THE UNIVERSITY OF ADELAIDE
AUSTRALIA

LAW SCHOOL
FACULTY OF THE PROFESSIONS

LIGERTWOOD BUILDING
THE UNIVERSITY OF ADELAIDE
SA 5005
AUSTRALIA

Dr Joanna Howe
Lecturer

Friday, 26 April 2013

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 6000

Submission as to the Framework and Operation of Subclass 457 Visas, Enterprise Migration Agreements and Regional Migration Agreements

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

2. Our submission is concerned with Subclass 457 Visas. In summary, we contend that:

    - The subclass 457 visa scheme is in significant need of reform to ensure that it more effectively meets skill shortages in the domestic economy. The current mechanism being used to achieve this, the Consolidated Sponsored Occupations List (CSOL), is too broad and predicated upon employer demand.

    - We recommend a 'two stream' approach, with each stream having different requirements for visa entrants and sponsors according to their skill level.

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

    - In the absence of an occupation being listed on the CSOL, then we contend that there needs to be further investigation to ensure that the employer's request for overseas

workers cannot be met through the local labour market. This can be done through a three month period of employer-conducted labour market testing.

- For low and semi-skilled labour, we suggest that consideration be given to using the labour agreement pathway. For these workers we suggest there be a six month labour market testing requirement, with additional safeguards and conditions built into the labour agreement to protect these workers from exploitation.

The Subclass 457 Visa

3. The primary temporary labour migration visa is the subclass 457 visa. According to the Department of Immigration and Citizenship website, the subclass 457 visa is for 'skilled workers from outside Australia who have been sponsored and nominated by a business to work in Australia on a temporary basis. …. A business can sponsor a skilled worker if they cannot find an appropriately skilled Australian citizen or permanent resident to fill a skilled position listed in the Consolidated Sponsored Occupations List'.[1]

4. In meeting its primary aim of responding to skills shortages in the Australian labour market, the sub-class 457 visa attempts to balance a number of interests and concerns, including:

   - the interests of Australian workers – both their short term interests in being employed, and their longer term interest in education and training opportunities;
   - the national economic interest – maintaining a strong and growing economy, and linked to this the interests of employers in being able to meet their immediate demands for labour;
   - the needs of Australia's migration program – there is a strong connection between permanent and temporary migration within the economic stream;
   - Australia's relationship with other countries – ensuring the dignity of foreign nationals resident in Australia is maintained and their rights protected;
   - Australia's international legal obligations; and
   - the interests of migrant workers – in particular, the protection of their workforce rights and ensuring they are free from exploitation.

   Several of these interests and concerns may be in conflict. Most obviously, the more the sub-class 457 visa policy focuses on the protection of the employment interests of Australian workers, the less effectively it will fill the short term demand for labour of Australian employers.

5. The current policy settings for sub-class 457 visas have in mind all of the interests and concerns stated above. However, as we argue in this submission, the priorities underpinning sub-class 457 visas have shifted since their introduction in 1996. In particular, the focus of sub-class 457 visas is more directly on satisfying immediate employer demand for labour, with less concern for Australia's mid to long term employment needs. We argue that the shift in this balance has had a number of negative consequences for other interests and concerns that are central to the operation of sub-class 457 visas.

Australian Temporary Worker Visas in Context

6. When temporary visas for the employment of skilled labourers in Australia were first introduced in 1996 they were a significant policy innovation. Until that time in Australia, all

---

[1] http://www.immi.gov.au/skills/skillselect/index/visas/subclass-457/.

[2] J Garrett and C McGrath, 'Expanded Pacific Worker Program "Benefits" Australia, Pacific',

visas for economic and family migration entitled visa holders to permanent residence. The understanding was that migrants were permanent additions and contributors to the Australian community. The introduction of temporary labour migration visas reflects a change in national culture in response to changing international realities, most notably the increased movement of people around the world for economic purposes.

7. The law and policy settings for temporary migrant labour in Australia are different from other comparable countries in several respects. The focus in Australia has been on introducing *skilled* labour into the economy.

8. The only unskilled migrant labour visa is the subclass 416 Seasonal Worker visa scheme which is available for up to 12, 000 workers from Pacific Island nations to work in the horticulture and aquaculture industries over 4 years. A pilot scheme in 2008 was replaced by a permanent scheme in 2012. To June 2012, just over 1600 placements had been made.[2]

9. Although there are no other visa schemes for unskilled labourers in Australia, migrants on subclass 570–576 international student visas and subclass 417 working holiday visas are able to work in any position in the local labour market for limited periods of time. In reality a good deal of unskilled work is done by migrants under these visa categories.[3]

10. Other comparable countries have dedicated visa schemes for unskilled labourers. In the US, H-1B visas allow migrants to work temporarily in 'specialty occupations'. H-2A visas are available for agricultural workers, and H-2B visas are available for unskilled labourers in non-agricultural work. Employers can only hire foreign workers on H-2A and H-2B visas if they can demonstrate that there are no US workers to take the job.

11. In Canada, there are temporary worker visas available for skilled and unskilled workers. For unskilled workers, employers need to a provide a 'Labour Market Opinion' in order to demonstrate that there is a skills shortage. A number of higher skilled jobs and professions are exempt from this requirement. In addition, there are special programs for Live in Carers and seasonal workers.

12. Neither Canada nor the US rely on a comprehensive list of occupations to distinguish between eligible and ineligible temporary workers.

13. The absence of a dedicated visa scheme for unskilled migrant labour in Australia, outside the Pacific Seasonal Worker Scheme means there has been pressure from Australian employers to interpret 'skilled labour' broadly, so that migrant workers were available to fill as many gaps in the local workforce as possible. As this submission explains, this has led to the scope of 'skilled occupations' being drawn very broadly.

Concerns In Relation To The Current Sub-Class 457 Visa Policy Settings

14. A number of areas of concern present from the current framework for the sub-class 457 visa:

    a. The most pressing area is the scheme's reliance upon a broadly-based occupational list to identify the occupations for which employers can sponsor temporary migrant workers. Crucially, this list is not compiled with reference to skill shortages in the domestic economy. The CSOL currently has 742 occupations on it from ASCO skill levels 1–4. So long as an occupation is on this list, an employer can make a 457 visa

[2] J Garrett and C McGrath, 'Expanded Pacific Worker Program "Benefits" Australia, Pacific', http://www.abc.net.au/news/2012-08-03/an-pacific-seasonal-worker-feature/4174642 (accessed on 15 April 2013).

[3] B Birrell and E Healy, *Immigration Overshoot, CPUR* Research Report, Centre for Population and Urban Research, November 2012, pp 33–35.

nomination and the occupation is deemed to be in shortage. Present on this list is a number of occupations where there is clearly no domestic labour shortfall.

b. In contrast, the Skilled Occupation List (SOL) prepared by AWPA[4] 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 contains occupations which fulfill three criteria. First, the skills needed take a long time to learn; second, there is evidence of high skills matching; and third, the costs of the skills being in short supply are high to the economy or to the respective local communities.[5] The SOL's rigorous requirements are distinct from the more populated CSOL.

c. The liberal definition of a 'skilled' occupation means that the focus of the subclass 457 visa has shifted from its original anchorage as a highly skilled temporary migration visa into a skilled visa for 'general labour supply'. [6] For example, included on the list are Certificate III occupations such as 'cook' and 'flight attendant' for which the only requirement is 2 years of on the job training. It is arguable these are jobs for which unemployed Australian workers can be trained to do.

d. The absence of rigorous labour market testing means that occupations on the CSOL are not proven to be in shortage. The initial manifestation of the 457 visa in 1996 required employers to conduct labour market testing prior to making a sponsorship application. However, this was later abolished as it was seen as being too onerous a requirement upon business. Instead the concept of 'skill thresholds' was introduced. The change was premised on two key assumptions:[7] that the time and costs involved in making a sponsorship application would protect the subclass 457 visa from being used by employers where there was no domestic labour shortfall; and that the high skill level of the migrant worker would prevent their exploitation. However because the CSOL is not finely tuned to domestic skill shortages, the absence of labour market testing means that there is no mechanism for ensuring the sub-class 457 visa meets its objectives.

e. Inherent in the sub-class 457 visa scheme are two conditions which mean sub-class 457 visa workers are in a precarious labour market position: they only have 28 days to find a new employer if they are dismissed; and the interest of many of these workers in obtaining permanent residency means they may be compliant in accepting less than market salary rates for their work.

f. This vulnerability of subclass 457 visa holders is exacerbated by their profile as migrants. The vulnerability of temporary migrant workers in general is well documented.[8] Migrant workers lack the capacity of citizens to participate in the

---

[4] C Evans, Minister for Immigration and Citizenship, Media Release, *New Skilled Occupation List to meet Australia's economic needs,* 17 May 2010. For more information on the work of AWPA see http://www.awpa.gov.au.

[5] OECD, *International Migration Outlook* (2011) 260.

[6] External Reference Group, *In Australia's Interests: A Review of the Temporary Residence Program,* DIMIA, Canberra, June 2002, 37.

[7] These assumptions were explored by the External Reference Group in their report *In Australia's Interests: A Review of the Temporary Residence Program,* DIMIA, Canberra, June 2002, p 46.

[8] See, eg, D Attas, 'The Case of Guest Workers: Exploitation, Citizenship and Economic Rights' (2000) 6 *Res Publica* 73; H Bauder, *Labour Movement: How Migration Regulates Labor Markets*, Oxford University Press, New York, 2006; R Garcia, 'Labor as Property: Guest workers, International Trade and the

political system that determines their work rights, they lack security of residence, and they often face language and cultural barriers which makes it less likely they will know their rights as workers, and more difficult for them to assert them against a local employer.[9]

Reform Of 457 Visas So That They Are Better Targeted

15. The monitoring of abuse of the subclass 457 visa scheme is difficult to achieve. We welcome the recent decision to give the Fair Work Ombudsman (FWO) a greater role in the monitoring of workplaces with 457 visa workers. Nevertheless, to address the concerns raised above, we submit that there should be a more effective mechanism for identifying skill shortages in the Australian labour market, so as to better enable the subclass 457 visa to achieve its objectives.

16. Research conducted by the Center for Comparative Immigration Studies in the United States recognises that most countries lack viable alternatives to guest-worker programs because of long-term demographic trends, and suggests a number of policy principles for making temporary foreign worker programs successful.[10] The Center recommends the implementation of a uniform temporary foreign workers program that can accommodate foreign workers of all skill levels. This is of particular relevance to Australia given the disjuncture between the design of the sub-class 457 visa scheme for skilled migration and the increasing desire of employers to sponsor semi and low-skilled workers.

17. Martin Ruhs of the Centre on Migration, Policy and Society at the University of Oxford argues that countries should take an integrative approach in the design of their migration schemes so that they facilitate the inflow and employment of foreign workers of all skill levels. Such schemes should be designed so that: 'the decisive factor of whether to admit and employ a foreign worker or not should be whether his or her skill level is in demand in the host economy', because 'there is no a priori reason why highly skilled foreign workers are inherently more desirable than low-skilled ones'.[11] A redesign of the sub-class 457 visa so that it allows employers who cannot access local employees in their industry to access overseas labour of all skill levels could potentially ensure greater consistency in entitlements and protection for all temporary migrant workers in Australia, and provide greater responsiveness to business demand.

18. We propose that the 457 visa become two-tiered so as to explicitly accommodate foreign workers of all skill levels via different streams, with each stream having different requirements for visa entrants and sponsors according to their skill level.

    a. The *first stream* would be lightly regulated and facilitate the entry of highly skilled temporary migrant workers. The rationale for the deregulation of this scheme is to enable businesses that have a need for highly skilled workers in occupations which cannot be filled locally to efficiently and expediently access this labour.

    b. The *second stream* would be subject to a higher regulatory burden because its focus would be on allowing employers to nominate for low and semi-skilled workers in areas of labour shortage. The rationale for these tighter controls for low and semi-skilled workers is that highly-skilled workers possess greater capacity to negotiate their own

---

Democratic Deficit (2007) 10 *Journal of Gender, Race and Justice* 27; K Mapes, *Sweet Tyranny: Migrant Labor, Industrial Agriculture and Imperial Politics*, University of Illinois Press, Chicago, 2009.

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

[10] M Ruhs, 'Temporary Foreign Worker Programmes: Policies, Adverse Consequences and the Need to Make Them Work', Working Paper, UC San Diego Center for Comparative Immigration Studies, 2002.

[11] Ibid, pp 59–60.

terms and conditions. As noted in an issues paper released as part of the Deegan Review, there is a particular vulnerability to visa holders at the lower end of the salary and skill scale because they are reluctant to make any complaint which may put their employment at risk, and they possess less labour market power as their skill level is more easily replaceable than for highly skilled workers.[12] The reason these low and semi-skilled workers do not voluntarily return home when faced with exploitation by their sponsor is because of 'the large income inequalities between high and low income countries', which means that many low and semi-skilled migrant workers 'may sometimes be willing to trade economic gains for restrictions in personal rights to an extent that is likely to be considered unacceptable in most liberal democracies'.[13]

19. The first, lightly regulated stream could consist of highly skilled migrant workers (ASCO levels 1–3) and be based upon the existing subclass 457 visa's reliance on the CSOL. The key reform we suggest, however, is that the CSOL be significantly reduced so that it only includes occupations which are *proven* to be in shortage in the domestic economy. The decision as to which occupations should be placed onto the CSOL should be made by AWPA, which currently conducts a similar labour market analysis for determining which occupations should be placed on the SOL – a list used for permanent residency purposes.[14] If an occupation is not on the revised CSOL, then an employer seeking to sponsor an overseas migrant worker would need to prove that they have advertised the position for 3 months at the market salary rate and been unsuccessful in recruiting an Australian worker to do the job. If the employer can meet this test, then a sponsorship application can be made for the same job title and salary rate as provided for in the advertisement. This application would occur via the labour agreement pathway for the subclass 457 visa.[15]

20. The *second*, more heavily regulated stream could consist of low and semi-skilled workers (ASCO levels 4–9) and be more tightly controlled than the first stream as to the obligations on sponsors and the expectations upon visa entrants.

21. For stream two, when an occupation is not on the CSOL, then an employer seeking to sponsor an overseas migrant worker would need to prove that they have advertised the position for 6 months at the market salary rate and been unsuccessful in recruiting an Australian worker to do the job. If the employer can meet this test, then a sponsorship application can be made for the same job title and salary rate as provided for in the advertisement. This application would again occur via the labour agreement pathway for the subclass 457 visa.

22. Ensuring that the skill shortage is genuine helps protect domestic workers' rights to preferential access to the Australian labour market. Stream two could also be designed to increase the labour market mobility of low and semi-skilled workers. Under the current system, visa holders have 28 days to find a new sponsor or to apply for another kind of visa if they are dismissed from their employment or if they wish to find a new job. This is a particular source of vulnerability for low and semi-skilled workers because it effectively ties the worker to a specific employer and if a worker wishes to escape an exploitative working arrangement, the worker must find a new job before leaving the existing one (otherwise, they risk jeopardising

---

[12] *Visa Subclass 457 Integrity Review Issues Paper #3: Integrity/Exploitation*, Department of Immigration and Citizenship, Canberra, September 2008 p 12.

[13] M Ruhs, 'The Potential of Temporary Migration Programmes in Future International Policy', Global Commission on International Migration, 2005, p 14; and see further A Reilly, 'The Ethics of Seasonal Labour Migration' (2011) 20 *Griffith Law Review* 127.

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

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

their right to stay in Australia). For low and semi-skilled workers who are usually in less labour market demand because of their lower qualifications, this places them in an extremely precarious position. This could perhaps be remedied by stream two allowing low and semi skilled workers to have 90 days to find a new sponsor, rather than the current 28 day limit.

23. Another issue relevant to the design of stream two is whether it permits foreign migrant workers who are low or semi-skilled to be 'permanently temporary'. According to Mares:

> it is clearly undesirable for this situation to continue indefinitely, otherwise we create a class of residents who are 'permanently temporary' — who live in Australia, pay Australian taxes and are subject to Australian laws but are excluded from the social security net and the domestic franchise.[16]

The 457 visa is often used as a gateway to permanent migration via Australia's two-step migration process. Visa holders are able to apply for permanent residency with the support of their employer or to make an independent application. The Deegan Review noted that visa holders who have aspirations towards permanent residency are particularly 'vulnerable to exploitation as a consequence of their temporary status'.[17] While this is currently a problem for all 457 visa holders, it is particularly acute for low and semi-skilled workers because they have no option of making an independent application and are completely dependent upon employer sponsorship. The limited range of professions on the SOL makes it much harder for tradespeople and other low-skilled 457 workers to make an independent application for permanent residency. If low and semi-skilled workers wish to settle permanently in Australia, they are entirely reliant upon sponsorship from their employer, making them vulnerable to pressure to perform unsafe work, accept low wages or suffer sub-standard conditions without complaint.

24. One way to remedy this situation is to limit the length of time that a person can work on a 457 visa. After this time, a person must either return home or be offered permanent residence. Justice requires that once a person has made a long-term contribution to the nation, this contribution should be recognized through the conferral of membership.[18] What length of contribution is required before this conferral is appropriate is not clear. The Deegan Report suggested a worker should remain temporary for a maximum of 8 years. From other perspectives, this might be regarded as too long to wait.[19] One indicator of what is considered an appropriate length of residence to lead to membership is the length of time a person must be a permanent resident before being able to apply for citizenship. For most permanent residents that is 4 years. Accordingly, we suggest that for migrant workers in stream two, 457 visas should be capped at 4 years with no provision for renewal, or alternatively that an alternative pathway to permanent residency be made available for these low and semi-skilled workers, thus ensuring that this stream does not become a pool of 'permanently temporary' migrant workers. For workers in stream one, the cap should be 8 years, recognising their relatively stronger position in the labour market, and that stream one 457 visa holders have other pathways to permanent residence.

25. An additional safeguard within stream two could be that these occupations are more closely monitored by a specialist team of the FWO's workplace inspectors to ensure that the terms of

---

[16] P Mares, 'The permanent shift to temporary migration', Inside Story, 17 June 2009, at <http://inside.org.au/the-permanent-shift-to-temporary-migration.> (accessed 10 January 2010).

[17] B Deegan, Visa Subclass 457 Integrity Review Issues Paper #3 Integrity/Exploitation, Department of Immigration and Citizenship, Canberra, September 2008.

[18] J Carens, 'Migration and Morality: A Liberal Egalitarian Perspective' in Brian Barry and Robert Goodin(eds), *Free Movement: Ethical Issues in the Transnational Migration of People and Money* (1992).

[19] See eg W Barbieri, *Ethics of Citizenship: Immigration and Group Rights in Germany* (1998); M Walzer, *Spheres of Justice* (1983), p 60.

the visa's approval are being adhered to, and to ensure that market salary rates and conditions are being paid.

26. For both streams, there should be provision for a system of regional exceptions on the CSOL. This would allow the AWPA to include occupations on the list that are in shortage in a particular geographical area. Employers in this area could then apply for a subclass 457 visa worker. The Deegan Review advocated that regional nuances in skill shortages be included on these lists, recognising that 'whilst a particular trade may be in short supply in the north-west of Western Australia, there may be unemployment in the same trade in the outer suburbs of Sydney'.[20]

27. The most obvious objection to the two-stream 457 visa model proposed above is that it would make the burden of sponsorship too heavy for employers using this route to fill low and semi-skilled labour shortages. In our view, that is an acceptable price to pay for seeking the right kind of balance. We submit that this regulation is necessary to ensure that employers seeking to access non-local low and semi-skilled labour are able to prove that there is a genuine need. Furthermore, the above requirements do nothing more than ensure that 457 visa holders are being used in areas of genuine skill shortage, and guarantee that their remuneration and conditions of employment are on a par with Australian workers. This prevents the creation of a two-tier labour market and reduces incentives for unscrupulous employers to avoid maintaining Australian labour market standards by relying upon temporary migrant workers.

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