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Thursday, 20 June 2013

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Senate Legal and Constitutional Affairs Committee
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Submission regarding the *Migration Amendment (Temporary Sponsored Visas) Bill 2013*

1. This submission has been prepared by Dr Joanna Howe, Associate Professor Alexander Reilly and Professor Andrew Stewart. We are labour and migration law scholars in the Law School at the University of Adelaide.

2. Our submission is concerned with the Government's proposed reforms to the Subclass 457 Visas. In summary, we contend that:

    - The subclass 457 visa scheme is in significant need of reform to ensure that it more effectively meets skill shortages in the domestic economy. We contend, however, that the Bill's introduction of a six month labour market testing requirement is the incorrect way to achieve this.

    - We support the introduction of a two track approach, consistent with our earlier submission on the subclass 457 visa scheme.[1] The Government's two track proposal involves exempting occupations categorised as ASCO skill levels 1 and 2 from employer-conducted labour market testing. However, we recommend a slightly different approach.

[1] Howe, Reilly and Stewart (2013) *Submission to the Inquiry on the Framework and Operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements*, Legal and Constitutional Affairs Committee.

- We suggest that the Government expand the occupations for which employer-conducted labour market testing is not required to ASCO skill levels 1-3 so long as the occupation is listed on the Consolidated Sponsored Occupations List. If an occupation is not on this list, we propose that an employer conduct three months of labour market testing in order to prove the occupation is in shortage.

- We recommend that the Government conduct independent labour market testing so that the Consolidated Sponsored Occupations List (CSOL) is more finely tuned to Australia's skill needs.

- The Australian Workforce and Productivity Agency (AWPA) should be given responsibility for compiling and maintaining the CSOL so that there is a more rigorous and targeted approach to identifying Australia's skill needs. If an occupation is listed on the CSOL then an employer will be able to quickly and efficiently access the skilled labour they require.

- In the absence of an occupation being listed on the CSOL, then we contend that there needs to be further investigation to ensure that the employer's request for overseas workers cannot be met through the local labour market. This can be done through a three month period of employer-conducted labour market testing.

- We support the increased numbers of inspectors and the broader range of powers being accorded to them under Schedule 6 of the Bill.

- We welcome the amendment of Visa Condition 8107 increasing the time period until the expiration of the 457 visa for visa holders who are no longer employed. This will go some way to alleviating the vulnerable position of many 457 visa holders.

Labour Market Testing and the Subclass 457 Visa

3. The introduction of employer-conducted labour market testing for ASCO skill level 3 and lower will significantly delay employers in accessing 457 visa workers. This is likely to reduce the competitiveness of Australian businesses needing to access temporary migrant workers in areas of acute skill shortages.

4. Historically, Australia's temporary labour migration program included a labour market testing requirement which was deregulated in 1996 so that it was only required if an employer nominated an overseas worker to conduct a 'non-key activity' of the business. This emphasis on relying upon an unchallenging requirement of employer attestation in the determination of whether an activity was 'key' was recommended by the Roach Report (commissioned by the Keating Labor Government in 1995) because it allowed the fast-track sponsorship of executives within a company, as well as managers, specialists and certain high-level full-time trainees.[2] 'Key' activities were defined as those that were essential to the operations of the business and which required professional/specialist skills or specialist knowledge of the business.[3] This acceptance of employer nomination for 'key' activities relied on the belief that these key activities would be in areas of genuine skill shortages as there were relatively low levels of unemployment in this segment of the labour market.[4] In contrast, if the employer

[2] Committee Report into the Temporary Entry of Business People and Highly Skill Specialists, *Business Temporary Entry: Future Directions,* Commonwealth of Australia (1995) 84 ('Roach Report') 33.

[3] *Migration Regulations 1994* (Cth) reg 1.20H(2) (as in force on 1 August 1996). reg 1.20B (as in force on 1 August 1996).

[4] External Reference Group, *In Australia's Interests: A Review of the Temporary Residence Program,* DIMIA, Canberra, June 2002, 8.

nominated a business activity that was 'non-key' then the employer was required to have undergone labour market testing if the proposed employment was to exceed 12 months. This requirement sought to ensure that the 457 visa was only used where 'a suitably qualified Australian citizen or Australian permanent resident [was] not readily available to fill the position to which the nominated activity relate[d]'.[5] This labour market testing requirement obliged the employer to have unsuccessfully advertised the position within the previous six months. This advertisement could occur via trade journals, the internet, newspapers or through lodging the position as a vacancy with a job placement service provider.[6]

5. This labour market testing requirement was abandoned in 2001 with the introduction of skill thresholds for 457 visa holders.[7] The Government accepted a report by the External Reference Group (ERG)[8] which recommended that subjective labour market testing be replaced by objective measures to ascertain whether the entry of a temporary migrant worker would impact on employment opportunities for Australian workers.[9] The ERG identified the view of stakeholders who regarded the 'key' and 'non-key' distinction as too unclear and the requirement of labour market testing for the latter as unnecessarily time-consuming, expensive and a process in which it was relatively easy to contrive the desired outcome.[10] As a result, this report concluded that the best approach to labour market testing involved 'the use of relatively objective approaches to determining labour market needs, rather than traditional approaches which are easily circumvented and involve unnecessary costs and time for people genuinely finding it difficult to obtain skilled employees'.[11] This report recognised that employer-conducted labour market testing could be avoided by unscrupulous employers but penalised decent employers seeking to fill genuine skill shortages by forcing them to go through the farce of advertising for jobs in areas where the domestic labour market had no expertise.

6. The OECD's advice to countries in developing a temporary migration scheme advocates a means for mapping where there is a shortfall in domestic labour that needs to be filled through migration.[12] According to Graeme Hugo, this is 'the first fundamental step' in the development of temporary migration schemes and cannot be outsourced to employers as they 'will always have a "demand" for foreign workers if it results in a lowering of their costs'.[13]

7. The OECD recommends that identification of skill shortages by employers be independently confirmed to ensure its legitimacy as 'historically, requests by employers have not been considered a fully reliable guide in this regard, at least not without some verification by public authorities to ensure that the requests represent actual labour needs that cannot be filled from

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[5] Ibid (n 3) reg 1.20H(3) (as in force on 1 August 1996).

[6] ERG (n 4) 46.

[7] P Ruddock, *New Visa Processes to Help Business, Overseas Students and Skill Migration from 1 July 2001,* Media Release (1 July 2001).

[8] The Minister for Immigration and Multicultural Affairs appointed an External Reference Group of eminent persons to guide the review of the Temporary Residence Visa announced by the Minister on 4 July 2000. These people represented a wide range of community interests and brought their particular areas of expertise and experience into the review process with the objective of providing an important external perspective: External Reference Group, *In Australia's Interests: A Review of the Temporary Residence Program,* DIMIA, Canberra, June 2002, 18. For a list of ERG members, see Appendix D.

[9] ERG (n 8) 47.

[10] Ibid.

[11] Ibid.

[12] OECD (2009) *International Migration Outlook,* 133.

[13] G Hugo, 'Best Practice in Temporary Labour Migration for Development: A Perspective from Asia and the Pacific' (2009) 47 (5) *International Migration* 23, 59.

domestic sources'.[14] They suggest that whilst 'a regulated labour migration regime would, in the first instance, need to incorporate a means to identify labour needs which are not being met in the domestic labour market and ensure that there are sufficient entry possibilities to satisfy those needs', it is public authorities who should provide final verification of whether there is a genuine skills need in the domestic economy.[15]

8. This is not to deny the fact that there must be some form of labour market testing or the 457 visa scheme cannot be effective in meeting Australia's skill shortages. But this testing needs to be done independently of employers. Independent labour market testing limits the regulatory burden on employers genuinely seeking to fill domestic shortages and eliminates the opportunities for unscrupulous employers seeking to rort the system by circumventing the labour market testing requirement which occurred in the late 1990s.

9. Therefore, the key reform we suggest is that the CSOL be significantly reduced so that it only includes occupations which are *proven* to be in shortage in the domestic economy. The decision as to which occupations should be placed onto the CSOL should be made by AWPA, which currently conducts a similar labour market analysis for determining which occupations should be placed on the SOL – a list used for permanent residency purposes.[16] If an occupation is not on the revised CSOL, then an employer seeking to sponsor an overseas migrant worker would need to prove that they have advertised the position for 3 months at the market salary rate and been unsuccessful in recruiting an Australian worker to do the job. If the employer can meet this test, then a sponsorship application can be made for the same job title and salary rate as provided for in the advertisement. This application would occur via the labour agreement pathway for the subclass 457 visa.[17]

10. There should be provision for a system of regional exceptions on the CSOL. This would allow the AWPA to include occupations on the list that are in shortage in a particular geographical area. Employers in this area could then apply for a subclass 457 visa worker. The Deegan Review advocated that regional nuances in skill shortages be included on these lists, recognising that 'whilst 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'.[18]

11. The recommendations outlined above ensure that the skill shortage in a particular occupation is genuine, that the burden of labour market testing falls on the most independent and best qualified body, and that the policy objectives underpinning the 457 visa scheme are achieved. In addition, the recommendations further protect domestic workers' rights to preferential access to the Australian labour market.

Visa Condition 8107

12. We welcome the Government's proposal to extend the time period form 28 days to 90 days before a 457 visa expires once a temporary migrant worker has lost their job. Contrary to suggestions by some business organisations, this provision will not increase the regulatory

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[14] OECD, *International Migration Outlook*, 2009, 134.

[15] OECD, *International Migration Outlook*, 2009, 134.

[16] C Bowen, Minister for Immigration and Citizenship, Media Release, *Simplifying sponsorship for permanent skilled migrants* (9 March 2012).

[17] Labour Agreements are formal arrangements between an employer and the Commonwealth which allow for the recruitment of an agreed number of overseas skilled workers. For more on how labour agreements are negotiated, see: http://www.immi.gov.au/skilled/skilled-workers/la/.

[18] Visa Subclass 457 Integrity Review, *Final Report*, Commonwealth of Australia (October 2008) ('Deegan Report') 39.

burden on employers and will not make the system more inefficient or complex. It merely affords more time to a 457 visa holder before his or her visa expires.

13. Due to their temporary migration status, subclass 457 visa workers are in a precarious labour market position. The vulnerability of temporary migrant workers in general is well documented.[19] Migrant workers lack the capacity of citizens to participate in the political system that determines their work rights, they lack security of residence, and they often face language and cultural barriers which makes it less likely they will know their rights as workers, and more difficult for them to assert them against a local employer.[20]The precariousness of the position of 457 workers is exacerbated if they only have 28 days to find a new employer when their original employment is terminated. 457 visa holders make a significant investment to come to Australia to work. There is a reasonable expectation that the period of work will be for the full four year term of the visa, or that if employment ceases, there will be the opportunity to seek alternative work for the balance of the 4 year period. 28 days is a very short period in which to secure alternative work. It does not adequately account for the time it takes to search for vacancies, make an application and complete an interview process. 90 days is a more realistic time frame.

Schedule 6

14. Through Schedule 6 of the Bill there will also be higher penalties and more inspectors with greater powers to investigate alleged abuses by employers of the subclass 457 visa. This is contentious because some stakeholders argue the 457 visa is working well with rorts only occurring at the margins, whereas the Labor Government argues that these are more widespread. We believe that the reality is somewhere in the middle of these two positions.

15. Whilst rorts do exist, the vast majority of employers use the 457 visa scheme to fill genuine domestic shortages. However, when rorts exist these tend to involve pretty serious cases of exploitation. Last month's Fairfax Media investigation into the 457 visa scheme which uncovered hundreds of cases of foreign workers being forced into debt bondage provides compelling evidence of this.[21]

16. Thus, the introduction of additional inspectors to audit workplaces and investigate claims of rorting is a step in the right direction but it must still be acknowledged that these 300 inspectors cannot possibly provide comprehensive inspection given that there are over 22,000 employer-sponsors and over 120,000 457 visa workers in Australia.

17. Labor's proposals to increase monitoring and compliance are but a drop in the ocean if the 457 scheme itself is flawed in its design. With a smaller occupations list and the introduction of independent labour market testing, the 457 visa scheme can work much more effectively in minimising the opportunities for rorting to occur. This is because the 457 visa will be used only in areas of genuine skill shortage. The existence of a skill shortage will mean that the 457 visa holder is somewhat protected by their skill level and the employer's demand for their labour. This will lessen the likelihood of exploitative treatment occurring.

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[19] See, eg, D Attas, 'The Case of Guest Workers: Exploitation, Citizenship and Economic Rights' (2000) 6 *Res Publica* 73; H Bauder, *Labour Movement: How Migration Regulates Labor Markets*, Oxford University Press, New York, 2006; R Garcia, 'Labor as Property: Guest workers, International Trade and the Democratic Deficit (2007) 10 *Journal of Gender, Race and Justice* 27; K Mapes, *Sweet Tyranny: Migrant Labor, Industrial Agriculture and Imperial Politics*, University of Illinois Press, Chicago, 2009.

[20] See A Reilly, 'Protecting Vulnerable Migrant Workers: The Case of International Students' (2012) 25 *Australian Journal of Labour Law* 181.

[21] The Age/The Sydney Morning Herald, *'Visa scheme rorting leaves foreigners in debt bondage'*, 6 June 2013.

The introduction of a two-track subclass 457 visa scheme

18. We support the introduction of a two track approach, consistent with our earlier submission on the subclass 457 visa scheme.[22] The Government's two track proposal involves exempting occupations categorised as ASCO skill levels 1 and 2 from employer-conducted labour market testing. However, we recommend a slightly different approach.

19. We suggest that the Government expand the occupations for which employer-conducted labour market testing is not required to ASCO skill levels 1-3 so long as the occupation is listed on the Consolidated Sponsored Occupations List. If an occupation is not on this list, we propose that an employer conduct three months of labour market testing in order to prove the occupation is in shortage.

20. For ASCO skill levels 4-9, we suggest that employers seeking to sponsor these semi and low skilled workers should have to meet additional sponsorship obligations which we outlined in our previous submission. This is because low and semi skilled workers are more susceptible to exploitation given that they are not protected by their high skill level. For these workers, their occupations should need to be listed on the CSOL in order for sponsorship to occur. If the occupation is not on this list, then an employer should have to conduct six months of labour market testing. The rationale for the longer labour market testing period than what we propose for ASCO skill levels 1-3 is that the vacancies for low and semi skilled jobs can be filled by unemployed Australians if there is a greater investment in the training of these workers.

[22] Howe, Reilly and Stewart (2013) *Submission to the Inquiry on the Framework and Operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements,* Legal and Constitutional Affairs Committee.