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Independent Review of Integrity in the Subclass 457 Programme

29 April 2014

Dear Panel Members,

Independent Review of Integrity in the Subclass 457 Programme

I have pleasure in enclosing a submission by the Human Rights Council of Australia (HRCA) to the panel of review into the abovementioned matter.

If you have any questions or if you wish to contact the HRCA in relation to this submission, please contact Sanushka Mudaliar and Laurie Berg at the email address referred to above. Alternatively, please feel free to contact me at any time on 0417 773 382 or a.naylor@mauricebyers.com.

Yours sincerely

Andrew Naylor
Chairperson

Submission to the Independent Review of Integrity in the Subclass 457 Programme

Written by Laurie Berg and Sanushka Mudaliar

29 April 2014

The Human Rights Council of Australia Inc. (the HRCA) is an organisation committed to promoting universal human rights for all without discrimination in Australia, the Asia-Pacific region and the world. Human Rights Council members are human rights professionals with extensive domestic and international experience in all areas of human rights policy and practice. The HRCA's goals include monitoring actions by the Australian government, calling for the observance of international human rights obligations and improving Australia's human rights policies and performance. The HRCA advocates a human rights-based approach that analyses inequalities and discrimination using international human rights standards, and proposes action directed towards the promotion and protection of human rights for all.

The HRCA submits that a human rights-based approach to this review would substantially strengthen Australia's ability, through the 457 visa program, to protect and fulfil the rights of both local and migrant workers. The HRCA recommends that this review of reforms made to the 457 visa programme over recent years be carefully assessed in the broader public interest, including with regard to human rights concerns, and not be driven by politicisation for partisan political purposes. International human rights obligations, which are binding on Australia, apply equally to migrant and local workers except where differential treatment is consistent with the circumstances authorised by particular treaty articles. At the same time, international human rights law recognises the right of States to determine the criteria governing admission of people entering their territory for employment or other purposes.

Review Panel Terms of Reference 1: non-compliance by sponsors in the subclass 457 programme

Human Rights Standards and the Terms of this Review

Two overarching human rights principles are relevant to Australia's management of its temporary immigration program: firstly, the principle of non-discrimination; secondly, the protection of the rights of all non-citizens on temporary visas working in Australia. Australia must ensure that it meets these obligations as well as the detailed human rights and labour rights norms which relate to all workplaces in Australia more generally.

In the HRCA's view, the most important issues to be addressed by this review are:

1) The adequacy and efficiency of laws and policy settings which protect the human rights of all workers (both migrant and local);
2) Whether these laws are being effectively and rigorously enforced so that every worker enjoys full access to their human rights guaranteed under international law, no worker is exposed to working conditions that degrade their human dignity, no worker is required to work in conditions that are unsafe, and that no worker is deprived of the wages and employment conditions they are entitled to under law and prevailing market conditions.

An Australian industrial relations system that respects, protects and fulfils international human rights for all workers is ultimately the only adequate safeguard for the integrity of the 457 visa programme. Ensuring the equal treatment of all workers will ensure that employers have no incentive to employ migrant workers in preference to local workers or to use the 457 visa programme as a means to avoid the employment entitlements of local workers.

Disappointingly, there is significant evidence that employers are failing to respect the employment rights of 457 visa-holders. So long as violations of the rights of migrant workers persist and are tolerated, local workers will be exposed to the risk of degraded labour standards which arise when any worker's entitlements are withheld.

Ratification of Relevant International Human Rights Treaties

This submission recommends that Australia ratify as a matter of urgency the following international treaties:

1) The United Nations International Convention on Protection of the Rights of All Migrant Workers and Members of their Families (the UN Migrant Workers Convention);[1]
2) The International Labour Organisation Migration for Employment Convention (Revised) 1949 (ILO C-97);[2] and
3) The International Labour Organization Migrant Workers (Supplementary Provisions) Convention 1975 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO C-143).[3]

[1] *International Convention on Protection of the Rights of All Migrant Workers and Members of their Families,* adopted by GA Res 45/158, UN GAOR, 45th sess, UN Doc A/RES/45/158, 18 December 1990 (entered into force 1 July 2003). The UN Migrant Workers Convention recognises that migrant workers, both temporary and permanent, are as deserving of recognition of their human rights as citizens. It also requires States Parties to take steps to eliminate illegal movement of workers and prevent the employment of workers without permission to work.

[2] *ILO Convention No 97 on Migration for Employment) 1949*, adopted by 32nd ILC session, 1 July 1949 (entered into force 22 January 1952), which covers the conditions under which migrant workers are employed. It specifies the need for migrant workers to have access to accurate information, and applies the principle of treatment 'no less favourable' than that afforded to nationals. ILO C-97 contains provisions that allow for discrimination between non-citizens and citizens in certain areas. For example, with respect to social security, limitations can be prescribed concerning benefits that are wholly paid out of public funds.

These three conventions (The Migrant Worker Conventions) contain the international human rights framework for migration for employment. There are some technical differences between the provisions contained in the UN Migrant Workers Convention and ILO C-97 and C-143. For the sake of brevity, this submission will refer primarily to UN human rights treaties which Australia has already ratified. However, we contend that ratification of all three instruments, and consonant changes to domestic legislation and policy, is necessary to strengthen the 457 visa framework.

Two points regarding these Conventions should be noted upfront. Firstly, the Migrant Worker Conventions do not interfere with State sovereignty or fetter States' discretion in relation to regulating the entry of non-citizens. The UN Migrant Workers Convention explicitly protects a State's ability to "establish the criteria governing admission of migrant workers".[4] Secondly, these conventions do not create new rights for migrant workers. Indeed, Australia has already accepted the rights contained in the UN Migrant Workers Convention by our ratification of the *International Covenant on Civil and Political Rights* (ICCPR) and *International Covenant on Economic, Social and Cultural Rights* (ICESCR).[5] However, this does not mean that the human rights of temporary migrants in Australia are already sufficiently protected. The UN Migrant Workers Convention applies existing rights so that they are meaningful in the context of migration.[6] The UN Migrant Workers Convention is needed because there is clear evidence that the human rights of 457 visa-holders are not adequately protected either by general industrial measures designed to protect the rights of all workers, or by specific regulatory criteria governing the 457 visa framework. There is further evidence that the safeguards which exist are not sufficiently enforced.

The Application of General Human Rights Standards

Human rights apply to migrant and local workers. The ICCPR and ICESCR explicitly state that the rights recognised are to be applied to non-nationals through the strong non-discriminatory clauses prohibiting distinctions *of any kind*, including grounds such as race, colour, language, national ethnic or social origin.[7] Universal language is also used to refer to the 'right of everyone' to, for example,

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[3] *ILO Convention No 143 on Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers 1978* adopted by 60th ILC session, Geneva, 24 June 1975 (entered into force 9 December 1978), which requires signatories to adopt all necessary means to suppress clandestine movement of migrants, and illegal employment of migrants, in collaboration with other members. ILO C-143 also mandates equal treatment with nationals for migrant workers working legally.

[4] See for example Article 79 of the UN Migrant Workers Convention.

[5] ICCPR, 999 UNTS 172, 16 December 1966 (entered into force 23 March 1976); ICESCR, 993 UNTS 3, 16 December 1966 (entered into force 3 January 1976).

[6] Address by Navi Pillay, High Commissioner for Human Rights to the Graduate Institute of International and Development Studies, Geneva - 14 December 2011, http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11723&LangID=E [accessed 15 Feb 2012]

[7] ICCPR, arts 2(1) and 26; ICESCR, art 2(2).

social security or an adequate standard of living.[8] The UN Committee on Civil and Political Rights – which oversees the implementation of the ICCPR – states that 'the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other person, who may find themselves in the territory or subject to the jurisdiction of the State Party'.[9]

Review Panel Terms of Reference 2: The regulatory framework of the subclass 457 programme

Skills Shortages

The HRCA notes that the current listing of skilled occupations in the *Consolidated Sponsored Occupations List* may not be appropriately adapted to labour shortages. In certain respects, it appears over-broad in that is not restricted to occupations for which there is a demonstrated high demand for labour. It other respects it may be too narrow: certain occupations for which there *is* a demand for workers are excluded from the list, for instance those industries which are the basis for the Seasonal Worker Program administered by the Department of Employment . As long as workers are not permitted to immigrate to work in sectors where there *is* a demand for workers, it is inevitable that irregular migration and unauthorised work will occur. This undermines the integrity of the skilled immigration programme overall, and degrades the rights of temporary workers and local workers alike.

Training Measures

The review panel will be assessing the appropriateness and adequacy of training opportunities provided to Australian workers. The HRCA notes that ICESCR has wide application in relation to employment regulation, guaranteeing everyone the right to work (Art 6) (subject to the sovereign right of States to grant admission via work visas) and the right to just and favourable conditions of work (Art 7). To achieve the progressive realisation of these rights under Art 2(1), Australia is required to provide 'vocational guidance and training programs' and other policies that promote economic, social and cultural development as well as productive employment (Art 6.2). Under the subclass 457 programme, an applicant for employer sponsorship must (in most cases) meet certain training benchmarks (if the employer is based in Australia) or have an auditable plan to meet training benchmarks (if the employer is a business based an overseas).[10] However, these training obligations do not involve skills development for 457 visa-holders in particular. The HRCA

[8] ICESCR arts 7, 9 and 11.
[9] UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant,* 11 April 1986 [accessed 3 May 2013].
[10] See *Migration Regulations 1994* (Cth), reg 2.59 and *Specification of Training Benchmarks* (IMMI 12/062, F2012L01311) under regs 2.59(d) and 2.68(e).

recommends that the training commitments of employer sponsors not differentiate between temporary migrant and local workers.

Visa Conditions and Freedom of 457 Visa-Holders' Labour

The ICCPR guarantees freedom from forced labour.[11] The ICESCR safeguards, more broadly, the 'right of everyone to the opportunity to gain his living by work which he freely chooses or accepts' (Art 6.1). Serious questions arise as to whether the employer sponsorship mechanism in the 457 visa scheme compromises these rights of temporary migrant workers.

Reforms to the 457 visa programme in 2013 extended the time limit under condition 8107 such that 457 visa holders who cease employment with an employer-sponsor have 90 days, rather than 30 days, to find an alternative sponsor (the employer must lodge a nomination under the scheme), apply for another type of substantive visa, or make arrangements to depart Australia. Expanding the timeframe between termination of employment and possible visa cancellation was an important step towards reducing visa-holders' dependency on a particular employer or enterprise, though it continues to fall far short of the right to freedom of employment.[12] The HRCA recommends that this employer sponsorship mechanism be weakened, so that 457 visa-holders are permitted more easily to change employers or occupations. Greater mobility might legitimately be provided after an initial short period of employment with the original sponsoring employer (for example, three months) or mobility might be restricted to occupations within the industry sector in which the visa was nominated. This would be consistent with international guidelines regarding the operation of work permit schemes such as the 457 visa program.[13]

The freedom of 457 visa-holder's employment may be further limited through the current pathways to permanent residency which are open to them. In the 2008 *Visa Subclass 457 Integrity Review* industrial relations expert Barbara Deegan noted that:

> *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*

[11] ICCPR, Art 8.3(a) provides that no-one shall be required to perform forced or compulsory labour.
[12] ILO C-143 does countenance employer-based restrictions on a migrant worker's 'free choice of employment' but only for a maximum of two years or in relation to categories of employment 'where this is necessary in the interest of the State': art 14.
[13] *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination*, Organization for Security and Co-operation in Europe, International Organization for Migration & International Labour Organization Office Geneva, 2006, p115.

visa holders (by employers and migration agents) concerning the possibility of attaining permanent residency was misleading.[14]

Reforms to the permanent skilled migration program since 2008 have seen an even greater emphasis on residence via employer-sponsorship, over residence through points-tested visas that do not rely on employer sponsorship (such as the Skilled Independent (subclass 189) visa and Skilled – Nominated (subclass 190) visa). In July 2012 a new Temporary Residence Transition stream was inserted into the Employer Nomination Scheme (subclass 186) to facilitate the transition of 457 visa-holders to residency. While the HRCA strongly endorses the principle of open pathways to residence for temporary migrant workers, this scheme requires 457 visa-holders to have worked for their sponsoring employer for the last two years and to secure an offer from *that same* employer for at least a further two years. By creating such strong incentives to remain employed with a sponsoring employer, this policy amplifies 457 visa-holders' reliance upon employers and increases the prospect of abuse of migrant workers' rights.

Review Panel Terms of Reference 4: Current compliance and sanctions.

The Capacity to Ensure Enforcement of Migrant Workers' Rights under Migration Legislation

The HRCA notes the recent passage of legislative amendments (in particular, the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* and the *Migration Amendment (Reform of Employer Sanctions) Act 2013*) which are intended to penalise employers for criminal exploitation of migrant workers, in relation to the former Act, and employment of migrant workers in violation of immigration rules, in relation to the latter. 457 visa-holders may benefit from these laws. For instance, serious criminal sanctions against employers who commit the new forced labour offence protect 457 visa-holders as much as any other vulnerable person forced into labour in Australia.

However, these legislative schemes are not sufficient to combat the exploitation of migrant workers. While they prescribe criminal and civil sanctions against culpable employers, they do not significantly transform 457 visa-holders' dependency on their employers. As long as 457 visas rely for their validity on the ongoing sponsorship of employers, 457 visa-holders may have as much if not more to lose from government detection of an employer's non-compliance with immigration rules.

[14] *Visa Subclass 457 Integrity Review* (The Deegan Review), October 2008, Department of Immigration and Citizenship, p50 http://www.immi.gov.au/skilled/skilled-workers/_pdf/457-integrity-review.pdf

In any event, these substantive protections may remain ineffective without comprehensive enforcement. Apparently, the Department of Immigration and Border Protection (DIBP) has scaled down enforcement practices in relation to the 457 visa program in recent years.[15] From 2008-2009 to 2011-2012, the number of sponsors monitored by DIBP decreased by 67%, and the number sponsors visited by DIBP decreased by 38%. In 2011-2012, DIBP monitored only approximately 7.5% of the approximately 185000 employer sponsors, but uncovered breaches in almost 40% of the sites visited.[16] It also took more than two years from the implementation of new penalties for employer sponsors in 2009 for the first employer sponsor to face court-ordered penalties.[17] Given the alarmingly high numbers in which employers are breaching their sponsorship obligations, it is clear that these pieces of domestic legislation alone cannot be relied upon to maintain the integrity of Australian labour standards and prevent employers from viewing temporary migrant workers as a cheap and exploitable alternative to local workers. [not sure what else to add here about deregulation but sounds like a good idea if you have something in mind!]

The Capacity to Ensure Enforcement of Migrant Workers' Rights under Employment and Anti-Discrimination Legislation

The inclusion of temporary migrant workers within existing labour laws is insufficient. Certainly, the *Fair Work Act 2009* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Age Discrimination Act 2004* (Cth) and the *Racial Discrimination Act 1975* (Cth) apply to all workers in Australia. The Australian Human Rights Commission, the Fair Work Ombudsman (FWO) and Fair Work Australia are also empowered to protect the rights of all workers in Australia, including migrant workers. The FWO in particular has identified 457 visa-holders as a vulnerable category of worker and has done a great deal in recent years in pursuance of claims on their behalf.[18] In one case in 2008, a sponsoring employer was fined $18,200 after paying nothing whatsoever to a chef he had recruited in India who worked 14 hours every day for over five weeks.[19]

[15] Natasha Wallace "Employers avoid fines despite visa abuse sanctions" *Sydney Morning Herald*, 25 July 2011.

[16] From 2011-2012 DIBP employed 38 officers (up from 27) to monitor approximately 18500 employer sponsors. DIBPcommenced monitoring on 1398 employer sponsors and conducted 1081 site visits. This resulted in 423 formal warnings, administrative sanctions or infringement notices; Migration Blog, DIBP, http://migrationblog.immi.gov.au/category/sponsor-monitoring/ [accessed 1 Aug 2012]; Letter from the Hon. Chris Bowen, Minister for Immigration and Citizenship to Mr Andrew Naylor, Chair of the Human Rights Council of Australia, 9 Aug 2012.

[17] *Minister for Immigration v Sahan Enterprises Pty Ltd* [2012] FMCA 619. See further: Report of the 2010 Review of the *Migration Amendment (Employer Sanctions) Act 2007* (The Howells Review), 21 Jul 2011, Department of Immigration and Citizenship, http://www.immi.gov.au/media/publications/compliance/review-employer-sanctions/

[18] These have included claims in relation to employers' failure to pay correct minimum wage rates under Awards, overtime, leave entitlements, and penalty rates for evening, weekend and public holiday work: *Flattery v Zeffirelli's Pizza Restaurant* [2007] FMCA 9; *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7; *Workplace Ombudsman v KSN Engineering* [2009] FMCA 538; *FWO v DZ Import & Export Trading Co Pty Ltd* (Chief Industrial Magistrates Court NSW, 5 August 2010, unreported); *FWO v Ultra Tune Australia Pty Ltd* [2012] FMCA 560.

[19] *Freya v Yoga Tandoori House Pty Ltd* [2008] FMCA 288.

However, these institutional structures do not, by themselves, provide an entirely credible process for access to remedies for many 457 visa-holders. The *Universal Declaration of Human Rights* recognises the right of everyone to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law (art 8). Simply granting the same substantive rights as local workers does not address the special vulnerabilities of migrant workers that led to the creation of the Migrant Worker Convention. 457 visa-holders can face barriers in enforcing their rights as a result of the operation of Australian migration law and policy. By creating the potential for a second-tier of workers alongside local workers, these regulatory gaps can depress wages and working conditions for local workers.[20]

To provide just one example, 457 visa-holders are legally entitled to bring claims of unfair dismissal against their employer sponsor under the *Fair Work Act 2009*.[21] However, once an employer has terminated the employment relationship, 457 visas are liable to cancellation after 90 days. There is no standard process through which workers with meritorious claims can be granted a bridging visa to regularise their status past this time period. Since the s 116 cancellation power is discretionary, it is possible for a visa-holder to persuade the Department to leave the visa on foot long enough to lodge a claim, and 457 visa-holders have successfully brought such claims.[22] However, this does not appear to happen as a matter of course. It has been commonly reported that some employers take advantage of these relative difficulties faced by 457 visa-holders.[23] This area of employment law also illuminates the differential remedial entitlements of temporary migrants workers: the primary remedy for unfair dismissal, reinstatement, is typically not be available where a visa sponsorship is no longer in effect.[24]

The HRCA recommends that DIBP and the Department of Employment undertake a comprehensive audit of provisions of Australian employment law in order to assess precisely where 457 visa-holders are accorded differential substantive entitlements or remedies, as well as where practical barriers may prevent 457 visa-holders from pursuing their lawful entitlements.

Conclusion

[20] International Labour Conference, 92nd Session, 2004, Report VI, *Towards a Fair Deal for Migrant Workers in the Global Economy* (Geneva: International Labour Office, 2004) p. 32, para. 109 cited in R. Cholewinski, "Protection of the Human Rights of Migrant Workers and Members of their Families under the UN Migrant Workers Convention as a Tool to Enhance Development in the Country of Employment", 15 Dec 2005, presented at the Committee on Migrant Workers Day of General Discussion http://www2.ohchr.org/english/bodies/cmw/mwdiscussion.htm

[21] Section 385 of the *Fair Work Act 2009* (Cth).

[22] E.g. *Cunningham v Bensons Building Services Pty Ltd* [1998] SAIRC 26.

[23] See 'Filipino Worker Unfairly Sacked Over Illness: Union' *ABC*, 20 January 2008; Natalie Sikora, 'Men Forced to Work with Broken Hands, Arm' *Herald Sun*, 18 June 2008.

[24] *Mr L and the Employer* [2007] AIRC 457, [23]; *Mr Luke Webster v Mercury Colleges Pty Limited* [2011] FWA 1807, [47]. Compensation may be ordered in lieu of reinstatement: s 390, *Fair Work Act*.

The HRCA urges the Review Panel to recommend that the Australian Government to ratify the Migrant Worker Conventions, and revise the temporary work visa program with a view to bringing Australia into full compliance with its obligations under international human rights law and to protecting the human rights of all workers in Australia.