

## **Temporary Migrant Labour in Australia: The 457 Visa Scheme and the Challenges for Labour Regulation**

Joo-Cheong Tham (Faculty of Law, University of Melbourne)

Iain Campbell (Centre for Applied Social Research, RMIT University)

Paper prepared for the Conference on 'Regulating for Decent Work – Innovative labour regulation in a turbulent world', Geneva, 8-10 July 2009.

**DRAFT ONLY, PLEASE DO NOT QUOTE WITHOUT PERMISSION**

# Temporary Migrant Labour in Australia: The 457 Visa Scheme and the Challenges for Labour Regulation

Joo-Cheong Tham

Iain Campbell

## 1) Introduction

Schemes for temporary migrant labour have expanded in many countries in response to employer demands for more flexible labour. Such schemes present a major challenge for labour regulation in the receiving countries. Regulation needs to balance several competing interests, in particular the interests of employers in the receiving country, local workers and the migrant workers themselves. It is widely accepted, if equity is to be preserved and the dangers of economic and social disruption are to be avoided, that such workers should be integrated into the mainstream of employee protection. However, debate often rages on how to institute such integration. Precisely what rights should such workers acquire? Precisely what labour standards should apply? Who should decide? These questions are particularly sharp in countries such as Australia, where employment forms have multiplied and the labour regulation system increasingly resembles a patchwork marked by complex overlapping of standards in some places and complete gaps in other places.<sup>1</sup>

This paper starts by describing the tradition of permanent settlement in Australia and the recent rise of temporary migrant labour. It refers to increases in the number of working holidaymakers, overseas students and temporary business entrants, but it focuses on the Temporary Business (Long Stay) visa scheme ('the 457 visa scheme'), which is seen as significant because it is the main direct path for temporary migrant labour; it has experienced rapid growth since its establishment in 1996; it has attracted substantial controversy and debate; and it poses the sharpest challenges for regulation. The paper examines the way in which changing regulation of the 457 visa scheme can be seen to resolve the

---

<sup>1</sup> J-C Tham, 'Towards an understanding of standard employment relationships under Australian labour law', (2007) 20 *Australian Journal of Labour Law*, 123; I. Campbell, 'Australia: institutional changes and workforce fragmentation', in S. Lee and F. Eyraud (eds) *Globalization, Flexibilization and Working Conditions in Asia and the Pacific*, London, Chandos, 2008.

challenges of labour regulation. We discuss these challenges in terms of three themes: employer needs and skill shortages, the principle of equal treatment; and the principle of effective enforcement. We situate the scheme in the context of an extensively 'deregulated' labour market and the recent transition from a federal Liberal/ National Coalition government to a federal Labor government.

## **2) Temporary migrant workers in Australian labour markets**

Since the arrival of the First Fleet in 1788, Australia has been a colonial-settler country, heavily reliant on successive waves of immigrants seeking permanent settlement in order to fill the labour needs of growing industries.<sup>2</sup> Regulation of these flows has varied. In the strong waves of immigration in the decades after World War 2, regulation was achieved primarily through visas for permanent residency. Initially, such visas were constrained by quotas or caps for different source countries – an indirectly discriminatory system, designed to fit a White Australia policy favouring immigration from the United Kingdom – the so-called 'mother country'. However, this discriminatory system gradually disintegrated, succeeded by a system that streamed applicants for permanent migration into different programs (with the main program referred to as a 'skilled', a second program for 'family reunion', and a smaller, third program for refugees and those in need of humanitarian assistance). Within this framework, an overall target was set for each program, and assessment of applicants under the 'skilled' program centred on points for individuals, awarded according to a range of criteria (age, English-language proficiency, etc) but with priority for labour market qualifications and skills. Under this less discriminatory system, permanent immigrants were actively sought and arrived not only from the UK but also from northern Europe, Southern Europe, parts of the Middle East, and eventually Asia.

The permanent migration program was designed to boost consumption and feed booming labour markets, and the majority of immigrants, including many who had not been employed in their source country, eventually found themselves in paid work. Powerful processes of labour market segmentation channelled immigrants into blue-collar jobs in the urban centres, and European migrants assumed

---

<sup>2</sup> Permanent immigration was dominant but was not the only mechanism. Convict labour was important in the early years of settlement. Pacific Island labour that had been 'blackbirded' (kidnapped) was crucial for the sugar industry in the latter part of the nineteenth century. In addition, labour needs have been met by natural increase in the population.

prominence in certain occupations and industries.<sup>3</sup> Though this sometimes entailed a misuse of skills, based on failure to recognise qualifications gained overseas, the overall effect in terms of social integration was positive. Permanent migrants were entitled to a relatively full range of social and political rights. Some immigrant women from a non-English speaking background (NESB) were confined to marginalised positions, such as clothing outwork, but the majority of immigrants in the years of the post-war boom were integrated into the heart of the working class, where they were protected by comprehensive award conditions and union membership.<sup>4</sup> Immigrants came to participate actively in unions, often shaping distinctive structures and forms of action. The broad sweep of source countries, the widespread commitment to settler immigration, and the speedy integration of immigrants into standard jobs contributed to the widely-acknowledged success of the post-war immigration program.<sup>5</sup>

The upsurge of mass unemployment in the mid-1970s, and its subsequent return in the recessions of 1981-82, 1990-91, and now 2009, has produced some changes. Economic restructuring eliminated many of the manufacturing jobs that had sustained earlier generations of recently-arrived immigrants. Within the permanent migration program, the period since the mid-1970s has seen an ever-stronger emphasis on labour market qualifications and skills as a criterion for entry. As part of a so-called 'boa constrictor' effect, overall numbers tend to be cut back during recessions and then expanded again as economic recovery takes hold.

One fundamental change in recent decades, especially in the last five years, is the rapid expansion of *temporary migrant labour*. This is a little-noticed change that has taken place outside the official permanent migration program. The stress on 'temporary' and the fact that the labour dimension is often swallowed up in the broader discussion of temporary entry, for example for purposes of tourism or tertiary study, means that it is often overlooked. But it is crucial development that is having a major impact on labour markets and that is posing a substantial challenge, including a substantial challenge to

---

<sup>3</sup> C. Lever-Tracy and M. Quinlan, *A Divided Working Class: Ethnic Segmentation and Industrial Conflict in Australia*, London, Routledge and Kegan Paul, 1988; see I. Campbell, R. Fincher and M. Webber 'Occupational Mobility in Segmented Labour Markets: The Experience of Immigrant Workers in Melbourne', (1991) 27 *Australian and New Zealand Journal of Sociology* 172.

<sup>4</sup> C. Lever-Tracy and M. Quinlan, *A Divided Working Class: Ethnic Segmentation and Industrial Conflict in Australia*, London, Routledge and Kegan Paul, 1988.

<sup>5</sup> J. Collins, *Migrant Hands in a Distant Land: Australia's Post-War Immigration*, Sydney, Pluto, 1988.

traditional forms of labour regulation. As Collins remarks, it is a change that “requires a reassessment of the traditional categorization of Australia as primarily a country of settler immigration”.<sup>6</sup>

### *What is temporary migrant labour?*

In talking of temporary migrant labour we tend to think most directly of people who are allowed temporary entry into Australia *for the specific purpose of employment*. This group is indeed important and we focus on them in the bulk of this paper. However, it is useful to situate this group in a broader context that examines the labour undertaken by temporary migrants, irrespective of the official purpose of their temporary visa.

Temporary migrant labour in the broad sense appears in different forms, and classification can be a fraught matter.<sup>7</sup> Some temporary migrant labour may be clandestine, for example in the form of people arriving on a tourist visa and then working illegally and perhaps overstaying the period of their visa.<sup>8</sup> But the more important categories are official, whereby people are granted temporary entry to Australia and are formally permitted to engage in paid work during the period of their stay. Two important categories are working holiday makers (417 visa) and overseas students. Their temporary entry to Australia is not officially for the purposes of employment (but rather for holidaymaking and study respectively), but they are nevertheless permitted, within certain limits, to engage in paid work during their stay. Because the permitted quantum of employment is generous, these groups can engage in a substantial amount of paid labour, amplified in cases where workers are willing or need to breach the conditions of their visa. This is perhaps particularly true with international students, whose labour has become very important in urban

---

<sup>6</sup> J. Collins, ‘Globalisation, Immigration and the Second Long post-War Boom in Australia’, (2008) 61 *Journal of Australian Political Economy* p. 262; see also G. Hugo, ‘Temporary Migration and the Labour Market in Australia’ (2006a) 37 *Australian Geographer* 211; G. Hugo, ‘Globalization and Changes in Australian International Migration’ (2006b) 23 *Journal of Population Research* 107; P. Mares, ‘The permanent shift to temporary migration’, (2009) *Inside Story*. Available online. <http://inside.org.au>. (accessed 18 June 2009).

<sup>7</sup> ‘Temporary’ and ‘permanent’ are usually distinguished according to the terms of the visa rather than the stay intentions of the worker. However, even in this definition, the boundary between the two can be blurred, since people may jump from one status to another. Indeed, this is common in Australia, mainly in the form of temporary visa holders applying for permanent residency during their stay. Moreover, definitions according to the visa category are of little use for classifying New Zealanders, who are permitted to enter Australia and engage in employment without any visa restrictions.

<sup>8</sup> There were an estimated 48,500 ‘overstayers’ at the end of June 2008, mainly persons who had overstayed on a visitor’s visa – DIC, *Population flows: Immigration aspects 2007-08*, Economic Analysis Unit, Belconnen ACT, Commonwealth of Australia, 2008b. About half could be expected to be working – J. Collins, ‘Globalisation, Immigration and the Second Long post-War Boom in Australia’, (2008) 61 *Journal of Australian Political Economy* 244.

centres in industries such as hospitality and parts of retail. Working holidaymakers are important for seasonal harvesting and tourism. In the light of the rapid expansion of numbers of working holidaymakers and international students (see below), and the fact that some are willing to engage in full-time employment, it is important to include them in discussions of temporary migrant labour.

Temporary migrant labour is most often associated with temporary entry into Australia *for the specific purpose of employment*. The main group here are ‘temporary business entrants’. Some categories under this general heading are familiar and long-standing, for example, short-stay entries for purposes such as concert tours and long-stay entry visas for executives who are transferred within multi-national firms. The major category, and the one that we focus on in this paper, is called The Temporary Business Long Stay – Standard Business Sponsorship (subclass 457) Visa (‘the 457 visa scheme’), which allows approved employers to sponsor foreign skilled workers for a period up to four years (with opportunities for further renewal). Though it has predecessors, the program was formally introduced in 1996, in order to overcome skill shortages. We discuss the (changing) regulations governing this program in more detail below. However, we can note here that it represents an example of what is called a ‘demand-driven’ or ‘employer-driven’ scheme,<sup>9</sup> in which decisions on immigrant entry and immigrant status are vested in (approved) employers. The scheme covers both primary visa holders, who have been sponsored by the employer, and their families, who appear as secondary visa holders and who can also engage in paid work (though their right to stay is dependent on the employment of the primary visa holder). If primary visa holders lose their jobs, they must leave the country within 28 days, unless they find another sponsoring employer. Consistent with the orientation to the employer, there is no cap on numbers under this scheme. It was initially designed to cover business executives and Information Technology (IT) professionals, but the list of permitted occupations soon expanded rapidly to include a long list of skilled and semi-skilled occupations (see below). The scheme has grown rapidly since 1996, to the point where there is now discussion of extending its principles even more broadly.<sup>10</sup>

---

<sup>9</sup> J. Chaloff and G. Lemaitre, *Managing Highly-Skilled Labour Migration: A Comparative Analysis of Migration Policies and Challenges in OECD Countries*, OECD Social, Employment and Migration Working Paper no. 79, DELSA/ELSA/WD/SEM(2009)5, Paris, OECD, 2009.

<sup>10</sup> A small step in this direction has come with the decision, in response to requests from employers in horticulture, to introduce a Pacific Seasonal Worker Pilot Scheme that would bring immigrants from Pacific countries such as Tonga, Vanuatu and Papua New Guinea to Australia on a seasonal basis to help with the harvest. The scheme has only just started and the numbers involved are still tiny, but if the pilot is successful the numbers may increase in the coming years.

In any discussion of migrant labour, it is important to examine the role of employers. Migration fits in to labour markets in a complex way, dependent on the configuration of the labour markets, labour supply, the regulatory system and the practices of agents such as employers. Employers can derive many benefits from immigrant labour, in particular in the short-term. Both permanent and temporary immigrant labour can be an answer to skill shortages, offering a ready supply of already-trained and experienced labour. At the same time, it is important not to overlook the opportunities to employers to pay less than standard wage rates and to impose more onerous working conditions. Immigrants are often ignorant of prevailing conditions, attuned to comparisons drawn from their home country, and often burdened with urgent short-term needs to earn money. They are often dependent on their current job and their current employer and may be reluctant to complain about unfair treatment for fear of jeopardising their employment.

Although immigrants may be relatively compliant because of the factors cited above, the advantage for employers tends to dissipate over time, as migrants become settled. Temporary migrants can be seen to offer greater potential for compliance, not only because of the shorter stay but also because of greater exclusion from many social and political rights and greater distance from the institutions of the mainstream society. The crucial factor in determining the vulnerability of temporary immigrants is the degree of dependence on the individual employer. Working holiday makers have relatively little dependence and, despite isolated cases of poor conditions, their presence raises few general policy concerns. International students are in principle independent, but need for money, poor language skills and a desire to achieve permanent residency may push them into poor and highly exploitative employment relations. The workers involved in the 457 scheme are the most dependent and therefore the most vulnerable. We discuss this issue of dependence and vulnerability more fully below. Here we can note that it does not necessarily lead to problems, for example where the workers are highly valued for their skills and where the threat of dismissal does not carry much risk. But where workers are less skilled and more intent on following a path to permanent residency there is higher potential for super-exploitation.

Employers who use temporary migrant labour can be from the private or public sector. Though most focus is on the private sector, some sections of the public sector, such as the state hospitals, are also heavy users of the 457 scheme. Indeed the NSW government is reputed to be the largest single user. Also worth mentioning is the role of temporary work agencies.<sup>11</sup> For much of the period since 1996, temporary work agencies (often called 'labour-hire' or on-hire' firms in Australia) could be standard business sponsors and use the scheme to recruit workers, who would then be placed in other companies. This option as a standard business sponsor has now been closed off,<sup>12</sup> although such firms are still able to have recourse to the Subclass 457 scheme through the pathway of Labour Agreements.<sup>13</sup> The role of temporary work agencies adds a further layer of dependence (and confusion) for 457 workers.

### *The growth of temporary migrant labour*

Temporary migrant labour has expanded rapidly, especially in the past five years, to become a major influence in Australian labour markets.<sup>14</sup> The increased significance of temporary migrant labour is clearly apparent in the statistics, especially if we compare it with permanent migration. Permanent settler arrivals in 2007-8 amounted in total to 149,365 persons (including 35,919 New Zealand citizens who are outside the migration program), but added to this were a further 56,575 who gained permanent residency from an onshore application. The 'skill' component was 65,404 permanent settler arrivals plus 42,065 from an onshore application.<sup>15</sup> The long-term pattern for permanent migration is pretty stable, although in accordance with the traditional 'boa constrictor' effect, the target number for the 'skilled' component in the permanent program was increased by 25,000 over 2007-2008, before a slight reduction in response to the onset of the global recession.

---

<sup>11</sup> We refer here to firms in an ongoing triangular relationship, involved both with client firms, who contract them to supply and organise workers, and with the workers themselves, who are recruited, organised and generally regarded as employed by the agency. They are referred to as 'on-hire firms' in Joint Standing Committee on Migration, *Temporary visas . . . permanent benefits: Ensuring the effectiveness, fairness and integrity of the temporary business visa program* (2007) 94. They can be distinguished from employment brokers or recruitment agencies who simply pocket a fee from the client firm for supplying workers and then retreat from any broader role.

<sup>12</sup> *Migration Amendment Regulations 2007 (No 11)* (Cth).

<sup>13</sup> The temporary agency industry is, in fact, a heavy user of Labour Agreements, with such firms being party to 24 out of 71 of Labour Agreements current at 30 September 2008 – Visa Subclass 457 Integrity Review, *Final Report* (2008) 43.

<sup>14</sup> G. Hugo, 'Temporary Migration and the Labour Market in Australia' (2006a) 37 *Australian Geographer* 211.

<sup>15</sup> DIAC [Department of Immigration and Citizenship] *Immigration Update 2007-2008*, Barton ACT, Commonwealth of Australia, 2008a.

Temporary entry over the course of a year is much larger. In 2007-2008, around 4.2 million temporary entry visas were issued.<sup>16</sup> This figure is inflated by the large number of short-term visitors, mainly here for tourist purposes. Nevertheless, the flow of people entering as working holidaymakers, students and 457 visa holders is substantial, amounting to almost one million persons.<sup>17</sup>

Stock figures give the best idea of the impact of temporary migrants on labour markets. At the end of June 2008, there were an estimated 809,628 people in Australia on temporary entry visas, excluding New Zealand citizens. Twenty two percent were visitors (mainly tourists, though also included were some short stay business visitors on visa sub-classes 456, 459, 956, 977). A further 10.7 percent were working holidaymakers, here for a few months or perhaps a year (=86,558). The biggest group, amounting to 39.3 percent of the total, were students (=317,897). The group that we are most interested in – those on long stay business visas – contributed a further 16.6 percent (=134,238).<sup>18</sup>

This gives us a rough idea of the likely current size of the temporary migrant labour workforce. The figure of 809,628 can be compared with the size of the total workforce (employed persons) in June 2008 of 10,726,400.<sup>19</sup> It is true that not all those counted in the DIAC statistics will be working or seeking work. Visitors are generally not be in paid work, with the exception of short-stay business entrants and some on tourist visas who work illegally. Overseas students here for full-time study are required to demonstrate that they have sufficient funds for living expenses. But they are allowed to work up to 20 hours per week during semester, and it is likely that the majority do at least some paid work. Working holiday makers can work under certain conditions – in temporary or casual jobs for no more than six months – and the vast majority will work for some months during the period of their stay in Australia. Those on long-stay business visas are here primarily to work. In short, the vast majority of the temporary migrants are entitled to be engaged in paid work, and it seems likely that at any one point in

---

<sup>16</sup> DIAC, *Population flows: Immigration aspects 2007-08*, Economic Analysis Unit, Belconnen ACT, Commonwealth of Australia, 2008b.

<sup>17</sup> DIAC [Department of Immigration and Citizenship] *Immigration Update 2007-2008*, Barton ACT, Commonwealth of Australia, 2008a.

<sup>18</sup> DIAC, *Population flows: Immigration aspects 2007-08*, Economic Analysis Unit, Belconnen ACT, Commonwealth of Australia, 2008b; see DIAC [Department of Immigration and Citizenship] *Immigration Update 2007-2008*, Barton ACT, Commonwealth of Australia, 2008a.

<sup>19</sup> ABS, *Labour Force, Australia*, Time Series Spreadsheet, Table 03, Labour force Status by Sex, Cat. no. 6202.0, 2009.

time many will be in paid work. As a result, the impact of temporary migrants on labour markets is likely to be strong.<sup>20</sup>

The most comprehensive assessment of the impact of temporary migration on the labour market draws on 2004 data for working holiday makers, overseas students, all temporary business entrants and New Zealand temporary migrants. It suggests that they accounted at that time for around 400,000 jobs, which was equivalent to around 4% of the workforce. It suggests that the impact is amplified because of concentration in certain areas, including in particular professional and managerial occupations and major urban centres.<sup>21</sup>

What is the pattern of growth? As permanent migration has remained largely stable, temporary migrant labour has risen rapidly, especially in recent years. The number of *working holidaymakers*, young people holidaying in Australia with short-term work and study rights, has increased strongly over the years, especially as Australia has concluded more reciprocal WHM arrangements. The number of *overseas student* visas, for people who wish to undertake full-time study in registered courses in Australia, has shown a spectacular pattern of growth. There seems to have been a particular expansion in the last three years, including a big expansion of 28 percent from the end of June 2007 (248,500) to the end of June 2008 (317,897).<sup>22</sup> This expansion has gone hand-in-hand with other changes – not only a growth in overseas student numbers in universities but also a massive growth in participation in private education providers, often offering courses in hospitality and hairdressing (seen as the fastest and easiest channel for overseas students to apply for permanent residency).

We are particularly interested in visa 457 holders. We can measure the growth first through the figures for visa grants (see Table 1). These increased steadily from 1997-98 (16,550 visas granted to primary applicants) to 2004-05 (27,350 primary grants), but in the following three years the number more than doubled (58,050 primary grants and 52,520 secondary grants in 2007-2008). This has been

---

<sup>20</sup> If we are comparing temporary migrant labour with permanent migrant labour, we need to take into account that not all permanent migrants will be working or seeking work. This is particularly true for those in the family reunion component. At the same time, however, the impact of permanent migration compounds from year to year, depending on the rate of return of immigrants to their home country.

<sup>21</sup> G. Hugo, 'Temporary Migration and the Labour Market in Australia' (2006a) 37 *Australian Geographer* 211.

<sup>22</sup> DIAC [Department of Immigration and Citizenship] *Immigration Update 2007-2008*, Barton ACT, Commonwealth of Australia, 2008a.

accompanied by an expansion in the stock of primary 457 visa-holders, which has risen rapidly from an estimated 31,471 at the end of June 2005<sup>23</sup> to \*\* (134,238 in total) at the end of June 2008. Evidence for the first few months of 2009 suggests that the number of visa grants is receding somewhat, as the recession dampens demand amongst employers, but it is still running at a high rate equivalent to that of 2006.

**Table 1: Primary and secondary 457 visa grants: 1997-2008**

Program year	Primary	Secondary	Total
1997-98	16 550	14 330	30 880
1998-99	16 080	13 250	29 320
1999-00	17 540	13 530	31 070
2000-01	21 090	15 810	36 900
2001-02	18 410	15 100	33 510
2002-03	20 780	16 020	36 800
2003-04	22 370	17 130	39 500
2004-05	27 350	21 250	48 590
2005-06	39 530	31 620	71 150
2006-07	34 170	30 290	64 460
2007-08	58 050	52 520	110 570

Source: Figures up to 2006-07 are from Joint Standing Committee on Migration 2007, 15; figure for 2007-2008 is from DIC 2008c.

It should be noted that granting a 457 visa does not necessarily mean recruitment from overseas. Using data from 2000-2001, Kinnaird suggests that “the majority of 457 visas have been granted to foreign nationals who are already in Australia on other temporary visas – many already working for their 457 sponsoring employer”.<sup>24</sup> As the program has expanded, the proportion granted to onshore applicants seems to have fallen below 50 percent, but it remains substantial.<sup>25</sup>

In its early form the 457 scheme was biased to managerial and professional workers, often from advanced industrial countries such as the UK and the US.<sup>26</sup> This bias has weakened in recent years.

The most recent expansion is characterised by two main features – an increased proportion of 457 visas

<sup>23</sup> B. Kinnaird, ‘Current Issues in the Skilled Temporary Subclass 457 Visa’, (2006) 14 *People and Place*, p. 55.

<sup>24</sup> B. Kinnaird, ‘Current Issues in the Skilled Temporary Subclass 457 Visa’, (2006) 14 *People and Place*, p. 58.

<sup>25</sup> This is one aspect of the broader phenomenon of on-shore visa grants. 457 visa holders also participate in major flows at the other end – by applying for permanent residency during their period of temporary stay. In a 2003-2004 survey some 60 percent of 457 visa holders stated that the opportunity to apply for permanent residency was an important reason for their participation in the scheme – S-E Khoo, P. McDonald, C. Voigt-Graf and G. Hugo, ‘A Global Labor Market: Factors Motivating the Sponsorship and Temporary Migration of Skilled Workers to Australia’, (2007) 41 *International Migration Review*, 480.

<sup>26</sup> S-E Khoo, C. Voigt-Graf, G. Hugo and P. McDonald, ‘Temporary Skilled Migration to Australia: The 457 Visa Sub-Class’ (2003) 11 *People and Place*, p. 38.

granted for trades rather than professional occupations and an increased proportion of participants from developing countries. The main trades occupations are chef, cook, welder, metal fabricator and motor mechanic.<sup>27</sup> The UK and the US remain important source countries, but they are increasingly matched by India, the Philippines and the Peoples Republic of China.<sup>28</sup> These changes appear to be accompanied by changes in the reasons that workers participate in the scheme – with more emphasis on financial benefits and the opportunity to apply for permanent residency – and perhaps also in the reasons that employers use the scheme.<sup>29</sup> This is likely to affect the labour market impacts. For example, Toner and Woolley speculate that the increasing number of new entrants to trades occupations deriving from the 457 scheme may act as a further disincentive for employers to support apprenticeship training.<sup>30</sup>

In short, the growth of temporary migrant labour has occurred since the early 1990s, but the sharpest growth, fuelled not only by international students but also by 457 visa holders, has been in the last three years. The 457 visa holders are only a minority in the temporary migrant labour workforce, but they are an important group...

### **3) Regulation of the 457 scheme**

The history of the 457 scheme dates back to the last days of the previous federal Labor government (1983-1996). A Committee of Report into the Temporary Entry of Business People and Highly Skilled Specialists, chaired by Neville Roach, then Managing Director of Fujitsu Australia, was tasked to report 'on the operation and effectiveness of policies and procedures governing the temporary entry into, and further temporary stay in, Australia of business personnel against the background of the increasing globalisation of business, and Government policy to open the economy up to greater international

---

<sup>27</sup> P. Toner and R. Woolley, 'Temporary Migration and Skills Formation in the Trades: A provisional Assessment' (2008) 16 *People and Place* 47.

<sup>28</sup> DIAC, *Subclass 457 Business (Long Stay), State/Territory Summary Report*, Financial Year to 30 June 2008, Report Id: BR0008, 2008c.

<sup>29</sup> S-E Khoo, P McDonald, C Voight-Graf and G Hugo, 'A Global Labor Market: Factors Motivating the Sponsorship and Temporary Migration of Skilled Workers to Australia', (2007) 41 *International Migration Review*, 480. The majority of responses in the 2003-2004 employer survey cited skill shortages as the main reason for participating in the 457 scheme. But a minority of employers pointed to advantages such as higher control, greater commitment from workers and lower cost – *ibid*, p. 495-498, 505.

<sup>30</sup> P. Toner and R. Woolley, 'Temporary Migration and Skills Formation in the Trades: A Provisional Assessment' (2008) 16 *People and Place*, pp. 53, 56.

competition'.<sup>31</sup> Handing down its report in 1995, the Committee found the current procedures to be overly cumbersome and recommended a liberalisation of migration procedures for the purpose of facilitating entry of key business personnel into Australia; a measure that it considered necessary for Australia to remain internationally competitive.<sup>32</sup>

In 1996, the newly-elected Coalition Government (1996-2007) adopted the thrust of the Roach report by introducing the 457 visa scheme.<sup>33</sup> Its introduction is aptly described as 'a radical deregulation of Australia's temporary entry regime'.<sup>34</sup> Though regulations governing the scheme have been almost continuously amended since its inception, with phases of liberalisation and extension succeeded, especially since the advent of the new federal government under the Australian Labor Party (2007-), by tentative efforts to tighten up certain rules to prevent abuses, the basic lineaments of the scheme remain much the same.

Changes to regulation are still in train. But we can broadly summarise the current arrangements. The scheme allows approved employers to recruit and deploy temporary migrant labour. There are currently eight pathways by which employers can seek to utilise the scheme.<sup>35</sup> Putting aside the pathway of Labour Agreements, which accounted for approximately eight per cent of all 457 visas granted in 2006-2007,<sup>36</sup> we can summarise roughly the main pathways, in which the employer starts by becoming either an Australian business sponsor or an overseas business sponsor. In these cases, the scheme currently depends on three regulatory phases or processes:

- Approval of the employer as a business sponsor<sup>37</sup> (sponsorship last for up to two years or expires when number of nominations under sponsorship issued)<sup>38</sup>;

---

<sup>31</sup> Committee of Report into the Temporary Entry of Business People and Highly Skilled Specialists, *Business Temporary Entry: Future Directions* (1995), Commonwealth of Australia, Canberra, 84 ('The Roach Report').

<sup>32</sup> The Roach Report, 4.

<sup>33</sup> *Migration Regulation (Amendment) 1996* (Cth).

<sup>34</sup> B. Kinnaird, 'Current Issues in the Skilled Temporary Subclass 457 Visa', (2006) 14 *People and Place*, p. 50.

<sup>35</sup> The eight streams are Labour Agreements; RHQ agreements; Australian business sponsorship; Overseas business sponsorship; Independent Executives; Service Sellers; Diplomats; IASS agreements: *Migration Regulations 1994* (Cth) Schedule 2, Subclass 457, cl 457.22.

<sup>36</sup> Department of Immigration and Citizenship's statistics quoted in Joint Standing Committee on Migration, *Temporary visas . . . permanent benefits: Ensuring the effectiveness, fairness and integrity of the temporary business visa program* (2007) 14.

<sup>37</sup> *Migration Regulations 1994* (Cth) reg 1.20C(1).

<sup>38</sup> *Migration Regulations 1994* (Cth) reg 1.20D(6) (Australian business sponsorship); reg 1.20DA(5) (Overseas business sponsorship).

- Approval of the sponsoring employer's nomination of a specified position to be performed by a 457 worker (approval of nomination generally last 12 months or until a 457 visa issued to worker);<sup>39</sup> and
- Granting of a primary 457 visa to a specific worker (with secondary visas also applicable to members of the family).

Table A in the Appendix sets out in more detail the key requirements of each phase.

The 457 scheme is readily recognised as 'demand-driven' or 'employer-driven'.<sup>40</sup> Nevertheless, some of the requirements relating to the 457 visa scheme listed in Table A appear to constrain the employer and deserve fuller elaboration, namely, those relating to:

1. the requirement that the nominated position corresponds to tasks specified in the *Gazette*;
2. the requirement to pay a Minimum Salary Level (MSL); and
3. the requirement to abide by sponsorship undertakings.

#### 1. *permitted occupations*

The purpose of the list of specified tasks in the *Gazette* is to define the range of jobs that may be taken by 457 workers. Though the 457 scheme was originally designed to cover just 'key business personnel', the list of permitted tasks soon expanded. The current list separates out occupations in the ICT sector, for which somewhat different rules apply. But otherwise, employers can use 457 workers in a long list of occupations that span the first four major groups of the Australian Standard Classification of Occupations (ASCO) – as managers and administrators (1), professionals (2), associate professionals (3) and tradespersons and related workers (4). In addition, certain employers can access 457 workers for jobs that match a longer list. The major difference is the location of the employer. If the employer is in a regional area, s/he can employ temporary migrant workers via a 'regional certified employment' 457 visa in a list of occupations that extends – with some exclusions – to ASCO major groups 5 (advanced clerical and service workers), 6 (intermediate clerical sales and service workers) and 7 (intermediate

<sup>39</sup> *Migration Regulations 1994* (Cth) reg 1.20H(5).

<sup>40</sup> J. Chaloff and G. Lemaitre, *Managing Highly-Skilled Labour Migration: A Comparative Analysis of Migration Policies and Challenges in OECD Countries*, OECD Social, Employment and Migration Working Paper no. 79, DELSA/ELSA/WD/SEM(2009)5, Paris, OECD, 2009.

production and transport workers).<sup>41</sup> Such a nomination can be presented by a standard business sponsor, who is required to nominate a position falling within the specified lists of tasks and provide an undertaking to pay the MSL. Further, the nomination will be approved only if: the nominated position is a genuine full-time position necessary to operation of employer's business; the nominated position relates to a position that cannot be reasonably be filled locally;<sup>42</sup> and a regional body has certified that the above requirements have been met.<sup>43</sup> Though the 'certified regional employment' visa has been heavily used in the past, it only accounted for three percent of all 457 visas in the 2006-2007 financial year.<sup>44</sup>

The 457 scheme is sometimes described as a scheme for skilled labour. But as this discussion indicates, its reach is much broader. It may be more accurately described, as the External Reference Group observed, as 'a general labour supply visa'.<sup>45</sup>

## *2. minimum salary level*

One crucial constraint on employers is a requirement that the worker is paid at least the Minimum Salary Level (MSL) that applies to that position.<sup>46</sup> Currently, the MSL is based on the Average Weekly Ordinary Time Earnings of Australian workers.<sup>47</sup> The level of the MSL is specified in a Gazette Notice<sup>48</sup> and, like the list of specified tasks, depends on whether the position is in the ICT or non-ICT sector and whether there is a 'regional certified employment' nomination. A higher MSL applies to ICT occupations, while a 'regional certified employment' visa is subject to a lower MSL. The level of the MSL also depends on the time the 457 visa was granted. Table 2 provides details of the current levels of the MSL. The rules for the MSL are currently changing (see below), and it should be noted that these levels are now indexed,

---

<sup>41</sup> The Department of Immigration and Citizenship (DIAC) interprets 'regional' broadly to include all of Australia with the exception of Brisbane, Gold Coast, Newcastle, Central Coast, Sydney, Wollongong, Melbourne and Perth – Standing Committee on Migration, *Temporary visas . . . permanent benefits: Ensuring the effectiveness, fairness and integrity of the temporary business visa program* (2007) 71.

<sup>42</sup> *Migration Regulations 1994* (Cth) reg 1.20GA(1)(a)-(d).

<sup>43</sup> *Migration Regulations 1994* (Cth) reg 1.20GA(1)(e).

<sup>44</sup> Department of Immigration and Citizenship's statistics quoted in Joint Standing Committee on Migration, *Temporary visas . . . permanent benefits: Ensuring the effectiveness, fairness and integrity of the temporary business visa program* (2007) 71-72.

<sup>45</sup> Visa Subclass 457 External Reference Group, *Final Report to the Minister for Immigration and Citizenship* (2008) 37.

<sup>46</sup> *Migration Regulations 1994* (Cth) reg 1.20G(4), 1.20H(1) (sponsorship); *Migration Regulations 1994* (Cth) Schedule 2, Subclass 457, cl 457.221A(4)(f)-(g) (Australian business sponsorship s 457 visa); cl 457.221A(5)(h) (Overseas business sponsorship s 457 visa).

<sup>47</sup> Australian Department of Immigration and Citizenship, *Discussion Paper: Business (Long Stay) Subclass 457 and related temporary visa reforms* (2008) 11.

<sup>48</sup> *Migration Regulations 1994* (Cth) reg 1.20CB.

increasing by 4.1% on 1 July 2009, and, from mid-September 2009, will be based on so-called 'market rates'.<sup>49</sup>

**Table 2: Minimum Salary Level for 457 Visa Workers**

When visa granted	Before 11 February 2004	11 February 2004 - 8 April 2005	9 April 2005 – 2 May 2006	After 2 May 2006 <sup>50</sup>
<i>General s 457 visa</i>				
Non-ICT occupations	\$37 190	\$39 150	\$40 590	\$43 440
ICT occupations		\$48 390	\$52 700	\$59 480
<i>Regional certified employment s 457 visa</i>				
Non-ICT occupations	Industrial Award			\$39 100
ICT occupations				\$53 530

Source: Minimum Salary Levels and Occupations for the Temporary Business Long Stay Visa Notice 2008, cl 8.

### 3. obligations on employers

The current provisions require sponsoring employers to make various undertakings. Amongst others, the sponsor must undertake to:

- comply with its responsibilities under immigration law and not employ a person in breach of immigration laws;<sup>51</sup>
- comply with workplace relations law and any workplace agreement reached with worker;<sup>52</sup>

<sup>49</sup> Chris Evans, Minister for Immigration and Citizenship, 'Government announces changes to 457 visa program', 1 April 2009 (media release) <http://www.minister.immi.gov.au/media/media-releases/2009/ce09034.htm>; accessed on 30 April 2009). These changes will be discussed in greater detail below, see text accompanying nn??

<sup>50</sup> For regional certified employment s 457 visas, the date is 30 June 2006: Minimum Salary Levels and Occupations for the Temporary Business Long Stay Visa Notice 2008, cl 8(9).

<sup>51</sup> *Migration Regulations 1994* (Cth) reg 1.20CB(1)(b)-(c).

- pay at least the applicable MSL;<sup>53</sup>
- ensure sponsored worker holds any licence, registration or membership required for performance of work;<sup>54</sup>
- make superannuation contributions and deduct tax instalments re worker;<sup>55</sup>
- meet the costs of return travel;<sup>56</sup>
- meet the costs of all medical or hospital expenses for sponsored worker arising from treatment administered in a public hospital (if not met by health insurance);<sup>57</sup>
- notify the Immigration Department of any relevant change of circumstances;<sup>58</sup>
- notify the Immigration Department within 5 working days after the worker ceases to be employed by the sponsor;<sup>59</sup>
- cooperate with Immigration Department's monitoring of sponsor and sponsored employer;<sup>60</sup> and
- pay Cth amount equal to costs incurred by Cth in relation to sponsored worker including costs of locating, detaining and removing sponsored worker not exceeding \$10 000.<sup>61</sup>

Presently, the main penalty for breaches of these undertakings is the cancellation of the approval of the employer as a sponsor or barring the employer from being a sponsor (whether generally or within specified circumstances).<sup>62</sup>

The *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth) will make important changes to the obligations of sponsors. Rather than tying these obligations to specific undertakings made by sponsors (at the time they apply for sponsorship), the obligations will be set out in the *Migration Regulations*.<sup>63</sup> This change will mean that obligations of sponsors will not be necessarily fixed at the time their applications were granted but can be changed by law.<sup>64</sup> In February 2009, the Immigration Minister

---

<sup>52</sup> *Migration Regulations 1994* (Cth) reg 1.20CB(1)(g).

<sup>53</sup> *Migration Regulations 1994* (Cth) reg 1.20CB(1)(i).

<sup>54</sup> *Migration Regulations 1994* (Cth) reg 1.20CB(1)(h).

<sup>55</sup> *Migration Regulations 1994* (Cth) reg 1.20CB(1)(l)-(m).

<sup>56</sup> *Migration Regulations 1994* (Cth) reg 1.20CB(1)(a).

<sup>57</sup> *Migration Regulations 1994* (Cth) reg 1.20CB(1)(k).

<sup>58</sup> *Migration Regulations 1994* (Cth) reg 1.20CB(1)(d).

<sup>59</sup> *Migration Regulations 1994* (Cth) reg 1.20CB(1)(f).

<sup>60</sup> *Migration Regulations 1994* (Cth) reg 1.20CB(1)(e).

<sup>61</sup> *Migration Regulations 1994* (Cth) reg 1.20CB(1)(n), (2); 1.20CC.

<sup>62</sup> *Migration Act* ss 140J, 140L; *Migration Regulations 1994* (Cth) reg 1.20HA.

<sup>63</sup> *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth), proposed s 140H.

<sup>64</sup> See discussion in Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Worker Protection) Bill 2008* (2008) 5-6.

released draft regulations on the obligations of sponsors.<sup>65</sup> The Act will also introduce a system of civil penalties (or fines) in relation to these obligations. This system does not universally apply to all breaches of the obligation with only breaches specified by the *Migration Regulations* subject to civil penalties.<sup>66</sup>

#### 4) Controversy and Debate

The 457 scheme has sparked considerable controversy and debate, especially in the past five years, as the number of participants has grown and as the range of occupations has widened. Cases of abuse in several sectors have been widely publicised. Unions and community groups have drawn attention to problems and have campaigned for changes. Critics argue that the scheme is too heavily oriented to the interests of employers and neglects the interests of local workers and the migrant workers themselves. They suggest that it represents a neoliberal commitment to labour market deregulation, which is increasingly inappropriate for a modern society. Union representatives point to numerous of abuse, including underpayments and unsafe working conditions.<sup>67</sup> The problems here are seen as covering not only illegal practices but also perfectly legal practices that allow employers to pay 457 workers less and impose more onerous working conditions than would be the case for local workers. Both illegal and legal practices impact not only on the individual worker but also, more broadly, on all workers in the occupation. This can in turn cause major problems. Sutton refers to the looming danger of a two-track model of the labour market, as seen in its most extreme form in the Gulf States, while Bissett and Landau point to the risk of creating a tier of second class workers.<sup>68</sup>

Partly in response to these concerns, the federal Labor Government, on assuming office in late 2007, established two inquiries into the Subclass 457 visa scheme: one by the External Reference Group, a group comprising of industry experts, and the other by Australian Industrial Relations Commissioner Barbara Deegan. Both inquiries helped to focus attention on the scheme and stimulated further debate.

---

<sup>65</sup> Url ref

<sup>66</sup> *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth), proposed s 140Q. See discussion in Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Worker Protection) Bill 2008* (2008) 23-26.

<sup>67</sup> For example, J. Sutton, 'Asia-Pacific Labour Mobility and the Two Track Labour Market' (2008) 16 *People and Place* 85; M. Bissett and I. Landau, 'Australia's 457 Visa Scheme and the rights of migrant workers' (2008) 33 *Alternative Law Journal* 142; ACTU, *Response to Issues Paper #3: Integrity/ Exploitation*, Melbourne, ACTU, 2008.

<sup>68</sup> J. Sutton, 'Asia-Pacific Labour Mobility and the Two Track Labour Market' (2008) 16 *People and Place*, pp. 89-90; M. Bissett and I. Landau, 'Australia's 457 Visa Scheme and the rights of migrant workers' (2008) 33 *Alternative Law Journal*, p.145.

Both inquiries analysed problems with the scheme, including cases of abuse, and delivered reports making a range of recommendations to the operation and design of the scheme.<sup>69</sup>

## 5) Three themes

In developing policy and forms of regulation around temporary migrant labour, one major challenge is to balance the disparate interests of employers, local workers and the migrant workers. We consider the implications of this challenge for regulation of the 457 schemes under three headings:

1. Employer needs and the question of skill shortages;
2. The principle of equal and 'no less favourable' treatment; and
3. The principle of effective enforcement.

### *1. Employer needs and the question of skill shortages*

The 457 visa scheme was designed in response to changing employer needs for labour. The recourse to temporary migrant labour was justified because employers were seen as suffering skill shortages, in which they were unable to secure skilled workers through local labour markets.

One challenge for regulation is to ensure that opportunities to use temporary migrant labour match genuine, short-term skill shortages and are not simply a response to employer desires to find labour that can be employed more cheaply and under more onerous conditions than local labour. In short, the challenge is to ensure that recourse to immigrant labour is not simply a device to lower minimum labour standards. It is not plausible to rely on the simple assurance of the employer. Employers speak freely and often of skill shortages in Australia and then add a demand for a short-term fix through increased immigration. Talk of skill shortages is sometimes apt. However, the notion of skill shortage is notoriously slippery, and it sometimes merely alludes to the fact that employers are reluctant to offer wages and conditions at the rates needed to attract local workers.<sup>70</sup>

---

<sup>69</sup> Visa Subclass 457 External Reference Group, *Final Report to the Minister for Immigration and Citizenship* (April 2008) ('External Reference Group Report'); Visa Subclass 457 Integrity Review, *Final Report* (October 2008) ('Deegan Report').

<sup>70</sup> C. Briggs and J. Buchanan, 'Work, commerce and the law: A new Australian model?', (2005) 38 *The Australian Economic Review*, 182; S. Richardson, *What is a skill shortage?* Adelaide, NCVET, 2007.

In seeking to assess employer needs, most temporary migration schemes rely on some sort of labour market testing. How does the 457 scheme measure up? We can note first of all that in most cases the individual employer is not required to demonstrate that they have explored the availability of suitably skilled local labour. There is not even a prohibition against replacing local workers with 457 workers. The individual employer has to do little more than offer assurances that they need migrant labour. A high-level public servant justified the absence of any requirement for labour market testing by suggesting that employers knew best:

Labour market testing required employers to demonstrate to DIMA that they had advertised the position in the right places, the right number of times and in the right way and that any applicants from within Australia who had applied were not suitable. Those are judgments that can only be made by an employer. Public servants cannot be involved in second-guessing those sorts of judgments.<sup>71</sup>

The official claimed that 'bringing skilled workers to Australia from overseas involves very significant costs for employers', and that 'employers are unlikely to incur these costs if they can find the skills locally'.<sup>72</sup> In this view the fact that employers want migrant labour is taken as evidence that they need migrant labour!

Proponents of the scheme point to two main indirect mechanisms, which are said to ensure that only genuine employer needs are met. The first is the list of specified occupations. But it is hard to treat this seriously as a list of occupations with skill shortages, since it lists *every* four-digit occupational group in the first four ASCO major groups and it then lists *almost all* four-digit occupational groups in three further ASCO major groups. It is not clear what relation this list has to any process of determining skill shortages.<sup>73</sup>

This is not to say that there are no skill shortages. There appears to be a general agreement that there are skill shortages in various industries including construction and major infrastructure, mining and

---

<sup>71</sup> Quoted in Bob Kinnaird, 'Current Issues in the Skilled Temporary Subclass 457 Visa' (2006) 14(2) *People and Place* 49, 52.

<sup>72</sup> *Ibid.*

<sup>73</sup> Joint Standing Committee on Migration, *Temporary visas . . . permanent benefits: Ensuring the effectiveness, fairness and integrity of the temporary business visa program* (2007) 81; Visa Subclass 457 Integrity Review, *Final Report* (2008) 39.

tourism and hospitality.<sup>74</sup> Yet as the Deegan Report noted, broad agreement that skill shortages exists in relation to a particular occupation or industry in one location is not the same as agreement that these shortages exist throughout the country. In its words, '(w)hile a particular trade may be in short supply in the north-west of Western Australia, there may be unemployment in the same trade in the outer suburbs of Sydney'.<sup>75</sup> A list of specified occupations that applies nationally is inherently unable to capture these spatial variations in skill shortages.

As noted above, employers in regional areas can take the path of 'certified regional employment' nominations, which gives access to a longer list of permitted occupations. This is accompanied by what at first glance appears to be a stricter requirement that nominations must be certified by a Regional Certified Body (RCB).<sup>76</sup> RCBs compose a diverse group of organisations ranging from local councils and Government departments to chambers of commerce,<sup>77</sup> and their deliberations have been criticised for lack of transparency and consistency. The Deegan Report, for example, documented concerns 'about inconsistencies in decision-making, forum shopping, lack of transparency and a lack of rigor applied to the process by some RCBs'.<sup>78</sup> Moreover, some have pointed out the potential for conflict of interest especially when RCBs are private bodies like chambers of commerce.<sup>79</sup>

As noted above, labour-hire companies can access the 457 scheme. Given that such firms are not the end-users of the labour, it is difficult to see how this is compatible with the rationale for the scheme in terms of skill shortages.

With departmental processes that do not adequately tailor the list of specified occupations to skill shortages; a mismatch between the localised character of skill shortages and a list that apply on a national basis; problems associated with RCBs and Labour Agreements; the absence of a labour market

---

<sup>74</sup> See Visa Subclass 457 External Reference Group, *Final Report to the Minister for Immigration and Citizenship* (2008) 16-20. The causes of such shortages can be found in various factors, including the recent dominance of a market model in skills development and the reluctance of employers to invest in long-term training for skilled jobs – R. Hall and R. Lansbury, 'Skills in Australia: Towards workforce development and sustainable skill ecosystems', (2006) 48 *Journal of Industrial Relations*, 575.

<sup>75</sup> Visa Subclass 457 Integrity Review, *Final Report* (2008) 39.

<sup>76</sup> See text above accompanying ?

<sup>77</sup> DIAC's website

<sup>78</sup> Visa Subclass 457 Integrity Review, *Final Report* (2008) 48.

<sup>79</sup> Standing Committee on Migration, *Temporary visas . . . permanent benefits: Ensuring the effectiveness, fairness and integrity of the temporary business visa program* (2007) 71-76.

testing requirement; and the ability of labour-hire firms to source labour through the scheme, the underlying notion of 'skill shortages' appears hollow. Some commentators argue that the scheme has been very successful in meeting skill shortages in a number of areas.<sup>80</sup> However, this outcome appears rather fortuitous, based on the happy circumstance that some employers do indeed suffer skill shortages. It does not appear to be the case in all areas. Paradoxically, as Toner and Woolley suggest, the 457 scheme may exacerbate rather than ease skill shortages in areas such as trade occupations.<sup>81</sup>

The second indirect mechanism, said to ensure that only genuine employer needs are met, is the requirement to pay a MSL. According to the Immigration Department:

The Subclass 457 visa program is intended to meet the emerging needs of a dynamic labour market through the provision of skilled overseas workers on a temporary basis. The *primary mechanism* by which the program seeks to achieve this is a market based price signal – currently enforced through the Subclass 457 sponsor undertaking to pay the primary visa holder at least the minimum salary level.<sup>82</sup>

If the MSL were indeed a market rate, equivalent to the rate that would have to be paid a local worker, this appeal to a 'market based price signal' might have some plausibility. However, as the Deegan Report notes, the MSL falls well short of market rates for Australian workers employed in the professional, semi-professional or trades categories.<sup>83</sup> There is an even sharper disjuncture when there is a 'regional certified employment' nomination, as the level of MSL is lower. This deficit signals in effect the insertion of many temporary migrant workers in a structurally disadvantaged position within Australian labour markets. Far from being a guarantee that only responsible employer needs are being met, it acts as an incentive for employers to use the scheme for irresponsible purposes. It represents an unfair advantage for certain employers.

The new federal Labor government has done little in response to suggestions for changes in the process for nominating specified occupations. It has, however, acted more vigorously in relation to complaints

---

<sup>80</sup> G. Hugo, 'Globalization and Changes in Australian International Migration' (2006b) 23 *Journal of Population Research*, p. 113.

<sup>81</sup> <sup>81</sup> P. Toner and R. Woolley, 'Temporary Migration and Skills Formation in the Trades: A Provisional Assessment' (2008) 16 *People and Place* 47.

<sup>82</sup> Australian Department of Immigration and Citizenship, *Discussion Paper: Business (Long Stay) Subclass 457 and related temporary visa reforms* (2008) 11 (emphasis added).

<sup>83</sup> Deegan Report, 27.

about the low level of the MSL. As noted above, the MSL was increased by 3.8% in 2008. From September 2009, it will also be indexed resulting in an increase of 4.1%.

The ALP Government has announced that, from September 2009 onwards, employers sponsoring 457 workers will be required to pay 'market rates' for Australian workers. However, it is not yet clear what mechanism will be put in place to determine these rates. Wage determination in Australia, like determination of most employment conditions, is complex and layered by different mechanisms. Even for local employees, there is a wide differentiation of pay rates, according to the impact of features such as employment status and then of institutional mechanisms such as legislated minima, awards, (single-employer) collective agreements and informal individual arrangements. Final pay will of course also be affected by the nature of other employment conditions, including working-time arrangements and the allowances and penalty rates that apply for such arrangements. These too are variegated in Australia. As a result, there is no straightforward or naturally obvious option for determining the 'market rates' that might apply for temporary migrant workers. In its inquiry into the Subclass 457 visa scheme, the Joint Standing Committee on Migration identified various main options, namely:

- wages and conditions of Australian workers doing equivalent work;
- the median or the '75<sup>th</sup> percentile' of the salary of the Australian workers in the occupation concerned; and
- advertised rate for vacancies in the occupations concerned.<sup>84</sup>

The Deegan Report recommended the first option and suggested the abolition of the MSL in favour of a system of market rates integrated with the industrial law system. Its proposal was that market rates would generally be determined by the rates set in collective agreements. In the few cases, where it could be argued that the industrial award provided the market rates for an industry, the award wage rate would apply. In situations where there is no applicable collective agreement or award, the federal industrial tribunal, Fair Work Australia, would determine the level of the market rates to be paid by sponsoring employers. Importantly, the Deegan Report recommended that the market rates under the Subclass 457

---

<sup>84</sup> Joint Standing Committee on Migration, *Temporary visas . . . permanent benefits: Ensuring the effectiveness, fairness and integrity of the temporary business visa program* (2007) 38.

visa scheme be subject to a 'salary floor' set by reference to the relevant ABS-published wage rate based upon average weekly full-time earnings.<sup>85</sup>

## *2. The principles of equal and 'no less favourable' treatment*

The principle of equal treatment is strongly supported by various international instruments on migrant work.<sup>86</sup> Other treaties provide for the cognate principle of 'not less favourable' treatment. The principles are seen as serving a twofold purpose: preventing abuse of temporary migrant workers and protecting the rights and entitlements of Australian workers. The principle of equal treatment alludes to the existence of a mainstream of social protection in countries such as Australia and aims to ensure that migrant workers are as closely integrated as possible within this mainstream.

What rights and entitlements do these principles apply to? They apply first of all to remuneration. At the same time, they readily extend to other key working conditions including hours of work, holidays, leave entitlements, termination of employment and safety. International treaties also stipulate that the principles of equal treatment and/or 'not less favourable' treatment shall apply to freedom of association<sup>87</sup> and rights of collective bargaining.<sup>88</sup> Similarly, access to unemployment benefits is also frequently subject to these principles,<sup>89</sup> as is access to health services.<sup>90</sup>

The principle of equal treatment is frequently invoked in the Australian debate. The first and foremost recommendation of Deegan report is that 'so far as possible given their special circumstances, Subclass 457 visa holders have the same terms and conditions of employment as all other employees in the workplace'.<sup>91</sup>

---

<sup>85</sup> Visa Subclass 457 Integrity Review, *Final Report* (2008) 28-.

<sup>86</sup> The key instruments are the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990; ILO Migration for Employment Convention (Revised), 1949 (No 97); ILO Migration for Employment Recommendation (Revised, 1949 (No 86); ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No 143) and ILO Migrant Workers Recommendation, 1975 (No 151). The International Labour Office has also produced the 'ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration' full cite.

<sup>87</sup> Article 26 UN Convention. See also Article 40 as it relates to migrant workers in regular situations.

<sup>88</sup> ILO Migration for Employment Convention 1949 Article 6(1)(a)(ii).

<sup>89</sup> For example, ILO Migration for Employment Convention 1949 Article 6(1)(b).

<sup>90</sup> UN Convention Article 43(1)(e). Article 45(1)(c) equivalent provision for family members of regular migrant workers.

<sup>91</sup> Visa Subclass 457 Integrity Review, *Final Report* (2008) 8.

How does the 457 scheme measure up? In the previous section we discuss the issue of ‘market rates’ and discuss the problems associated with the complex and layered nature of labour regulation in Australia. The problems are equally forceful when we turn to employment conditions in general. There is significant difficulty in finding a reliable comparator to use as the basis for an assessment of equal and not less favourable treatment. This in turn reflects the fact that local employees are themselves subject to unequal treatment, according to their differentiated situation in relation to institutional forms and mechanisms of social protection. Alternatively put, it reflects the fact that it is difficult to identify a central mainstream of social protection in Australia.<sup>92</sup>

The entitlement to unemployment benefits and public health insurance are set out in statute so the benchmark for comparisons should be derived from the relevant statutory provisions. Matters are, however, much more complicated in relation to industrial entitlements because of the complexity of the Australian regulatory system. This system is, firstly, federal in character resulting in a mosaic of federal, State and Territory industrial statutes. Secondly, there are various industrial instruments within each jurisdiction. Under the federal industrial statute, the *Fair Work Act 2009* (Cth) (*‘Fair Work Act’*), there are three main sources of terms and conditions: statutory provisions; modern awards<sup>93</sup> and enterprise agreements.<sup>94</sup> These instruments further sit alongside terms of common law contracts. Further, these instruments interact in complicated ways. It is fair to say, however, that the statutory provisions provide a ‘floor’ in that common law contracts, modern awards and enterprise agreements cannot provide for entitlements that inferior to those conferred by these provisions.<sup>95</sup> We also have to grapple with the problem of employment status. Under the Australian industrial system, workers can be engaged as continuing, casual and fixed-term or fixed task employees. Legislative provisions and other industrial instruments tend to accord these various groups of workers different sets of rights and entitlements. For example, continuing employees are generally entitled to annual and sick leave while casual employees do not enjoy such entitlements (although many are paid a loading in lieu). These differences apply even when these workers are performing the same kind of work.

---

<sup>92</sup> The metaphor of mainstream is not appropriate; instead the Australian picture more closely resembles an arid landscape with a few strong streams, supplemented by many dried-up creek beds and little trickles that only swell under the most favourable conditions!

<sup>93</sup> *Fair Work Act 2009* (Cth) Part 2-3.

<sup>94</sup> *Fair Work Act 2009* (Cth) Part 2-4.

<sup>95</sup> See, for example, in relation to the entitlements under the National Employment Standards: *Fair Work Act* s 55.

A comprehensive assessment is beyond the scope of this paper. Here we just make a few points. There are no formal exclusions of temporary migrant workers, including 457 visa workers, from the statutory entitlements provided by the *Fair Work Act*. This Act generally applies to 'national system employees', that is, employees engaged by a trading, financial or foreign corporations<sup>96</sup> and if 457 visa workers come within this broad category, they will be able to formally access these entitlements provided they meet the eligibility conditions. Much the same applies to occupational health and safety statutes.<sup>97</sup> Under these statutes, employers are subject to a duty to provide a safe working environment for all their workers (including temporary migrant workers like 457 visa workers).

Temporary migrant workers, including 457 visa workers, are, however, barred from accessing the unemployment benefit and public health insurance. Under the *Social Security Act 1991* (Cth), the Australian unemployment benefit, the Newstart Allowance, is generally only available to 'Australian residents', namely, Australian citizens and holders of permanent visas residing in Australia.<sup>98</sup> Under the *Health Insurance Act 1973* (Cth), public health insurance in Australia, the Medicare benefit is also generally for 'Australian residents', that is, Australian citizens and holder of permanent visas present in Australia.<sup>99</sup> Sponsoring employers are currently obliged to provide benefits that partially compensate for the inability of 457 visa workers to access these entitlements. These workers are provided an unemployment benefit of sorts as their sponsoring employers are obliged to pay them for the duration of the sponsorship. As sponsorship only ceases for the 457 visa worker at the end of 28 days after the sponsor notifies DIAC that the worker has ceased in the sponsor's employment,<sup>100</sup> these workers are entitled to be paid at least for a period of 28 days after they have left their sponsor's employment. Also sponsors presently have to undertake to meet the costs of all medical or hospital expenses for the sponsored worker arising from treatment administered in a public hospital if such costs are not met by

---

<sup>96</sup> Refs

<sup>97</sup> List of statutes

<sup>98</sup> *Social Security Act 1991* (Cth) s 593(g)(ii). 'Australian resident' is defined by s 7. There are minor exceptions to this rule. Persons residing in Australia for more than 10 years after 26 February 2001 are entitled to a maximum of six months of the Newstart Allowance: *Social Security Act 1991* (Cth) s 7(7)(b). This provision obviously will have no application until 2011. Also New Zealand citizens residing in Australia are entitled to the Newstart Allowance: *Social Security Act 1991* (Cth) s 7(7)(a);. This, however, is of no consequence in terms of the Subclass 457 visa scheme as New Zealand citizens will not be resorting to this scheme as they who can obtain a 'special category' visa simply by producing a valid New Zealand passport: *Migration Act* ss 5, 32.

<sup>99</sup> *Health Insurance Act 1973* (Cth) ss 3(1), 10(1).

<sup>100</sup> *Migration Regulations 1994* (Cth) reg 1.20E.

health insurance.<sup>101</sup> This undertaking does not, however, cover all the medical costs that can be incurred by the sponsored worker, for example, costs arising from treatment administered in medical clinic.

It is possible to argue that 457 workers lack a basic right enjoyed by local workers – the freedom to choose employment. With 457 visa workers, the freedom to choose employment is highly circumscribed. A mandatory condition of their visas is Visa Condition 8107. The terms of this condition, reproduced below,<sup>102</sup> clearly impose severe restrictions upon the ability of 457 visa workers to change employers or perform different types of work.

### **Visa Condition 8107**

The holder must not:

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

Serious consequences can follow from a breach of this condition. The worker's visa may be cancelled, therefore rendering the worker liable to being detained and deported. A subsequent 457 visa application can also be refused for such a breach.<sup>103</sup> It is also a criminal offence to work in breach of visa conditions.<sup>104</sup> These formal sanctions attaching to the breach of Visa Condition 8107 also combine with informal restrictions on mobility including perceptions that the worker is 'tied' to an employer because of

---

<sup>101</sup> *Migration Regulations 1994* (Cth) reg 1.20CB(1)(k).

<sup>102</sup> Reproduced in Visa Subclass 457 Integrity Review, *Final Report* (2008) 100.

<sup>103</sup> This is the effect of there being a condition of a successful s 457 visa application that the applicant has complied substantially with the conditions of previous visas: *Migration Regulations 1994* (Cth) Schedule 2, Subclass 457, cl 457.221.

<sup>104</sup> *Migration Act* s 235.

the difficulty in having overseas qualifications recognised and the view of some employers that their outlays in recruiting the Subclass 457 worker means that they have some entitlement to worker's services.<sup>105</sup>

The current federal Labor government appears committed to preserving the status quo on the issue of equal treatment.

### 3. *The Principle of Effective Enforcement*

Rights and entitlements are only meaningful in so far as they can be properly enforced. Lack of enforcement of existing rights and entitlements increases the risk of poor treatment. A key principle of the *ILO Multilateral Framework on Labour Migration* is that the rights of migrant workers 'should be protected by the effective application and enforcement of national laws and regulations in accordance with international labour standards and applicable regional instruments'.<sup>106</sup>

The extent of effective enforcement of labour regulation partly depends on the configuration of the regulation and the resources devoted to enforcement. In Australia enforcement has long been a sensitive issue. Employer evasion of employee entitlements has, according to one study, been 'significant and sustained'.<sup>107</sup> The complexity of the labour regulation system inhibits complaint and reinforces acquiescence to illegal treatment, while at the same time few resources have been available for following up cases of abuse. The problem is compounded when the law itself is unclear, as in the case of the protections available to labour-hire workers.

In addition to these structural factors, the situation of the worker can affect enforcement. If the worker is highly dependent on the employer and vulnerable, this can further inhibit the likelihood of enforcement and increase the chances of poor treatment. 457 workers have special difficulties in this respect

---

<sup>105</sup> Visa Subclass 457 Integrity Review, *Final Report* (2008) 66. It should be emphasised, however, that breaches of a 457 visa (including breaches of Visa Condition 8107) do not mean that the visa is automatically cancelled. Such breaches confer upon DIAC a *discretion* to cancel the visa – Department of Immigration and Citizenship, *Submission to the Joint Standing Committee on Migration's Report into Temporary Business Visas* (2007) 1 (available at <http://www.apf.gov.au/HOUSE/committee/MIG/457visas/subs/sub086.pdf>; accessed on 11 May 2008).

<sup>106</sup> International Labour Office, *ILO Multilateral Framework o Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration* (2006) 19, Principle 10.

<sup>107</sup> M. Goodwin and G. Maconachie, 'Unpaid Entitlement Recovery in the Federal Industrial Relations System: Strategy and Outcomes 1952-95', (2007) *The Journal of Industrial Relations* 49, 4, 523.

because of their enhanced vulnerability. Some are vulnerable because of factors such as relative lack of cultural and language literacy and a lack of understanding of the complex system of labour regulation. But the main factor determining vulnerability is the high level of dependence on the sponsoring employer that is built into the design of the scheme. This dependence stems from various circumstances; most important of which is that continued employment by the sponsoring employer tends to be necessary for the 457 visa worker to remain in Australia. As the Deegan Report puts it:

Despite the views of some employers and employer organisations, Subclass 457 visa holders are different from other employees in Australian workplaces. They are the only group of employees whose ability to remain in Australia is largely dependent upon their employment and to a large extent, their employer. It is for these reasons that visa holders are vulnerable and are open to exploitation.<sup>108</sup>

In this context, the ability of the sponsoring employer to terminate the employment of the 457 visa workers appears as a power to remove the worker from Australia. Not surprisingly, the Deegan Report found that there is a perception amongst 457 visa workers that the sponsoring employer can cancel their visas despite this power formally residing with DIAC.<sup>109</sup>

This power is clearly bound up with the lack of the freedom to choose employment that is experienced by 457 visa workers. There is a complex two way process at work here. The power of the sponsoring employers to terminate the employment of these workers and, therefore, trigger a chain of events that might lead to their removal naturally induces a lack of mobility on the part of the workers. At the same time, sponsoring employers who sense that their workers lack the freedom to change employment may choose to engage in more exploitative practices. As the Deegan Report observed '(g)enerally it is the most vulnerable of the Subclass 457 visa holders who are exploited as a consequence of their lack of mobility, whether that lack is real or perceived'.<sup>110</sup>

One consequence of the tight nexus between engagement by the sponsoring employment and the ability to remain in Australia is that the protection against dismissal, while formally available to 457 visa

---

<sup>108</sup> Visa Subclass 457 Integrity Review, *Final Report* (2008) 69.

<sup>109</sup> put reference.

<sup>110</sup> Visa Subclass 457 Integrity Review, *Final Report* (2008) 67.

workers, is largely illusory. Put simply, they are in no position to effectively invoke such protection when they are already back in their home country after 28 days. This nexus also explains why some 457 visa workers are reluctant to complain of ill-treatment or illegal conduct. As the Joint Standing Committee on Migration put it, 'they are fearful their employment will be terminated and they will be returned home'.<sup>111</sup> This nexus further explains why some 457 visa workers are willing to abide by illegal or exploitative contracts. As the director of employer found to have underpaid their 457 visa workers put it, the workers 'would sign anything' as they 'are frightened of . . . being sent back'.<sup>112</sup>

The dependence of 457 visa workers on their sponsoring employers is amplified in some cases, where the workers are dependent upon the employer for the provision of essential services. In the case of *Fryer v Yoga Tandoori House Pty Ltd*, where the sponsoring employer did not pay his chef for nearly seven weeks, the worker was dependent upon his employer for food, money, accommodation and transportation.<sup>113</sup>

Dependence is conditioned by financial need and by the long-term aims of the worker. Many workers aim to use the 457 visa as a pathway to permanent residence, and indeed a substantial number have succeeded in becoming permanent residents.<sup>114</sup> The main permanent visa categories which these workers use are the Employer Nomination Scheme and the Regional Sponsored Migration Scheme; both of which depend on the sponsorship of an employer.<sup>115</sup> This formal dependence sits alongside a general perception that employer sponsorship is necessary for a successful permanent residence application. Both can result in the 457 visa worker being willing to work in breach of labour laws. As the Deegan Report notes, 'where a visa holder has permanent residency as a goal that person may endure, without complaint, substandard living conditions, illegal or unfair deductions from wages, and other forms of exploitation in order not to jeopardise the goal of permanent residency'.<sup>116</sup>

---

<sup>111</sup> Joint Standing Committee on Migration, *Temporary visas . . . permanent benefits: Ensuring the effectiveness, fairness and integrity of the temporary business visa program* (2007) 132.

<sup>112</sup> Quoted in *Jones v Hannsen Pty Ltd* [2008] FMCA 291 [8].

<sup>113</sup> *Fryer v Yoga Tandoori House Pty Ltd* [2008] FMCA 288.

<sup>114</sup> p 23 External Review Task Force. In 2006-2007 financial year, 18,352 people obtained permanent residence where the last substantive visa was a Subclass 457 visa: Department of Immigration and Citizenship's statistics quoted in Joint Standing Committee on Migration, *Temporary visas . . . permanent benefits: Ensuring the effectiveness, fairness and integrity of the temporary business visa program* (2007) 23.

<sup>115</sup> See discussion in Visa Subclass 457 Integrity Review, *Final Report* (2008) 50.

<sup>116</sup> Visa Subclass 457 Integrity Review, *Final Report* (2008) 49.

Cutting across the various sources of dependence is the shadow of irregular status. It is a cruel irony that if a 457 visa worker is engaged by an employer in violation of labour laws, this can, in fact, strengthen the hand of the employer. For instance, a 457 visa worker who works in a job classification different (most likely lower) from that stated in his or her visa would be in breach of Visa Condition 8107. This would mean not only that the visa would be liable to be cancelled but also that the worker was committing a criminal offence. Even when a violation of labour laws does not involve a breach of the worker's visa, there can still be a perception that the worker's participation of worker in illegal arrangements, if disclosed, might jeopardise the visa or his or her prospect of permanent residence. In these circumstances, continuing in illegal work arrangements might be seen as preferable to regularisation of status.

It is difficult to assess the extent of illegal work arrangements. We can speculate that it is likely to highest when 457 visa workers are engaged at less skilled categories<sup>117</sup> and/or paid close to MSL.<sup>118</sup> DIAC's 2006/2007 Annual Report documents that only 1.67% of sponsors were found to be in breach of their sponsorship undertakings.<sup>119</sup> Reliance on the official sanction rate as a measure, however, is extremely problematic. The Deegan Report observes that:

This view ignores the major problem with providing protection for Subclass 457 visa holders. Those visa holders who are susceptible to exploitation are also reluctant to make any complaint which may put their employment at risk . . . The precariousness of the position of Subclass 457 visa holders is such that the type of evidence of exploitative practices demanded by some employer organisations . . . can be difficult to obtain and is usually only made available on the basis of a guarantee that no action will be taken which will put at risk the employment of the visa holders concerned. . . Discussions with the Workplace Ombudsman and various State and Territory authorities responsible for enforcing compliance with employment conditions support the view that the incidences of exploitation involving Subclass 457 visa holders that are brought to the attention of the authorities are a very small part of the overall problem.<sup>120</sup>

---

<sup>117</sup> Visa Subclass 457 Integrity Review, *Final Report* (2008) 23-24.

<sup>118</sup> Visa Subclass 457 Integrity Review, *Final Report* (2008) 27.

<sup>119</sup> Quoted in Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Worker Protection) Bill 2008* (2008) 14.

<sup>120</sup> Visa Subclass 457 Integrity Review, *Final Report* (2008) 23-24.

There are many documented cases of 457 visa workers being engaged in breach of labour laws.

Evidence to the Joint Standing Committee on Migration's inquiry into the 457 visa scheme alleged cases of:

- underpayment of MSL;
- unlawful deductions from wages (e.g. for travel, medical or accommodation costs);
- non-payment of overtime rates;
- obliging worker to work excessive hours (e.g. 15-18 hours per day, 7 days a week);
- employment of skilled workers in unskilled roles
- unfair termination of employment; and
- racial abuse and threat of physical harm.<sup>121</sup>

The Australian Human Rights Commission's submission to the Deegan Inquiry catalogues complaints it had received in relation to 457 visa workers. While bearing strong similarity to the allegations made to the Joint Standing Committee, this submission also included complaints of the following:

- limited access to sick leave and dismissal if worker takes sick leave;
- dismissal because worker is pregnant;
- dismissal for taking leave to care for sick spouse or child; and
- sexual harassment.<sup>122</sup>

A number of cases have also wound up in the courts, with sponsoring employers fined for employing 457 visa workers in breach of labour laws. Predominantly, they involve cases of underpayment of wages, and they include sponsoring employers being fined for underpaying Chinese workers employed in the printing industry,<sup>123</sup> Filipino nurses,<sup>124</sup> Filipino workers employed in the hospitality industry<sup>125</sup> (including a case involving Filipino chefs).<sup>126</sup> One of the most extreme cases, *Fryer v Yoga Tandoori House Pty Ltd*, involved a sponsoring employer not paying his chef from India for nearly seven weeks.<sup>127</sup>

---

<sup>121</sup> Joint Standing Committee on Migration, *Temporary visas . . . permanent benefits: Ensuring the effectiveness, fairness and integrity of the temporary business visa program* (2007) 112-114.

<sup>122</sup> Visa Subclass 457 Integrity Review, *Final Report* (2008) 6.

<sup>123</sup> *Hortle v Aprint* [2007] FMCA 1547.

<sup>124</sup> *Armstrong v Healthcare Recruiting Australia Pty Ltd (No 2)* [2008] FMCA 1050.

<sup>125</sup> *Flattery v Italian Eatery trading as Zeffirelli's* [2007] FMCA 9;

<sup>126</sup> *Mason v Harrington Corporation* [2007] FMCA 7.

<sup>127</sup> *Fryer v Yoga Tandoori House Pty Ltd* [2008] FMCA 288.

The problem of non-compliance can also affect the work arrangements of family members who accompany the 457 visa holder. Engagement of secondary visa-holders can be quite significant in some industries. For instance, the Deegan report observes that Teys Brothers, a leading meat processor and exporter, employs approximately 500 primary visa holders and 300 secondary visa holders.<sup>128</sup> It also points out that children of primary visa holders can be 'persuaded to work in irregular and exploitative conditions for employers who have claimed that to 'regularise' the situation (and pay correct wages etc) would jeopardise that person's status as a dependent of the primary visa holder and their right to remain in Australia'.<sup>129</sup>

The federal Labor government has taken a few steps to combat problems of abuse. The principal response has been to improve state regulation of the working conditions of 457 visa workers. These measures are contained in the *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth) ('*Worker Protection Act*') and the draft Migration Amendment Regulation which proposes various sponsorship obligations. The *Worker Protection Act* provides for the appointment of inspectors with wide powers to inspect premises and to compel the production of information;<sup>130</sup> arrangements that may be buttressed by a sponsorship obligation to cooperate with these inspectors.<sup>131</sup> The Act also establishes a system of civil penalties where certain breaches of sponsorship obligations will be subject to maximum fines of \$33,000 for companies and \$6600 for individuals.<sup>132</sup>

While these measures are generally welcome, their ability to adequately tackle the problem of enforcement remains to be seen. They do not fundamentally lessen the dependence of many 457 visa workers on their sponsoring employers. No consideration appears to have been given to imposing restrictions on the ability of the employer to terminate the engagement of these workers. Neither has the Labor Government proposed measures that will increase the mobility of these workers, for instance, by adopting the Deegan Report's recommendation that these workers be given 90 rather than 28 days after

---

<sup>128</sup> Visa Subclass 457 Integrity Review, *Final Report* (2008) 58.

<sup>129</sup> Visa Subclass 457 Integrity Review, *Final Report* (2008) 58.

<sup>130</sup> Migration Legislation Amendment (Worker Protection) Act 2008 (Cth) inserting s 140V-140ZA into the *Migration Act 1958* (Cth).

<sup>131</sup> Draft Migration Amendment Regulation 2009, proposed reg 2.67.

<sup>132</sup> Migration Legislation Amendment (Worker Protection) Act 2008 (Cth) inserting s 140Q into the *Migration Act 1958* (Cth).

their employment is terminated to find another sponsoring employer.<sup>133</sup> Moreover, the Government has not announced any changes to the requirements for securing a permanent visa through the Employer Nomination Scheme or the Regional Sponsored Migration Scheme that may reduce the dependence of 457 visa workers who wish to secure permanent residence on their sponsoring employers. In particular, it has not responded to the Deegan Report's recommendation that the precedence given to employer nomination for permanent residence through these categories be lessened with more weight given to the length of time the applicant has worked for any Australian employer.<sup>134</sup>

## 6) Conclusion

Similar to other advanced industrial societies, Australia has experienced a rise in recent years of temporary migrant labour. The most important mechanism for regulating the flow of temporary migrant labour is the 457 scheme. This is an example of an employer-driven scheme. However, as we suggest above, the critics seem right to accuse it of being an extreme example, unfairly biased towards the employers and neglecting the interests of local workers and migrant workers.

The previous sections discuss the challenges for regulation that are associated with temporary migrant labour arrangements. Ruhs notes that:

There is always a need for host countries to manage the demand for migrant labour. This is because the level of labour immigration that is in the interest of individual employers is unlikely to coincide with that in the best interest of the economy as whole.

He goes on to argue that this entails ensuring that there are no opportunities for lowering labour costs by lowering labour standards, that demand for migrant labour is residual after recruitment of local workers fails, and that other methods of responding to shortages are not unfairly foreclosed.<sup>135</sup> The 457 scheme fails to meet this fundamental challenge of managing the demand for labour.

---

<sup>133</sup> See text above accompanying nn??

<sup>134</sup> Visa Subclass 457 Integrity Review, *Final Report* (2008) 51.

<sup>135</sup> M. Ruhs, 'The potential of temporary migration programmes in future international migration policy' (2006) 145 *International Labour Review*, pp. 14-15. In Ruhs' classification, the 457 scheme can be classified as *laissez faire* because of the absence of any caps or quotas, but even within this classification it appears as extreme, due to the absence of any labour market testing – *ibid*, p. 10.

Because the 457 scheme comes with extensive opportunities for renewal and with opportunities for the worker to apply for permanent residency, it may be wrong to call it a temporary migrant labour scheme. Instead it may be better characterised as a permanent migration program, though one that differs from the traditional program in that the workers are highly dependent on individual employers.<sup>136</sup> This does not of course detract from but instead reinforces our argument concerning the need to meet the challenges of regulation.

The design of the 457 scheme is often loosely linked to globalization, but it is clear that policy decisions play a major role.<sup>137</sup> One crucial influence has been neoliberal philosophies that seek to remove the fetters from management prerogative. The incoming Labor government has offered a few innovative reforms, but it too has not yet confronted the full set of challenges posed by the current operation of the scheme.

---

<sup>136</sup> J. Chaloff and G. Lemaitre, *Managing Highly-Skilled Labour Migration: A Comparative Analysis of Migration Policies and Challenges in OECD Countries*, OECD Social, Employment and Migration Working Paper no. 79, DELSA/ELSA/WD/SEM(2009)5, Paris, OECD, 2009, pp. 18-19.

<sup>137</sup> G. Hugo, 'Globalization and Changes in Australian International Migration' (2006b) 23 *Journal of Population Research* 107.

## APPENDIX

**Table A:**

Key sponsorship requirements	Key nomination requirements	Key visa requirements <sup>138</sup>
<p>Employment of worker would contribute to:</p> <ul style="list-style-type: none"> <li>• creation or maintenance of employment for Australian citizens or permanent residents; or</li> <li>• expansion of Australian trade in goods or services; or</li> <li>• improvement of Australian business links with international markets; or</li> <li>• competitiveness within sectors of the Australian economy.<sup>139</sup></li> </ul> <p>For Australian business sponsors, employer:</p> <ul style="list-style-type: none"> <li>• will introduce or utilise in Australia new or improved technology or business skills; or</li> <li>• has satisfactory record or demonstrated commitment to training Australian citizens and permanent residents.<sup>140</sup></li> </ul> <p>Employer has satisfactory record complying with immigration laws<sup>141</sup></p>	<p>Position corresponds to tasks specified in Gazette Notice<sup>145</sup></p> <p>Position will be paid at nominated level which is at least the Minimum Salary Level<sup>146</sup></p>	<p>Employer has consented<sup>147</sup> to being a standard or overseas business sponsor for the worker<sup>148</sup></p> <p>An approved business nomination<sup>149</sup></p> <p>Worker has personal attributes and employment background relevant to activity to be performed<sup>150</sup></p> <p>Worker has skills necessary to perform work<sup>151</sup></p> <p>Worker has English proficiency at least equivalent to 4.5 score on IELTS test<sup>152</sup> with 5.0 score required for those seeking to be chefs and in trades occupations<sup>153</sup></p> <p>From 1 July 2009, applicants seeking to be chefs and in trades occupations from 'high</p>

<sup>138</sup> Meeting these visa requirements are also a condition of successfully applying to be a standard business sponsor: *Migration Regulations 1994* (Cth) reg 1.20D(2)(b) (Australian business sponsorship); reg 1.20DA(2)(b) (Overseas business sponsorship).

<sup>139</sup> *Migration Regulations 1994* (Cth) reg 1.20D(2)(a) (Australian business sponsorship); reg 1.20DA(2)(a) (Overseas business sponsorship).

<sup>140</sup> *Migration Regulations 1994* (Cth) reg 1.20D(2)(c) (Australian business sponsorship).

<sup>141</sup> *Migration Regulations 1994* (Cth) reg 1.20D(2)(e) (Australian business sponsorship); reg 1.20DA(2)(d) (Overseas business sponsorship).

<p>No adverse information known about employer's business background and no investigation of employer (and directors etc) of breaches of law or of sponsorship undertakings<sup>142</sup></p> <p>Employer must provide requisite sponsorship undertakings<sup>143</sup></p> <p>Requirement to be introduced in late 2009 that employer have a strong record of or demonstrated commitment to employing local labour and non-discriminatory employment practices<sup>144</sup></p>		<p>risk' immigration countries to subject to formal skills assessment<sup>154</sup></p> <p>Position not created solely for purpose of securing entry of worker<sup>155</sup></p> <p>For workers sponsored by overseas business sponsors, worker has commitment to establish (or assist in establishing) business in Australia with overseas connection or fulfil contractual obligations of benefit to</p>
---	--	--

<sup>142</sup> *Migration Regulations 1994* (Cth) reg 1.20D(2A) (Australian business sponsorship); reg 1.20DA(2A) (Overseas business sponsorship). These requirements must also be met in order for a nomination and s 457 visa to be approved, see respectively *Migration Regulations 1994* (Cth) reg 1.20H(1A) and *Migration Regulations 1994* (Cth) Schedule 2, Subclass 457, cl 457.221A(4)(j)-(k) (Australian business sponsorship); cl 457. 221A(5)(k)-(l) (Overseas business sponsorship).

<sup>143</sup> *Migration Regulations 1994* (Cth) reg 1.20CB.

<sup>144</sup> Chris Evans, Minister for Immigration and Citizenship, 'Government announces changes to 457 visa program', 1 April 2009 (media release) <http://www.minister.immi.gov.au/media/media-releases/2009/ce09034.htm>; accessed on 30 April 2009)

<sup>145</sup> *Migration Regulations 1994* (Cth) reg 1.20G(2), 1.20H(1). This requirement must also be met for a successful visa application: *Migration Regulations 1994* (Cth) Schedule 2, Subclass 457, cl 457.221A(4)(ed)-(ee) (Australian business sponsorship); cl 457. 221A(5)(ba) (Overseas business sponsorship).

<sup>146</sup> *Migration Regulations 1994* (Cth) reg 1.20G(4), 1.20H(1). This requirement must also be met for a successful visa application: *Migration Regulations 1994* (Cth) Schedule 2, Subclass 457, cl 457.221A(4)(f)-(g) (Australian business sponsorship); cl 457. 221A(5)(h) (Overseas business sponsorship).

<sup>147</sup> This is the effect of the requirement that the sponsor be an approved sponsor pursuant to section 140D of the Act: *Migration Regulations 1994* (Cth) Schedule 2, Subclass 457, cl 457.221A(i) (Australian business sponsorship); cl 457. 221A(5)(j) (Overseas business sponsorship).

<sup>148</sup> *Migration Regulations 1994* (Cth) Schedule 2, Subclass 457, cl 457.221A(b)-(ba) (Australian business sponsorship); cl 457. 221A(5)(c) (Overseas business sponsorship).

<sup>149</sup> *Migration Regulations 1994* (Cth) Schedule 2, Subclass 457, cl 457.221A(4)(a) (Australian business sponsorship); cl 457.221A(5)(b) (Overseas business sponsorship).

<sup>150</sup> *Migration Regulations 1994* (Cth) Schedule 2, Subclass 457, cl 457.221A(4)(d) (Australian business sponsorship); cl 457. 221A(5)(f) (Overseas business sponsorship).

<sup>151</sup> *Migration Regulations 1994* (Cth) Schedule 2, Subclass 457, cl 457.221A(4)(e) (Australian business sponsorship); cl 457. 221A(5)(e) (Overseas business sponsorship).

<sup>152</sup> *Migration Regulations 1994* (Cth) Schedule 2, Subclass 457, cl 457.221A(4)(ea)-(eb) (Australian business sponsorship); cl 457. 221A(5)(fa)-(fc) (Overseas business sponsorship)..

<sup>153</sup> See <http://www.immi.gov.au/skilled/skilled-workers/changes-eng-req.htm> (accessed on 30 April 2009).

<sup>154</sup> Chris Evans, Minister for Immigration and Citizenship, 'Government announces changes to 457 visa program', 1 April 2009 (media release) <http://www.minister.immi.gov.au/media/media-releases/2009/ce09034.htm>; accessed on 30 April 2009)

<sup>155</sup> *Migration Regulations 1994* (Cth) Schedule 2, Subclass 457, cl 457.221A(4)(f)-(g) (Australian business sponsorship); cl 457. 221A(5)(h) (Overseas business sponsorship).

<sup>156</sup> *Migration Regulations 1994* (Cth) Schedule 2, Subclass 457, cl 457.221A(5)(i). Clause 457.111(2) defines when a business activity will be of benefit to Australia.

		Australia <sup>156</sup>
--	--	--------------------------