

**Visa Subclass 457  
Integrity Review**

**Final Report**

**October 2008**

## Table of Contents

<b>OVERVIEW OF THIS REPORT .....</b>	<b>4</b>
Note on nomenclature .....	4
Note on references .....	4
<b>List of abbreviations .....</b>	<b>5</b>
<b>SECTION 1 - EXECUTIVE SUMMARY .....</b>	<b>6</b>
<b>SECTION 2 - LIST OF RECOMMENDATIONS .....</b>	<b>8</b>
<b>2.1 Introduction.....</b>	<b>8</b>
<b>2.2 Recommendations.....</b>	<b>8</b>
<b>SECTION 3 - THE VISA SUBCLASS 457 INTEGRITY REVIEW .....</b>	<b>17</b>
<b>3.1 The Integrity Review .....</b>	<b>17</b>
3.11 Secretariat .....	18
<b>3.2 The temporary skilled migration reform agenda .....</b>	<b>18</b>
<b>3.3 Work program .....</b>	<b>18</b>
3.31 Acknowledgements.....	18
3.32 Disclaimer .....	19
<b>SECTION 4 - VISA SUBCLASS 457 .....</b>	<b>20</b>
<b>4.1 Managing the Subclass 457 visa program.....</b>	<b>20</b>
4.11 Subclass 457 visa processing process .....	20
<b>4.2 Subclass 457 visa grants.....</b>	<b>21</b>
<b>SECTION 5 - THE INTEGRITY OF THE SUBCLASS 457 VISA - OVERVIEW .....</b>	<b>23</b>
<b>SECTION 6 - WAGES AND RELATED ISSUES.....</b>	<b>25</b>
<b>6.1 Introduction.....</b>	<b>25</b>
<b>6.2 Minimum Salary Level.....</b>	<b>25</b>
6.21 Market rates .....	28
<b>6.3 The skills shortage .....</b>	<b>32</b>
6.31 Labour shortages.....	33
6.32 Skills assessment.....	34
6.33 Labour market testing .....	38
6.34 The training requirement .....	40
<b>6.4 Labour Agreements.....</b>	<b>43</b>
<b>6.5 Regional concessions.....</b>	<b>47</b>

<b>SECTION 7 - INTEGRITY AND EXPLOITATION.....</b>	<b>49</b>
7.1 Introduction.....	49
7.2 The pathway to permanent residency .....	49
7.3 English language requirement .....	52
7.4 Occupational Health and Safety .....	56
7.5 Secondary visa holders.....	58
7.6 The role of ‘agents’ .....	59
7.61 Migration agents .....	60
7.62 On-hire agencies .....	63
7.7 Mobility.....	66
7.8 Transparency .....	69
<b>SECTION 8 - VISA PROCESSING, MONITORING AND COMPLIANCE .....</b>	<b>70</b>
8.1 Introduction.....	70
8.2 Sponsor obligations.....	70
8.3 Accreditation .....	74
8.4 Complexity of the legislation and unintended consequences.....	76
8.5 Information and support .....	78
8.6 Departmental responsibilities and resources.....	80
8.61 DIAC outreach officers .....	80
8.7 Role of other agencies.....	83
8.71 Jurisdiction of Tribunals .....	83
<b>SECTION 9 - GLOBAL ISSUES .....</b>	<b>85</b>
9.1 Introduction.....	85
9.2 Availability of data.....	85
9.21 Occupational Classification - ASCO and ANZSCO .....	86
9.3 One visa or two?.....	87
9.31 Visa substitution.....	88
9.4 Assistance for migrants .....	90
9.41 Funding for English studies.....	91
9.42 Availability of housing.....	92
<b>ATTACHMENT A - REFERENCES .....</b>	<b>94</b>
<b>ATTACHMENT B - MINISTER’S MEDIA RELEASE .....</b>	<b>96</b>
<b>ATTACHMENT C - SUPPLEMENTARY INFORMATION .....</b>	<b>98</b>
C1 IELTS test bands.....	98
C2 English Language Training Programs.....	99
C3 Visa Condition 8107.....	100

## Overview of this report

This paper includes the following sections:

- Executive summary
- A List of Recommendations
- The Visa Subclass 457 Integrity Review
- Visa Subclass 457
- The Integrity of the Subclass 457 Visa - Overview
- Wages and related issues
- Integrity and Exploitation
- Visa Processing, Monitoring and Compliance
- Global issues.

The paper includes the following attachments:

- a list of the references used in the compilation of this report
- the text of the media release from the Minister for Immigration and Citizenship announcing the appointment of industrial relations commissioner Ms Barbara Deegan to examine the integrity of the temporary skilled migration program
- supplementary information on aspects of the Subclass 457 visa program

### **Note on nomenclature**

When the phrase ‘the department’ is used in this report without further attribution it should be read as ‘the Department of Immigration and Citizenship (DIAC)’.

The term ‘Subclass 457 visa holder’ applies only to primary visa holders unless otherwise noted.

References to submissions in this report refer both to written submissions and conversations with stakeholders.

### **Note on references**

To avoid repetition, references in this report are generally concise. Full details on each reference may be found in the references list in Attachment A.

## ***List of abbreviations***

ACCI	Australian Chamber of Commerce and Industry
ACEA	Association of Consulting Engineers Australia
ACS	Australian Computer Society
ACTU	Australian Council of Trade Unions
AIG	Australian Industry Group
AMEP	Adult Migrant English Program
AMIC	Australian Meat Industry Council
AMWU	Australian Manufacturing Workers Union
ANZSCO	Australian and New Zealand Standard Classification of Occupations
APS	Australian Public Service
AQF	Australian Qualifications Framework
ASCO	Australian Standard Classification of Occupations
ATO	Australian Taxation Office
CFMEU	Construction, Forestry, Mining and Energy Union
CSWP	Commonwealth / State Working Party on Skilled Migration
DEEWR	Department of Education, Employment and Workplace Relations
DIAC	Department of Immigration and Citizenship
ECA	Electrical and Communications Association
ENS	Employer Nomination Scheme
ERG	Visa Subclass 457 External Reference Group
ESL-NA	English as a Second Language - New Arrivals
FECCA	Federation of Ethnic Communities' Councils of Australia
FWA	Fair Work Australia
GSM	General Skilled Migration
ICT	Information and Communications Technology
IELTS	International English Language Testing System
IOO	Industry Outreach Officer
LHMU	Liquor, Hospitality and Miscellaneous Union
LMT	Labour Market Testing
MARA	Migration Agents Registration Authority
MCA	Minerals Council of Australia
MIA	Migration Institute of Australia
MoU	Memorandum of Understanding
MRT	Migration Review Tribunal
MSL	Minimum Salary Level
NATSEM	National Centre for Social and Economic Modelling
NZSCO	New Zealand Standard Classification of Occupations
OH&S	Occupational Health and Safety
QRC	Queensland Resources Council
RCB	Regional Certifying Body
RCSA	Recruitment and Consulting Services Association
REA	Registered Employment Authority
ROO	Regional Outreach Officer
RSMS	Regional Sponsored Migration Scheme
VACC	Victorian Automobile Chamber of Commerce
WACCI	Chamber of Commerce and Industry WA
WELL	Workplace English Language and Literacy Program

## Section 1 - Executive summary

This is the final report of the Visa Subclass 457 Integrity Review (the Review) conducted by Ms Barbara Deegan, an industrial relations expert appointed by the Deputy Prime Minister and the Minister for Immigration and Citizenship. This paper summarises the issues raised under its Terms of Reference during the course of the Review and provides a series of recommendations to improve the integrity and operation of the temporary skilled migration (Subclass 457 visa) program (the program) for the consideration of Government.

The Review released a series of three issues papers to prompt discussion and seek submissions on integrity issues relevant to the program.

The first issues paper was on Labour Agreements and Minimum Salary Levels. It was released in July 2008. The second issues paper was on the English Language Requirement and Occupational Health and Safety. It was released in August 2008. The third issues paper was on Integrity and Exploitation and it was released in September 2008.

This report has been compiled from consideration of the submissions received in response to the issues papers and feedback received during informal consultation carried out between stakeholders and Ms Deegan following establishment of the Review. The Review has also consulted with the Skilled Migration Consultative Panel appointed by the Minister for Immigration and Citizenship during the course of its consideration of the Terms of Reference.

Stakeholders have provided the Review with numerous examples of the exploitation of workers on Subclass 457 visas. The Australian Human Rights Commission *'has received complaints from 457 Visa Holders alleging discrimination in the workplace. The types of issues raised by people making complaints include:*

- *not being paid overtime*
- *working longer hours or days than non-visa employees*
- *limited access to sick leave and dismissal if the Visa Holder takes sick leave*
- *dismissal because the Visa Holder is pregnant*
- *dismissal for taking leave to care for a sick spouse or child*
- *overcharges on rent or other expenses organised by the employer*
- *sexual harassment'*.

It is worth noting the strong support for the continued integrity of the program that has been evident over the course of the Review. The Motor Trades Association of Australia are typical when they note their *'in-principle support for strengthening the integrity of the Subclass 457 visa procedures, while ensuring smooth access by employers'*, they go on to support *'the principles of fairness that underpin the Subclass 457 visa regime'*. The Australian Council of Trade Unions (ACTU) *'welcomes this review into the integrity of Australia's Temporary Business Long Stay - Standard Business Sponsorship (Subclass 457) Visa (the 457 visa scheme). The current scheme fails to adequately protect the rights of temporary overseas workers'*.

Support for the principles underlying the Subclass 457 visa is reflected in the Queensland Government's statement that *'the support of the Queensland Government for the 457 visa program is contingent upon the clear understanding that it does not undermine Australian employment opportunities, wages or working conditions'*. Likewise the Minerals Council of Australia (MCA) *'strongly support the need for the system to be operated with integrity so that all parties have confidence that Australia remains internationally competitive in facilitating labour movement whilst at the same time safeguarding employment and training opportunities for Australian workers and protecting overseas workers from exploitation'*.

Similarly, the NSW Government *'supports the Australian Government's efforts to reform the employer sponsored temporary migration program. These reforms should ensure the program is flexible and responsive to the needs of Australian employers, while respecting the rights and dignity of employer sponsored migrants and ensuring transparency, accountability and integrity in the administration of the program'*.

The Review builds upon stakeholder input to earlier reviews of the temporary skilled migration program, including the work of the Council of Australian Governments, the Joint Standing Committee on Migration of 2007 and the External Reference Group (ERG) earlier in 2008 (see Attachment A for references).

## **Section 2 - List of Recommendations**

### **2.1 Introduction**

The Integrity Review of the Subclass 457 visa has generated considerable interest from stakeholders across Australia. More than 150 submissions from interested parties have been received, and consultations held with employers, peak industry bodies, unions, government agencies, visa holders and academics in all states and territories.

The recommendations summarised below and discussed in more detail later in this report are the result of a consideration of the wide range of views expressed during the consultative process; they are designed to improve the integrity of the Subclass 457 visa program, thereby ensuring it has ongoing public support.

### **2.2 Recommendations**

#### **Recommendation**

It is recommended that so far as possible given their special circumstances, Subclass 457 visa holders have the same terms and conditions of employment as all other employees in the workplace.

#### **Recommendation**

It is recommended that the MSLs be progressively abolished as other mechanisms (such as collective agreements or market rate determinations - see below) are introduced to replace them.

#### **Recommendation**

It is recommended that a 'salary floor' be introduced for workers on the Subclass 457 visa. The salary floor should be set by reference to an appropriate ABS-published wage rate based upon average weekly full-time earnings.

#### **Recommendation**

It is recommended that market rates of pay should be paid to all temporary visa holders with salaries less than \$100 000 per year (or the FWA exempted salary level if different). All such rates should be provided for in industrial instruments (awards, agreements or determinations) enforceable by the Workplace Ombudsman or State equivalent.

#### **Recommendation**

It is recommended that the federal tribunal with responsibility for employment conditions should determine the appropriate market rate to be applied if the matter is in dispute.

**Recommendation**

It is recommended all sponsors be required to make payment of wages or salaries to visa holders by direct credit to an Australian bank in the name of the visa holder.

**Recommendation**

It is recommended that sponsors of Subclass 457 visa holders be required to maintain income protection insurance for those workers for the duration of their employment, unless an alternative protection is provided for in a Labour Agreement.

**Recommendation**

It is recommended that two new lists of skilled occupations for which temporary visas may be granted are developed by DEEWR, in consultation with DIAC and industry parties. Only occupations requiring genuine skill (professional, semi-professional and trades) should be included on the lists.

**Recommendation**

It is recommended that consideration be given to requiring, where practicable, offshore skills testing by a qualified workplace assessor employed by a Registered Training Organisation and acceptable to the Commonwealth for all occupations included on the standard list of occupations.

**Recommendation**

It is recommended that where offshore skills assessment is not practicable each visa application be accompanied by a statutory declaration signed by the employer stating that they are satisfied that the applicant possesses the necessary skill to perform tasks of the occupation to the Australian standard.

**Recommendation**

It is recommended that applications for Subclass 457 visas be considered with reference to the skilled migration lists recommended elsewhere in this report.

**Recommendation**

It is recommended that an employer seeking to sponsor more than 20 workers from the standard list of occupations (excepting those with salaries in excess of \$100 000) should be required to be a party to a Labour Agreement.

**Recommendation**

It is recommended that DEEWR be requested to provide, after consultation with relevant industry bodies and Government agencies (Skills Australia, industry training councils, for example) a list of training options from which employers can choose in order to demonstrate a meaningful and focussed commitment to training. The menu should be flexible and should contain options capable of being monitored and enforced.

### **Recommendation**

It is recommended that Labour Agreements be utilised in the following situations:

- where mandated for particular industry sectors or groups (e.g. on-hire companies, meat industry)
- for occupations not included in the standard occupation lists to be compiled by DEEWR and DIAC
- where an employer intends to sponsor more than 20 visa holders (in positions with salaries of less than \$100 000).

### **Recommendation**

It is recommended that appropriate resources be made available to DEEWR and DIAC to enable Labour Agreements to be concluded in a timely manner.

### **Recommendation**

It is recommended that the Government remove regional concessions from the Subclass 457 visa program.

### **Recommendation**

It is recommended that no visa holder be permitted to remain in Australia for more than 8 years in total on a Subclass 457 visa. The visa is to last no more than 8 years (e.g. two 4-year visas or four 2-year visas etc.). Temporary visa applicants must go offshore before reapplying for a visa after the 8 year period.

### **Recommendation**

It is recommended that more comprehensive information on pathways to permanent residency be provided on the DIAC website and such information should be designed to remove the perception that the Subclass 457 visa is a guarantee of permanency. Visa applicants should be provided with as much official information as possible to counteract misleading information supplied by agents or sponsors.

### **Recommendation**

It is recommended that the Subclass 457 visa be renamed the 'Temporary Employment Visa' in all publicly available information to reinforce its temporary nature.

### **Recommendation**

It is recommended that the current procedures which give precedence to employer nomination for permanent residency for visa holders be rebalanced to give greater weight to the length of time worked by the visa holder for any Australian employer under the temporary visa. It should not be necessary for Subclass 457 visa holders with a number of years of employment in Australia to apply offshore for permanent residency in circumstances where the application is not supported by an employer.

**Recommendation**

It is recommended that the current English language requirements attached to the Subclass 457 visa program be retained for all occupations included on the new standard list of occupations with the exception that applicants should also be found to have met their requirement should they achieve an average score of 4.5 without reference to the written component.

**Recommendation**

It is recommended that the relevant instrument be amended to exempt from the English language requirement those workers applying for visa renewal whose current visas were granted before that requirement took effect.

**Recommendation**

It is recommended that the current exemption from the English language requirement for visa holders earning salaries in excess of \$77 850 be raised to \$100 000 (or the FWA exempted salary level if different).

**Recommendation**

It is recommended that variations to the English language requirement should only be available in exceptional circumstances by means of Labour Agreements containing appropriate safeguards.

**Recommendation**

It is recommended that the numbers, location, occupation and industry of Subclass 457 visa holders be provided to relevant State and Territory OH&S authorities.

**Recommendation**

It is recommended that the rights of Subclass 457 visa holders who are involved in safety complaints are properly protected and the necessary mechanisms put in place so any visa holder required for the purposes of a prosecution of a complaint is permitted to remain in Australia for that purpose.

**Recommendation**

It is recommended that secondary visa holders retain work rights but that any Labour Agreement providing for the migration of secondary visa holders should address the work rights of that group.

**Recommendation**

It is recommended that dependents be allowed full working rights upon attaining working age during the currency of the primary visa, until the dependent attains the age of 21 years. Children aged 21 years and over should be regarded as independent, unless they are in full-time study or have a medical condition that prohibits them from becoming independent.

### **Recommendation**

It is recommended that efforts be made to reach agreements with other governments designed to regulate the activities of offshore agents involved in finding employment, or obtaining visas, for Subclass 457 visa applicants.

### **Recommendation**

It is recommended that employers be expressly prohibited from entering into any arrangement for the purpose of obtaining money from a visa holder as a consequence of the visa holder obtaining the employment and be prohibited from making any deduction from the wages of a visa holder for payment to any agent.

### **Recommendation**

It is recommended that there be enhanced scrutiny of the operations and conduct of migration agents.

### **Recommendation**

It is recommended that the procedure for making complaints against migration agents be provided to all prospective clients together with a schedule setting out the standard fees generally charged for particular services.

### **Recommendation**

It is recommended that all official documentation sent by DIAC to migration agents be copied to the clients of those agents.

### **Recommendation**

It is recommended that DIAC information be amended so that any reference to the role of migration agents should make it abundantly clear that while these agents are registered pursuant to a legislative process, they are not government officials and no responsibility is taken for their actions or conduct.

### **Recommendation**

It is recommended that consideration be given to removing the requirement for legal practitioners with practising certificates to be registered migration agents in order to provide immigration assistance.

### **Recommendation**

It is recommended that there be clarification of the ability of staff of community organisations and similar bodies who are not registered migration agents to provide limited immigration information and assistance without breaching the terms of the legislation. If necessary, changes should be made to the legislation in order to allow these organisations to assist visa holders, in particular.

### **Recommendation**

It is recommended that information be widely disseminated concerning the ability of DIAC staff to provide assistance with immigration procedures.

### **Recommendation**

It is recommended that Labour Agreements be retained as the only manner in which on-hire companies can sponsor under the Subclass 457 visa program.

### **Recommendation**

It is recommended that additional resources be directed to monitoring of visa holders from high risk groups sponsored by on-hire companies.

### **Recommendation**

It is recommended that the Visa Condition 8107 be amended to make it clear that Subclass 457 visa holders may cease work for one sponsor and find work with another approved sponsor. Further, the ability to do so should be explained in the information provided to all visa applicants.

### **Recommendation**

It is recommended that visa holders be allowed up to 90 days to find a new sponsor unless it is apparent that there is no likelihood that this will occur and the visa holder is unable to provide for him or herself (and dependents where relevant) during this period.

### **Recommendation**

It is recommended that Subclass 457 visa holders should be provided with assistance, including:

- website information on transferring to another approved employer
- information on how to find another sponsor, such as a list of approved sponsors and how to have an employer approved as a sponsor
- access to Job Search Support from Job Network while seeking new employment.

### **Recommendation**

It is recommended that consideration be given to requesting Trades Recognition Australia to provide a simple service for Subclass 457 visa holders to have their trade qualifications assessed against Australian standards (this would also assist visa holders in applications for permanent residence).

### **Recommendation**

It is recommended that while additional time should be allowed for Subclass 457 visa holders to find new employment there should be no change to the current requirement that sponsors continue to pay wages for 28 days.

**Recommendation**

It is recommended that the names of sponsors with 20 or more Subclass 457 visa holders be published on the DIAC website.

**Recommendation**

It is recommended that the Government institute a levy from employers for each Subclass 457 visa holder they sponsor. The levy is to be pro-rated across the term of the visa and collected through the tax system. Funds gathered through the levy are to be used to fund the provision of services to visa holders and removal costs if required.

**Recommendation**

It is recommended that the government provide Medicare coverage of public health costs to Subclass 457 visa holders and their dependents by means of the proposed employer levy.

**In the alternative**

It is recommended that it become a visa obligation for all Subclass 457 visa holders to maintain public health cover for themselves and their dependents.

**Recommendation**

It is recommended that if an appropriate accreditation process is unable to be developed then a risk matrix should be developed to ensure rapid processing of applications of little risk with greatest focus given to the rigorous examination of high risk applications and the ongoing monitoring of those sponsorships if granted.

**Recommendation**

It is recommended that information, in simple language, be provided to sponsors detailing their rights and obligations under the Migration legislation.

**Recommendation**

It is recommended that sponsors be required to provide a statutory declaration to the effect that the sponsor has read and understood their sponsorship obligations.

**Recommendation**

It is recommended that DIAC provide clear guidelines to Subclass 457 visa holders and their sponsors setting out the conditions under which visa cancellation will be considered, clearly stating that cancellation will not result if the breach of immigration obligations is a direct result of a visa holder or a sponsor complying with the terms of any other law.

**Recommendation**

It is recommended that clear instructions are given to Subclass 457 visa holders, prior to arrival where possible, in their language of origin about their rights and obligations when they come to Australia on a Subclass 457 visa. Those instructions should contain information about the Subclass 457 visa including requirements for permanent residency.

**Recommendation**

It is recommended that information should be provided directly to Subclass 457 visa holders and sponsors / employers, not through migration agents or other third parties.

**Recommendation**

It is recommended that DIAC records the addresses of Subclass 457 visa holders to ensure that they can communicate directly with the visa holder rather than relying on a third party.

**Recommendation**

It is recommended that it be a visa requirement that Subclass 457 visa holders notify DIAC of any change of address.

**Recommendation**

It is recommended that high risk groups of Subclass 457 visa holders be identified and provided with full induction sessions on arrival in Australia.

**Recommendation**

It is recommended that DIAC designate a position as an 'integrity coordinator' to coordinate and monitor integrity reporting and investigations, liaise with relevant external agencies and provide advice to DIAC management on integrity issues.

**Recommendation**

It is recommended that IOOs and ROOs operate in a manner designed to provide information and assistance to as great a range of users of the temporary skilled migration program as possible.

**Recommendation**

It is recommended that any placements of IOOs in organisations be short-term and part-time (i.e. involving more than one organisation at any time).

**Recommendation**

It is recommended that so far as possible the Subclass 457 visa program be designed to enable DIAC to focus on matters primarily the responsibility of the Immigration portfolio and other federal, State and Territory agencies to perform with respect to Subclass 457 visa holders as employees, the tasks and functions for which they are trained and resourced.

**Recommendation**

It is recommended that the system be refined so that issues of wages, workplace conditions and the classification of occupations are not matters for the MRT. The appropriate tribunal dealing with employment conditions (Fair Work Australia) should be the body vested with jurisdiction in these matters.

**Recommendation**

It is recommended that the integrity coordinator coordinate research into the incidence of integrity problems, and the effectiveness of monitoring and compliance activities in reducing the rate of occurrence of such problems.

**Recommendation**

It is recommended that the integrity coordinator, together with relevant DIAC and DEEWR staff, ensure program activities (including monitoring and compliance processes) and reporting mechanisms accurately reflect current and future classification systems.

**Recommendation**

It is recommended that DIAC carry out a review of visas 'at risk' of substitution to ensure consistency with the integrity provisions of the Subclass 457 visa program post-Review.

**Recommendation**

It is recommended that DIAC provide early notice of sponsorship applications to State / Territory and local government to facilitate planning in remote and rural areas.

**Recommendation**

It is recommended that consideration be given to the provision of funding for English language training for temporary visa holders, with particular emphasis on training for dependents.

**Recommendation**

It is recommended that the concerns raised during the Review regarding the relationship between immigration and housing shortages in Australia be noted.

## Section 3 - The Visa Subclass 457 Integrity Review

Following concerns raised about the exploitation of migrant workers, salary levels and English language requirements within the temporary skilled migration program, the Minister for Immigration and Citizenship, Senator Chris Evans, announced the establishment of an integrity review process (see Attachment B) to be conducted by Ms Barbara Deegan (a member of the Australian Industrial Relations Commission on leave from the Commission to conduct the Review).

The terms of reference for the Review include examining:

- measures to strengthen the integrity of the temporary skilled migration (Subclass 457 visa) program
- the employment conditions that apply to workers employed under the temporary skilled migration program
- the adequacy of measures to protect 457 visa holders from exploitation
- the health and safety protections and training requirements that apply in relation to temporary skilled workers
- the English language requirements for the granting of temporary skilled migration workers' visas
- the opportunities for Labour Agreements to contribute to the integrity of the temporary skilled migration program.

The Review was carried out independently of DIAC which provided accommodation and secretariat support. This is the final report of the Review to the Deputy Prime Minister and the Minister for Immigration and Citizenship.

### **3.1 The Integrity Review**

#### **Barbara Deegan**

Ms Barbara Deegan holds a law degree from the University of Tasmania. After a time in private practice, and then a period with a TAFE teachers' organisation, she joined the Australian Public Service in the Department of Employment and Industrial Relations.

She held the position of Assistant Secretary of the Legislation Branch of the Department of Industrial Relations for a number of years before being appointed as the Principal Registrar of the Australian Industrial Relations Commission.

Subsequently she became the Australian Government's representative at the International Labour Organisation in Geneva, and was appointed to her current position as a Commissioner with the Australian Industrial Relations Commission in 1996.

### **3.11 Secretariat**

The secretariat function for the Review has been provided by the following DIAC staff:

- Tony Davison - Project Manager, Labour Market Branch
- Penelope Robinson - Director, Labour Market Branch
- Felicity Lloyd - Project Officer, Labour Market Branch.

Secretariat members coordinated the activities of the Review, drafted issues papers and reports, managed meetings and assisted with the consultation process.

The members of the secretariat carried out their roles independently of DIAC and the Review itself was carried out independently of the department.

### **3.2 *The temporary skilled migration reform agenda***

The Skilled Migration Consultative Panel has been established to provide advice to the Government on proposals aimed at improving Australia's temporary skilled migration program and how it integrates with the employer sponsored permanent skilled migration program.

The Review worked closely with the Consultative Panel and provided it with advice on integrity matters relevant to its operation. The Panel, in turn, considered and provided advice on issues referred to it by the Review.

The independent work of the Review was limited to the scope of its terms of reference and the subject matter of the issues papers it released.

### **3.3 *Work program***

This is the final report of the Visa Subclass 457 Integrity Review conducted by Ms Barbara Deegan. It follows a series of three issues papers released by the Review. The first issues paper was on Labour Agreements and Minimum Salary Levels, it was released in July 2008. The second issues paper was on the English Language Requirement and Occupational Health and Safety, it was released in August 2008. The third issues paper on Integrity and Exploitation was released in September 2008.

The discussion in this report incorporates relevant background material from each of the issues papers to avoid frequent cross-referencing. This report supplements the discussion in the issues papers with commentary based on the submissions received in response to each of the papers.

### **3.31 Acknowledgements**

The Review would like to thank all of the groups and individuals who have contributed to the Review through the initial consultation process and by submissions in response to the issues papers.

### **3.32 Disclaimer**

The views and recommendations in this report do not necessarily reflect the views of the department or of the government or of those parties whose submissions are quoted in the body of the report. While portions of submissions received are quoted in this report the conclusions drawn, and recommendations made, reflect a consideration of all submissions received as well as discussions held during the consultation process.

## Section 4 - Visa Subclass 457

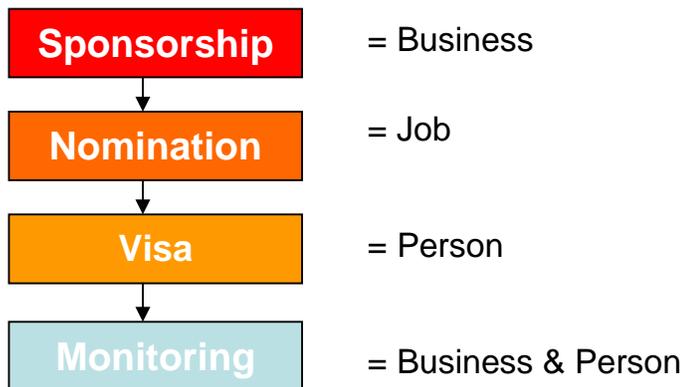
### 4.1 Managing the Subclass 457 visa program

Managing the program poses two critical and potentially competing challenges:

- remaining internationally competitive in facilitating the movement of labour, particularly skilled labour, in the context of Australia's changing demographic and skill needs, and in meeting international trade commitments
- safeguarding employment and training opportunities for Australians and protecting overseas workers from exploitation.

#### 4.11 Subclass 457 visa processing process

There are currently three processing steps in the Subclass 457 visa program, followed by ongoing monitoring, as shown in the following diagram:



The business sponsorship process involves assessing the employer to ensure:

- they are actively and lawfully operating
- the entry of the visa holder will benefit Australia, such as by contributing to Australian trade, improving international business links, contributing to competitiveness
- they will either introduce new technologies to Australia or demonstrate a record of, or commitment to, training Australians
- they are directly employing the visa holder
- they are able to meet their sponsorship obligations.

The nomination process involves the assessment of the position (job) to ensure it meets minimum skill and salary requirements.

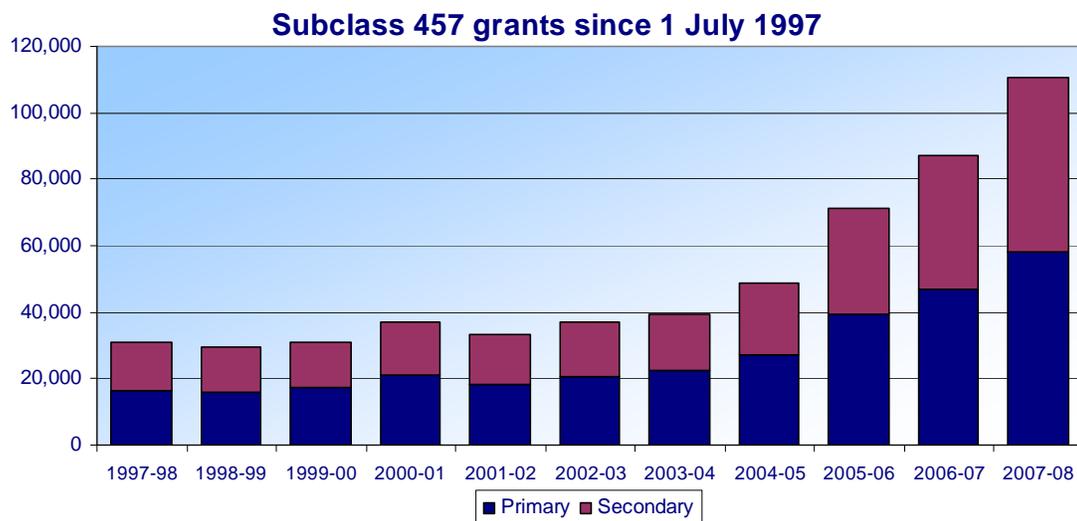
The Subclass 457 visa application process assesses:

- the appropriateness of the match between the nominated position and the personal attributes / employment background of the Subclass 457 visa applicant
- the applicant against health and character requirements
- the extent to which the nominated salary is known to the applicant and meets the minimum salary requirement
- English language proficiency, where relevant.

The duties of the position sought must be equivalent to those of an occupation prescribed under Migration Regulations and the position must attract a salary of at least the Minimum Salary Level (MSL) set for the program.

## 4.2 Subclass 457 visa grants

The number of Subclass 457 visas granted over the last 11 years is shown in the graph below.



Source: DIAC

Primary visa holders are the workers who fill the nominated position, secondary visa holders are the spouse and family members who may accompany them to Australia (where the sponsor has agreed to the arrangement).

The tables below show the number and proportion of visa grants in 2007-08 by Australian Standard Classification of Occupations (ASCO) major group.

**Number of Subclass 457 visa grants to primary applicants in 2007-08 by State / Territory location of the nominated position by ASCO Major Group (excludes independent executives)**

ASCO Major Group	Location of the nominated position									Total
	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Not Spec	
ASCO 1 to 3	630	18 670	470	7 060	1 470	390	10 490	7 730	90	47 010
ASCO 4 to 9	80	1 790	440	2 630	450	50	1 270	4 060	10	10 780
Not recorded	0	20	0	120	0	0	0	10	110	260
<b>Total</b>	<b>720</b>	<b>20 480</b>	<b>910</b>	<b>9 810</b>	<b>1 930</b>	<b>450</b>	<b>11 750</b>	<b>11 800</b>	<b>200</b>	<b>58 050</b>

Source: DIAC

**Percentage of Subclass 457 visa grants to primary applicants in 2007-08 by State / Territory location of the nominated position by ASCO Major Group (excludes independent executives)**

ASCO Major Group	Location of the nominated position									Total
	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Not Spec	
ASCO 1 to 3	88.7%	91.1%	51.5%	72.0%	76.6%	87.9%	89.2%	65.5%	44.6%	81.0%
ASCO 4 to 9	11.3%	8.7%	48.5%	26.8%	23.4%	12.1%	10.8%	34.4%	3.9%	18.6%
Not recorded	0.0%	0.1%	0.0%	1.3%	0.0%	0.0%	0.0%	0.1%	51.5%	0.4%
<b>Total</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>

Source: DIAC

For comparison purposes the following table shows the percentage of grants by ASCO major group in 2005-06.

**Percentage of Subclass 457 visa grants to primary applicants in 2005-06 by State / Territory location of the nominated position by ASCO Major Group (excludes independent executives)**

ASCO Major Group	Location of the nominated position									Total
	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	Not Spec	
ASCO 1 to 3	86.9%	89.0%	57.2%	62.1%	61.3%	88.3%	85.1%	56.9%	65.4%	76.1%
ASCO 4 to 9	12.9%	11.0%	42.8%	37.9%	38.7%	11.7%	14.9%	43.1%	29.1%	23.7%
Not recorded	0.2%	0.0%	0.0%	0.0%	0.1%	0.0%	0.0%	0.1%	5.5%	0.2%
<b>Total</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>	<b>100.0%</b>

Source: DIAC

## Section 5 - The Integrity of the Subclass 457 Visa - Overview

Many Subclass 457 visa holders are potentially vulnerable to exploitation as a consequence of their temporary status. This is particularly so in relation to those who may have aspirations towards permanent residency. The concern of the Federation of Ethnic Communities' Councils of Australia (FECCA) that the *'potential for exploitation and violation of human rights due to the inherent inequality of power that can exist between employers and temporary migrant workers'* is a concern widely held in the community.

Stakeholders have given examples of Subclass 457 visa holders who, after asking about such matters as salary deductions, underpayment of wages or union membership have been dismissed by their sponsor and put on the next plane 'home' as an example to the rest of the workforce to encourage compliance. It has been suggested that such behaviour is particularly prevalent where Subclass 457 visa holders make up a large percentage of the workforce at a workplace (although some employer organisations question whether the instances of such treatment and exploitation are widespread).

The ACTU have stated that *'the 457 visa program has failed to protect temporary overseas workers from abuse and exploitation. Recognition and protection of the rights of migrant workers must be central to Australia's temporary overseas labour program'*. The Australian Human Rights Commission note that *'many people on 457 Visas are vulnerable to workplace exploitation, including discrimination, due to a limited knowledge and understanding of Australian workplace rights, limited English language, and the ongoing reliance on a sponsor for their visa status'*.

Under the ASCO classification system, the ASCO groups 1-3 are generally professionals or semi-professionals, most of whom have the capacity to negotiate their own terms and conditions. Feedback received during consultations and from submissions received in response to the Review's issues papers indicates that, with some exceptions (for example, chefs and aged care nurses) there are few concerns relating to exploitation of the ASCO 1-3 group.

In relation to the ASCO classifications 4-7 there are a number of areas of concern. It is this group, together with visa holders in those occupations in the ASCO 1-3 group who are paid salaries close to the current MSL, who are the particular focus of this report from both an exploitation perspective and in relation to integrity issues.

A number of written and oral submissions made to the Review claim that the suggested scale of the problem of exploitation of Subclass 457 visa holders is not supported by evidence or made out in DIAC statistics as to sponsors who have been found to have breached their sponsorship obligations. This view ignores the major problem with providing protection for Subclass 457 visa holders. Those visa holders who are susceptible to exploitation are also reluctant to make any complaint which may put their employment at risk.

Discussions held with unions, community groups and visa holders during this Review support the finding that concerns about exploitation are well-founded, particularly in relation to visa holders at the lower end of the salary scale.

The precariousness of the position of Subclass 457 visa holders is such that the type of evidence of exploitative practices demanded by some employer organisations as justification for this Review can be difficult to obtain and is usually only made available on the basis of a guarantee that no action will be taken which will put at risk the employment of the visa holders concerned.

Discussions with the Workplace Ombudsman and the various State and Territory authorities responsible for enforcing compliance with employment conditions support the view that the incidences of exploitation involving Subclass 457 visa holders that are brought to the attention of the authorities are a very small part of the overall problem.

Further background on the topics in this report can be found in the three issues papers produced by the Review.

## Section 6 - Wages and related issues

### 6.1 Introduction

The integrity of the Subclass 457 visa system can be compromised where systems are poorly designed (allowing easy and low-cost transgression for those who wish to abuse the system) or are unfit for the purpose (where the nature of the system design inadvertently allows or encourages unintended activity) as outlined below. Further background on MSLs and Labour Agreements may be found in Issues Paper #1; the other topics in this section were considered in Issues Paper #3.

### 6.2 Minimum Salary Level

The MSL aims to deliver three main policy objectives:

- to provide a price signal to employers to encourage training and hiring of Australians first, noting that there may also be other costs for employers associated with recruiting overseas skilled workers
- to ensure that employers gain no benefit from ‘inflating’ the skill description of positions they wish to fill in order to imply that the positions require a higher level of skill than is actually the case
- to ensure that overseas workers maintain a standard of living broadly commensurate with that of Australian citizens noting that they do not have access to the same level of government services as Australians (while having access to the same industrial relations protections as local workers they do not have access to, for example, social security).

Other characteristics of the MSL include:

- The introduction, from February 2004, of a separate and much higher MSL for Information and Communications Technology (ICT) occupations. This followed the dot-com crash in 2001 and was based on a concern that the crash led to a significant number of Australian ICT graduates not finding work. The higher MSL was designed to increase the likelihood of Australians being considered by employers first but without preventing employers from accessing overseas employees to fill gaps in higher-end ICT positions. It should be noted that in some parts of the ICT industry skill gaps have remained and indeed, are now growing. This is substantiated by the large number of ICT occupations that are currently on the national shortage list produced by the Department of Education, Employment and Workplace Relations (DEEWR). The ICT MSL since 1 August 2008 is \$59 480.
- Specification, from 1 July 2006, of a standard working week of 38 hours. The purpose of this was to make clear the intention of the MSL was to reflect a standard working week and to avoid the mechanism being undermined through its application to working weeks in excess of 38 hours (e.g. paying the MSL but requiring an employee to perform work for 60 hours per week for no additional payment).

- The introduction, from 1 July 2006, of a separate MSL for regional Australia set at 90 per cent of both the standard and ICT MSLs (from 1 August 2008 these are \$39 100 and \$53 530 respectively). The regionally-certified MSLs establish a floor for salary levels approved by Regional Certifying Bodies (RCBs). This complements the existing requirements under regional provisions that are intended to ensure that the salary is in accordance with workplace legislation and awards.
- The MSL only has application to the extent that it prescribes a salary greater than that specified in any applicable industrial instrument (e.g. an award, Certified Agreement or Australian Workplace Agreement). If the industrial instrument applicable to the employment provides for a salary higher than the MSL, then that higher salary must be paid.
- MSL is calculated exclusive of all deductions other than PAYG (Withholding) Tax, 100 per cent tax deductible items and items that are exempt from Fringe Benefits Tax.

Stakeholders are generally critical of the MSL for a number of reasons. The Law Institute of Victoria, for example, *'considers reliance on MSL to be arbitrary ... as it is based on a statistical average which bears no relationship to the real market'*.

The MSL has been criticised for being complex and inconsistent. Stirling Henry Migration Services advise that the *'method of calculation seems to be unnecessarily complex. The inclusion of 100% tax deductible items and items that are exempt from fringe benefits tax but the non inclusion of Living Away From Home Allowance for applicants recruited from overseas seems inconsistent. The basis on which the MSL is calculated seems unnecessarily complex and beyond the capacity of small employers. The timing of adjustments also seems to be quite haphazard'*. Similarly, the Recruitment and Consulting Services Association (RCSA) *'submits that there is confusion in relation to the maintenance of the MSL pertaining to the taking of parental leave and unpaid annual leave under the Australian Fair Pay and Conditions Standard and / or any applicable State industrial instrument'*.

The separate MSL for the ICT industry has also been criticised, Neville Roach suggesting that *'the separate minimum wage for ICT professionals is clearly unjustified, inequitable and bad for the Australian ICT industry, its customers and the Australian economy. It was introduced to address perceived conditions in the 2000-2003 period, conditions which no longer apply. It should be removed immediately so that the ICT industry is treated in the same way as all other industries in the economy'*.

The Australian Computer Society (ACS) notes that *'for many multinational firms, the price signal for the MSL must establish a balance between the costs of maintaining the role in Australia and relocating it to a cheaper overseas destination. So while it is important to ensure the 457 visas are not being used to displace Australian workers, it is also important to ensure that the cost imposed on 457 sponsors do not drive greater offshoring of ICT roles and functions'*. The Australian Information Industry Association supports this view, noting that *'the unfortunate result of the current Minimum Salary Level regime is to foster the offshoring of Australian jobs because there are no appropriately skilled and experienced Australians to fill the vacancies at the current market rates'*.

The ACTU has suggested that the current process for determining rates of pay for temporary overseas skilled workers through ministerial regulation should be abolished. The ACTU view is that the MSL violates the basic human right to equal pay for work of equal value. The ACTU strongly believes that workers on Subclass 457 visas should be paid the market rate, as established in collective agreements.

In its submission to Issues Paper #1 the Australian Manufacturing Workers Union (AMWU) suggested that the MSL is an inadequate mechanism *‘due to the significant gap between actual market rates in many trade occupations and the MSL. There is strong evidence that a significant proportion of workers on 457 visas are paid below the market rate for their occupation, placing downward pressure on wages in the market’*.

As one example supporting their claim, the Union provided the following analysis: *‘a fitter, employed in Western Australia can command base wages of between \$49,400 and \$69,160 per annum based on a 38 hour week (excluding allowances and penalties). This represents between \$7550 and \$27,310 per annum more than the current MSL. Additional to this disparity, the vast majority of 457 workers do not receive a number of other allowances including Living Away from Home Allowance (up to \$550 per week), Productivity Incentive Pay (up to \$150 per week), and Redundancy Allowance (up to \$50 per week). These inequities create a significant financial incentive to engage 457 workers rather than permanent residents’*.

By way of contrast, Swift Australia *‘support the continuation of the MSL, exclusive of non-salary benefits, incentive payments and overtime penalties to ensure that reasonable standards of living are achievable by overseas workers’*. In a submission to the Review Mr Matthew Costa also argues in favour of retaining the MSL, and proposes that the *‘minimum salary level should continue to be higher than the Federal minimum wage, and the Australian median wage, in order to effectively prevent “wage dumping” in the lower skilled, lower earning segment of the Australian labour market’*.

During consultation it was apparent that it does not matter where the occupation of a Subclass 457 visa holder is on the ASCO list, if the visa holder is paid a salary not much above the MSL then they are more likely to be subject to exploitation, or to work for a sponsor who may present a range of compliance problems.

In a recent speech the Deputy Prime Minister, Julia Gillard, outlined a Government proposal to develop a set of National Employment Standards for all workers. For those on salaries below \$100 000 annually these standards will be complemented by a set of awards tailored to the needs of particular industries or occupations. The Review’s position on the MSL has been determined in light of the emerging industrial relations environment.

It is apparent that the application of the MSL has not resulted in visa holders universally receiving salaries or wages equivalent to those received by Australian workers performing the same work, even where employed in the same workplaces. This is particularly so in relation to workers at the trades or semi-skilled levels. Visa holders in the professional or semi-professional categories have received salaries more aligned with market rates but rarely as the result of the application of the MSL. The imposition of the MSL based on a 38 hour week has caused significant difficulties for visa holders employed in managerial and professional positions by imposing unnecessary constraints on an area of employment not usually subject to such constraints (e.g. time-keeping, application of hourly rates).

While the abolition of the MSL system responds to these concerns it is necessary to replace that system with some more practical mechanism. A system of market rates should apply where a simple mechanism for determining such rates is available. If such a system is not available a variation on the MSL should be applied to ensure that a salary more closely aligned with those normally paid for the particular occupation is paid.

While a replacement mechanism appears unnecessary for visa holders in the professional, semi-professional and managerial streams earning above \$100 000 per year, the employment conditions and salaries of visa holders in trades and semi-skilled areas should be governed by enforceable industrial instruments such as collective agreements and, where appropriate, be the subject of other safeguards contained in the terms of Labour Agreements.

The setting of market rates is dealt with below.

Although a system of market rates should apply, it is necessary to ensure that in circumstances where the wage applicable to a particular skill or occupation is lower than that required to allow a visa holder to maintain a reasonable standard of living (given the lack of access to welfare and tax benefits available to Australian citizens) no visa will be granted at that salary level. There should be a salary floor established and the visa should only be granted if the proposed salary for the position is a market rate above that salary level.

## **Recommendations**

It is recommended that so far as possible given their special circumstances, Subclass 457 visa holders have the same terms and conditions of employment as all other employees in the workplace.

It is recommended that the MSLs be progressively abolished as other mechanisms (such as collective agreements or market rate determinations - see below) are introduced to replace them.

It is recommended that a 'salary floor' be introduced for workers on the Subclass 457 visa. The salary floor should be set by reference to an appropriate ABS-published wage rate based upon average weekly full-time earnings.

### **6.21 Market rates**

It has been suggested that if the MSL were to be abolished a better system of wages determination would be to allow market mechanisms to determine the pay rates that should apply to temporary skilled workers from overseas. The ACTU, the AMWU and the Construction, Forestry, Mining and Energy Union (CFMEU) have all suggested that market rates should replace the MSL.

In addition, the MSL was set at a rate intended to compensate Subclass 457 visa holders for their inability to access services (such as health, social security and education) otherwise available to local workers. Any wages system adopted needs to take account of that requirement in the context of other recommendations of this Review.

With reference to the MSL, the Master Builders *‘proposes that a better indicator of appropriate value would be for employers to be required to pay the minimum Award rate. Where an employee category is not covered by an Award rate, it should be the highest Award rate in the most applicable Award that stands as the minimum to be paid to a 457 visa holder.’* They go on to note that *‘awards are currently being modernised by the Australian Industrial Relations Commission to be appropriate for an underpinning safety net in all categories of work save for the high paid’*.

While paying market rates would suggest both a fair and desirable outcome (particularly in that all workers doing a particular job at a particular location would be paid comparable wages), the concept of regulating payment of market rates (as opposed to allowing the market to determine the rate at which that person is paid) is not simple. The Australian Industry Group (AIG) suggest *‘any attempt to set local “market rates” would be hugely complicated and difficult to enforce’*.

The Motor Trades Association of Australia note *‘the opportunity for an industry sector to utilise its relevant industrial instrument as the basis for the appropriate and equitable remuneration of a sponsored 457 visa holder would address a number of those issues, as well as provide a simple and familiar basis for remuneration for the visa sponsor / employer’*.

The AMWU supports the principle of ensuring that employers are required to pay a premium for Subclass 457 visa holders. The AMWU has suggested that this premium has the potential to serve to ensure that employers first seek to access local labour prior to seeking Subclass 457 visa holders. The AMWU advocates that the establishment of a regime that requires Subclass 457 visa holders to be paid the actual market rate and places the obligation on employers to pay all travel, migration, health and other associated costs will create a premium and enable the policy aim of protecting the jobs of Australians to be achieved. The CFMEU also supports the concept of a premium and notes that employers in a market where there are genuine shortages would expect to pay a premium above average wage rates anyway.

A number of employer groups are not supportive of a premium on wages; for example the Victorian Automobile Chamber of Commerce (VACC) *‘rejects the notion that there is a need for a higher level of payment for overseas workers on the ground that 457 Visa holders do not have access to the same level of government services as Australians. VACC believes that government policy defects should not have to be compensated by individual employers’*. The Chamber of Commerce and Industry WA (WACCI) stress *‘the important role that the temporary migration program plays in maintaining strong economic growth without engendering unsustainable wages inflation’*.

Within the ICT sector Tata Consultancy Services claim that *‘to use market rates comparisons for wages under the subclass 457 visa program would certainly be inappropriate. This would further increase costs of “salaries and wages” for external organizations beyond acceptable limits making it difficult to sustain the business’*.

With a few exceptions most stakeholders appear to agree that employees working in Australia on a Subclass 457 visa should receive, at a minimum, the same wages and conditions of employment as Australians performing the same tasks at the same workplace or in the same locations. Suggestions that imported labour should receive rates of pay less than those applicable to Australians performing the same work in the same workplace or geographical location do not have any persuasive basis.

To adopt award rates as market rates would be to distort reality. In very few industries or occupations in Australia would the award rate (which, federally, is a legislated *minimum* rate) represent the rate actually paid to employees.

Generally, in the trades and related areas the market rate can be arrived at by reference to rates applicable to the relevant classification contained in collective agreements applicable at the same or similar workplaces. Where a collective agreement applies in a workplace it is the rate applicable under that agreement which will generally set the market rate for that workplace. There are some exceptions. The wage rates in some collective agreements may be substantially out of date. Some collective agreements may operate as minimum rates collective agreements and not provide for the actual rates paid to workers. Additionally, some workplaces staffed largely by Subclass 457 visa holders may have collective agreements containing wage rates which are not representative of the wages generally paid for similar classifications in other workplaces in the same geographical location.

So long as provision is made for the exceptions it would usually be a fairly safe assumption that wages rates contained in a collective agreement applicable at a workplace represents the appropriate market rate for a temporary visa holder employed in that workplace. Where no collective agreement applies the market rate can be set for classifications generally covered in agreements and awards by reference to collective agreements that apply at similar workplaces in the immediate vicinity. On occasions it may be that the market rate is set by an applicable award. In such cases, so long as the award rate for the position was not less than the salary floor then it would be appropriate for that rate to apply.

Where there is no appropriate applicable collective agreement then input should be sought as to the appropriate market rate from interested industry parties (such as employer organisations and unions).

In the event of a dispute as to the correct market rate, the most appropriate body to settle the matter would be the federal industrial tribunal. A change to legislation may be required in order to vest the tribunal with the relevant jurisdiction. This should not require a lengthy or complicated process. The relevant stakeholders should be required to put their proposed rate, and the basis for that rate, to the tribunal. The tribunal should then determine the rate on the basis of written submissions. The tribunal is the body best equipped to make such a determination. The determination should be provided quickly (a matter of days) and be subject to review only in very limited circumstances. Ideally, a market rate determination by the tribunal not otherwise contained in an award or agreement would be able to be enforced in the same manner as an award or collective agreement.

Some occupations in respect of which Subclass 457 visas are currently granted may have salary rates less than the Fair Work Australia (FWA - see Section 8.71) exemption (anticipated to be \$100 000) but may not be a classification with wage rates normally set out in awards or agreements. In such cases, (ICT occupations for example) the industry parties could be requested to propose appropriate market rates for various classifications (on a geographical basis, if appropriate) which could then be set out in a determination of the federal tribunal. Where there was agreement as to the rates and the industry parties were sufficiently representative the tribunal would be required merely to endorse those rates and include them in a determination. If there was no agreement the matter could be determined by the tribunal.

Wage rates contained in such determinations should, as suggested above, be subject to the same enforcement regime as awards and collective agreements. This is important to enable visa holders to recover underpayments of wages by a simple process and for recovery to be undertaken on their behalf by the Workplace Ombudsman or State equivalent. Additionally, in order to provide for ease of monitoring all sponsors should be required to make payment of wages or salaries to visa holders by direct credit to an Australian bank in the name of the visa holder.

Assuming the recommendation made above to progressively abolish the MSL is adopted, Subclass 457 visa holders will be vulnerable in those situations where they may be inadvertently unable to work for a period (for example, due to illness or accident outside the workplace) and without the protection of access to the welfare system. To protect the Subclass 457 worker in these cases it is proposed that sponsors be required to provide income protection insurance for Subclass 457 visa holders.

### **Recommendations**

It is recommended that market rates of pay should be paid to all temporary visa holders with salaries less than \$100 000 per year (or the FWA exempted salary level if different). All such rates should be provided for in industrial instruments (awards, agreements or determinations) enforceable by the Workplace Ombudsman or State equivalent.

It is recommended that the federal tribunal with responsibility for employment conditions should determine the appropriate market rate to be applied if the matter is in dispute.

It is recommended all sponsors be required to make payment of wages or salaries to visa holders by direct credit to an Australian bank in the name of the visa holder.

It is recommended that sponsors of Subclass 457 visa holders be required to maintain income protection insurance for those workers for the duration of their employment, unless an alternative protection is provided for in a Labour Agreement.

### 6.3 The skills shortage

The ERG report set out the extent of the skills shortages being experienced within the Australia economy. The Subclass 457 visa was established at a time of higher unemployment than exists in the economy at the present time, and even in that environment it was recognised that there existed shortages in particular skills in some industries and regions. These shortages have become more acute as labour force participation has increased and unemployment has decreased.

The submissions received by the Review generally confirm the shortages, as typified by the Association of Consulting Engineers Australia (ACEA) 2008 Skills Survey which *'surveyed our member firms on skills shortages, found that on average, two-thirds of firms across Australia are delaying projects and some are even declining projects outright because they simply don't have the available staff. This is the third year in a row this has been reported'*.

Developing a solution to these shortages in the short term is difficult, the Queensland Government notes that *'initiatives to develop skills through education and training are vital, but take time. This is particularly the case for occupations that require both training and experience. For example, there are currently many vacancies for engineers with long-term work experience. This shortage cannot be met in the short-term through education and training programs ... the availability of a temporary work visa to target these immediate skill needs has therefore been vital'*.

The evidence on other occupations is contradictory. Stakeholders have cited chefs, cooks and truck drivers as occupations in short supply, yet *Australian Jobs 2008* published by DEEWR shows unemployment in these occupations ranging from above average to high. Similarly, the Australian Nursing Federation (ANF) state *'the aged care industry's inability to attract nursing labour relates more to the low levels of pay and poor working conditions than it does to a general shortage of labour'*.

In another example; over the period 2003-04 to 2007-08 there has been a rise in the number of Subclass 457 visas granted for manufacturing positions (many of which were located in Victoria and New South Wales) although there has been a general decline in manufacturing in the same period. The numbers of Subclass 457 visa holders coming to fill positions in the manufacturing sector has dramatically increased, with the sector showing the highest increase of all ASCO 4 occupations in the program.

While there may be regional factors at play within these industries, care needs to be taken to ensure skill shortages are not overstated by employers seeking to maintain salaries below current market rates. The Liquor, Hospitality and Miscellaneous Union (LHMU) have stated concerns that *'a reliance on 457 visas to address a lack of skilled workers, whether through Labour Agreements or not, reflects the reluctance on the part of employers to address skills shortages through the basic economics of supply and demand. The relatively unfettered and unmonitored introduction of temporary labour essentially allows employers to avoid providing wages and conditions sufficient to attract local skilled workers'*.

## 6.31 Labour shortages

Discussion with stakeholders and an examination of the submissions received by the ERG suggest that a number of employers are facing labour shortages rather than specific skills shortages. In their report *Staffing the Supercycle* the MCA note that, while there are skills shortages in the mining sector, *'what the sector is facing is a people shortage, not necessarily a skills shortage per se'*. Using a skilled visa to address these shortages may increase the risk to the integrity of the program.

Furthermore, measures sufficient to protect the integrity of the system as it applies to the more highly skilled and paid employees may be insufficient to protect workers at the 'lower' end of the market, particularly where those workers may be more concerned with gaining permanent residency in Australia than ensuring that they receive appropriate wages and conditions in the short term.

Even programs specifically designed to manage perceived labour shortages may be problematic. In an article in The Australian newspaper on September 30 2008 Tony Abbott states *'there are plenty of better ways to make fruit picking and other seasonal labour more attractive. One is to pay workers more'*. He goes on to say that *'it's certainly not the government's job to make it easier for labour-intensive industries to avoid innovation and to keep pay down'*. By way of contrast Blue Care and TriCare note that *'the Aged Care Sector does not have the flexibility to pay at the market leading rates for its employees'*.

The vast majority of Subclass 457 visa holders have skills which are in demand in Australia. In some cases visas may have been granted to applicants who possess few, if any, desired skills. In such cases both sponsors and applicants have usually been complicit in concocting documentation in order to present a position as an occupation on the gazetted list when it clearly was not (for instance, applicants destined to perform fruit packing or similar tasks have been presented as 'production horticulturalists').

The current gazetted ASCO classifications should be replaced by two new lists drawn up by DEEWR in consultation with DIAC and the industry parties (the Temporary Migration Consultative Panel could be the appropriate forum). One list should contain those occupations at the semi-professional or professional level (usually found in ASCO levels 1 to 3). The occupations on this list should be low-risk occupations unlikely to require the additional safeguards that might be contained in Labour Agreements. These low-risk occupations could be exempted from the English language requirement (a higher level of English would in most cases be required for such positions in any case) in line with the current exemption for ASCO levels 1-3. The second, or standard, list should contain all other skilled occupations for which temporary visas could be granted, generally those included in ASCO 4 together with higher-risk occupations currently included in ASCO levels 1-3 (chefs, nurses etc.).

If these lists are compiled with sufficient rigor there should be no risk of the visa program being manipulated to import unskilled labour, or skilled labour where there is a plentiful supply available locally. Where the need can be demonstrated, and there is public benefit in allowing entry of semi-skilled labour in order to compensate for labour shortages, this should occur only under the terms of a Labour Agreement. Labour Agreements should provide the necessary safeguards to ensure that the extension of the scheme to semi-skilled occupations does not drive down, or artificially maintain, low wages in those occupations or in the industries or regions concerned.

The proposed skills lists should be national lists, but where appropriate should contain exemptions for particular States or Territories. As an example:

Occupation (e.g. Carpenter)

State Exemption (e.g. NSW)

In such a case an applicant granted a visa for the occupation of carpenter would be permitted to work as a carpenter anywhere in Australia except NSW. A system of State exemptions would enable skill shortages to be addressed in those jurisdictions where such shortages exist without impacting on other areas where there might be an over-supply. It is apparent from submissions made by a number of stakeholders (some of which are referred to later in this report) there is a perception that the current list of occupations is prepared on the basis of a degree of 'labour market testing (LMT)'. The proposed list should make that perception a reality.

### **Recommendation**

It is recommended that two new lists of skilled occupations for which temporary visas may be granted are developed by DEEWR, in consultation with DIAC and industry parties. Only occupations requiring genuine skill (professional, semi-professional and trades) should be included on the lists.

## **6.32 Skills assessment**

Skill thresholds for Subclass 457 primary visa holders were introduced in July 2001 when the concept of 'key' and 'non-key' activities was abolished (the latter had been subject to LMT).

The skill thresholds were designed to reflect the highly skilled focus of the program and aimed to deliver two main policy objectives:

- to allow employers to sponsor suitably skilled overseas workers to fill highly skilled positions that they could not readily fill from the local labour market
- to promote training opportunities and prevent displacement of Australians by excluding low-skilled and unskilled jobs from those occupations which can be nominated under standard Subclass 457 visa arrangements.

To apply to nominate positions, employers are required to outline the responsibilities, main duties, qualifications, essential skills, employment experience and registration / licensing requirements for each position. The department then makes an assessment as to whether the tasks sought can be appropriately matched to the tasks of an occupation listed in the Australian Standard Classification of Occupations and gazetted by the Minister for Immigration and Citizenship on an occupations list.

The gazetted occupations list is broadly consistent with ASCO major groups 1-4, or ASCO major groups 1-7 under regional arrangements - the latter could be considered to work against the intended aims of the skills thresholds process.

With regard to the timing of skills assessment, Blue Care and TriCare in their joint submission to the Review propose that *'this should predominately occur prior to Visa approval. In non-licensed occupations there is scope (and merit) to providing some flexibility surrounding the skilled migrants' preparedness to continue to build skills once they arrive, particularly around technical, cultural and locally specific variances which may occur between the Australian and overseas work environments. For licensed occupations, DEEWR and DIAC must work to fix the anomalies surrounding the granting of the Visa, and the potential for the employer / skilled worker to be in breach of their Visa conditions and local licensing laws. This may be achieved by recognising that a provisional licensing arrangement is provided until the overseas skilled worker has the chance to obtain the full license'*.

This is particularly relevant in fields such as nursing where the Review has received submissions critical of current practice. The Queensland Nurses Union have provided case studies of the problems faced by overseas nurses who *'have endured the most stressful of situations. They have sold most of their assets in their home country to fund medical assessments and an airfare to Australia. On arrival, they are presented with extreme challenges of securing accommodation, working within a foreign health care system and coping with culture shock and isolation'*. The Union go on to propose that *'procedures for the assessment of nursing qualifications from other countries must be equitable and fair, be based on a proficiency in the English language and clinical competence and recognise previous experience in addition to formal qualifications. Employers should also provide migrant nurses with the orientation, mentoring and support to make a successful transition to employment in Queensland'*.

Difficulties may arise for occupations lacking standard assessment or licensing procedures. The Australian Institute of Medical Scientists notes that *'although employees brought in to Australia under these visas are required to meet local registration or licensing requirements, as there is no statutory registration of Medical Scientists in Australia this requirement is of no assistance in ensuring the standard of workers recruited in this way as Medical Scientists. There is a real danger that inadequately trained staff will be recruited and employed in pathology laboratories by this method'*.

The skills verification, particularly checks for appropriate licensing or registration, can be difficult to perform consistently as skills assessment is not a core departmental responsibility and licensing is a matter for State and Territory agencies. Another area of vulnerability for the integrity of the process is the verification of claims of relevant overseas work experience, the department currently carries out risk-based referrals to overseas posts to check such claims.

The MCA make the suggestion that *'therefore, the best determinant of an individual's skills is for that person to demonstrate them to the potential employer. This may be difficult in many circumstances but ultimately it is the employer that has to be satisfied'*. The WACCI support this view when they state *'formal skills assessment requirements would represent an excessive pre-entry regulatory burden and should not be imposed on a temporary visa program where the onus is on employers to evaluate and determine whether employees have the requisite skills to do the job for which they are to be employed as employers carry the associated risks and costs'*.

Other stakeholders support the view expressed by the ACS that *'greater certainty and assurance that the people being sponsored into Australia on 457 visas are indeed those with skills considered in short supply could be achieved by introducing some form of skills verification for 457 visa applicants'*. Skills assessment also has a role to play where visa holders are hoping to move to permanent residency, under current arrangements they would have a greater chance of success with independent applications where their skills have been formally assessed and recognised before moving to Australia.

A more pernicious outcome of inadequate skills assessment or verification is the possibility that unskilled workers are lured to Australia with the promise of gainful employment and then forced into bondage within the sex industry. Kevin Bales, an American academic, has written extensively on the modern slave trade and in an article in the Sydney Morning Herald on 8 August 2008 he is quoted as saying that *'worker visas, such as the 457 visa in Australia, could lead to slavery if employers were inadequately monitored ... while some {workers} may know they are, in fact, going to work in prostitution when they are brought here, some are promised other work'*.

While opposed by many employers, apparently because of anticipated delays or a perceived interference with the rights of an employer to determine the suitability of an employee, a mandatory assessment of the skills of all those applying for temporary employment visas would ensure that there is integrity in the program. Only persons possessing the requisite skills would be granted visas.

The ACS has suggested that *'skills verification should include criteria around competence and experience for the role being undertaken by the visa applicant'*, and go on to assert that *'skills verification would reduce concerns that "cheap" international skills are being used to replace readily available domestic skills and provide improved data around the skills and specialisations being imported into Australia, for use in planning and curriculum development by tertiary education providers to supply graduates with the domestic skills in demand by industry'*.

During consultations, examples were given of visa holders entering Australia but lacking the level of skill required to properly perform the duties of their nominated visa occupation. Employers have claimed to have required visa holders to perform other lesser duties as they were not sufficiently skilled to perform the duties of the nominated position. This has also been used as an excuse by employers who have failed to pay the visa holder the salary of the nominated position.

The Electrical and Communications Association (ECA) notes a case where an ECA member sponsored eleven electrical power line tradespeople (linesmen) under a Subclass 457 visa from the Philippines. The sponsored employees did not have their qualifications assessed prior to leaving the Philippines. The Electrical Safety Office in Queensland have advised the ECA member that the only way the employees can receive a licence is if they return to the Philippines to be assessed and then return to Australia.

ECA has submitted that *‘the assessment of people seeking a 457 should be conducted by an authority under the control of DIAC, and that DIAC officers should be more aware of the additional requirements needed by people who seek to utilise their skills in a regulated environment once they begin working in Australia’*. ECA also recommends *‘that in instances where the assessment has not been conducted offshore, that provisions are made to allow for assessments to be conducted in Australia by a suitably qualified and registered organisation such as Registered Training Organisation that is scoped to deliver the training for the qualification being assessed’*.

The submissions of the Queensland Nurses Union noted that sponsors have brought nurses to Australia only to discover that their qualifications and / or experience was not sufficient for them to perform the duties of a registered nurse in the Australian health system. In such cases the nurses concerned have lost their positions and as a consequence lost their visa status and been removed from Australia. Sponsors of these nurses have shown a cavalier disregard for the disruption to their lives. Some nurses had sold homes and moved their families, apparently confident (on the basis of information supplied by agents and sponsors) of gaining permanent residency in Australia. Had more attention been paid to their level of skills and experience by sponsors and / or their agents such disruption would have been avoided.

Offshore testing would ensure that only employees possessing the necessary skills enter Australia. Currently, it is the practice of many responsible employers to skills test applicants in the country of origin or to utilise the services of competent recruitment agencies to carry out these tests. Doubt must surround the motives of employers whose purported requirement for skilled workers is such that they are prepared to recruit overseas, but who accept assurances about skill levels without properly satisfying themselves that the skills possessed meet their requirements.

### **Recommendations**

It is recommended that consideration be given to requiring, where practicable, offshore skills testing by a qualified workplace assessor employed by a Registered Training Organisation and acceptable to the Commonwealth for all occupations included on the standard list of occupations.

It is recommended that where offshore skills assessment is not practicable each visa application be accompanied by a statutory declaration signed by the employer stating that they are satisfied that the applicant possesses the necessary skill to perform tasks of the occupation to the Australian standard.

### 6.33 Labour market testing

One of the aims for the Subclass 457 program given in Section 4 was to safeguard employment opportunities for Australian workers. From the inception of the Subclass 457 program, LMT for 'non-key' activities was one of the mechanisms intended to ensure employers had tested local labour markets before seeking skilled workers from overseas.

LMT involved two main steps:

- checking to ensure that the positions involved had been properly advertised (described accurately) in the right places (appropriate media) and over a sufficient period of time (four to six weeks)
- checking to ensure that no suitably qualified Australians were overlooked in the selection process or had recently had their employment in these positions terminated.

The system proved cumbersome and difficult to operate effectively and was removed in 2001 when MSLs were introduced (see Issues Paper #1). Currently Labour Agreements are the only segment of the Subclass 457 visa program which requires prospective employers to demonstrate evidence of shortages in the required skills.

An example of the practical difficulties involved with assessing compliance with LMT requirements is that while the employer might be required to place an ad for a job, they could rightly claim that no applicants had the skills they were seeking and therefore a skilled worker from overseas is required.

The efficacy of LMT is also questionable in a situation of general skills and labour shortages. The Queensland Tourism Industry Council has advised that *'we are working with various initiatives to tap into domestic labour pools, including women returning to the workforce, indigenous Australians, people with disabilities, and we are promoting staff retention policies to industry. However, the available labour pool is shrinking and insufficient to accommodate current demand, let alone any future growth'*. In this environment it is difficult to justify the added impost of LMT.

The Australian Contract Professions Management Association is *'of the opinion that the current system, whereby we have a gazetted list of occupations that are open to sponsorship, already very efficiently fulfils the functions of LMT. This method is much less susceptible to abuse, is less expensive and is less complex than the previous system, which required a specific programme of advertising to establish skills shortages for each position nominated'*.

While mindful of the difficulties involved with LMT, a number of the submissions received by the Review were still in favour of implementing it in some form, as reflected in FECCA's comments that *'we nevertheless believe that some form of market testing, in particular within the lower paid and lower skilled categories is essential to ensure genuine areas of skills shortage'*.

While noting that *‘ensuring that employers make every attempt to fill skill shortages with Australian Workers before considering recruitment from overseas is a complex issue and any single approach will not be sufficient on its own’* the Queensland Government go on to suggest *‘further research is required to determine an efficient method to perform any LMT so that it is not unnecessarily onerous on employers, but which properly tests whether Australians with the required skills are available in the labour market’*.

Australia has committed, at the World Trade Organisation and under Free Trade Agreements, not to use LMT for some categories of persons that seek to enter Australia temporarily to supply a service, invest or sell goods. For example, the visa application of a manager or executive who wishes to transfer temporarily from the foreign office of a company to an Australian office of that company must not be subject to LMT. Australia has also committed not to limit the numbers of service suppliers from other countries that can take advantage of Australia’s specific commitments on temporary entry.

It should be noted that such commitments do not restrict the Government’s ability to assess the eligibility of each individual who applies for a visa (including the use of LMT in certain circumstances) or to deny entry to specific persons that do not meet such criteria. As noted above, Australia’s current international obligations with regard to not using LMT apply only to certain categories of service suppliers.

It has been argued that LMT is both unnecessary and ineffective in its application to the Subclass 457 program. Often there is general agreement that a skill shortage exists in relation to a particular occupation. In such cases there is not always agreement that the skill is in short supply on a general basis throughout the country. While a particular trade may be in short supply in the north-west of Western Australia, there may be unemployment in the same trade in the outer suburbs of Sydney.

There has been clear evidence presented to this Review that Subclass 457 visa holders have been sought to fill vacancies in situations where other employers paying the appropriate market rate have sourced labour locally. The integrity of the program is compromised if employers are permitted to source cheap labour from overseas rather than offer a wage sufficient to attract local labour.

While LMT of the type required in the early years of the scheme (advertising a position for a set period without success) may not be an effective manner of testing the market, some mechanism should be adopted to ensure that the program is not compromised by providing what amounts to a Government subsidy to employers who are reluctant to pay the market rate for the skill required.

The lists of occupations that may be subject of a temporary employment visa should be rigorously compiled on the basis of current disaggregated data and in consultation with relevant industry parties. The lists should be subject to frequent revision to ensure the maximum responsiveness to labour market fluctuations.

Where an employer is seeking to sponsor a number of employees on the Subclass 457 visa the employer should be required to do so under the terms of a Labour Agreement. In order to ensure that the labour market is not distorted by numbers of employees being sourced from overseas in circumstances where there is no real shortage of the particular skill, a sponsor seeking more than 20 workers with salaries under \$100 000 should be required to be a party to a Labour Agreement. During the negotiation of the Labour Agreement and consultation

with the industry parties the sponsor should be required to provide supporting evidence of the need for the types and numbers of workers sought including steps taken to source labour locally. Proposed Registered Employment Authorities (REAs) may be suitable bodies through which to test the sponsors' claims.

### **Recommendations**

It is recommended that applications for Subclass 457 visas be considered with reference to the skilled migration lists recommended elsewhere in this report.

It is recommended that an employer seeking to sponsor more than 20 workers from the standard list of occupations (excepting those with salaries in excess of \$100 000) should be required to be a party to a Labour Agreement.

### **6.34 The training requirement**

Under the Migration Regulations, a part of the approval process for sponsorship is that the Minister is satisfied that the applicant has *'a satisfactory record of, or a demonstrated commitment towards, training Australian citizens and Australian permanent residents in the business operations of the applicant in Australia'*. A DIAC officer makes this decision on the Minister's behalf.

This is a consideration at the time of the sponsorship application. DIAC monitors compliance with this undertaking and the outcome of monitoring is used for subsequent applications for sponsorship, although stakeholder feedback indicates that failure to comply appears to have minimal impact on existing sponsorships.

Employers using Subclass 457 visa arrangements often cite difficulty in meeting the training requirement due to a perceived lack of flexibility with regard to industry characteristics. Potential solutions include allowing more options for meeting the training requirement, some possible examples might include:

- a minimum prescribed percentage of the workforce comprises apprentices and trainees
- a minimum prescribed percentage of the workforce comprises first year graduates
- support for approved University scholarships
- a minimum level of expenditure on structured training for each Australian employee
- active participation in nominated labour market programs, based on a regularly updated list of such participants provided by relevant agencies to DIAC
- a contribution per Subclass 457 employee per annum to an approved industry training fund or a State government training fund for the training of Australians.

In relation to the suggestions outlined above, a number of submissions to the Review supported similar proposals related to meeting and assessing the training requirement.

In their submission to the Review Swift Australia note that *'it is extremely possible in the current economic conditions that the lack of available employees, leads to an inability for the employer to train potential employees'*. They go on to suggest that *'provided the sponsor can demonstrate commitment to training its existing workforce and despite those efforts it still suffers from a "skill" and / or "labour" shortage, the training requirements imposed in a Labour Agreement should be flexible'* (see below for further discussion on Labour Agreements).

The Australian Contract Professions Management Association have suggested that *'the on the job training of highly skilled labour must be acknowledged and factored into compliance with any training obligations. This currently has no recognition'*.

The ACTU are in favour of more stringent training requirements, stating *'the ACTU strongly believes that the use of temporary overseas workers should not be permitted unless the employer can demonstrate:*

- *a history of accredited training*
- *a successful outcome of this training (measured in employment outcomes)*
- *retention of trained workers in the workforce*
- *an ongoing program of, and commitment to, training in the areas of the skills shortage*
- *a demonstrated on-going financial investment in training in the area of the identified skill shortage. This investment may be directed at new entrants into the workforce or up skilling existing workers'*.

The RCSA is *'especially concerned about the training benchmarks that need to be met within the On-Hire Labour Agreement ... training benchmarks for the on-hire industry should not place employers of on-hired employees at a comparative disadvantage when considered against the training benchmarks applying to traditional (direct-hire) employers'*. They go on to suggest that one mechanism to achieve this would be for *'any training assessment to consider the joint training commitment of both on-hire employer and the host organisation (client)'*.

It is clear that while most stakeholders support the requirement for users of the temporary skilled migration program to demonstrate a commitment to providing training to Australians, the extent and type of commitment that should be demonstrated is a subject of great debate.

The current commitment, when properly applied, has been found to be too rigid and in some cases impossible for some, particularly small, employers to meet. The commitment has been rarely enforced or even monitored. If the training commitment is to remain part of the scheme it should be meaningful and capable of enforcement.

DEEWR should be tasked with compiling a menu of training examples from which employers, of all sizes and types, can select appropriate means by which their commitment to training Australians can be demonstrated, with particular reference to the provision of training designed to reduce reliance on the importation of those skills being sourced overseas. The content of a number of submissions to the Review made it clear that many employers did not understand the nature of the commitment to training that was being sought. Some appeared to believe that the expectation was that they would devote a level of resources to training the sponsored visa holders. Many employers may have devoted a percentage of the

payroll to training but in areas unconnected with ensuring that Australians were being trained in the skills being sought overseas. For example, some on-hire agencies devoted training money to training administrative and managerial staff in the agency but contributed nothing to training in the area of the supposed skill shortage.

Employers seeking to benefit by bringing overseas workers to Australia should be required to make some tangible commitment to the training of Australians in the skills sought. The commitment could be commensurate with the level of overseas labour employed but should also have a real connection to training in the appropriate area of skill. Large employers could be required to hire a percentage of apprentices or new graduates. This, at least, might ensure that Australian graduates were not passed over for employment opportunities because they lacked relevant work experience and because it is more cost effective to employ experienced employees from outside Australia. Small employers could participate in industry-wide training schemes or contribute to scholarship or training funds in appropriate areas.

The menu of training options devised should be such that sponsors of temporary skilled labour could demonstrate that their use of that labour would not contribute to the de-skilling of Australians in the skill area being sourced.

Once established the training commitments should be sufficiently flexible to meet all reasonable circumstances, however, in exceptional cases, further flexibility could be provided through the terms of a Labour Agreement.

### **Recommendation**

It is recommended that DEEWR be requested to provide, after consultation with relevant industry bodies and Government agencies (Skills Australia, industry training councils, for example) a list of training options from which employers can choose in order to demonstrate a meaningful and focussed commitment to training. The menu should be flexible and should contain options capable of being monitored and enforced.

## 6.4 Labour Agreements

One of the terms of reference for the Review was to examine *'the opportunities for Labour Agreements to contribute to the integrity of the temporary skilled migration program'*. Labour Agreements allow for the negotiation of terms and conditions surrounding visa grants and companies are able to request concessions where standard visa arrangements do not meet their needs. These concessions are usually balanced by other terms of the Labour Agreements which provide additional protections for visa holders. Labour Agreements most often cover occupations within ASCO groups 1-7.

Given the potential problems noted earlier with regard to workers in ASCO group 4 it has been argued by some stakeholders that the current Subclass 457 visa should only be available for workers in ASCO groups 1-3. The Australian Contracts Professions Management Association *'strongly suggest that workers below these levels should not be part of the 457 program. The Labour Agreement approach is more suited to this latter category. Most of the difficulties have arisen because the program has been used to bring unskilled or very lowly skilled people into Australia'*.

The number of Labour Agreements in effect changes constantly; some expire, others are renewed and new agreements are approved. As at 30 September 2008 there were 71 current Labour Agreements, of these 16 were with the meat industry and 24 with the on-hire industry (for both of these industries the Labour Agreement is the only avenue to access Subclass 457 visa workers). The terms and conditions of a further 108 Labour Agreements were under negotiation including 12 within the meat industry and 68 with the on-hire industry.

A number of older Agreements contain negotiated salary concessions based on identified industry requirements. Language concessions (where the minimum requirement of English language proficiency has been adjusted or waived due to exceptional circumstances) have also been granted for several of the agreements. In the latter Agreements additional requirements for interpreters, language training and information in languages other than English are usually included.

The Australian Meat Industry Employees' Union *'acknowledges that the framework of obligations established by the meat industry labour agreement is preferable to the arrangement that previously existed under the general visa subclass 457 regimen'* though they go on to caution that it would be *'a mistake to expect similar results in labour agreements if they are to operate in significantly different industrial circumstances'*. They stressed the important role that existing Certified Agreements, reflecting industry standards, played in the Labour Agreement process.

The question was posed in Issues Paper #1 as to whether State governments should play a greater role in the negotiation process for Labour Agreements within their borders. The general tenor of the response to this question is typified by the Blue Care / TriCare submission which suggested that *'State and Territory Government involvement in Labour Agreements should not be a mandatory requirement. Such involvement would only add to the bureaucracy, time and complexity of negotiations. Industries, employers or projects subject to the Labour Agreement often operate across multiple States and Territories, and engaging in specific negotiation with each would add significant time to the process and add to the risk of being able to finalise a Labour Agreement. Furthermore, in some circumstances such as the health and community services sector the States and Territories are major providers of services in competition to industry, and as such could create conflicted interests if there was a mandatory involvement'*.

While supporting the use of Labour Agreements a number of stakeholders are concerned, as were Commerce Queensland, that *'these agreements take an inordinate amount of time to finalise. There is a strong case to provide the relevant departments additional resources to ensure these agreements are negotiated in a timely manner'*. The Queensland Resources Council (QRC) has similar concerns noting *'the benefits of a labour agreement are far outweighed by the time and resources it takes to negotiate the Terms of Reference of a labour agreement. Furthermore, labour agreements are restrictive and inflexible'*.

The RCSA is also critical of the process for negotiating Labour Agreements, stating *'the lack of communication and cooperation between DIAC and DEEWR has been extremely frustrating for RCSA. It is absolutely critical that there is "one voice" in relation to Labour Agreements'*.

It is noted that the weight of stakeholder opinion is that current administrative procedures supporting the negotiation and approval of the Agreements appear cumbersome. The relative paucity of Labour Agreements outside the meat and on-hire industries would seem to support that view. A number of participants in Labour Agreements have also commented on difficulties in meeting the training requirement, as outlined above. Adopting a more streamlined set of procedures might improve turnaround times and lead to greater uptake.

The AIG questioned the role of Labour Agreements suggesting *'labour agreements can be very useful for companies requiring, for example, advance agreement for large numbers of employees to work on big projects. However, they should not be seen as a replacement for a 457 visa or a way of addressing shortcomings in that visa. It would be better to have a visa that worked rather than increasingly channelling sponsors through this route'*.

It is clear that there is not general support for the system of Labour Agreements that is currently part of the Subclass 457 visa program. The view expressed by AIG that Labour Agreements should not be invoked to address shortcomings in the wider Subclass 457 visa scheme has merit. Labour Agreements are, however, useful to selectively apply additional safeguards to areas of the program that require these without burdening other areas of the program with unnecessary and unwarranted regulation.

Very few problems concerning integrity or exploitation are found affecting visa holders who earn high salaries and work in white collar professional or semi-professional occupations. As noted elsewhere, steps taken to reduce the capacity for exploitation of visa holders employed in trades or semi-skilled occupations and paid salaries closer to the required MSL have unreasonably restricted the flexibility concerning hours of work and salary arrangements normally enjoyed by individuals working in highly paid occupations. In order to address this problem greater use should be made of a system of Labour Agreements. These should be redesigned so as to be simple, plain English expressions of the additional obligations entered into by a sponsor in order to be permitted to employ workers sourced from overseas where the level of wages to be paid or the position to be occupied by the visa holder is such that without additional requirements attached to the visa grant there is a potential for exploitation of the workers concerned or for labour to be sourced which might result in a failure to make training opportunities available for Australian workers.

Under the current program some occupations not generally available under the scheme have been permitted to be sourced by sponsors from regional areas where permitted by RCBs. Concerns arising from the RCB system are dealt with in Section 6.5. Given these concerns and the particular problems involved with sourcing semi-skilled labour without compromising the integrity of the scheme, it would be appropriate if occupations properly described as semi-skilled (requiring limited training and not included on the standard lists of occupations in respect of which this class of visa could be issued) could be sourced in exceptional circumstances under an appropriate Labour Agreement. In such cases the Labour Agreement could be used to ensure sponsors who were permitted to source semi-skilled labour were committed to arrangements designed to ensure that local labour would be available for the positions over time.

One of the main complaints about Labour Agreements arises from the requirement that both DEEWR and DIAC approve each agreement. Each department has primary responsibility for particular aspects of such agreements. While the policy responsibility for matters such as training, and skill shortages rest with DEEWR, DIAC will need to ensure that immigration concerns are met. There is no reason why Labour Agreements can not be quickly and efficiently negotiated by representatives of both portfolios. If an appropriate level of resources is allocated to both agencies to meet the demand for Labour Agreements, clear guidelines developed, and the process conducted as transparently as possible, sponsors will be sufficiently aware of the requirements to ensure rapid processing.

Labour Agreements should only be approved in situations where there has been genuine consultation about the terms with the industry stakeholders (including relevant unions) and any concerns raised have been sufficiently addressed. Support from the relevant union would be influential in the Labour Agreement process.

## **Recommendations**

It is recommended that Labour Agreements be utilised in the following situations:

- where mandated for particular industry sectors or groups (e.g. on-hire companies, meat industry)
- for occupations not included in the standard occupation lists to be compiled by DEEWR and DIAC
- where an employer intends to sponsor more than 20 visa holders (in positions with salaries of less than \$100 000).

It is recommended that appropriate resources be made available to DEEWR and DIAC to enable Labour Agreements to be concluded in a timely manner.

## 6.5 Regional concessions

The significant expansion in the range of concessions to enable higher and more targeted levels of skilled migration to regional Australia and low population growth centres began with a report in 1996-97 from the Commonwealth / State Working Party on Skilled Migration (CSWP). The report recommended mechanisms to permit States and Territories to use aspects of the migration program to support their individual development strategies including:

- addressing skill shortages
- encouraging a more balanced dispersal of the skilled migrant intake
- attracting overseas business people.

Over the subsequent 10 years, the CSWP has continued to meet regularly to expand and refine the range of state and regional migration mechanisms. These fall into three main categories:

- mechanisms that provide a concession where a State / Territory government provides sponsorship
- mechanisms that provide a concession based on family or study linkages
- mechanisms that provide concessions for employer-sponsored visas.

In the case of the Subclass 457 visa the third category above applies. Access to these concessions requires certification by a Regional Certifying Body. There has been a variable pattern of uptake of the RCB function by a range of regional bodies, in some states RCBs are State Government instrumentalities, in others RCBs may be the local Chamber of Commerce or industry peak body. Concerns have been expressed that where RCBs are constituted by industry or employer organisations, the employers seeking access to concessions may often be members of those organisations. In such circumstances there is a perceived, if not actual, conflict of interest.

The Queensland Government has suggested *‘that payment of only 90 per cent of the MSL in regional areas may well disadvantage visa holders. A recent report by NATSEM found that housing costs tend to be lower in regional areas but this factor is offset by higher fuel and food prices, with fuel prices growing exponentially in the past 12 months. In remote areas prices are much higher overall. Paying the full MSL in regional and remote areas may also attract more workers to these areas, which continue to experience significant skilled vacancies’*. The ACS notes *‘it is worth considering that a lower MSL for regional areas might make it more difficult to attract appropriately skilled staff to these areas’*.

As the Australian Meat Industry Council (AMIC) note *‘a regional concession assumes that there is a level of payment set outside of the region such as the Minimum Salary Level in the current system. If the payment rate is the actual {rate of pay} for an equivalent occupation in a specific region a concession is not required’*. The Government of WA agrees, stating *‘regional salary concessions should not be available, particularly if market rates are used for setting the salary level. Whilst acknowledging the current cost pressures in some regions, the Government of Western Australia does not consider it appropriate to vary salaries on a regional basis in the current labour market’*.

The ACTU is also of the view that *‘the process of establishing regional and non-regional areas for the purpose of the 457 visa scheme should be abolished. There is no justification for the establishment or application of different criteria, including labour market testing, minimum skill levels or payment of different rates of pay, based on different parts of the country’*. Stakeholders have suggested that more effective measures might be wider availability of regional tax concessions or allowing certain non-salary benefits to be included in allowable salaries for workers in these areas.

A number of the integrity issues which have arisen in the program have emanated from the decisions of RCBs. There have been claims that regional concessions to the MSL have been granted in circumstances where such concessions were not warranted. Additionally, problems have arisen where the occupation approved by the RCB was not the position that the visa holder subsequently occupied. Given the wide range of organisations constituting RCBs concerns were raised during consultations about inconsistencies in decision-making, forum-shopping, lack of transparency and a lack of rigor applied to the process by some RCBs.

Where a regime of market rates is mandated for payment of the visa holders there is no need for any specific regional concession. If occupations not included on the lists of skilled occupations (e.g. semi-skilled occupations) are accessed only by means of a Labour Agreement, regional considerations can be addressed through that mechanism.

It is understood that the Government is considering replacing RCBs with REAs. If established and sufficiently representative those Authorities could be consulted in the Labour Agreement process.

### **Recommendation**

It is recommended that the Government remove regional concessions from the Subclass 457 visa program.

## Section 7 - Integrity and Exploitation

### 7.1 Introduction

For further background on the topics in this section see Issues Paper #2 which covered the English language requirement and Occupational Health and Safety (OH&S) and Issues Paper #3 which considered other aspects of integrity and potential exploitation.

### 7.2 The pathway to permanent residency

Subclass 457 visa holders regularly move from being temporary migrants to having permanent residence status. In 2007-08 over 20 000 Subclass 457 visa holders (both primary and secondary applicants) were granted permanent visas, primarily on the basis of sponsorship by an Australian employer.

Stakeholder feedback has highlighted that many Subclass 457 visa holders in ASCO major groups 4-7 see the Subclass 457 visa as a pathway to permanent residency in Australia. It has been made clear during the consultation process that where a visa holder has permanent residency as a goal that person may endure, without complaint, substandard living conditions, illegal or unfair deductions from wages, and other similar forms of exploitation in order not to jeopardise the goal of permanent residency. These situations are exacerbated where the visa holder is unable to meet the requirements for permanent residency via an independent application.

As one example, Iman International Health Plans suggest that Subclass 457 visa holders in ASCO group 4 occupations frequently lack health insurance *'and if seriously ill are just dumped at the nearest hospital emergency room. Very few cases are ever reported, as they are prepared to tolerate abuse and exploitation as they reach for the glittering prize of permanent residency after two years'*. In their submission to the Review, FECCA note that *'consultations have revealed a concern that sponsoring employers may be reluctant to assist workers in gaining permanent residence preferring to maintain the contractual arrangement that is to their benefit'*.

The Ethnic Communities Council of Queensland propose that *'people residing and working in Australia on subclass 457 visas need to be recognised as migrants, rather than just "visa holders"'. A majority of them transfer to permanent residency visas at some stage, and it is a false economy not to invest in providing support for migrants to effectively settle and integrate when they first arrive'*.

Under the current system a Subclass 457 visa may be granted for up to 4 years and there is no age limitation on those who can apply for the visa. As Subclass 457 visa holders can apply for new Subclass 457 visas in Australia on an unlimited number of occasions, some visa holders could potentially remain in Australia for a significant period of time on that visa.

Subclass 457 visa holders can also apply for certain permanent residence visas while in Australia, through such mechanisms as the Employer Nomination Scheme (ENS), the Regional Sponsored Migration Scheme (RSMS) and Labour Agreements through employer sponsorship. There are concessions for onshore Subclass 457 visa holders applying for these visas.

As the ENS and RSMS are permanent visas, they are limited to people who are less than 45 years old. There is, however, scope to waive the age requirement for these visas where there are 'exceptional circumstances', such as when special skills are in strong need and a person can not be found to fill the vacancy. Some Labour Agreements also include requirements relating to the obtaining of permanent residence and these too can include variations to the usual age requirements.

ENS applicants are not required to have formal qualification assessments if they have worked in Australia for at least two years in their occupation or profession and at least 12 months with the sponsoring employer. Offshore ENS applicants are required to have formal assessments and have worked for at least three years in their occupation after graduating or qualifying in their profession. RSMS also provides concessions for Subclass 457 visa holders in the lower qualified occupations to access permanent residency, particularly where they have been sponsored by their Subclass 457 employer.

Other permanent visa options for Subclass 457 visa holders while in Australia are limited to family stream visa subclasses. In order to apply for the General Skilled Migration (GSM) subclasses, the Subclass 457 visa holder must be offshore.

Many stakeholders expressed concerns that the permanent skilled migration program was taking second place to, and in some ways being subverted by, the Subclass 457 visa program.

Visa holders expressed concerns that their sponsors had assured them that they would nominate them for permanent residence but failed to do so. Often information supplied to visa holders (by employers and migration agents) concerning the possibility of attaining permanent residency was misleading.

If the Subclass 457 visa program is to be viewed largely as a pathway to permanent residency then the requirements for entering Australia under both schemes should not be significantly different. It is clear that many employers who sponsor Subclass 457 visa holders move as quickly as possible to nominate the visa holders for permanent residency. This is particularly in relation to professionals and in areas of great demand, such as nursing. Fewer visa holders in the trades and lesser skilled areas move on to permanent residency although it is the expressed intention of a large number from this group. There is a major concern that employers of visa applicants at the lower end of the skills matrix prefer to retain those persons under temporary visas in order to increase the level of control over them. This concern has a basis in reality. Many visa holders are reluctant to take any action, including looking for other employment, which might antagonise their current employer for fear of losing their job and their ability to remain in Australia.

Under current arrangements it is difficult for a Subclass 457 visa holder to gain permanent residence in Australia unless sponsored by an employer. It is also necessary for the visa holder to have been employed by the sponsoring employer for a certain period. These requirements unfairly increase the power of an employer over a visa holder whose goal is permanent residency.

The Subclass 457 visa program should not be able to be used as a device to obtain long term residence in Australia for applicants who would not qualify under the permanent migration program. Visa holders should not be permitted to live in Australia, in vulnerable circumstances, under a temporary visa which is repeatedly renewed. The temporary nature of the visa should be emphasised.

It would contribute to the integrity of the scheme if applicants were made aware of the qualifications for permanent migration prior to entering Australia and there was a finite life to the temporary visa. Most visa holders should be in a position within 8 years of being granted their first temporary visa to gain permanent residency or to leave if unable or unwilling to take up permanent residency. Very few Subclass 457 visa holders remain in Australia beyond 8 years (DIAC estimates the quantum as in the order of 1-2 per cent) and instituting a limit reinforces the temporary nature of the visa.

### **Recommendations**

It is recommended that no visa holder be permitted to remain in Australia for more than 8 years in total on a Subclass 457 visa. The visa is to last no more than 8 years (e.g. two 4-year visas or four 2-year visas etc.). Temporary visa applicants must go offshore before reapplying for a visa after the 8 year period.

It is recommended that more comprehensive information on pathways to permanent residency be provided on the DIAC website and such information should be designed to remove the perception that the Subclass 457 visa is a guarantee of permanency. Visa applicants should be provided with as much official information as possible to counteract misleading information supplied by agents or sponsors.

It is recommended that the Subclass 457 visa be renamed the 'Temporary Employment Visa' in all publicly available information to reinforce its temporary nature.

It is recommended that the current procedures which give precedence to employer nomination for permanent residency for visa holders be rebalanced to give greater weight to the length of time worked by the visa holder for any Australian employer under the temporary visa. It should not be necessary for Subclass 457 visa holders with a number of years of employment in Australia to apply offshore for permanent residency in circumstances where the application is not supported by an employer.

### **7.3 English language requirement**

The English language requirement was introduced to the Subclass 457 program on 1 July 2007. Before 1 July 2007 applicants were only required to demonstrate English language proficiency where required for licensing or registration in their nominated occupation.

The requirement is designed to ensure overseas workers in Australia on Subclass 457 visas are able to:

- understand and respond to OH&S risks and practices in the workplace
- raise any concerns about their welfare with appropriate authorities
- benefit Australia by sharing their skills with other workers
- participate more effectively in the Australian labour market.

The main characteristics of the requirement are:

- applicants are required to have proficiency in English equivalent to an average score of 4.5 across the four test components in the International English Language Testing System (IELTS) test (the IELTS test bands are given in Attachment C)
- applicants must meet a higher level of English proficiency where this is required for licensing or registration in their nominated occupation (such as for nurses and doctors).

All primary applicants must meet the English language requirement unless they have been nominated for a position that does not require English language for licensing or registration and any one of the following exempted person categories apply:

- their first language is English and they are a passport holder from Canada, New Zealand, the Republic of Ireland, the United Kingdom or the United States of America
- their nominated occupation is within the highly skilled major groups 1-3 of the ASCO, comprising managers, administrators, professionals and associate professionals
- they are to be paid at least a salary specified in a legislative instrument (initially a gross base salary of \$75 000 excluding all deductions and based on a 38 hour week) and the grant of the visa is of benefit to Australia. This salary is the minimum required to be paid for the duration of the visa
- they have completed at least five years of continuous full-time secondary and / or tertiary education at an institution where at least 80 per cent of instruction was conducted in English
- they hold a Subclass 457 visa that was granted before 1 July 2007 and have applied for a new Subclass 457 visa with a proposed period of stay that would not extend beyond the end date of their current visa.

Consideration was given to the impact of the English language requirement on Subclass 457 visa holders who were granted their visas prior to the introduction of the English language requirement on 1 July 2007 and who want to apply to renew their visa. Stakeholder feedback on their status was strongly in favour of allowing this group an exemption to the language requirement on visa renewal where they had not been the subject of an adverse report or an OH&S concern connected to English language ability.

A number of stakeholders have suggested that the language exemption for workers on salaries above \$75 000 is arbitrary, as typified by the CFMEU who state that *'the \$75K exemption is arbitrary and assumes competence where this may not exist. 457 Visa workers in our industries who are covered by CFMEU negotiated collective agreements will routinely exceed this exemption limit. These payment levels per se will have no immediate bearing on their English language skills. The impact on the integrity of the Subclass 457 visa process of this exemption is obvious and deleterious'*.

The majority of stakeholders consider that the English language requirement is not defensible from an OH&S perspective, with the NSW Government stating *'the view that an employee's inability to speak, read and write English contributes an unacceptable OHS risk in a workplace is not supported. Under the NSW Occupational Health and Safety Act 2000, employers have a legal duty to protect the health, safety and welfare of all people in their workplace. The legislation does not make reference to any specific language requirements'*.

Some other arguments that have been advanced in support of the English language requirement include concerns that overseas employees with minimal or no English language competency may:

- be uncomfortable about coming forward with complaints about their treatment, or about OH&S concerns, due to language barriers
- have an adverse impact on public services in small communities, particularly when arriving in large numbers with their families
- be at higher risk of non-compliance (through lack of comprehension) with Australian laws.

The importance of English language skills for migrant workers has been highlighted in a recent decision in the Victorian Magistrate's Court in favour of eight Chinese students where Magistrate Kate Hawkins noted *'these employees were foreign nationals without a working knowledge of the Australian industrial relations system. ... They were clearly not on a "level playing field" with other Australian employees. They were vulnerable due to their cultural background and less than perfect English skills'*.

The Australian Chamber of Commerce and Industry (ACCI) state *'ideally, business would prefer that the English language requirement of sponsored workers be determined solely by the employer, depending on the nature of the nominated occupation. However, if the government intends to continue regulating this aspect of the 457 program, ACCI recommends that a more flexible model be adopted for the English language requirement for 457 visa holders'*.

The ACS were one of the few stakeholders who argued for a higher level of English skills in their area of interest, suggesting *'that an IELTS level of 4.5 for 457 ICT visa applicants is too low for ICT professionals'* noting that most ICT professionals *'require excellent English language skills and an ability to communicate orally and in writing unambiguously to professionally execute their duties'*.

The NSW Government suggested Subclass 457 visa holders and other employer sponsored migrants *'bring skills and experience to the workplace and can contribute to the development of a skilled workforce. The possession of a good level of English would enhance the transfer of skills from migrant workers to others in the Australian workforce'*.

With regard to the current service provider, the MCA is *'concerned that the integrity or effectiveness of the International English Language Testing System (IELTS) used to assess the English language competence of skilled migrants has been questioned by mineral sector employers. Unfortunately there are worrying instances where skilled migrants have trouble with site inductions even though they have supposedly achieved the requisite IELTS attainment levels'*.

According to the DIAC website the department *'is seeking to expand the number of English language tests that are accepted as evidence of English language proficiency'*. The submission process for this review is due to close in December 2009 and should address concerns that stakeholders have expressed about the IELTS test. DIAC advise that the assessment of submissions received will be on a rolling basis and expect the first submissions to be reviewed and recommendations made to the Minister by early 2009.

As noted above, the Subclass 457 visa is frequently used as a pathway to permanent residency. With this in mind the NSW Government has suggested *'a more strategic approach to the temporary skilled migration program which would place temporary skilled migration within a broader settlement planning and social inclusion framework. The English language requirement for 457 visa holders should be considered within this broader framework, as English proficiency is vital to full participation and successful settlement in Australia'*. Under this model English language requirements and testing procedures should be consistent across visa classes which exhibit significant crossover.

OH&S laws have been developed in all Australian jurisdictions which give full recognition to the likelihood that there will be employees operating in Australian workplaces whose English language ability might be non-existent or limited. There is no justification based solely on OH&S grounds for imposing an English language requirement on holders of Subclass 457 visas where similar requirements are not imposed on other employees with limited English such as working holiday makers and refugees.

Justification for a limited level of English ability can be found in the status of the Subclass 457 visa holder as a temporary resident who is required to remain employed to retain the visa status. As noted elsewhere in this paper such persons, particularly those with a desire to become permanent residents and in the cohort with little bargaining power (i.e. not highly paid professionals) are particularly vulnerable. It is this group which may be unaware of their rights in the workplace and confused about their ability to complain about their circumstances. It is also this group who are most likely to be engaged in high-risk or hidden occupations.

Visa holders included in the most vulnerable group are more likely to be made aware of their rights and be able to communicate any concerns to the appropriate authorities if they have a level of English which enables communication with others in the community and in the workplace. As noted, many Subclass 457 visa holders wish to remain in Australia and gain permanent residency. Visa holders with limited English are less likely to attain this goal, remaining temporary and thus heavily reliant on their employer for their continued presence in Australia and consequently vulnerable and open to exploitation.

There would seem to be logic in the argument that the concerns which support the retention of the current English language requirement do not justify requiring that the visa holder meet the written component of the IELTS test. A limited ability to speak, understand and read English is sufficient to allay concerns about vulnerability and the opportunity for social interaction. An ability to reach a similar level of written English is unnecessary for that purpose.

So far as those visa holders who entered Australia prior to the introduction of the English language requirement are concerned, there are good reasons to allow them to renew their visas despite their inability to meet the English requirement. They should not be disadvantaged by a policy which was introduced after their arrival. It can be assumed that they have been operating effectively in the community during their initial stay. While believing that the problem should not be further exacerbated by continuing to admit vulnerable visa holders without any English skills, it would be unfair to curtail the stay of those who were permitted to enter under different rules.

As it is considered that the vulnerability of the visa holder is the primary justification for the English language requirement, it follows that the exemptions for more highly skilled and paid occupations (which usually demand a much higher level of English competence in any case) are reasonable. Given the exemptions otherwise proposed for positions attracting salaries above \$100 000 it would be consistent to raise the English language salary exemption to the same level.

## **Recommendations**

It is recommended that the current English language requirements attached to the Subclass 457 visa program be retained for all occupations included on the new standard list of occupations with the exception that applicants should also be found to have met their requirement should they achieve an average score of 4.5 without reference to the written component.

It is recommended that the relevant instrument be amended to exempt from the English language requirement those workers applying for visa renewal whose current visas were granted before that requirement took effect.

It is recommended that the current exemption from the English language requirement for visa holders earning salaries in excess of \$77 850 be raised to \$100 000 (or the FWA exempted salary level if different).

It is recommended that variations to the English language requirement should only be available in exceptional circumstances by means of Labour Agreements containing appropriate safeguards.

## **7.4 Occupational Health and Safety**

It must be noted that a person's visa status does not alter their right to a safe workplace and that the same OH&S requirements applying to Australian employees in any workplace apply to Subclass 457 visa holders employed there by Australian employers.

All States, Territories and the Commonwealth have OH&S legislation aimed at preventing workplace disease, injury or death. Each jurisdiction has legislation regulating OH&S and portfolios or agencies responsible for the administration and implementation of the legislation.

Subclass 457 visa holders are subject to the same workers compensation legislation and obligations as all other employees of Australian employers operating in Australian workplaces. In relation to workers compensation the situation of Subclass 457 visa holders who are sponsored by overseas business sponsors (i.e. the employer company is based in another country) is less clear. The NSW Government feel it is preferable *'for sponsors to have a physical presence within Australia, as it is almost impossible for OHS regulators to follow-up a breach of workplace safety legislation when the sponsor is located offshore'*.

The ACTU feel it is *'critical that workers on 457 visas have the capacity to recognise safety hazards in their workplaces and the confidence to refuse to work in an unsafe workplace and to inform relevant authorities or the union of suspected breaches by their employer of OHS laws'*. They further state that *'in order to ensure OHS for workers on 457 visas, it is imperative that trade unions have access to workplaces at which these workers are employed'* as *'no state or territory inspectorate in Australia has the capacity to visit more than a tiny fraction of the total workplaces it covers in any given year'*.

During consultations with OH&S agencies it was clearly put that those agencies have the same responsibilities in relation to all employees in workplaces regardless of their residency status. Some agencies suggested that it would be useful to be informed of the location of new visa holders in order to determine whether any information or assistance might be provided to the relevant employer.

Subclass 457 visa holders should be treated in the same way as all other employees in a workplace so far as OH&S matters are concerned. It would be useful for employers of visa holders to be reminded of their obligations in relation to employees with limited English and this could form part of information provided to sponsors by DIAC, in consultation with the relevant OH&S bodies.

The Minister for Immigration and Citizenship recently signed a new Memorandum of Understanding (MoU) between his department and WorkCover NSW that is intended to strengthen the monitoring of employers hiring overseas workers on Subclass 457 visas. Under the agreement DIAC and WorkCover NSW will exchange names and addresses of businesses that employ Subclass 457 visa holders, and information about workplace safety incidents. The Minister noted that in addition to this MoU, similar agreements are under consideration with Western Australian, Queensland and Victorian workplace safety authorities.

Some special consideration must be given to the concern raised by many stakeholders, including OH&S agencies, that Subclass 457 visa holders may be reluctant to complain about health and safety issues if there is a possibility that the employer may bring their employment to an end as a consequence. This is a legitimate concern. All visa holders should be issued with advice setting out their rights and obligations in relation to workplace safety and indicating the protections offered to them should they need to bring a safety issue to the attention of the authorities. Special consideration should be given by DIAC to the position of any visa holder involved in a safety complaint who may subsequently lose their employment. All such matters should be capable of being dealt with by the proper authorities in a timely manner and without the added complication of the visa holder being removed from the country.

### **Recommendations**

It is recommended that the numbers, location, occupation and industry of Subclass 457 visa holders be provided to relevant State and Territory OH&S authorities.

It is recommended that the rights of Subclass 457 visa holders who are involved in safety complaints are properly protected and the necessary mechanisms put in place so any visa holder required for the purposes of a prosecution of a complaint is permitted to remain in Australia for that purpose.

## **7.5 Secondary visa holders**

Secondary visa holders (who include the spouse and children of the primary visa holder) are entitled to work, without restriction, while in Australia. The chart in Section 4 of this paper shows that secondary visa holders comprise approximately 40 to 45 per cent of Subclass 457 visa holders. In some industries employment of family members is quite substantial, for example Teys Brothers employs approximately 500 primary visa holders and 300 secondary visa holders.

To be a member of the family unit, children are required to be under 18 years of age, or if over 18 years, to be financially dependent. The children of Subclass 457 visa holders may turn 18 while on their Subclass 457 visa. If they subsequently carry out paid work they may no longer qualify as dependent under the terms of the visa.

During consultations claims were made that children of primary visa holders who have left school have been persuaded to work under irregular and exploitative conditions for employers who have claimed that to 'regularise' the situation (and pay correct wages etc) would jeopardise that person's status as a dependent of the primary visa holder and their right to remain in Australia. Hallmark Immigration suggest that '*the "nil condition" applicable to spouses should be extended also to adult children*' (which would mean they no longer need to remain financially dependent to retain their visa), so that families are not faced with these problems.

Some stakeholders raised concerns about large numbers of Subclass 457 visa holders taking up residence in country towns and their dependents (generally spouses) being employed in unskilled positions otherwise occupied by locals. It was pointed out that such situations could generate community concerns despite there being recognition of the need for the skilled Subclass 457 visa holders. No case was put, however, for a blanket removal of dependents' work rights.

Where the entry of significant numbers of secondary visa holders to small areas could distort the local labour market these concerns could be addressed by having the working rights of dependents dealt with in Labour Agreements.

The position of working age children requires attention. The work rights of these secondary visa holders must be unambiguous if unscrupulous employers are to be dissuaded from using the surrounding uncertainty to obtain labour on exploitative terms by suggesting that a loss of dependent status could result in removal from Australia.

### **Recommendations**

It is recommended that secondary visa holders retain work rights but that any Labour Agreement providing for the migration of secondary visa holders should address the work rights of that group.

It is recommended that dependents be allowed full working rights upon attaining working age during the currency of the primary visa, until the dependent attains the age of 21 years. Children aged 21 years and over should be regarded as independent, unless they are in full-time study or have a medical condition that prohibits them from becoming independent.

## 7.6 The role of 'agents'

Stakeholders have mentioned a number of factors contributing to vulnerability through a lack of transparency in the current system. These include the role of both registered and unregistered migration agents. For some Subclass 457 visa holders the role of offshore 'agents' who are unregulated by Commonwealth legislation is a major integrity concern.

In a significant proportion of cases raised during consultation in which issues arose in relation to integrity, there was a concern about misinformation or lack of information provided by an 'agent', however described. These 'agents' can charge large fees (often paid offshore) about which an employer may never become aware. Other stakeholders have described situations where employers attempt to recover the costs of bringing a Subclass 457 visa holder to Australia from the visa holder's wages after they arrive, having being told by their 'agent' that this was acceptable.

With reference to the *2001–02 Review of Statutory Self-Regulation of the Migration Advice Industry*, the NSW Government have noted that the main recommendation outstanding from that process related to registration of migration agents operating outside Australia. To this end they '*maintain that either:*

- *industry registration be extended to migration agents operating outside Australia who submit applications for migration to Australia; or*
- *migration agents operating outside Australia be required to submit applications through a registered migration agent in Australia'.*

It is worth noting that DIAC publish on their internet site a list of recruitment agents in China who have committed not to charge applicants for placement in Australia, though initial feedback on the success of this initiative has been mixed. As the website notes '*there is no obligation on Australian employers to use an agent on this list*'.

It is recognised that the regulation of agents operating offshore is particularly difficult. Some stakeholders have commended the type of MoU entered into with the PRC and urged the extension of these arrangements. It has also been suggested that DIAC refuse to accept applications involving recruitment agents who have been found to have extorted visa holders or charged them a fee. Such measures may be difficult to implement, and while every effort should be made to reach agreements with countries where unscrupulous agents are known to operate in order to try to regulate those agents, it should be possible to take some action in Australia which may have the effect of curtailing some of the worst excesses.

It is of particular concern that some Australian employers have been complicit in sharing in moneys paid to agents by visa holders in order to obtain employment and visas. Others have deducted money from the wages of visa holders on behalf of agents. Both practices should be prohibited and employers found to be involved in such arrangements should lose sponsorship rights and be subject to monetary penalties.

It should be noted that changes to the Migration Act which came into effect on 27 October 2008, combined with policy, enable DIAC to not communicate with an offshore authorised recipient (that is an unregistered migration agent) if there are concerns about the person's professionalism, competence, conduct or character. In addition to this legislative amendment DIAC intends to pilot an administrative scheme to provide greater levels of assurance to the clients of offshore migration agents. This change should improve DIAC's capacity to influence offshore practice.

## **Recommendations**

It is recommended that efforts be made to reach agreements with other governments designed to regulate the activities of offshore agents involved in finding employment, or obtaining visas, for Subclass 457 visa applicants.

It is recommended that employers be expressly prohibited from entering into any arrangement for the purpose of obtaining money from a visa holder as a consequence of the visa holder obtaining the employment and be prohibited from making any deduction from the wages of a visa holder for payment to any agent.

### **7.61 Migration agents**

In Australia, in order to legally provide immigration assistance, individuals must be registered with the Migration Agents Registration Authority (MARA), unless they belong to certain exempted groups. An individual must meet several requirements in order to be registered. Amongst other requirements, these include that agents:

- meet specific knowledge requirements
- are an Australian citizen, permanent resident, or a New Zealand citizen holding a special category visa
- are a person of integrity / are of good character
- are over 18 years of age
- hold professional indemnity insurance of at least \$250 000.

During the consultation process for the Review there have been consistent claims that many migration agents have not carried out their tasks in a professional manner. The lack of information provided to clients by migration agents has been claimed as a major contributing factor in many cases of failure to abide by the visa conditions.

Other stakeholders have given examples of migration agents who tell employers that the Subclass 457 visa is only a 12 month visa (when they can in fact be granted for up to 4 years). Others have charged excessive fees. Stakeholders have described migration agents who act for both the employer and employee and who advertise their services as both migration and employment agents, charging both 'clients', despite the potential conflicts of interest issues that must arise.

FECCA suggests that *‘the current system of using private contractors that charge fees for services is open to abuse, particularly when the industry relies on self regulation’*.

A particular concern expressed by many stakeholders has been the level and variability of fees charged, Business SA suggests *‘a schedule of fees and charges would be good – as is the case in the Medical profession. If agents are charging above the scheduled fee, clients will then see how much above the scheduled fee is being charged which could be a signal for them to “shop around” for other agents to ensure they are getting value for money. Clients may choose to pay above the scheduled fee if they believe the agent’s service is superior’*.

The Migration Institute of Australia (MIA) contend that *‘the role played by migration agents in the Subclass 457 visa process is overwhelmingly positive and shows high levels of integrity and professionalism. The MIA is concerned that the activities of unregulated “middlemen”, especially those overseas, gets confused with the role of Registered Migration Agents’*.

Similarly, the Queensland Government consider that *‘the very great majority of migration agents registered with the Migration Agent Registration Authority are responsible people and act in the best interests of their clients, whether that client be an employer or a visa applicant’*.

The MARA is a division of the MIA, with the result that the Law Council of Australia *‘firmly believes that the MARA should be wound up and replaced by a statutorily independent regulator, similar to the Office of the Immigration Services Commissioner in the United Kingdom. The MIA / MARA has an irreconcilable conflict of interest which affects the perception of its capacity to carry out its regulatory function independently’*.

The Law Council of Australia *‘strongly submits that legal practitioners, who hold a current practising certificate, should not be required to register as a migration agent in order to provide “immigration assistance”’*. They go on to note that *‘requiring legal practitioners to register as agents to give practical assistance to visa applicants effectively amounts to dual-regulation, whereby migration lawyers must satisfy two regulatory frameworks with often inconsistent obligations and duties’*.

Employer groups, including Restaurant and Catering Australia suggest *‘that the confusion around salary level for overseas workers is fuelled by a reticence by some employer organisations to provide migration advice’*. They go on to suggest that the Migration Act be amended to allow for employer organisations *‘to provide migration advice to their members. This would ensure that the role of Associations in the provision of this information is clear and they are able to do so without fear of prosecution’*.

The Review notes that a number of migration agents are former employees of DIAC, which may lead to the perception that they enjoy some sort of favoured status or access to DIAC resources. The ACTU supports *‘DIAC employees being clearly informed about the required correct professional conduct’*.

It is noted that the system of migration agents and their registration, control and complaints mechanism is currently under review.

Many migration agents operate professionally and with integrity. This was acknowledged by stakeholders consulted during this Review. Unfortunately, the profession generally seemed to be held in poor regard. There is an alarming number of migration agents whose competence must be doubted given the significant numbers of sponsors who, when found to be in breach of their sponsorship obligations, claim to have been ill-informed or even blatantly misled by their agents. Employers consulted during the Review were often unaware of the extent of their sponsorship obligations. Many were content to allow agents to operate on their behalf and were never made properly aware of the obligations that attach to the role of a sponsor.

While registered migration agents may have a degree of competence in relation to Migration legislation their ability to deal with the many aspects of law which are necessary so as to properly advise on all aspects of the current Subclass 457 visa program is doubtful. Migration agents who are legally qualified and / or employed in legal firms are more likely to have, or have access to, the resources necessary to provide accurate advice concerning other areas of the law, particularly employment law, which impact on the rights and obligations of sponsors and visa holders. In these circumstances it is difficult to understand why fully qualified legal practitioners should be required to hold registration as migration agents in order to provide immigration assistance. The views of the Law Council of Australia, in this regard, seem persuasive.

There is currently a schedule of fees available on the MARA website as an indicative guide to the potential costs of a migration assistance matter, however given concerns about the level of fees charged by some migration agents that were expressed by a number of stakeholders consideration should be given to requiring the regulatory body responsible for them to ensure that registered migration agents provide prospective clients with an approved guide to the level of fees reasonably charged for particular services so as to enable those clients to make an informed decision about whether to utilise the agent.

Registered migration agents have a particular and special status under the Migration legislation. Much of the literature provided by DIAC, and by the agents and their professional body, gives the misleading impression that the agents are approved by or are agents of the government, which, of course they are not. If migration agents are to retain their special status under Migration law there should be an independent body in a position to rigorously scrutinise and regulate their behaviour.

As noted above, many migration agents are former DIAC officers. In some circumstances this will generate a conflict of interest. Measures should be put in place to ensure that all DIAC staff are aware of the problems that arise where contact is made by former colleagues who are migration agents. Staff should be reminded of their obligations under the APS Code of Conduct and clearly instructed on the correct manner of dealing with such approaches. Former DIAC staff acting as migration agents should not be given preferential access to services or information. The regulatory body should ensure that former DIAC officers do not, as migration agents, misuse their previous status.

## **Recommendations**

It is recommended that there be enhanced scrutiny of the operations and conduct of migration agents.

It is recommended that the procedure for making complaints against migration agents be provided to all prospective clients together with a schedule setting out the standard fees generally charged for particular services.

It is recommended that all official documentation sent by DIAC to migration agents be copied to the clients of those agents.

It is recommended that DIAC information be amended so that any reference to the role of migration agents should make it abundantly clear that while these agents are registered pursuant to a legislative process, they are not government officials and no responsibility is taken for their actions or conduct.

It is recommended that consideration be given to removing the requirement for legal practitioners with practising certificates to be registered migration agents in order to provide immigration assistance.

It is recommended that there be clarification of the ability of staff of community organisations and similar bodies who are not registered migration agents to provide limited immigration information and assistance without breaching the terms of the legislation. If necessary, changes should be made to the legislation in order to allow these organisations to assist visa holders, in particular.

It is recommended that information be widely disseminated concerning the ability of DIAC staff to provide assistance with immigration procedures.

### **7.62 On-hire agencies**

On-hire (or labour hire) firms have been significant users of the Subclass 457 visa since it began in 1996, especially in the Information Technology industry, but increasingly in other areas. These firms generally operate by recruiting and employing skilled workers and placing them in client sites. Since 2007 the on-hire industry has been limited to accessing Subclass 457 workers through the means of Labour Agreements.

Where aspects of the employment relationship are shared between the on-hire firm and an end-user client, identification of the sponsor for compliance with sponsorship undertakings can become problematic. Difficulties have also arisen with management of Subclass 457 visa holders who are unemployed between contracts, with third parties interposed between the on-hire firm and the end-user client, and with compliance with Subclass 457 training requirements. There have been examples in the past where there has been some confusion (actual or claimed) about who the employer is, with some hire firms claiming that once the employee is placed they are no longer responsible for meeting Subclass 457 visa requirements.

Other concerns that have been raised by stakeholders with regard to the industry include overseas recruitment standards, the level of charging of both employees and employers, and possible displacement of Australians (the latter has been a particular concern within the ICT industry). As one stakeholder has stated, *'Growcom believes it is essential to include a review of labour hire firms and other similar service providers. The Queensland horticulture industry is becoming increasingly concerned with the amount of fraudulent behaviour occurring within this sector'*.

The Labour Agreements utilised in the on-hire sector clarify employment arrangements and give greater force to training commitments required of on-hire employers, but have been criticised for inflexibility and time necessary to conclude negotiations. The RCSA has stated their concern *'about the lack of information being made available to substantiate the discrimination against on-hire firms in relation to accessing the Standard Business Sponsorship within the Subclass 457 visa system'*.

While noting the on-hire industry's concerns over the current requirements, the integrity of the program is compromised where there is no certainty as to the particular position that the Subclass 457 visa holder may occupy at any given time, or who will be responsible for the control and supervision of the visa holder. The use of Labour Agreements ensures that workers are hired in areas of labour shortage and are only available to fill known vacant positions.

The situations of a visa holder sponsored by an on-hire firm and a visa holder sponsored by and working directly for an employer are quite different. In the case of an employer sponsored visa holder the particular position and workplace in which the visa holder is to operate is known and unlikely to alter over the period of the sponsorship. The workplace of a visa holder sponsored by an on-hire company may change on a regular basis, together with the working conditions and the nature of the work performed (within the terms of the visa).

The chances of a visa holder losing their employment status and thus their visa status are higher if the visa holder has been sponsored merely on the basis of a strong likelihood of employment being consistently available rather than for a particular position in a particular company; the majority of on-hire employees, whether visa holders or not, have far more precarious employment than direct employees. A company does not have to give any reasons or have any justification for dispensing with the services of a worker obtained from an agency. In such cases the on-hire worker has no remedy if treated unfairly or illegally as the on-hire company may rely on the fact that the worker was no longer required by the contracting company and can claim that the decision to terminate was not that of the on-hire company.

As the CFMEU suggest *'Labour hire companies raise more issues for compliance ... site visits in relation to labour hire companies must be made to every individual employer where their 457 workers are located, not simply to the office of the labour hire company notionally "employing" these workers'*.

An additional concern relating to on-hire companies as sponsors is that employers who formerly sponsored Subclass 457 visa holders and who may have breached sponsorship obligations so as no longer to be approved sponsors may continue to source vulnerable workers through on-hire agencies.

Given all these matters, the requirement that on-hire companies sponsor workers only under the terms of a Labour Agreement is justified. Most importantly, the imposition of conditions under Labour Agreements can ensure that these companies make some contribution to the training of Australians. It is important that every effort is made so as not to encourage employers to source skilled workers from overseas rather than investing in training locals.

### **Recommendations**

It is recommended that Labour Agreements be retained as the only manner in which on-hire companies can sponsor under the Subclass 457 visa program.

It is recommended that additional resources be directed to monitoring of visa holders from high risk groups sponsored by on-hire companies.

## 7.7 Mobility

Limited mobility is a factor in placing employees in a vulnerable situation in the workplace. If an Australian worker is being exploited at work they generally are free to move to another employer. A number of factors inhibit the ability of Subclass 457 visa holders to move to alternative employment.

Actual or perceived bonds to a particular employer are potentially exacerbated by the conditions of grant of the Subclass 457 visa. Visa condition 8107 (given in full in Attachment C) is applied to all Subclass 457 visa holders. It states that the visa holder can only work for the one employer and could be seen by the visa holder as bonding the employee to the employer AND prohibiting work for a third party. This visa condition contributes to a perception that a Subclass 457 visa holder is ‘bonded’ to their sponsor for the length of their stay in Australia.

That such perceptions exist are substantiated by employer submissions to the Review supporting positions similar to that of Blue Care and TriCare’s that the Commonwealth should ‘*establish mechanisms to discourage transfer of employment and poaching*’, with Horticultural Skills Australia having the view that ‘*people on 457 visas must not be allowed to change their employers whilst in Australia*’.

Visa holders have complained that they can be ‘tied’ to a particular employer by the difficulty of having their overseas qualifications recognised in Australia. While the initial employer may have been content with the visa holders overseas qualification or experience a new employer may require evidence that the skill is equivalent to an Australian qualification.

A further factor leading to the perception that a Subclass 457 visa holder is ‘tied’ to the sponsor may be the cost associated with bringing a Subclass 457 visa holder (and often dependants) to Australia. Many employers who sponsor Subclass 457 visa holders expend considerable amounts of money to do so. Some stakeholders have noted that the fact that this money has been outlaid gives some sponsors the impression that they have a claim or entitlement to the visa holder’s services.

These views contrast with the findings of the ERG who stated ‘*firms who have invested time and resources on the sponsorship and nomination processes are reluctant to see their newly-acquired staff move to another employer, yet mobility of labour is one of the keys in ensuring that prices signals work effectively in the market. The market would operate more efficiently if employers protected their investment through normal contractual arrangements and not through restrictive visa conditions*’. Thus improved mobility of employees has significant benefits from both an economic and integrity perspective but needs to be considered in light of the substantial costs employers incur in bringing Subclass 457 visa holders into the country.

With regard to improved mobility, the Ethnic Communities Council of Queensland suggest *‘one of the key aspects of the current 457 visa requirements which increases the vulnerability of migrants is the short time frame they have to find alternative employment with a new sponsor should problems arise with their original employer. This leaves a migrant in a weak bargaining position. Employers who blatantly breach their obligations under the 457 visa scheme should be penalised, but migrant workers in those situations should be given every assistance and ample time to seek alternative employment without a fear of imminent removal’*.

Generally it is the most vulnerable of the Subclass 457 visa holders who are exploited as a consequence of their lack of mobility, whether that lack is real or perceived. Those visa holders with limited English or with skills that are less in demand are most easily persuaded that they are ‘tied’ to a particular employer for the term of their visa.

The terms of Visa Condition 8107 can be used by unscrupulous employers and agents to intimidate visa holders and persuade them that if they leave their initial sponsor the visa will be cancelled and they will be forced to leave the country. While this is not the case it is difficult to dissuade visa holders from this perception when the words of the applicable condition are so unambiguous.

Even where visa holders are aware of their rights to obtain new sponsors and employment the process in doing so can be lengthy and problematical. As noted, few visa holders in this group will have the Australian-recognised qualifications which may assist in finding a new employer, particularly where such qualifications are not a requirement for grant of the visa. If a new employer is found that employer must be approved by DIAC as a sponsor before the visa holder will be permitted to commence employment. While visa holders could seek out existing approved sponsors for employment it is not an easy process as an employer’s status as a sponsor is not public.

Mobility is further reduced by the provision that allows only 28 days for a visa holder to obtain a new sponsor after having ceased employment with the current sponsor. While this provision is rarely enforced and DIAC officers are flexible in allowing further time where it is likely that a new sponsor will be found, the existence of the time limit and the uncertainty surrounding the discretion to allow more time, operate to restrict mobility. Visa holders are unwilling to risk changing employers given the uncertainties surrounding the process and the threat to their visa status.

## **Recommendations**

It is recommended that the Visa Condition 8107 be amended to make it clear that Subclass 457 visa holders may cease work for one sponsor and find work with another approved sponsor. Further, the ability to do so should be explained in the information provided to all visa applicants.

It is recommended that visa holders be allowed up to 90 days to find a new sponsor unless it is apparent that there is no likelihood that this will occur and the visa holder is unable to provide for him or herself (and dependents where relevant) during this period.

It is recommended that Subclass 457 visa holders should be provided with assistance, including:

- website information on transferring to another approved employer
- information on how to find another sponsor, such as a list of approved sponsors and how to have an employer approved as a sponsor
- access to Job Search Support from Job Network while seeking new employment.

It is recommended that consideration be given to requesting Trades Recognition Australia to provide a simple service for Subclass 457 visa holders to have their trade qualifications assessed against Australian standards (this would also assist visa holders in applications for permanent residence).

It is recommended that while additional time should be allowed for Subclass 457 visa holders to find new employment there should be no change to the current requirement that sponsors continue to pay wages for 28 days.

## 7.8 Transparency

A common thread during consultations has been that the integrity of the Subclass 457 visa process could be improved with greater levels of transparency, in all respects including decision-making and outcome reporting.

A number of overseas jurisdictions, including the USA, have adopted the philosophy that greater public scrutiny provides one mechanism for ensuring employers 'do the right thing'. In order to achieve this the names of firms employing temporary migrant workers are published on the internet, along with the number of such employees at the firm.

Making publicly available lists of firms employing Subclass 457 visa holders would provide Subclass 457 employees with access to the names of potential alternative employers should they be dissatisfied with their current employer, facilitating improved mobility as recommended above.

Stakeholder feedback on this issue has been mixed. Generally employee groups and government agencies are in favour of greater transparency, either between government agencies or more generally, as in the LHMU position that *'on a basic level, considering the compliance issues (and the seriousness of breaches to date) the LHMU believes there is a strong case for the name and details of any employer who sponsors a worker on a 457 visa to be released to the public (via the internet)'*.

A number of employers have the opposite view, as typified by *Blue Care and TriCare* who suggest that *'there is no rationale for treating this class of employee differently to all other classes of employees (whether they be Australian or from overseas)'*. The WACCI express concerns that *'publicly disclosing information about sponsoring businesses has the potential to help identify these businesses as prime targets for anti-457 visa temporary migrant worker campaigns instigated by certain union groups'*.

Despite the views of some employers and employer organisations, Subclass 457 visa holders are different from other employees in Australian workplaces. They are the only group of employees whose ability to remain in Australia is largely dependent upon their employment, and to a large extent, their employer. It is for these reasons that visa holders of this type are vulnerable and are open to exploitation. If these employees are visible and their treatment is open to scrutiny then exploitation is less likely to occur. The more invisible the visa holder, the more opportunity there is for exploitation.

The risk of employers being targeted by union groups is less of a concern than the risk of workers being exploited as a consequence of their status. Union groups should have little to campaign about if workers are paid fair market rates, treated properly and provided with full information as to their rights and obligations. As noted elsewhere relevant government agencies should also be informed of the employers and workplaces of Subclass 457 visa holders.

### Recommendation

It is recommended that the names of sponsors with 20 or more Subclass 457 visa holders be published on the DIAC website.

## Section 8 - Visa Processing, Monitoring and Compliance

### 8.1 Introduction

As noted in Section 6 of this report, the integrity of the Subclass 457 visa program is influenced by the efficiency of the procedures and processes which support its operation. This section of the report examines the scope for these processes to contribute towards improved integrity, bearing in mind difficulties faced by participants in making effective use of the program, characterised by comments received from the National Farmers Federation that *'the agricultural sector continues to contend with irrelevant occupation descriptions, unrealistic and less relevant criteria, red-tape and poor advice from migration agents regarding eligibility'*.

Further background on the topics in this section may be found in Issues Paper #3.

### 8.2 Sponsor obligations

Currently sponsors give a number of undertakings in relation to the visa applicants they sponsor, including undertaking to:

- pay certain costs; including ensuring the cost of return travel for visa holders is met, public health costs (other than those covered by health insurance or reciprocal healthcare arrangements), and the cost of locating and removing the employee if they become unlawful
- comply with immigration laws
- cooperate with the department, including notifying them of a change in circumstance over the employment arrangement
- comply with the terms of nomination of the position
- comply with workplace relations laws.

Current arrangements to ensure compliance with these undertakings are not well defined; liability is not always clear and sanctions for infringement are primarily administrative and rarely enforced. In response to these problems the 2008-09 Budget committed \$19.6 million to enhanced arrangements for temporary working visas. A significant portion of this funding is to support the introduction of legislation to better define employers' obligations, improve investigative powers, provide for a more robust sanctions framework to protect workers' rights, and facilitate greater information exchange between government agencies.

On the 30 June 2008 the Minister for Immigration and Citizenship publicly released a discussion paper seeking stakeholder feedback on proposed reform to the Subclass 457 visa arrangements and other temporary visas with work rights.

The Minister has introduced a Bill to amend the *Migration Act 1958* and reform the sponsorship regime for all temporary visas with work rights, including Subclass 457 visas. The Bill (and related Migration Regulations) will incorporate four key initiatives, all of which will contribute to better protecting the rights of Subclass 457 visa holders:

- better defined sponsorship obligations

- improved investigative powers
- a more robust sanctions framework
- improved information sharing.

It is intended that the better defined sponsorship obligations will resolve the existing ambiguity around sponsorship undertakings, including by clearly defining who is responsible for particular costs. The proposed new obligations will replace current employer undertakings to comply with monitoring, and give specially trained inspectors the power to enter premises unannounced (without force) for the purposes of conducting investigations. This is intended to give the department greater capacity to identify possible non-compliance with the legislation.

The more robust compliance framework is to complement existing administrative sanctions by introducing punitive sanctions in the form of civil penalties. It is intended that the civil penalty regime should provide a strong incentive for sponsors to comply with the legislation and hence improve the integrity of the system.

While bearing in mind that the aim of the legislation is to make the visa compliance framework more robust, there remains a risk that any regulations requiring sponsors to be responsible for increased 'up front' costs may add to pressures to restrict the mobility of that person until these costs are recovered. Some stakeholders have expressed the view that there should be some mechanism which provides for a suitable proportion of these costs to move to new employers if the visa holder changes employer.

Greater concerns existed with regard to overseas employers. They are beyond the scope of Australian law in their overseas activities, and their capacity to meet the direct sponsor requirements and be responsible for supervision of their employees in Australia is questionable.

The matter of the appropriate level of obligations that should lie with the sponsor of Subclass 457 visa holders is a vexed one. As already noted, where large initial costs are paid by some sponsors this appears to increase their sense of 'ownership' over the visa holder and contributes to their concern not to lose the worker's services.

Of more concern has been the practice of some sponsors who expected visa holders to contribute to upfront costs incurred by the sponsor and who have deducted these from the wages of the workers.

The level of sponsorship obligations is to be regulated under the proposed legislation. Numerous stakeholders have had, and continue to have, input into the preparation of that legislation. The level of sponsorship obligations is of concern from the perspective of integrity and exploitation if sponsors attempt to defray the costs by preventing visa holders from ceasing employment in circumstances where that is the desire of the visa holder or by coercing the visa holder to contribute to the costs. Such actions are difficult to monitor or prevent in circumstances where the visa holder's main goal is to continue in employment or to gain permanent residency. There will be less of an imperative for sponsors to retain the services of visa holders by coercive means if the initial cost to the sponsor in gaining those services is not prohibitive.

One of the more contentious support issues is the provision of health services to Subclass 457 visa holders. As noted earlier in this paper, responsibility for ensuring public health costs are met (when required) rests with the sponsor. There have been well-publicised cases where significant health costs have been assessed against sponsors from accidents involving Subclass 457 visa holders outside the workplace.

Sponsors are liable for the public health costs of visa holders as generally visa holders have no entitlement to Medicare benefits (a few countries have reciprocal arrangements which give their nationals access to Medicare). Unfortunately this requirement can result in sponsors actively discouraging visa holders from accessing medical care when it is required. Given the power imbalance between the visa holder and the sponsor this is a major concern. Some employers insure for the public health costs of their sponsored visa holders but often deduct the premiums from the workers' wages.

Apart from assigning responsibility for meeting the cost of such insurance (or of health costs in its absence), payment of costs may still be problematic where:

- insurance is allowed to lapse (either consciously or inadvertently)
- the insurance company refuses to pay costs due to perceived 'prior conditions' or other factors
- sponsors fail to provide adequate coverage for costs.

With regard to the latter point, Iman International Health Plans state '*unfortunately too many rogue sponsors avoid their obligations by refusing to pay hospital expenses incurred by 457 visa employees. Accounts are ignored and become bad debts in the public hospital system. In theory the hospital could recover the debt from the Commonwealth which in turn would recover from the sponsor. However this process is so time consuming, complicated and expensive that it is rarely pursued*'.

Australian Health Plans, a division of Iman International, also suggest that '*those rogue sponsors who under pay and otherwise exploit employees have scant regard for their undertaking to pay public hospital costs. Mostly hospital accounts are just ignored as sponsors know hospitals have no effective way to transfer an account from a patient to a sponsor. One scam is to deduct health insurance premiums from employees then pocket the money. Another is to purchase one or two policies to serve a group of employees*'.

Currently Subclass 457 visa holders pay the Medicare levy but are not able to access public health services under Medicare (they are able to claim back the cost of the levy when they complete their end of year tax return). Some stakeholders, including the AMWU, have suggested that '*all 457 workers should be granted a Medicare card on arrival to allow treatment as a public (Medicare) patient in a public hospital, and free or subsidised treatment by medical practitioners*'. Medicare payments from visa holders themselves could either contribute to the provision of services or continue to be refunded through the tax system as at present.

Such arrangements would simplify the process of ensuring adequate health cover for this group but could, however, cause problems should the Subclass 457 visa scheme become a route for citizens (particularly those with pre-existing conditions) of other countries to take advantage of Australia's already heavily burdened health system.

If access to Medicare is not considered practicable then from an exploitation perspective the most satisfactory arrangement would be for the visa holders to be required to cover themselves with insurance for public hospital treatment costs. Currently, all holders of a student visa are required to retain health insurance as a visa condition. If visa holders are given the responsibility for their own health cover, they are likely to access medical attention when required. Visa holders will be aware of pre-existing conditions which might result in refusal of cover. Employers will rarely have that knowledge but may still be held responsible for payment if insurance cover is refused after treatment. If health cover became a visa obligation most, if not all, visa holders would abide by the condition rather than risk having their visa cancelled. The change would result in a lower chance of medical treatment being accessed by visa holders at cost to the Australian taxpayer.

One suggested method of providing funding for basic services to Subclass 457 visa holders could dovetail neatly with the widely held view that employing migrant workers should be more expensive than employing Australian workers. As one example, the ACTU *'supports the principle that employers who sponsor workers on 457 visas should be required to pay a premium. This ensures that employers have an incentive to exhaust all avenues for employing and training local labour before considering sponsoring workers from overseas'*.

Employers have suggested that they have concerns that increased mobility of Subclass 457 workers might leave the initial employer with excessive 'sunk costs' and some had recommended that subsequent employers take responsibility for some costs.

One solution to maintaining a premium on overseas workers and moving costs equitably across employers would be to apply a periodic levy on each visa holder employed by the sponsor during each pay period. This amount could be collected through the taxation system and used by the Government to fund those services it decides to extend to workers on Subclass 457 visas. This amount could form part of the 'premium' designed to dissuade employers from using overseas labour in preference to local labour.

It is considered that this pro-rata premium for employing such workers could maintain a price differential without distorting the market while at the same time increasing public acceptance of the provision of limited services to Subclass 457 visa holders.

## **Recommendations**

It is recommended that the Government institute a levy from employers for each Subclass 457 visa holder they sponsor. The levy is to be pro-rated across the term of the visa and collected through the tax system. Funds gathered through the levy are to be used to fund the provision of services to visa holders and removal costs if required.

It is recommended that the government provide Medicare coverage of public health costs to Subclass 457 visa holders and their dependents by means of the proposed employer levy.

## **In the alternative**

It is recommended that it become a visa obligation for all Subclass 457 visa holders to maintain public health cover for themselves and their dependents.

### 8.3 Accreditation

In line with ERG recommendations and the Minister's direction, the department is moving towards developing an accreditation scheme whereby employers who demonstrate an exemplary record of compliance with Subclass 457 visa requirements will be able to 'fast-track' Subclass 457 visa applications.

As one example of the strong stakeholder support for accreditation, ACEA suggest that *'by identifying the businesses within these industries who have a good track record ... DIAC can prioritise these applications so that Australia's economic growth can be sustained'*. ACEA go on to propose that businesses that have wilfully and fragrantly breached the Subclass 457 visa requirements should be removed from the accreditation program, with a possible return after a five year period without further breach or incident.

The MCA proposes *'through effective approval, monitoring and compliance programs by government it should be possible to maintain the integrity of the Subclass 457 visa system. In such an environment it is reasonable to expect employers with exemplary performance under the system to be accredited and afforded fast-track approvals for new requests'*. They go on to suggest that *'the benefits of accreditation to employers should be significant and the risk of loss of accreditation profound so as to ensure maintenance of compliance'*.

However, the need for accreditation has been questioned by some stakeholders such as AMIC who suggest *'the notion of an "accredited employer" suggests that "some employers are better than others" in relation to access to 457 labour. All sponsors should be assessed to a transparent program which considers relevant employment issues'*.

Any 'fast-tracking' program would allow firms to adapt to demand and manage labour requirements more swiftly. The prospect of losing accreditation by acting inappropriately could then act as an incentive to minimise integrity problems among this group.

The recent introduction of processing hubs by DIAC appears to have improved processing times to the extent that the development and maintenance of an accreditation process may be an unnecessary diversion of resources. As one example of the costs that might be associated with accreditation, the AIG, who favour the accreditation proposal, suggest *'it is important, however, that with any fast tracking approach that appropriate appeals mechanisms are put in place so that employers denied access can effectively and fairly have such decisions reconsidered'*.

It has been clear from discussions with stakeholders that the development of an accreditation process, particularly as regards the criteria for accreditation, is likely to be an exercise fraught with difficulty. Determining whether or not a particular sponsor is 'worthy' of having applications processed with little scrutiny or less monitoring for purposes of ensuring compliance with obligations is unlikely to be a process about which all relevant stakeholders agree.

Whether a particular sponsor has, in the past, sufficiently demonstrated compliance with relevant laws (e.g. taxation, employment, OH&S) is a matter about which stakeholders are unlikely to agree. Some stakeholders suggest that only those employers with perfect records should merit accreditation while others suggest that minor or unintended breaches should not prevent a sponsor obtaining accreditation.

If a process can be agreed which is sufficiently robust to ensure that the integrity of the program is not compromised and that all stakeholders are satisfied with the outcomes, then accreditation may serve some useful purpose. Given the probability that no such process will ever meet the requirements of all relevant interests, a properly applied risk matrix is likely to result in processing speeds appropriate to the nature of the applications and in monitoring and compliance resources being focussed on areas of greatest risk while maintaining scrutiny of all sponsors at a level sufficient to ensure the integrity of the program and to prevent exploitation of workers.

### **Recommendation**

It is recommended that if an appropriate accreditation process is unable to be developed then a risk matrix should be developed to ensure rapid processing of applications of little risk with greatest focus given to the rigorous examination of high risk applications and the ongoing monitoring of those sponsorships if granted.

## **8.4 Complexity of the legislation and unintended consequences**

Understanding the current Migration Act and Migration Regulations can be a challenge for employers and employees, even those who have excellent English language skills. This may be one reason why many people who have questions about migration seek advice from migration agents. A number of submissions to the Review have noted that Labour Agreements add even more complexity and often require substantial internal, or expert external, resources to negotiate and manage.

This complexity extends to employer understanding of the application of the MSL and its interrelationship with applicable industrial relations legislation, leading the VACC to suggest *'the interpretation and application of Industrial Instruments made under the Migration Regulations 1994 is a challenging and complex task. VACC believes that the Federal Government should provide free and relevant training on the application and interpretation of legislation relating to the employment of 457 Visa holders'*.

Often obligations imposed under Migration legislation conflict with applicable industrial awards or agreements and workplace legislation. For example, the MSL applied to Subclass 457 visa holders is calculated by reference to a 38 hour week; issues have arisen in those industries with non-standard patterns of work, including the fishing and farming industries.

Additionally, where visa holders have suffered workplace injuries and are on a graduated return to work, they may be unable to work full-time (an obligation under the visa). Similarly, a return to work program might require a visa holder to undertake duties not consistent with the visa condition that they work only in the occupation nominated for the visa. As the Insurance Council of Australia has noted, certain visa conditions *'may in some circumstances be contrary to our members' obligations to provide effective rehabilitation and return to work services for workers who are injured while working under a 457 Visa'*.

The Insurance Council have given further examples of difficulties following injuries sustained at work where *'in the event that the worker's injury is serious, the worker may require a tailored specialised treatment program including operative procedures. However if the employer decides to terminate the worker's employment or the 457 Visa expires, the worker has no option but to return to their homeland unless they are able to obtain a medical visa in the event that a doctor certifies that they are unfit to fly. The worker may prefer to stay in Australia to receive the treatment to assist their recovery particularly if the appropriate medical facilities are not readily available in their homeland'*.

The ACTU *'strongly believes that the provision of adequate information to workers on 457 visas is critical. The availability of workers compensation to 457 visa holders is of little assistance if these workers are unaware of the obligation upon their employers to receive and process a claim or do not understand the process through which to apply for compensation.'*

Another problem has arisen with the requirement that Subclass 457 workers are meant to be in continual paid employment. Some Subclass 457 visa holders have been unable to access extended unpaid maternity leave without risking cancellation of their visa, despite being paid sufficiently well to be able to support themselves during the leave.

The ACTU '*recognises that detailed regulations on employment conditions (including hours of work) in the migration regulations may lead to unintended and undesirable consequences*'. The ACTU suggests that the Migration Regulations should specify that workers on Subclass 457 visas may be employed on a full-time basis only. All other working conditions, including ordinary hours of work should be determined by reference to the applicable collective agreement.

The Migration legislation and explanatory material need to clearly articulate in plain English the intersection between the Migration Act and Migration Regulations and other workplace laws to clarify that the Migration legislation does not override workplace protections under Workers Compensation and other Australian workplace related legislation such as Anti-Discrimination legislation.

### **Recommendations**

It is recommended that information, in simple language, be provided to sponsors detailing their rights and obligations under the Migration legislation.

It is recommended that sponsors be required to provide a statutory declaration to the effect that the sponsor has read and understood their sponsorship obligations.

It is recommended that DIAC provide clear guidelines to Subclass 457 visa holders and their sponsors setting out the conditions under which visa cancellation will be considered, clearly stating that cancellation will not result if the breach of immigration obligations is a direct result of a visa holder or a sponsor complying with the terms of any other law.

## **8.5 Information and support**

A lack of information about Australian workplace rights has led to some Subclass 457 visa holders signing employment contracts which purport to bar union membership or other contacts with unions; other visa holders have been dismissed from their employment for asking about union membership.

It has also been made clear through stakeholder consultations that there is a widespread misunderstanding about how the Subclass 457 visa operates in practice. There appears to be a general misconception that the employer or sponsor can ‘cancel’ an employee’s Subclass 457 visa. This is clearly not the case - only the department can cancel a visa under the Migration legislation. A sponsor can withdraw their sponsorship for a visa holder but this is not the same as cancelling a visa as the visa holder has the option of finding another sponsor and obtaining a new Subclass 457 visa. However, unscrupulous employers may use this perception as a constant threat to help keep Subclass 457 employees from complaining about exploitative work practices.

According to the Queensland Government *‘the information on services available to 457 visa holders is disjointed and requires considerable research. The current publications provided on DIAC’s website are too general and do not provide accurate cost of living information. There is a great need to have clear and concise information that is readily accessible for both sponsors and employees to assist with the transition and relocation to Australia. An example of this would be the creation of an immigration portal where key documents can be located and links provided’*.

The NSW Government suggest *‘a mechanism whereby the sponsored employees are provided with an information pack on their employment entitlements, such as the Fair Work Information Statement or a copy of the relevant industrial instrument, may assist in preventing some of the problems which have emerged’*.

The CFMEU further propose that *‘pre and post migration inductions should contain sufficient information to facilitate 457 visa holders to seek assistance (including medical or legal assistance) in respect of OHS concerns or workers’ compensation claims from either their jurisdiction’s regulator or the relevant trade union. To this end the relevant regulators and unions should be given access to 457 Visa holders at such inductions’*.

Subclass 457 visa holders can be vulnerable to exploitation due to lack of information about their rights and obligations. High risk groups could be identified and given induction sessions on arrival explaining their rights and obligations. Such induction sessions could be provided for in Labour Agreements.

## **Recommendations**

It is recommended that clear instructions are given to Subclass 457 visa holders, prior to arrival where possible, in their language of origin about their rights and obligations when they come to Australia on a Subclass 457 visa. Those instructions should contain information about the Subclass 457 visa including requirements for permanent residency.

It is recommended that information should be provided directly to Subclass 457 visa holders and sponsors / employers, not through migration agents or other third parties.

It is recommended that DIAC records the addresses of Subclass 457 visa holders to ensure that they can communicate directly with the visa holder rather than relying on a third party.

It is recommended that it be a visa requirement that Subclass 457 visa holders notify DIAC of any change of address.

It is recommended that high risk groups of Subclass 457 visa holders be identified and provided with full induction sessions on arrival in Australia.

## **8.6 Departmental responsibilities and resources**

There has been a strong focus within the Subclass 457 visa program on the creation of a processing and monitoring environment designed to provide speed and accuracy of processing and an improved, risk-based approach to monitoring and compliance activity.

Risk-based monitoring is essential in the current environment where the number of visa grants has increased substantially over the life of the program (as shown in Section 4 of this report) and resources are limited.

This approach, however, raises the possibility that non-compliant employers may not be discovered promptly, by which time the profits of their exploitation of workers outweigh any concern they may have with any temporary, or even permanent, bans on future sponsorship which might be imposed.

The skills assessment discussion earlier in this report touched on the problem of sex slavery, the Anti-Slavery Project at the University of Technology in Sydney suggest that DIAC staff need to be trained about human trafficking and go on to propose that *'the Government prioritise analysis of the exploitation of Subclass 457 visa holders and whether that exploitation may be organised and may in some instances constitute human trafficking'*.

### **8.61 DIAC outreach officers**

The Industry Outreach Officer (IOO) program was established in April 2005 as a result of consultations with peak industry bodies and employer groups on skilled migration issues and labour shortages. The IOOs are based in 25 industry groups on a variety of full-time and part-time placements.

The role for the IOO network is to:

- work in partnership with industry to help employers better understand how to use DIAC's services to address skilled labour shortages
- provide expert support to employers who want to employ skilled overseas workers
- promote DIAC expos and recruitment events
- provide an effective communication link between DIAC and industry.

The primary role of a Regional Outreach Officer (ROO) is to provide information and advice on state-specific and regional migration schemes to a range of stakeholders including:

- local employers
- State / Territory and local governments
- regional certifying bodies
- area consultative committees
- chambers of commerce
- universities / educational institutions.

As Blue Care and TriCare note *‘one limitation of the IOOs is that there are sectors of industry that do not have coverage including for example the health and community services sectors’*. In a similar vein AMIC suggest *‘IOOs and ROOs have not been available to the meat industry. If made available they would be a valuable resource in improving the communication between DIAC and sponsors’*.

ROOs make regular visits to regional areas to meet and provide information to employers. The ROOs could be seen by some organisations (such as local government) as a demonstration of the department’s commitment to addressing regional labour market concerns.

Stakeholder feedback on the DIAC outreach program has generally been positive, with many organisations commenting on the significant value they place on the role and the staff supporting it. While noting the benefit and support they have received from DIAC IOOs, the RCSA go on to mention that they have *‘received some anecdotal information indicating some IOO / ROO prejudice against the on-hired employment of sponsored workers and RCSA would ask that the IOO / ROO scheme, if maintained, maintain a neutral position on such matters’*.

While supportive of the roles of the outreach network the Queensland Government caution that *‘care must be taken that the officer is able to separate the aims of DIAC from the commercial aims of the placement organisation. The practice in Queensland of an officer being placed in the offices of Commerce Queensland (2 days per week), Growcom (2 days per week) and Queensland Tourism Industry Council (1 day per week) appears to be working well’*.

The Government of WA note that outreach officers *‘currently focus on providing support to employers’* and go on to recommend *‘that a parallel service be established to specifically support 457 visa holders’*.

It is apparent that the DIAC outreach officers have provided a valuable service to industry in assisting employers to navigate the immigration maze. As noted, some IOOs work for lengthy periods on-site in employer organisations, essentially performing services for those organisations. Other IOOs, particularly in the smaller States and Territories, work from DIAC offices and provide services to a range of employers as and where the need arises, as do the ROOs. In fact, many of the latter group perform a wider role in providing education and information to other community groups and organisations, as well as to employers and employer organisations. While those organisations with dedicated IOOs obviously appreciate the resource provided, clearly the IOOs and ROOs with wider reach are likely to service a larger range of stakeholders. These officers must, by necessity, have a more up-to-date familiarity with DIAC policies and procedures, given that they work from DIAC offices and interact with other DIAC staff on a regular basis.

The outreach role is important and the provision of education, assistance and information to users of the temporary skilled migration program is particularly important. Given the limited number of DIAC outreach officers, and the concerns of some employers who have been unable to access their services, it would appear that an IOO model that more closely replicates the ROO arrangement is likely to reach a greater number of users of the program.

Working for long periods in a private sector organisation is not consistent with the position of IOOs as Commonwealth public servants and in extreme cases, could result in IOOs becoming confused about their role and out of touch with DIAC policies and public service standards.

If the practice of locating IOOs in private sector organisations is to continue, such placements should be of short duration. The preferable situation would be for an IOO to service a number of different employers or employer organisations from a DIAC office. The DIAC officer would still develop a sufficient relationship with the industry concerned without any risk of a conflict of interest arising or any suggestion that the officers role as a public servant was compromised. Visa holders are less likely to misinterpret the role of a DIAC officer who is not so closely aligned with a particular employer organisation.

If altering the current position would so affect the useful role provided by DIAC IOOs who are located full-time with particular organisations then the preferable model would be for interested officers to take leave without pay to work as part of that organisation and for funding for the position to be provided directly to the organisation concerned.

### **Recommendations**

It is recommended that DIAC designate a position as an 'integrity coordinator' to coordinate and monitor integrity reporting and investigations, liaise with relevant external agencies and provide advice to DIAC management on integrity issues.

It is recommended that IOOs and ROOs operate in a manner designed to provide information and assistance to as great a range of users of the temporary skilled migration program as possible.

It is recommended that any placements of IOOs in organisations be short-term and part-time (i.e. involving more than one organisation at any time).

## **8.7 Role of other agencies**

A consistent thread in stakeholder consultations is that DIAC seems to lack the resources, authority and expertise to administer areas of the program which fall outside the immigration sphere. These include, but are not limited to:

- labour market testing
- skills examination / matching
- determinations as to market rates
- determinations as to employment contracts.

It has been suggested that existing agencies, which have appropriately trained and resourced staff, should be given a greater role in monitoring and ensuring compliance with what are, in essence, employment conditions, both prior to the approval of a visa application and after a visa applicant has commenced employment.

As AMIC note *'DIAC staff should specialize in immigration matters. Specific skill sets for analyzing financial information or assessing trade recognition and other factors should be provided from other Government Departments with the appropriate skills'*. These agencies could include, but not be limited to:

- The Workplace Ombudsman
- The Workplace Authority
- Australian Taxation Office
- State and Territory OH&S agencies
- DEEWR staff on training issues
- Skills Australia.

Stakeholders who commented on this aspect of the program were generally supportive of increased cooperation between government agencies, ACEA suggest that *'sharing information between government departments will enable DIAC to monitor and audit sponsors with less disruption to businesses. When considering this in the context of minimum salary level compliance, ACEA views that it would be extremely beneficial to employers if DIAC could seek confirmation directly from the Australian Tax Office (ATO) as to whether a 457 visa holder is being paid the correct amount without needing business to provide this information'*.

### **8.71 Jurisdiction of Tribunals**

Fair Work Australia will be the independent body responsible for overseeing the Government's new workplace relations system; it is intended to be fully operational from 1 January 2010. It is meant to provide the public with an accessible 'one-stop-shop' for practical information, advice and help on workplace issues and will operate to ensure compliance with workplace laws. It will replace a number of existing government agencies including the Australian Industrial Relations Commission, the Workplace Authority and the Australian Building and Construction Commission.

Within current visa arrangements the Migration Review Tribunal (MRT) exists to provide an independent and final merits review of decisions made in relation to visas to travel to, enter or stay in Australia. The Tribunal is established under the *Migration Act 1958* and the Tribunals' jurisdiction and powers are set out in the *Migration Act* and in the *Migration Regulations 1994*. The Tribunal comprises Members appointed by the Governor-General upon recommendations made and approved by Government under the Act, and staff engaged under the *Public Service Act 1999*.

The *Migration Act* states that the Tribunal is required to '*pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick*'. Concerns have been expressed as to whether a 'quick and informal' review is appropriate in cases dealing with integrity and exploitation.

As far as possible, the immigration and employment aspects of the Subclass 457 visa program should be kept distinct and those agencies with the appropriate portfolio responsibilities should be tasked with ensuring compliance. DIAC should retain responsibility for all aspects of visa processing and ensuring compliance with immigration requirements, sponsorship obligations and visa conditions. So far as employment conditions are concerned, the appropriate workplace authorities should be responsible for monitoring, compliance and enforcement.

In a regime of market rates underpinned by enforceable industrial instruments and workplace regulation consistent with that applicable to all other employees in Australian workplaces, there should be little requirement for the MRT to deal with matters concerning the payment of wages, the determination of correct working conditions or the appropriate classifications of employees. All such matter should be determined by appropriate courts and tribunals and the decision of those bodies used to inform decisions of the MRT in relation to breaches of the immigration laws and requirements.

## **Recommendations**

It is recommended that so far as possible the Subclass 457 visa program be designed to enable DIAC to focus on matters primarily the responsibility of the Immigration portfolio and other federal, State and Territory agencies to perform with respect to Subclass 457 visa holders as employees, the tasks and functions for which they are trained and resourced.

It is recommended that the system be refined so that issues of wages, workplace conditions and the classification of occupations are not matters for the MRT. The appropriate tribunal dealing with employment conditions (Fair Work Australia) should be the body vested with jurisdiction in these matters.

## Section 9 - Global issues

### 9.1 Introduction

During the consultation process for the Review, stakeholders raised a number of issues regarding the Subclass 457 visa and other temporary work visas which were not central to the scope of the Review and its terms of reference but which are nevertheless worthy of consideration as they impact on the effective operation of the program. A number of these issues can have an impact on the mobility of temporary migrants and their ability to settle in Australian society and are discussed further in this section of the report.

### 9.2 Availability of data

Issues Paper #2 noted *‘there are no specific figures available from OH&S agencies on the number of fatalities or injuries involving Subclass 457 visa holders as a group. DIAC does not have useful data in this area. Data on OH&S incidents is collected by State and Territory agencies’*.

This lack of data is apparent across the program in relation to the prevalence of integrity problems. While the Review in its consultation has come across numerous cases of exploitation of Subclass 457 visa holders and stakeholder submissions have provided additional case studies, it is difficult to determine the proportion of cases these represent.

The WACCI reflect these difficulties in their comment that *‘without evidence of systemic or widespread abuse of temporary migrants, it is not possible to effectively discuss the issues identified by the Integrity Review as it is not clear the relative magnitude of any issue’*. They go on to claim that *‘the lack of objective evidence means that it is impossible to ascertain the appropriate policy response to the alleged abuses’*.

The Anti-Slavery Project note that *‘little research or coordinated effort has been undertaken to unpack the mechanics of migrant labour exploitation in Australia’* and go on to recommend *‘that the Government fund research, and encourage other funders / agencies to do the same, to provide both qualitative and quantitative data on the experience of exploited Subclass 457 visa holders’*.

Extensive evidence provided to the Review via consultation and case studies makes apparent the integrity problems within the program. The notion that the relative lack of empirical evidence precludes development of appropriate measures to protect the integrity of the program is rejected. The numerous case studies and testimony provided during the consultation process, along with expert advice from stakeholders, provided examples sufficient for the development of the recommendations contained in this report.

Further empirical evidence will determine the extent of the problems and help assess the effectiveness of the remedies proposed in this report. With this in mind the integrity coordinator recommended earlier in this report would seem the suitable position to coordinate improved data gathering and analysis.

## **Recommendation**

It is recommended that the integrity coordinator coordinate research into the incidence of integrity problems, and the effectiveness of monitoring and compliance activities in reducing the rate of occurrence of such problems.

### **9.21 Occupational Classification - ASCO and ANZSCO**

It is intended that the Australian and New Zealand Standard Classification of Occupations (ANZSCO) will replace the existing Australian Standard Classification of Occupations (ASCO) Second Edition and the New Zealand Standard Classification of Occupations (NZSCO) 1999 used in Australia and New Zealand, respectively.

It is likely that this will lead to changes in the classification system used for temporary skilled migration visa purposes. Details on the new classification system may be found at the Australian Bureau of Statistics website:

See: <http://www.abs.gov.au>

The use of ASCO classifications has been criticised by some stakeholders, with Swift Australia stating *'the Federal Government and employers spend enormous amounts of money in training employees in nationally recognized training programs based on competency and skills. These {Australian Qualifications Framework} (AQF) skill qualifications / classifications are ignored for the purpose of the 457 skilled migration visa, in preference to the ASCO codings which are determined by the Australian Bureau of Statistics without any proper regard to the skill level required for these occupational classifications. A skilled migration visa program must be based on the AQF skills classifications, with the minimum skill level commensurate with a relevant AQF Certificate III'*. The development of tailored skills lists as recommended earlier in this report would be able to account for the qualifications required within each occupation.

Adoption of the recommendations outlined earlier in this report will mean that the broad ASCO groupings used to define the program in the past will no longer be relevant. The skilled migration lists proposed will be readily adaptable to changes in classification structure but will require ongoing maintenance. Maintenance of the classification system will aid the collection of up-to-date data to enable ongoing evaluation of the program.

## **Recommendation**

It is recommended that the integrity coordinator, together with relevant DIAC and DEEWR staff, ensure program activities (including monitoring and compliance processes) and reporting mechanisms accurately reflect current and future classification systems.

### 9.3 One visa or two?

A number of the submissions to the ERG stated that there was a need for migration across the skills spectrum, however, the ERG noted *'the 457 visa was ... never envisaged as a general labour supply visa (which it has become by default)'* and went on to note *'the ERG is of the view that the Visa Subclass 457 visa is not suitable to meet market requirements for semi-skilled and unskilled labour except through Labour Agreements for semi-skilled'*.

The ERG thus proposed a 2-tier system whereby labour requirements for workers in ASCO major groups 1-4 would be available under the Subclass 457 program and access to workers in other ASCO groups would be available under another program specifically designed to manage general labour supply issues (with some exceptions for projects of national significance under Labour Agreements).

Underlying these proposals appears to be a recognition that the majority of integrity issues around the skilled visa program appear to be associated with employment in lower skilled ASCO major groups and particularly those occupations attracting salaries close to the MSL. The ERG recommendation may need to be reviewed in light of integrity and exploitation concerns that have arisen with ASCO 4 (trades level) workers employed at or close to the MSL as discussed elsewhere in this report.

The link between skill levels, integrity issues and potential reforms to the system were summarised by one of the architects of the program, Mr Neville Roach, when he stated *'in my view most of the problems have arisen as a result of including low-skilled workers under the scheme and it is mainly in relation to such workers that most of the rorts and abuses have taken place. In an attempt to address these problems, however, it appears that draconian new conditions are being proposed that would apply to all entrants, whether high or low skilled. This is a very inappropriate approach and is penalizing responsible employers and temporary entrants for the bad behaviour of those bringing in lower skilled and lower paid workers. This "one size fits all" approach will significantly damage the scheme in the areas where it is most needed and where the Australian economy will benefit most'*.

The QRC supports the '2-tier' concept, noting that *'the QRC contends that possible changes to the skilled migration system could create restrictions or delays simply to address the concerns at the "low end of the market" where abuses are evidently occurring. Controls required at the low end of the market should not impede efficient, effective and timely arrangements for companies and visa applicants at the high income, high qualifications end of the skilled migration market. Therefore, QRC is supportive of the concept of a "2-tier system" that recognises these differences'*.

A number of submissions to the Review support this view, with Giovana Arrarte suggesting that *'perhaps by implementing a "semi-skilled" visa subject to ongoing monitoring by DIAC and a MSL, the matter can be solved without further increasing compliance cost and the complexity of the 457 program'*.

As outlined earlier in this report, the consultation process has confirmed that the majority of integrity issues in the Subclass 457 program have been in the trade classifications and below. However, testimony from nurses and their industrial organisations has revealed that there are apparently problems even in higher skilled job classifications - some of which are close to the existing MSL, which was noted earlier as another possible area of risk.

The recommendations contained earlier in this report with regard to the development of improved skills lists, along with those relating to the wider use of Labour Agreements, have been designed to address these problems. Assuming these recommendations are accepted by Government then the Subclass 457 visa should be able to continue to satisfy the requirements for skilled and semi-skilled workers within the constraints proposed, without the requirement for a separate visa for semi-skilled workers. However, the program continues to be unsuitable for unskilled labour.

### **Recommendation**

No separate recommendation is required to deal with this issue - the recommendations outlined earlier in the report are considered sufficient.

### **9.31 Visa substitution**

During this Review departmental officers have related numerous examples of employers or individuals attempting to gain entry to Australia using a range of visas in unintended ways. If the recommendations in this report are accepted and the Subclass 457 visa made more robust, it is likely that there will be greater use of related visas to try and circumvent visa policy. Care will need to be taken that other temporary visas are robust enough to avoid this substitution.

Visas which stakeholders have suggested might be subject to substitution include the:

- Occupational Trainee visa (Subclass 442)
- Business (Short Stay) visa (Subclass 456)
- Skilled - Recognised Graduate (Temporary) visa (Subclass 476)
- Skilled - Graduate (Temporary) visa (Subclass 485).

One recent example of integrity issues with the Subclass 442 visa similar to those identified in the Subclass 457 visa were illustrated in a recent case in the Victorian Magistrates Court, where a Melbourne-based training provider had been fined \$40 000 over its failure to pay eight Chinese students correct rates of pay, shift allowances, casual loading and penalty rates, and for making unlawful deductions from the employees' pay.

Another example of substitution is provided by the ANF who state *'increasingly the ANF is being asked to assist nurses who have been "lured" to Australia utilising visas other than the 457. For example immigration agents assist registered nurses to enter the country on training visas with the "promise" of English language courses that will enable them to eventually register as nurses in Australia. The immigrant nurses are enrolled in courses that do not add value to their qualifications and are employed on "clinical placements" in aged care facilities on questionable employment conditions or as unlicensed workers. More often than not the promise of registration is not realised'*.

With regard to the Subclass 456 visa the Workplace Ombudsman noted that *'although the Subclass 456 visa is not strictly a "working" visa, foreign workers who enter the country on these visas are still able to engage in some work, but no mandated minimum salary is required for these workers'*. The Ombudsman went on to recommend *'that greater scrutiny*

*is placed on the approval of Subclass 456 visas to ensure foreign workers are not being engaged to work in Australia in employment conditions that would be considered exploitative by Australian standards’.*

In addition, the Workplace Ombudsman has recently launched a campaign to educate almost 460 000 overseas students studying in Australia about their workplace rights, expressing concerns that *‘they are becoming a new group of vulnerable workers open to exploitation by unscrupulous employers’.*

While not an issue of substitution, the LHMU *‘also wishes to draw the Review’s attention to 427 {Domestic Worker (Executive)} visas. Although this is a separate visa, its holder remains dependent upon a 457 visa holder. Indeed, the integrity of this visa impacts upon the integrity of 457 visas as well’.* The LHMU have given an example of exploitation of a worker on this visa which they suggest is *‘a simple and obvious case of blatant exploitation carried out, interestingly, by a 457 visa holder. It hints at the intertwined and complicated issues surrounding the 457 visa scheme’.*

Stakeholder consultation has revealed that certain unscrupulous employers and agents will take advantage of perceived flaws in the immigration system to bring people to this country outside the intention of the relevant Regulations. Whether this is due to substitution intended to evade the requirements of the Subclass 457 visa or in response to limitations in other visas it is apparent that a number of visas with attached work rights are being systematically abused.

Evidence has been provided to the Review of students working outside the provisions of the relevant student visa and of workers under other visas being employed without recourse to acceptable workplace rights and protections. Many of the affected groups (such as students and working holiday makers) may be complicit in these arrangements and may only be in the country to take advantage of the perceived lack of scrutiny of these visas, which is compounded by their mobility.

## **Recommendation**

It is recommended that DIAC carry out a review of visas ‘at risk’ of substitution to ensure consistency with the integrity provisions of the Subclass 457 visa program post-Review.

## 9.4 Assistance for migrants

Any newly arrived migrant may be eligible for a range of support services from DIAC and other government agencies. As the Subclass 457 visa is a temporary visa, those services available to permanent migrants (dependent upon visa subclass) are generally not available to temporary visa holders. State and local government authorities have raised concerns during consultation that failure to provide adequate funding to support primary Subclass 457 visa holders and their families has strained available resources, particularly in education and health care.

The WACCI proposes that *‘to address the objective of ensuring overseas workers can maintain equivalent standards of living to Australians, the tax payments of subclass 457 visa holders justify extending some Government services on at least a semi-subsidised level. Alternatively, overseas workers could be reimbursed their taxes’*.

Regarding education provision, Blue Care and TriCare *‘consider it would be a valuable reform to achieve harmonisation across State and Territory Governments in relation to school fees for the children of overseas skilled workers’*.

Expressing their support for greater access to government services by Subclass 457 visa holders FECCA suggest *‘as a signatory to the International Labour Organization (ILO) Conventions that protect the labour rights of migrant workers and the Convention on the Rights of the Child Australia has an obligation to ensure migrant workers are treated equally in matters of employment and occupation, social security, and that education is accessible and affordable for migrant workers children. At the very minimum health and education are fundamental rights and as such subsidised health benefits (offered through Medicare) and educational resources should be made available to Subclass 457 visa holders and their families’*.

For service provision to be effective, particularly where a large number of visa holders work in small or remote communities, adequate notice needs to be given to local authorities to enable adequate planning, with the Queensland Government stating that they would *‘prefer the introduction of a direct DIAC mechanism, early in the sponsorship process, to provide adequate warning of significant numbers of new arrivals and their dependants. This is particularly important to allow education, health and other services to be adequately planned and delivered’*.

The importance of providing notice for education providers has been raised by a number of stakeholders; for example the ESL office of the South Australian Department of Education and Children’s Services suggest *‘notice of the location of skill Subclass 457 visa holders should be given to State and Territory governments to assist with planning infrastructure. Notification is required not only of the primary Visa holders but also their dependants (particularly school age dependants) to enable adequate preparation of schools. Not only do schools need to build their capacity to meet English language and curriculum needs of the dependants they also need to:*

- *organise bilingual support for key events such as orientation to the school, enrolment and parent meetings*
- *encourage a positive attitude in the school towards cultural diversity*

- *ensure that bullying and harassment procedures are inclusive of racial harassment*
- *build the capacity of counsellors to support the well being issues of dependants, related to migration and resettlement*
- *develop insights into the cultural background of the new arrivals so that they demonstrate cultural sensitivity.*

*This is particularly the case in regional, largely mono-cultural schools and communities’.*

A common thread throughout the submissions received by the Review and during consultations has been the strong contribution made by Subclass 457 visa holders to the Australian economy. The Review has also been advised that Australia is competing in the international market for these skilled workers and, in light of predicted demographics, will find this competition even more intense in the future.

Further, a number of stakeholders have made the link between temporary migration and the pathway to permanency and have suggested that it is a false economy to deny Subclass 457 workers access to migrant support services that many will eventually have access to anyway - particularly as many of these services are most efficacious on arrival in the country and immediately thereafter.

With the exception of NSW and the ACT, all jurisdictions currently provide free education to dependents of workers on Subclass 457 visas. Such a matter may be very persuasive in the event a highly skilled visa holder has a choice of employment in a number of jurisdictions.

The majority of State and Territory governments consulted during the Review have mentioned the difficulty of providing adequate services in areas where large numbers of migrants arrive with little or no notice. Provision of early notice of visa grants, or even of visa applications, to assist in planning, particularly in rural and remote areas where even a small number of migrants can have a significant impact on local infrastructure would be an appropriate response to these concerns.

## **Recommendation**

It is recommended that DIAC provide early notice of sponsorship applications to State / Territory and local government to facilitate planning in remote and rural areas.

### **9.41 Funding for English studies**

A number of submissions to the Review have raised concerns over the nature and extent of Commonwealth funding for English language tuition and support for non-English speakers in Australian schools - in particular that current arrangements are designed to manage permanent entrants and are not suited to the increased numbers of temporary visa holders coming into the education system from the greater use of the Subclass 457 visa in recent years. English language training programs are summarised in Attachment C.

Subiaco Primary School in Western Australia note that they have a significant number of students at the school on Subclass 457 visas and that *‘many of these students are arriving in the classroom with virtually no ability to speak, read or write English. This is creating a direct and unreasonable load on the teaching staff at the school, and right now, is adversely affecting the quality of teaching across all year levels at the School’*.

With regard to the English as a Second Language - New Arrivals (ESL-NA) program outlined in Attachment C, the NSW Government note that *‘State and Territory education systems have been arguing for a number of years for the need for the Australian government to extend eligibility for ESL NA per capita funding to this visa subclass’* with the WA State Migration Centre suggesting *‘the lack of English language support for dependents of 457 visa holders is likely to have a negative impact on the attraction of skilled migrants and the success of the skilled migration scheme’*.

Funding for English studies for primary Subclass 457 visa applicants may not be a major concern since the introduction of the English language requirement, however it remains a concern for secondary visa holders. In light of the recommendations earlier in this report with regard to settlement and other services adequate English language tuition should be provided to this group to ensure they are better able to integrate into the Australian workplace and their local communities.

### **Recommendation**

It is recommended that consideration be given to the provision of funding for English language training for temporary visa holders, with particular emphasis on training for dependents.

## **9.42 Availability of housing**

In their submission to the ERG the Housing Industry of Australia estimated that an additional 20 000 skilled trades people would be required before 2010 to meet the existing and projected demand for housing. They went on to state that *‘neither apprentices currently enrolled in apprenticeships or the current skilled migration program will adequately address shortages in the residential building industry’*.

During consultation a number of stakeholders expressed concerns that existing shortages would be exacerbated by the increased pressures of Subclass 457 visa holders seeking accommodation, particularly where they were employed in large numbers in small or remote communities with a limited existing housing base.

As one example, while attending a Subclass 457 information seminar in Darwin hosted by the local Chamber of Commerce and Industry, the Review noted that the question from the floor which evoked the most interest was: *‘where will the visa holders live?’* Available housing is at a premium in Darwin. Local stakeholders also stressed the key role Subclass 457 visa holders play in economic growth in the Northern Territory.

There are also integrity concerns around the provision of housing to workers by employers. The Review received numerous complaints related to excessive rents being charged to visa holders for crowded and / or sub-standard housing provided by employers or parties connected to the employer. In many rural or remote areas the housing shortage is particularly acute, which gives the visa holder little choice of accommodation.

It is apparent from media reports and stakeholder feedback that Australia is facing a housing shortage. While not within the terms of reference of this Review the shortage has been raised during consultation from two perspectives.

First, a number of stakeholders have raised housing as a constraint on their ability to recruit and place skilled workers. In many rural and remote areas in particular, there is virtually no housing for the workers needed by local employers.

Secondly, the shortage of available housing for Subclass 457 workers has led some unscrupulous employers or parties known or related to them to provide accommodation to visa holders at exorbitant rates, often cramped or crowded, and often accompanied by unauthorised deductions from salary, all of which are integrity concerns.

There is a concern that Australian residents, themselves faced with housing difficulties, may come to resent migrants for apparently contributing to the housing shortage and related increases in the cost of accommodation.

### **Recommendation**

It is recommended that the concerns raised during the Review regarding the relationship between immigration and housing shortages in Australia be noted.

## Attachment A - References

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September 2008.

Workplace Express, '*\$48,000 in fines for labour hire company for exploitation of Filipino nurses*', August 2008 (Internet).

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September 28 2008 (Media Release).

## Attachment B - Minister's media release

Included below is the text of the media release from Senator Chris Evans on 14 April 2008 announcing the establishment of the Integrity Review. The biography of Ms Deegan included in the original media release is included in Section 2 of this report.



### **IR expert to oversee temporary skilled migration review**

Monday, 14 April 2008

The Rudd Government has appointed industrial relations commissioner Barbara Deegan to examine the integrity of the temporary skilled migration program, the Minister for Immigration and Citizenship, Senator Chris Evans said today.

Senator Evans said Ms Deegan will address concerns about the exploitation of migrant workers, salary levels and English language requirements.

'Ms Deegan will draw on her extensive expertise in the industrial relations sector to review the Temporary Business Long Stay subclass 457 program and provide options to improve the integrity of the scheme,' Senator Evans said.

'Ms Deegan will take leave from her current position as Commissioner of the Australian Industrial Relations Commission for six months to undertake this independent role.

'Ms Deegan will consult with overseas workers, union and industry representatives as well as relevant Commonwealth, state and territory agencies.'

A working party of industry and trade union leaders will be formed to provide a forum for Ms Deegan to access relevant information.

The terms of reference for the review include examining:

- Measures to strengthen the integrity of the temporary skilled migration (Subclass 457 visa) program;
- The employment conditions that apply to workers employed under the temporary skilled migration program;

- The adequacy of measures to protect 457 visa holders from exploitation;
- The health and safety protections and training requirements that apply in relation to temporary skilled workers;
- The English language requirements for the granting of temporary skilled migration workers' visas; and
- The opportunities for Labour Agreements to contribute to the integrity of the temporary skilled migration program.

The review will report periodically to the Minister for Immigration and Citizenship and the Deputy Prime Minister with a final report to be presented by 1 October 2008.

Senator Evans said Ms Deegan's review would complement the recommendations of the External Reference Group, which was established in February to look at ways to streamline visa processing times and improve the flexibility of the temporary skilled migration program for employers.

'The Rudd Government is determined to address the skills and labour shortages we are currently experiencing,' Senator Evans said.

'We are working with industry to improve the efficiency of our skilled migration program while ensuring we continue to provide employment and training opportunities for Australian workers.

'The External Reference Group has consulted widely and in an interim report has flagged the concept of establishing an accreditation system whereby 'low risk' employers with a good track record can have 457 visa applications fast-tracked by the department.'

The final reports from Ms Deegan and the ERG form part of the Australian Government's medium and longer term strategy to improve the transparency, accountability and integrity of the temporary skilled migration program.

Any recommended initiatives will also complement broader labour market policies, including the development of a new fair and flexible workplace relations system.

**Media contact:** Simon Dowding – (02) 6277 7860 or 0411 138 541

## Attachment C - Supplementary information

### C1 IELTS test bands

Band	Language skill level	Description
9	Expert user	Has fully operational command of the language: appropriate, accurate and fluent with complete understanding.
8	Very good user	Has fully operational command of the language with only occasional unsystematic inaccuracies and inappropriacies. Misunderstandings may occur in unfamiliar situations. Handles complex detailed argumentation well.
7	Good user	Has operational command of the language, though with occasional inaccuracies, inappropriacies and misunderstandings in some situations. Generally handles complex language well and understands detailed reasoning.
6	Competent user	Has generally effective command of the language despite some inaccuracies, inappropriacies and misunderstandings. Can use and understand fairly complex language, particularly in familiar situations.
5	Modest user	Has partial command of the language, coping with overall meaning in most situations, though is likely to make many mistakes. Should be able to handle basic communication in own field.
4	Limited user	Basic competence is limited to familiar situations. Has frequent problems in understanding and expression. Is not able to use complex language.
3	Extremely limited user	Conveys and understands only general meaning in very familiar situations. Frequent breakdowns in communication occur.
2	Intermittent user	No real communication is possible except for the most basic information using isolated words or short formulae in familiar situations and to meet immediate needs. Has great difficulty understanding spoken and written English.
1	Non user	Essentially has no ability to use the language beyond possibly a few isolated words.
0	Did not attempt test	No assessable information provided.

Source: IELTS internet site ([http://www.ielts.org/pdf/IELTS\\_Handbook\\_2007.pdf](http://www.ielts.org/pdf/IELTS_Handbook_2007.pdf))

## **C2 English Language Training Programs**

### **Adult Migrant English Program (AMEP)**

AMEP is a national settlement program administered by DIAC that has been providing English classes to eligible adult migrants, who do not have functional English. The English classes teach new arrivals language skills that can be used in day-to-day situations such as shopping and paying bills. AMEP classes are delivered by contracted service providers who specialise in teaching English as a second language.

Eligible migrants have a legislative entitlement to study English for up to 510 hours or until they reach functional English, whichever comes first. Additional tuition is available to humanitarian migrants with limited education or difficult pre-migration experiences such as torture or trauma. Migrants are required to register for English language tuition with an AMEP provider within three months of arrival in Australia and should start tuition within one year.

### **ESL for children in schools**

Currently the English as a Second Language - New Arrivals (ESL-NA) Program provides Australian Government funding to State and Territory government and non-government education authorities to assist with the cost of delivering intensive English language tuition to eligible newly arrived migrant primary and secondary school students. According to the DEEWR website, school aged dependents of Subclass 457 visa holders are not eligible for the ESL-NA Program.

Government and non-government education authorities in each State and Territory are responsible for the detailed administration of the ESL-NA Program.

### **Workplace English Language and Literacy (WELL) Program**

According to the WELL homepage on the DEEWR website the main aim of the WELL Program is to assist organisations to train workers in English language, literacy and numeracy skills. Funding is available for three types of projects - training projects, resource projects and strategic projects, on a competitive grants basis for English language and literacy training linked to job-related workplace training. The program is designed to help workers meet their current and future employment and training needs.

Applications for WELL training grants may be submitted at any time during the year. From time to time, advertisements appear in major national newspapers. The WELL Program is a competitive, grants based funding program. All applications are considered on their merits and funding is not guaranteed.

### **C3 Visa Condition 8107**

The holder must not:

- (a) if the visa was granted to enable the holder to be employed in Australia:
  - (i) cease to be employed by the employer in relation to which the visa was granted; or
  - (ii) work in a position or occupation inconsistent with the position or occupation in relation to which the visa was granted; or
  - (iii) engage in work for another person or on the holder's own account while undertaking the employment in relation to which the visa was granted; or
- (b) in any other case:
  - (i) cease to undertake the activity in relation to which the visa was granted; or
  - (ii) engage in an activity inconsistent with the activity in relation to which the visa was granted; or
  - (iii) engage in work for another person or on the holder's own account inconsistent with the activity in relation to which the visa was granted.