hon Kevin Andrews MP, Minister for Immigration and Citizenship, 'Address to the Committee for the Economic Development of Australia (CEDA)'; and 'Australian Immigration Fact Sheet 15—Population Projections' at <<http://www.immi.gov.au/media/fact-sheets/15population.htm>>.
- ² Department of Immigration and Citizenship (DIAC), 'Subclass 457—Business (Long Stay)—Policy Update' (24 February 2009) <<http://www.immi.gov.au/gateways/agents/news/2009/457-policy-changes.htm>>
- ³ The DIAC 'Strategic Plan 2009–12' paragraph 4
- ⁴ The term 'benefit to Australia' is used to reflect the intent of the requirements set out in the Migration Regulations 1994 (Cth)—Regulations 1.20D(2)(a)(i)–(iv).
- ⁵ Migration Regulations 1994 (Cth)—Regulations 1.20D(2)(a)(i)–(iv)
- ⁶ This is paraphrased from an April 2009 template letter of the Department of Immigration and Citizenship, 'Requested information as to the "Benefit to Australia" requirements for the purposes of assessing the merits of the Application'.
- ⁷ B. Deegan, *Visa Subclass 457 Integrity Review: Final Report*, October 2007 <<http://www.immi.gov.au/skilled/457-integrity-review.htm>>
- ⁸ R. Arulanantham, Manager, Temporary Business Entry, DIAC (Victoria), '457 policy settings—In the context of the economic downturn' (PowerPoint Presentation 2009)
- ⁹ The Minister's media release can be found at <<http://www.minister.immi.gov.au/medial/media-releases/2009/ce09034.htm>>.
- ¹⁰ *ibid.*
- ¹¹ *ibid.*
- ¹² *ibid.*
- ¹³ *ibid.*
- ¹⁴ *ibid.*
- ¹⁵ DIAC, 'Minimum Salary Levels and Occupations for the Temporary Business Long Stay Visa Notice 2009', Legislative Instrument F2009LO1242, 25 May 2009