

Committee Secretary

Senate Legal and Constitutional Affairs Committee

By email: LegCon.sen@aph.gov.au

21 June 2013

Dear Secretary,

Inquiry into the Migration Amendment (Temporary Sponsored Visas) Bill 2013

This submission is made to the inquiry by the Senate Legal and Constitutional Affairs Committee into the Migration Amendment (Temporary Sponsored Visas) Bill 2013 ('the Bill').

The submission broadly endorses the changes proposed by the Bill to the Temporary Work (Skilled) visa (subclass 457) ('457 visa scheme'). It does, however, submit that significant amendments should be made to the Bill before it is passed and makes eight recommendations to this effect.

This submission focuses on following aspects of the Bill:

- A) Its insertion of a provision providing for the purposes of the 457 visa scheme;
- B) Its increase in the period during which a worker on a 457 visa can cease being employed from 28 to 90 days; and
- C) Its introduction of a labour market testing requirement.¹

The submission will evaluate these aspects of the Bill according to three core purposes of the 457 visa scheme. The scheme aims to:

- Address skill shortages;
- Protect the employment and training opportunities and working conditions of Australian workers; and

¹ While the submission does not focus on the enforcement measures proposed by the Bill because of the brief period of time to put in submissions to the inquiry, it does support the thrust of these measures.

- Protect the working conditions of 457 visa workers.²

The submission ends by calling for a broader debate on temporary labour migration in Australia.

² See Department of Immigration and Multicultural and Indigenous Affairs, *In Australia's Interests: A Review of the Temporary Residence Program* (2002) 23-24; Commissioner Barbara Deegan, *Visa Subclass 457 Integrity Review: Final Report* (2008) 20 (Deegan Report).

A INSERTING A PROVISION IDENTIFYING PURPOSES OF THE 457 VISA SCHEME

The Bill proposes a new section 140AA to be inserted into the *Migration Act 1958* (Cth) ('*Migration Act*'). If enacted, this section will provide that the purposes of sponsored visa programs (including the 457 visa scheme) are as follows

140AA Division 3A—purposes

The purposes of this Division are as follows:

- (a) to provide a framework for a temporary sponsored work visa program in order to address genuine skills shortages;
- (b) to address genuine skills shortages in the Australian labour market:
 - (i) without displacing employment and training opportunities for Australian citizens and Australian permanent residents (within the meaning of the regulations); and
 - (ii) without the temporary sponsored work visa program serving as a mainstay of the skilled migration program;
- (c) to balance the objective of ensuring employment and training opportunities for Australian citizens and Australian permanent residents with that of upholding the rights of non-citizens sponsored to work in Australia under the program;
- (d) to impose obligations on sponsors to ensure that:
 - (i) non-citizens sponsored to work in Australia under the program are protected; and
 - (ii) the program is not used inappropriately;
- (e) to enable monitoring, detection, deterrence and enforcement in relation to any inappropriate use of the program;
- (f) to give Fair Work Inspectors (including the Fair Work Ombudsman) and inspectors appointed under this Division the necessary powers and functions to investigate compliance with the program.

An objects clause of this kind which clearly states the purposes of the 457 visa scheme is to be welcomed – it clearly sets out the goals of the program, and in doing so assists in the

implementation of the scheme especially the exercise of discretion by the Immigration Minister and officials of the Department of Immigration and Citizenship ('DIAC').

The provision, however, should be amended to more fully acknowledge that one of core purposes of the 457 visa scheme is to protect the working conditions of 457 visa workers. Proposed section 140AA currently captures this purpose by way of a caveat rather than as a central purpose in its own right. Specifically, proposed s 140AA(c) provides that a purpose of the 457 visa scheme is 'to balance the objective of ensuring employment and training opportunities for Australian citizens and Australian permanent residents with that of upholding the rights of non-citizens sponsored to work in Australia under the program'. Instead of such qualified wording, there should be a provision that emphatically states that one of the core purposes of the 457 visa scheme is protect the working conditions of 457 visa workers.

This provision should make particular reference to the rights that 457 visa workers have under the human rights treaties to which Australia is a signatory, in particular, the documents that make up the International Bill of Rights (the Universal Declaration of Human Rights ('UDHR'), International Covenant of Civil and Political Rights ('ICCPR'), International Covenant on Economic and Social Rights ('ICESR')).³

One principle obvious from the International Bill of Rights is that migrant workers enjoy equal status as human beings. The preambles of the UDHR, ICCPR and ICESCR open with the "recognition of inherent dignity and of the equal and inalienable rights of *all members of the human family*" as "the foundation of freedom, justice and peace in the world."⁴ This equal status, as these preambles emphasise, implies equal enjoyment of human rights amongst human beings. As expressed by Article 1 of the UDHR, "(a)ll human beings are born free and *equal in dignity and rights*."⁵ Human rights, as the preambles of the ICCPR and ICESCR state, "derive from the inherent dignity of the human person."⁶

³ See <http://www.info.dfat.gov.au/treaties>

⁴ UDHR, Preamble; ICCPR, Preamble; ICESR, Preamble (emphasis added).

⁵ UDHR, Article 1 (emphasis added).

⁶ ICCPR, Preamble, ICESR, Preamble.

The equal status of migrant workers as human beings entitled to human rights is powerfully reflected in the obligations of States under the International Bill of Rights. The preambles of the UDHR, ICCPR and ICESCR commit United Nations Member States — in effect, all countries of the world⁷ to promote “*universal respect* for and observance” of human rights and freedoms.⁸ This is an obligation that generally extends to non-nationals within a State’s territory⁹ — all countries are required to promote respect for the human rights of their migrant workers. Very clearly, Australia as signatory to these international treaties is obliged to respect the human rights of 457 visa workers.¹⁰

Explicit recognition of the human rights of 457 visa workers under these international treaties in the objects clause will also go some way to rectifying an imbalance that currently exists with the Bill: it recognises the international trade obligations of Australia¹¹ but fails to acknowledge other relevant international legal obligations.

The provision stipulating that the protection of working conditions of 457 visa workers is a core principle of the 457 visa scheme should also make specific reference to the principle of equal rights at work. In her crucial report on the integrity of the 457 visa scheme, the first and foremost recommendation made by Australian Industrial Relations Commissioner, Barbara Deegan, was 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’.¹² The principle of equal rights at work is also strongly supported by various international instruments on migrant work. So much so that the International Labour Organisation (ILO) has observed that ‘(e)quality of treatment in employment for authorized

⁷ United Nations, Member States of the United Nations (as at Feb. 23 2012), <http://www.un.org/en/members/>.

⁸ UDHR, Preamble (emphasis added).

⁹ See ICCPR, Article 2; ICESCR, Article 2. An important exception to this obligation is provided by Article 2(3) of ICESCR which states the following:

Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

¹⁰ For fuller discussion, see Joo-Cheong Tham and Iain Campbell, ‘Equal Treatment for Temporary Migrant Workers and the Challenge of their Precariousness’, paper presented at ILERA World Congress, July 2012 (available at <http://ilera2012.wharton.upenn.edu/RefereedPapers/ThamJooCheong%20IainCampbell.pdf>; accessed on 20 June 2013).

¹¹ Proposed sections 140GBA(1)(c), 140GBA(2).

¹² Commissioner Barbara Deegan, *Visa Subclass 457 Integrity Review: Final Report* (2008) 8.

migrant workers is a central premise of international standards'.¹³ These treaties also provide for the cognate principle of 'not less favourable' treatment.¹⁴ This principle insists that migrant workers receive *at least* equal treatment and is a principle that finds legislative expression in the 'no less favourable' requirement.¹⁵

Recommendation One: Proposed section 140AA of the *Migration Act* should be amended to expressly provide that a key purpose of the 457 visa scheme is to the protect the working conditions of 457 visa workers including by ensuring that they enjoy:

- Rights provided under human rights treaties to which Australia is a signatory; and
- Equal rights at work.

Recommendation Two: Subject to the amendment above, proposed section 140AA of the *Migration Act* should be enacted.

¹³ ILO (2010), above n 6, p 173. This report also states that a 'fundamental notion' of existing international law as applies to migrant workers and their families is that '(t)here should be equality of treatment and non-discrimination between migrant workers regularly admitted and native workers in the realm of employment and work': p 216.

¹⁴ 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).

¹⁵ See text above accompanying n 32-33.

Clause 17 of the Explanatory Memorandum which refers to the objects clause to be inserted through new section 140AA provides the following:

17. However, new section 140AA of the Act is not intended to impact on the way Division 3A is interpreted or administered, nor to limit or restrict any future interpretation of the provisions in the Division.

This clause should be taken out because it is wrong in principle – the key rationale of an object clause like proposed section 140AA is to govern the administration and interpretation of relevant statutory provisions. This clause is also liable to produce confusion. On the one hand, there is nothing in the proposed Bill that reflects Clause 17. Given the established legal principle that clauses in explanatory memoranda cannot prevail over provisions of an Act, this means that proposed section 140AA, if enacted, is to be given its full legal effect. On the other hand, having Clause 17 in the Explanatory Memorandum might result in DIAC officials erroneously relying upon it (as a result, wrongly applying the law).

Recommendation Three: Clause 17 of the Explanatory Memorandum to the Bill should be deleted.

B INCREASE IN THE PERIOD 457 VISA WORKERS CAN CEASE BEING EMPLOYED
FROM 28 TO 90 DAYS¹⁶

Schedule 3 of the Bill makes a vital amendment to the *Migration Regulations 1994* ('*Migration Regulations*'). The purpose of this amendment is well explained by pages 17-18 of the Explanatory Memorandum to the Bill:

92. The conditions that are imposed on the holder of a Temporary Work (Skilled) (Subclass 457) visa are set out in clause 457.611 of Division 457.6 of Part 457 Schedule 2 to the Migration Regulations. Subclause 457.611(2) provides that if the applicant satisfies the primary criteria for the grant of a Subclass 457 visa condition 8107 must be imposed.

93. Subclause 8107(3) of Schedule 8 to the Migration Regulations currently provides that if the visa is, or the last substantive visa held by the applicant was, a Subclass 457 (Temporary Work (Skilled)) visa that was granted on the basis that the holder met the requirements of subclause 457.223(2) or (4)

- the holder must:
 - work only in the occupation listed in the most recently approved nomination for the holder; and
 - unless the circumstances in subclause (3A) apply – work only for:
 - the standard business sponsor, former standard business sponsor, party to a labour agreement or former party to a labour agreement (the **sponsor**) who nominated the holder in the most recently approved nomination; or

¹⁶ Parts of this discussion draw on Joo-Cheong Tham and Iain Campbell, *Temporary Migrant Labour in Australia: The 457 Visa Scheme and Challenges for Labour Regulation* (2011), Centre for Employment and Labour Relations Law Working Paper No 50 (available at http://www.law.unimelb.edu.au/files/dmfile/CELR_L_Working_Paper_No_50_-_March_2011_FINAL2.pdf; accessed on 20 June 2013).

- if the sponsor is a standard business sponsor or former standard business sponsor who lawfully operates a business in Australia – an associated entity of the sponsor; and
- if the holder ceases employment – the period during which the holder ceases employment must not exceed 28 consecutive days.

94. Subclause 8107(3B) of Schedule 8 to the Migration Regulations currently provides that if the visa is, or the last substantive visa held by the applicant was, a Subclass 457 (Temporary Work (Skilled)) visa that was granted on the basis that the holder met the requirements of subclause 457.223(8):

- the holder must work only in the occupation or position in relation to which the visa was granted; and
- if the holder ceases employment – the period during which the holder ceases employment must not exceed 28 consecutive days.

95. The purpose of this amendment is to increase the period of time for which the holder of a subclass 457 visa to whom paragraph 8107(3)(b) or 8107(3B)(b) of the Migration Regulations applies can cease to be employed without breaching condition 8107. Such a person can cease to be employed for up to 90 consecutive days (approximately 3 months) before they will be in breach of the condition.

This Schedule should be enacted. It has strong merit and is an overdue implementation of one of the recommendations made by Deegan review.¹⁷ Arguably, the increase in the period during which 457 visa workers can cease being employed advances the scheme's aim of meeting skill shortages by providing 457 visa workers with greater employment mobility and freedom of employment.

More importantly, it provides better protection of the working conditions of 457 visa workers. Visa Condition 8107 clearly imposes severe restrictions upon the ability of 457 visa workers to change employers or perform different types of work. Serious consequences can follow from a breach of this condition. The worker's visa may be cancelled, therefore

¹⁷ Commissioner Barbara Deegan, *Visa Subclass 457 Integrity Review: Final Report* (2008) 68.

rendering the worker liable to being detained and deported. A subsequent 457 visa application can also be refused for such a breach.¹⁸ It is also a criminal offence to work in breach of visa conditions.¹⁹ These formal sanctions attaching to the breach of Visa Condition 8107 combine with informal restrictions on mobility, including perceptions that the worker is 'tied' to an employer because of the difficulty in having overseas qualifications recognised and the view of some employers that their outlays in recruiting the 457 visa worker imply an entitlement to the worker's services.²⁰

Both these formal and informal sanctions contribute to the vulnerability of 457 visa workers. Some of these workers are vulnerable because of factors such as a 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 Inquiry 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.²¹

Prior to Visa Condition 8107 being amended to require a 457 visa worker to not cease being employed by his or her original sponsor (when the condition merely imposed a notification requirement), Carr J considered the scenario whereby a sponsoring employer could have its

¹⁸ This is the effect of there being a condition that, in order to make a successful 457 visa application, the applicant must have complied substantially with the conditions of previous visas: *Migration Regulations 1994* (Cth) Schedule 2, Subclass 457, cl 457.221.

¹⁹ *Migration Act 1958* (Cth) s 235.

²⁰ Commissioner Barbara Deegan, *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 – DIAC, *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).

²¹ Commissioner Barbara Deegan, *Visa Subclass 457 Integrity Review: Final Report* (2008) 69.

obligations as a sponsor ceased (thereby, triggering the Immigration Department's discretion to cancel the 457 visa) by terminating the employment of the worker, a scenario that, in fact, currently applies. His Honour observed:

Such a situation could easily give rise to abuse by an unscrupulous employer. The employee might be forced to accept illegally sub-standard conditions of employment on pain of having his or her visa cancelled. The migrant would be turned into a bonds slave.²²

In this context, the ability of the sponsoring employer to terminate the employment of the 457 visa workers can appear as a power to remove the worker from Australia. Not surprisingly, the Deegan Inquiry found that there is a perception amongst 457 workers that the sponsoring employer can cancel their visas despite this power formally residing with DIAC.²³

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 Inquiry 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'.²⁴

One consequence of the tight nexus between engagement by the sponsoring employer and the ability to remain in Australia is that the protection against dismissal, while formally available to 457 visa workers, is largely illusory. Put simply, many of these workers are in no position to effectively invoke such protection because they are already back in their home

²² *Cardenas v Minister for Immigration and Multicultural Affairs* [2001] FCA 17 at [57]. Carr J was making his comments in the context where Visa Condition 8107 merely imposed an obligation not to change employer or occupation in Australia without the permission of DIAC and *not* a positive obligation (as currently exists) to remain in the employment of the sponsoring business. Indeed, the current version of Visa Condition 8107 imposes a positive obligation that Carr J stated he would find 'surprising'.

²³ Visa Subclass 457 Integrity Review, *Issues Paper #3: Integrity / Exploitation*, Commonwealth of Australia, Canberra, 2008, p 27.

²⁴ Commissioner Barbara Deegan, *Visa Subclass 457 Integrity Review: Final Report* (2008) 67.

country after 28 days.²⁵ 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'.²⁶ This nexus further explains why some 457 visa workers are willing to abide by illegal or exploitative contracts. As one employer who was found to have underpaid 457 visa workers put it, the workers 'would sign anything' as they 'are frightened of . . . being sent back'.²⁷

Recommendation Four: Schedule 3 of the Bill should be enacted.

The change made by Schedule 3 will only be effective if 457 visa workers are properly informed of their ability to cease being employed for 90 days. This will require dedicated efforts on the part of DIAC and the Fair Work Ombudsman to inform these workers of this entitlement. Sponsoring employers should also – as part of their sponsorship obligations – be required to notify 457 visa workers of this entitlement.

Recommendation Five:

- The Department of Immigration and Citizenship and the Fair Work Ombudsman shall take steps to notify 457 visa workers of their ability to cease being employed for 90 days.
- Sponsoring employers should be required in terms of their sponsorship obligations to notify their workers of above.

²⁵ 457 workers who are able to secure a new visa will be able to invoke such protection, see *Mr L v the Employer* [2007] AIRC 457.

²⁶ Joint Standing Committee on Migration, *Temporary visas . . . permanent benefits: Ensuring the effectiveness, fairness and integrity of the temporary business visa program* (2007) 132.

²⁷ Quoted in *Jones v Hannsen Pty Ltd* [2008] FMCA 291 at [8].

C INTRODUCTION OF LABOUR MARKET TESTING

Arguably the most controversial aspect of the Bill is its introduction of labour market testing. The Bill proposes to replace current section 140GB(2) of the *Migration Act* with the following:

- (2) The Minister must approve an approved sponsor's nomination if:
- (a) in a case to which section 140GBA applies, unless the sponsor is exempt under section 140GBB or 140GBC—the labour market testing condition under section 140GBA is satisfied; and
 - (b) in any case—the prescribed criteria are satisfied.

Proposed section 140GBA(1) provides for the labour market testing as a condition:

- (1) This section applies to a nomination by an approved sponsor, under section 140GB, if:
- (a) the approved sponsor is in a class of sponsors prescribed by the regulations; and
 - (b) the sponsor nominates:
 - (i) a proposed occupation for the purposes of paragraph 140GB(1)(b); and
 - (ii) a particular position, associated with the nominated occupation, that is to be filled by a visa holder, or applicant or proposed applicant for a visa, identified in the nomination; and
 - (c) it would not be inconsistent with any international trade obligation of Australia determined under subsection (2) to require the sponsor to satisfy the labour market testing condition in this section, in relation to the nominated position.

The requirement of labour market testing is subject to significant exceptions due to:

- Determinations by the Immigration Minister as to Australia's international trade obligations;²⁸

²⁸ Proposed sections 140GBA(1)(c) and 140GBA(2).

- Determinations by the Immigration Minister as to major disaster exemptions;²⁹ and
- Legislative instruments made by the Immigration Minister granting skill and occupational exemptions.³⁰

At one level, it is puzzling why there is so much controversy – and opposition to – a labour market testing requirement. If the central goal of the 457 visa scheme is to address skill shortages then it must have some regulatory mechanism to ensure that workers brought under the scheme meet actual shortages (and not simply the desires of sponsoring employers). A labour market testing requirement is a rather straightforward mechanism for this – it expressly requires sponsoring employers to demonstrate a labour shortage.

Three arguments have, however, been made against the introduction of a labour market testing requirement. It is said to be:

- Unnecessary as the cost disincentives for employers to engage 457 visa workers mean they effectively recruit these workers only when there is no available suitable Australian workers;
- Inconsistent with Australia's international trade obligations; and
- Ineffective in practice.

All three arguments are problematic and the submission will draw out why in the following analysis.

Flaws in relation to argument of lack of necessity

In February this year, the DIAC website provided the following:

What incentives are there to encourage employers to employ Australians first?

The 457 sponsorship requirements ensure that if a suitably qualified and experienced Australian is readily available to work where needed, employers will look to them first.

²⁹ Proposed sections 140GBB.

³⁰ Proposed sections 140GBA(1)(c) and 140GBA(2).

If a suitably qualified Australian worker is readily available and acceptable, they are the more preferable option because it is comparatively less expensive to source a local worker.

There are significant costs to the employer when sponsoring a 457 worker. These costs include:

- paying sponsorship and nomination fees
- costs of recruitment
- providing equal terms and conditions including paying market rates
- maintaining a financial commitment to training levels
- being liable for the cost of return travel to the person's country of origin.

When these costs are factored in, it is more expensive to employ an overseas worker than a local worker of the same skills and experience.

This analysis is repeated in substance in the joint submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration agreements made by DIAC; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education (DIICCSRTE); and the Department of Resources, Energy and Tourism (RET).³¹

There are serious difficulties with the above analysis. First, it fails to sufficiently take into account the fact that many 457 visa workers are recruited on-shore so there is no relocation costs for these workers and the recruitment costs for these workers will be comparable to those incurred for local workers. Second, it also fails to adequately account for the trajectory of many 457 visa workers who go on to become permanent residents. Third, it does not acknowledge at all the cost incentive of hiring some 457 visa workers. With local workers, there is structural wage inflation with local workers tending to seek wage increases commensurate to the increase in Australian living standards; such pressure is much less

³¹ See pages 1-2 of the joint submission at http://www.aph.gov.au/parliamentary_business/committees/senate_committees?url=legcon_ctte/457_visas/submissions.htm

present with many 457 visa workers especially those from countries with lower living standards.

What is perhaps the central – and fatal – flaw in the argument that a labour market testing requirement is unnecessary because of the cost incentives faced by sponsoring employers is its reliance on the so-called ‘market’ salaries regime.

This regime is based on the ‘no less favourable’ obligation that requires ‘the terms and conditions of employment (of the 457 worker) will be no less favourable than those that are provided, or would be provided, to an Australian citizen or an Australian permanent resident for performing work in an equivalent position in the person’s workplace’. This obligation is a condition for approval of a nominated position³² and also imposed as a continuing sponsorship obligation on standard business sponsors.³³

The ‘no less favourable’ obligation fails to provide any meaningful market rate simply because it is based on the employment terms and conditions at the *workplace*.

This benchmark allows sponsoring employers to pay less than the prevailing salaries in the relevant occupation or industry. The following case study found in DIAC’s Policy Advice Manual provides a powerful illustration:

Evans Electrics in Dubbo, NSW is an approved standard business sponsor and currently has four other 457 visa workers in their business of 12 employees. They wish to nominate Sandeep as a General Electrician (4311-11).

...

Evans uses the modern award as the basis of the terms and conditions of employment, they pay their Australian workers doing the same work an over-award annual salary of AUD 49 000.

...

Evans states that Sandeep’s nominated annual base rate of pay will be AUD 49 000.

³² Migration Amendment Regulations 2009 (No 5) (Cth) Schedule 1 inserting reg 2.72(1)(10)(c).

³³ Migration Amendment Regulations 2009 (No 5) (Cth) Schedule 1 inserting reg 2.79.

...

The processing officer notes that Sandeep's base rate of pay of AUD 49 000, which is equivalent to the base rate of pay provided to other equivalent Australian workers in Evans, is above the TSMIT. *The processing officer compares this rate to labour market data noting that DEEWR's Job Outlook estimates the annual wage for electricians to be AUD 52 000 and the ABS average salary rate for an electrical and electronics tradesperson in NSW is AUD 56 00 across NSW including Sydney.*³⁴

Despite the 457 visa worker's pay being less than the occupational average indicated by DEEWR and ABS data, '(t)he processing officer approves the nomination as Evans has provided evidence to demonstrate that this is the rate that is provided to equivalent Australian workers in their workplace'.³⁵

The workplace benchmark of the 'no less favourable' obligation also explains why DIAC in its recent discussion paper to the Ministerial Advisory Council on Skilled Migration, *Strengthening the Integrity of the Subclass 457 Program*,³⁶ provided this example:

Under the current Regulations, there is potential for the employer to create their own market rate through sourcing just one Australian citizen or permanent resident worker willing to work for a particular wage, even though other employers in the same geographical region may remunerate equivalent workers at a higher rate. The risk of this occurring is considered particularly high in businesses which employ predominately 457 workers.³⁷

The following observations made in the discussion paper speak truthfully to the flaws of the 'market' salaries regime:

The current market salary rate provisions are not sufficient to ensure equitable remuneration arrangements or that Australians are not disadvantaged. On this basis, it

³⁴ DIAC, *Policy Advice Manual: Subclass 457 visa*, para 24.6 (as at 1 July 2010) (emphasis added).

³⁵ DIAC, *Policy Advice Manual: Migration Regulations*, reg 1.03, para 2.3 (as at 1 July 2010).

³⁶ Department of Immigration and Citizenship, *Ministerial Advisory Council on Skilled Migration Discussion Paper: Strengthening the Integrity of the Subclass 457 Program* (2012) (available at http://www.immi.gov.au/about/discussion-papers/_doc/strengthening-integrity-457-program.pdf; accessed on 20 June 2013).

³⁷ Ibid 12.

may be possible for a 457 visa holder to displace an Australian employee on less beneficial terms and conditions of employment for performing the same work in the same location.

Where a sponsor determines the market salary rate according to the methodology specified in accordance with the Regulations, the Department cannot refuse a nomination if the market salary rate is believed to be uncompetitive compared to other employers.³⁸

Flaws in argument concerning international trade obligations

At the time the Immigration Minister announced changes aimed at strengthening the integrity of the 457 visa scheme in February this year, the DIAC website provided an explanation of these changes. Included in this description (which has now been revised) was the following paragraph:

Why is the government not reintroducing Labour Market Testing?

The 457 program is an important part of how Australia meets a number of our international trade obligations. These obligations mean we can't limit access to our economy of people who wish to do business with us. Part of doing business with us often involves sourcing skilled labour from other countries. Australia must remain open for business people and service providers and the reforms to the 457 program will not adversely impact these obligations.

These broad statements, in fact, make reference to two distinct arguments:

- Labour market testing is incompatible with Australia's obligations under the General Agreement on Trade in Services ('GATS'); and
- Labour market testing is incompatible with an offer made by the Australian government in the 2005 Doha trade negotiations.

The first argument is significantly overstated while the second is profoundly wrong in principle.

³⁸ Ibid 11.

Overstated incompatibility with GATS

GATS only applies to 'trade in services'.³⁹ Article 1(2) of GATS provides the relevant definition:

For the purposes of this Agreement, trade in services is defined as the supply of a service:

- (a) from the territory of one Member into the territory of any other Member;
- (b) in the territory of one Member to the service consumer of any other Member;
- (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
- (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

The four modes of supply in Article 1(2) are respectively described by the World Trade Organisation as cross-border trade, consumption abroad, commercial presence, and presence of natural persons.⁴⁰ It is the last, which is described in Article 1(2)(d), which is of relevance to the 457 visa scheme.

Article 1(2)(d), however, only refers to a *very specific* group of temporary migrant workers – those who are engaged by companies based overseas who are providing services through the provision of their workers. The terms of Article 1(2)(d) do not extend to the following situations:

- Australian-based companies engaging 457 visa workers; and
- Multinational companies with an Australian branch which engage 457 visa workers.

In short, the limited scope of GATS does not provide a compelling argument against introducing a labour market testing requirement into the 457 visa scheme.

The difficulties with the argument against labour market testing based on GATS go even deeper. Under GATS, Australia is subject to two broad types of obligations: general obligations and specific commitments. General obligations automatically apply to Australia in relation to 'trade in services' (as defined by the Agreement). The most important general

³⁹ General Agreement on Trade in Services, Article 1 (for text of GATS, see http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#articleVb; accessed on 20 June 2013).

⁴⁰ http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (accessed on 20 June 2013).

obligation is the obligation to accord 'most-favoured-nation treatment' ('MFN obligation'). Article 2(1) provides as following:

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

Article 2(1) is, however, followed by an important caveat in Article 2(2) which states that:

A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.

Most importantly for the present purposes, the Annex on Article II Exemptions provides an 'Annex on Movement of Natural Persons Supplying Services Under the Agreement' which opens with the following clauses:

1. This Annex applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service.
2. *The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis (emphasis added).*

The italicised words demonstrate how the MFN obligation does not apply to limitations on access to Australia's employment market. As such, it is not barrier to introducing a labour market testing requirement in relation to the 457 visa scheme.

The other category of obligations Australia has under GATS are specific commitments it has made in relation to liberalisation of 'trade in services'. The schedule of specific commitments made by Australia in relation to movement of natural persons has been attached as an Appendix to this submission. None of these commitments rule out generally requiring labour market testing in relation to 457 visas. Indeed, one of the commitments

expressly contemplate the use of labour market testing. The schedule records Australia's specific commitment in relation to market access and national treatment in relation to:

Specialists, *subject to individual compliance to labour market testing*, for periods of initial stay up to a maximum of two years with provision of extension provided the total stay does not exceed four years. Specialists, being natural persons with trade, technical or professional skills who are responsible for or employed in a particular aspect of a company's operations in Australia . . . (emphasis added).

In conclusion, the arguments relying upon Australia's obligations under GATS to oppose the introduction of a labour market testing requirement have profound difficulties: they significantly overstate the scope of the Agreement and exaggerate these obligations Australia has under the Agreement.

Egregious reliance on offer made in 2005 Doha trade negotiations

The other argument made in this context is that a labour market testing requirement is incompatible with an offer made by the Australian government in the 2005 Doha trade negotiations. Among others, this offer seeks to remove reference to labour market testing of specialists currently found in Australia's specific commitments.⁴¹

The character of this argument should be made plain: it contends that an act of the executive - one that does not involve any legal obligation and one that which has not been fully debated in public - is a barrier against Parliament making a particular law. This argument subverts the democratic principles underpinning Australia's system of government.

In a parliamentary democracy like Australia, it is Parliament that makes laws and the executive that implements these laws; Parliament is sovereign with executive a servant of Parliament. With a democratically elected Parliament, it is this relationship that ensures that popular sovereignty is given effect. The argument that an offer made in the 2005 Doha trade negotiations, more than two federal elections ago, should prevent the

⁴¹ The offer can be found here <http://www.dfat.gov.au/trade/negotiations/services/> (accessed on 20 June 2013).

Commonwealth Parliament from legislating a labour market testing requirement inverts this position: it says that an act of the executive – not even clear by whom – that is not legally binding should bind Parliament. This argument is a deep affront to Australian democracy and should be rejected.

Flaws in argument of ineffective in practice

In its submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements, the Law Council of Australia, in opposing a labour market testing requirement, said this:

It is worthy of note that many of our many members were practising in the 1990s when labour market testing was compulsory as part of the company sponsored temporary visa program. It was our experience that those requirements were poorly managed, largely ineffective and honoured more in form than substance.⁴²

Even if these observations are true, they do not provide an argument against a labour market testing requirement. The ineffectiveness of the requirement is said to result from its defective implementation, not any inherent flaw of a labour market testing requirement. Defective implementation should be cured through proper implementation of laws, not through repeal of laws. Otherwise bureaucratic ineptitude and incompetence become justifications for overriding the will of Parliament.

Another argument made against the introduction of a labour market testing requirement is that some sponsoring employers already engage in the recruitment efforts mandated by such a requirement. This is no doubt true but it is mystifying why this constitutes an argument against a labour market testing requirement. A labour market testing requirement does not presume that all sponsoring employers fail to undertake local recruitment efforts; what it does is provide a regulatory assurance that they do so.

⁴² Law Council of Australia's submission, Submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements (2013) 9 (available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/457_visas/submissions.htm; accessed on 20 June 2013).

The need for a labour market testing requirement with very limited exemptions

The argument for a labour market testing requirement is straightforward and compelling. On the other hand, the arguments against such a requirement strongly lack plausibility: the 457 program does not currently provide adequate cost incentives for sponsoring employers to hire local workers before recruiting 457 workers; the argument based on international trade obligations is both overstated and wrong in principle; and the argument concerning ineffectiveness is misdirected. This analysis strongly supports a general labour market testing requirement in the 457 visa scheme; it also suggests that any exemptions to this requirement being strictly limited. These conclusions point to key amendments being made to the Bill.

Clause 22 of the Explanatory Memorandum to the Bill explains the purpose of proposed section 140GB(2) of the *Migration Act* as follows:

the Minister must be satisfied that the labour market testing condition under new section 140GBA of the Act is met before approving a nomination by an approved sponsor.

This purpose is, however, not reflected in the text of proposed section 140GB(2) which states that 'The Minister must approve an approved sponsor's nomination if . . . the labour market testing condition under section 140GBA is satisfied'. Rather than requiring the Minister to be satisfied that the labour market testing requirement is met prior to approving a nomination, it *obliges* the Minister to approve a nomination if the requirement is met. As currently drafted, proposed section 140GB(2) treats the satisfaction of the labour market testing requirement as a *sufficient* condition for approval of a nomination, not as a *necessary* condition for approval. The word 'must' should be replaced with 'shall only'.

The Bill provides through proposed section 140GBC for broad discretions on the part of the Immigration Minister to exempt various occupations. Such discretion is not defensible in light of the compelling justification for a general labour market testing requirement – proposed section 140GBC should not be enacted. The discretion on the part of the Immigration Minister to limit the application of the labour market testing requirement due to Australia's international trade obligations is appropriate but should be accompanied by a requirement to table a statement of reasons to Parliament when this discretion is exercised.

- Recommendation Six:* The word 'must' in proposed section 140GB(2) of the *Migration Act* should be replaced with 'shall only'.
- Recommendation Seven:* Proposed section 140GBC of the *Migration Act* which confers the Immigration Minister discretion to exempt various occupations should not be enacted.
- Recommendation Eight:* Exercise by the Immigration Minister of the discretion to limit the labour market testing requirement due to Australia's international trade obligations should be accompanied by a requirement to table a statement of reasons to Parliament.

D THE NEED FOR A BROADER DEBATE ON TEMPORARY LABOUR MIGRATION⁴³

The debate on the 457 visa scheme has been cast in unduly narrow terms. A genuine debate regarding temporary labour migration and its role in addressing skill shortages should not be confined to migration policy. It is imperative to ask: how have these alleged shortages come about? Once this question is asked, the role of the education and training sector in providing skills comes to the fore, as does industry planning, regional development and a number of related policies.

The debate has also been too narrow in another way. There are more than 1.2 million temporary migrants with work rights in Australia (including international students, NZ citizens). 457 visa workers and their families only amount to around one-eighth of this total. It is somewhat bizarre to have such heated discussion of these workers with almost no consideration of the other (more numerous) groups of temporary migrants which tend to have less protection than 457 visa workers in relation to their working conditions.

A debate that extends to all temporary migrant workers in Australia should have justice for these workers as an anchor-point. It is not necessarily xenophobic to insist that local workers be given preference to employment but it comes close to being so when such emphasis comes with little regard for the interests of temporary migrant workers.

The question of justice for temporary migrant workers should also be joined to the question of justice for Australian workers. But not in the way the government has done so. Its statements about 'putting Aussie workers first' by 'putting foreign workers at the back of the queue' threatens to turn the specific – and real – conflict in relation to accessing employment to a broader – but false – conflict between the rights and interests of Australian workers versus foreign workers. This poses a false trade-off that does fuel xenophobia – why wouldn't Australian workers be hostile to foreign workers if they perceive them as a threat to their working conditions?

⁴³ This section draws on the following opinion piece: Leigh Hubbard and Joo-Cheong Tham, '457 visa scheme: Time for a proper debate', *The Guardian: Comment is Free*, 16 June 2013 (available at <http://www.guardian.co.uk/commentisfree/2013/jun/16/457-visa-australia-migration-jobs>; accessed on 20 June 2013).

What is needed are not divisive notions of industrial justice that pitch one group of workers against another but solidarity that stresses the right of all workers, including temporary migrant workers, to decent work.

A genuine debate regarding temporary labour migration, however, will not take place until our leaders realise the special duty of care they have in conducting migration debates. This duty arises because these debates can easily be infused with racism and xenophobia even where it is not intended; it also arises because migrants often lack an effective voice in the political process. There is something particularly vile here in using migrants as pawns in the electoral game.

I hope this submission has been of assistance to you.

Yours sincerely,

Dr Joo-Cheong Tham

Associate Professor

Melbourne Law School