IS THE NET CAST TOO WIDE? AN ASSESSMENT OF WHETHER THE REGULATORY DESIGN OF THE 457 VISA MEETS AUSTRALIA'S SKILL NEEDS

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ABSTRACT

With increasing use of skilled temporary migration by employers and its significant influence upon Australia's permanent migration intake, the 457 visa has far-reaching implications — both for the domestic labour market and for the long-term composition of the Australian population. The scheme was introduced in 1996 to facilitate the temporary migration of skilled overseas workers to alleviate domestic skill shortages. Predicated upon a premise of business demand, the scheme allows employers to sponsor overseas workers whose occupations are on the Consolidated Sponsored Occupation List. Verification of whether the employer's attestation of a skill shortage is genuine is provided through employer-conducted labour market testing for certain occupations and the market salary rates requirement. This article questions whether these regulatory mechanisms are effective for ensuring the 457 visa program meets its objectives.

INTRODUCTION

The 457 visa was a significant policy innovation at the time of its introduction. Prior to this, visas for economic and family migration entitled visa holders to residency based on an understanding that migrants were permanent contributors to Australia. The shift to temporary labour migration visas reflects the increased movement of people around the world for economic purposes. The World Bank estimates that moving an additional 14 million workers from low

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income to high income countries would increase global income by $350 billion,[1] and the Global Commission on International Migration recommends 'carefully designed temporary migration programs as a means of addressing the economic needs of both countries of origin and destination'.[2] Australia's 457 visa aims to address skill shortages in the domestic economy by allowing employers to sponsor a foreign worker for anything up to a four year period.[3]

Given the sheer numbers involved and the fact that the visa has become a stepping-stone to permanent residency, the architectural foundation of the 457 visa has far-reaching implications for the configuration of the Australian population. Use of the 457 visa has quintupled since its inception in 1996 and is increasingly the first step towards permanent settlement in Australia.[4] In 2010–11, 41 710 permanent residency visas were for people who last held a 457 visa, with almost nine in ten granted a permanent employer sponsored visa.[5] As such, the 457 visa impacts not only upon how efficaciously Australia can attract temporary migrant workers to meet skill shortages but also the composition of Australia's permanent migrant intake.

Thus the question as to whether the 457 visa is effective in meeting skill shortages is of high national significance. Historically, this question has not been properly explored in the Parliament because of a bipartisan political commitment to the 457 visa that has only recently been fractured.[6] Those advocating a rethink of the 457 visa are accused of 'turning away skilled, net-contributors to the Australian project' because of a 'protectionist' belief — a position scathingly critiqued in a recent editorial in *The Australian*.[7] In contrast, those opposed to reregulating the 457 visa scheme have been cast as failing to protect the jobs of

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1 World Bank, *Global Economic Prospects 2006: Economic Implications of Remittances and Migration* (World Bank, Washington DC, 2005) 31.

2 Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action (*Global Commission on International Migration, Geneva, 2005) 16.

3 The 457 visa was introduced by the Howard Coalition Government on 1 August 1996, through the insertion of a new Pt 457 in Sch 2 of the Migration Regulations (Amendment) 1996 No 76.

4 There were 25 786 subclass 457 visa grants in 1996–1997 compared with 125 070 in 2011–2012: Janet Phillips and Harriet Spinks, *Skilled migration: temporary and permanent flows to Australia (*Background Note, Parliamentary Library, December 2012) 40, Table 3; Department of Immigration and Citizenship, *Trends in migration: Australia 2010–11,* (Australian Government, February 2012) 37.

5 Department of Immigration and Citizenship, *Population flows: Immigration aspects 2010–11 edition* (Department of Immigration and Citizenship, 2012) 66.

6 For more on the recent debate over the subclass 457 visa, see, David Penberthy, 'The debate over the 457 visa scheme is embarrassing', *Herald Sun* (Melbourne), 6 April 2013; Daniel Hurst, 'Labor's talk against 457 visa scheme is "disgraceful" and "racist": Murdoch', *The Sydney Morning Herald* (Sydney), 2 April 2013; 'Strong evidence of 457 visa rorts says PM', *The West Australian* (Perth), 26 March 2013.

7 The Editor, 'Skilled migrants a success story: unions must not be allowed to undermine productivity', *The Australian* (Sydney), 13.

Australian workers or being unconcerned about the exploitation of 457 visa holders. In the final Parliamentary sitting day at the expiration of Labor's second term, the Government passed the *Migration Amendment (Temporary Sponsored Visas) Act 2013* (Cth). This Act introduced a number of key reforms to the 457 visa scheme including a limited form of labour market testing for certain occupations,[8] a requirement that employers provide notification of redundancies in the four months prior to the making of a sponsorship application[9] and the granting of new powers to the Fair Work Ombudsman's workplace inspectors to monitor the treatment of 457 visa workers and to ensure compliance with the visa's conditions.[10]

Recognising this fraught political context, and in light of the *Migration Amendment (Temporary Sponsored Visas) Act 2013* (Cth), this article attempts to trace and evaluate the ability of the 457 visa to meet skill shortages. Any scheme to address 'skill shortages' — a type of labour shortage experienced by employers — will necessarily be based on 'employer demand'. This is because it is employers who must first identify their need for a particular job to be done that cannot be met through the local labour market. What is concerning about the 457 visa scheme is that it is entirely demand-driven as it allows employers to attest their need for temporary migrant workers rather than relying on a more independent verification of this need. As such, this article tells a story of a 457 visa developed to meet employer needs — as distinct from a visa designed to meet national needs that consequentially provided employers with skilled temporary migrant workers in areas of shortage. The power to determine how many foreign workers to employ has always been outsourced to employers. From the beginning there was only a limited labour market testing that could be circumvented if an employer nominated the 457 visa to undertake a 'key activity'. By the early 2000s, even this requirement was done away with and replaced with an occupational list that included a large number of occupations not closely tied to the existence of skill shortages. As the visa was uncapped, employers could request unlimited numbers of foreign workers so long as their occupations corresponded with those on the list. If employers wished to employ semi-skilled workers they could do so via the labour or regional agreement streams. The *Migration Amendment (Temporary Sponsored Visas) Act 2013* (Cth) has reinstated a narrow form of labour market testing by requiring that certain occupations be advertised domestically within the four month period prior to making a 457 visa sponsorship nomination application. It is unlikely that this will have a significant impact on improving the efficacy of the 457 visa to meet skill shortages as the labour market testing is only of a limited nature and can be evaded by unscrupulous

8 Section 140GBA inserted into the *Migration Act 1958* (Cth).
9 Section 140GBA(3)(b)(ii) inserted into the *Migration Act 1958* (Cth).
10 Section 140UA inserted into the *Migration Act 1958* (Cth).

employers. Moreover, the employer-demand principle still underpins the 457 visa.

This article commences with an examination of how Australia's 457 visa has evolved from relying upon labour market testing to a broadly conceived occupational list from 1996 until the passage of the *Migration Amendment (Temporary Sponsored Visas) Act 2013* (Cth).[11] This trajectory has occurred adjacent to numerous reviews of the 457 visa which have identified the shortcomings of occupational shortage lists in addressing skill shortages. Part II critiques the current mechanisms being used to enable the 457 visa to be responsive to Australia's skill needs. Regulatory instruments such as numerical caps, quotas and targets, occupational shortage lists, labour market testing and independent analysis all feature within the various temporary migration programs within the Organization for Economic Cooperation and Development ('OECD'). In Australia three primary regulatory levers are used to enable the 457 visa to meet domestic skill needs, namely, employer-conducted labour market testing, market salary rates and the Consolidated Sponsored Occupations List ('CSOL'). My assessment of these levers hinges upon a number of arguments: first, that Australia's 457 visa scheme is entirely demand-driven with only limited assessment of whether an employer's request for a foreign worker is based upon an inability to locate a domestic worker to fill the vacancy; second, the market salary rates requirement can be circumvented, third, the CSOL is too broadly compiled, including far too many occupations with no criteria that the occupation be in shortage; fourth, there is no effective mechanism for guaranteeing that the CSOL occupation nominated by the employer is the actual job the 457 visa holder is performing; fifth, the definition of skill used to determine the CSOL is too wide-ranging and includes occupations in which it would only take a relatively short time to train domestic workers and sixth, the CSOL does not operate to protect the underlying precarious labour market status of many 457 workers, although the amendment Act's recent reforms have improved their status somewhat. Cumulatively, these factors indicate there needs to be a rethink of the regulatory design of the 457 visa scheme. The final part of this article considers the rationale for reforming the 457 visa so as to more dynamically meet Australia's skill needs. Excluded from this discussion are enterprise migration agreements and labour agreements.

That the 457 visa was designed to meet employer needs has been observed before. Shortly after its inception, Crock argued that the 'most striking aspect of the regime…is the emphasis that is placed on the needs and wishes of employers'.[12] This article questions whether a visa

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11 Hereafter referred to as 'the amendment Act'.

12 Mary Crock, 'Immigration and Labour Law: Targeting the Nation's Skills Needs' in Andrew Frazer, Ron McCallum and Paul Ronfeldt (eds), 'Individual Contracts and Workplace Relations' (Working Paper No 50, Australian Centre for Industrial Relations Research and Training, 1997) 123, 141.

scheme intended to meet the national interest but dependent upon employer demand is appropriate.[13] I argue that there is a disjuncture between the public position of successive governments that the 457 visa aims to attract skilled migrants in order to meet Australia's labour market needs and the mechanism being used to achieve this: a government-established list of nominated occupations specifying in which occupations employers can access temporary migrant labour constrained only by a narrow form of employer-conducted labour market testing and a requirement to pay market salary rates. Fundamental problems are associated with outsourcing migration decisions to employers and using a general occupational list to meet skill shortages. These have not been properly addressed in the recent reform to the 457 visa which remains ill-equipped to ensure that the visa is only used in areas of domestic skill shortage.

PART I: THE TRADITIONAL LEVERS FOR REGULATING HOW THE 457 VISA MEETS SKILL SHORTAGES

The imperative to identify and meet skill shortages has been central to the 457 visa since its inception in 1996. The genesis of the visa was the Roach Report, commissioned by the Keating Labor Government, which recommended that Australia needed to have streamlined access to skilled temporary workers from overseas.[14] This report recognised that Australia's labour force could not adequately meet the skill needs of the national economy:

> A country of Australia's size cannot expect to be completely self-sufficient at the leading edge of all skills in the area of key business personnel…Thus there will be a need for Australia to import certain skills, in much the same way as Australia is developing skills to export.[15]

The newly elected Howard Coalition Government lost no time in implementing the report's recommendations, and the 457 visa was introduced on 1 August 1996 resulting in a 'radical deregulation of Australia's temporary entry regime'.[16] The purpose of the new 457 visa was to more efficaciously meet skill shortages through the rationalisation of visa arrangements (seventeen visa types were subsumed into one business temporary visa class), the simplification of

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13 Others have raised concerns with the use of occupational lists to meet skill shortages but no scholarly paper has comprehensively investigated this. See, eg, Joo Cheong Tham and Iain Campbell, *Temporary Migrant Labour in Australia: The 457 Visa Scheme and Challenges for Labour Regulation,* (Working Paper No 50, Centre for Employment and Labour Relations Law, University of Melbourne, March 2011) 19–23.

14 Joint Standing Committee on Migration, Australian Parliament, *Business Temporary Entry: Future Directions – Report to the Committee of Inquiry into the Temporary Entry of Business People and Highly Skilled Specialists* (1995) 84 ('Roach Report').

15 Ibid.

16 Bob Kinniard, 'Current Issues in the Skilled Temporary Subclass 457 Visa' (2006) 14(2) *People and Place* 49, 50.

procedures and the introduction of a degree of self-regulation for certain employers of 457 visa holders.[17] Birrell argues that the introduction of the 457 visa is consistent with the primary determinant of migration policy evolving by the late 1980s into a concern with the labour market outcomes of migrants.[18] He observes:

> Most of the previous restrictions on the sponsors of skilled temporary entrants were abolished, including the need to prove that the skills in question were in short supply in Australia. This reform fits squarely within the new focus on migrants as providers of skills which supplemented those that were available in Australia and which could be put to immediate use.[19]

Upon its inception in 1996, a limited form of employer-conducted labour market testing was used to ensure the 457 visa could alleviate skill shortages. This requirement could be automatically dispensed with so long as an employer nominated the activity being performed by the overseas worker as 'key' to the business. The Minister for Immigration was then required to approve such a nomination if it had been made according to the correct process.[20] 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 because it allowed the fast-tracked sponsorship of overseas workers.[21] 'Key' activities were defined as those that were essential to the operations of the business and which required high-level skills or specialist knowledge of the business.[22] This acceptance of employer nomination that an activity was 'key' was because it was believed that the expertise required to perform a key activity would mean that only genuine skill shortages would be met as there were relatively low levels of unemployment for this segment of the labour market.[23] In contrast, if an employer nominated a business activity as 'non-key' (defined as any activity that did not meet the definition of 'key') then an 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 genuine skills shortage existed, in other words, to guarantee that a suitably qualified Australian

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17 Explanatory Statement, Statutory Rules, Schedule, *Migration Regulations (Amendment) 1996) No.76* (Cth).

18 Bob Birrell, 'Immigration policy and the Australian labour market' (2003) 22 *Economic Papers* 36.

19 Ibid 39.

20 *Migration Regulations 1994* (Cth) reg 1.20H(2) (as in force on 1 August 1996).

21 Roach Report, above n 14, 33. In particular, the Roach Report envisages the visa being used for senior executives within a company, as well as managers, specialists and certain high-level full-time trainees.

22 *Migration Regulations 1994* (Cth) reg 1.20B (as in force on 1 August 1996).

23 External Reference Group, *In Australia's Interests: A Review of the Temporary Residence Program* (Department of Immigration and Multicultural and Indigenous Affairs, Canberra, June 2002) 8.

worker was not readily available to fill the position.[24] This labour market testing requirement obligated an 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.[25]

The introduction of the non-key/key activity distinction in 1996 represented a deregulation of the earlier requirement that employers test the labour market for all temporary skilled immigration. The 457 visa replaced the traditional, highly regulated approach to temporary skilled migration which permitted targeted recruitment linked to specific domestic skill shortages only if the employer had rigorously tested the local labour market to show there was no appropriately qualified Australian worker to fill the position.[26] O'Donnell and Mitchell identify a strong regulatory tradition in the migration field linked to a desire to protect wages and conditions in the Australian labour market.[27]

Even though the 457 visa in its original design was a substantial deregulation of the previous scheme for temporary skilled migration, more reform was to come. The labour market testing requirement was abandoned altogether in 2001 with the introduction of a new test of 'skill thresholds' for 457 visa holders.[28] The Government accepted a report by the External Reference Group (ERG)[29] recommending that subjective labour market testing be replaced by objective measures to ascertain whether the entry of a temporary migrant worker will impact on employment opportunities for Australian workers.[30] 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 that was fairly easy to manipulate in order to achieve the desired

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24 *Migration Regulations 1994* (Cth) reg 1.20H(3) (as in force on 1 August 1996).

25 External Reference Group, above n 23, 46.

26 Anthony O'Donnell and Richard Mitchell, 'Immigrant Labour in Australia: The Regulatory Framework' (Working Paper No 20, Centre for Employment and Labour Relations Law, August 2000) 12.

27 Ibid.

28 Phillip Ruddock, 'New Visa Processes to Help Business, Overseas Students and Skill Migration from 1 July 2001' (Media Release, 1 July 2001).

29 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, above n 23, 18. For a list of External Reference Group members, see Appendix D.

30 External Reference Group, above n 23, 47.

outcome.[31] As a result, this report concluded that 'the ideal approach to labour market testing involves 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.'[32]

The 2001 reforms hinged upon a concept of 'skill thresholds' to regulate the effectiveness of the 457 visa in addressing skill shortages. These were designed to reflect the highly skilled focus of the 457 visa as the occupation of temporary migrant workers had to match with tasks of an occupation specified by the Minister for Immigration in a Gazette notice.[33] These encompassed occupations in major groups 1 to 4 of the Australian Standard Classification of Occupations (ASCO): managers and administrators, professionals, associate professionals, and tradespersons and related workers. The ASCO classifications used by the Department of Immigration and Multicultural Affairs were compiled by the Australian Bureau of Statistics (ABS).[34] The ABS did not determine this list by reference to the existence of labour market needs or the identification of skill shortages. ASCO classifications were determined by the level of skill required to perform a particular job.

The rationale for replacing labour market analysis with an undemanding test of an occupational shortage list was that an employer would not voluntarily undergo the laborious and costly process of recruiting overseas workers in the absence of a genuine skill shortage. It was believed that the financial premium for employing a 457 worker was significant given that it included the additional expense of covering a visa holder's airfares, application costs and health care. The ERG Report recommending this reform identified the use of skills thresholds as an effective measure for meeting skill shortages for highly skilled work but not in the case of low skill positions. They stated,

> Higher levels of unemployment in this area [low and semi skilled work] suggest that it is appropriate to require employers to meet a high standard of proof that the entry of the overseas worker will not take away an opportunity for an Australian worker. This is because it is unlikely that an employer would genuinely not be able to find a local employee for a position, unless the position was particularly unattractive for some reason. Even if an employer can demonstrate that no local employee can be found who could do the work, it should be relatively easy to train a person to perform unskilled work. While the entry of temporary unskilled workers is not prohibited under the

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31 Ibid.

32 Ibid. These criticisms of the 1996 scheme which required employer-conducted labour market testing for an employer seeking to sponsor an overseas worker performing a 'non-key' activity will be revisited in Part II of this article when we consider the Labor Government's reintroduction of employer-conducted labour market testing in the *Migration Amendment (Temporary Sponsored Visas) Act 2013* (Cth).

33 *Migration Regulations 1994* (Cth) regs 1.20D–1.20DA (as in force on 1 July 2003).

34 The Department of Immigration and Multicultural Affairs has since changed its name to the Department of Immigration and Citizenship ('DIAC').

> temporary resident arrangements, opportunities are limited and consultation with DEWR and possibly relevant unions may be appropriate. This should continue to be the case.[35]

Despite this recognition by the ERG that employers seeking to sponsor low and semi-skilled workers should meet a higher burden of proof that a genuine skill shortage existed, in practice, the labour agreement and regional agreement streams allowed these workers to enter Australia without labour market testing, although they did involve inter-departmental and union consultation, as the ERG recommended.[36] The labour agreement stream had existed since the inception of the 457 visa scheme in 1996, however the regional agreement stream was an innovation.[37] Employers in remote areas were able to form regional agreements if they applied for a certificate from the Regional Certificating Body that 'the position cannot reasonably be filled locally'.[38] From late 2002, a provision existed to waive the salary and skill thresholds for the 457 visa for regional agreements so that employers in regional areas were permitted to pay their workers only 90 per cent of the minimum salary requirement.[39] They were also able to employ workers who were not in ASCO occupations 1-4 and were therefore of a lower skill level.

The 2001 decision to rely upon an occupational shortage list for which the 457 visa could be used was highly significant. As such, the process for identifying a skill shortage was entirely outsourced to employers: so long as the occupation they sought to sponsor was on the list, their visa request could be approved either via standard business sponsorship or the labour/regional agreement pathway. No independent labour market testing was done to ensure that the occupations listed in the Gazette were ones in which Australia was experiencing a skills shortage. Nor was there a requirement that employers prove that they had undergone labour market testing to ensure the vacancy could not be filled locally. According to Tham and Campbell, this meant that after these reforms in the *Migration Amendment Regulations 2003 (No 5) (Cth)*, the 457 visa could be characterised as 'an undemanding attestation scheme' as 'the individual employer has to do little more than offering assurances that they need migrant labour'.[40]

A number of reviews have recommended rethinking the occupations list as the threshold for sponsoring 457 workers. In 2007 the Federal

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35 External Reference Group, above n 23, 48.

36 Under Labour Agreements or Regional Agreements, subclass 457 visa holders could be employed in ASCO Groups 5–7 including 'advanced clerical and service workers', 'intermediate clerical, sales and service workers' and 'intermediate production and transport workers'.

37 *Migration Regulations 1994* (Cth) Regs 1.20GA(1)(a)(iii) (as in force on 1 July 2003).

38 Excluded from making a regional agreement were employers in Sydney, Newcastle, Wollongong, Melbourne, Brisbane, the Gold Coast and Perth.

39 Department of Immigration and Citizenship, Temporary Business (Long Stay) — Standard Business Sponsorship (Subclass 457): Concessions for Regional Australia, 2001.

40 Tham and Campbell, above n 13.

Parliament's Joint Standing Committee on Migration recommended the list of approved occupations be regularly reviewed to ensure it only included skilled occupations in demand.[41] It suggested the list should not merely replicate those occupations listed in ASCO groups 1–4 but become a 'Temporary Migration Occupation in Demand List'.[42] The Committee also recommended a reversion back to labour market testing for a narrow range of occupations where the existence of skill shortages was more contested. In contrast to the original model of labour market testing used in 1996, the Committee recommended that this testing be done independently (by a government authority other than DIAC) rather than by employers.[43]

The next attempt at reform was by the Rudd Labor Government, which moved quickly following its election to office in November 2007 to instigate a review of the 457 visa through widespread stakeholder input. A business-led External Reference Group was set up to examine ways to make the program more responsive to skill shortages in the economy,[44] and Commissioner Barbara Deegan of the Australian Industrial Relations Commission was appointed to review the integrity of the system.[45] The Deegan Review questioned the viability of using a broad list of nominated occupations because employers asserting skill shortages where none existed could easily manipulate this list.[46] The Deegan Review suggested that this list needed to be compiled with 'sufficient rigor' as 'care needs to be taken to ensure skill shortages are not overstated by employers seeking to maintain salaries below current market rates'.[47] Similar to the Joint Committee on Migration's proposal of a more targeted occupational list, the Deegan Review advocated that the list of ASCO groups 1–4 be replaced by two new lists drawn up by DEEWR in consultation with DIAC and the industry parties. One list

41 Joint Standing Committee on Migration, Parliament of Australia, *Temporary visas…permanent benefits: ensuring the effectiveness, fairness and integrity of the temporary business visa program* (2007) 81.

42 Ibid.

43 Ibid.

44 On 17 February, 2008 the Minister for Immigration and Citizenship, Senator the Honourable Chris Evans, unveiled a package of migration measures designed to address Australia's skills and labour shortages. As part of this package Senator Evans announced the formation of an External Reference Group (ERG) to examine how selected temporary skilled migration measures could help ease labour shortages. Attachment B of the ERG's final report lists the members of the ERG: External Reference Group, *Final Report to the Minister for Immigration and Citizenship* (Department of Immigration and Citizenship, April 2008).

45 Commissioner Deegan has since been appointed to the Fair Work Commission. For more on the ERG Review and the Deegan Review, see: Joanna Howe 'The Migration Amendment (Worker Protection) Act 2008: Long Overdue Reform, But Have Migrant Workers Been Sold Short?' (2010) 24 *Australian Journal of Labour Law* 13.

46 Visa Subclass 457 Integrity Review, *Final Report* (Commonwealth of Australia, October 2008) 32 ('Deegan Report').

47 Ibid.

could contain those occupations at the semi-professional or professional level (usually found in ASCO levels 1–3) and would not require labour market testing because the high skill level required for these positions would minimise the risk of 457 visa workers in these occupations being exploited. In contrast, the second list could contain all other skilled occupations for which temporary visas could be granted, generally those included in ASCO 4 together with occupations currently included in ACSO levels 1–3 where workers hold weaker labour market power such as chefs and nurses. It was proposed this list be closely monitored to ensure it was tied to skill shortages and to guarantee that employers seeking to sponsor foreign workers were not doing so to avoid hiring Australian workers. 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.'[48]

A central motivation for creating a more targeted occupational list from which temporary migrant workers could be nominated was to avoid the 457 visa shifting from its original anchorage as a skilled visa. In 2008 the External Reference Group reported the 457 visa had become, by default, a 'general labour supply visa' and advocated it be rebalanced in favour of skilled temporary migration.[49] This echoed an earlier sentiment made by the Joint Committee on Migration in 2007 strongly opposed to the 457 visa being used to meet unskilled labour shortages:

> It is the Committee's view that the 457 visa is a skilled visa — it is, and should remain, a means through which Australian businesses can employ skilled workers. The extension of the 457 visa to try and meet unskilled labour shortages would undermine the rationale for this visa and put at risk its acceptability to the general community.[50] (Emphasis in the original)

The Deegan Review also argued for a rigorous compilation of the occupational shortage lists so as to ensure the occupations that could be sponsored by employers were ones where genuine skill shortages existed. The rationale for this was to avoid the 'risk of the visa program being manipulated to import unskilled labour, or skilled labour where there is a plentiful supply available locally.'[51]

Despite three separate reviews advocating reform of the 457 visa to more effectively identify and meet skill shortages, the primary mechanism being used to ascertain which workers can be employed under this visa is still an indiscriminate listing of a vast array of skilled and semi-skilled occupations, coupled with a limited form of labour market testing and a market salary rates requirement. In the following

48 Ibid 39.

49 External Reference Group, *Final Report to the Minister for Immigration and Citizenship*, (Department of Immigration and Citizenship, April 2008) 37.

50 Joint Standing Committee on Migration, above n 41, 12.

51 Deegan Report, above n 46, 34.

part there is an assessment of the efficacy of these three mechanisms in enabling the 457 visa to meet domestic skill needs.

PART II: AN EVALUATION OF THE CURRENT APPROACH FOR REGULATING HOW THE 457 VISA MEETS SKILL SHORTAGES

This part examines the current mechanisms for ensuring the 457 visa meets Australia's labour needs. In a comparative study of OECD countries, Chalof observes that whilst labour migration settings vary between countries, 'one area of convergence has been the spread of mechanisms to fine-tune selection and manage entries'.[52] Regulatory instruments such as numerical caps, quotas and targets, occupational shortage lists, labour market testing and independent analysis all feature within the various temporary migration programs within the OECD. In Australia there are a range of requirements employers must satisfy in order to gain approval as sponsors and in terms of their nominated positions being approved of by the department. These include, for instance, requirements that putative sponsors demonstrate an economic commitment to training local workers,[53] that employers commit to accord visa-holders a market rate of pay and conditions[54] and that visa applicants demonstrate English language competency except for exempt occupations.[55] Taken together, whilst these requirements are additional constraints on participation in the 457 visa scheme, they can be relatively easily satisfied and are in no way related to ascertaining whether a genuine skill shortage exists. As such, they are necessary but not sufficient for protecting the local labour market from employers turning to migrant workers for a purpose other than to fill skill shortages. In addition, three primary regulatory levers are used to enable the 457 visa to meet domestic skill needs, namely, employer-conducted labour market testing, the market salary rates requirement and the Consolidated Sponsored Occupations List. I now critique each of these in turn.

(i) Labour market testing

A key reform of the *Migration Amendment (Temporary Sponsored Visas) Act 2013* (Cth) is the introduction of employer-conducted labour market testing for certain occupations.[56] This mandates that an employer seeking to sponsor a temporary foreign worker has advertised the position within the domestic labour market at some point in the

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52 Jonathan Chaloff, 'Structuring Evidence-Based Regulation of Labour Migration in OECD Countries: Setting Quotas, Selection Criteria and Shortage Lists' (Paper presented at the Expert Commissions and Migration Policy Making Conference, University of California, April 18–19 2013) 1.

53 *Migration Regulations 1994* (Cth) reg 2.59.

54 *Migration Regulations 1994* (Cth) reg 2.72.

55 *Migration Regulations 1994* (Cth) sch 2, Subclass 457, cl 457.223(4).

56 Section 140GBA inserted into the *Migration Act 1958* (Cth).

preceding four months. An employer must also stipulate whether any redundancies have been made of Australian workers during that period.[57] The purpose of this reform is to 'ensure that Australian citizens and permanent residents are given the first opportunity to apply for skilled vacancies in the domestic labour market'.[58] Some occupations are exempt from labour market testing where the skill required is ASCO level 1 and 2,[59] or where determinations are made by the Minister for Immigration that labour market testing for a given occupation would breach Australia's international trade obligations.[60] There is also provision to remove the labour market testing requirement in cases of major disaster where overseas workers are urgently required.[61]

The decision to introduce a limited form of labour market testing was highly controversial. On the one hand, it was touted as guaranteeing the protection of Australian jobs. However, others decried it as significantly increasing the regulatory burden upon employers seeking to access temporary migrant workers. Illustrating the arguments raised by many employer groups contending the latter position, Judith Sloan, contributing Economics Editor of *The Australian* has written:

> The icing on the cake for unions was the passing of new regulations governing 457 visas. These are designed to impose such high costs on employers, particularly of tradesmen and other manual workers, that they will be dissuaded from employing temporary migrants.[62]

Scott Morrison, the Coalition's spokesperson on immigration, made a similar case:[63]

> Labor's attack on skilled migration through the measures introduced to choke the 457 skilled migrant programme with union red tape was economic vandalism. But it's not just the measures that Labor forced through the Parliament, it was their rhetoric. Labor's rhetoric on the 457 changes was blunt, unsophisticated and anti-migrant; crudely blaming migrants for taking away Aussie jobs.[64]

A central part of the Coalition's argument against labour market testing was that Labor's rhetoric about the reform was racially charged and reflected an anti-immigration position. During the debate in the House of Representatives, Liberal MP, Don Randall criticised the reforms as being 'the most racist piece of legislation that has come to the

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57 Section 140GBA(4A) inserted into the *Migration Act 1958* (Cth).

58 Commonwealth, *Parliamentary Debates,* House of Representatives, 6 June 2013, 5543 (Brendan O'Connor).

59 Section 140GBC(2) inserted into the *Migration Act 1958* (Cth).

60 Section 140GBA(1)(c) and 140GBA(2) inserted into the *Migration Act 1958* (Cth).

61 Section 140GBB inserted into the *Migration Act 1958* (Cth).

62 Judith Sloan, 'Why so quiet on the IR front this time around?' *The Australian* (Sydney), 17 August 2013.

63 When he delivered this speech to the Australian Mines and Metals Association (AMMA), Scott Morrison was the Shadow Minister for Productivity and Population and the Shadow Minister for Immigration and Citizenship.

64 Scott Morrison, 'Immigration that Creates Jobs' (Speech delivered to the AMMA, Brisbane, 8 August 2013).

House since I have been a member…It is not only xenophobic in its nature but it also highly jingoistic in its interpretation of our attitude towards foreign workers'.[65] Is it racist and/or xenophobic to employers to advertise job vacancies locally before seeking to access overseas workers to perform these jobs? It is an accepted principle that labour market testing can be a legitimate part of a country's temporary migration program to ensure that migrant workers are not used to replace local workers.[66] In this way, it is difficult to argue that legislating for this requirement is inherently racist or xenophobic. Nonetheless, perhaps the more egregious aspect of Labor's reforms was not the substance but the manner in which these were sold to the public as part of a pre-election pitch. Tham has aptly expressed this in the following terms:

> 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 [Labor] 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?[67]

Even leaving aside the significant political controversy, the impact of employer-conducted labour market testing on improving the efficacy of the 457 visa is questionable. This is because the Amendment Act only stipulates that an employer provide evidence the job has been advertised within the domestic labour market at some point during the preceding four months, a requirement which can be easily met or evaded if an unscrupulous employer wished to do so. In the Minister's own words, the Government's intention was to be 'light touch' and 'a job ad would be a reasonable thing to do and the Department would then be satisfied that there's been an effort to look for local skills'.[68] There is nothing in the legislation to suggest more than one job advertisement will be required by the Department when assessing a 457 visa nomination from an employer. The legislation does not provide any clear criteria on how much advertising is required by the employer, whether it needs to occur in newspapers, job boards and websites that are viewed frequently, or whether it can be an advertisement on a website that is rarely accessed. The Labor Government made it clear that its reforms will not increase processing times for 457 visa applications so

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65 Commonwealth, *Parliamentary Debates,* House of Representatives, 19 June 2013, 6269 (Don Randall).

66 See, eg, Chaloff, above n 52.

67 Joo Cheong Tham, Submission No 22 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Migration Amendment (Temporary Sponsored Visas) Bill 2013* (21 June 2013) 26.

68 Brendan O' Connor, *Insiders with Barrie Cassidy,* Australian Broadcasting Corporation, 23 July 2013.

presumably DIAC officers will still be subject to significant efficiency pressures in processing 457 visa applications and will be unable to allocate resources to effectively investigate whether an employer's attempt to recruit local workers is bona fide.[69] To properly scrutinise whether a job vacancy is genuinely unable to be filled by an Australian worker, a DIAC officer would have to consult a wide range of sources as to the state of the domestic labour market for a particular job and allow for regional variations. A submission by the Law Council of Australia to a recent Senate inquiry on 457 visas opposed labour market testing on the following grounds:

> 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.[70]

Although some have argued that such a position does not provide an argument against a labour market testing requirement because 'defective implementation should be cured through proper implementation of laws, not through repeal',[71] it could also be said that an employer-conducted labour market testing requirement is a feeble lever for ensuring the 457 visa meets local skill shortages because it can be so easily evaded and entails significant costs to enforce in any meaningful way. A similar stipulation in the United States under the H-1B visa scheme for temporary migrant workers has been found to be ineffectual as 'the advertising for US workers that is required as part of certification rarely finds US candidates'.[72] This is because employers wishing to shirk the obligation to advertise locally have found it relatively straightforward to do so.[73]

Despite having the potential to be futile at dissuading unscrupulous employers from using the 457 visa where no domestic skill shortage exists, the requirement of employer-conducted labour market testing also increases the regulatory burden on *all* employers. It is an additional

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69 Ibid.

70 Law Council of Australia, Submission No 24 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Framework and operation of the subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements*, 21 June 2013, 2.

71 Joo Cheong Tham, above n 67, 23.

72 Martin Ruhs and Peter Martin, 'Independent Commissions and Labor Migration' (Paper presented to the Expert Commissions and Migration Policy Making Conference, University of California, April 18–19 2013) 2.

73 One example is the case of the Cohen & Grigsby law firm which made a promotional film in which its lawyers said they would help employers seeking immigrant visas for foreigners they were sponsoring to advertise for local workers in ways that would minimize the chances of finding qualified US workers. Their lawyer said: 'Our objective is to not find a qualified and interested worker' during the statutorily mandated recruitment process. See: <http:migration.ucdavis.edu/mn/more.php?id+3434_0_2_0> Accessed 10 June 2013.

bureaucratic hurdle for employers seeking to make a 457 visa nomination and necessarily delays the process of accessing skilled overseas labour. An employer will be forced to advertise the job vacancy even if he or she is already aware that there is a skill shortage for that particular position. From an employer's perspective, this requirement of labour market testing makes the 457 visa more expensive and time-consuming. On this basis, a number of employer organisations made submissions to the Senate inquiry arguing against the passage of the labour market testing requirement.[74]

In this way, it could be said that employer-conducted labour market testing penalises decent employers who wish to use the 457 visa in areas of genuine skill shortage through making them go through the farce of advertising, but it is also ill-equipped to deter unscrupulous employers from evading the statutory requirement of advertising jobs locally. In Part I of this article, it was shown how the initial attempt at employer-conducted labour market testing introduced in 1996 was dispensed with because of numerous reviews proving it to be an inefficient mechanism for regulating the ability of the 457 visa scheme to meet skill shortages. Given this history, it is surprising the Labor Government chose to reintroduce employer-conducted labour market testing to the 457 visa scheme.

Although this is not the central purpose of this part, it is important to briefly allude to the other reforms contained within the amendment Act. The requirement that recent redundancies be reported is a useful way of safeguarding that employers do not dismiss Australian workers for economic reasons and replace them with 457 visa workers. This provision should not significantly increase the regulatory burden upon employers as it can be addressed through an additional question on the sponsorship nomination form. The same can be said for the decision to grant new powers to the Fair Work Ombudsman's workplace inspectors to monitor the treatment of 457 visa workers and to ensure compliance with the visa's conditions.[75] These new powers for monitoring and compliance, coupled with an increase of the time limit before the expiration of the visa from 28 days to 90 days,[76] will go some way to

74 These included the submissions to the Senate Legal and Constitutional Affairs Committee's inquiry into the *Migration Amendment (Temporary Sponsored Visas) Bill 2013*. See Business Council of Australia, Submission No 14 (June 2013), Australian Industry Group, Submission No 12 (19 June 2013), Master Builders Association, Submission No 7 (20 June 2013), Australian Chamber of Commerce and Industry, Submission No 10 (19 June 2013), Australian Hotels Association, Submission No 11 (20 June 2013), the Australian Mines and Metals Association, Submission No 9 (June 2013) and Restaurant and Catering, Submission No 13 (20 June 2013).

75 Section 140UA inserted into the *Migration Act 1958* (Cth).

76 Paragraph 8107(3)(b) of the *Migration Regulations 1994* (Cth).

improving the precarious labour market status of some 457 visa workers without unduly increasing the regulatory burden upon employers.[77]

(ii) Market salary rates

The requirement to pay 457 visa workers market salary is held out as a key mechanism for ensuring that the scheme effectively addresses skill shortages. Introduced in 2009, the market salary rates requirement replaced the previous obligation to pay a 457 visa worker a minimum salary level[78] and stipulated that employer sponsors accorded conditions to visa holders that were 'no less favourable' than their Australian counterparts in the equivalent position.[79] This was intended as a safeguard against exploitation of 457 visa workers and as a means of ensuring the scheme was only used in areas of genuine skill shortage as it was believed that employers would not seek to access overseas workers if there were Australian workers available given that both sets of workers were to be paid comparable wages. This was said to operate as a market-based price signal which effectively rendered a migrant worker more expensive to hire than a local worker in the same occupation as an employer using the former would need to cover additional costs associated with nomination and sponsorship under the 457 visa scheme.

Nonetheless, the market salary rates requirement, in the form it was introduced in 2009 has been critiqued on the basis that there are ways to get around this hurdle. This is because the assessment of what is the market salary rate is contingent upon the wage equivalent to other workers doing the same job in the enterprise; the employer's categorisation of what job the employee is doing, and that there is no other equivalent worker is accepted at face value.[80] Tham and Campbell have used DIAC's own policy advice manual to show how a 457 visa worker can be paid less than the occupational average because the department's processing officer can approve nomination of an overseas worker so long as the rate that is provided is equivalent to Australian workers in their workplace.[81] If none of the latter exists for comparative purposes, then an employer can assert a workplace benchmark of what the appropriate market salary rate is. A recent discussion paper to the Ministerial Advisory Council on Skilled Migration, Strengthening the Integrity of the Subclass 457 noted this:

> 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

77 For analysis of how the 28-day requirement has been critiqued as being too harsh on 457 visa holders, see Tham and Campbell, above n 13.

78 For more on minimum salary levels, see Howe, above n 45, 11.

79 *Migration Amendment Regulations 2009 (No 5)* (Cth) Sch1, inserting reg 2.72(1)(10)(c).

80 For analysis of how some employers avoid the requirement to pay market salary rates, see, Australian Manufacturing Workers Union, Submission to the Department of Innovation *National Resources Sector Employment Taskforce* (April 2010) 26–30.

81 Tham and Campbell, above n 13, 25.

> 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.[82]

In a positive development, this 'no less favourable' requirement was strengthened as part of the Labor Government's 2013 reforms so that the market test was broadened to the regional locality of the worker and not just the worker's enterprise.[83] This means the department will need to take into account what other workers in that same occupation are being paid within the regional locality. As yet, no policy guidance has been released by the department as to how they will make this assessment, so it is hard to conclusively determine whether this requirement will be rigorously enforced or whether there will still be room for circumvention by employers. The difficulty lies in ascertaining what is the market rate for a particular locality because this cannot be easily ascertained and necessitates a consideration of a wide range of enterprise agreements and common law contracts for equivalent workers in the region. As Tham and Campbell note:

> It is the upper end of the rates provided by these instruments that should form the basis of the 'market rates' — after all, the governing idea behind the 'market rates' is that Australian employers should source local labour first.[84]

Or as Hugo argues, '[b]est practice should be to offer wages at the same (or better) levels than are offered to local workers. In this way, labour shortages reported by employers are more likely to be genuine'.[85] Given this analysis, it would be better if the department set the assessment of a regional locality's 'market rates' according to the higher of two options: first, the highest rate for the occupation as provided by enterprise agreements in the relevant industry; and second, the '75th percentile' of the salary of Australian workers in the occupation concerned.[86] Thus, despite the strengthening of the market salary requirement, whether this reform is effective in ensuring the scheme is only used in areas of genuine skill shortages will depend upon how this requirement is interpreted and enforced by the department.

(iii) The consolidated sponsored occupations list

Apart from labour market testing and market salary rates, the other primary regulatory lever used to enable the 457 visa to meet domestic

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82 Department of Immigration and Citizenship, 'Ministerial Advisory Council on Skilled Migration (MACSM) Discussion Paper: Strengthening the Integrity of the Subclass 457 Program' (Discussion Paper, December 2012) 12 <http://www.immi.gov.au/about/discussion-papers/_doc/strengthening-integrity-457-program.pdf>.

83 *Migration Regulations 1994* (Cth) reg 2.72(10AA).

84 Tham and Campbell, above n 13, 26.

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

86 See Tham and Campbell, above n 13, 26.

skill shortages is the CSOL. The CSOL is a legislative instrument authorised by the *Migration Regulations 1994* (Cth). These regulations are issued by the Minister for Immigration and Citizenship and are the primary determinant of the parameters and content of the 457 visa. Regulations 1.20G(2) and 1.20H(1) stipulate that the nominated position corresponds to the occupations specified in the Gazette as issued by the Minister for Immigration and Citizenship. The CSOL was launched on 1 July 2012 and is remarkable for its continuation of a broad range of occupations for which sponsorship is permitted, namely 742 different occupations.[87] The CSOL replaces three separate sponsored occupation lists which previously existed for the 457 visa, the employer nomination scheme and the state and territory sponsored general skilled migration scheme – the latter two are permanent migration pathways. The CSOL is an attempt to streamline the process of both the 457 visa application, as well as moving from a 457 visa to permanent residence via employer sponsorship and render it less confusing for employers and visa applicants.[88] By way of contrast, other countries have much narrower occupational shortage lists (for example, Germany's current shortage list contains four occupations)[89] and these tend to be culled during economic downturns (for example, Canada's list was reduced from 38 to 29 occupations in 2010).[90]

The CSOL is far more wide-ranging than the list used for Australia's non-employer sponsored permanent migration program. The Skilled Occupation List ('SOL') prepared by the Australian Workforce and Productivity Agency ('AWPA'),[91] which is the basis for independent points-tested visas, includes 192 occupations selected by AWPA to ensure that independent skilled migration assists in meeting the medium- and long-term skill needs of the Australian economy. The SOL no longer has two subset lists as the Migration Occupations in Demand List and provisional Critical Skills List were revoked in February 2010. Since July 2010, there is a new SOL, which cuts the number of eligible occupations by more than half. The new list contains occupations that fulfill three criteria.[92] First, the skills take a long time to learn; second, there is evidence of high skills matching between the skill desired by the employer and the skill possessed by the overseas worker; and third, the costs of the skills being in short supply are high to the economy. The SOL's rigorous requirements are distinct from the more populated CSOL. The significant disparity between CSOL and SOL reveals that the

87 Chris Bowen, 'Simplifying Sponsorship for Permanent Skilled Migrants' (Media Release, 9 March 2012).

88 Ibid.

89 OECD, *Recruiting Immigrant Workers: Germany* (OECD Publishing, 2013).

90 OECD, *International Migration Outlook: Sopemi 2011* (OECD Publishing, 2011) 113.

91 Chris Evans, 'New Skilled Occupation List to Meet Australia's Economic Needs' (Media Release, 17 May 2010). See also <http://www.awpa.gov.au>. AWPA has replaced the organisation Skills Australia.

92 OECD, above n 90, 260.

independent skilled migration program is more strategically positioned to identify and meet skill shortages in the domestic economy. The rationale for this is that independent skilled migrants do not have a job offer when they immigrate unlike 457 visa holders. This reveals a government preference for allowing employers to attest their need for temporary migrant workers rather than relying on a more independent verification of this need. This is demonstrated even more acutely in the priority increasingly accorded to employer-sponsored permanent migration over independent points-tested skilled migration.

In this section a number of flaws in both the design and operation of the CSOL are explored: firstly, its breadth in comprising 742 occupations; secondly, inclusion on the list is only determined by skill level and not that the occupation be in shortage; thirdly, use of the CSOL abdicates responsibility for determining skill shortages to employers as the 457 visa is entirely demand-driven; fourthly, the definition of skill used to determine the CSOL is too wide-ranging and includes skilled occupations in which it would only take a short time to train domestic workers; and fifthly, the CSOL does not operate to protect the precarious labour market status of many 457 workers. Cumulatively, these factors indicate that there needs to be reconsideration of the importance of the CSOL in determining the profile of 457 visa workers.

The first aspect of the CSOL deserving of scrutiny is its central role in permitting employer sponsorship of a temporary migrant worker. In addition to the limited labour market testing requirement critiqued above, so long as an occupation is listed on the CSOL an employer can make a 457 visa application to sponsor a worker for that occupation. This process presumes the existence of a skill shortage because the employer's request for use of the visa is taken as confirmation that the job cannot be filled by a domestic worker. Under this model there are no review mechanisms to ensure that the occupations listed on the CSOL correspond with areas of shortage in the domestic labour market as the primary criteria for inclusion on the CSOL is that the occupation be skilled.[93] It is the employer who determines whether an occupation is experiencing a shortage. This deference to employer say-so fails to question whether the shortage is genuine by assessing the reasons for its existence. In some cases this may be because there is a genuine lack of domestic workers with the particular skill set required to perform the job, however other reasons for this shortage can exist: it may be caused by 'labour-related shortages' such as 'skills gaps', 'labour shortages' and 'recruitment difficulties'.[94]

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93 Questions Taken on Notice, Budget Estimates Hearing: 21–22 May 2012, Immigration and Citizenship Portfolio, answer to question by Senator Xenophon, BE12/0213.

94 Sue Richardson, *What is a Skills Shortage?* (National Centre for Vocational Education Research, 2007).

In this way, the 457 visa is driven by employer-demand and is not closely linked to an independent assessment of Australia's skill needs. 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.[95] According to 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'.[96] The simplistic notion that employers will only go to the trouble and expense of making a 457 visa application when they want to meet a skill shortage skims over a range of motives an employer may have for using the 457 visa. These could be a reluctance to invest in training for existing or prospective staff,[97] or a desire to move towards a deunionised workforce.[98] Additionally, for a small minority of employers, there could be a belief that, despite the requirement that 457 visa workers be employed on terms 'no less favourable' than their Australian counterparts, it is easier to avoid paying award rates and conditions for temporary migrant workers who have been recognised as being in a vulnerable labour market position.[99] Given the possibility for employers to use the 457 visa scheme for a motive other than to meet a genuine skill shortage, it is necessary to further scrutinise employer attestation that a skill shortage exists. This is to ensure 'the demand for migrant workers identified by employers is in fact a demand for workers who can be — and end up being — employed in compliance with existing employment laws and regulations'.[100]

Australia's demand driven model for identifying and meeting skill shortages results in a short-term focus for the 457 visa scheme which has the potential to preference the needs of a particular employer over the needs of the national economy. Whilst these two 'needs' would often coincide, there would be instances where they would not. An example could be when an employer identifies a need for a particular tradesperson because the trade is in short supply in a particular geographical area, however an oversupply of this worker exists elsewhere in Australia. In this case, it may be in the national interest, albeit potentially more inconvenient and costly, for the employer to offer

95 OECD, *International Migration Outlook: Sopemi 2009* (OECD Publishing, 2009) 133.

96 Hugo, above n 85, 59.

97 See, eg, Australian Council of Trade Unions, Submission to the National Resources Sector Employment Taskforce, April 2010.

98 For a fascinating insight into how employers can use subclass 457 visa workers to limit union power in their workplaces, see: Ken Phillips, '457 visas about union control', *The Australian* (Sydney) 2 April 2013.

99 This point as to the precarious labour market position of some subclass 457 visa workers is explored elsewhere in this part.

100 Martin Ruhs, 'The Potential of Temporary Migration Programmes in Future International Migration Policy' (2006) 145 *International Labour* Review 7, 14.

a relocation package and source an unemployed domestic worker rather than rely on the 457 visa to fill the shortage. This will also depend on the willingness of the worker to relocate. The OECD recommends that identification of skill shortages by employers be independently confirmed to ensure their legitimacy:

> 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 domestic sources'.[101]

There is also nothing to constrain employers nominating a worker for a 457 visa where there is a surplus of local workers in the occupation. In response to a question by Senator Xenophon as to whether DIAC would take into account whether the sponsoring airline has an actual surplus of pilots in its existing workforce in making a decision to grant a 457 visa, DIAC answered:

> The Department does not take into account an employer's existing workforce when considering nomination or visa applications. However, it does assess an employer's record of providing training opportunities to Australians when considering their application to become a standard business sponsor. Employers are also required to attest in writing to employing local labour and to having non-discriminatory employment practices.[102]

This statement illustrates that employer attestation is regarded as sufficient for the department and that there is no rigorous independent assessment of whether a shortage exists in the employer's actual workforce.

The abolition of labour market testing in 2001 in favour of skills thresholds was justified on the basis that employers would only use a 457 visa worker in areas of genuine skill shortage because of the expensive and time-consuming process for sponsoring temporary migrant workers. This argument supports a broad-based CSOL because the 'premium' associated with sponsoring a 457 visa worker insulates the scheme from abuse. Nonetheless, there is a growing body of research to suggest that there are other advantages for employers in using the 457 visa scheme that may incentivise use of the scheme in areas where skill shortages do not exist.[103] In particular, the research of Tham and

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101 OECD, above n 95, 134.

102 Questions Taken on Notice, Budget Estimates Hearing: 21–22 May 2012, Immigration and Citizenship Portfolio, answer to question by Senator Xenophon, BE12/0216.

103 Tham and Campbell, above n 13; Bob Birrell and Ernest Healy, 'Immigration Overshoot' (Research Report, Centre for Population and Urban Research, November 2012); Andrew Newman, 'The Legal Precariousness of Temporary Migrant Work: Common Regulatory Challenges to Security of Employment in Canada and Australia' (paper presented at Australian Labour Law Association Conference, Rydges Hotel Canberra, 16–17 November 2012); Joo Cheong Tham and Ian Campbell, 'Equal Treatment for Temporary Migrant Workers and the Challenge of Their Precariousness' (paper presented at Australian Labour Law Association Conference, Rydges Hotel Canberra, 16–17 November); Joanna Howe (2010) 'The Migration Amendment (Worker Protection) Act 2008: Long Overdue Reform, but Have Migrant Workers Been Sold Short?' 24 *Australian Journal of Labour Law* 13.

Campbell reveals the precarious labour market position of many 457 workers. Whilst recognising that many highly skilled 457 workers are not exploited and are employed in areas of genuine skill shortage, Tham and Campbell's research identifies structural defects in the architectural design of the 457 visa placing these workers in a disadvantaged position. Many 457 visa workers are vulnerable because of their hope for continuing employer sponsorship so that they can achieve permanent residency.[104] As the Deegan Inquiry 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.[105]

The inherent difficulty in identifying whether the terms and conditions of a 457 visa are being complied with makes it all the more necessary to properly ascertain in the first place whether a visa application should be approved. The sheer numbers of 457 visa workers employed in Australia render it very challenging to ascertain whether an employer is complying with the terms of the visa. A welcome reform has been the recent decision by the Labor Government to empower the Fair Work Ombudsman to supplement the monitoring conducted by DIAC so as to investigate whether 457 visa workers are being paid the correct market salary rate and are performing the job identified on the employer's sponsorship application.[106] This decision builds on the existing DIAC inspectorate of 37 inspectors by empowering the FWO's 300 inspectors to monitor the wages and conditions of 457 visa holders as well. Nonetheless, it is easier to ensure at the outset that the 457 visa is only being used in areas of genuine skill shortage than to monitor down the track whether other less desirable employer motivations exist for use of this visa.

As some occupations listed on the CSOL are given broad titles, somewhat devoid of meaning, these can be more easily used by employers to sponsor a 457 visa holder to perform an entirely different job. Whilst these ambiguous occupational titles correspond to ASCO classifications and are accompanied by a brief description, there is no verification by DIAC to confirm that the job the employer is requesting to sponsor is the job the worker will actually perform. For example, 'Program or Project Administrator'[107] was the second most popular occupation on the CSOL for the 457 visa for 2012-2013 but it is difficult

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104 Many 457 visa holders end up realising this goal through receipt of permanent residency via a permanent employer sponsored visa, see: DIAC, 'Population Flows: Immigration Aspects 2010–11' (Statistical Publication, DIAC, April 2012) 66.

105 Deegan Report, abov n 46, 49.

106 Brendan O'Connor and Bill Shorten, 'Fair Work Inspectors to Monitor Rogue 457 Employers' (Joint Media Release, 18 March 2013).

107 For a description of 'Project or Program Administrator', see Australian Bureau of Statistics, *Australian Standard Classification of Occupations (ASCO) Second Edition 1997* (24 June 2009) <http://www.abs.gov.au/ausstats/abs@.nsf/0/3F37C3796BC20A3DCA25697E0018504C?opendocument>.

to know what a person performing this job is required to do and what particular skills and work experience he or she should possess on their 457 visa application.[108] With a system of paper-based applications, it is very hard for someone sitting in a DIAC office to get an accurate understanding of the person being nominated for the 457 visa and the occupation they are applying for. The applicant must provide a written certification that the duties of the position match a significant majority of the occupations as listed in the CSOL, and that the applicant's experience and qualifications are commensurate with the qualifications and experience listed in the CSOL. These certifications are intended to enable employers to make a self-assessment of the eligibility of a particular position and intended visa holder. However, the only opportunity to assess whether the applicant's certification and the employer's self-assessment have been made correctly is retrospective — it occurs only if a business is monitored for compliance. This has been improved by the 2013 reform requiring a formal skills assessment for generalist occupations such as 'Program and Project Administrator' and 'Specialist Manager'.[109] However, it is still a concern that as the CSOL includes so many occupations, unscrupulous employers seeking to avoid the skills assessment requirement for particular generalist occupations will nominate a 457 visa worker under a different occupation and rely on the fact that there is no other way for DIAC to independently assess whether the applicant genuinely fits into the occupation's description on the paper-based application form.[110]

Another area of concern in the regulatory design of the CSOL is whether the definition of a 'skilled' occupation under this list is too broad. An assumption informing the CSOL is *not* that skilled occupations are more likely to experience shortages than low or semi-skilled occupations but rather that it is more desirable to fill shortages in skilled occupations more quickly as these cannot be filled in the short-term through training domestic workers whereas low and semi-skilled occupations can. A related assumption is that allowing shortages in skilled occupations to remain unmet has negative effects for job creation generally in the domestic economy. The National Resources Sector Employment Taskforce, which handed down its final report in July 2010, envisaged using Australians for all work required over the long-term and using temporary migrant workers only where there are short-term needs.[111] The report recommended that the Government 'meet temporary skills shortages with temporary migration' and identified an immediate skills shortage in the supply of mining engineers and

108 DIAC, 'Subclass 457 State/Territory Summary Report' (Report, 2012–13 to 30 November 2012) 11.

109 DIAC, 'Skills Assessments for Generalist Occupations', <wwww.immi.gov.au/skilled/changes-457-program.htm>. Accessed 10 September 2013.

110 Howe, above n 45.

111 National Resources Sector Employment Taskforce, 'Resourcing the Future' (Report, July 2010) 10.

geoscientists, which it said would have to be filled by temporary migration.[112] This is unlike the occupation of 'cook' for which there are short-terms vacancies but also vacancies that will need to be filled over the medium- to long-term. Whilst the occupation of 'cook' was the most popular occupation for the 457 visa in 2012-2013 and the number on this visa has increased by 129 per cent in the past year,[113] it is arguable that domestic workers can quickly be trained to do this job.[114] A lot of the learning for an occupation such as this can occur on the job through an apprenticeship program. Another example is the occupation of 'flight attendant' — is there really a skill shortage in this area in the domestic economy which is better met through the 457 visa rather than the training of domestic workers? The training requirement for occupations such as these is relatively brief, meaning the skill shortage can be remedied fairly expediently. For example, Independent Senator Nick Xenophon identified during a meeting of the Senate Estimates Committee that the course requirement for flight attendants with Jetstar was between two and three weeks, and for Qantas was six weeks.[115] This is not a particularly long time frame for an airline to employ domestic workers and to train them to meet this skill level. However, in response to Mr Xenophon's observation that 'we are not talking about months and months, we are talking about several weeks in order to be qualified as a flight attendant',[116] Mr Kukoc from DIAC stated:

> The department does not make these decisions. It is now under the Australian and New Zealand Standard Classification of Occupations list. It is classified as a level 3 occupation,

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112 Ibid, 11, 64.

113 This represented an increase from 540 in 2011–2012 to 1250 in 2012–2013 subclass 457 visa holders working as a 'cook': DIAC, 'Subclass 347 State/Territory Summary Report' (Report, 2012–13 to 30 November 2012) 11.

114 Anecdotal evidence suggests that the occupation of 'cook' is one where cases are emerging of foreign workers being sponsored under this job title but performing much lower skilled work and being paid below the minimum rate for 457 visa workers and the Australian award rate. See, eg, SBS report of an Italian national being sponsored on a subclass 457 visa as a restaurant manager but being actually employed as a waiter: Phillippa Carisbrooke, 'Are 457 Visa Holders Being Exploited?', SBS (online), 5 November 2012 <http://www.sbs.com.au/news/article/1708121/Are-457-visa-holders-being-exploited>. For emerging evidence of exploitation of foreign workers in the restaurants and hospitality industry more generally, see *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor* [2012] FMCA 258; Courtney Trenwith, 'Perth Cafe Receives Record Fine for Underpaying Migrant Workers', WA News (online), September 29 2011 <http://www.watoday.com.au/wa-news/perth-cafe-receives-record-fine-for-underpaying-migrant-workers-20110929-1kyxl.html#ixzz2MWiMrbPD>; Fair Work Ombudsman, 'Fine Imposed for Underpayment of Foreign Workers in Adelaide and Brisbane' (Media Release, 13 February 2013); Fair Work Ombudsman, 'Court Action over Alleged Underpayment of Foreign Workers in Tasmania' (Media Release, 26 January 2013); Fair Work Ombudsman, 'Perth Sushi Cafe Back-Pays Two Foreign Workers Almost $50,000' (Media Release, 14 July 2011).

115 Commonwealth, *Parliamentary Debates*, Senate, 15 October 2012, 127 (Senator Xenophon).

116 Ibid.

> which is considered a skilled occupation. It requires, as I said, a certificate III and a few years experience.[117]

In actuality, to work as a flight attendant a person needs AQF Certificate III including at least two years of on-the-job training.[118] AQF's guidelines recognise a pathway to gaining a Certificate III as employer-provided training and assessment.[119] This same requirement is also stipulated for the occupation of cook under the ASCO rating system. As the barriers to entry are not prohibitive (there is no requirement of prior learning and experience), the skills for these occupations can be learnt on the job. Therefore, it seems appropriate there be a more rigorous labour market testing requirement to ensure there are no local workers willing and able to perform these jobs before an employer can make an application to sponsor overseas workers. Birrell and Healy identify the poor job outcomes for Australian-born young people as an example of where domestic workers could be employed in place of 457 visa holders.[120] Additional research needs to be done, and more resources deployed for identifying how to transition local workers into these jobs.

In sum, there are clear deficiencies in the way the 457 visa is currently regulated to ensure that it assists in meeting Australia's skill needs. Taken together, labour market testing, the market salary requirement and the CSOL are regulatory mechanisms of limited value as they enable the sponsorship of occupations that are not in shortage in Australia.

PART III: IS THERE ANOTHER WAY? FUTURE DIRECTIONS FOR THE 457 VISA

The task of this final part is to briefly canvas whether there are more effective mechanisms for enabling the 457 visa to better address Australia's labour market needs.[121] It is very difficult to propose a solution here: too many hurdles before sponsorship can be approved, and the 457 visa risks being underutilised by business to meet genuine skill shortages; too few requirements would enable faster processing of

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117 Ibid.

118 Australian Bureau of Statistics, *Australian and New Zealand Standard Classification of Occupations, First Edition, Revision 1* (3 October 2013) <http://www.abs.gov.au/ausstats/abs@.nsf/Product+Lookup/1220.0~First+Edition,+Revision+1~Chapter~UNIT+GROUP+4517+Travel+Attendants>.

119 Australian Quality Framework, *AQF Implementation Handbook* (2007) http://www.aqf.edu.au/portals/0/documents/handbook/aqf_handbook_15-35.pdf Accessed 10 June 2013.

120 Unemployment for 15–19 year olds surged to 15% in July 2009 and to 6.8% for 20–24 year olds. The unemployment rate for the former group has not improved since this time and in the case of those in their early 20s this rate has deteriorated to 8.1% by July 2012. The numbers are even worse in lower income metropolitan areas: Birrell and Healy, above n 62, 26.

121 Other aspects of the design of the 457 visa scheme are not discussed here.

visa applications but may mean that temporary foreign workers are used in occupations where there is no domestic skill need. As always with temporary migrant worker programs, this boils down to *who* to admit and *on what basis*? As Chaloff states, the purpose of a temporary migrant worker program is to meet 'labour needs which cannot be met effectively with domestic labour within a reasonable timeframe, without causing adverse effects on the labour market for residents'.[122]

Perhaps a more effective approach would be to use an independent labour market testing model. This would depend upon an independent body to conduct impartial, evidence-based advice to government on specific sectors and occupations in the labour market where shortages exist which can sensibly be filled by temporary migration.[123] This would lead to the creation of a more effective occupational shortage list allowing for regional variations so that skill shortages in particular areas could be identified.[124] Such a model is consistent with the OECD's approach to how occupational shortage lists should be managed under temporary migration schemes:

> Shortage lists, which can be based at least in part on objective data, have more advantages than employment tests, which can be subject to manipulation and to discretionary decisions that may vary from area to area and from official to official.[125]

Independent labour market analysis, conducted by a body such as the Australian Workforce and Productivity Agency,[126] could replace employer-conducted labour market testing and result in the production of a more fine-tuned Consolidated Sponsored Occupations List.[127] The abolition of the former reduces the regulatory burden on employers and the latter ensures that listed occupations are actually in shortage.

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122 Chaloff, above n 52, 1; see also 'Workers Crossing Borders: A Road Map for Managing International Labour Migration' in OECD, *International Migration Outlook: Sopemi 2009* (OECD Publishing, 2009) 77–224.

123 An independent labour market testing model was proposed by the Joint Standing Committee on Migration: above n 41.

124 An occupational shortage list with regional variation was proposed in the Deegan Report: above n 46.

125 Ibid 139.

126 AWPA already does some labour market analysis to prepare the Skilled Occupations List for the permanent migration program. This is explored in more detail in Part II.

127 Earlier this year, the author, combined with colleagues from the University of Adelaide Law School submitted to the Senate Legal and Constitutional Affairs Committee that the Australian Workforce and Productivity Agency be used to independently test the labour market for skill shortages so as to compile a CSOL more responsive to Australia's skill needs: Joanna Howe, Alexander Reilly and Andrew Stewart, Submission No 11 to Senate Legal and Constitutional References Committee, *Inquiry into the Framework and Operation of Subclass 457 Visas, Enterprise Migration Agreements and Regional Migration Agreements,* 26 April 2013. This recommendation was accepted by the Committee in their final report, see Senate Legal and Constitutional Affairs References Committee, 'The Framework and Operation of Subclass 457 Visas, Enterprise Migration Agreements and Regional Migration Agreements' (Final Report, June 2013).

For employers a smaller and more targeted occupational shortage list could pose certain difficulties. It will be challenging for the list to be regularly updated and managed so that it is an accurate reflection of the current state of the domestic labour market and to ensure there is no lag between the identification of a skill shortage and the addition of an occupation onto the list. Indeed, it was on this basis that employers were influential in advocating for an expanded CSOL. For example, the Western Australia Chamber of Commerce and Industry argued in 2007:

> The most critical reform is the need to broaden the list of occupations that may qualify for the 457 visa. This is particularly important for Western Australia, which has significant labour shortages across a broad range of occupations, many of which do not qualify under the 457 visa program, as a consequence of an outdated occupational classification system.[128]

Industry groups have also raised concerns with the rigidity of the CSOL because of its reliance upon ASCO ratings.[129] They complain that the list does not include new and emerging occupations and defines skill level too narrowly. However, a properly resourced AWPA could respond to this objection and attempt to regularly revise the occupational shortage list so that it accurately reflected Australia's labour market needs. Indeed, Ruhs and Martin's study of the British temporary skilled migration system's reliance on independent labour market analysis conducted by the Migration Advisory Committee ('MAC') suggests that an independent body (such as AWPA) can be a highly effective regulatory mechanism in managing the interaction between labour migration supply and demand. They state:

> After almost five years, the MAC has had three major effects on British labor migration policies. First, the MAC has earned a reputation for careful analysis of the data and evidence on which it bases its recommendations, which has helped it to win credibility both with the government and the public. There are stakeholders who disagree with some of the MAC's recommendations, but the MAC's willingness to consider both top-down labour market indicators and bottom-up evidence from employers and advocates gives all stakeholders a voice in the process of determining whether there are labor shortages. Second, even if the MAC concludes there is a labor shortage, it does not always recommend that migrant workers be admitted….Third, MAC shortage findings can trigger governmental actions to reduce labor shortages in the future. When the MAC puts an occupation on the shortage list, making it easier for employers to employ foreign workers, there can be a formal review of the training system that trains British workers for that occupation in question.[130]

The third benefit identified by Ruhs and Martin would be of particular use in Australia for helping differentiate between skill shortages that need to be met by temporary migration and those that could be met by increased training of domestic workers. A reliance on independent labour market analysis would also identify where

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128 Chamber of Commerce and Industry, Western Australia, 'Building Human Capital', (Discussion Paper, November 2007) 51.

129 Sarah Martin, 'Lettuce Use Foreign Skills to Grow', *The Australian* (Sydney) 1 March 2013, 2.

130 Ruhs and Martin, above n 72, 7.

resources for training purposes need to be placed in the medium- and long-term to enable more strategic reliance on the temporary migrant worker program and improve the employment prospects of domestic workers.

Of course, independent labour market testing necessarily reduces the number of occupations for which foreign workers can be sponsored when compared with the current CSOL. In our view, that is an acceptable price to pay for seeking the right kind of balance within the 457 visa scheme. This regulation is necessary to ensure that employers seeking to access temporary migrant labour are able to prove that there is a genuine need. This reduces incentives for an unscrupulous employer to avoid complying with Australian labour market standards by relying upon temporary migrant workers.

Another possible objection to the use of an independent body charged with determining a list of permissible occupations is the implications for Australia's treaty commitments. Australia's free trade obligations under the General Agreement on Trade in Services ('GATS') and an offer made by the Australian Government in the 2005 Doha trade negotiations have both been mooted as constraining any attempt to limit the number and types of occupations permitted by the 457 visa scheme. Tham offers a compelling critique of this argument.[131] First, he identifies how GATS only refers to a very narrow group of temporary migrant workers, namely those who are engaged by overseas-based businesses who are providing services through the provision of their workers and second, he explains how limiting access to Australia's labour market for this specific group of workers is a permitted exemption under GATS.[132] In terms of the argument that the 2005 Doha offer provides a basis for preventing the limiting of the 457 visa scheme, Tham's critique is even stronger, describing this as an 'egregious' position which is a 'deep affront to Australian democracy'.[133] This is because this offer was made by the executive in 2005 and should not have the capacity to prevent future federal parliaments from passing a law that negates the substance of the offer. To argue otherwise contradicts the accepted doctrine of parliamentary sovereignty in favour of the executive.

CONCLUSION

This article has argued there is a clear disjuncture between the aspirations and practice of the 457 visa scheme. This has manifested itself in the inability of the visa to effectively identify and meet skill shortages. The CSOL includes too many occupations, as its primary determinant is the skill level of the occupation in question, not whether it is in demand in the domestic labour market. The definition of skill is

131 Tham, above n 67, 18–22.
132 Ibid 19–20.
133 Ibid 21-2.

too broad and includes occupations in which it takes a relatively short time to train unskilled Australian workers. The broad description of CSOL occupations and the fact that there is no real scrutiny of whether the sponsored occupation is the one actually being performed by the visa holder hampers the effectiveness of this visa as a skilled visa designed to meet Australia's labour market needs. The fact that DIAC does not account for whether there is a surplus of staff in a particular occupation for the employer, means that 457 visas can be used to develop a more compliant workforce less likely to voice concerns over safety, pay and conditions because of a desire to remain in Australia on the visa or to one day achieve permanent residency through employer nomination. The recent introduction of a limited form of employer-conducted labour market testing is also problematic. It simultaneously increases the regulatory burden upon employers but can also be circumvented by those wishing to evade the obligation to advertise jobs locally prior to sponsorship. It also remains to be seen whether the new requirement that market salary rates be assessed according to a worker's regional locality will ensure that a 457 visa worker is employed on equivalent terms to a domestic worker in the same position.

These problems associated with the CSOL, the market salary rates requirement and the reintroduction of employer-conducted labour market testing infects the 457 visa scheme as a whole. This is because a primary objective of the visa is to meet Australia's skills needs and this is only being crudely achieved. Nonetheless, this article has not argued for a wholesale rejection or even a review of the 457 visa scheme — this is a much larger question than can be addressed here. What is apparent however, is that the policy of successive governments to use 'skill thresholds' as the principal determinant of the profile of 457 visa holders needs reviewing. This article advocates consideration of alternative methods for ascertaining this, and in particular a mechanism that moves away from Australia's model of a demand-driven temporary migration scheme in favour of one that allows independent assessment of Australia's skill needs.