Centre for Employment and Labour Relations Law

The University of Melbourne

March 2011

Working Paper No. 50

TEMPORARY MIGRANT LABOUR IN AUSTRALIA: THE 457 VISA SCHEME AND CHALLENGES FOR LABOUR REGULATION

Joo-Cheong Tham and Iain Campbell

ISSN 1321-9235

The Centre for Employment and Labour Relations Law gratefully acknowledges the support of the following major legal practices and organisations:

CONTENTS

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

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

Joo-Cheong Tham[*] *and Iain Campbell*[**]

INTRODUCTION

Temporary migrant labour is increasing in significance in many industrialised countries, including Australia. More than a decade ago, a commentator observed that there was a 'quiet revolution' occurring in relation to the admission of temporary migrant workers to Australia.[1] Eight years later, a leading demographer considered the shift from permanent to temporary migration as probably the 'greatest change' made to Australian immigration in the last decade.[2] That this change is far from transitory is captured in the suggestion that there is now a 'permanent shift to temporary migration'.[3]

Temporary migrant labour can be understood as paid work undertaken by persons who are in the host country under an arrangement for temporary residence. This definition would exclude work performed by those who are legally entitled to reside permanently in the host country, such as citizens and permanent residents. Temporary migrant labour in this definition may include forms of illegal work, but in most cases it involves legal activity by persons who have been given formal rights both to reside temporarily in the receiving country and to engage in paid work during their stay. This includes persons whose entry is primarily for the purpose of study or holidays, but the core group is made up of persons whose entry is primarily for the purpose of employment. In Australia these persons are labelled 'temporary business entrants', most of whom are regulated by the Subclass 457 Business (Long Stay) visa program ('the 457 visa scheme'). It is this program that forms the focus of this paper.

Since its inception, the 457 visa scheme has undergone considerable change (change that we detail later in the paper). It is convenient, however, to outline the key features of the scheme. The scheme is an employer-sponsored program - in order to successfully apply for a 457 visa, a worker needs to be nominated by an employer. There are no limits or quotas applying to the number of 457 visas being issued. These visas can last from three months to four years and can also be renewed (repeatedly). 457 visa workers, known as primary visa-holders, are entitled to bring members of the immediate family (secondary visa-holders). They also can transfer employers provided that the new employer meets the relevant migration requirements. Moreover, there is no restriction on these workers applying for permanent residence.

---

[*] Centre for Employment and Labour Relations Law, Melbourne Law School, University of Melbourne. Thanks to Jesse Winton for his exceptional research assistance.
[**] Centre for Applied Social Research, RMIT University.
[1] M Crock, *Immigration and Refugee Law in Australia* (Federation Press, 1998) 92.
[2] G Hugo, 'Globalization and Changes in Australian International Migration' (2006) 23(2) *Journal of Population Research* 107, 110.
[3] P Mares, *The Permanent Shift to Temporary Migration* (17 June 2009) Inside Story <http://inside.org.au/the-permanent-shift-to-temporary-migration/>.

There is considerable controversy surrounding this scheme. Critics argue that the scheme is too heavily oriented to the interests of employers and neglects the interests of local workers and the migrant workers themselves. They suggest that it represents a neo-liberal commitment to labour market deregulation, which is increasingly inappropriate for a modern society. Union officials point to several cases of abuse, including underpayments and unsafe working conditions, derived not only from illegal practices but also from legal arrangements that allow employers to pay 457 workers less and impose more onerous working conditions than would be the case for local workers.[4] Sutton refers to the looming danger of a two-track model of the labour market, as seen in its most extreme form in the Gulf States, while Bissett and Landau point to the risk of creating a tier of second-class workers.[5]

This paper examines the challenges posed by the 457 visa scheme for labour regulation. It begins by situating the growth of the scheme in the context of the general increase in temporary migrant workers before examining the changes within the scheme itself.

Programs like the 457 visa scheme clearly pose sharp challenges for regulation; even amongst migrant workers, this group experiences particular vulnerability because of their temporary residential status.[6] Does the 457 visa succeed in balancing competing interests and goals? This paper describes the changing regulation of the scheme and then assesses it in terms of three themes: addressing skill shortages, the principle of equal and not less favourable treatment; and the principle of effective enforcement. It concludes that, despite changes made since the election of the federal Labor government, the scheme is still wanting on all three criteria.

457 visa workers and temporary migrant labour in Australia

Temporary migrant labour in the broad sense, as paid work undertaken by persons who are in the host country under an arrangement for temporary residence, appears in different forms.[7] The three main categories in Australia are working holiday makers, overseas students and temporary business entrants.[8] In the first two cases, temporary entry to Australia is not officially for the purposes of employment (but rather for holidaymaking and study respectively), but migrants in these categories are

[4] For example, J Sutton, 'Asia-Pacific Labour Mobility and the Two Track Labour Market' (2008) 16 *People and Place* 85; M Bissett and I Landau, 'Australia's 457 Visa Scheme and the Rights of Migrant Workers' (2008) 33 *Alternative Law Journal* 142; Australian Council of Trade Unions (ACTU), *Response to Issues Paper #3: Integrity/ Exploitation* (ACTU, 2008).

[5] Sutton, above n 4, 89–90; Bissett and Landau, above n 4, 145.

[6] International Labour Organisation (ILO), *Towards a Fair Deal for Migrant Workers in the Global Economy* (International Labour Office: 2004) 89–90; ILO, *International Labour Migration: A Rights-Based Approach* (International Labour Office: 2010) 168–9.

[7] 'Temporary' and 'permanent' are usually distinguished according to the terms of the visa rather than the stay intentions of the worker. However, even in this definition, the boundary between the two can be blurred, since people may jump from one status to another. Indeed, this is common in Australia, mainly in the form of temporary visa holders applying for permanent residency during their stay.

[8] We do not include New Zealanders, who are permitted to enter Australia and engage in employment without any visa restrictions. This group is important for calculation of net flows, but it clearly differs from temporary migrant groups from the point of view of labour and labour regulation. This is a group that stands closer to the categories of permanent settlers, since they have few restrictions on their participation in Australian society and can quickly access most of the rights and benefits available to permanent residents and citizens.

nevertheless permitted, within certain limits, to engage in paid work during their stay. Because the permitted quantum of employment is generous, these groups can engage in a substantial amount of paid labour, amplified in cases where workers are willing or need to breach the conditions of their visa. This is perhaps particularly true with international students, whose labour has become very important in urban centres in industries such as hospitality and parts of retail. Working holiday makers are important for seasonal harvesting and tourism.

In contrast to working holiday makers and overseas students, the admission of 'temporary business entrants' is *for the specific purpose of employment*. Some categories under this general heading are well-established and familiar, for example, short-stay entries for purposes such as concert tours and long-stay entry visas for executives who are transferred within multi-national firms.[9] More recently, a new program for seasonal work in horticulture, the Pacific Island Seasonal Worker Pilot Scheme, has been introduced. But the major category, and the one that we focus on in this paper, is the 457 visa scheme (described below).

Australia is widely regarded as a country of permanent settler migration. However, in recent years permanent migration has been supplemented and even overshadowed by the rapid expansion of temporary migrant labour. This is a little-noticed change, perhaps because the term 'temporary' gives a misleading impression that the phenomenon is only marginal. Nevertheless, temporary migrant workers can acquire a permanent presence, for example through renewal of visas or conversion to permanent status. Moreover, irrespective of the length of stay of the individual worker, reliance on temporary migrant *work* can become a permanent feature of labour markets. Also contributing to the neglect of the topic may be the fact that the labour dimension is often swallowed up in the broader discussion of temporary entry, for example for the purposes of tourism or tertiary study. As Collins remarks, the expansion of temporary migrant labour is a change that 'requires a reassessment of the traditional categorisation of Australia as primarily a country of settler immigration'.[10]

The current size of the temporary migrant labour workforce is substantial. At the end of June 2009, there were more than 900,000 people in Australia on Visitor and Temporary Residence visas. This figure excludes New Zealand citizens. Almost nineteen percent were visitors (mainly tourists, though also included were some short-stay business visitors). A further 11.2 percent (=102,319) were working holiday makers, here for a few months or perhaps longer. The biggest group, amounting to 42.1 percent of the total (=386,523), were overseas students. The group that we are most interested in – those on long-stay business visas – contributed a further 15.6 percent (=142,669).[11]

---

[9] For information on these other business visas, see 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) 23ff.

[10] J Collins, 'Globalisation, Immigration and the Second Long Post-War Boom in Australia' (2008) 61 *Journal of Australian Political Economy* 244, 262; see also G Hugo, 'Temporary Migration and the Labour Market in Australia' (2006) 37 *Australian Geographer* 211; Hugo, above n 2; Mares, above n 3.

[11] Department of Immigration and Citizenship (DIAC), *Population Flows: Immigration Aspects 2008–09* (2010); see DIAC, *Immigration Update 2008–2009* (2010).

This gives us a rough idea of the likely current size of the temporary migrant labour workforce. The figure of over 900,000 can be compared with the size of the total workforce (employed persons) in June 2009 of 10,916,600.[12] It is true that not all those listed above will be working or seeking work. Visitors are generally not engaged in paid work, with the exception of short-stay business entrants and some on tourist visas who work illegally. Overseas students here for full-time study are required to demonstrate that they have sufficient funds for living expenses. But they are allowed to work up to 20 hours per week during semester, and longer at other times, and it is likely that the majority do at least some paid work, often in low-skilled jobs. Working holiday makers can work for up to six months during their stay, and most will take advantage of this opportunity to work, generally in low-skilled jobs.[13] Those on long-stay business visas are here primarily to work and at any one time almost all will be in paid employment. In short, many temporary entrants are entitled to be engaged in paid work, and it seems likely that at any one point in time many will be in paid work. As a result, the impact of temporary migrants on labour markets is likely to be strong.

All categories of temporary migrant labour have expanded strongly in recent years. The growth in 457 visa holders can be measured through the figures for visa grants (see Table 1). These increased steadily from 1997-98 (16,550 visas granted to primary applicants) to 2004-05 (27,350 primary grants), but in the following three years the number more than doubled, before falling back slightly in the most recent financial year. The Global Economic Downturn (GED) has clearly had some effect, though it seems to have led to only a slight hiccup in the trajectory of growth.

[12] Australian Bureau of Statistics (ABS), *Labour Force, Australia* (2009) Time Series Spreadsheet, Table 03, Labour Force Status by Sex, cat no 6202.0.

[13] A recent report suggests that the average and median lengths of stay for working holiday makers in Australia is eight months and that more than two thirds (69%) work during their holiday: Y Tan, S Richardson, L Lester, T Bai and L Sun, *Evaluation of Australia's Working Holiday Maker (WHM) Program* (National Institute of Labour Studies, 2009).

Table 1: Primary and secondary 457 visa grants (1997-2009)

Program year	Primary	Secondary	Total
1997–98	16 550	14 330	30 880
1998–99	16 080	13 250	29 320
1999–00	17 540	13 530	31 070
2000–01	21 090	15 810	36 900
2001–02	18 410	15 100	33 510
2002–03	20 780	16 020	36 800
2003–04	22 370	17 130	39 500
2004–05	27 350	21 250	48 590
2005–06	39 530	31 620	71 150
2006–07	34 170	30 290	64 460
2007–08	58 050	52 520	110 570
2008-09	50 660	50 620	101 280

Source: Figures up to 2006-07 are from Joint Standing Committee on Migration, above n 9, p 15; figure for 2007-2008 is from DIAC, below n 22, while the figure for 2008-2009 is from DIAC, below n 15.

Perhaps the best measure is the expansion in the number of 457 visa-holders. The stock figure for primary visa holders has risen rapidly from an estimated 31,471 at the end of June 2005[14] to a peak of 83,130 at the beginning of 2009.[15] It has fallen back since this time, first to 77,330 in June 2009 and now, in May 2010 to 69,510. If we add together primary and secondary grant holders, the stock figure has almost doubled from 78,340 in June 2006 to 142,669 in June 2009.

It should be noted that granting a 457 visa does not necessarily mean recruitment from overseas. Using data from 2000-2001, Kinnaird suggests that 'the majority of 457 visas have been granted to foreign nationals who are already in Australia on other temporary visas – many already working for their 457 sponsoring employer'.[16] These could be tourists or overseas students. As the program has expanded, the proportion granted to onshore applicants seems to have fallen below 50 percent, but it remains substantial.[17]

[14] B Kinnaird, 'Current Issues in the Skilled Temporary Subclass 457 Visa' (2006) 14 *People and Place* 49, 55.

[15] DIAC, *Subclass 457 Business (Long Stay), State/Territory Summary Report*, Financial Year to 30 June 2009, Report Id: BR0008 (2009).

[16] Kinnaird, above n 14, 58.

[17] This is one aspect of the broader phenomenon of on-shore visa grants. An equally important aspect concerns the flows at the other end, whereby 457 visa holders apply for permanent residency during their period of temporary stay. In a 2003-2004 survey about one third of 457 visa holders had already applied for permanent residence and another 48 percent intended to apply, with only 16 percent indicating that they had no intention of applying for permanent residence: S-E Khoo, G Hugo and P McDonald, 'Which

Most primary grant holders are men, but a significant minority – around one third in 2004 – are women, often employed in Australia as nurses. The majority of primary grant holders are under 35.[18] In its early form the 457 visa scheme was biased to managerial and professional workers, often from advanced industrial countries such as the UK, Japan and the US.[19] A bias to skilled workers remains but it has weakened in recent years. The latest expansion is characterised by two main features – an increased proportion of 457 visas granted for trades rather than professional occupations and an increased proportion of participants from developing countries. The main trades occupations are chef, cook, welder, metal fabricator and motor mechanic.[20] Grants for occupations below the semi-professional level (ie. Australian Standard Classification of Occupations (ASCO) groups 4 to 9) accounted for 18.6 percent of all 457 visa grants in 2007-2008.[21] The UK and the US remain important source countries, but they are now matched or outpaced by India, the Philippines and China.[22] These changes appear to be accompanied by changes in the reasons that workers participate in the scheme – with even more emphasis on financial benefits and the opportunity to apply for permanent residency – and perhaps also in the reasons that employers use the scheme.[23]

The De/regulation of the 457 Visa Scheme

Temporary migrant schemes: Purposes and Regulatory Methods

Temporary migrant schemes tend to have three key purposes.[24] The central aim - the *raison d'être* of such schemes - is to address labour shortages, in the case of 457 visa scheme, skill shortages. The secondary purposes are usually to protect the employment opportunities and working conditions of local workers and to protect the working conditions of the migrant workers.[25]

The relationship between these purposes and, in particular, the extent to which they can be reconciled depends on the design of the temporary migrant schemes and, importantly, broader labour regulation. The goals of addressing labour shortages and

---

Skilled Temporary Migrants Become Permanent Residents and Why?' (2008) 42 *International Migration Review* 193, 204–5.

[18] Ibid 205.

[19] S-E Khoo, C Voigt-Graf, G Hugo and P McDonald, 'Temporary Skilled Migration to Australia: The 457 Visa Sub-Class' (2003) 11(4) *People and Place* 27, 38.

[20] P Toner and R Woolley, 'Temporary Migration and Skills Formation in the Trades: A Provisional Assessment' (2008) 16 *People and Place* 47.

[21] Visa Subclass 457 Integrity Review, *Final Report*, Commonwealth of Australia (October 2008) 22 ('Deegan Report').

[22] DIAC, *Subclass 457 Business (Long Stay), State/Territory Summary Report*, Financial Year to 30 June 2008, Report Id: BR0008 (2008).

[23] S-E Khoo, P McDonald, C Voight-Graf and G Hugo, 'A Global Labor Market: Factors Motivating the Sponsorship and Temporary Migration of Skilled Workers to Australia' (2007) 41 *International Migration Review* 480. The majority of responses in the 2003-2004 employer survey cited skill shortages as the main reason for participating in the 457 visa scheme. But a minority of employers pointed to advantages such as higher control, greater commitment from workers and lower cost: at 495–8, 505.

[24] In a minority of cases like the Pacific Island Seasonal Worker Pilot Scheme, the program also has the purpose of promoting the development of the source country: see DIAC, *Pacific Seasonal Worker Pilot Scheme* <http://www.immi.gov.au/skilled/pacific-seasonal-worker.htm>. This development purpose, however, is not applicable to the 457 visa scheme.

[25] See also ILO, *International Labour Migration*, above n 6, 164.

protecting the employment opportunities and working conditions of local workers can come into conflict: the supply of temporary migrant workers will inevitably impact upon the employment opportunities and working conditions of Australian workers engaged in similar industries. Whether these two purposes can be reconciled depends on the definition of labour shortages and how such shortages are demonstrated. Is employer say-so sufficient or are there strict evidential requirements? At what level of wages and conditions are the shortages to exist? If the requisite level is placed at the lower end, there is then the risk of migrant workers underpricing local workers, thereby, displacing them.

There is also a close relationship between protecting local workers and protecting the working conditions of migrant workers. Migrant workers will be employed in the same labour market as local workers and, hence, the level of their working conditions will impact upon employment opportunities and working conditions of local workers. If the working conditions of migrant workers are inferior to those of local workers there is again a risk that migrant workers will underprice local workers. Whether this risk eventuates depends on the extent to which the working conditions of migrant workers are adequately protected so as to be on par with working conditions of comparable local workers. Here, regulation imposed by the temporary migrant scheme - whether it directly regulates the working conditions of migrant workers - and broader labour regulation is relevant.

These purposes can be pursued in a range of ways and the regulatory methods can be roughly classified into three categories. First, there can be scheme-wide requirements like caps or quotas on the number of temporary migrant workers and imposts on hiring these workers.[26] Second, there are requirements applying to the sponsoring employer. This can include 'standing' requirements – requirements that relate to the status and record of the employing organization – like its record in training and employing local workers and various probity requirements. Employers are also usually required to demonstrate that the position/job being sponsored meets various criteria, for example, labour market testing requirements, skills and language requirements and minimum levels in terms of wages and conditions. Third, there are requirements that apply to the aspiring migrant worker. Foremost, the worker needs to have a sponsoring employer who has met the necessary requirements. The worker might also need to meet the position/job requirements that apply to the sponsoring employer. In addition, the worker may be required to demonstrate certain personal attributes, for example, possession of the relevant skills and requisite language literacy.

The next section explains the changing contours of the 457 visa scheme, charting how the scheme has developed under both the federal Coalition and the federal ALP governments. These changes are further analysed according to the concepts of 'regulation' and 'deregulation'. The preceding discussion of the various purposes and regulatory methods of temporary migrant schemes allows a more grounded discussion of whether the 457 visa scheme is 'regulated' or 'deregulated'. This should not be seen as a simple quantitative question (how much or how little regulation?) but rather as a

[26] A sophisticated system of foreign worker levy rates applies, for instance, in Singapore: see G Hugo, 'Best Practice in Temporary Labour Migration for Development: A Perspective from Asia and the Pacific' (2009) 47(5) *International Migration* 23, 59.

more qualitative question that is to do with the extent to which regulation effectively serves its purposes. Viewing the question in this way avoids facile assumptions that more regulation is good (or bad) or conversely, less regulation is good (or bad). Such assumptions fail to recognise that the crucial issue here is one of effectiveness.

Assessment of effectiveness may involve consideration of trade-offs, if regulation is seen as animated by multiple – and at times, competing – objectives. We draw attention to three central purposes of temporary migrant labour schemes. Similarly, in their overview of the regulatory framework governing immigrant labour in Australia, O'Donnell and Mitchell identified two broad purposes of such regulation: 'a clear protective purpose, concerned with the maintenance of labour standards for domestic workers' and a 'facilitative purpose' directed at matching migrant skills to labour market demand.[27] Crock and Friedman have also argued that Australian immigration law as it impacts upon the labour market is informed by 'two imperatives that have occasionally come into conflict with one another': 'the need to meet the requirements of an emergent community for both skilled and unskilled labour' and 'the fostering – through protection where necessary – of a local work force'.[28]

The 457 Visa Scheme under the Coalition Government (1996-2007)

Since its introduction in August 1996,[29] the 457 visa scheme has had various pathways for an employer to sponsor a 457 worker. The original had eight pathways[30] while the current scheme has six.[31] The key pathways, at all times, have been through business sponsorship by Australian-based businesses and through Labour Agreements, and it is these two main pathways that form the focus of this paper.

Deregulatory in its inception

The history of the 457 visa scheme dates back to the last days of the previous federal Australian Labor Party (ALP) government (1983-1996). A Committee Report into the Temporary Entry of Business People and Highly Skilled Specialists, chaired by Neville Roach, then Managing Director of Fujitsu Australia, was tasked to report

> on the operation and effectiveness of policies and procedures governing the temporary entry into, and further temporary stay in, Australia of business personnel against the background of the increasing globalisation of business,

[27] Anthony O'Donnell and Richard Mitchell, 'Immigrant Labour in Australia: The Regulatory Framework' (2001) 14 *Australian Journal of Labour Law* 269, 301–2.

[28] Mary Crock and Leah Friedman, 'Immigration Control and the Shaping of Australia's Labour Market: Conflicting Ideologies or Historical Imperatives?' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (Federation Press, 2006) 322, 322–3.

[29] *Migration Regulations (Amendment) Act 1996* (Cth).

[30] The eight pathways were Labour agreements, RHQ agreements, sponsorship by Australian businesses (key activities), sponsorship by Australian businesses (non-key activities), sponsorship by overseas businesses, independent executives, service sellers and persons accorded certain privileges and immunities: *Migration Regulations 1994* (Cth) sch 2, Subclass 457, cl 457.223 (as in force on 1 August 1996).

[31] The current six pathways are Labour Agreements, standard business sponsorships, independent executives, service sellers, persons accorded certain privileges and immunities and IASS agreements: *Migration Regulations 1994* (Cth) sch 2, Subclass 457, cl 457.223 (as in force on 5 July 2010).

> and Government policy to open the economy up to greater international competition.[32]

Handing down its report in 1995, the Committee found the current procedures to be overly cumbersome and recommended a liberalisation of migration procedures for the purpose of facilitating entry of key business personnel into Australia, a measure that it considered necessary for Australia to remain internationally competitive.[33] Central to the Committee's report was the need to address skill shortages in Australia, which were seen as an inevitable outcome of the process of countries developing their own comparative advantage:

> 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. When world trade in service is based on different countries developing specialised skills in different areas, it is not realistic for Australia to attempt to develop specialised skills in all areas. Thus there will be of necessity a need for Australia to import certain skills, in much the same way as Australia is developing skills to export.[34]

In 1996, the newly-elected Coalition government formed by the Liberal and National Parties adopted the thrust of the Roach report by introducing the 457 visa scheme.[35]

With the pathway of business sponsorship, there were (and still are) three regulatory phases: approval of the employer as a business sponsor, approval of the employer's nomination of the position (or job), and the issuing of a 457 visa to the worker.[36]

Businesses could be approved as a standard business sponsor or a pre-qualified business sponsor.[37] For both types of sponsors, the key requirements included a cluster of 'standing' requirements: the sponsoring business (or related company) had to be the direct employer of the visa applicant;[38] the sponsor was to have a satisfactory record or demonstrated commitment towards training Australian workers;[39] and the sponsor was to meet various probity requirements.[40] The sponsoring business also had to demonstrate that it would introduce or utilise in Australia new or improved technology or business skills (whether or not resulting from the employment of the 457 visa

---

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

[33] Ibid 4.

[34] Ibid 19.

[35] *Migration Regulation (Amendment) Act* 1996 (Cth).

[36] See generally Crock, above n 1, 116–22.

[37] *Migration Regulations 1994* (Cth) reg 1.20C(1) (as in force on 1 August 1996). There were higher application and renewal fees for pre-qualified business sponsorships: regs 1.20C(3), 1.20E(2) (as in force on 1 August 1996). A pre-qualified business sponsorship, however, lasted longer than a standard business sponsorship – 24 months compared with 12 months for a standard business sponsorship – and there was no restriction on number of nominations that can be made by pre-qualified business sponsors and, further, no fees to be paid for such nominations: regs 1.20D(5)–(6), 1.20G(3) (as in force on 1 August 1996).

[38] The requirement of being a 'direct employer' requires the 457 worker to be an employee at law – that is, engaged under a contract of service – of the sponsoring business: *C H A Agencies v Minister for Immigration* [2004] FMCA 279, [21].

[39] For tribunal and court decisions involving this requirement, see *Review Applicant: Mr Sang Sook Park Visa Applicant: Mr Kyun Hee Lee* [1998] IRTA 11823; *Review Visa Applicant: Jin Gui Lin* [1998] IRTA 11964; *Chiang v Minister for Immigration and Multicultural Affairs* [2001] FCA 542; *Huo v Minister for Immigration & Multicultural Affairs* [2002] FCA 617; *Hua Cheng Trading Pty Ltd v Minister for Immigration* [2005] FMCA 119.

[40] *Migration Regulations 1994* (Cth) reg 1.20(2)(b)(iii)–(iv), (c)(ii), (d)–(e) (as in force on 1 August 1996).

worker).[41] Further, it had to show that employment of the 457 visa worker in its business would be of benefit to Australia, in that it would result in at least one of following: the creation or maintenance of employment for Australians;[42] the expansion of Australian trade in goods or services; the improvement of Australian business links with international markets; or a contribution to the competitiveness within sectors of the Australian economy.[43]

The second regulatory phase, once a business had been approved as a standard business sponsor or a pre-qualified business sponsor, was for the business to nominate a business activity in which the 457 visa worker would be engaged. The requirements that attended this stage depended on whether the nominated activity was a 'key activity', meaning an activity 'essential to the business operations of the employer' that required either 'specialist or professional skills' or 'specialised knowledge of the business operations of the employer'.[44] If a business sponsor nominated a 'key activity', they did not face any requirements beyond the fact of nomination - the Immigration Minister was required to approve such a nomination if had been made according to the proper procedures.[45] Nominations of activities that were *not* a 'key activity', on the other hand, were subject to a labour market testing requirement if the proposed employment was to last more than 12 months. The Immigration Minister could also impose such a requirement on nominations involving employment lasting for a shorter period.[46] The labour market testing requirement was only met when the sponsoring employer could demonstrate to the Minister that 'a suitably qualified Australian citizen or Australian permanent resident is not readily available to fill the position to which the nominated activity relates'.[47]

The key requirements of the third regulatory phase in relation to business sponsors – the issuing of the visa to the 457 worker – largely paralleled those applying to the previous stages: the applicant worker's employer was to be either a standard business sponsor or a pre-qualified business sponsor; and there was to be an approved nomination of the business activities with the applicant as nominee.[48] For sponsorship involving activities that were not a 'key activity', there were additional requirements. Foremost, the applicant was to demonstrate that s/he had the skills necessary to perform the activity if the proposed employment was to last more than 12 months,[49] and that the position was not 'created only for the purposes of securing the entry of the applicant to Australia'.[50] An issued visa can last from three months to four years.[51]

---

[41] Ibid reg 1.20D(c)(i) (as in force on 1 August 1996).
[42] See *Shead v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 479.
[43] *Migration Regulations 1994* (Cth) reg 1.20D(2)(a) (as in force on 1 August 1996).
[44] Ibid reg 1.20B (as in force on 1 August 1996).
[45] Ibid reg 1.20H(2) (as in force on 1 August 1996).
[46] Ibid regs 1.20G(4), 1.20H(3) (as in force on 1 August 1996).
[47] Ibid reg 1.20H(3) (as in force on 1 August 1996).
[48] Ibid sch 2, Subclass 457, cl 457.223(4)(b)–(d), (5)(b)–(d) (as in force on 1 August 1996).
[49] Ibid sch 2, Subclass 457, cl 457.223(5)(f) (as in force on 1 August 1996). This requirement may be imposed on sponsorship involving a 'key activity' when the proposed employment is to last more than 12 months: sch 2, Subclass 457, cl 457.223(4)(e)(ii) (as in force on 1 August 1996).
[50] Ibid sch 2, Subclass 457, cl 457.223(5)(e) (as in force on 1 August 1996).
[51] Ibid sch 2, Subclass 457, cl 457.511 (as in force on 1 August 1996).

The requirements that applied to the Labour Agreements pathway were principally governed by the terms of such agreements. A Labour Agreement was defined as a 'formal agreement entered into between the (Immigration) Minister, or the Education Minister, and a person or organisation in Australia under which an employer is authorised to recruit persons (other than the holders of permanent visas) to be employed by that employer in Australia'.[52] Like business sponsors, employers who were parties to such agreements had to nominate a business activity in which it proposed to employ the 457 visa worker.[53] Provided that such activity fell within the terms of the Labour Agreement, there were no further requirements, as the Immigration Minister was required to approve the nomination if it had been made according to the proper procedures.[54] As with the issuing of the visa to the 457 worker, the requirements corresponded to those that previously applied to the sponsoring employer: the sponsoring employer was to be a party to a Labour Agreement; the specified activity was to be within the terms of the agreement; and there was to be an approved nomination. The Immigration Minister also had to be satisfied that skills and experience of the worker/applicant were suitable for performing the specified activity and that relevant requirements of the Labour Agreement had been met.[55]

The 457 scheme, together with the 456 (Business Short Stay) visa sub-class, replaced the previous seventeen visa sub-classes.[56] According to Crock, the 'most striking aspect of the regime … is the emphasis that is placed on the needs and wishes of employers'.[57] Kinnaird similarly describes the 1996 introduction of the 457 visa scheme as 'a radical deregulation of Australia's temporary entry regime'.[58]

The deregulatory thrust of the original scheme was reflected by the mechanisms in place to ensure that the scheme addressed skill shortages, its main rationale. With nominations involving 'key activity', employer say-so was pretty much decisive in demonstrating that there were such shortages - it was only nominations that did not involve a 'key activity' that were subject to a labour market testing requirement (if the proposed employment was to last more than 12 months). Further, the scheme had no measures like caps/quotas or additional imposts for hiring 457 workers.

The deregulatory character of the original 457 visa scheme is even more apparent if we consider the other purposes associated with such schemes. Besides the (narrow) labour market testing requirement, the original scheme did not impose any specific regulation to protect either the employment opportunities or working conditions of Australian workers. Nor was there any specific regulation to protect the working conditions of the 457 visa workers; in particular, the scheme did not impose any minimum wage requirement nor did it stipulate any conditions regarding the other working conditions of the 457 visa workers. Both were left to more general labour regulation.

---

[52] Ibid reg 1.03 (as in force on 1 August 1996).
[53] Ibid reg 1.20G(1) (as in force on 1 August 1996).
[54] Ibid reg 1.20H(2) (as in force on 1 August 1996).
[55] Ibid sch 2, Subclass 457, cl 457.223(2) (as in force on 1 August 1996).
[56] See M Crock, 'Immigration and Labour Law: Targeting the Nation's Skills Needs' in A Frazer, R McCallum and P Ronfeldt (eds), 'Individual Contracts and Workplace Relations' (Working Paper No 50, ACCIRT, 1997) 123, 140.
[57] Ibid 123, 141.
[58] Kinnaird, above n 14, 50.

Deregulating the 457 scheme: The 2003 amendments

Under the Coalition government, the most important changes to the 457 visa scheme took place through the *Migration Amendment Regulations 2003 (No 5)* (Cth). The result was to greatly liberalise the provisions relating to business sponsors. Instead of there being two classes of business sponsors – standard business sponsors and pre-qualified business sponsors – these changes merged them into the single category of standard business sponsorship.[59] The provisions relating to the approval of nominations of business activities were overhauled, with the distinction between 'key' and other activities abolished, together with the labour market testing requirement for the latter. In its place were various new requirements, two of which were most important: the tasks of nominated activity had to correspond with tasks of an occupation specified by the Immigration Minister in a Gazette notice;[60] and the 457 visa worker had to be paid a salary specified in the nomination that was at least equal to the minimum salary level (MSL)[61] specified by the Immigration Minister (in a Gazette Notice applicable at that time).[62]

It should be noted here that these requirements did not automatically apply to Labour Agreements. As explained earlier, the requirements applying to Labour Agreements were governed by the terms of such agreements.[63] An important consequence is that 457 visa workers could be brought in under such agreements even though they were to be employed in occupations with a lower skill level than those specified by the Immigration Minister. The list specified by the Minister in 2003, for example, tended not to go beyond Groups 1-4 of the Australian Standard Classification of Occupations (ASCO):[64] managers and administrators (Group 1); professionals (Group 2); associate professionals (Group 3); Tradespersons and related workers (Group 4). The 457 visa workers brought under Labour Agreements could, however, be engaged in positions in the other occupational groups, for instance, advanced clerical and service workers (Group 5), intermediate clerical, sales and service workers (Group 6) and intermediate production and transport workers (Group 7).[65]

The 2003 amendments also introduced a concessional stream for regional areas, with business sponsors (other than those engaging in recruitment or labour hire activities) being able to make 'certified regional employment' nominations.[66] Significant advantages accrued if such a nomination was approved: the MSL requirement was not applicable and the nomination could be made in relation to a longer list of occupations (for standard business sponsors, the listed occupations were generally in ASCO 1-4

---

[59] *Migration Regulations 1994 (Cth)* regs 1.20D–1.20DA (as in force on 1 July 2003).
[60] Ibid reg 1.20G(2) (as in force on 1 July 2003).
[61] Ibid reg 1.20B (as in force on 1 July 2003).
[62] Ibid reg 1.20G(4) (as in force on 1 July 2003).
[63] See text above accompanying nn 52–5.
[64] SPECIFICATION OF THE MINIMUM SALARY LEVEL FOR THE PURPOSES OF REGULATION 1.20B, AND OCCUPATIONS FOR THE PURPOSES OF SUBREGULATION 1.20G(2) AND SUBPARAGRAPH 1.20GA(1)(A)(I), OF THE MIGRATION REGULATIONS (Gazette Notice, SGN 406, 30 October 2002).
[65] ABS, *Australian Classification of Occupations (ASCO)* (2nd ed, 1997) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/0/5C244FD9D252CFC8CA25697E00184D35?opendocument>.
[66] *Migration Regulations 1994 (Cth)* reg 1.20GA(2) (as in force on 1 July 2003).

whereas 'certified regional employment' nominations could go down to occupations in ASCO 7).[67]

There were, however, requirements that applied specifically to 'certified regional employment' nominations. They had to relate to 'genuine full-time position(s) that (were) necessary to the operation' of the sponsoring employer;[68] and the sponsoring employer had to demonstrate that the positions could not 'reasonably be filled locally'.[69] The sponsoring employer also had to ensure that wages and working conditions of 457 workers were no less favourable than that provided under relevant Australian laws and awards.[70] Lastly, a body specified by the Immigration Minister in a Gazette Notice was required to certify that the various requirements of nomination had been met.[71]

The 2003 amendments could be viewed as providing increased protection of the working conditions of most 457 visa workers through the MSL requirement and the 'no less favourable' obligation placed on 'certified regional employment' sponsors (although the latter merely restates the position under general labour law). The modest increase of regulation on this front, however, was part of a broader set of changes liberalising the admission and selection criteria of 457 visa workers, the most notable being the abolition of the labour market testing requirement that had applied for activities other than 'key activity' and the introduction of the 'certified regional employment' stream. As a consequence, the (already weak) stringency of regulation to ensure that the 457 scheme effectively met skill shortages was further relaxed.

Increased regulation of compliance and enforcement

For the remaining term of the Coalition government (until 2007, when it was replaced by an ALP government), the key features of the 457 visa scheme remained largely intact. Public controversy surrounding use of the scheme, however, prompted the Coalition Government to put in place various measures to enhance the compliance of sponsoring businesses with their obligations. In 2004, legislation came into effect providing for the cancellation and barring of sponsorship approval in the event that a sponsoring employer breached its sponsorship undertakings.[72] In 2006, $17.6 million in additional funding was allocated for 'investigative strike teams' to ensure that sponsoring employers complied with their obligations.[73] In 2007, the Coalition Government also introduced the Migration Amendment (Sponsorship Obligations) Bill 2007 (Cth) which sought to strengthen obligations of sponsors as well as to increase the severity of sanctions for breaching these obligations by putting into a place a system of civil penalties.

2007, a federal election year, witnessed a flurry of legislative activity. Legislation was passed adding another probity requirement for approval as a standard business sponsor: the applicant business (and its officers) should not be under investigation for

[67] Ibid reg 1.20GA(1) (as in force on 1 July 2003).
[68] Ibid reg 1.20GA(1)(a)(ii) (as in force on 1 July 2003).
[69] Ibid reg 1.20GA(1)(a)(iii) (as in force on 1 July 2003).
[70] Ibid reg 1.20GA(b)–(d) (as in force on 1 July 2003).
[71] Ibid reg 1.20GA(1)(e) (as in force on 1 July 2003).
[72] *Migration Legislation Amendment (Migration Agents Integrity Measures) Act 2004* (Cth); *Migration Amendment Regulations 2004 (No 3)* (Cth).
[73] Joint Standing Committee on Migration, above n 9, 121–2.

breach of sponsorship undertakings or any Australian law. In addition, an English language requirement was introduced, with 457 visa applicants generally being required to have an average band score of 4.5 in an International English Language Testing System (IELTS) examination.[74] The regulations governing the scheme were also amended to prohibit labour-hire companies from utilising the scheme for the purpose of recruiting workers that would be placed in other companies.[75]

The 457 Visa Scheme under the ALP Government (2007-present)

A move to increased regulation

Upon assuming office, the ALP government established two inquiries into the Subclass 457 visa scheme: one by the External Reference Group, a group comprised of industry experts, and the other by Australian Industrial Relations Commissioner, Barbara Deegan (Deegan Inquiry). Responding to the recommendations made by the External Reference Group and the Deegan Inquiry,[76] the ALP government introduced important changes that resulted in the 457 visa scheme becoming more highly regulated.

These changes, which mostly came into effect in September 2009,[77] retained the two key pathways, standard business sponsorships and Labour Agreements. With standard business sponsorships, the framework of three regulatory phases was also preserved. The requirements that attended each phase were, however, made more demanding. A business seeking approval as a standard business sponsor now has to meet two additional requirements. It has to attest in writing that it has 'a strong record, or a demonstrated commitment to employing local labour and non-discriminatory employment practices'.[78] Moreover, if the business has been lawfully operating business in Australia and has traded for more than 12 months, it would need to meet benchmarks specified in a legislative instrument for training Australian citizens and permanent residents. If it has been trading for less than 12 months, the requirement is to have an auditable plan to meet such benchmarks.[79]

Key changes in relation to the approval of nominated positions included the abolition of the 'certified regional employment' stream. The effect is that occupations in ASCO 5-7 cannot be nominated unless there is an applicable Labour Agreement. The amendments also required the business sponsor to provide more information in relation to the nominated occupation.[80]

---

[74] *Migration Amendment Regulations 2007 (No 5)* (Cth) sch 6.
[75] *Migration Amendment Regulations 2007 (No 11)* (Cth).
[76] Visa Subclass 457 External Reference Group, *Final Report to the Minister for Immigration and Citizenship*, Commonwealth of Australia, Canberra, April 2008 ('External Reference Group Report'); Deegan Report, above n 21.
[77] The changes were introduced through three separate pieces of legislation: *Migration Amendment Regulations 2009 (No 5)* (Cth); *Migration Amendment Regulations 2009 (No 9)* (Cth); and *Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 2)* (Cth).
[78] *Migration Amendment Regulations 2009 (No 5)* (Cth) sch 1 inserting reg 2.59(f).
[79] Ibid sch 1 inserting reg 2.59(d)–(e).
[80] Ibid sch 1 inserting reg 2.72(1)(f)–(g).

A crucial change was that a nominated position could not be approved unless 'the terms and conditions of employment (of the 457 worker) will be no less favourable than those that are provided, or would be provided, to an Australian citizen or an Australian permanent resident for performing work in an equivalent position in the person's workplace'.[81] Besides being a requirement for approval of a nominated position, the 'no less favourable' requirement is also imposed as a continuing sponsorship obligation on standard business sponsors.[82]

The minimum salary level (MSL) requirement[83] has been replaced by the requirement that the nominated position under 'no less favourable' conditions has a base rate of pay greater than the 'temporary skilled migration income threshold' (TSMIT) specified by the Minister in a legislative instrument.[84] Importantly, both the 'no less favourable' term and the TSMIT requirement are not applicable when the annual earnings of the 457 worker is equal to or greater than an amount specified by the Minister in a legislative instrument.[85]

While both the MSL and TSMIT requirements set a floor on the wages to be paid to 457 visa workers, they operate in different ways. The MSL requirement operated as a flat floor applied directly to the wage being paid to the 457 visa worker, and it did not need to have any relationship to the wage being paid to comparable local workers employed by the sponsoring business. The TSMIT requirement, however, operates *after* the fulfilment of the 'no less favourable' requirement: the wage to be paid to the 457 visa worker is first determined according to the 'no less favourable' requirement and the proposed wage is then further evaluated to ensure that is higher than the TSMIT.

Requirements attending to the final regulatory phase, the issuing of the visa to the 457 visa worker, have been changed to reflect those made to the approval of a standard business sponsor and a nominated position.[86] In addition, the English language requirement has been made more demanding and now requires a score of more than 5 in the IELTS tests (previously the requisite score was more than 4.5).[87] Formal skills assessment was also introduced in July 2009 for certain occupations and countries.[88]

Table 2 summarises the requirements that currently apply to standard business sponsors under the 457 scheme.

---

[81] Ibid sch 1 inserting reg 2.72(1)(10)(c).
[82] Ibid sch 1 inserting reg 2.79.
[83] Prior to the abolition of the MSL requirement, its level was increased by 3.8% in August 2008: Minimum Salary Levels and Occupations for the Temporary Business Long Stay Visa Notice 2008 (Cth).
[84] *Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 2)* (Cth) inserting reg 2.72(10)(cc).
[85] Ibid inserting reg 2.72(10AB).
[86] See *Migration Amendment Regulations 2009* (Cth).
[87] *Migration Amendment Regulations 2009 (No 3)* (Cth).
[88] Senator C Evans, Minister for Immigration and Citizenship, 'Assessment Changes for Skilled Migrants from July 1' (Media Release, 1 July 2009) <http://www.minister.immi.gov.au/media/media-releases/2009/ce09063.htm>. For the list of occupations and countries, see <http://www.deewr.gov.au/Skills/Programs/SkillsAssess/TRA/457Assessment/Pages/home.aspx>.

Table 2: Key requirements relating to standard business sponsorship under the 457 visa scheme

Approval as standard business sponsor[89]	Approval of nomination[90]	Issuing of visa[91]
• Lawfully operating business (in Australia or overseas) • If lawfully operating business in Australia: - meets training benchmarks;[92] - has attested in writing that has strong record of, or demonstrated commitment to, employing local labour and non-discriminatory employment practices. • If lawfully operating business overseas, has auditable plan to meet training benchmarks • No adverse information known about applicant or person associated (or reasonable to disregard)	• Provision of information relating to nominated person • Provision of information relating to nominated occupation • No adverse information known of nominating business or person associated (or reasonable to disregard) • Nominated occupation corresponds with occupation specified in a legislative instrument, currently list various occupations in ASCO 1-4 together with miscellaneous non-ASCO listed occupations[93] • Terms and conditions of employment of nominated person no less favourable than those provided to an Australian citizen or permanent resident performing equivalent work in the nominating business's workplace at the same location (unless exceed specified annual earnings, currently $180 000[94]) • Base rate of pay above greater than TSMIT, currently $47 480[95] (unless exceed specified annual earnings, currently $180 000[96]) • Nominating employer has certified that: - nominated occupation is a position in its business (unless an exempt occupation)[97]; - nominated worker has qualifications and experience commensurate to applicable ASCO occupation.	• Nominated occupation corresponds to occupation specified in a legislative instrument, currently a list of various occupations in ASCO 1-4 together with miscellaneous non-ASCO listed occupations[98] • If sponsoring business' activities include recruitment of labour to supply to unrelated businesses or hiring of labour to unrelated businesses, occupation is in a position in the business (or associated entity) (unless an exempt occupation) • Visa applicant's intention to perform the occupation genuine; • The position associated with nominated occupation genuine; • If required by Minister, has skills necessary to perform the occupation; • IELTS test score of at least 5 in each of 4 tests (unless exempt); • If required to obtain licence, registration or membership, English proficiency required for such qualification; • No adverse information known of sponsoring employer or person associated (unless reasonable to disregard).

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

90 Ibid reg 2.72.

91 Ibid sch 2, Subclass 457, cl 457.223(4).

92 These benchmarks can be met in two ways: expenditure by the sponsoring business equivalent to at least 2% of its payroll to an industry training fund together with a commitment to maintain such expenditure during the term of sponsorship; or expenditure by the sponsoring business equivalent to at least 1% of its payroll in the provision of training to its employees together with a commitment to maintain such expenditure: Legislative instrument under *Migration Regulations 1994* (Cth), Specification of Training Benchmarks (sub-regs 2.59(d), 2.68(e)) (IMMI 09/107).

93 Legislative instrument under *Migration Regulation 1994* (Cth), Specification of Occupations (sub-paras 2.72(10)(a), 2.72I(5)(b) (IMMI 09/125).

94 Legislative instrument under *Migration Regulations 1994* (Cth), Specification of Income Threshold and Annual Earnings (para 2.72(10)(cc), sub-reg 2.72(10AB) and para 2.79(1A)(b) (IMMI 10/037).

95 Ibid.

96 Ibid.

97 The occupations currently exempt largely relate to occupations as managers and senior health professionals, see Legislative instrument under *Migration Regulations 1994* (Cth), Specification of Occupations for Nominations in Relation to Subclass 457 (Business (Long Stay)) for Positions other than in the Business of the Nominator (sub-sub-paras 2.72(10)(d)(ii)(B), 2.72(10)(d)(iii)(B), 2.72(10)(e)(ii)(B), 2.72(10)(e)(iii)(B), sub-reg 2.86(2B) and sub-para 457.223(4)(ba)(iv) (IMMI 10/030).

98 Legislative instrument under *Migration Regulation 1994* (Cth), Specification of Occupations (sub-paras 2.72(10)(a), 2.72I(5)(b) (IMMI 09/125).

The major change to the Labour Agreements[99] pathway is that parties to such agreements, like standard business sponsors, are subject to the 'no less favourable' obligation in relation to the wages and conditions of the 457 visa worker.[100] Otherwise, the current version of this pathway retains its previous thrust: businesses that are party to such agreements do not need to be approved as standard business sponsors (and thereby, do not have to meet the applicable requirements) and generally do not have to meet the requirements that attend the approval of a position nominated by a standard business sponsor. The crucial requirement with positions nominated by a party to a Labour Agreement is that the position falls within the terms of the agreement.

Another relevant legislative initiative was the *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth). Largely modelled upon the Migration Amendment (Sponsorship Obligations) Bill 2007 (Cth) (see above), this Act came into effect in September 2009.[101] Its key elements are a new framework for sponsorship obligations for a range of visas including the Subclass 457 visa, civil penalties for breach of these obligations, the appointment of inspectors to police these obligations and greater powers for the Immigration Department to disclose personal information relating to sponsoring employers and 457 visa workers.

There is little doubt that the changes introduced by the ALP government result in a more regulated scheme, compared to its predecessors. This is most obvious when considering the aim of protecting the working conditions of 457 workers. Of importance here is the introduction of the 'no less favourable' obligation and the TSMIT requirement. These changes, along with the scrapping of 'regional certified employment' stream, also reveal more careful attention to ensuring that the 457 scheme effectively meets skill shortages. The protection of the employment opportunities and the working conditions of Australian workers is also enhanced through these mechanisms.

[99] The legislation is confusing in that it refers to 'Labour Agreements' in terms of the approval of the visa (*Migration Regulations 1994* (Cth) sch 2, cl 457.223(2)) but refers to 'Work Agreements' in relation to the approval of the nomination (*Migration Regulations 1994* (Cth) regs 2.70, 2.72). This confusion does not seem to be of any real significance as 'work agreements' are defined as 'labour agreements' between the Commonwealth represented by the Immigration Minister (or the Immigration Minister and other Minister/s) with a business that authorises 'the recruitment, employment, or engagement of services' of 457 workers: *Migration Regulations 1994* (Cth) reg 2.76.

[100] *Migration Amendment Regulations 2009 (No 5)* (Cth) sch 1 inserting reg 2.79.

[101] See *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth) s 2. For analysis of this Act, see J Howe, 'The Migration Legislation Amendment (Worker Protection) Act 2008: Long Overdue Reform, But Have Migrant Workers Been Sold Short?' (2010) 23(4) *Australian Journal of Labour Law* 251.

An Assessment Based on Three Themes

Having set out the shifts in the regulation of the 457 visa scheme, we can now turn to the task of assessment. At the outset, it should be said that any proper assessment has to be complex and multi-faceted. The analysis of the scheme through the conceptual lens of de/regulation underscores this: the question of the extent to which the 457 scheme is regulated does not yield a simple answer but requires a layered examination based on the central purposes of the scheme. These varying purposes also complicate the task of assessment – clearly bound up in this task are the differing perspectives of the migrant workers, Australian workers, employers/enterprises and the source and host countries,[102] and their respective rights and interests.[103]

This paper does not purport to provide a full assessment of the 457 visa scheme. It does, however, takes up three themes that are central to any such assessment with a particular focus on the regulatory framework:

1) ensuring the scheme meets skill shortages;
2) the principles of equal and not less favourable treatment; and
3) the principle of effective enforcement.

These themes directly relate to the central purposes of the 457 visa scheme as well as the rights and interests of various parties. The first theme not only goes to the *raison d'être* of the scheme but also relates to the rights of Australian workers and the interests of Australian employers and Australia as a nation. The principles of equal and not less favourable treatment and effective enforcement relate not only to the purpose of addressing skill shortages but also to the purposes of protecting the employment opportunities and working conditions of Australian workers and protecting the working conditions of 457 workers.

Ensuring the scheme meets skill shortages

As noted earlier, the 457 visa scheme was designed in response to changing employer needs for labour, couched in terms of skill shortages, in which employers were allegedly unable to secure skilled workers through local labour markets. Although the rationale of skill shortages speaks most strongly to the interests of employers and perhaps also to general national needs, it also implicitly incorporates recognition of the rights and interests of Australian workers. Thus the 457 visa scheme is not intended to displace local workers but rather to fill gaps that they are unable to fill. As the ALP government has emphasised '(t)emporary overseas workers on subclass 457 visas are only to be employed if skilled labour cannot be sourced locally' - '(e)mployers must put locals first'.[104]

[102] See, eg, Table 2.1 in ILO (2004), above n 6, 18. See also ILO (2010),above n 6, pt 1.
[103] Ruhs and Chang use a similar distinction in terms of rights and consequences: see M Ruhs and H-J Chang, 'The Ethics of Labor Immigration Policy' (2004) 58(1) *International Organization* 69.
[104] Senator C Evans, Minister for Immigration and Citizenship, 'Employers Must Put Locals First' (Media Release, 2 March 2010).

Such sentiments express the principle that Australian workers should generally enjoy preferential access to the national labour market.[105] For this to be respected, regulation should ensure that opportunities to use temporary migrant labour match genuine, short-term skill shortages and are not simply a response to employer desires to find labour that can be employed more cheaply and under more onerous conditions than local labour. In seeking to assess employer needs, most temporary migration schemes rely on some sort of labour market testing.[106] Martin distinguishes between an approach that relies upon certification, that is, independent verification of the employer's labour needs, and an alternative approach based on attestation, which takes the employer's desire for migrant workers as sufficient proof of genuine labour needs.[107]

According to this distinction, the 457 visa scheme since the 2003 removal of labour market testing requirement[108] can be characterised as an undemanding attestation scheme. In most cases, the individual employer is not required to demonstrate, or even state, that they have explored the availability of suitably skilled local labour. There is not even a prohibition against replacing local workers with 457 visa workers. The individual employer has to do little more than offer assurances that they need migrant labour. A high-level public servant justified the absence of any requirement for labour market testing by suggesting that employers knew best:

> Labour market testing required employers to demonstrate to DIMA that they had advertised the position in the right places, the right number of times and in the right way and that any applicants from within Australia who had applied were not suitable. Those are judgments that can only be made by an employer. Public servants cannot be involved in second-guessing those sorts of judgments.[109]

The official further claimed that 'bringing skilled workers to Australia from overseas involves very significant costs for employers', and that 'employers are unlikely to incur these costs if they can find the skills locally'.[110]

This strikingly naïve view fails to grasp the distinction between skill shortages and the varied other types of 'labour-related shortages', such as 'skill gaps', 'labour shortages' and 'recruitment difficulties'.[111] The deference it shows to employer judgment arguably involves a view that the question of labour shortages should be solely determined by employers. It is not plausible to rely on the assurances of the employer to identify skill shortages. Employers speak freely and often of skill shortages in Australia. Though such talk is sometimes apt, often it merely alludes to the fact that employers are reluctant to offer wages and conditions at the rates needed to attract local workers. It is important to develop a firmer grasp of the economics of employer labour-use practices. As Ruhs puts it,

---

[105] M Ruhs, 'The Potential of Temporary Migration Programmes in Future International Migration Policy' (2006) 145 *International Labour Review* 7, 14.
[106] On the importance of such measures, see ibid 19.
[107] P Martin, 'Towards Effective Temporary Work Programs: Issues and Challenges in Industrial Countries' (International Migration Paper No 89, International Labour Office, 2007) 29.
[108] See text above accompanying n 59.
[109] Quoted in Kinnaird, above n 14, 52.
[110] Ibid.
[111] S Richardson, *What is a Skill Shortage?* (NCVER, 2007).

> individual employers' demand for labour critically depends on the cost at which workers can be recruited and employed. Importantly, the cost of employing migrant workers is not only determined by employers' recruitment and wage costs but also by the employment conditions at which migrant labour is available… *There is thus a need to make sure that 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.*[112]

As Hugo puts it, '(e)mployers will always have a "demand" for foreign workers if it results in a lowering of their costs', hence, effective management of the demand for labour is, according to Hugo, 'the first fundamental step for destination countries developing sound policies on temporary labour migration'.[113]

List of specified occupations

Does the 457 visa scheme, in the absence of a labour market testing requirement, effectively manage demand for skilled labour? Proponents of the scheme point to two main indirect mechanisms, which are said to ensure that only genuine employer needs are met. The first is the list of specified occupations in the *Gazette*, the purpose of which is to define the range of jobs that may be taken by 457 visa workers.

Under the post-2003 scheme, the list of specified occupations separated jobs in the ICT sector, for which somewhat different rules apply. But otherwise, employers could use 457 visa workers in a long list of occupations that spanned the first four major groups of the ASCO – as managers and administrators (1), professionals (2), associate professionals (3) and tradespersons and related workers (4).

This list of specified occupations did not work effectively as a measure to ensure that skill shortages were met through the 457 visa scheme. It is hard to treat this seriously as a list of occupations with skill shortages, since it listed *every* four-digit occupational group in the first four ASCO major groups. Moreover, under the Coalition government, the integrity of the list of specified occupations was undermined by the 'certified regional employment' stream. This concessional stream allowed an employer in a regional area to employ temporary migrant workers via a 457 visa in a list of occupations that extended – with some exclusions – to ASCO major groups 5 (advanced clerical and service workers), 6 (intermediate clerical sales and service workers) and 7 (intermediate production and transport workers). The impact of the stream was compounded by a broad interpretation of 'regional' by the Department of Immigration and Citizenship (DIAC), which resulted in all of Australia being 'regional' except for Brisbane, Gold Coast, Newcastle, Central Coast, Sydney, Wollongong, Melbourne and Perth.[114] The breadth of the list of specified occupations is a key reason why the 457 visa scheme under the Coalition government, rather than being a scheme for skilled labour, was, as the External Reference Group observed, 'a general labour supply visa'.[115]

---

[112] Ruhs, above n 106, 14 (emphasis added).
[113] Hugo, above n 26, 59.
[114] Joint Standing Committee on Migration, above n 9, 71.
[115] External Reference Group Report, above n 76, 37.

The ALP government has tightened the list of specified occupations by abolishing the 'certified regional employment' stream. As explained earlier, the effect is that 457 visas will only be issued in relation to ASCO major groups 5-7 when there is a Labour Agreement.[116] The list in relation to ASCO major groups 1-4, however, still remain quite embracing, capturing 80% or 524 out of the 655 occupations listed in these groups together with another 43 occupations specified in addition to the ASCO occupations.[117]

The fact that the list of specified occupations is not – and was not – clearly related to skill shortages appears to be partly due to the failures of the responsible departments, namely, the DIAC and the Department of Employment and Workplace Relations (DEWR). The Joint Standing Committee on Migration, for example, observed that '[i]t is unclear to the Committee to what extent DIAC and DEWR customise the gazetted list in terms of listing not only "skilled" occupations but also migration occupations in demand'.[118] Both this Committee and the Deegan Inquiry recommended that the Departments should adopt more rigorous procedures in ensuring that the list of specified occupations corresponds to skilled occupations experiencing shortages.[119]

The extent of skill shortages in Australia is contentious. There appears to be a general agreement that there are, or at least have been, skill shortages in various industries including construction and major infrastructure, mining, tourism and hospitality.[120] Yet as the Deegan Inquiry notes, broad agreement that skill shortages exist in relation to a particular occupation or industry is not the same as agreement that these shortages exist throughout the country. In its words: '[w]hile a particular trade may be in short supply in the north-west of Western Australia, there may be unemployment in the same trade in the outer suburbs of Sydney'.[121] A list of specified occupations that applies nationally is inherently unable to capture these regional variations in skill shortages.

There are also question marks over the Labour Agreement pathway. Employers who are party to such agreements generally do not have to satisfy the sponsorship and nomination requirements that apply to standard business sponsors.[122] The assumption here is that the Immigration (or other) Minister who must be a party to a Labour Agreement will ensure that proper requirements are placed upon these employers by negotiating appropriate terms for agreement, terms that must be met before a 457 worker can be hired through this pathway.

It is not clear that this assumption is always borne out. Under the Coalition government, serious concerns were raised regarding the transparency of the processes for

---

[116] See text above accompanying n 65.

[117] Figures produced by comparing specified list in Specification of Occupations (Subparagraphs 2.72(10)(a) and 2.72I(5)(b)) (Legislative instrument IMMI 09/125 made on 22 October 2009) and ABS, *Australian Standard Classification of Occupations* (ABS Catalogue 1220.0, 2nd edition, 1997) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/0/5c244fd9d252cfc8ca25697e00184d35?OpenDocument>.

[118] Joint Standing Committee on Migration, above n 9, 80.

[119] Ibid 81; Deegan Report, above n 21, 39.

[120] See External Reference Group Report, above n 76, 16–20. The causes of such shortages can be traced to various factors, including the recent dominance of a market model in skills development and the reluctance of employers to invest in long-term training for skilled jobs: R Hall and R Lansbury, 'Skills in Australia: Towards Workforce Development and Sustainable Skill Ecosystems' (2006) 48 *Journal of Industrial Relations* 575.

[121] Deegan Report, above n 21, 39.

[122] See text above accompanying nn 51–4.

negotiating the Labour agreements, with several businesses criticising the criteria employed by DIAC as opaque and inconsistent.[123] There is little indication of greater transparency under the ALP government. Neither the *Migration Act* nor its regulations specify the criteria for judging when a Work Agreement will be appropriate.

Moreover, the Policy Advice Manual of DIAC fails to provide further clarity. The section headed 'Cases for which a labour agreement may be appropriate' provides as follows:

> It is important to recognise as to when a labour agreement may be appropriate. Indicators that point to the appropriateness of a labour agreement would include, but are not limited, to the following:
>
> Likely:
> - labour market sensitive occupations
>
> Less likely:
> - lesser-skilled occupations
> - employers previously assessed by the Department of Education, Employment and Workplace Relations (DEEWR) as having a poor commitment to the employment and training of Australians and
> - employers who are unable to meet requirements, for example, salary and training requirements.[124]

Despite the Policy Advice Manual insisting that '(i)t is important to recognise when a labour agreement is appropriate', it fails to provide clear guidance on this topic. The list of factors is a short and inclusive, raising the question: what other factors apply in determining when a labour agreement is appropriate? Other issues are also unaddressed: What weight should be given to these various factors? What threshold of satisfaction needs to be reached before a Labour Agreement is considered appropriate, thereby displacing normal requirements (is a compelling justification a requirement or is mere convenience sufficient?)? Moreover, two out of the four factors listed are vague and obscure. The positive indicator of 'labour market sensitive occupations' is not explained and neither is the negative indicator of 'lesser-skilled occupations' (which ASCO occupational groups does this refer to?).

With departmental processes that do not adequately tailor the list of specified occupations to skill shortages; a mismatch between the localised character of skill shortages and a list that applies on a national basis; risks with Labour Agreements; and the absence of a labour market testing requirement, the underlying notion of 'skill shortages' appears hollow. Some commentators argue that the scheme has been 'very successful' in meeting skill shortages in a number of areas.[125] However, this outcome appears rather fortuitous, based on the happy circumstance that some employers using the scheme do indeed suffer skill shortages. It does not appear to be the case in all areas. Paradoxically, as Toner and Woolley suggest, the 457 visa scheme may in the longer term exacerbate rather than ease skill shortages in areas such as trade occupations, since it may reduce the incentive for employers to train apprentices.[126] In a similar vein, Kinnaird's research has shown that, for the period 2001/2002 to

[123] See Joint Standing Committee on Migration, above n 9, 101; External Reference Group Report, above n 76, 35–6.
[124] DIAC, *Policy Advice Manual: Migration Regulations*, reg 1.03, para 2.3 (as at 1 July 2010).
[125] Hugo, above n 2, 113.
[126] Toner and Woolley, above n 20.

2004/2005, 457 visas continued to be granted in large and increasing numbers to information technology workers, despite the domestic job market in that industry being in oversupply and the lack of evidence that the 457 workers had skills that were in shortage in this industry.[127]

The MSL, 'no less favourable' and TSMIT requirements

Under the Coalition government, the second indirect mechanism said to ensure that only genuine employer needs are met, was the requirement to pay a Minimum Salary Level (MSL). According to the Immigration Department:

> The Subclass 457 visa program is intended to meet the emerging needs of a dynamic labour market through the provision of skilled overseas workers on a temporary basis. The *primary mechanism* by which the program seeks to achieve this is a market based price signal – currently enforced through the Subclass 457 sponsor undertaking to pay the primary visa holder at least the minimum salary level.[128]

Apart from cases of non-compliance, the obligation to pay a MSL did constitute a floor upholding the wages of 457 visa workers. But it suffered from several deficiencies. One central problem is that it is not a 'market' salary rate. As the Deegan Inquiry notes, the MSL fell well short of 'market' rates for Australian workers employed in the professional, semi-professional or trades categories.[129] There is an even sharper disjuncture when there is a 'certified regional employment' nomination, as the level of the MSL is lower. This deficit signalled in effect the insertion of many temporary migrant workers in a structurally disadvantaged position within Australian labour markets. Far from being a guarantee that only responsible employer needs were being met, the MSL acted as an incentive for employers to use the scheme for irresponsible purposes. It represented an unfair advantage for certain employers.

Under the ALP government, the MSL requirement has now been replaced by the TSMIT requirement and the 'no less favourable' obligation that requires the conditions of employment of the 457 worker to be no less favourable than those that are provided, or would be provided, to an Australian citizen or an Australian permanent resident for performing work in an equivalent position in the person's workplace.[130]

Do these new arrangements provide for 'market rates' as claimed by the ALP government?[131] This is not a straightforward issue. Underlying the issue of 'market rates' are two key questions: a) what is the relevant 'market'? and b) what industrial instruments and/or labour market data best reflect the rate in this 'market'?

---

[127] B Kinnaird, 'The Impact of the Skilled Immigration Program on Domestic Opportunity in Information Technology' (2005) 13(4) *People and Place* 67.

[128] DIAC, *Discussion Paper: Business (Long Stay) Subclass 457 and Related Temporary Visa Reforms* (Commonwealth of Australia, 2008) 11 (emphasis added).

[129] Deegan Report, above n 21, 27.

[130] See text above accompanying n 81.

[131] C Evans, Minister for Immigration and Citizenship, 'Government Announces Changes to 457 Visa Program' (Media Release, 1 April 2009) <http://www.minister.immi.gov.au/media/media-releases/2009/ce09034.htm>.

The relevant market can be determined in different ways. It can be: the internal labour market within the workplace; the market of the relevant occupation (national, state or regional) or the market of the relevant industry (national, state or regional). It would seem here that the 'market' should be that of the occupation. Under the 457 visa scheme, the key device for delineating the areas and activities in which 457 workers can be employed is the list of specified *occupations.* This clearly implies that it is markets in these occupations that are experiencing 'skill shortages'.

On this score, the 'no less favourable' obligation and the TSMIT requirement fail to provide a 'market rate' because they operate at the enterprise level, a rate that can be lower than the average salary for the occupation. The following case-study found in DIAC's Policy Advice Manual provides a powerful illustration:

> Evans Electrics in Dubbo, NSW is an approved standard business sponsor and currently has four other 457 visa workers in their business of 12 employees. They wish to nominate Sandeep as a General Electrician (4311-11).
> . . .
> Evans uses the modern award as the basis of the terms and conditions of employment, they pay their Australian workers doing the same work an over-award annual salary of AUD 49 000.
> . . .
>
> Evans states that Sandeep's nominated annual base rate of pay will be AUD 49 000.
> . . .
> The processing officer notes that Sandeep's base rate of pay of AUD 49 000, which is equivalent to the base rate of pay provided to other equivalent Australian workers in Evans, is above the TSMIT. *The processing officer compares this rate to labour market data noting that DEEWR's Job Outlook estimates the annual wage for electricians to be AUD 52 000 and the ABS average salary rate for an electrical and electronics tradesperson in NSW is AUD 56 00 across NSW including Sydney.*[132]

Despite the 457 visa worker's pay being less than the occupational average indicated by DEEWR and ABS data, '(t)he processing officer approves the nomination as Evans has provided evidence to demonstrate that this is the rate that is provided to equivalent Australian workers in their workplace'.[133]

Turning to the second issue - which industrial instruments and/or labour market data best reflect the 'market' rate - the starting point is that wage determination in Australia, like determination of most employment conditions, is complex and layered by different mechanisms. Under the principal industrial statute, the *Fair Work Act 2009* (Cth), there are various mechanisms: the National Employment Standards (NES) and modern awards, which form the safety net,[134] enterprise (single employer) agreements,[135] and individual flexibility arrangements that can vary the application of awards and

[132] DIAC, *Policy Advice Manual: Subclass 457 Visa,* para 24.6 (as at 1 July 2010) (emphasis added).
[133] Ibid reg 1.03, para 2.3 (as at 1 July 2010).
[134] *Fair Work Act 2009* (Cth) pts 2–3.
[135] Ibid pts 2–4.

enterprise agreements.[136] Alongside are common law contracts that can provide for pay rates significantly higher than the safety net standards.

As a result, even for local employees, there is a wide differentiation of pay rates, according to the impact of these various regulations. Final pay will of course also be affected by the nature of other employment conditions, including the status of employment (permanent, regular part-time or casual), working-time arrangements (full-time or part-time) and the allowances and penalty rates that apply for such arrangements. These too are variegated in Australia. As a result, there is no straightforward or naturally obvious option for determining the 'market rates' that might apply for temporary migrant workers.

That said, it is clear that 'market rates' are not set by the NES or modern awards given that they only provide the minimum standards. So it is within enterprise agreements and common law contracts that one must look for such rates. Moreover, 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.[137] One option that meets these various principles is to set the 'market rates' according to the higher of the following:

- the highest rate for the occupation as provided by enterprise agreements in relevant industry;[138]
- the '75th percentile' of the salary of Australian workers in the occupation concerned.[139]

The principles of equal and 'no less favourable' treatment

The first and foremost recommendation of Deegan Inquiry is that 'so far as possible given their special circumstances, Subclass 457 visa holders have the same terms and conditions of employment as all other employees in the workplace'.[140] The principle of equal treatment is also strongly supported by various international instruments on migrant work. So much so that the International Labour Organisation (ILO) has observed that '(e)quality of treatment in employment for authorized migrant workers is a central premise of international standards'.[141] These treaties also provide for the

[136] *Fair Work Act 2009* (Cth) ss 144–5 (modern awards), 202–4 (enterprise agreements).

[137] Hugo, for example, has argued that '[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': Hugo, above n 26, 59.

[138] The Deegan Report proposed market rates being generally determined by the rates set in enterprise agreements: above n 21, 28.

[139] This was one of the options identified in R T Kinnaird & Associates Pty Ltd, *Submission to the Joint Standing Committee on Migration's Inquiry into Temporary Business Visas* (2007) 4. Other options identified included the median salary of Australian workers in the occupation concerned and the advertised rate for vacancies in the relevant occupation.

[140] Deegan Report, above n 21, 8.

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

cognate principle of 'not less favourable' treatment.[142] This principle insists that migrant workers receive *at least* equal treatment and is a principle that finds legislative expression in the 'no less favourable' requirement.[143]

This is not, however, to suggest that these principles enjoy universal support. On the contrary, they have been subject to serious challenge. In the following discussion, we respond to some of the critiques of these principles through a reaffirmation of the reasons that give them compelling force. We then draw out some of the complexity in the application of these principles and provide a preliminary assessment of the 457 visa scheme against these principles.

A defence of the principles of equal and not less favourable treatment

At first glance, it is odd to be so emphatic regarding these principles when it seems that the position of temporary migrant workers is characterised by *difference:* they are not citizens of their host country. Importantly, this lack of citizenship has profound significance for the position of such workers. Generally, they have no right to enter or remain in the host country. As the ILO has noted, '(t)he principle of state sovereignty over immigration means that States essentially decide who enters their territory, who stays, who can work and who should leave, within the framework of internationally recognized norms'.[144] Moreover, their interest in seeking employment in the host country should yield to the preferential access that local workers enjoy to the national labour market.

There is also another important challenge to the principles of equal and not less favourable treatment as it applies to temporary migrant workers. According to Ruhs and Martin, there is a trade-off between the number and rights of low-skilled temporary migrant workers in high-income countries – a larger number of such workers implying fewer rights for them and vice-versa.[145] If this argument is correct, it would suggest that the conferral of rights on temporary migrant workers prescribed by the principle of equal and not less favourable treatment comes at the price of a lesser number of such workers.

According to Ruhs and Martin, the 'numbers vs. rights' trade-off in relation to low-skilled temporary migrant workers in high-income countries arises for two reasons. The principal reason is that 'employer demand for labor is negatively sloped with respect to labor costs, and that more rights for migrants typically means higher costs'.[146]

---

[142] The key instruments are the UN *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 1990; ILO *Migration for Employment Convention (Revised)*, 1949 (No 97); ILO *Migration for Employment Recommendation (Revised)*, 1949 (No 86); ILO *Migrant Workers (Supplementary Provisions) Convention*, 1975 (No 143) and ILO *Migrant Workers Recommendation*, 1975 (No 151). The International Labour Office has also produced the *ILO Multilateral Framework on Labour Migration: Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration* (ILO, 2006). For a discussion of these conventions, see ILO (2010), above n 6, ch 4, 'International Standards on Labour Migration'.

[143] See text above accompanying n 81.

[144] ILO (2010), above n 6, 164.

[145] M Ruhs and P Martin, 'Numbers v Rights: Trade-Offs and Guest Worker Programs' (2008) 42(1) *International Migration Review* 249.

[146] Ibid 251.

Another reason, according to these authors, is the effect of immigration on state finances.[147]

The 'numbers vs. rights' argument as put by Ruhs and Martin clearly suggests a tight (inverse) relationship between rights for migrants, on one hand, and labour costs and state finances, on the other. Such a tight relationship, however, does not hold because of the heterogeneity of rights that may be conferred upon migrant workers. In terms of the relationship between migrant rights and labour costs, there is clearly an inverse relationship with monetary entitlements, notably, wages. But the exact character of the relationship between many key industrial rights and labour costs cannot be determined *a priori*. For example, a legal right to freedom from discriminatory conduct will constrain employer conduct and provide protection for migrant workers. Whether or not this results in increased labour costs is moot. Similarly with protection against unfair dismissal, this may result in additional imposts on employers or may produce better recruitment practices. With such protection, the specific responses of employers will determine whether it results in additional labour costs.

In terms of the relationship between rights and state finances, we, firstly, note that the argument made by Ruhs and Martin is tentative. According to these authors, the fiscal effects of immigration on state finances '*may* . . . be a second factor' underlying the 'numbers vs. rights' trade-off (emphasis added).[148] Such circumspection is clearly warranted because there is no uniform relationship between migrant rights and state finances. It is true that some rights, for example an entitlement to social security payments, are likely to mean additional costs for the host country. With other rights, however, for instance, freedom of association and the freedom to change employers, the impact on state finances is unclear.

We can now see several key difficulties with the 'numbers vs. rights' argument. It homogenises the rights of migrants as a precursor to positing tight relationships between these rights, labour costs and state finances. Once the heterogeneity of these rights is recognised, we see little basis for assuming such tight relationships. What must follow is that there is no *necessary* 'numbers vs. rights' trade-off. The *existence* of any such trade-off has to be empirically determined rather than assumed. This equally applies to the *effect* of any such trade-off. For instance, the costs incurred by employers in conferring particular rights may be outweighed by the benefits they secure, for instance, a stable workforce. In such circumstances, the effect of any 'numbers vs. rights' trade-off may be marginal. Not surprisingly, a recent empirical study has cast doubt on any tight 'numbers vs. rights' trade-off.[149]

The other set of difficulties with the 'numbers vs. rights' argument relates to its normative implications. To be sure, Ruhs and Martin emphasise that the existence of a 'numbers vs. rights' trade off does not necessarily mean that 'restricting migrant rights under a guest worker program is a desirable policy from a normative point of view'.[150] Yet, if there is an unavoidable trade-off based largely on the relationship between labour

[147] Ibid.
[148] Ibid (emphasis added).
[149] M Cummins and F Rodriguez, *Is There a Numbers vs. Rights Trade-off in Immigration Policy?: What the Data Say* (2009) <http://hdr.undp.org/en/reports/global/hdr2009/papers/HDRP_2009_21.pdf>.
[150] Ibid 261.

costs and rights, the implication would seem to be that, at least in some circumstances, it is appropriate to reduce rights in order to decrease labour costs.

If the rights of temporary migrant workers are to be calibrated according to labour costs, it follows that the rights of these workers are parcelled out according to 'the logic of the market'.[151] Such logic clearly inverts the principle that 'labour is not a commodity' and neglects Polanyi's famous observations that the '[t]he commodity description of labor is . . . entirely fictitious'[152] because '[l]abor is only another name for a human activity which goes with life itself'.[153] The danger with the 'rights vs. numbers' argument is that it treats temporary migrant workers principally as commodities, as factors of production, and neglects the conditions upon which they are integrated into the labour markets of destination countries, in particular the rights they enjoy (or are deprived of).[154]

Rather than the commodity principle, the rights of temporary migrant workers should be governed, firstly, by their status as *human beings.* Second - and this is a fundamental point - temporary migrant workers are *workers.* Both these statuses provide the basis of the principles of equal and not less favourable treatment. As human beings, temporary migrant workers should enjoy the bundle of rights recognised as *human rights.*[155] As workers, they enjoy the status of industrial citizens[156] and therefore, should be able to access the rights attached to such a status. According to this line of reasoning, they should at the very least enjoy the *minimum rights and entitlements* that are available to local workers.[157]

The foundation of the principles of equal and not less favourable treatment does not rest solely on the rights of temporary migrant workers (and by implication the needs of their countries) but also on the rights of local workers. In order to ensure that local workers are not displaced, temporary migrant workers should be employed according to working conditions that apply to comparable local workers. Such equality of treatment also protects the integrity of labour protection for local workers by ensuring that inferior working conditions do not undermine such protection. As the ILO has put it,

---

[151] Ibid.

[152] K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press, 2001) 76.

[153] Ibid 75.

[154] See S Rosewarne, 'Globalisation and the Commodification of Labour: Temporary Labour Migration' (2010) 20(2) *Economic and Labour Relations Review* 99.

[155] ILO Multilateral Framework on Labour Migration Principle 8 states '[t]he human rights of all migrant workers, regardless of their status, should be promoted and protected'. For enumeration of such rights, see UN *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990* pt III. For a similar emphasis on the '[p]rotection of the fundamental rights of the migrant workers', see Hugo, above n 26, 69.

[156] See generally R McCallum, 'Industrial Citizenship' in J Isaac and R Lansbury (Eds), *Labour Market Deregulation: Rewriting the Rules* (The Federation Press, 2005); R McCallum, 'Justice at Work: Industrial Citizenship and the Corporatisation of Australian Labour Law' (2006) 48(2) *Journal of Industrial Relations* 131.

[157] According to the ILO, a 'fundamental notion' of existing international law as applies to migrant workers and their families is that '[u]niversal human rights and core labour rights apply to all migrants, regardless of their status': ILO (2010), above n 6, 216.

'lower protection and inferior working conditions for temporary migrant workers will result in unfair competition for native workers'.[158]

The principles of equal and not less favourable treatment go to the heart of temporary migration programs like the 457 visa scheme that are aimed at addressing labour shortages. As discussed earlier, such a rationale implies that temporary migrant workers should be employed according to these conditions so as to ensure that workers brought through such schemes meet genuine labour shortages and are not used as a way for local employers to undermine labour regulation.

We see then that the principles of equal and not less favourable treatment go beyond human rights and minimum workplace rights and entitlements to a requirement for comparable working conditions. We also see that the logic of national citizenship is not all encompassing in governing the rights and entitlements of temporary migrant workers. While significant, the difference it entails is bounded not only by the status of temporary migrant workers as human beings and workers but also by the rights of local workers and the key rationale of temporary migration schemes.

The complexity of application

Two questions are central to applying the principles of equal and not less favourable treatment: a) which areas are subject to these principles, and b) what is (or are) the benchmarks for comparison? The first issue is relatively straightforward. These principles apply first of all to remuneration. At the same time, they readily extend to other key working conditions including hours of work, holidays, leave entitlements, termination of employment and safety. The principles of equal treatment and/or 'not less favourable' treatment should also apply to freedom of association[159] and rights of collective bargaining.[160] Similarly, access to unemployment benefits is also frequently subject to these principles,[161] as is access to health services.[162]

On the second issue, two benchmarks could apply to the 457 scheme. The first is based on the rights and entitlements generally available to local workers. Some of the relevant ILO and UN conventions seem to suggest this by insisting migrant workers enjoy equal or not less favourable treatment.[163] Moreover, the rationales of principles of equal and not less favourable treatment based on the rights of temporary migrant workers as human beings and workers would tend towards this benchmark. The second benchmark is based on the wages and conditions of comparable local workers in the occupation concerned. The choice of this benchmark is implied by the central purposes

---

[158] ILO (2010), above n 6, 212.

[159] UN Convention art 26. See also art 40 as it relates to migrant workers in regular situations. This Convention has not been ratified by Australia: see <http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-13&chapter=4&lang=en#Participants>.

[160] ILO *Migration for Employment Convention 1949* art 6(1)(a)(ii). This Convention has not been ratified by Australia: see <http://www.ilo.org/ilolex/english/newratframeE.htm>.

[161] For example, ILO *Migration for Employment Convention 1949* art 6(1)(b).

[162] UN Convention art 43(1)(e). Article 45(1)(c) is the equivalent provision for family members of regular migrant workers.

[163] See *Migration for Employment Convention (Revised) 1949* (No 97) art 6(1); *Migrant Workers Recommendation*, 1975 (No 151) art 2 and *International Convention on the Protection of Rights of All Migrant Workers and Members of their Families* art 25.

of the scheme in addressing skill shortages and protecting the employment opportunities and working conditions of Australian workers. These purposes, as was argued earlier, support the argument that 'market rates' should be based on the salary rates of the relevant occupation.[164]

A preliminary assessment

A full assessment of the principles according to these two benchmarks is beyond the scope of the paper. This would require a research project of considerable magnitude that provided detailed case studies of key industries and occupations in which 457 visa workers were employed. The paper has a much more modest aim of assessing the extent to which the 457 visa scheme gives effect to these principles and the extent to which these workers enjoy the legislative entitlements generally provided to Australian workers.

Until 2010, the deregulatory thrust of the 457 scheme meant it made little attempt to give effect to these principles. It is true that nominations under the 'certified regional employment' stream were only approved if the wages and conditions of the 457 workers were no less favourable than those provided by relevant awards and industrial laws. But this seemed merely symbolic and had no additional legal effect, as awards and industrial laws applied by their own force (and did not require such a provision). Moreover, this 'no less favourable' requirement only provided 457 visa workers with the protection of minimum standards: under the *Workplace Relations Act 1996* (Cth), awards functioned only as part of the 'safety net' with wages and conditions generally determined by agreements.[165] After the 2005 *WorkChoices* amendments,[166] even this minimal assurance was not forthcoming, as awards ceased to have a general 'safety net' function.[167]

The 'no less favourable' requirement introduced under the ALP government provides a real advance in realising the principles of equal and not less favourable treatment. This requirement is not restricted to the minimum standards and seeks to achieve parity between 457 visa workers and comparable local workers at the workplace. The workplace focus is, however, seriously flawed, as the benchmark should be the wages and conditions of workers of the occupation concerned.[168]

In relation to legislative entitlements, there are no formal exclusions of temporary migrant workers, including 457 workers, from the statutory entitlements provided by the *Fair Work Act*[169] and occupational health and safety statutes.[170] Temporary migrant

---

[164] See text above accompanying nn 131-3.

[165] The relevant object of the *Workplace Relations Act 1996* (Cth) was 'to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment': *Workplace Relations Act 1996* (Cth) s 3(d)(ii).

[166] *Workplace Relations Amendment (Work Choices) 2005* (Cth).

[167] The relevant object of the *Workplace Relations Act 1996* (Cth), after the WorkChoices amendments, was to ensure that 'awards provide minimum safety net entitlements for *award-reliant employees*': *Workplace Relations Act 1996* (Cth) s 3(g) (as applied on 31 March 2006) (emphasis added).

[168] See text above accompanying nn 131-3.

[169] *Fair Work Act 2009* (Cth) pts 2-2 (National Employment Standards), 3 (Rights and Responsibilities of employees, employers, organisations etc).

workers, including 457 workers, are, however, barred from accessing the unemployment benefit and public health insurance. Under the *Social Security Act 1991* (Cth), the Australian unemployment benefit, the Newstart Allowance, is generally only available to 'Australian residents', namely, Australian citizens and holders of permanent visas residing in Australia.[171] Under the *Health Insurance Act 1973* (Cth), public health insurance in Australia (the Medicare benefit), is also generally for 'Australian residents', that is, Australian citizens and holders of permanent visas present in Australia.[172] Previously, sponsors were obliged to meet the costs of all medical or hospital expenses for the sponsored worker arising from treatment administered in a public hospital if such costs were not met by health insurance.[173] Rather than adopt the Deegan Inquiry's recommendation that 457 workers be provided access to public health insurance through a levy on sponsoring employers,[174] the ALP government has taken the opposite tack of shifting the costs of health expenses on to 457 workers by requiring them to maintain adequate health insurance.[175]

Here, we see a definite tension between the conferral of rights upon 457 visa workers and the costs to state finances, a tension reminiscent of the 'numbers vs. rights' argument and often resolved against temporary migrant workers.[176] This tension, however, does not – and should not – completely define the relationship between the rights and interests of 457 visa workers, on one hand, and that of local workers, on the other. Another perspective would suggest that the lack of a social 'safety net' for 457 visa workers increases the risk of unfair competition with comparable local workers; here, as in many other areas, there is a congruence of interests between both groups of workers that dictates equal and not less favourable treatment.

It is also possible to argue that 457 visa workers lack a basic right enjoyed by local workers – the freedom to choose employment. With 457 visa workers, the freedom to choose employment is highly circumscribed. A mandatory condition of their visas is Visa Condition 8107. This condition did not initially impose a severe restriction on the freedom of 457 visa workers to choose employment. The original version of this condition, which was in effect until 2002, merely imposed a requirement to seek permission in the following terms:

---

[170] See, for example, *Occupational Health and Safety Act 2000* (NSW), *Occupational Health and Safety Act 2004* (Vic), *Workplace Health and Safety Act 1995* (Qld), *Occupational Health, Safety and Welfare Act 1986* (SA), *Occupational Safety and Health Act 1984* (WA) and *Workplace Health and Safety Act 1995* (Tas).

[171] *Social Security Act 1991* (Cth) s 593(g)(ii). 'Australian resident' is defined by s 7. There are minor exceptions to this rule. Persons residing in Australia for more than 10 years after 26 February 2001 are entitled to a maximum of six months of the Newstart Allowance: *Social Security Act 1991* (Cth) s 7(7)(b). This provision obviously will have no application until 2011. Also New Zealand citizens residing in Australia are entitled to the Newstart Allowance: *Social Security Act 1991* (Cth) s 7(7)(a). This, however, is of no consequence in terms of the Subclass 457 visa scheme as New Zealand citizens will not be resorting to this scheme as they can obtain a 'special category' visa simply by producing a valid New Zealand passport: *Migration Act 1958* (Cth) ss 5, 32.

[172] *Health Insurance Act 1973* (Cth) ss 3(1), 10(1).

[173] *Migration Regulations 1994* (Cth) reg 1.20CB(1)(k) (as applied on 15 February 2009).

[174] Deegan Report, above n 21, 69.

[175] This obligation is imposed by Visa Condition 8501: *Migration Regulations 1994* (Cth) sch 2, cl 457.611(1)(b). See Senator C Evans, Minister for Immigration and Citizenship, 'Integrity Review of Temporary Overseas Worker Scheme Released' (Media Release, 14 November 2008) <http://www.minister.immi.gov.au/media/media-releases/2008/ce08108.htm>.

[176] On decision not to fund public health insurance for 457 visa workers, see Evans, 'Integrity Review of Temporary Overseas Worker Scheme Released', above n 175.

> The holder must not change employer or occupation in Australia without the permission in writing of the Secretary (of the Immigration Department).[177]

In 2002, however, the condition was amended to provide as follows:

> The holder must not:
>
> (a) if the visa was granted to enable the holder to be employed in Australia:
>
> (i) cease to be employed by the employer in relation to which the visa was granted; or
>
> (ii) work in a position or occupation inconsistent with the position or occupation in relation to which the visa was granted; or
>
> (iii) engage in work for another person or on the holder's own account while undertaking the employment in relation to which the visa was granted; or
>
> (b) in any other case:
>
> (i) cease to undertake the activity in relation to which the visa was granted; or
>
> (ii) engage in an activity inconsistent with the activity in relation to which the visa was granted; or
>
> (iii) engage in work for another person or on the holder's own account inconsistent with the activity in relation to which the visa was granted.[178]

In 2009 and 2010, the ALP government amended the terms of Visa Condition 8107[179] with two key changes. First, the requirement that the 457 visa worker be employed by the employer in relation to whom the *visa* was granted was replaced the requirement to only work for the employer identified in the most recent approved *nomination.* Secondly, an express provision was inserted requiring that the 457 visa worker not cease employment for a period exceeding 28 consecutive days. The current provisions of Visa Condition 8107 (as it applies to 457 visa workers engaged under labour agreements and by standard business sponsors) provides as follows:

> (a) the holder must:
>
> (i) work only in the occupation listed in the most recently approved nomination for the holder; and
>
> (ii) . . . work only for:
>
> (A) the standard business sponsor, former standard business sponsor, party to a labour agreement or former party to a labour agreement (the ***sponsor***) who nominated the holder in the most recently approved nomination; or
>
> (B) if the sponsor is a standard business sponsor or former standard business sponsor who lawfully operates a business in Australia — an associated entity of the sponsor; and
>
> (b) if the holder ceases employment — the period during which the holder ceases employment must not exceed 28 consecutive days.[180]

---

[177] *Migration Regulation 1994* (Cth) sch 8, Visa Condition 8107 (as in force on 1 August 1996).

[178] Ibid sch 8, Visa Condition 8107 (as in force on 2 May 2002). The amending statute was the *Migration Amendment Regulations 2002 (No 2)* (Cth).

[179] The amending statutes were *Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 1)* (Cth) [160]; *Migration Amendment Regulations 2010 (No 1)* (Cth) [46]; *Migration Amendment Regulations 2010 (No 6)* (Cth) [75].

[180] *Migration Regulation 1994* (Cth) sch 8, Visa Condition 8107 (as in force on 25 October 2010).

Visa Condition 8107 clearly imposes severe restrictions upon the ability of 457 visa workers to change employers or perform different types of work. Serious consequences can follow from a breach of this condition. The worker's visa may be cancelled, therefore rendering the worker liable to being detained and deported. A subsequent 457 visa application can also be refused for such a breach.[181] It is also a criminal offence to work in breach of visa conditions.[182] These formal sanctions attaching to the breach of Visa Condition 8107 combine with informal restrictions on mobility, including perceptions that the worker is 'tied' to an employer because of the difficulty in having overseas qualifications recognised and the view of some employers that their outlays in recruiting the 457 visa worker imply an entitlement to the worker's services.[183]

The amendment made by the ALP government to Visa Condition 8107 marginally increases the freedom of employment of 457 visa workers, as it allows these workers to change employers without lodging a fresh visa application. The condition is that the new employer is a standard business sponsor or a party to a Labour Agreement and has an approved nomination in relation to the worker. Moreover, the worker has to secure a new employer within 28 days of ceasing employment with his or her current employer.[184] However, this amendment falls seriously short of the Deegan Inquiry's recommendation that 457 visa workers be given 90 days to find a new sponsor unless it is apparent that there is no likelihood that this will occur or the visa holder is unable to provide for herself or himself (and dependents if relevant) during this period.[185]

The principle of effective enforcement

This principle relates firstly to the administration of the 457 visa scheme itself – the purposes and goals of the scheme cannot be properly pursued in the absence of effective enforcement of its provisions. The effectiveness with which these requirements are administered depends on the resources and expertise of the relevant government agencies, in particular DIAC, and the strength of the co-ordination with other government agencies and departments involved in the administration of the scheme, in particular with the Department of Education, Employment and Workplace Relations, which manages the skills assessment process through Trades Recognition Australia[186] and also develops the training benchmarks.[187]

There has not been sustained research into the administration of the 457 visa scheme by DIAC and other agencies. This is a significant gap especially given the *discretion* enjoyed by DIAC. The terms of Labour Agreements, for instance, are to be decided by the

---

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

[182] *Migration Act 1958* (Cth) s 235.

[183] Deegan Report, above n 21, 66. It should be emphasised, however, that breaches of a 457 visa (including breaches of Visa Condition 8107) do not mean that the visa is automatically cancelled. Such breaches confer upon DIAC a *discretion* to cancel the visa: DIAC, *Submission to the Joint Standing Committee on Migration's Report into Temporary Business Visas* (2007) 1 <http://www.aph.gov.au/HOUSE/committee/MIG/457visas/subs/sub086.pdf>.

[184] *Migration Regulations 1994* (Cth) sch 8, Visa Condition 8107, cl 3.

[185] Deegan Report, above n 21, 68.

[186] DIAC, *Policy Advice Manual: Subclass 457 Visas*, para 58.1 (as at 1 July 2010).

[187] DIAC, *Policy Advice Manual: Standard Business Sponsor*, para 41.4 (as at 1 July 2010).

Immigration Minister, presumably upon the advice of DIAC officials. Even with provisions imposing obligations, DIAC practices will affect how rigorously these provisions are applied. The following paragraph of the Department's Policy Advice Manual, which relates to the 'no less favourable' requirement, is instructive:

> The onus is on the sponsor to include sufficient information in the nomination application to demonstrate the nominated person will be subject to terms and conditions of employment which are no less favourable than the relevant 'market salary rate'. *Officers are not required to undertake detailed analyses of enterprise agreements or industrial instruments in order to assess the 'market salary rates'*.[188]

The last sentence suggests that DIAC is relying upon employer say-so as to whether and which enterprise agreement or industrial instrument applies. If this were the case, it would throw up a serious risk of undermining the integrity of the 'no less favourable' obligation as well as the TSMIT requirement.

The principle of effective enforcement also applies to labour regulation. Labour rights and entitlements are only meaningful in so far as they can be properly enforced. Lack of enforcement of existing rights and entitlements increases the risk of poor treatment. A key principle of the *ILO Multilateral Framework on Labour Migration* is that the rights of migrant workers 'should be protected by the effective application and enforcement of national laws and regulations in accordance with international labour standards and applicable regional instruments'.[189] Because of the crucial nexus that joins labour regulation, the issue of skill shortages and preferential access of local workers to the national labour market, the principle of effective enforcement is relevant not only to the rights of migrant workers but also to the rationale of a scheme like the 457 visa scheme and the rights of local workers.

The extent of effective enforcement of labour regulation partly depends on the configuration of the regulatory structure and the resources devoted to enforcement. In Australia, enforcement has long been a sensitive issue. Employer evasion of employee entitlements has, according to one study, been 'significant and sustained'.[190] The complexity of the labour regulation system inhibits complaints and reinforces acquiescence to illegal treatment, while at the same time few resources have been available for following up cases of abuse. The problem is compounded when the law itself is unclear, as in the case of the protections available to labour-hire workers.

In addition to these factors, the situation of the worker can affect enforcement. If the worker is highly dependent on the employer and vulnerable, this can further inhibit the likelihood of enforcement and increase the chances of poor treatment. The extent of vulnerability experienced by a worker will depend on a range of complex factors.

---

[188] DIAC, *Policy Advice Manual: Subclass 457 Visas*, para 24.4 (as at 1 July 2010) (emphasis added).

[189] ILO, *ILO Multilateral Framework of Labour Migration: Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration* (International Labour Office, 2006) 19, Principle 10.

[190] M Goodwin and G Maconachie, 'Unpaid Entitlement Recovery in the Federal Industrial Relations System: Strategy and Outcomes 1952–95' (2007) *The Journal of Industrial Relations* 49, 4, 523. See also L Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (Law Book Co, 1994).

Temporary migrant workers, in particular, will experience varying degrees of vulnerability. As a group, however, temporary migrant workers have a special vulnerability in that they experience circumstances contributing to vulnerability not experienced by local workers.[191] Table 3 lists various factors affecting the vulnerability of local and temporary migrant workers on employment visas like 457 visas. It can be seen that some of these factors are distinctive to the position of such temporary migrant workers. Moreover, some of the factors that contribute to the vulnerability of workers, while affecting local and temporary migrant workers alike, will affect some in the latter group to a far greater extent. The ability of local workers to access social security, while not necessarily guaranteed, will tend to be greater than that of temporary migrant workers.[192] Many temporary migrant workers are more likely to suffer from discriminatory work practices compared to local workers.[193] Similarly, inferior language and cultural literacy will affect many temporary migrant workers to a greater extent than local workers.

What is striking is how many of these factors strengthen the power of the sponsoring employer. Formal dependence on the employer is associated with the nature of the employment visa, including the limits on freedom of employment.[194] There is also informal dependence stemming from factors such as the lack of a social security 'safety net', which would tend to increase reliance on wage income, and the desire for permanent residence.[195]

[191] For discussion of some of the factors contributing to the vulnerability of temporary migrant workers, see M Ruhs, *Temporary Foreign Worker Programmes: Policies, Adverse Consequences, and the Need to Make Them Work* (Perspectives on Labour Migration No 6, International Labour Office, 2003) 12–15; ILO (2004), above n 6, 42–63.

[192] ILO (2010), above n 6, 104.

[193] ILO (2004), above n 6, 46–8; ILO (2010), above n 6, 80–2.

[194] As noted by the ILO, '[t]emporary migrant workers often find it difficult to change their employers or jobs; this makes them overly dependent on their initial employers and places them in a vulnerable position': ILO (2010), above n 6, 30.

[195] See generally Rosewarne, above n 154, 103–4.

Table 3: Factors affecting the vulnerability of local and temporary migrant workers on employment visas

	Local workers	Temporary migrant workers on employment visas
Level of labour demand	√	√
Level of skills	√	√
Extent of discriminatory work practices	√	√
Extent of union organisation	√	√
Various forms of employment	√	√
Level of language and cultural literacy	√	√
Access to social security	√	√
Formal freedom to choose employer and employment	X	√
Nexus between employment and right to reside	X	√
Desire for permanent residence and dependence on employer nomination	X	√
Irregular immigration status	X	√
Overseas recruitment	X	√
Difference between income received in home country and income received in Australia	X	√
Differences in socio-political conditions of home country compared to Australia	X	√

To avoid misunderstanding, we do not mean to suggest that temporary migrant workers, as a group, are more vulnerable than local workers as a whole. Both groups are heterogeneous, making generalisations such as these problematic. The vulnerability of highly skilled or highly paid temporary migrants will, of course, vary from that of low-skilled or low-paid migrant workers. The former will usually enjoy relatively more rights because of more generous immigration rules and/or their better bargaining power; choice, freedom and agency will tend to be greater for these workers.[196] That said, for all these workers, the status of being a temporary migrant worker gives rise to a special vulnerability not experienced by local workers – migration status is a clear factor in determining the vulnerability of workers.[197]

[196] See Hugo, above n 26, Table 1, 27; ILO (2010), above n 6, 24–36.
[197] ILO (2010), above n 6, 77.

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

> Despite the views of some employers and employer organisations, Subclass 457 visa holders are different from other employees in Australian workplaces. They are the only group of employees whose ability to remain in Australia is largely dependent upon their employment and to a large extent, their employer. It is for these reasons that visa holders are vulnerable and are open to exploitation.[198]

Prior to Visa Condition 8107 being amended to prohibit a 457 visa worker leaving the employment of his or her original sponsor (when the condition merely imposed a requirement to seek permission),[199] Carr J considered the scenario whereby a sponsoring employer could have its obligations as a sponsor ceased (thereby, triggering the Immigration Department's discretion to cancel the 457 visa) by terminating the employment of the worker, a scenario that, in fact, currently applies. His Honour observed:

> Such a situation could easily give rise to abuse by an unscrupulous employer. The employee might be forced to accept illegally sub-standard conditions of employment on pain of having his or her visa cancelled. The migrant would be turned into a bondslave.[200]

In this context, the ability of the sponsoring employer to terminate the employment of the 457 visa workers can amount to a power to remove the worker from Australia. Not surprisingly, the Deegan Inquiry found that there is a perception amongst 457 workers that the sponsoring employer can cancel their visas despite this power formally residing with DIAC.[201]

This power is clearly bound up with the lack of the freedom to choose employment that is experienced by 457 visa workers. There is a complex two-way process at work here. The power of the sponsoring employers to terminate the employment of these workers and, therefore, trigger a chain of events that might lead to their removal naturally induces a lack of mobility on the part of the workers. At the same time, sponsoring employers who sense that their workers lack the freedom to change employment may choose to engage in more exploitative practices. As the Deegan Inquiry observed

---

[198] Deegan Report, above n 21, 69.

[199] See text above accompanying nn 177–80.

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

[201] Visa Subclass 457 Integrity Review, *Issues Paper #3: Integrity / Exploitation* (Commonwealth of Australia, 2008) 27.

'[g]enerally it is the most vulnerable of the Subclass 457 visa holders who are exploited as a consequence of their lack of mobility, whether that lack is real or perceived'.[202]

One consequence of the tight nexus between engagement by the sponsoring employer and the ability to remain in Australia is that the protection against dismissal, while formally available to 457 visa workers, is largely illusory. Put simply, many of these workers are in no position to effectively invoke such protection because they are already back in their home country after 28 days.[203] This nexus also explains why some 457 visa workers are reluctant to complain of ill-treatment or illegal conduct. As the Joint Standing Committee on Migration put it, 'they are fearful their employment will be terminated and they will be returned home'.[204] This nexus further explains why some 457 visa workers are willing to abide by illegal or exploitative contracts. As one employer who was found to have underpaid 457 visa workers put it, the workers 'would sign anything' as they 'are frightened of . . . being sent back'.[205]

The dependence of 457 visa workers on their sponsoring employers is amplified in some cases, where the workers are dependent upon the employer for the provision of essential services. In the case of *Fryer v Yoga Tandoori House Pty Ltd,* where the sponsoring employer did not pay his chef for nearly seven weeks, the worker was dependent upon his employer for food, money, accommodation and transportation.[206]

Dependence is conditioned by financial need and by the long-term aims of the worker. Many workers aim to use the 457 visa as a pathway to permanent residence, and indeed a substantial number have succeeded in becoming permanent residents.[207] The main permanent visa categories which these workers use are the Employer Nomination Scheme and the Regional Sponsored Migration Scheme, both of which depend on the sponsorship of an employer.[208] This formal dependence sits alongside a general perception that employer sponsorship is necessary for a successful permanent residence application. Both can result in the 457 visa worker being willing to work in breach of labour laws. As the Deegan 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.[209]

Cutting across the various sources of dependence is the shadow of irregular status. It is a cruel irony that if a 457 visa worker is engaged by an employer in violation of labour laws, this can, in fact, strengthen the hand of the employer. For instance, a 457 visa worker who works in a job classification different (most likely lower) from that stated in

---

[202] Deegan Report, above n 21, 67.
[203] 457 workers who are able to secure a new visa will be able to invoke such protection: see *Mr L v the Employer* [2007] AIRC 457.
[204] Joint Standing Committee on Migration, above n 9, 132.
[205] Quoted in *Jones v Hannsen Pty Ltd* [2008] FMCA 291, [8].
[206] *Fryer v Yoga Tandoori House Pty Ltd* [2008] FMCA 288.
[207] External Reference Group Report, above n 76, 23. In the 2006–07 financial year, 18 352 people obtained permanent residence where the last substantive visa was a Subclass 457 visa: DIAC's statistics quoted in Joint Standing Committee on Migration, above n 9, 23.
[208] See discussion in Deegan Report, above n 21, 50.
[209] Deegan Report, above n 21, 49.

his or her visa would be in breach of Visa Condition 8107. This would mean not only that the visa would be liable to be cancelled but also that the worker was committing a criminal offence. Even when a violation of labour laws does not involve a breach of the worker's visa, there can still be a perception that the worker's participation in illegal arrangements, if disclosed, might jeopardise the visa or his or her prospect of permanent residence. In these circumstances, continuing in illegal work arrangements might be seen as preferable to regularisation of status.

Besides the dependence of 457 visa workers on their sponsoring employers, there are other circumstances that contribute to the problem of enforcing labour laws in relation to these workers. Many would suffer from a relative lack of cultural and language literacy, including an unfamiliarity with a complex system of labour regulation. Victorian Magistrate Kate Hawkins captured these sentiments when handing down a decision in favour of eight Chinese students. Her Worship observed that:

> the . . . employees were foreign nationals without a working knowledge of the Australian industrial relations system . . . They were clearly not on a "level playing field" with other Australian employees. They were vulnerable due to their cultural background and less than perfect English skills.[210]

It is difficult to assess the extent of illegal work arrangements.[211] DIAC itself is unable to estimate the current number of non-citizens in Australia that work in breach of their visas[212] (although a 1999 department report estimated that 50% of the 53,000 persons suspected to be in Australia unlawfully were working illegally).[213] In relation to the 457 scheme, DIAC's 2006/2007 Annual Report documents that only 1.67% of sponsors were found to be in breach of their sponsorship undertakings.[214] Reliance on the official sanction rate as a measure, however, is extremely problematic. The Deegan Inquiry observes that:

> This view ignores the major problem with providing protection for Subclass 457 visa holders. Those visa holders who are susceptible to exploitation are also reluctant to make any complaint which may put their employment at risk . . . The precariousness of the position of Subclass 457 visa holders is such that the type of evidence of exploitative practices demanded by some employer organisations . . . can be difficult to obtain and is usually only made available on the basis of a guarantee that no action will be taken which will put at risk the employment of the visa holders concerned. . . Discussions with the Workplace Ombudsman and various State and Territory authorities responsible for enforcing compliance with employment conditions support the view that the incidences of exploitation involving Subclass 457 visa holders that are brought to the attention of the authorities are a very small part of the overall problem.[215]

---

[210] Quoted in Deegan Report, above n 21, 53.

[211] See G Orr, 'Unauthorised Workers: Labouring Beneath the Law?' in C Arup et al, *Labour Law and Labour Market Regulation* (Federation Press, 2006) ch 35.

[212] Australian National Audit Office, *Onshore Compliance – Visa Overstayers and Non-Citizens Working Illegally: Department of Immigration and Multicultural and Indigenous Affair* (Commonwealth of Australia, 2004) 28.

[213] Department of Immigration and Multicultural Affairs, *Review of Illegal Workers in Australia: Improving Immigration Compliance in the Workplace* (Commonwealth of Australia, 1999) 18. See also Department of Immigration and Multicultural Affairs, *Protecting the Border: Immigration Compliance* (Commonwealth of Australia, 2000) ch 9.

[214] Quoted in Senate Standing Committee on Legal and Constitutional Affairs, *Migration Legislation Amendment (Worker Protection) Bill 2008* (Commonwealth of Australia, 2008) 14.

[215] Deegan Report, above n 21, 23–4.

The Deegan Inquiry speculated that the risk of illegal work arrangements involving 457 visa workers was likely to be highest when these workers are engaged in less skilled categories[216] and/or paid close to the MSL.[217]

Whilst precise data are unavailable, there are many documented cases of 457 visa workers being engaged in breach of labour laws. Evidence to the Joint Standing Committee on Migration's inquiry into the 457 visa scheme alleged cases of:

- underpayment of the MSL;
- unlawful deductions from wages (e.g. for travel, medical or accommodation costs);
- non-payment of overtime rates;
- obliging workers to work excessive hours (e.g. 15-18 hours per day, 7 days a week);
- employment of skilled workers in unskilled roles
- unfair termination of employment; and
- racial abuse and threat of physical harm.[218]

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

- limited access to sick leave and dismissal if workers take sick leave;
- dismissal because workers are pregnant;
- dismissal for taking leave to care for sick spouse or child; and
- sexual harassment.[219]

A number of cases have also wound up in the courts, with sponsoring employers fined for employing 457 visa workers in breach of labour laws. Predominantly, they involve cases of underpayment of wages, including sponsoring employers being fined for underpaying Chinese workers employed in the printing industry,[220] Filipino nurses[221] and Filipino workers employed in the hospitality industry[222] (including a case involving Filipino chefs).[223] One of the most extreme cases, *Fryer v Yoga Tandoori House Pty Ltd,* involved a sponsoring employer not paying his chef from India for nearly seven weeks.[224]

The problem of non-compliance can also affect the work arrangements of family members who accompany the 457 visa holder. Engagement of secondary visa-holders can be quite significant in some industries. For instance, the Deegan Inquiry observes that Teys Brothers, a leading meat processor and exporter, employs approximately 500

[216] Ibid.
[217] Ibid 27.
[218] Joint Standing Committee on Migration, above n 9, 112–14.
[219] Deegan Report, above n 21, 6.
[220] *Hortle v Aprint* [2007] FMCA 1547.
[221] *Armstrong v Healthcare Recruiting Australia Pty Ltd (No 2*) [2008] FMCA 1050.
[222] *Flattery v Italian Eatery trading as Zeffirelli's* [2007] FMCA 9.
[223] *Mason v Harrington Corporation* [2007] FMCA 7.
[224] *Fryer v Yoga Tandoori House Pty Ltd* [2008] FMCA 288.

primary visa holders and 300 secondary visa holders.[225] It also points out that children of primary visa holders can be

> persuaded to work in irregular and exploitative conditions for employers who have claimed that to "regularise" the situation (and pay correct wages etc) would jeopardise that person's status as a dependent of the primary visa holder and their right to remain in Australia.[226]

The federal ALP government has taken a few steps to combat problems of abuse. The principal response has been to improve public regulation of the working conditions of 457 workers through the *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth). As noted earlier, this Act provides for the appointment of inspectors with wide powers to inspect premises and compel the production of information;[227] arrangements that are buttressed by a sponsorship obligation to cooperate with these inspectors. The Act also establishes a system of civil penalties where certain breaches of sponsorship obligations will be subject to maximum fines of $33,000 for companies and $6,600 for individuals.[228]

While these measures are generally welcome, their ability to adequately tackle the problem of enforcement remains to be seen. They do not fundamentally lessen the dependence of many 457 visa workers on their sponsoring employers. No consideration appears to have been given to imposing restrictions on the ability of the employer to terminate the engagement of these workers. Despite the 'freedom to change jobs [being] a powerful protection',[229] the ALP Government has not proposed measures that will increase the mobility of these workers, for instance, by adopting the Deegan Inquiry's recommendation that these workers be given 90 rather than 28 days after their employment is terminated to find another sponsoring employer or enabling 457 workers to work within a defined job category after a certain period of time.[230]

Moreover, the Government has not announced any changes to the requirements for securing a permanent visa through the Employer Nomination Scheme or the Regional Sponsored Migration Scheme that may reduce the dependence of 457 workers who wish to secure permanent residence on their sponsoring employers. In particular, it has not responded to the Deegan Inquiry's recommendation that the precedence given to employer nomination for permanent residence through these categories be lessened with more weight given to the length of time the applicant has worked for any Australian employer.[231] On the contrary, the changes it has mooted emphasise a more 'demand-driven' skilled migration program that will give preference to workers

[225] Deegan Report, above n 21, 58.
[226] Deegan Report, above n 21, 58.
[227] *Migration Legislation Amendment (Worker Protection) Act* 2008 (Cth) inserting ss 140V–140ZA into the *Migration Act 1958* (Cth).
[228] *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth) inserting s 140Q into the *Migration Act 1958* (Cth).
[229] Martin, above n 107, 31.
[230] Ruhs, above n 106, 24.
[231] Deegan Report, above n 21, 51.

nominated by employers,[232] a shift that is likely to increase the vulnerability of some 457 workers.

The shortcomings of the ALP Government's approach may stem from its view that it is only 'rogue' employers that are employing 457 workers under illegal arrangements. In a recent media release, the Immigration Minister, while condemning such employers, stated that '[m]ost employers do the right thing'.[233] This is a doubly problematic view. Because the actual extent of non-compliance is unknown, it is not clear whether it is true that most employers are doing the 'right thing'. Moreover, it is a view that overlooks the various structural factors that contribute to the special vulnerability of temporary migrant workers like the 457 visa workers.

CONCLUSION

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

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

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

He goes on to argue that this entails ensuring that there are no opportunities for lowering labour costs by lowering labour standards, that demand for migrant labour is residual after recruitment of local workers fails, and that other methods of responding to shortages are not unfairly foreclosed.[234] The 457 visa scheme fails to meet this fundamental challenge of managing the demand for labour.

Because the 457 visa scheme comes with extensive opportunities for renewal and with opportunities for the worker to apply for permanent residency, it may be wrong to call it a temporary migrant labour scheme. Instead it may be better characterised as a

---

[232] See Senator C Evans, Minister for Immigration and Citizenship, 'Changes to Australia's Skilled Migration Program' (Speech given to Australia Demographic and Social Research Institute, Australian National University, 8 February 2010); Senator C Evans, Minister for Immigration and Citizenship, 'Budget 2010-11 – Government Sharpens Focus of Skilled Migration Program' (Media Release, 11 May 2010).

[233] Senator C Evans, Minister for Immigration and Citizenship, 'Exploitation of Foreign Workers is Unacceptable' (Media Release, 9 July 2009) <http://www.minister.immi.gov.au/media/media-releases/2009/ce09066.htm>.

[234] Ruhs, above n 106, at 14–15. In Ruhs' classification, the 457 visa scheme can be classified as *laissez faire* because of the absence of any caps or quotas, but even within this classification it appears as extreme, due to the absence of any labour market testing: at 10.

permanent migration program, though one that differs from the traditional program in that the workers are highly dependent on individual employers.[235]

The design of the 457 visa scheme is often loosely linked to globalisation.[236] It is clear too that policy decisions play a major role. One crucial influence has been neo-liberal philosophies that seek to remove the fetters from managerial prerogative. The ALP government has offered a few innovative reforms, but it too has not yet confronted the full set of challenges posed by the current operation of the scheme.

[235] J Chaloff and G Lemaitre, 'Managing Highly-Skilled Labour Migration: A Comparative Analysis of Migration Policies and Challenges in OECD Countries' (OECD Social, Employment and Migration Working Paper No 79, DELSA/ELSA/WD/SEM(2009)5, OECD, 2009) 18–19.

[236] Hugo, above n 2.

OTHER WORKING PAPERS IN THIS SERIES

1. A Cattermole, *The Political Economy of Work and Health for Women of Non-English Speaking Background* (May, 1994)

2. R Naughton, *The Industrial Relations Reform Act 1993* (May, 1994).

3. R Mitchell and J Telfer, *The Taxation Implications of Statutory Unlawful Terminations of Employment* (August, 1994).

4. S Kollmorgen and J Harvey, *Genuine and 'Post-Modern' Industrial Demands: The Impact of the State Public Services Federation Decision on Federal Tribunal Practice* (August, 1994).

5. K Reade, *The Use of the External Affairs Power in the Industrial Relations Reform Act 1993* (April , 1995).

6. R Naughton, *The Obligation to Bargain in Good Faith: Inspired Innovation or Legislative Folly?* (April, 1995).

7. I Fehring and T Lindsey, *Indonesian Labour Law under the New Order: The Military and Prospects for Change* (June, 1995).

8. R Hunter and A Leonard, *The Outcomes of Conciliation in Sex Discrimination Cases* (August, 1995).

9. R Johnstone (ed), *New Directions in Occupational Health and Safety Prosecution: The Individual Liability of Corporate Officers, and Prosecutions for Industrial Manslaughter and Related Offences* (June, 1996).

10. T Sharard, *Competing Models of Worker Representation: The ILO Collective Bargaining Principles and Part VIB of the Industrial Relations Act 1988* (June, 1996).

11. R Naughton, *Employee Involvement at the Workplace: Does the Law Provide Sufficient Incentive for Change* November, 1996).

12. A Chapman, B Creighton, R Naughton and WQ Chan, *Valid Reasons for Termination of Employment* (January, 1997).

13. JM Fox, *Labour Law under the New Order: The Interaction between Workers' Rights and Economic Priorities in Indonesia* (October, 1997).

14. A Mitchell, *Industrial Democracy: Reconciling Theories of the Firm and State* (December, 1997).

15. J Murray, *Social Justice for Women? The ILO's Convention on Part-Time Work* (May, 1998).

16. A O'Donnell and R Mitchell, *Immigration Law and Policy, and its Contribution to Labour Market Regulation: A Historical Survey to 1979* (February, 2000).

17. S Marshall, *The Stake Holding Theory of Corporate Governance: Can it Deliver upon its Promises?* (March, 2000).

18. M Brown and S Ainsworth, *A Review and Integration of Research on Employee Participation in Australia 1983-1999* (March, 2000).

19. C Arup, J Howe, R Mitchell, A O'Donnell and JC Tham, *Employment Protection and Employment Promotion: The Contested Terrain of Australian Labour Law* (April, 2000).

20. A O'Donnell and R Mitchell, *Immigrant Labour in Australia: The Regulatory Framework* (August, 2000).

21. A Forsyth, *Re-Regulatory Tendencies in Australian and New Zealand Labour Law* (March, 2001).

22. A Chapman and JC Tham, *The Legal Regulation of Information in Australian Labour Markets: Disclosure to Employers of Information about Employees* (April, 2001).

23. JC Tham and A Chapman, *The Legal Regulation of Information in Australian Labour Markets: Information that is Required to be Disclosed by Employers to Employees and Trade Unions* (September, 2001).

24. A O'Donnell and C Arup, *Social Security and Labour Law: Constructing the Labour Market Subject.* (December, 2001).

25. R Mitchell and J Fetter, *Human Resource Management and the Individualisation of Australian Industrial Relations* (August, 2002).

26. J Fetter, *The Strategic Use of Individual Employment Agreements: Three Case Studies* (December, 2002).

27. G Mason and A Chapman, *Defining Sexual Harassment: A History of the Commonwealth Legislation and its Critiques* (March, 2003).

28. A Murphy, *Protecting Employee Entitlements from Foul Play: Reform of Insolvency Law in Australia* (May, 2003).

29. H Glasbeek, *Crime, Health and Safety and Corporations: Meanings of the Failed Crimes (Workplace Deaths and Serious Injuries) Bill* (February, 2004).

30. C Fenwick and E Kalula, *Law and Labour Law Market Regulation in East Asia and Southern Africa: Comparative Perspectives* (July, 2004).

31. J Fetter and R Mitchell, *The Legal Complexity of Workplace Regulation and Its Impact upon Functional Flexibility in Australian Workplaces* (September, 2004).

32. MJ Ierodiaconou, *Conciliation, Mediation and Federal Human Rights Complaints: Are Rights Compromised?* (January, 2005).

33. R Mitchell, R Campbell, A Barnes, E Bicknell, K Creighton, J Fetter and S Korman, *What's Going On with the 'No Disadvantage Test'?: An Analysis of Outcomes and Processes Under the Workplace Relations Act 1996 (Cth)* (March, 2005).

34. J Howe, *'Deregulation' of Labour Relations in Australia: Toward Command and Control* (April, 2005).

35. C Fenwick, *Labour Law in Namibia: Towards an 'Indigenous Solution'*? (June, 2005).

36. A O'Donnell, *Re-Inventing Unemployment: Welfare Reform as Labour Market Regulation* (October, 2005).

37. B Gibson, *Compensation for Psychological Injuries Arising From Dismissal* (March, 2006).

38. A Forsyth, *The 'Transplantability' Debate in Comparative Law and Comparative Labour Law: Implications for Australian Borrowing from European Labour Law* (June, 2006).

39. C Fenwick, *Workers' Human Rights in Australia* (August, 2006).

40. J Howe and I Landau, '*Light Touch' Labour Regulation by State Governments in Australia: A Preliminary Assessment* (December, 2006).

41. S Weller, *Power and Scale: The Shifting Geography of Industrial Relations Law in Australia* (June, 2007).

42. T Hardy, *Protection of Employees in a Transmission of Business: What is Left in the Wake of WorkChoices and Subsequent Statutory Amendments* (November, 2007).

43. I Campbell, J Malone and S Charlesworth, "*The Elephant in the Room": Working-Time Patterns of Solicitors in Private Practice in Melbourne* (May, 2008).

44. J Howe and I Landau, *Do Investment Attraction Incentives Create Decent Jobs? A Study of Labour Conditions in Industry Assistance Contracts* (August, 2008).

45. J Fudge and F MacPhail, *The Temporary Foreign Worker Program in Canada: Low-Skilled Workers as an Extreme Form of Flexible Labour* (August, 2009).

46. A Chapman, *Employment Entitlements to Carer's leave: Domesticating Diverse Subjectivities* (November, 2009).

47. C Andrades, *Intersections between 'General Protections' Under the Fair Work Act 2009 (Cth) and Anti-Discrimination Law: Questions, Quirks and Quandaries* (December, 2009).

48. G Patmore, *Happiness as an Objective of Labour Law* (March, 2010).

49. J Howe, *The Broad Idea of Labour Law: Industrial Policy, Labour Market Regulation and Decent Work* (November 2010).