7 October 2008

COVER PAGE
CFMEU RESPONSE
TO

SUBCLASS 457 VISA INTEGRITY REVIEW PAPER No. 3
Integrity/Exploitation

Dated September 2008

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7 October 2008

1 Introduction

The CFMEU welcomes the opportunity to provide a response to the Visa Subclass 457 Integrity Review's Discussion Paper No. 3, on Exploitation/Integrity.

Our response addresses the specific questions asked in the Discussion Paper, under the broad headings listed in the Paper.

2 Integrity and exploitation issues

2.1. Is the current Subclass 457 visa suitable for occupations in ASCO 5-9?

No. The 457 visa regime should be restricted to occupations in ASCOs 1-4, and only selected highly-paid occupations in ASCO 5, eg plant operators. These are occupations requiring lengthy training periods to reach the skill levels required.

The CFMEU agrees that 457 visa integrity issues increase progressively down the ASCO skill spectrum and are concentrated among those paid close to the MSL. The issue of temporary work visas for foreign workers in semi-skilled or unskilled occupations is a major policy issue for Australia, requiring very serious consideration and public debate. This cannot take place in the context of a review of the integrity of the 457 visa program for skilled workers.

We consider that the case for temporary work visas for foreign workers in semi-skilled or unskilled occupations has not been made and that the regulation of any such scheme would have to be many times stronger than the 457 visa regime.

We believe that it is not the role of the government, through temporary visa policies, to prop up every marginal business or industry that claims it needs low-wage temporary migrant labour for its viability or survival.

2.2. Market rates including regional differences

The CFMEU stated its position on how market rates should be defined for ASCO 4 Tradespersons in its submission dated 12 August 2008 on the Integrity Review Discussion Paper No.1. This is shown in Attachment 1.

The CFMEU restates its view that this is the most important issue in reform of the 457 visa program. This is essential for restoring integrity to the program. We also note that our 12 August 2008 submission stated our views on:

- accommodating regional differences in a market rates structure (p9); and
- the need for a premium on top of market rates, as defined for ASCO 4 (p10).

The Discussion Paper also asks whether a breach of MSL/market rates in the 457 regime should be a breach of the *Workplace Relations Act 2006* for which a penalty should apply.

The CFMEU considers that this breach should be elevated to the level of a breach of the *Workplace Relations Act 2006.*

2.3. Labour market testing

Discussion Paper No. 3 asked these questions regarding LMT:

Should LMT be used in the Subclass 457 visa program?

Yes.

The CFMEU stated its position on the importance of Labour Market Testing (LMT) in its submission dated 12 August 2008 on the Integrity Review Discussion Paper No. 1 – see pp11-12, section 3.1.

The CFMEU's position in summary is that LMT is an essential part of ensuring 457 visa workers are paid market rates and do not undermine Australian wages and conditions.

Is it (LMT) necessary at all levels of the program?

As stated in the CFMEU's response to Discussion Paper No.1, LMT should apply to **all** positions at all ASCO levels, with some limited exceptions:

i) For specific skilled occupations where a national shortage genuinely exists.

ii) For some *intra-company transfers*, namely only those positions involving highly-specialised and company-specific skills.

Regarding ii), we would expect intra-company transfers exempted from LMT to involve highly-paid positions requiring visa applicants with substantial experience and a lengthy work history with the company concerned, say at least 12 months as in the Republic of Ireland scheme.[1]

A third LMT exemption category has also been raised in discussions with the Review, namely those positions attracting very high nominated base salaries of say at least $150,000 (in 2008 dollars).

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[1] Department of Enterprise, Trade and Employment (Republic of Ireland), *Employment Permit Arrangements, Intra-Company Transfers,* January 2007, p2. The scheme applies to senior management, key personnel and trainees who are foreign nationals from an overseas branch of a multinational corporation.

The CFMEU believes this exemption could be considered for occupations in ASCOs 1-3 but not ASCO 4. Based on DIAC data provided to the Senate Estimates, only **5.2%** of all 457 primary visa grants in 2006-07 were nominated at base salaries of $150K+ including a relatively small number (80) in ASCOs 4-9. That percentage would mean around 3,000 visa grants exempted at $150+ base salaries in 2007-08.

We do not support any blanket LMT exemptions based purely on ASCO classification, eg ASCO 1 Managers and administrators, without taking nominated base salary into account. This is because the group ASCO 1 Managers etc, despite its relatively high *average* nominated base salary ($129,100 in 2006-07), also includes some very low paid workers. For example, in 2006-07 ASCO 1 Managers included 110 "Farmers and farm managers" (ASCO 11) with a median nominated base salary of only $37,700.[2]

WTO and FTA arrangements restricting LMT

The Discussion Paper (p17) notes that WTO and FTA arrangements can restrict LMT in some cases. But there is not enough detail provided on the particular circumstances in which this restriction applies, to assess whether this is an issue in ASCO 4.

How could it (LMT) be assessed? Or are there alternative ways of ensuring employers recruit local workers first, eg. a price signal?

Improving the price signal (via market rates and additional sponsor costs) will encourage more employers to recruit local workers but will not be sufficient on its own to ensure program integrity. That is why LMT at market rates is needed.

The CFMEU previously said that "DIAC must satisfy itself that the position has been advertised at market rates", as defined above for ASCO 4 (Response to Paper No 1., p8).

The 2007 ALP Platform says (para 176) that LMT will occur 'to ensure that:
- available Australian workers with the requisite skills are offered the vacant job at the market rate
- Australian workers are not displaced
- local market rates and conditions are not undercut
- qualification standards are maintained.'

A practical system based on this standard will involve:

1. An employer attestation regarding employee redundancy. This should be included in the 457 sponsorship application and sponsor obligations, as well as 457 visa applications. The attestation should specify that the employer has not **in the last 12 months** made Australian workers redundant in the same classifications in which 457 workers will be sought; and will not do so in the period during which temporary foreign workers will be employed.

[2] Unpublished DIAC data in forthcoming article on 457 salaries by Bob Kinnaird.

2. If employers have made Australian workers redundant in the last 6 months, employers must be required to give priority job offers to these employees on no less than the original terms and conditions of employment.

3. The ASCO 4 positions must be registered with a Job Network member, for lodgement on the Australian Job Search website for a minimum of **28 days** prior to the visa nomination lodgement, at a salary level at least equal to the market rate applying to that classification. This is similar to the requirement currently applying to labour hire companies in the DIAC standard on-hire Labour Agreement (except for the market rate requirement).

4.Where a Labour Agreement is in place, the employer must notify the job vacancy to all other parties to the Agreement, for circulation in their networks, at the same time as the vacancy is registered with the Job Network member. The parties will have 28 days to respond.

5. An employer attestation regarding advertising the vacant job at market rates and conditions should also be included in the 457 sponsorship application and sponsor obligations, as well as 457 visa applications. The approach in the Canadian and Irish temporary foreign worker programs provide good models.[3]

6. Qualifications of visa applicants: the employer seeking to sponsor a particular temporary foreign worker must provide evidence of a positive assessment by the relevant Australian accreditation authority of the visa applicant's trade qualifications – see also Section 2.4 below.

The CFMEU emphasises its strong view that the above requirements should apply to **all** positions in ASCO 4 and below in the 457 visa program. The Commonwealth-State Working Party on Skilled Migration suggested in 2007 that "appropriately skilled ASCO 4 occupations" should be exempted from traditional forms of LMT.[4]

The CFMEU does not accept that any ASCO 4 positions should be exempted from LMT purely on the basis of the skill level involved in the trade occupation.

2.4 Assessment of work skills and qualifications

Should work skills be assessed for visa applicants under the (457) program? If so, by whom and at what stage? Should any such assessments be applied to all skill levels?

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[3] The Canadian application form - *Foreign Worker Application – Application for a Labour Market Opinion* - was referenced in the CFMEU's submission to the 457 visa Review's Discussion Paper No. 1.
[4] Commonwealth State Working Party on Skilled Migration, *Draft Discussion Paper – Temporary entry and employment of skilled migrants,* 19 February 2007, p1.

Yes. The issues here are claimed formal trade qualifications and claimed trade experience.

The CFMEU considers that the trade qualifications of 457 visa applicants should be formally assessed by the relevant Australian accreditation authority, namely,Trades Recognition Australia (the TRA). The assessments should:

- involve a practical trade skills assessment (formal skills testing) by an independent qualified assessor, not employed by or associated with the sponsoring employer. They should not be paper-based assessments because of the high risk of document fraud in many high-risk countries supplying the vast majority of 457 tradespersons.
- be completed before the 457 visa is issued, ie a positive trades skills assessment should be a pre-condition of the visa grant.
- make maximum use of offshore skills assessment arrangements established by DIAC and DEEWR.

Regarding claimed work experience as a tradesperson with overseas-based employers, integrity checking of these claims by overseas posts should be conducted. Systems in this area (as in others) will need to be vastly improved if the 457 program is maintained at present levels, let alone at increased levels.

2.5 Training obligations of sponsors

What training obligations, if any, should be required of employers?

Training obligations are, and should remain, an essential component of sponsorship obligations on employers under the 457 visa program.

In relation to ASCO 4, the current training requirement in the On-hire Industry Labour Agreement is a good guide and starting point, namely:

> that 15% of its (the employer's) trade (ASCO Major group 4) workforce are Australian Apprentices or recent Australian Apprentices (with less than 12 months post-qualification work experience) including those under contract to Group Training Organisations but whose placements are co-ordinated by the Company.(para 7.83) [5]

Some flexibility will be required, and in some cases more and others less than this will be appropriate.

[5] This standard was introduced in October 2007, under the previous government.

The CFMEU notes that the 15% figure is close to the current national "training rate" of 14% (the ratio of apprentices to employed tradespersons in the Australian workforce).[6] However, this ratio will probably need to increase in future, in response to the projected increase in the number of tradespersons reaching retirement age in the near term.

The CFMEU regards actual participation in apprentice training by 457 sponsors as a far more adequate contribution to training than other measures such as contributing a minimum percentage of payroll expenditure on structured training for each Australian employee. A contribution to an approved Industry Training fund for the training of Australians is acceptable, provided the funds are earmarked specifically for training in the occupation in which 457 workers are being sought.

The Immigration Minister should direct that the training obligations requirement on sponsors should give preference to employers directly training apprentices, compared to the alternatives.

2.6 Accreditation of sponsors

Should accredited employers be given freer access to the Subclass 457 program? If so what benefits should accompany accreditation of employers under the program?

What should be the basis of accreditation of employers?

The CFMEU notes that the Immigration Minister has already announced that there will be a system of accreditation of employers/sponsors in the 457 visa program; that "accredited" employers will get "fast track" 457 visa processing; and that accredited employers will be limited to those with an exemplary record of compliance with 457 visa requirements (Discussion Paper No 3, p 29). We understand no further details of the benefits for "accredited" sponsors have been spelt out.

The CFMEU's position is that notwithstanding the decision already announced, moving to an accreditation system with fast track benefits for 457 sponsors is premature.

This is for two reasons. First, the test put forward to qualify for accreditation is seriously inadequate, namely 'an exemplary record of compliance with 457 visa requirements'. This is because 457 visa requirements have been set so low that compliance with these requirements says nothing about an employer's fitness for exemption from some 457 requirements. This was the case under the previous government and unfortunately remains so in October 2008. The 457compliance bar is still set so low that employers can fully comply, even though they are not paying their 457 workers market rates.

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[6] P. Toner (2005) Getting It Right: what employers and apprentices have to say about apprenticeships. Dusseldorp Skills Forum, Group Training Australia Ltd and Australian Industry Group (updated to 2007 by author).

Secondly, there has been very little transparency about the actual operation of the 457 visa program before the accreditation decision was made. There has not been enough relevant information about the 457 visa program made available publicly, to properly assess whether an accreditation system is justified.

The CFMEU's position is that, if an accreditation system for employers is introduced:

- it should initially be extremely limited, say to employers with 100 or more 457 visa applications per year (around 60 employers in 2007-08, based on DIAC data, with between possibly 20-30% of all 457 visa grants).
- be limited to employers already paying top of the market rates, not second tier companies; and those with a history of not just *compliance* with industrial, OH&S, taxation and immigration laws, but "best practice" in these areas.
- labour hire firms should not be eligible.
- in return for the privileges of accreditation, employers should agree to *increased* transparency of their 457 activity and increased participation in monitoring and compliance. This includes publication of the names of employers and details of all associated 457 visa nominations and applications lodged, including occupations, proposed location of workers and nominated salaries.
- it should not be a substitute for Labour Agreements.
- fast tracking of visa applications should not involve exemption from Labour Market Testing, at least for occupations in ASCO 4.

The CFMEU would be extremely concerned if the accreditation system resulted in large segments of the 457 visa program activity being further removed from public scrutiny. This would undermine efforts by the Immigration Minister to build public confidence in the 457 scheme.

2.7 DIAC outreach officers

Are Industry Outreach Officers (IOOs) and Regional Outreach Officers (ROOs) a useful resource for business? If so, what should be their area of responsibility? For example:

- **educating employers**
- **providing information to employers and employees**
- **assisting employers in carrying out immigration related work.**

Is the current practice of placing DIAC outreach officers with employer organizations for extended periods of time an efficient/appropriate practice?

The CFMEU has serious concerns about the use of taxpayer-funded immigration officials being outposted to business and industry bodies. According to DIAC information

provided to Senate Estimates, these officials are being used in 2008 'to increase employer-sponsored immigration'[7].

IOOs were operating at 25 locations around Australia and ROOs were at a further 7-9 locations.

We understand that neither the US nor the UK have similar outplacement arrangements with their immigration agency public servants.

We consider that this arrangement will contribute to the integrity of the 457 system only if the role of departmental officers is limited to educating employers.

If this role is to be played by these IOOs/ROOs in the future, it is not appropriate that these officers be attached only to employer groups. Some should also be attached to key trade unions and peak union bodies, as part of the broader campaign to educate the community about the 457 program.

2.8 Greater transparency

Would greater transparency improve the integrity of the program? If so, what form should it take, for example:

- **publishing the names of employers on the internet where those employers have sponsored 5 or more workers on Subclass 457 visas**
- **publishing regional data on the number of Subclass 457 visas granted**
- **notifying State and Territory governments of subclass 457 visa grants**
- **passing on information on Subclass 457 visa grants to relevant external agencies, eg Workplace Ombudsman, Australian Taxation Office and OH&S agencies.**

Yes. The CFMEU supports all of the above, and notes that our earlier submissions made recommendations along these lines. We also make the following additional points.

First, one area where much greater transparency is vital concerns 457 wages and salaries, both those nominated by employers and wages actually paid. The CFMEU believes that unless there is much more information ***publicly*** available on this area, public confidence in the integrity of the 457 program will be compromised. The CFMEU considers that this information should be published on the DIAC website and be freely accessible.

The CFMEU welcomes the fact that the new Labor government is now publishing more 457 salaries information than the previous government, specifically the average nominated base salaries and total remuneration packages by ASCO major group (eg,

[7] DIAC, Answer to Senate Estimates (legal and Constitutional Affairs) Question No.31, 28 May 2008

Tradespersons, Professionals etc).[8] However, this is still not enough to make informed judgements about wages and salaries in the 457 program.

As well, the DIAC website should show the following additional information on nominated base salaries, at least at the level of ASCO submajor 2-digit group (eg, Construction trades, Food trades etc), and preferably at the 4-digit ASCO level (eg, Carpenters, Cooks, Welders, Fitters). This occupational wages data should show nationally and by State/Territory:

- the median nominated salary
- the number approved at the MSL, both standard and regional MSL separately
- the number of visa grants approved by salary range

Second, we commend the Immigration Minister's 30 September 2008 announcement that his department (DIAC) and WorkCover NSW will exchange names and addresses of businesses that employ subclass 457 visa holders, and information about workplace safety incidents; and that similar arrangements are under consideration with Western Australian, Queensland and Victorian workplace safety authorities.[9]

Third, we emphasise the importance of ***publicly*** available information on the operation of the 457 program, as distinct from information exchanged between government agencies such as between DIAC and NSW Workcover, mentioned above. Both are essential to improving the integrity of the 457 program. But public confidence in the program's integrity can only be improved by maximum public release of information about the operation of the 457 visa scheme, particularly concerning its more contentious features.

The CFMEU therefore proposes that:

- a comprehensive annual report on the operation of the 457 visa program be published, and tabled in the Parliament by the Immigration Minister.
- the 457 program should be reviewed by an independent agency such as the Auditor-General, every 3 years or so.

Should the Workplace Ombudsman and OH&S agencies be given the details of Subclass 457 visa holders when they arrive in Australia to assist these agencies to monitor compliance with workplace regulations?

Yes, and details of their employers.

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[8] The previous government refused to publish 457 nominated salaries data by occupation and instead published *average* 457 salaries only by *industry*. Since 457 visa grants in each industry were a combination of more highly-paid managers and professionals in ASCOs 1-2 and ASCOs 4-9, the average 457 salary by industry was skewed upwards.

[9] Senator Chris Evans, Minister for Immigration and Citizenship, "Joint agreement to protect overseas workers in NSW", media release, 30 September 2008.

Should this information also be given to State and Territory governments to assist with planning infrastructure, such as providing local schools with teachers with 'teaching English as a second language' skills?

Yes.

This information should also be provided to the relevant unions.

2.9 Access to information and services on rights & obligations

How important is access to information about visa holders rights and obligations pre-arrival in Australia?

- What can be done to improve potential applicants understanding of their rights and obligations?

- Would increasing awareness about key elements of the program assist in reducing vulnerability?

Yes. 457 workers should also be provided with a list of relevant unions and contact details in each State/Territory.

What services (if any) should be available to subclass 457 visa holders and their dependants on arrival in Australia?

DIAC officials should brief 457 workers on their rights, either on arrival or shortly after. At this induction briefing, the visa holders should be given the name and contact details of a DIAC contact officer, as the person the worker is entitled to contact with any future questions regarding their rights and entitlements. It is important to interpose these officials between the employers and the 457 visa holders.

2.10 Time to locate another sponsor

Should Subclass 457 visa holders be given more time to locate another sponsor, beyond 28 days, if they decide to change sponsors in Australia?

- **what sort of assistance should they be given to locate another sponsor?**
- **what sort of support, if any, should they be given in this time?**

The CFMEU considers that giving 457 visa holders more time to locate another sponsor is central to improving the program's integrity and reducing the vulnerability of foreign workers.

We endorse the ACTU submission[10], which proposes changing the allowable period in which to find alternative employment from 28 to **90 days** after termination of employment, based on international standards. This three-month period should be extended if the worker has workers compensation or employment litigation in place.

During this period:

- for the first 28 days post termination, the 457 sponsor continues to pay the nominated salary (market rate, in future) (which is current policy, but limited to "at least the MSL")
- for the next 28 days, the 457 sponsor pays the visa-holder 50% of the nominated salary (market rate).
- after 56 days, the 457 visa holder would become eligible only for Special Benefits payments for exceptional circumstances, on the same basis applying to other temporary residents able to access this benefit.

The CFMEU does not support establishing a general right for 457 visa-holders to become eligible for Centrelink unemployment payments after this 56-day period of support provided by the employer. This would create anomalies between 457 visa-holders and Australian permanent migrants who must serve a 2-year waiting period in Australia before being able to access social security benefits. This includes persons granted permanent residence visas under employer-sponsored PR arrangements such as the ENS.

2.11 English language ability

Does a visa holder's country of origin contribute to their vulnerability?

Yes. The CFMEU's experience is that 457 workers from countries without a well-developed system of worker rights and active trade unions are generally more vulnerable in Australia than workers from countries where these institutions are stronger.

Does a visa holder's level of English language contribute to their vulnerability?

Yes – see p2-5 of the CFMEU's response to Discussion Paper No.2.

2.12 457s converting to permanent residence (PR)

[10] ACTU Submission to 2007 JSCM Inquiry into temporary business visas, 9 February 2007, p22.

The CFMEU believes this is an important issue for the integrity of the 457 program. The Discussion Paper correctly highlights that the link between the sponsoring employer and access to PR visas provides a strong incentive for 457 workers to accept substandard wages and working conditions, and living conditions generally.

This situation is made worse by the regulations currently governing wages in the employer-sponsored PR visa, the ENS or Employer Nomination Scheme. Employers sponsoring workers on this visa are only required to nominate the 457 MSLs to satisfy the visa wage requirements.

We note some 457 statistics that support the view that this issue is increasing in importance in the ASCO 4 area, in particular.

- 457 workers in ASCO 4 appear to be staying in Australia for longer on average than 457 workers in other occupations. As a result, in future relatively more in ASCO 4 will meet the qualifying period for employer-sponsored PR visas (2 years working in Australia, for the ENS or Employer Nomination Scheme).

DIAC data shows that on 1 July 2008, the total stock of 457 primary visa holders in Australia was 74,000. Of these, **16,540** were tradespersons, making up 22 per cent of the total stock of 457 primary visa holders at this time. This was more than their 17 per cent share of 457 visa grants in 2007-08, indicating this group has an average duration of stay in Australia longer than other occupations. [11]

Do some subclass 457 visa holders come to Australia with aspirations of permanent residency, when this might never in fact be a realistic possibility?

Yes.

Should subclass 457 visa holders be denied access to permanent residence at certain levels of ASCO classification?

Yes, in relation to employer-sponsored arrangements like the ENS and Regional Sponsored Migration Scheme (RSMS)

The CFMEU believes that access to PR visas through employer-sponsored arrangements like the ENS and the RSMS should generally be available only in ASCO 4 (Tradespersons) and ASCOs 1-3. Some exceptions could be made for selected highly-paid positions in ASCO 5 (eg, mobile plant operators)

The Discussion Paper states that “RSMS 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” (p26).

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[11] DIAC, Subclass 457 visa State/Territory Summary Report 2007-08.

The CFMEU has serious concerns about the potential for exploitation by sponsors of 457 workers in arrangements where the sponsoring employer can effectively determine whether or not the 457 worker will gain PR status in Australia, along with members of the worker's family.

The scope for this exploitation increases in occupations further down the skill spectrum.

Should subclass 457 visa holders have greater access to permanent residency in Australia not requiring sponsor support?

The CFMEU supports 457 visa holders having greater access to PR visas not requiring sponsor support, providing that any such arrangements do not lead to a reduction in standards for skilled migration categories generally. Any such reduction will lead to a dilution of skill standards in the overall migration program.

The CFMEU supports a broader review of the access of 457 visa holders to employer-sponsored PR visas.

The Discussion Paper notes that currently 457 workers can be granted PR visas through the ENS without any formal assessment of their trade qualifications if they have worked in Australia for 2 years *and* worked with their sponsoring employer for at least 12 months (p26).

This arrangement is wide open to abuse of 457 visa holders. It also risks diluting the skills base of the Australian trades workforce. This is because it allows 457 workers to be granted PR visas as "tradespersons" even though they might have skills in only a few trade areas, or even no trade skills at all. As the Discussion Paper points out, the so-called trade qualifications of 457 workers from high-risk countries are frequently bogus, and document fraud is rife in many of these countries.

We have proposed that in future trade qualifications claimed by 457 visa applicants should be assessed properly before the 457 visa is granted in the first place – see Section 2.4, above. That change will remove one potential area of exploitation.

But that still leaves the issue of 457 workers already here in Australia – over 16,000 in ASCO 4 in July 2008, as noted above.

The CFMEU believes that the ENS rules should be changed as follows:

- a formal assessment of the trade qualifications of ENS applicants should be required as a condition for granting the PR visa, by way of a practical skills test and not a paper-based assessment, in all cases where a positive skills assessment has not already been made.

- the regulation of wages in the ENS should be changed in line with changes to the 457 visa, that is, employers must pay the relevant market rate (at least in ASCO 4), as defined for that program, not the current 457 MSLs, as a pre-condition for granting the visa.

2.13 Cost sharing between 457 visa holder and sponsor

Given there are relocation costs to Australia for Subclass 457 visa holders and dependents, and ongoing costs to remain here, how should these costs be distributed between the sponsor and the visa holder?

The CFMEU outlined its position on this issue in its response (dated 11 July 2008) to the DIAC Discussion Paper on 457 visa reform. In summary, the CFMEU supports the view of the Commonwealth-State Working Party on Skilled Migration that the sponsor should be liable for all costs associated with:

- travel to/from Australia
- recruitment
- migration agents services
- licensing and registration, or similar
- visa fees
- skills assessment
- English testing
- health testing
- health insurance premiums
- education costs (in public schools only) for primary and secondary students of mandatory school age.

Imposing additional upfront and ongoing costs on 457 sponsors may provide more incentive for employers to:

- restrict the mobility of the 457 visa holders until these costs are recovered – see next point; and
- sponsor these workers for PR visas, because that will shift some costs back to the taxpayer. This underlines the importance of reforming the employer-sponsored PR visa programs.

What measures can be taken to ensure that the additional premium attached to subclass 457 visa holders moves to a new employer with them, thus increasing the mobility of the visa holder and reducing the cost to the initial sponsor?

The CFMEU supports the principle of transferring to new sponsors the pro-rata proportions of the additional premium attached to 457 visa holders, involved in upfront costs.

2.14 Role of migration agents

How could the role of migration agents be altered to increase their contribution to the integrity of the program?

- **should the prohibition on giving migration advice unless you are a registered migration agent be clarified to ensure that other organizations can assist visa holders without infringing the current prohibition?**

Yes.

Should migration agents have a schedule of fees and charges for their services?

Yes. The CFMEU strongly supports a schedule of standard fees for 457 visa-related services. The schedule be well-publicised and migration agents should be obliged to inform prospective visa applicants of the schedule.

Should migration agents be prohibited from being employment agents or running a business associated with them?

Yes. This dual role involves a conflict of interest that can only disadvantage visa applicants.

Should specific penalties be introduced for migration agents who fraudently deceive their clients or the Commonwealth?

Yes. The penalties should be in line with those imposed on sponsors who breach their 457 sponsorship undertakings, as set out in the Migration Amendment (Worker Protection) Bill, introduced into the Parliament by the Immigration Minister in September 2008.

Should migration agents have obligations to properly inform their client of their rights and responsibilities, and be penalized if they breach those obligations?

Yes.

2.15 Migration Review Tribunal

The Discussion Paper notes (p40) that concerns have been raised as to whether the MRT legislative charter to provide a “quick and informal” review is appropriate for 457-related cases involving integrity and exploitation.

The CFMEU shares these concerns. Cases dealing with integrity and exploitation in the 457 visa program should not be the subject of a “quick and informal” review. The MRT is therefore not an appropriate forum for dealing with these serious cases. Those cases involving abuse or alleged abuse of industrial standards should be referred to a more appropriate industrial tribunal.

The Discussion Paper also notes that the MRT overturned the department’s sanction barring a Queensland 457 employer “from employing further workers under the scheme for a period of time.” This employer was the sponsor of a Chinese 457 worker who was killed at work while working for the sponsor. According to the Discussion Paper, the MRT overturned the department’s sanction of this employer “on the grounds that the applicant had not breached the undertakings identified by the department.” (p40)

The CFMEU considers that this is decision is extremely difficult to understand given the circumstances and matters of public interest in the case. We are unable to comment further at this stage because we have not been able to see the MRT decision. This MRT decision was not published by the tribunal, even though the MRT publishes 20 per cent of all its decisions. DIAC had also declined to provide a copy of the decision, at the time of completing this submission.

3 Monitoring, compliance and related issues

3.1 Overall comments

The CFMEU supports integrating 457 visa holders as much as possible into the workplace regulations framework for Australian workers generally. We believe this is the best way to minimize exploitation and maximize integrity in the 457 visa program.

We also believe that the administration of the 457 visa program requires a greater division of labour involving more government departments and agencies with expertise in the many areas that the 457 visa impacts on.

DIAC does not have expertise in many of these areas, and it is unrealistic to expect its officers to be workplace inspector experts, for example.

Finally, we also strongly believe that more employer site visits, not fewer, are needed to improve integrity in the scheme. The CFMEU opposes any move to increase reliance on paper-based monitoring and reduce site visits.

The following section addresses specific questions in the Discussion Paper.

3.2 Specific questions

Should DIAC staff processing 457 visa applications be formally trained in reading financial documents and have the ability to assess trades recognitions and other formal qualifications or should a more appropriate area of government assume such responsibilities?

DIAC staff do need some basic training in these matters. But the integrity of the program will be improved if the more appropriate area of government is delegated the responsibility for its area of expertise. For example, trades and qualifications assessment should be referred to the designated agency for this task, the TRA in the case of the trades.

Similarly should DIAC employees processing 457 visas be required to have an understanding of employment law and contract law generally?

See above responses.

Should DIAC officers have responsibility for monitoring compliance with workplace conditions of employment for 457 employees?

The CFMEU believes this function is best performed by officers of the Workplace Ombudsman.

Are there functions currently performed by DIAC processing, monitoring and compliance staff that are more appropriately the province of other departments, agencies or institutions?

In relation to processing, the functions of establishing and drawing up an operational table of market rates by occupation should be a DEEWR responsibility; and the labour market testing function should also involve DEEWR in a reformed 457 visa regime.

In relation to compliance monitoring, see answer to previous question.

In the case of monitoring and compliance activities, should relevant external agencies be routinely informed of the location of 457 employees?

Yes.

Is DIAC providing sufficient information on employer obligations to employers?

The CFMEU believes it is the nature of employer obligations, not just information about them, that matters.

We would expect a major employer information campaign following passage of the Migration Amendment (Worker Protection) Bill introduced in September 2008, and consequent regulations.

Is there sufficient oversight of sponsors who do not do the right thing in relation to the subclass 457 visa holders they sponsor?

- **what type of compliance work would be most effective in reducing vulnerability?**
- **do Labour Agreements provide any greater controls to assist with compliance?**
- **How effective are Labour Agreements in reducing vulnerability?**

The most effective type of compliance work for reducing vulnerability is site visits.

Labour Agreements in theory do provide greater controls to assist with compliance. In practice, consultation on Labour Agreements has been mainly limited to the front-end terms and conditions of the Agreement. The amount and quality of information exchange between the parties to a Labour Agreement is central to these Agreements playing an effective role in reducing vulnerability.

The CFMEU believes unions are well placed to help minimize exploitation and vulnerability of 457 visa workers. A higher degree of consultation and cooperation with registered trade unions is desirable, to help improve compliance generally.

The Commonwealth should provide resources to relevant unions as a means of building capacity to assist in compliance monitoring in the context of Labour Agreements, and more generally.

Is DIAC appropriately managing the risk of Subclass 457 visas through its monitoring and compliance activity? What risk factors should be taken into account when targeting monitoring activity?

It is difficult to assess whether DIAC is effectively managing this risk, because the data needed for this assessment is not publicly available. As stated earlier, the CFMEU believes that site visits to 457 employers are the most effective form of compliance monitoring.

But the number of 457 sponsors subject to any kind of site visit is very low. In 2007-08, the total number of sponsors "site visited" was only 1,759 or 8.8% of the approx 20,000 total 457 sponsors in Australia. This was only marginally higher than the number in 2006-07 (1,759 vs 1,680 – an increase of only 79 employers or a 5% increase).

But the number of employers site-visited is meaningless without knowing how many 457 visa-holders were employed by those employers and in what occupations (for example, ASCO 4). For example, if all 1,759 employers visited in 2007-08 only employed on average one 457 worker each, then site visits have only covered 1,759 foreign workers – or only **2.4%** of the total 74,000 457 visa holders in Australia in July 2008.

But if the 1,700 employers included many large employers with several hundred 457s on their books as direct employees, that means a much larger coverage of these workers at greatest risk.

Labour hire companies raise more issues for compliance monitoring by site visits and DIAC data on site visits. A “site visit” to the head office of a labour hire company is little more than paper-based monitoring, because compliance officials can only inspect paper work there. 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.

As a minimum, data is needed on the total number of employers employing 457 workers in ASCO 4-9 by the type of sponsor (labour hire company/direct employer), and the number of 457 workers in ASCO 4-9 employed by these employers. The number of sponsors “site visited” should be similarly disaggregated, and in relation to labour hire companies, data should show the number of employers using outplaced 457 workers who were site-visited (and those not visited), and the number of 457 visa-holders working at the sites visited (and not visited).

Risk factors for ASCO 4-9 to be taken into account in targeting activity include the following:

- relatively low salaries paid to 457 workers, at or close to the MSL
- 457 workers from high-risk countries
- sponsor is a labour hire company rather than standard direct employer
- a concentration of 457 workers with a particular employer
- non-compliance with OH&S and other workplace laws.

Attachment 1 Defining market rates for ASCO 4, Tradespersons and related workers

Extract from CFMEU submission (dated 12 August 2008) on 457 visa Integrity Review Paper No.1

3.2.1 Market rates for tradespersons (ASCO4)

1. The CFMEU position is that for the purpose of the 457 visa program, market rates for the occupational classification in question, in the State/Territory in question, should be determined as follows:

i) Where there is a collective agreement applying at the sponsor's workplace, the actual rates of pay as specified in that agreement (excluding greenfields agreements) would be the market rate to be paid to 457 visa workers.[12] The rates of pay would generally be specified as hourly rates.

ii) Where there is no collective agreement in place, the average rate of pay for the trade classification as specified in current collective agreements in the State or Territory where the 457 visa holder will be working (or where applicable, the regional average Certified Agreement (CA) rate, for example in the Latrobe Valley). [13]

iii) Where there is a very low number of CAs for a trade or occupational classification (eg, agriculture) or CAs are non-existent, the average rate of pay as determined by ABS employer-based surveys or other ABS data (or a non-ABS survey which is agreed by the stakeholders to be a good guide to current market rates and conditions in the occupation and State/Territory concerned).[14]

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[12] The workplace collective agreement should also apply to any 457 visa holders supplied by a labour hire company to the sponsor's workplace.

[13] Regarding 1 ii) above, DEEWR should prepare and provide to DIAC a list of current average hourly rates of pay by occupation and State/Territory in collective agreements and update this list quarterly. The wage rates by occupation in this list would then be the market or going rate, for the purpose of 457 program administration, to apply where a collective agreement was not in place at a 457 sponsor's workplace.

[14] Regarding 1 iii) above, the CFMEU understands that there are various issues with different ABS surveys of earnings (including reliability and timeliness) - see ABS Feature Article: *Comparison of ABS measures of employee remuneration*, in the October 2005 issue of Australian Labour Market Statistics (cat. no. 6105.0). For the purposes of the 457 program, the key requirement is a measure of hourly earnings by trade occupation. The CFMEU believes the most appropriate ABS survey for this purpose is the 2-yearly ABS employer-based *Survey of Employee Earnings and Hours*, Cat.6306.0 (the EEH survey).

The EEH survey produces, for each trade subgroup in the tradespersons and related workers group (ASCO 4), a national average (mean) hourly rate for full-time non-managerial adults, for ordinary time hours, overtime and total hours (see table 1 in section 2). Similar data can be generated at a State or Territory

iv) Where there is disagreement about the rate that should apply (ie, between the Department and the sponsoring employer), then the matter should be referred to the relevant union for advice.

level, with varying margins of error. The last EEH survey was conducted in May 2006 and the next EEH survey is scheduled for August 2008, with results expected in May-June 2009.

Assuming the new market rates system is adopted in the 457 visa program before May 2009 when the next EEH survey data becomes available, the May 2006 EEH survey earnings data could be adjusted for general wage movements since 2006.