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Employment contracts for Subclass Visa 457 workers

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INGRAINED INTELLIGENCE

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1. Introduction

1.1 Recent amendments to the *Migration Act* and regulations, along with the imminent commencement of the new federal safety net under the *Fair Work Act*, highlight a number of issues for consideration by employers in documenting terms and conditions of employment for foreign nationals engaged to work in Australia under Subclass 457- Business (Long Stay) visas.

1.2 The new federal safety net of terms and conditions of employment found in the *National Employment Standards* and, where they apply, modern awards, commence on 1 January 2010.

1.3 Employers of foreign nationals under Subclass 457 visas have to contend not only with the new federal industrial safety net, but also with the provisions of the *Migration Act* as now amended by the *Migration Legislation Amendment (Worker Protection) Act* 2008, which commenced on 14 September 2009.

1.4 The focus of this paper, as its title suggests, is the content of employment contracts for people employed under Subclass 457 visas. However, to put that material, which starts at paragraph 6 below, in context, some background discussion of the worker protection provisions and the industrial regulation of foreign workers in Australia is required.

2. Requirements of the *Worker Protection Act*

2.1 In broad terms the worker protection amendments to the *Migration Act* achieve two things.

2.2 Firstly, they more specifically define the sponsorship obligations of Australian employers.

2.3 Secondly, they introduce new compliance and monitoring arrangements including:

(a) allowing information sharing between government agencies, for example the disclosure of information by the Australian Taxation Office to the Department of Immigration and Citizenship;

(b) expansion of the powers of the Department of Immigration and Citizenship to monitor and investigate compliance with the legislative framework now applicable to Subclass 457 visa arrangements including, for example, expanded powers of inspectors; and

(c) prescribing civil penalties for employers found in breach of sponsorship obligations.

2.4 Some aspects of the new enforcement framework now applicable to Subclass 457 visa arrangements are very similar to the enforcement framework applicable to industrial arrangements in the federal industrial relations system under the *Fair Work Act*. For example, according to extrinsic materials accompanying the worker protection amendments, inspectors under the *Fair Work Act* will hold dual appointment under the *Migration Act*.

2.5 The penalty provisions in both Acts are also now largely complementary. In both cases:

(a) the maximum penalty applicable per breach is $33,000 for a corporation and $6,600 for an individual; and

(b) applications for penalty orders will be heard, either, in the Federal Court or the Federal Magistrates Court[1].

[1] *Migration Act* 1958 (Clth) s486R

3. The 'new' sponsorship obligations

3.1 In summary the 'new' sponsorship obligations - some of them are reworked from the previous employer undertakings - are these:

(a) **Obligation to cooperate with inspectors**
Sponsors must cooperate with inspectors who are appointed under the *Migration Act* and are exercising powers under that Act. This extends, for example, to the production of documents relating to a sponsored worker, upon request of the department, within a period as short as seven days. Failure to comply with a request can lead to prosecution for a civil penalty[2].

(b) **Obligation to ensure equivalent terms and conditions of employment**
Sponsors under the new framework will be obliged to ensure that the terms and conditions of employment provided to sponsored persons are no less favourable than the terms and conditions of employment that the employer would provide to a domestic worker employed in the same circumstances. The obligation extends to payment of market salary rates instead of the previous minimum salary level.

(c) **Obligation to pay travel costs to enable sponsored persons to leave Australia**
This is similar to one of the previous undertakings given by employers to the department in relation to Subclass 457 visa holders, although the detail around the obligation has now been changed. For practical purposes, sponsors will be obliged to pay reasonable and necessary travel costs to enable sponsored persons to leave Australia, if requested to do so in writing by the sponsored person or the Department of Immigration and Citizenship. The obligation extends to pay costs incurred by the Commonwealth, up to a maximum of $10,000, for the Department to locate and remove previously sponsored persons who have become unlawful non-citizens.

(d) **Obligation to keep records**
There is now a positive obligation to keep records of compliance with other sponsorship obligations. The records required to be kept extend, for example, to include details of the "equivalent terms and conditions of employment", payment of "market rate" remuneration, records of written requests for payment of return travel costs, and so on.

(e) **Obligation to provide records and information to the Minister**
The obligation is, if requested, to provide records or information to the Department of Immigration and Citizenship in the manner and within the timeframe requested by the department.

(f) **Obligation to notify the Department of Immigration and Citizenship of certain events**
There is a revised obligation to provide information to the department when certain events occur, for example when the employment of a sponsored worker ceases.

(g) **Obligation to ensure work in nominated occupation**
The obligation is to ensure that the primary sponsored person works or participates in the nominated occupation, program or activity. A sponsor must ensure that the sponsored person does not work in an occupation other than that which was identified in the most recent approved nomination for that person. The sponsored person must work for the nominated employer as an employee and, with few exceptions, engagements of persons as independent contractors are not allowed.

(h) **Prohibition against cost recovery**
There is now an obligation not to recover recruitment and sponsorship costs, including migration agent costs, from a primary sponsored person or secondary sponsored person (such as family members accompanying the sponsored worker).

[2] *Migration Act* 1958 (Clth) s140XF

4. Industrial regulation in Australia of sponsored workers generally

4.1 There is no special industrial relations system applicable to foreign workers. Australian industrial and related legislation, along with our "general" or judge made law, applies to sponsored foreign workers in the same way it applies to the employment of Australian residents, overwritten by the additional obligations imposed by the *Migration Act*, including as that Act has now been amended by the Worker Protection Act provisions.

4.2 For national system employers principal industrial regulation is now provided by the *Fair Work Act* 2009, under which the new safety net of basic entitlements and modern awards will commence on 1 January 2010.

4.3 Even for private sector employers currently outside the federal industrial relations system, there is now a strong prospect that most employers, in most States of Australia, will eventually be brought into the federal system by legislative arrangements between the States and the Commonwealth. For example, legislation to that end for non-national system employers was introduced into the Queensland Parliament on 27 October 2009 and, at this stage, is intended for implementation in time for commencement of the new federal safety net, on 1 January 2010[3].

5. Exposure to penalties under the *Migration Act*

5.1 The addition of exposure to liability for civil penalties for breach of sponsorship obligations under the *Migration Act* represents a significant addition to the migration legislation. A similar penalty regime has been in place in the federal industrial relations jurisdiction since 27 March 2006. Experience there has shown that the Federal Court and Federal Magistrates Court, who will also hear applications for penalty orders under the *Migration Act*, will impose very significant penalties in appropriate cases. For example, in one recent case an employer was ordered to pay a penalty of $240,000 for underpaying two cleaners less than $4,000[4].

5.2 Not just the employer is exposed to liability for a civil penalty. As under the *Fair Work Act*, people "involved in" contraventions can also be liable for penalties, for example directors of corporate employers[5]. The federal regulator, the Fair Work Ombudsman, has demonstrated both capacity and willingness in appropriate cases for pursuing individuals behind corporate offenders. In the case example just mentioned, a director of the employer was separately fined $48,000 in respect of the corporate employer's contraventions.

5.3 There is no reason to think that the approach of the Federal Court or the Federal Magistrates Court to the imposition of penalties under the *Migration Act* will be any different to the experience in the industrial jurisdiction. Penalties are likely to be significant, particularly where there is some suggestion of exploitation by an employer of a vulnerable worker or group.

5.4 Prosecutions can be brought at any time within six years after a relevant contravention has occurred. This corresponds with the civil penalty provisions under the *Fair Work Act*, and is also the limitation period for recovery of unpaid wages and related entitlements in the federal industrial relations system[6].

5.5 It is important to note that the penalties in both systems are "civil", meaning not for alleged "criminal" conduct. The point of this is to reflect government policy that liability not have unintended follow-on consequences that might follow a "criminal" conviction, for example disqualification from certain business activity, whether domestically or internationally.

5.6 Currently we have no experience with the approach of the Department of Immigration and Citizenship or the Minister to enforcement of the new *Migration Act* regime. However, it is not unreasonable to expect an approach similar to that taken in the enforcement of industrial rights under the *Fair Work Act* and its predecessor, the Workplace Relations Act, given the similarities between that regime and the regime now applicable under the *Migration Act*.

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[3] *Fair Work (Commonwealth Powers) and Other Provisions Bill* 2009 (Qld)
[4] *Workplace Ombudsman v Saya Cleaning Pty Ltd & Anor* [2009] FMCA 38
[5] *Migration Act* 1958 (Clth) s486S; *Fair Work Act* 2009 s550
[6] *Migration Act* 1958 (Clth) s486R; *Fair Work Act* 2009 ss544 and 545(5)

5.7 In that regard, the Fair Work Ombudsman has published a litigation policy based, with some adaptation, on the more generic Commonwealth prosecution policy. According to the litigation policy:

(a) The primary emphasis of the regulator is on voluntary compliance with the legislation, encouraged through the provision of information and education.

(b) Whether or not a prosecution is appropriate to a contravention of the legislative scheme will depend upon a range of circumstances. Not all contraventions will necessarily lead to a prosecution.

(c) It would also be wrong to assume that minor contraventions will not necessarily lead to a prosecution. Whether or not a prosecution will be taken depends, among other things, on two main elements. Firstly, the regulator has to be satisfied that it has a good case and that it has reasonable prospects to secure a penalty order. Secondly, it has to be satisfied that a prosecution is in the public interest.

(d) If a decision is made to bring a prosecution and the prosecution is successful, the question of the penalty or penalties to be imposed is a matter for the court in which the prosecution is brought, whether the Federal Court or the Federal Magistrates Court. Various matters can be taken into account in determining the appropriate level of penalty. For example, cooperation with the regulator, demonstrated contrition, early rectification of consequences and early admissions resulting in the avoidance of a trial may all count toward some discount in the penalty that might otherwise have been imposed[7].

5.8 In the industrial jurisdiction, however, the current civil penalty regime was introduced over the two years before around 2007, and over that period the maximum penalties were increased by more than 200 percent – that is, from $10,000 to $33,000 for corporate employers. The Federal Magistrates Court has since interpreted that state of affairs to mean that there is a new game in town and that what might have been lightly regarded in the past is now much more serious[8]. In other words, any prior "light handed approach" to breaches of industrial laws would no longer apply. Employers should assume that the court will take precisely the same view in relation to the imposition of penalties under the *Migration Act* for breaches of sponsorship and related obligations.

6. Employment contract issues generally

6.1 For many reasons, a comprehensive contract should be in place for a Subclass 457 sponsored worker - not just a short letter of offer incorporating the basic details required by the Department of Immigration and Citizenship for the assessment of the visa application. Frequently we see employers spend all of their time and energy on securing the visa, and none or very little time on documenting the terms and conditions of employment. This is a mistake.

6.2 While some employers object to what they consider to be long and complicated employment contracts, at least for employees outside of managerial positions, the reality is that (bearing in mind that in many cases, you are dealing with skilled workers in important, and not easily filled, positions) a short document cannot properly deal with all of the areas that should be covered. This is even the case for employers who, in relation to sponsored workers, rely heavily on award coverage or the terms of an applicable collective or enterprise agreement. Those instruments do not sufficiently cover the field of relevant matters.

6.3 We have seen instances where employers of sponsored workers have come unstuck because insufficient attention was paid to the employment contract. Historically these situations had more to do with civil issues between the parties, but in future, we suspect that we will see more issues raised by the regulators (both the Department of Immigration and Citizenship and the Fair Work Ombudsman), also as the result of insufficient attention to employment contracting issues - because of the increased enforcement and compliance mechanisms introduced into the *Migration Act* by the *Worker Protection Act*.

[7] At the time of writing, a full copy of the FWO Litigation Policy was available at this link to the FWO website: http://www.fwo.gov.au/Legal-info-and-action/Guidance-notes/Documents/GN-1-FWO-Litigation-Policy.pdf

[8] See *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7

6.4 In general terms, the terms and conditions of a contract for the employment of a foreign national should:

(a) ensure or demonstrate compliance with industrial laws and instruments, for example the matters currently covered by the Australian Fair Pay & Conditions Standard and applicable awards and, after 1 January, the *National Employment Standards* and modern awards.

Note that, in general terms, award coverage in the new federal industrial relations system is going to expand rather than contract. Some workers not currently covered by awards will be award regulated after 1 January 2010 by more widely ranging industry awards or a new miscellaneous award.

The contract of employment should establish the roadmap demonstrating compliance with the applicable industrial regulation;

(b) ensure regulatory compliance with other applicable laws, including such things as tax law and, in the present context, migration laws;

(c) minimise the risk of non-compliance with applicable legislation, for which there can be significant consequences (as mentioned above); and

(d) protect the employer's commercial interests in such things as confidential information, intellectual property, business goodwill, and in the employer's investment required to bring a foreign national into Australia. In this area the emphasis should be on retaining workers for long enough to justify the investment or, where possible, to recover costs in appropriate situations such as costs wasted by the premature termination of employment arrangements with sponsored workers.

6.5 Of course, all the other things appropriate for inclusion in an employment contract for a domestic worker should also be included, but that is a topic for another time.

7. Specific employment contracting issues for sponsored workers

7.1 Evidence

Your employment contract for a sponsored worker should perform a basic "evidence" function. As already discussed, sponsorship obligations under the new Subclass 457 visa framework include:

(a) to co-operate with inspectors;

(b) to keep records of compliance;

(c) if required, to produce relevant records to the Department of Immigration and Citizenship;

(d) to ensure employment terms and conditions that are no less favourable than those that would have been provided to workers other than 457 visa workers.

A comprehensively written employment contract will assist you to meet all of these obligations in a wide variety of possible scenarios.

7.2 Form and content of engagement

The relevant sponsorship obligation is to ensure that the primary sponsored person works in the nominated occupation. In most cases, only engagement by one employer (the sponsor) of the worker as an "employee" is allowed, for instance not engagement as an independent contractor. The employment contract should, consistent with the particular visa and attached sponsorship obligations:

(a) record the names of the parties;

(b) clearly distinguish itself as a contract of service. In other words, there should be no question of any attempt, at any time, to engage the worker as a contractor where that is not permitted; and

(c) should contain a position description and a duty statement.

7.3 Remuneration arrangements

Obviously these will have to demonstrate compliance with Department of Immigration and Citizenship requirements in relation to remuneration. However, the contract in this respect will also have to meet the requirements of the underlying industrial framework including, if applicable, a relevant award. Generally speaking, this will usually contemplate more than the nomination of a rate of pay which simply exceeds any applicable award rate. Pay issues can, in particular, be affected by such things as working hours and arrangements for working hours prescribed by awards. A rate of pay that simply exceeds the relevant minimum award rate (including a market rate) may be insufficient to comply with award requirements in these areas, although it is possible - subject to proper drafting - to accommodate award pay/hours/penalty requirements by a "flat" salary.

7.4 The *Fair Work Act* and high income employees

In the new federal industrial relations regime, high income employees can, by agreement, opt out of award coverage. The 'high income threshold' for this purpose is an indexed figure, which is currently $108,300, excluding (among other things) compulsory superannuation contributions.

From the employer's perspective, it might be appropriate in the case of a high income employee to offer employment upon the basis that no award will apply, by taking advantage of the high income threshold provisions in the *Fair Work Act*. One reason why an employer might choose to do this is that, regardless of the income level, an award regulated employee will have access to the federal unfair dismissal jurisdiction. A high income employee outside the award system will not. Another reason would be to avoid award provisions that could have unintended impact on the agreed remuneration arrangements.

An applicable award will apply unless provisions are included in the contract of employment whereby the parties 'opt-out' of the award. Certain formal requirements have to be met to achieve that result.

7.5 Deductions from remuneration

This is a sensitive area and one to be approached carefully.

In almost all cases, employer initiated deductions from remuneration will not be allowed, unless the employee has given written consent to them. The *Fair Work Act* also requires that the deductions be principally for the benefit of the employee. Deduction provisions in an employment contract that in any way benefit the employer are unenforceable if they are unreasonable. Similar rules apply to "directed" expenditures[9].

The starting point in the employment contract is to include a provision by which the employee consents to relevant deductions. Some of these will not be controversial, for example salary packaging arrangements by which some part of the salary is forgone (deducted) for provision or payment by the employer of other cash or non-cash benefits.

However, other possibilities include:

(a) consent to deductions on account of arms-length dealings between the parties, for example for employer-funded accommodation;

(b) consent to deduction of repatriation expenses. The principal obligation under the relevant sponsorship obligation is that the employer is obliged to pay for the costs of repatriation, including forced removal if required. However, there is no blanket prohibition on recovery of these expenses from the sponsored worker, but care is required to ensure, for example, that the minimum wage/salary requirements attached

[9] See generally *Fair Work Act* 2009 Part 2-9, Division 2 – Payment of Wages

to a visa will not be compromised by any deduction or directed reimbursement relating to repatriation expenses;

(c) consent to deduction of "agreed damages", discussed further below.

Deductions or directed expenditure on account of recruitment/visa costs for the primary sponsored person are prohibited, because of the sponsorship obligation not to recover these costs from a sponsored person.

7.6 Repatriation costs

While the sponsorship obligations will require the employer to pay the travel expenses for a sponsored worker and their families in certain situations, usually when requested by the sponsored person, it will not always be necessary for the employer to fund repatriation costs.

Most employment contracts do not seem to deal with these issues. For example, in some cases an employer will book and pay for travel, but the worker will not, for a range of legitimate reasons, need to leave Australia, and is able to stay and does stay on some other basis, for example because they have secured a new sponsor and another job or permanent residency status.

In those cases, unless the contract provides for it, the employer will be out of pocket and the expense will have been wasted. The alternative is to include a provision in the employment contract to the effect that if the employer pays repatriation costs which are ultimately not required or wasted, the employee, or former employee, agrees to reimburse them.

Apart from any contractual effect, such clauses will have some deterrent value.

7.7 Term of employment

Employment of sponsored workers under limited term visas is one of the few situations where it is appropriate to draft the contract for what is called an "outer limit" term - a maximum term expiring at the end of the visa term or, otherwise, if the worker's legal right to live and work in Australia ceases independently of anything done by the employer.

The purpose of doing this is to clarify that the employer's obligations (from an industrial perspective) will expire with the visa, and the employment will end so that, for example, there can be no doubt that no notice or redundancy payments are due. Bear in mind that under the *National Employment Standards,* default redundancy benefits will be introduced as applicable to all workers in the federal industrial system, whether covered by an award or not.

However, these provisions need to be carefully drawn to ensure that if, for whatever reason, the employment continues beyond the original "expiry" date, for example under another visa or because the sponsored worker becomes a permanent resident, the documented contract between the parties continues to apply. If this is not done properly there is a risk that the documented contract between the parties will cease to apply, leaving the parties with uncertainty and legal risk over a wide range of issues.

7.8 Notice of termination

Independently of these matters, the contract of employment should also include details of the notice provisions that will apply if the employment is to be terminated, from either side. With sponsored workers in key positions, it might be desirable to require a longer-than-usual period of notice upon resignation. Without that, some worker's will be legally entitled to leave on one or two weeks' (or with no) notice. Rarely will that suit an employer who has gone to the trouble of sponsoring the worker into Australia and into their position. Periods of notice of three and six months are not uncommon for some key positions.

Notice provisions that are not properly drawn, or absent altogether, will give rise to an implied entitlement on the part of the employee to reasonable notice of termination, or an entitlement to seek damages in the absence of such notice.

These liabilities can be substantial. There are recent case examples in Queensland where senior employees have recovered damages in these situations equivalent to nine months' pay[10].

Exposure is more significant in the case of foreign nationals because their employment mobility is likely to be more limited. Appropriately drawn termination provisions in the contract of employment will avoid that exposure.

7.9 Post employment restraints

Many sponsored workers occupy sensitive positions, in the sense that they will develop relationships with their co-workers and the employer's customers and clients. Many will also be exposed to information that is confidential to the employer.

In some cases, this is a recipe for problems, for example where a sponsored worker finds a new sponsor - your competitor - and resigns from employment with you. In that scenario, you are at risk of losing both other staff and business.

The issue is not unique to sponsored workers, but is often overlooked in their case.

While enforceable restraints against post-employment competitive activity are challenging to draw and enforce, an employer of a sponsored worker can still impose an enforceable restraint to prevent or limit the harm that could otherwise follow an abrupt departure. Obviously the restraint needs to be included in the employment contract and needs to be very carefully drawn. Where that occurs, in appropriate situations, the former employer will have rights against both the former worker and, in some cases, their new employer, to prevent competitive or other damaging activity in accordance with the terms of the restraint.

A related issue is that where restraints are appropriate for inclusion in the employment contract, so too will provisions for the protection of the employer's confidential information and other intellectual property. While these provisions can be valuable in their own right, generally speaking their use is more limited unless they are accompanied by an enforceable restraint. While the law will protect information that is confidential to a former employer from misuse or disclosure, arguments about what is or is not sufficiently confidential will often compromise the former employer's position. For example, are the former worker's contacts stored in their mobile phone confidential in the sense that the data cannot be used for the benefit of the former worker's new employer? An enforceable restraint can help to overcome these difficulties.

Apart from their contractual effect, such provisions can also provide a deterrent against conduct of the kind to which they are directed.

7.10 Agreed damages

Agreed damages clauses can be independent or used to supplement other provisions in the contract of employment:

(a) imposing restraints; and

(b) requiring particular notice upon resignation.

Their effect is to impose a requirement, in this context, that the employee pay to the employer specified or agreed damages as compensation for particular events. These can include, as examples:

(c) compensation for short notice upon resignation;

(d) compensation for failure to complete an agreed minimum period of service; or

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[10] *Macauslane v Fisher and Paykel Finance Pty Ltd* [2003] 1 Qd R 503; *Taske v. Occupational & Medical Innovations Ltd* [2007] QSC 118 (29 May 2007)

(e) compensation for breach of post-employment restraint obligations or particular aspects of them, for example upon recruitment of one of the former employer's other workers for the benefit of a new employer.

Agreed damages clauses can also be difficult, but not impossible, to draw and enforce. The biggest issue is that they will not be enforceable unless the agreed amount of compensation or damages payable represents a genuine estimate of the employer's actual loss. If the agreed amount is penal - something more than a real or genuine representation of the actual loss - it will not be enforceable on grounds of public policy.

Agreed damages are of particular relevance to sponsored work arrangements because of the significant effort, if not also expense, required to recruit and accommodate a foreign national into a skilled position that is not easy to fill. The potential for loss is real, and an agreed damages clause will serve to illustrate and emphasise that to the worker. Again, apart from any contractual effect in such clauses, they also provide an appropriate deterrent effect.

7.11 **Privacy**

All employment contracts should contain provisions by which the employee consents to use and disclosure of their 'personal information' by the employer for legitimate purposes.

There are two general reasons for this:

(a) Employers in Australia currently have the benefit of the 'employee records' exemption from the requirements of the National Privacy Principles. However, there is a push for this to be taken away, in which case the use and disclosure by employers of information personal to their workers (all workers) will become much more tightly regulated.

(b) There is uncertainty about the extent to which international disclosures of personal worker information are allowed. Obviously this consideration will be of more relevance to some employers than others.

A more specific reason for the inclusion of a relevant consent in the employment arrangements for a sponsored worker arises out of the sponsorship obligation to provide, when requested, records and information to the Minister. While disclosures made to the Department of Immigration and Citizenship at the request of the Minister will not theoretically contravene the *Privacy Act*, the immunity provision in the *Migration Act* is very narrow. The more conservative approach is to include a general consent to work-related disclosures of information personal to the worker in the contract of employment.

7.12 **Choice of law**

Often contracts for the employment of foreign workers include what are commonly described as "choice of law" clauses. Typically these say something like "This contract is to be regulated by the law of 'Indiana' or 'Nova Scotia' or 'Timbuktu'" or provide that "Disputes arising in relation to this contract are to be regulated by the law of…".

They are unhelpful and, in many respects, of limited effect. For example an employer could not use such a mechanism to contract out of the *Fair Work Act*. However, such a clause might import into the contract some legal principles from the 'chosen' jurisdiction, leaving the locals uncertain of their rights and obligations, and requiring them in some situations to seek potentially expensive legal advice overseas.

In most cases our recommendation is that choice of law clauses, like those in our examples above, be avoided.

For more information on employment contracts for visa subclass 457 workers in Australia, please contact HopgoodGanim's Industrial and Employment Law practice.

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