

REFORM OF SUBCLASS 457 VISA SCHEME

Proposal of three models

HITOSHI NASU

The temporary skills migration program has been playing a pivotal role in addressing the labour and skills shortages in the Australian labour market since its inception in 1996. The monolithic approach to the management of temporary skills migration however, has caused difficulties with accommodating different interests and needs across a range of industries. The imbalance caused by the current system is evident from the fact that it has left some industries with chronic labour and skills shortages, while in others the oversupply of skills has had negative impacts upon the local labour market. Abhorrent exploitation of migrant workers has caught media attention lately, prompting the government to tighten the monitoring and sanctions mechanisms.¹ However, problems still remain within the existing system itself, even though attempts have been made to address some abusive practices by employers.

Under the previous government, the Joint Standing Committee on Migration (JSCOM) issued a comprehensive report in August 2007 on the temporary business visa program.² In response to the final report of the External Reference Group recommending the development of a long-term strategy,³ the current government announced a review of the subclass 457 visa program,⁴ appointing Industrial Relations Commissioner Barbara Deegan to examine the integrity of the program.⁵ It is therefore timely to examine both the key problems underlying the current temporary business visa program and the potential reform plans. This study will focus on three alternative models — the skills advisory body model, the skills assessment model, and the industry self-regulation model. It will examine how effectively each model can operate to identify labour shortages and ensure skill level, while accommodating different needs across a range of industry sectors.

Key issues surrounding the 457 Visa

The subclass 457 visa accommodates eight different entry streams,⁶ including the Australian business sponsorship stream which highlights the tension between these competing demands. The rationale behind this scheme lies with the concerns expressed by Australian businesses, economic and trade agencies that previous mechanisms for bringing in skilled overseas workers were too complex and time consuming, causing substantial economic losses.⁷ Industry groups were therefore critical of the costly and time-consuming 'labour market testing', which

required employers to 'demonstrate that the jobs to be filled by foreign nationals had first been offered to Australian residents and that none suitable were available'.⁸ The 'deregulation' of migrant recruitment by the introduction of the subclass 457 visa scheme which abolished the 'labour market testing' requirement, helped streamline the visa application process, making it user-friendly for employers.

The issues surrounding the 457 visa are multifaceted, revolving around the effectiveness of the system in protecting migrants as well as local labourers.⁹ First, there are widespread concerns that temporary migrant workers are vulnerable to, and have been subject to, exploitation by their employers. Under the current system, employers must pay the Australian award wage or the minimum salary set by the Minister through Gazette Notice, which is 'aimed at excluding low-skilled or unskilled workers'.¹⁰ There has been a great deal of media attention on the 'slave labour' issue in breach of the minimum salary level and working conditions required under the migration law as well as workplace relations law.¹¹ Yet issues surrounding wages and work conditions do not end there. In industries where the minimum salary level is lower than the market rates, concerns are expressed that this has downward pressure on wages of local workers.¹² In other industries such as agricultural, catering and nursing, the minimum salary level is reportedly significantly higher than the average salary.¹³

The JSCOM considered alternative mechanisms for setting salary levels, including the identification and application of the market rate for each eligible occupation, and the relevant level of enterprise. However, it failed to go beyond simply recommending that alternatives for calculating salary levels be investigated.¹⁴ The Committee's position appears to be largely influenced by the practical difficulties involved in calculating the 'market rate', as pointed out by the Department of Employment and Workplace Relations. It could only be determined at an industry level and be subject to variation depending on the experience and quality of work as well as the place of employment.

Second, concerns have been raised as to the current arrangement for assessing and recognising the competencies of migrant workers, particularly in relation to overseas trained doctors. The processes and standards of skills assessment for overseas trained doctors seeking a temporary visa vary from jurisdiction to jurisdiction.¹⁵ Although the recent Council of Australian Governments' initiative towards

REFERENCES

1. Migration Amendment (Sponsorship Obligations) Bill 2007.
2. Joint Standing Committee on Migration, *Temporary Visas...Permanent Benefits* (August 2007), available via <aph.gov.au/house/committee/mig/457visas/report.htm> at 3 June 2008 (hereinafter JSCOM Report).
3. Visa Subclass 457 External Reference Group, *Final Report to the Minister for Immigration and Citizenship* (April 2008), <minister.immi.gov.au/media/media-releases/2008/erg-final-report-april-2008.pdf> at 3 June 2008.
4. 'Govt to Review 457 Visa Program', *Sydney Morning Herald* (Sydney), 14 April 2008.
5. 'IR Expert to Oversee Temporary Skilled Migration Review', (Press Release, 14 April 2008), <minister.immi.gov.au/media/media-releases/2008/ce08035.htm> at 3 June 2008.
6. Migration Regulations 1994 (Cth) Schedule 2, subcl 457.223(1)-(10).
7. Committee of Inquiry into the Temporary Entry of Business People and Highly Skilled Specialists, *Business Temporary Entry - Future Directions* (1995). See also, Mary Crock, 'Contract or Compact: Skilled Migration and the Dictates of Politics and Ideology' (2002) 16 *Georgetown Immigration Law Journal* 133, 141-144.
8. Bob Kinnaird, 'Current Issues in the Skilled Temporary Subclass 457 Visa' (2006) 14(2) *People and Place* 49, 50.
9. See, JSCOM Report, above n 2, 17.
10. Siew-Ean Khoo et al, 'A Global Labor Market: Factors Motivating the Sponsorship and Temporary Migration of Skilled Workers to Australia' (2007) 41(2) *International Migration Review* 480, 484.
11. See, eg, Matthew Moore and Malcolm Knox, 'Foreign Workers 'Enslaved'', *The Age* (Melbourne) 28 August 2007.
12. See, eg, Australian Council of Trade Unions, Submission No 39 to the JSCOM, 18-19. Submissions to the JSCOM, <aph.gov.au/house/committee/mig/457visas/subs.htm> at 3 June 2008.

the establishment of a national assessment process in this area is encouraging,¹⁶ the skills assessment issue still remains unaddressed in other industries. At no stage in the process of a 457 visa application is the formal skills assessment or qualifications recognition required.¹⁷ The Department's Procedures Advice Manual ('PAM3') provides that 'given the objective of quick, streamlined entry for the 457 visa, skills assessment should occur only if the decision-maker believes they are not able to make an assessment based upon the information provided in the application'.¹⁸

Third, it is alleged that the increase of subclass 457 visa workers threatens local employment and training opportunities for Australians. The abolition of measures protecting local workers by requiring employers to undertake labour market testing, has raised concerns that 457 visa workers are used as a substitute to training local workers, causing obstacles to the local employment and training opportunities, and the maintenance of Australian skills standards.¹⁹ In fact, the oversupply of migrant workers in the ICT industry has reportedly contributed to a significant reduction in demand for domestic IT graduates and poor graduate employment rates, which in turn has led to a significant drop in local enrolments in IT courses.²⁰ In contrast, the meat industry has expressed difficulties with improving their access to subclass 457 visa labour.²¹ The Australian Mines and Metals Association criticised the decision-makers for focusing merely on formal qualifications, and failing to acknowledge the experience and specialist knowledge of overseas workers in the industry.²² There is no doubt therefore that the current subclass 457 visa scheme has not been effective in filling a genuine shortage of some skills in Australia even though employers statistically tend to prefer to employ Australian residents.²³

These three main issues surrounding the subclass 457 visa demonstrate that the current temporary skilled migration program is ill-balanced. This is largely due to the absence of a proper mechanism whereby skills are appropriately assessed and maintained, and labour shortages are appropriately identified, accommodating the different needs and situations of each industry. In fact, the 2007 JSCOM Report recognises sectoral issues as an important area of investigation in refining temporary skilled migration policy and program.²⁴ Three alternative models are examined in the next section in light of how effectively each model accommodating different needs and situations in each industry can achieve a suitable balance between meeting the needs of business on the one hand, and the protection of the domestic labour market on the other.

Models for reform: three alternatives

Skills advisory body model

The first model involves the introduction of a skills advisory body that provides the most updated information on labour market trends, skills shortages, and even the wider impacts of skilled migration, to ensure that migration is balanced alongside the needs of both the economy and society.²⁵ This is the

model recently introduced in the United Kingdom as a framework which 'sets the bar in the right place'.²⁶ Under its new five-tier system, the Tier 2 migrants (equivalent to subclass 457 visa workers) must be employed in an occupation which has been identified as being in shortage by the Migration Advisory Committee (MAC). Migrants can be employed in other occupations provided that they pass a resident labour market test to demonstrate that the applicant is not displacing a worker in the domestic UK and EU labour market.²⁷ This system can therefore be seen as an attempt to overcome criticisms leveled at the labour market testing that led to its abolishment in Australia by institutionalising the process.

In the United Kingdom, this model is supplemented by the points test through which the appropriate level of skills is purportedly maintained. Points are calculated by reference to sponsorship, qualifications, prospective earnings, the ability to support themselves, and English language skills. In contrast to the Australian and US systems, where the salary level plays a major role for the protection of the domestic labour market, salary is seen in this new system merely as an indicator of the individual's contribution to the national economy. This system could prove effective in providing prospective employers with an added incentive to maintain the appropriate level of salary, especially when they employ migrants in an occupation not on the shortage occupation list. Yet, it is doubtful that the points test alone will ensure that the applicant meets the level of skills required.

The MAC has recently commenced its work, gathering evidence to inform their work from employers and stakeholders and conducting research.²⁸ It remains to be seen how effectively the MAC responds to employers' needs for filling labour shortages across a range of different industries. Under this model, employers are delegated the responsibility of ensuring that the applicant has the necessary skills, and that the salary is appropriate to the level of skills required in the industry and are thus entrusted to do so honestly and efficiently. Critics are wary that the scheme is open to abuse and fraud over which the government has little control.²⁹ Moreover, some employers have already expressed their frustration with the uncertainty and increased administration under the new system.³⁰

Skills assessment model

Utilising the existing institutions for the skills assessment for general skilled migration, this model requires the currently accredited skills assessment institutions to consider not only whether the applicant possesses appropriate skills, but also the level of skills and training according to which the appropriate level of salary can be estimated. This scheme thus aims to strengthen and expand the roles that skills assessment bodies play not only in assessing skills but in identifying and monitoring labour shortages as well as ascertaining an appropriate level of salary for each occupation.

This model could well be seen as the natural progression of skills recognition practice in Australia.

13. National Farmers Federation, Submission No 22 to the JSCOM, 3-5; Restaurant and Catering Australia, Submission No 50 to the JSCOM, 16; Migration Institute of Australia, Submission No 9 to the JSCOM, 12.

14. JSCOM Report, above n 2, 37-40.

15. See, Australian Medical Association, Submission No 43 to the JSCOM, 2; Productivity Commission, *Research Report: Australia's Health Workforce* (22 December 2005) 127-129.

16. Council of Australian Governments' Meeting, 26 March 2008: Health and Ageing, <coag.gov.au/meetings/260308/index.htm#health> at 3 June 2008.

17. Australian Manufacturing Workers' Union, *Temporary Skilled Migration: A New Form of Indentured Servitude*, 4, (July 2006), <backtrack.asn.au/files/skilled-migration-0706.pdf> at 3 June 2008.

18. Procedures Advice Manual 3, Sch2Visa457.25.4.

19. Patrick Chan, 'WorkChoices for Migration Law? Assessing the New Era of Skilled Migration' (2005) 28 *Immigration Review* [460].

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

21. Australian Meat Industry Council, Submission No 26 to the Joint Standing Committee on Migration.

22. Australian Mines and Metals Association, Submission No 30 to the JSCOM, 18.

23. Siew-Ean Khoo et al, 'Temporary Skilled Migration to Australia: Employers' Perspectives' (2007) 45(4) *International Migration* 175, 193-194.

24. JSCOM Report, above n 2, 22 [1.61].

25. 'Migration Advisory Committee Consultation Launched' (Press Release, 29 November 2006), <press.homeoffice.gov.uk/press-releases/Migration-advisory?version=1> at 2 June 2008.

26. *Ibid.*

At no stage in the process of a 457 visa application is the formal skills assessment or qualifications recognition required.

Trades Recognition Australia (TRA) is responsible for the skills assessment of many trade occupations, and though originally entrusted with assessments only in metal and electrical trades, it has extended its range of trade assessments since 1999.³¹ Australian Computer Society (ACS) has already commenced its own market research based on the survey of its members.³² With additional resources and capacities built into them, skills assessment bodies will be well placed and equipped in collecting and analysing data for the purpose of examining the labour market and an appropriate level of salary for each occupation.

Under this model, the authority to assess the suitability of migrant employment is delegated by the Department of Immigration to various expert bodies. Theoretically, each skills-assessment body has the knowledge and expertise necessary to effectively monitor the labour market demands, and to assess the level of skills required taking into account different needs and circumstances specific to each industry. However, this scheme has been criticised as being ill-suited to the skills assessment of tradespersons, especially those from non-traditional source countries.³³ The lengthy period of time that is currently spent for skills assessment (usually three to six months) also creates barriers to employers who need prompt and efficient access to global labour markets. For this model to work, the current skills assessment bodies will have to be revamped to accommodate competency-based training in their skills assessment and to expedite the assessment process. Skills assessment bodies would have to be better equipped with assessing different types and levels of skills and also to constantly monitor the skills demands and circumstances specific to each profession so that they can make an effective and prompt decision-making when an application is lodged.

Industry self-regulation model

The current subclass 457 visa scheme gives maximum flexibility to employers, allowing them to recruit migrants to specific jobs without the necessity of proving that local labour supplies can fill the position, or to have the migrants' skills assessed and approved by Australian credential authorities. The adoption of the skills advisory body model or the skills assessment model will inevitably impose fetters upon employers in opting for employing migrants. The third model relies on the self-regulation of each industry, and is designed to maintain the flexibility given to employers, while holding them responsible for ensuring that migrants are

employed where there is a genuine shortage of labour supply, and, that they have an appropriate level of skill.

The industry self-regulation model could well be more appealing to the government, as it is not required to balance different interests and needs among various industries. The responsibility to monitor the labour market and skills level is delegated to each peak industry representative body. This shift is also consistent with the gradually developing trend of migration decision-making practice, in which the Department of Immigration delegates a large portion of fact-finding work to those who possess expertise, for example, the Medical Officer of Commonwealth (MOC) for health assessments,³⁴ or education providers for the certification of students meeting course requirements.³⁵ The final decision-making authority would nevertheless be reserved for the Department of Immigration, together with rigorous enforcement mechanisms.

Peak industry representative bodies would be required to play a more active role in monitoring both labour shortages and appropriate levels of skills and salaries. They are well positioned to gather information and identify industry-specific needs, as demonstrated in the submissions made by various representative bodies to the JSCOM in 2006. Some industries such as mining and textile have their own training program, which can be adapted to enable effective and prompt skills assessment and on-going skills development programs. Also, some industries might take liberties in setting differential salary levels according to the level of training and the place where migrants will be employed.

There is also a risk that peak industry representative bodies might be 'captured' to represent the interests of employers.³⁶ The mechanisms set up by peak bodies might turn into a mere vehicle to justify the claim of a 'genuine shortage of labour', which could even become a subterfuge to undercut the wages and conditions of existing workers. To prevent this problem, a reassurance mechanism would have to be implanted into this model, such as requiring government officials and representatives of the relevant trade union to participate in the administration. Such a tripartite body would ensure that the administration of this system remains transparent and prevents the interests of one side from being over-represented.

Conclusion

The architectural foundation of the subclass 457 visa scheme determines how effective and efficient access

27. The Command Paper, *A Points-Based System: Making Migration Work for Britain* (Cm 6741, March 2006), at [91], <homeoffice.gov.uk/documents/command-points-based-migration> at 2 June 2008).

28. Migration Advisory Committee, *Identifying Skilled Occupations Where Migration Can Sensibly Help to Fill Labour Shortages: Methods of Investigation and Next Steps for the Committee's First Shortage Occupation List* (February 2008), <ind.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/mac/macreports/> at 2 June 2008.

29. Laura Devine, 'Is the New Highly Skilled Migrant Programme "Fit for Purpose"? If No, the Government's Proposed Points Based Immigration System is Fundamentally Flawed' (2007) 21 (2) *Journal of Immigration, Asylum and Nationality Law* 90.

30. Louisa Peacock, 'Points-based Migration System Makes Work for Employers', *Personnel Today* (2 June 2008), <personneltoday.com> at 2 June 2008.

31. Anthony O'Donnell and Richard Mitchell, 'Immigrant Labour in Australia: The Regulatory Framework' (2001) 14 *Australian Journal of Labour Law* 1, 21.

32. Australian Computer Society, 2007 *Australian Computer Society Remuneration Survey Summary Report* (2007), <apesma.asn.au/surveys/acs/summary/acs_2007_summary_report.pdf> at 2 June 2008.

33. Bob Birrell et al, *Brain Drain, Brain Gain: Accessing the Required Skills* (February 2006), 35, <skillinitiative.gov.au/brain_drain.pdf> at 2 June 2008.

34. Migration Regulations 1994 (Cth) reg 2.25A.

35. *Migration Act 1958* (Cth) s 137j; Migration Regulations 1994 (Cth), Schedule 8, item 8202.

36. For the 'capture' theory in regulation, see, eg, Toni Makkai and John Braithwaite, 'In and Out of the Revolving Door: Making Sense of Regulatory Capture' (1992) 12 *Journal of Public Policy* 61.

to global labour market is balanced with protection of the domestic labour market.³⁷ At present, this is chiefly done through the gazetted minimum salary levels. However, it is doubtful whether imposing these general minimum salary levels, without even differentiating between specific labour market needs in a range of industries and geographical regions, can accomplish this task alone. The de-regulation of the temporary skilled migration program and the monolithic approach to the administration of the scheme has distorted the system in an unbalanced manner. The key to recovering the right balance is to put in place a regulatory mechanism whereby skills are properly assessed and maintained, and labour shortages can be properly and promptly identified.

A solution can be found by adopting one, or a combination of the alternative models examined above. While the skills advisory body model can effectively accommodate different needs and situations in each industry, it may in fact widen the scope for abuse and fraud unless there is a robust monitoring and sanctions

mechanism. Furthermore, the skills assessment model may provide a practical solution utilising the existing institutions, yet will require skills assessment bodies to make significant changes to the way in which they operate with additional resources. Tensions between the government and industries over temporary skilled migration will be eased by adopting the industry self-regulation model, delegating the responsibility to manage the intake of migrants in a way that suits their own needs and situations in the labour market. The adoption of any of those models will mark a step forward towards a more balanced use of the subclass 457 visa scheme accommodating industry-specific needs and interests.

HITOSHI NASU teaches law at ANU College of Law, The Australian National University. I express my gratitude to Michael Rawling for his invaluable comments and to James McCombe for his research assistance.

© 2008 Hitoshi Nasu

37. JSCOM Report, above n 2, 17–18; Bob Kinnaird, 'Temporary-Entry Migration: Balancing Corporate Rights and Australian Work Opportunities' (1996) 4(1) *People and Place* 55, 57.



LAW AND JUSTICE
FOUNDATION

NEW
SOUTH WALES

Research into prisoners/ex-prisoners' legal needs

Taking justice into custody reveals the extent of the civil and family law problems faced by prisoners and people leaving prison and the barriers they experience getting legal help.

Researchers from the Law and Justice Foundation of NSW interviewed prisoners, ex-prisoners, and a range of legal/non-legal service providers and organisations providing assistance to them.

Available at \$35 from the Foundation

WEB: www.lawfoundation.net.au/publications

TEL: 02 8227 3200

