

Labour market deregulation and temporary migrant labour schemes:

An analysis of the 457 visa program

Abstract

This article examines Australia's main temporary labour migration scheme, the 457 visa program, through the concept of 'labour market deregulation'. In this article, 'deregulation' is not equated with the removal of regulation; rather it is defined to mean the removal of a particular kind of regulation – protective regulation. Applying this concept to the 457 program, the article identifies three protective purposes: protection of the employment opportunities of local workers; protection of the working conditions of local workers; and protection of the working conditions of temporary migrant workers. It argues that this program was deregulated under the Coalition Government (1996-2007) while being subject to re-regulation under the current ALP Government (2007-present). The significance of this study is twofold: it provides a specific analysis of the 457 program, up to and including the most recent changes, and it suggests an analytical approach to examining the regulation of temporary migrant work.

Temporary migrant work (paid work undertaken by persons who are in the host country under an arrangement for temporary residence) 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

¹ M Crock, *Immigration and Refugee Law in Australia*, Federation Press, Sydney, 1998, p92.

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

The phenomenon of temporary migrant work is directly relevant to labour law scholarship. It concerns a substantial segment of the modern workforce. At the same time, this is a special segment, whose employment conditions are influenced not only by mainstream labour regulation but also by their temporary migrant status and the rules that govern that status. There is concern here that such workers encounter precarious employment conditions partly because of their migratory status.⁴ As a result, the phenomenon of temporary migrant work presses scholars to go beyond the boundaries of traditional labour law scholarship; it points to the overlap between the study of labour law and the study of migration law and it underlines the value of the argument for a re-envisioning of the scope of labour law in order to capture its role in shaping labour market regulation.⁵ Some scholars have begun to explore the connection between labour law and migration law.⁶ Yet, there is an immediate challenge in studying temporary migration schemes as labour law scholars: how should a fast-changing area with seemingly different organising principles be understood? How relevant are traditional concepts and arguments to do with labour regulation?

² G Hugo, ‘Globalization and Changes in Australian International Migration’ (2006) 23(2) *Journal of Population Research* 107 at 110.

³ P Mares, ‘The Permanent Shift to Temporary Migration’, Inside Story, 17 June 2009, at <<http://inside.org.au/the-permanent-shift-to-temporary-migration/>>.

⁴ B Anderson, ‘Migration, immigration controls and the fashioning of precarious workers’ (2010) 24 *Work, Employment and Society* 300; J Fudge, ‘Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers’ (2012) 34 *Comparative Labor Law and Policy Journal* 95; A Reilly, ‘Protecting Vulnerable Migrant Workers: The Case of International Students’ (2012) 27 *Australian Journal of Labour Law* 181.

⁵ R Mitchell and C Arup, ‘Labour Law and Labour Market Regulation’, in C Arup et al (Eds), *Labour Law and Labour Market Regulation*, Federation Press, Sydney, 2006; J Fudge, ‘Labour as a “Fictive Commodity”: Radically Reconceptualizing Labour Law’, in G Davidov and B Langille (Eds), *The Idea of Labour Law*, Oxford University Press, Oxford, 2011.

⁶ A O’Donnell and R Mitchell, ‘Immigrant Labour in Australia: The Regulatory Framework’ (2001) 14 *Australian Journal of Labour Law* 1; M Crock and L Friedman, ‘Immigration Control and the Shaping of Australia’s Labour Market: Conflicting Ideologies or Historical Imperatives?’, in C Arup et al (Eds), *Labour Law and Labour Market Regulation*, Federation Press, Sydney, 2006; for comments on the 457 visa program see J Howe, ‘The Migration Legislation Amendment (Worker Protection) Act 2008: Long Overdue Reform, But Have Migrant Workers Been Sold Short?’ (2010) 23 *Australian Journal of Labour Law* 251.

This article picks up the challenge of examining the complex detail of temporary migration schemes by focussing on the major program in Australia that is explicitly designed to facilitate temporary migrant work – the 457 visa program, which now goes by the formal name of the Temporary Work (Skilled) (Subclass 457) visa program⁷ (from 1996 to 2012, its formal title was the Subclass 457 Business (Long Stay) visa program). The article aims to begin an analysis of this important and controversial scheme, using the tools of labour law scholarship.

Introduced in 1996, the program has been controversial, with critics complaining about a lack of adequate protective regulation and the possibility of abuse.⁸ These complaints stem in part from the structure of the program as an employer-sponsored program. The 457 visa program could in fact be called an ‘employer-driven scheme’, as employers determine both which workers are brought in under the scheme and also the number of such workers, with no limits or quotas applying to the number of 457 visas issued. In order to successfully apply for a 457 visa, a worker needs to be nominated by an employer. These visas can last up 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 can transfer employers provided that the new employer meets the relevant migration requirements. There is no restriction on these workers applying for permanent residence. Many features of the scheme encourage dependence on the employer, opening up room for abuse.

This article assesses the detail of the 457 visa program through the pivotal concepts of labour market ‘deregulation’ and ‘re-regulation’, commonly used to characterise changes in labour law and labour regulation, both internationally and in Australia.⁹

⁷ Migration Legislation Amendment Regulation 2012 (No 4) (Cth).

⁸ 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, Melbourne, 2008.

⁹ Australian studies include R Blandy and J Sloan, *The Dynamic Benefits of Labour Market Deregulation*, Australian Chamber of Commerce, Canberra, 1986; R Mitchell and M Rimmer, ‘Labour Law, Deregulation, and Flexibility in Australian Industrial Relations’ (1990) 12 *Comparative Labor Law Journal* 1; J Buchanan and R Callus, ‘Efficiency and equity at work: The need for labour market regulation in Australia’ (1993) 35 *Journal of Industrial Relations* 515; P Gahan and T Harcourt, ‘Australian Labour Market Institutions, “Deregulation” and the Open Economy’ (1999) 10 *Economic and Labour Relations Review* 296; K Hancock, ‘Labour Market Deregulation in Australia’, in S

These concepts can be blurred and characterised by difficulties, but they have proven useful in establishing the parameters both of the changes themselves and of the debates that accompany these changes. We argue that, carefully defined, they remain useful in labour law scholarship and can also be used fruitfully to analyse temporary migrant work schemes. In this way, this article offers two contributions to the literature of labour law in Australia: first, an analysis of one important program of temporary migration; and, second, further reflection on the value of central concepts used in current scholarship.

The article is set out in the following manner. It begins with elaboration of the concept of ‘deregulation’ (and ‘re-regulation’), starting with labour law and then reaching out to show its relevance to temporary migration schemes. In the remainder of the article, the analytical framework is used to begin an assessment of the 457 visa program. The article suggests that the 457 visa program under the Coalition government was deregulatory: this was true when the scheme was enacted in 1996 and a basic deregulatory thrust was maintained over the course of the period to 2007, including in the course of the liberalisation of the rules in 2001. Documenting the changes made since the election of the Australian Labor Party (ALP) to federal government in 2007, the article highlights how such changes, first made in 2009 and more recently in 2013, have entailed a re-regulation of the scheme. We conclude, however, that these changes amount to only a partial re-regulation of the 457 visa program because of the continued existence of substantial executive discretion to set lower levels of protection.

Labour market deregulation and worker protection

What do we mean by labour market deregulation?

Richardson (Ed), *Reshaping the Labour Market*, Cambridge University Press, Melbourne, 1999; I Campbell and P Brosnan, ‘Labour Market Deregulation in Australia: the slow combustion approach to workplace change’ (1999) 13(3) *International Review of Applied Economics* 353; R McCallum, ‘Plunder down under: Transplanting the Anglo-American labor law model to Australia’ (2005) 26 *Comparative Labor Law and Policy Journal* 381; J Isaac, ‘The deregulation of the Australian Labour Market’, in J Isaac and R Lansbury (Eds), *Labour Market Deregulation: Rewriting the Rules*, Federation Press, Sydney, 2005.

‘Deregulation’ is a term that has come into prominence since the 1980s, both in Australia and internationally, largely as a catch-all term, used by both advocates and critics, to cover neoliberal policies and initiatives aimed at reducing state involvement in the economy and allowing more scope for what are usually labelled ‘market forces’. Deregulation here tends to mean less state regulation both as a process and as an outcome.¹⁰

Much of the heat in the ongoing debates since the 1980s concerns the specific process of labour deregulation, or more broadly *labour market deregulation*, which is aimed at reducing state regulation in the sensitive area of minimum labour standards and trade union rights, that is, the elements of state regulation that function to protect workers, both individually and collectively. Labour market deregulation was an important catchcry in Australia, initially raised by neoliberal advocates in the employer associations, universities, conservative think tanks and the media, who sought major changes to the award system and labour law in general.¹¹ In this case the call for deregulation was linked with a call for an end to labour market rigidities and an increase in labour market *flexibility*. It was linked with a broad critique of what were seen as the inflexible rules built up to protect workers and trade unions, particularly in the post-war period of Keynesian-guided prosperity and full employment. Though the aim was sometimes couched in terms of freeing up market forces, it could be better described in terms of freeing up more space for individual employers to alter their labour management practices in response to their market position, that is, as a vehicle for enhancing managerial prerogatives.¹²

¹⁰ For a recent account of neoliberalism, or what is sometimes called ‘market fundamentalism’, see J Peck, *Constructions of Neoliberal Reason*, Oxford University Press, Oxford, 2012; for Australia see M Western et al ‘Neoliberalism, Inequality and Politics: The Changing Face of Australia’ (2007) 42 *Australian Journal of Social Issues* 401.

¹¹ See R Blandy and J Sloan, above n 9; Business Council of Australia (BCA), *Enterprise-Based Bargaining Units: a better way of working*, vol. 1, BCA, Melbourne, 1989; D Moore, ‘The Case for Further Deregulation of the Labour Market’, paper prepared for the Labour Ministers’ Council, Commonwealth of Australia, Canberra, November 1998.

¹² I Campbell, ‘Labour market flexibility in Australia: enhancing management prerogative?’ (1993)5(3) *Labour and Industry* 1. Labour market rigidities were broadly identified, in the words of Alan Jackson from the Confederation of Australian Industry, as “union structures, award structures, award conditions and restrictive work practices” (cited in Campbell, *ibid* 14). More substantively, the employer associations asked for measures that would facilitate ‘flexible working-time arrangements’, such as: extension of the spread of ordinary hours; reduction or elimination of penalty rates, overtime rates and shift allowances; increased management discretion in the scheduling of Rostered Days Off, annual leave, breaks and starting and finishing times; reduction or elimination of breaks; liberalization of restrictions on the use of casual workers, permanent part-time workers and contractors; changes in the duration of working time; averaged hours arrangements; and new shift arrangements (12-hour shifts,

Neoliberal initiatives in the arena of labour markets gathered pace in Australia from the late 1980s and then, most dramatically, in the federal sphere from the mid-1990s.¹³ Labour market deregulation took place in two main ways: first was a process of direct elimination or weakening of comprehensive protective rules; and second was a process of expansion of the inevitable gaps in protective rules. Most attention is given to the first process, but the second, though more hidden, is equally important. The labour regulation system in Australia, as in all countries, contains gaps that can be used to lower wages and conditions for select groups of workers in comparison to the mainstream, either to a secondary level of regulation or to a sphere of management unilateralism. The Australian labour regulation system is particularly porous, and numerous gaps exist as a result of limits in its coverage, eg the restriction to employees, limits in its enforcement, and the existence of numerous exemptions or derogations, such as for casual employees. As a result, labour market deregulation and the creation of new flexibilities for employers could be achieved through tightening of the scope of coverage of awards and statutes, loosening of enforcement, more and wider exemptions and more liberal rules around non-standard employment.¹⁴

Neoliberal initiatives were widely understood, both by advocates and critics, as aimed at labour market deregulation. Yet the concept of ‘deregulation’ in Australia possessed from the start a somewhat fuzzy and paradoxical appearance. It soon became clear in the course of the changes that neoliberal initiatives in the arena of

split shifts) (Confederation of Australian Industry, *Flexibility of working-time in Australia*, CAI, Melbourne, 1988; BCA, ‘Towards More Flexible Working-time Arrangements’ (1988) 40 *Business Council Bulletin*.

¹³ I Campbell and P Brosnan, above n 9; see also I Campbell, ‘Australia: Institutional changes and workforce fragmentation’, in S Lee and F Eyraud (Eds), *Globalization, flexibilization and working conditions in Asia and the Pacific*, Chandos, London, 2008.

¹⁴ A useful distinction between explicit and implicit deregulation is to be found in G Standing, ‘Labour regulation in an era of fragmented flexibility’, in C Buechtemann (Ed), *Employment Security and Labor Market Behavior*, IILR Report no. 23, ILR Press, Ithaca (NY), 1993. The fragmentation of the regulatory system and the importance of regulatory gaps are themes stressed in I Campbell and P Brosnan, above n 9, and I Campbell, ‘Australia: Institutional changes and workforce fragmentation’, above n 13. The complexity of the Australian labour regulation system, exacerbated in the course of the shifts in industrial relations regimes over the past twenty years, is outlined in M Bray and P Waring, ‘Complexity’ and ‘Congruence’ in Australian Labour Regulation’ (2005) 47 *Journal of Industrial Relations* 1; see also J Fetter and R Mitchell, ‘The Legal Complexity of Workplace Regulation and Its Impact Upon Functional Flexibility in Australian Workplaces’ (2004) 17 *Australian Journal of Labour Law* 276; P Gahan and P Brosnan, ‘The Repertoires of Labour Market Regulation’, in C Arup et al (Eds), *Labour Law and Labour Market Regulation*, Federation Press, Sydney, 2006; M Bray and A Stewart, ‘What is Distinctive about the Fair Work regime?’ (2013) 26 *Australian Journal of Labour Law* 20.

labour markets did indeed involve a reduction of certain forms of labour regulation, but they did not necessarily lead to less overall labour regulation. On the contrary, as several critics point out, such initiatives were quite compatible with increased control or subordination of workers. This could take place in several ways. First, it occurred *within* enterprises as a result of the increased scope of management authority and the increased salience of enterprise-specific rules and regulations. Though often misrepresented as an unfolding of market relations, increased subordination of labour within the enterprise in fact signalled the enhanced power of management practices, ranging from carefully developed business strategies to more momentary enthusiasms and whims.¹⁵ Second, even at the level of formal state regulation, neoliberal initiatives often involved tighter and more elaborate controls over aspects such as the content of collective agreements, the procedures for reaching collective agreements and the activities of worker organizations such as trade unions. In contrast to the New Zealand model of labour market deregulation, the Australian version, especially at its zenith with the bundle of legislation and regulations known as Work Choices, has been marked by an intensification of particular types of coercive state regulation.¹⁶

In short, what is commonly called labour market deregulation in Australia involves less state regulation in some respects but more state regulation in other respects. The end result is certainly not lacking state regulation. How could this process and this outcome be usefully described as ‘deregulation’?

Because it risks missing the aspect of increased regulation, some scholars argue that the term ‘labour market deregulation’ is inaccurate, a misnomer, and some therefore advocate discarding the term.¹⁷ We sympathise with many points made by the critics

¹⁵ J Buchanan and R Callus, above n 9.

¹⁶ J Howe, ‘Deregulation’ of Labour Relations in Australia: Towards a More “Centred” Command and Control Model’, in C Arup et al (Eds), *Labour Law and Labour Market Regulation*, Federation Press, Sydney, 2006; S Cooney, ‘Command and Control in the Workplace: Agreement-Making Under Work Choices’ (2006) 16(2) *The Economic and Labour Relations Review* 147; S Cooney, J Howe and J Murray, ‘Time and Money under WorkChoices: Understanding the new Workplace Relations Act as a Scheme of Regulation’ (2006) 29 *University of New South Wales Law Review* 215. The contrast between New Zealand and Australia is noted in G Anderson and M Quinlan, ‘The Changing Role of the State: Regulating Work in Australia and New Zealand 1788-2007’ (2008) 95 *Labour History* 111 at 128.

¹⁷ J Howe, above n 16; R Cooper, ‘Life in the Old Dog Yet? “Deregulation” and Trade Unionism in Australia’, in J Isaac and R Cooper (Eds), *Labour Market Deregulation: Rewriting the Rules*, Federation Press, Sydney, 2005; B Ellem, ‘Beyond Industrial Relations: WorkChoices and the

of the term labour market deregulation. But we believe that the term remains helpful for analysis. Continued use of the term has the advantage of linking scholarly use with popular and political usage. More substantively, it successfully draws attention to the central thrust of much recent labour market policy, which is indeed carefully aimed at reducing certain types of state regulation and is therefore aptly called deregulatory.¹⁸

In defining and applying an appropriately nuanced concept of labour market deregulation, we can draw on both the traditional tools of social science and the emerging conceptual tools of labour law scholarship. Labour law scholars rightly stress that regulation can have different sources – that in this sense it is *decentred*.¹⁹ Similarly labour law scholars point out that labour regulation is guided by multiple, often overlapping and often conflicting, purposes. The simple idea that labour regulation can be understood as possessing only one purpose, protection of workers, is mistaken and is a barrier to accurate understanding. Though protection has undoubtedly been a central purpose, it has always been supplemented by other purposes, which have come more to the fore in recent years.²⁰

The notion of labour market deregulation is most useful when referring to a process. As foreshadowed above, this is best understood as a process of reducing state labour regulation, but only in respect to *one aspect of state labour regulation* – the protective aspect that is oriented to defending the interests of workers against the authority of

Reshaping of Labour, Class and the Commonwealth' (2006) 90 *Labour History* 211; A Freiberg, *The Tools of Regulation*, Federation Press, Sydney, 2010, p 23.

¹⁸ We can note here that a compelling alternative term to characterise the process of change in labour regulation is lacking. Standing talks of a new regime of 'market regulation', but this is unsatisfactory, since it risks promoting the illusion of the 'invisible hand', according to which 'free' markets are seen as exercising autonomous influence independently of social and political forces. It risks missing the way in which markets and market pressures are politically constituted (G Standing, *Global Labour Flexibility: Seeking Distributive Justice*, Macmillan, London, 1999).

¹⁹ J Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1; J Howe, above n 16.

²⁰ R Mitchell and C Arup, above n 5. Five main 'forms' of labour market regulation through statute are distinguished in G Standing, *Global Labour Flexibility*, above n 18, at 40-41: 1. protective regulations - rules and procedures to protect workers, and/or to prevent those in strong positions from abusing those in weak positions; 2. fiscal regulations - taxes and subsidies to encourage certain forms of activity and/or to discourage other forms; 3. promotional regulations - rules and mechanisms (other than taxes) designed to promote certain developments; 4. repressive regulations - rules and mechanisms to prevent something that the state, or a dominant interest, does not wish to occur; and 5. facilitating regulations - rules and procedures that permit activities to take place, if there is a desire to do so. The manifold purposes that labour regulation can be intended to serve are well signposted in section 3 of the Fair Work Act 2009 (Cth), which announces that the object of the Act is to "provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians...". See also *ibid* s 134 on the 'modern awards objective'.

employers or indeed branches of the state. In the course of this process other aspects of state regulation may or may not be increased. Indeed, if we take the aims and intended effects of labour market deregulation seriously, that is as a reduction in protection for workers, it is by no means surprising that the reduction of the protective element might be complemented by an increase in the coercive element. For example, it is by no means surprising that legislation such as Work Choices should combine a deregulation of protective aspects of labour law with a tightened regulation of trade union activities, which might otherwise act as an alternative source of protective regulation of workers.

With this caveat kept in mind, the concept of labour market deregulation can be used in assessing individual policy processes. In this perspective, the success of a process of labour market deregulation is to be judged by its results – whether protection for workers has been reduced. Viewed from another angle, this result would equate with an increase in the freedom of individual employers (though we need to keep in mind that this is not necessarily a zero-sum game, and increased freedom for employers can occur in many ways).

This issue of ‘deregulation’ should not be seen as a simple quantitative question (how much or how little regulation?) but rather as a more qualitative question that concerns the extent to which regulation effectively serves its protective purpose(s). Viewing the question in this way avoids facile assumptions that more regulation is good (or bad) and, conversely, less regulation is bad (or good). In this perspective, the opposite of labour market deregulation would be a process of *labour market re-regulation* in which protection of worker rights and interests is increased.

It remains true that applying the concept of labour market deregulation is by no means straightforward. One issue in identifying protective elements in labour law concerns: ‘protection for whom?’ We may see protection for some workers at the expense of others. In particular, labour market deregulation by means of the expansion of gaps in comprehensive rules often implies a process of relative disadvantage for particular groups (such as youth, women and casual workers). There is also the question ‘protection of what?’ Workers have different and, at times, conflicting interests to be protected. Labour security, for instance, takes various forms including income

security, employment security and representation security.²¹ Another difficulty arises from the fact that protective elements may be bound up with other elements so that it is difficult in practice to disentangle them. The one piece of legislation or regulatory rule may be a complex combination of different purposes.

Deregulation and migration law

Once the concept of labour market deregulation is understood as the removal of regulation protective of the rights and interests of workers in the labour market, it is clear that its relevance is not restricted to the areas where it has been commonly applied, minimum labour standards and trade union rights, or even to labour law as traditionally conceived in Australia (statutory labour standards, award system, regulation of collective bargaining). The concept also applies to other areas of law that impact on labour markets and have a protective purpose as one of their organising principles. In particular, the concept of deregulation provides an important conceptual lens to analyse migration law. Scholarship on labour market regulation demonstrates how law not only regulates the working conditions of those employed but also constitutes and regulates both the supply and demand for labour. Migration law relating to labour migration operates as a form of labour market regulation in all these ways; it particularly regulates the supply of (migrant) labour. Further, as explained below, such regulation is underpinned by protective goals. This explains why the concept of labour deregulation has strong analytical purchase in relation to immigration law.

To conclude that the concept of labour market deregulation is relevant to various areas of law, including migration law, is not the same as saying that it is equally salient in these areas. Much will depend on the significance placed on the protective purposes vis-à-vis other policy goals – that is to say, the other organising principles of such regulation. In the case of immigration law, the notions of sovereignty, the national interest and the protection of borders are paramount.²²

²¹ G Standing, *Global Labour Flexibility*, above n 18.

²² The principal object of the Migration Act 1958 (Cth) ‘is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens’: *ibid* s 4(1).

In addition, labour market deregulation in these different areas of law will not necessarily take the same form. As noted earlier, deregulation of labour law has taken place in two main ways: weakening of the standards imposed by protective rules and expansion of the gaps within these rules. Deregulation of migration law can also occur in such ways but adopt different regulatory forms. Executive discretion to deregulate, for example, may be more prominent than in labour law.²³

The concept of labour market deregulation can be applied to immigration law in two main ways. First it can be applied to immigration law in its own right, considered as a separate body of law. Immigration law, like labour law, is characterised by multiple purposes, one of which is protection of workers, and, as in the case of labour law, we can assess whether changes in immigration law are deregulatory by examining whether the changes lessen the protective elements in the law. Second, the concept of labour market deregulation can be applied to immigration law, considered as a body of law that is articulated with labour law. The issue of articulation is important, especially in the case of temporary migrant labour schemes. This second way of applying the concept of labour market deregulation is undoubtedly the key to a full analysis. However, it is a complex task that is best undertaken after the successful completion of the first approach. This article therefore focuses just on the first approach, which applies to migration law considered as a separate body of law, specifically the 457 visa program.

Like labour regulation, migration regulation is characterised by multiple purposes, of which protection of workers is one, though it tends to be a more subsidiary purpose than in the case of labour regulation. In their overview of the regulatory framework governing immigrant labour in Australia, O'Donnell and Mitchell identify 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.²⁴ Crock and Friedman also argue 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

²³ See text below accompanying nn 60, 119-120, 169, 181.

²⁴ A O'Donnell and R Mitchell, above n 6, at 269, 301-2.

skilled and unskilled labour’ and ‘the fostering – through protection where necessary – of a local work force’.²⁵

The existence of multiple purposes is particularly clear in the case of temporary migrant schemes.²⁶ One central aim is to answer employer labour needs by boosting the supply of labour to particular industries or individual employers. This could be called ‘facilitative’. However, this aim is often couched in terms of resolving labour shortages, in the case of 457 visa program, skill shortages. By framing the issue in terms of labour shortages, the aim of the scheme is defined not only as directly serving employer needs but also as serving broader interests in the community. We can note here that talk of labour shortages implies a protective element, in this case protection of job opportunities for local workers. Thus, it implies that labour is boosted by turning to overseas sources *only where there is a genuine shortage*. In temporary migration schemes, the protective element is also highlighted by announcing other explicit aims such as protecting the working conditions of local workers and protecting the working conditions of migrant workers.²⁷

As suggested here, temporary migration law entails at least three protective elements, involving two constituencies for protection (local and overseas workers) and two distinct subject-matters for protection, employment opportunities and working conditions. This in turn raises the possibility of conflict or imbalance between protective elements – in particular, a conflict between protection for local workers, on one hand, and protection for migrant workers, on the other, with an acute risk that the latter receives lesser attention due to excessive weight given to notions of sovereignty, the national interest and the protection of borders. As with labour laws, a key question with the regulation of temporary migration is: protection for whom?

²⁵ M Crock and L Friedman, above n 6, at 322–3.

²⁶ 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 Department of Immigration And Citizenship (DIAC), *Pacific Seasonal Worker Pilot Scheme*, at <<http://www.immi.gov.au/skilled/pacific-seasonal-worker.htm>>; see also A Reilly, ‘The Ethics of Seasonal Labour Migration’ (2011) 20 *Griffith Law Review* 127. This development purpose, however, is not applicable to the 457 visa program.

²⁷ See also Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), *In Australia’s Interests: A Review of Temporary Residence Program*, DIMIA, Canberra, 2002, at 23–24; International Labor Office, *International Labour Migration: A Rights-Based Approach*, ILO, Geneva, 2010, at 164.

The de/regulation of the 457 visa program

Since its introduction in August 1996,²⁸ the 457 visa program has included various pathways for an employer to sponsor a 457 worker. The original had eight pathways²⁹ while the current scheme has six.³⁰ 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 article.

The article tracks the trajectory of the 457 visa program under the Coalition Government (1996-2007) and the present ALP Government, allowing the deregulation and re-regulation of the scheme to be analysed as both process and outcome.

The 457 visa program under the Coalition Government (1996-2007)

Deregulatory in its inception

The history of the 457 visa program 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, and Government policy to open the economy up to greater international competition.³¹

²⁸ Migration Regulations (Amendment) Act 1996 (Cth).

²⁹ 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).

³⁰ 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).

³¹ Committee of Inquiry into the Temporary Entry of Business People and Highly Skilled Specialists, *Business Temporary Entry: Future Directions*, Parliament of Australia, Canberra, 1995 at 84 (Roach Report).

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. The Committee considered this measure, which sought to promote temporary skilled migration, as necessary for Australia to remain internationally competitive³² by addressing its skill shortages.³³ 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 program.³⁴

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.³⁵

Businesses could be approved in the first regulatory phase as either a standard business sponsor or a pre-qualified business sponsor.³⁶ For both types of sponsorship, 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;³⁷ the sponsor was to have a satisfactory record or demonstrated commitment towards training Australian workers;³⁸ and the sponsor was to meet various probity requirements.³⁹ The sponsoring business also had to demonstrate that it would introduce or utilise in Australia new or improved technology or business skills

³² Ibid at 4.

³³ Ibid at 19.

³⁴ Migration Regulation (Amendment) Act 1996 (Cth).

³⁵ See generally Crock, above n 1, at p116–22.

³⁶ 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: ibid 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 the number of nominations that could be made by pre-qualified business sponsors and, further, no fees to be paid for such nominations: ibid regs 1.20D(5)–(6), 1.20G(3) (as in force on 1 August 1996).

³⁷ 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 279at [21].

³⁸ 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.

³⁹ Migration Regulations 1994 (Cth) reg 1.20(2)(b)(iii)–(iv), (c)(ii), (d)–(e) (as in force on 1 August 1996).

(whether or not resulting from the employment of the 457 visa worker).⁴⁰ 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 the following: the creation or maintenance of employment for Australians;⁴¹ 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.⁴²

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 or not 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’.⁴³ 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 it had been made according to the proper procedures.⁴⁴ 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 were to last more than 12 months. The Immigration Minister could also impose such a requirement on nominations involving employment lasting for a shorter period.⁴⁵ 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’.⁴⁶

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

⁴⁰ Ibid reg 1.20D(c)(i) (as in force on 1 August 1996).

⁴¹ See *Shead v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 479.

⁴² Migration Regulations 1994 (Cth) reg 1.20D(2)(a) (as in force on 1 August 1996).

⁴³ Ibid reg 1.20B (as in force on 1 August 1996).

⁴⁴ Ibid reg 1.20H(2) (as in force on 1 August 1996).

⁴⁵ Ibid regs 1.20G(4), 1.20H(3) (as in force on 1 August 1996).

⁴⁶ Ibid reg 1.20H(3) (as in force on 1 August 1996).

sponsor or a pre-qualified business sponsor; and there was to be an approved nomination of the business activities with the applicant as nominee.⁴⁷ 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 were to last more than 12 months,⁴⁸ and that the position was not ‘created only for the purposes of securing the entry of the applicant to Australia’.⁴⁹ An issued visa could last from three months to four years.⁵⁰

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’.⁵¹ 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.⁵² 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.⁵³ The requirements relating to the issuing of 457 visas 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 the skills and experience of the worker/applicant were suitable for performing the specified activity and that the relevant requirements of the Labour Agreement had been met.⁵⁴

⁴⁷ Ibid sch 2, Subclass 457, cl 457.223(4)(b)–(d), (5)(b)–(d) (as in force on 1 August 1996).

⁴⁸ 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: *ibid* sch 2, Subclass 457, cl 457.223(4)(e)(ii) (as in force on 1 August 1996).

⁴⁹ Ibid sch 2, Subclass 457, cl 457.223(5)(e) (as in force on 1 August 1996).

⁵⁰ Ibid sch 2, Subclass 457, cl 457.511 (as in force on 1 August 1996).

⁵¹ Ibid reg 1.03 (as in force on 1 August 1996).

⁵² Ibid reg 1.20G(1) (as in force on 1 August 1996).

⁵³ Ibid reg 1.20H(2) (as in force on 1 August 1996).

⁵⁴ Ibid sch 2, Subclass 457, cl 457.223(2) (as in force on 1 August 1996).

The 457 visa, together with the 456 (Business Short Stay) visa sub-class, replaced seventeen previous visa sub-classes.⁵⁵ Kinnaird describes the 1996 introduction of the program as ‘a radical deregulation of Australia’s temporary entry regime’.⁵⁶ Certainly, the 457 visa program can be aptly described as deregulatory, in that its basic features are characterised by a lack of effective mechanisms for realising protective purposes and by the extensive space granted to individual employers to recruit temporary migrant workers.

The main rationale of the program was to address skill shortages, but it lacked mechanisms to ensure that this aim was achieved and that employers did not use a claim of ‘skill shortages’ to cover up policies of offering reduced wages and conditions. Such mechanisms could include caps and quotas (which limit the supply of migrant labour according to the extent of the shortages), specification of the areas (geographical, industry, occupational) where there are skill shortages and labour market-testing requirements. They could also include mechanisms aimed at sending a price-signal to employer sponsors that the engagement of migrant workers will be more expensive than comparable local workers (for example, high application and sponsorship fees, specific taxes on engaging migrant workers, or a requirement that migrant workers be paid a higher wage than local workers). As well as ensuring skills shortages are properly addressed, these regulatory mechanisms also serve to protect the employment opportunities of local workers.⁵⁷ It is the general *absence* of such mechanisms that marks the original 457 program. With nominations involving a ‘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).

The deregulatory character of the original 457 visa program is even more apparent if we consider the other purposes normally associated with temporary migrant labour schemes. Apart from the (narrow) labour market testing requirement, the original

⁵⁵ 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*, ACIRRT Working Paper No 50, ACIRRT, Sydney, 1997, at 123, 140.

⁵⁶ B Kinnaird, ‘Current Issues in the Skilled Temporary Subclass 457 Visa’ (2006) 14 *People and Place* 49 at 50.

⁵⁷ See text above accompanying n 27.

program 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 program failed to impose any minimum wage requirement and failed to stipulate any conditions regarding the other working conditions of the 457 visa workers.

According to Crock, the ‘most striking aspect of the regime ... is the emphasis that is placed on the needs and wishes of employers’.⁵⁸ This is the sense in which the 457 visa program can be characterised as ‘employer-driven’. In international comparison, it appears as an example of a *laissez faire* version of a temporary migrant labour scheme.⁵⁹

How do Labour Agreements fit within this assessment? As noted earlier, these are a type of executive agreement, namely, agreements struck between the executive branch of government and other parties (in this case, sponsoring employers) that displace the normal requirements of the 457 visa program. These regulatory instruments illustrate a prominent feature of much migration law, executive discretion.⁶⁰ It could be argued that, given the discretion inhering in such agreements, they are not intrinsically regulatory (or deregulatory) in their effect: it will depend on the terms of the agreements. There is currently no definitive way of making an assessment, as Labour Agreements (past and present) are not made public by the Department of Immigration. However, it is unlikely that such Agreements are designed to impose more onerous protective requirements on selected employers; on the contrary, they appear designed to allow even the limited requirements of the standard business pathway to be bypassed. In this sense, executive discretion through Labour Agreements opens up an important exemption or gap in the regulatory framework that appears designed to increase flexibility for favoured employers and to deregulate.

Further deregulating the 457 scheme: The 2001 amendments

⁵⁸ M Crock, above n 55, at 123, 141.

⁵⁹ M Ruhs, ‘The potential of temporary migration programmes in future international migration policy’ (2006) 145 *International Labour Review* 7 at 14-15.

⁶⁰ J-C Tham, ‘Law-making and Temporary Migrant Labour Schemes: Accountability and the 457 Visa Scheme’ (2009) 17 *Australian Journal of Administrative Law* 18.

The most important changes to the 457 scheme under the Coalition government took place through the *Migration Amendment Regulations 2001 (No 5)* (Cth). These changes simplified and liberalised the provisions relating to business sponsors. Instead of there being two classes of business sponsors – standard business sponsors and pre-qualified business sponsors – the changes merged them into the single category of standard business sponsorship.⁶¹ 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 particularly important: the tasks of nominated activity had to correspond with tasks of an occupation specified by the Immigration Minister in a Gazette notice,⁶² 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)⁶³ specified by the Immigration Minister (in a Gazette Notice applicable at that time).⁶⁴

It should be noted here that these new requirements did not apply to Labour Agreements. As noted earlier, the requirements applying to Labour Agreements were governed by the terms of such agreements, and as such Labour Agreements continued to function in effect as a gap in the regulatory system.⁶⁵ 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 in the Gazette. The list specified by the Minister in 2001, for example, tended not to go beyond Groups 1-4 of the Australian Standard Classification of Occupations (ASCO): managers and administrators (Group 1); professionals (Group 2); associate professionals (Group 3); Tradespersons and related workers (Group 4).⁶⁶ The 457 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

⁶¹ Migration Regulations 1994 (Cth) regs 1.20D–1.20DA (as in force on 1 July 2001).

⁶² Ibid reg 1.20G(2) (as in force on 1 July 2001).

⁶³ Ibid reg 1.20B (as in force on 1 July 2001).

⁶⁴ Ibid reg 1.20G(4) (as in force on 1 July 2001).

⁶⁵ See text above accompanying n 60.

⁶⁶ 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).

service workers (Group 6) and intermediate production and transport workers (Group 7).⁶⁷

The 2001 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.⁶⁸ Significant advantages accrued if such a nomination was approved: a lower MSL requirement applied 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 whereas ‘certified regional employment’ nominations could go down to occupations in ASCO 7).⁶⁹

The concessional stream could be seen as another mechanism of exemption, designed to increase flexibility for employers and reduce worker protection. 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;⁷⁰ and the sponsoring employer had to demonstrate that the positions could not ‘reasonably be filled locally’.⁷¹ 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.⁷² 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.⁷³

The 2001 changes were deregulatory in their intent. While the Explanatory Memorandum to the amending Regulations only tersely stated that these changes

⁶⁷ Australian Bureau of Statistics, *Australian Standard Classification of Occupations (ASCO)*, 2nd ed, Cat No 1220.0, ABS, Canberra 1997, at <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/0/5C244FD9D252CFC8CA25697E00184D35?opendocument>>.

⁶⁸ Migration Regulations 1994 (Cth) reg 1.20GA(2) (as in force on 1 July 2001).

⁶⁹ Ibid reg 1.20GA(1) (as in force on 1 July 2001).

⁷⁰ Ibid reg 1.20GA(1)(a)(ii) (as in force on 1 July 2001).

⁷¹ Ibid reg 1.20GA(1)(a)(iii) (as in force on 1 July 2001).

⁷² Ibid reg 1.20GA(b)–(d) (as in force on 1 July 2001).

⁷³ Ibid reg 1.20GA(1)(e) (as in force on 1 July 2001).

‘enhance the integrity of the Subclass 457 (Business (Long Stay)) visa’,⁷⁴ a report by the Immigration Department explained more fully the underlying rationale. The report, *In Australia’s Interests: A Review of Temporary Residence Program*, documented employer dissatisfaction with the ‘key’ and ‘non-key’ distinction and the requirement for labour market testing. The distinction was said to be unclear, thereby resulting in ‘a level of uncertainty that had consequences for both client convenience and good administration’.⁷⁵ Strong opposition amongst employers was recorded in relation to the labour market testing requirement for ‘non-key’ activities on various grounds, notably, the expense in costs and time and the failure to pay sufficient regard to ‘specialised knowledge of the employer of the particular labour market’.⁷⁶ As a consequence, the report proposed abolishing the ‘key’ and ‘non-key’ distinction together with the labour market testing requirement and putting in their place a minimum skill threshold as well as a minimum salary threshold as part of a ‘move to a more effective means of achieving labour market testing objectives’.⁷⁷

The 2001 changes could be interpreted 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 in relation to relevant laws and awards. However, the benchmark of relevant laws and awards to this obligation meant that its substance merely restated the position under labour law (whilst bringing into play immigration law enforcement mechanisms). Moreover, the changes did not alter the basic features of the scheme as an example of labour market deregulation. In terms of addressing skill shortages and protecting employment opportunities of local workers, the 2001 changes did produce a change in regulatory methods, introducing both a list of occupational areas said to experience shortages and a price-signal through the Minimum Salary Level. But both methods were deficient as mechanisms for realising protective purposes.

⁷⁴ Explanatory Statement, Migration Amendment Regulations 2001 (No 5) (Cth), Parliament of Australia, 2001, at 2.

⁷⁵ DIMIA, *In Australia’s Interests: A Review of Temporary Residence Program*, DIMIA, Canberra, 2002, at 122.

⁷⁶ *Ibid* at 122.

⁷⁷ *Ibid* at 123.

Under the list of specified occupations, employers could generally⁷⁸ 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 program. 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.

Under the Coalition government, the integrity of the list of specified occupations was also 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 Immigration Department, which resulted in all of Australia being ‘regional’ except for Brisbane, Gold Coast, Newcastle, Central Coast, Sydney, Wollongong, Melbourne and Perth.⁷⁹ The breadth of the list of specified occupations is a key reason why the 457 visa program under the Coalition government, rather than being a scheme for skilled labour, could be described as ‘a general labour supply visa’.⁸⁰

As a mechanism to ensure that skill shortages are met by the 457 visa program under the Coalition government, the requirement to pay a Minimum Salary Level (MSL) was of crucial importance. As observed by 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

⁷⁸ Somewhat different rules apply to the ICT sector.

⁷⁹ Joint Standing Committee on Migration, above n 83, at 71.

⁸⁰ Visa Subclass 457 External Reference Group, *Final Report to the Minister for Immigration and Citizenship* (External Reference Group Report), Commonwealth of Australia, Canberra, April 2008, at 37.

market based price signal – currently enforced through the Subclass 457 sponsor undertaking to pay the primary visa holder at least the minimum salary level.⁸¹

The obligation to pay a MSL could be seen as setting a floor that supported the wages of 457 visa workers. But, even if we leave aside the important issue of non-compliance, it suffered from several deficiencies as a protective mechanism. One central problem is that it was not a ‘market’ salary rate, falling well short of ‘market’ rates for Australian workers employed in the professional, semi-professional or trades categories.⁸² There was an even sharper disjuncture when there is a ‘certified regional employment’ nomination, as the level of the MSL was lower.

Increased regulation of compliance and enforcement

For the remaining period of the Coalition government (until 2007, when it was replaced by an ALP government), the key features of the 457 visa program remained largely intact. However, public controversy, largely focused on cases of abuse of 457 workers,⁸³ 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.⁸⁴ 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

⁸¹ DIAC, *Discussion Paper: Business (Long Stay) Subclass 457 and Related Temporary Visa Reforms*, Commonwealth of Australia, Canberra, 2008, at 11 (emphasis added).

⁸² Commissioner Barbara Deegan, *Visa Subclass 457 Integrity Review: Final Report*, 2008 (Deegan Report) at 27.

⁸³ For examples of cases where the 457 visa program was said to have been abused, see Joint Standing Committee on Migration, *Temporary Visas. . . Permanent Benefits: Ensuring the Effectiveness, Fairness and Integrity of the Temporary Business Visa Program*, Parliament of Australia, Canberra, 2007, at 111-121.

⁸⁴ Migration Legislation Amendment (Migration Agents Integrity Measures) Act 2004 (Cth); Migration Amendment Regulations 2004 (No 3) (Cth).

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.⁸⁵ 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.⁸⁶

These late initiatives could be regarded as partial efforts in the direction of re-regulation. However, most of the focus was on tightening up expectations of compliance. Though important in promising to close gaps in enforcement and to increase protection for vulnerable workers, the initiatives left the basic features of the scheme unaltered.

The 457 visa program under the ALP Government (2007-present)

A move to re-regulation: 2009 amendments

Upon assuming office in 2007, the ALP government established two inquiries into the Subclass 457 visa program: one by the External Reference Group, a group comprising 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,⁸⁷ the ALP government introduced substantial changes.

These changes, which mostly came into effect in September 2009,⁸⁸ 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. If the business has been lawfully operating

⁸⁵ Migration Amendment Regulations 2007 (No 5) (Cth) sch 6.

⁸⁶ Migration Amendment Regulations 2007 (No 11) (Cth).

⁸⁷ External Reference Group Report, above n 80; Deegan Report, above n 82.

⁸⁸ 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).

business in Australia and has traded for more than 12 months, it would need to meet benchmarks specified in a legislative instrument in relation to training of its workers. If it has been trading for less than 12 months, the requirement is to have an auditable plan to meet such benchmarks.⁸⁹ Moreover, the business has to attest in writing that it has ‘a strong record, or a demonstrated commitment to employing local labour and non-discriminatory employment practices’.⁹⁰

Key changes in relation to the approval of a nominated position 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.⁹¹

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’.⁹² 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.⁹³ This ‘no less favourable’ obligation is apparently stronger from the one previously imposed in relation to ‘certified regional employment’ sponsors,⁹⁴ as it is benchmarked against the terms and conditions of equivalent workers in the workplace (and not against relevant laws and awards). However, the standard it sets remains subject to criticism (see below).

Another important change was the replacement of the minimum salary level (MSL) requirement⁹⁵ with a new requirement that the nominated position under ‘no less

⁸⁹ Migration Amendment Regulations 2009 (No 5) (Cth) sch 1 inserting reg 2.59(d)–(e).

⁹⁰ Ibid sch 1 inserting reg 2.59(f). Arguably, this is pretty much a non-requirement as it only requires the business to *attest* and not to demonstrate.

⁹¹ Ibid sch 1 inserting reg 2.72(1)(f)–(g).

⁹² Ibid sch 1 inserting reg 2.72(1)(10)(c).

⁹³ Ibid sch 1 inserting reg 2.79.

⁹⁴ See text accompanying nn 70-71.

⁹⁵ 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).

favourable' conditions should have a base rate of pay greater than the 'temporary skilled migration income threshold' (TSMIT) specified by the Minister in a legislative instrument.⁹⁶ Importantly, both the 'no less favourable' term and the TSMIT requirement do not apply when the annual earnings of the 457 worker are equal to or greater than an amount specified by the Minister in a legislative instrument.⁹⁷ While both the MSL and TSMIT requirements set a floor on the wages to be paid to 457 visa workers, they operated 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 it is higher than the TSMIT.

Requirements attending to the final regulatory phase, the issuing of the visa to the 457 visa worker, were changed to reflect those made to the approval of a standard business sponsor and a nominated position.⁹⁸ In addition, the English language requirement was made more demanding with a requirement of a score of more than 5 in the IELTS tests (previously the requisite score was more than 4.5).⁹⁹ Formal skills assessment was also introduced in July 2009 for certain occupations and countries.¹⁰⁰

Table 2 summarises the requirements that applied to standard business sponsors under the 457 visa program after the 2009 amendments.

⁹⁶ Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 2) (Cth) inserting reg 2.72(10)(cc).

⁹⁷ Ibid inserting reg 2.72(10AB).

⁹⁸ See Migration Amendment Regulations 2009 (Cth).

⁹⁹ Migration Amendment Regulations 2009 (No 3) (Cth).

¹⁰⁰ C Evans, *Assessment Changes for Skilled Migrants from July 1*, Media Release, 1 July 2009, at <<http://www.minister.immi.gov.au/media/media-releases/2009/ce09063.htm>>. For the list of occupations and countries, see Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, *457 Skills Assessment Program*, at <www.innovation.gov.au/skills/SkillsAssessment/TradesRecognitionAustralia/457SkillsAssessmentProgram/Pages/default.aspx> (accessed 6 August 2013).

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

Approval as standard business sponsor ¹⁰¹	Approval of nomination ¹⁰²	Issuing of visa ¹⁰³
<ul style="list-style-type: none"> • Lawfully operating business (in Australia or overseas) • If lawfully operating business in Australia: <ul style="list-style-type: none"> - meets training benchmarks;¹⁰⁴ - 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 	<ul style="list-style-type: none"> • 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 occupations¹⁰⁵ • 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 	<ul style="list-style-type: none"> • 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 occupations¹¹⁰ • 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;

¹⁰¹ Migration Regulations 1994 (Cth) reg 2.59.

¹⁰² Ibid reg 2.72.

¹⁰³ Ibid sch 2, Subclass 457, cl 457.223(4).

¹⁰⁴ 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).

¹⁰⁵ Legislative instrument under Migration Regulations 1994 (Cth), Specification of Occupations (sub-paras 2.72(10)(a), 2.72I(5)(b)) (IMMI 09/125).

<ul style="list-style-type: none"> No adverse information known about applicant or person associated (or reasonable to disregard) 	<p>location (unless exceed specified annual earnings, currently \$180 000¹⁰⁶)</p> <ul style="list-style-type: none"> Base rate of pay above greater than TSMIT, currently \$49 330¹⁰⁷ (unless exceed specified annual earnings, currently \$180 000¹⁰⁸) Nominating employer has certified that: <ul style="list-style-type: none"> nominated occupation is a position in its business (unless an exempt occupation)¹⁰⁹; nominated worker has qualifications and experience commensurate to applicable ASCO occupation. 	<ul style="list-style-type: none"> 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).
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¹¹⁰ Legislative instrument under Migration Regulation 1994 (Cth), Specification of Occupations (sub-para 2.72(10)(a), 2.72I(5)(b)) (IMMI 09/125).

¹⁰⁶ 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 11/041).

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ 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-para 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).

The major change to the Labour Agreements¹¹¹ pathway was that parties to such agreements, like standard business sponsors, were now subject to the ‘no less favourable’ obligation in relation to the wages and conditions of the 457 visa worker.¹¹² Otherwise, this pathway retained 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.

The *Labour Agreement Information Pack* issued by the Immigration Department¹¹³ provides more information as to the requirements that will be applied to such agreements. The principal requirement is a labour-market testing requirement: ‘(t)he employer must be able to demonstrate . . . that it has genuinely attempted to recruit Australian workers for the positions and that there are no appropriately qualified Australian workers readily available’.¹¹⁴

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), which had promised to tighten compliance, this Act came into effect in September 2009.¹¹⁵

The changes introduced by the ALP government can be seen as partial re-regulation, though still within the framework of the 457 scheme inherited from its Coalition

¹¹¹ 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.

¹¹² Migration Amendment Regulations 2009 (No 5) (Cth) sch 1 inserting reg 2.79.

¹¹³ DIAC, *Labour Agreement Information Pack*, DIAC, Canberra, January 2012 (copy on file with authors).

¹¹⁴ *Ibid* at 1.

¹¹⁵ See Migration Legislation Amendment (Worker Protection) Act 2008 (Cth) s 2.

predecessor. The two key regulatory methods that had been in place since 2001 - a list of specified occupations and mechanisms that provide a price signal to sponsoring employers - were retained, with no serious attempt being made to introduce a more direct labour market testing requirement. That said, both methods have become stricter as a result of the ALP government's changes. The list of specified occupations has been shortened somewhat and, more importantly, the 'no less favourable' obligation and the TSMIT requirement convey a stronger price signal than the MSL. These changes result in greater regulation to protect the employment opportunities and working conditions of local workers and the working conditions of 457 workers.

In particular, the workplace (or enterprise) benchmark of the 'no less favourable' obligation (which also underpins the TSMIT requirement) is a re-regulation as it picks up on *contractual* terms and conditions. That said, it remains limited re-regulation. In spite of claims by the ALP government, the 2009 'no less favourable' obligation fails to provide for 'market rates'.¹¹⁶ The relevant market for assessing wage rates in the 457 visa program should be that of the occupation, as it is the 'skill shortages' in these occupations that provides the rationale for the program. The 'workplace' benchmark, however, allows 457 visa workers to be paid at 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*

¹¹⁶ C Evans, *Government announces changes to 457 visa program*, Media Release, 1 April 2009 at <<http://www.minister.immi.gov.au/media/media-releases/2009/ce09034.htm>> (accessed on 6 August 2013).

*000 and the ABS average salary rate for an electrical and electronics tradesperson in NSW is AUD 56 00 across NSW including Sydney.*¹¹⁷

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'.¹¹⁸

The scrapping of the 'certified regional employment' stream eliminates one path by which the basic procedures of the 457 scheme could be by-passed. However, the more important deregulatory gap associated with Labour Agreements has been retained. The imposition of the 'no less favourable' obligation tightens the requirements within these Agreements and so does the application of the labour market testing requirement through the processes of approving such agreements. Nevertheless, retaining this pathway preserves a capacity to deregulate in circumstances of limited transparency (and accountability).¹¹⁹ In 2011, there were, in fact, strong indications from the ALP government that Labour Agreements were to be more extensively used, with the announcement in the 2011-2012 Budget that Enterprise Migration Agreements (EMAs) and Regional Migration Agreements (RMAs), both of which would utilise Labour Agreements, would be introduced under the 457 visa program. The information to date on these agreements is primarily found in information posted on the Immigration Department's website.¹²⁰ This further underscores how this aspect of the 457 visa program is underwritten by executive discretion – ministerial discretion to reach Labour Agreements is governed not by legislation but by departmental guidelines.

According to the Immigration Department's website, 'EMAs are a custom-designed, project-wide migration arrangement for large scale resource projects' 'available to resource projects with capital expenditure of more than two billion dollars and with a

¹¹⁷ DIAC, *Policy Advice Manual: Subclass 457 visa*, DIAC, Canberra, at para 24.6 (as at 1 July 2010) (emphasis added).

¹¹⁸ DIAC, *Policy Advice Manual: Migration Regulations*, reg 1.03, para 2.3 (as at 1 July 2010).

¹¹⁹ See text above accompanying nn 51-54.

¹²⁰ See C Bowen, *Budget 2011-12: New Temporary Migration Agreements to Further Address Skills Demand*, Media Release, 10 May 2011, at <<http://www.minister.immi.gov.au/media/cb/2011/cb165283.htm>> (accessed on 5 August 2011).

peak workforce of more than 1500 workers'.¹²¹ RMAs, on the other hand, seek to address 'the acute skill and labour shortages facing parts of regional Australia' and are reached with 'a state or territory government, local council, or another local stakeholder'.¹²²

Neither the EMAs nor the RMAs are themselves Labour Agreements. Reached with either the project owner or the main contractor of the project, EMAs are 'an umbrella migration arrangement for the (resource) project' under which Labour Agreements with individual employers are struck.¹²³ Similarly, RMAs 'will act as an overarching arrangement under which employers will sign individual Labour Agreements'.¹²⁴

Does provision for EMAs and RMAs mean a step back from re-regulation of the 457 visa program? Not yet; at the time of writing – more than two years after their introduction was announced – not a single RMA or EMA has taken effect.¹²⁵ What was supposed to be the first EMA, that relating to Gina Rinehart's Roy Hill iron ore mining project, has not proceeded to full formalisation for reasons not made public – despite being approved in May 2012.¹²⁶

Several points can, however, be made. First, EMAs and RMAs are intended to be deregulatory with respect to the list of specified occupations. As the Immigration Department's website states in relation to EMAs, 'occupations that are not eligible for standard migration programs can be sponsored, provided the project can justify a

¹²¹ DIAC, *Enterprise Migration Agreements*, at <<http://www.immi.gov.au/skilled/enterprise-migration-agreements.htm>> (accessed on 12 July 2013).

¹²² DIAC, *Regional Migration Agreements*, at <<http://www.immi.gov.au/skilled/regional-migration-agreements.htm>> (accessed 12 July 2013).

¹²³ DIAC, *Enterprise Migration Agreements*, at <<http://www.immi.gov.au/skilled/enterprise-migration-agreements.htm>> (accessed on 17 December 2012). See also Department of Immigration and Citizenship, *Enterprise Migration Agreements Submission Guidelines*, at <<http://www.immi.gov.au/skilled/enterprise-migration-agreements.htm>> (accessed 12 July 2013).

¹²⁴ DIAC, *Fact Sheet 48c – Regional Migration Agreement*, at <<http://www.immi.gov.au/media/fact-sheets/48c-rma.htm>> (accessed 12 July 2013).

¹²⁵ Department of Immigration and Citizenship et al, *Joint Submission to Senate Legal and Constitutional Affairs Committee's Inquiry into the framework and operation of Subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreement*, Canberra, 2013, at 4.

¹²⁶ C Bowen and M Ferguson, *First Enterprise Migration Agreement approved*, Joint Media Release, 25 May 2012 (at <<http://www.minister.immi.gov.au/media/cb/2012/cb187050.htm>>). There was considerable controversy over this agreement, see, for example, P Ker, 'Rinehart's new mine taps foreign workers', *Sydney Morning Herald*, 25 May 2012.

genuine need that cannot be met from the Australian labour market'.¹²⁷ Similarly, the website declares that '(t)he major benefit of the (RMA) program is to allow employers in certain regional areas to sponsor workers in a broader range of occupations that are currently not included in standard skilled migration programs'.¹²⁸

Loosening this requirement results in the lessening of regulation to protect the employment opportunities of Australian workers. This, however, is counter-balanced by labour market testing requirements: a party seeking an EMA must demonstrate 'why sufficient Australian workers cannot be found to fill anticipated vacancies in semi-skilled occupations, including labour market analysis';¹²⁹ while a party seeking an RMA needs to provide 'labour market analysis that demonstrates there are current or anticipated skills and labour shortages in the region and that these shortages cannot be filled by Australian workers.'¹³⁰

The main risk of deregulation in this context would seem to lie in the implementation of EMAs and RMAs and the danger that these requirements will not be rigorously applied. This risk arises for at least two reasons. First, the lack of transparency concerning Labour Agreements diminishes an effective mechanism for assuring compliance with these requirements.¹³¹ As the *Labour Agreement Information Pack* emphasises, '(a)ll information from the employer is treated as Commercial-in-Confidence'.¹³² Second, these requirements do not have the force of statutory law as they result from executive arrangements.

Further re-regulation of the 457 visa program: 2013 amendments

¹²⁷ DIAC, *Enterprise Migration Agreements*, at <<http://www.immi.gov.au/skilled/enterprise-migration-agreements.htm>> (accessed 12 July 2013).

¹²⁸ DIAC, *Regional Migration Agreements*, at <<http://www.immi.gov.au/skilled/regional-migration-agreements.htm>> (accessed 12 July 2013).

¹²⁹ DIAC, *Enterprise Migration Agreements Submission Guidelines* (at <<http://www.immi.gov.au/skilled/enterprise-migration-agreements.htm>>; accessed 12 July 2013) at 6.

¹³⁰ See DIAC, above n 124.

¹³¹ They may, however, be covered by the right to access under section 11 of the Freedom of Information Act 1982 (Cth).

¹³² DIAC, above n 113, at 1.

In February 2013, the ALP government announced various changes to deal with ‘the unscrupulous practices of some employers’¹³³ who were said to ‘exploiting loopholes to bring in temporary unskilled workers to replace Australian workers, or undercutting Australian wages by bringing in people who are prepared to work for less than the Australian market rate’,¹³⁴ practices the then Immigration Minister, characterised as ‘rorts’.¹³⁵ A heated debate followed, with the government defending its changes as necessary to address serious abuses of the 457 visa program, and the Coalition Opposition and employer groups challenging the government’s claims of ‘rorts’ and accusing the government of fuelling xenophobia through ‘dog-whistling’.¹³⁶

In June 2013, the changes proposed by the government were finally tabled. The key changes were proposed through the Migration Amendment (Temporary Sponsored Visas) Bill 2013 (Cth). After a brief inquiry by the Senate Legal and Constitutional Affairs Committee, which issued a report divided on party lines,¹³⁷ the Bill passed with last-minute amendments that secured the support of the cross-benchers.¹³⁸ Additional changes were made to the 457 visa program, though with considerably less publicity and controversy, through the *Migration Legislation Amendment Regulation 2013 (No 3)* (Cth). We consider the Act and the Regulation in turn below.

Migration Amendment (Temporary Sponsored Visas) Act 2013 (Cth)

¹³³ B O’Connor, *Reforms to the temporary work (skilled) (subclass 457) program*, Media Release, 23 February 2013, at <<http://www.minister.immi.gov.au/media/bo/2013/bo193683.htm>> (accessed 15 July 2013).

¹³⁴ B O’Connor, *Abbott no friend of Australian workers*, Media Release, 5 March 2013, at <<http://www.minister.immi.gov.au/media/bo/2013/bo194019.htm>> (accessed 15 July 2013).

¹³⁵ B O’Connor, *457s double in lowest paid occupations*, Media Release, 28 April 2013, at <<http://www.minister.immi.gov.au/media/bo/2013/bo202119.htm>> (accessed 15 July 2013).

¹³⁶ See, for example, ‘Dog whistling claims get louder in 457 visa debate’, *7.30 Report*, 5 March 2013, at <<http://www.abc.net.au/7.30/content/2013/s3704709.htm>> (accessed 15 July 2013).

¹³⁷ Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Temporary Sponsored Visas) Bill 2013 [Provisions]*, Parliament of Australia, Canberra, 2013.

¹³⁸ The government’s amendments to its original Bill are available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Famen-d%2F5068_amend_9ac847eb-9f1d-4c03-beaf-79cc1cb39d4a%22> (accessed 15 July 2013). The key changes made are: statutory recognition of the Ministerial Advisory Council on Skilled Migration; requiring the Immigration Minister to have regard to information concerning certain redundancies and retrenchments when applying the labour market testing requirements; and exclusion of engineering and nursing from occupations that can be exempt from the labour market testing requirements. See generally D Hurst, ‘457 visa laws squeak through’, *Sydney Morning Herald*, 27 June 2013, at <<http://www.smh.com.au/federal-politics/political-news/457-visa-laws-squeak-through-20130627-2oyri.html>> (accessed 15 July 2013).

The Act has six key elements.¹³⁹ It enacts:

- a section stipulating the purposes of sponsorship visas, including 457 visas;¹⁴⁰
- provisions introducing labour market testing in relation to the standard business sponsorship stream of the 457 visa program;¹⁴¹
- an amendment to the visa conditions applying to 457 workers, increasing the period during which they can cease being employed from 28 consecutive days to 90 consecutive days;¹⁴²
- provisions obliging the Immigration Minister to promulgate regulations relating to sponsorship obligations in specified areas;¹⁴³
- provisions providing for enforceable undertakings by 457 visa sponsors;¹⁴⁴ and
- provisions conferring powers on Fair Work Ombudsman inspectors in relation to the sponsorship obligations of 457 visa sponsors.¹⁴⁵

The Act clearly re-regulates the 457 visa program in terms of its three protective purposes: protecting the employment opportunities of local workers; protecting the working conditions of local workers; and protecting the working conditions of 457 visa workers. The last purpose is advanced through the obligation of the Immigration Minister to issue regulations relating to sponsorship obligations in specified areas,¹⁴⁶ obligations which, according to DIAC, ‘help ensure that overseas skilled workers are protected from exploitation’.¹⁴⁷

Significantly, the enforcement regime relating to these sponsorship obligations has been considerably strengthened by conferring powers to police these obligations upon inspectors appointed under the *Fair Work Act* (Fair Work Inspectors). According to the government, this substantially increases enforcement capacity, as there are

¹³⁹ Refer to commencement date: upon Royal Assent except for Schedule 2.

¹⁴⁰ Migration Amendment (Temporary Sponsored Visas) Act 2013 (Cth) sch 1.

¹⁴¹ Ibid sch 2.

¹⁴² Ibid sch 3.

¹⁴³ Ibid sch 4.

¹⁴⁴ Ibid sch 5.

¹⁴⁵ Ibid sch 6.

¹⁴⁶ Migration Act 1958 (Cth) s 140HA (newly inserted).

¹⁴⁷ DIAC, *Submission to Senate Legal and Constitutional Affairs Legislation Committee’s Inquiry into the Migration Amendment (Temporary Sponsored Visas) Bill 2013*, DIAC, Canberra, 2013 at 10.

currently only 32 inspectors under the *Migration Act* but 300 Fair Work Inspectors.¹⁴⁸ The other way in which the enforcement of sponsorship obligations has been enhanced is through the introduction of enforceable undertakings. These undertakings, which are available for breaches of the *Fair Work Act*,¹⁴⁹ expand the range of compliance tools available to inspectors under both the *Migration Act* and the *Fair Work Act* by allowing the Immigration Minister to accept undertakings made by a sponsoring employer in relation to breaches of sponsorship obligations – undertakings that the Minister can enforce through an application for a court order.¹⁵⁰ These changes to the enforcement regime of the sponsorship obligations clearly bring about a convergence between this regime and the enforcement provisions under the *Fair Work Act*.

Another, less obvious, amendment increases protection of the working conditions of 457 visa workers – that relating to Visa Condition 8107. Among others, Visa Condition 8107 requires a 457 visa worker to work only for his or her sponsoring employer and, prior to the enactment of the *Migration Amendment (Temporary Sponsored Visas) Act 2013* (Cth), the visa condition limited the period during which a 457 visa worker could cease being employed to 28 consecutive days.

Serious consequences can follow from a breach of this visa 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.¹⁵¹ It is also a criminal offence to work in breach of visa conditions.¹⁵² 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

¹⁴⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 6 June 2013 at 5543, 5545 (B O'Connor).

¹⁴⁹ See T Hardy and J Howe, 'Too Soft or Too Severe? Enforceable Undertakings and the Regulatory Dilemma Facing the Fair Work Ombudsman' (2013) 41(1) *Federal Law Review* 1; Beth Gaze, 'Fair Work Ombudsman's regulatory powers: the use of enforceable undertakings' (2013) 20(4) *Australian Journal of Administrative Law* (forthcoming).

¹⁵⁰ Migration Act 1958 (Cth), ss 140RA-140RB (newly inserted).

¹⁵¹ 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.

¹⁵² Migration Act 1958 (Cth) s 235.

entitlement to the worker's services.¹⁵³ Both these formal and informal restrictions build into the design of the 457 scheme a high level of dependence on the sponsoring employer, which in turn generates vulnerability on the part of many 457 visa workers.

By increasing the period during which 457 visa workers can cease being employed from 28 consecutive days to 90 consecutive days, the *Migration Amendment (Temporary Sponsored Visas) Act 2013* (Cth) provides more time for these workers to find another sponsoring employer. In doing so, it lessens their dependence on a particular sponsoring employer and lessens their consequent vulnerability in the workplace. This re-regulation of 457 visa program in terms of the protection of the working conditions of 457 visa workers illustrates that re-regulation is not – in substance – about intensity of regulation, which has lessened in this case, but about the kind of (protective) regulation.

The most controversial of the changes enacted by the *Migration Amendment (Temporary Sponsored Visas) Act 2013* (Cth) are those relating to labour market testing, with these changes strongly supported by key trade unions and the Australian Council of Trade Unions but fiercely opposed by employer groups.¹⁵⁴

The Act introduces two new substantive requirements in relation to approval of nominations by the Immigration Minister under the 457 visa program. In order to approve such nominations, the Minister is required to be satisfied that:¹⁵⁵

- ‘the approved sponsor has undertaken labour market testing in relation to the nominated position’ within a period determined by the Minister through legislative instrument in relation to the nominated occupation¹⁵⁶ with ‘labour market testing’ in relation to a nominated position defined as ‘testing of the Australian labour market to demonstrate whether a suitably qualified and

¹⁵³ Deegan Report, above n 82, at 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*, DIAC, Canberra, 2007, at 1 <<http://www.aph.gov.au/HOUSE/committee/MIG/457visas/subs/sub086.pdf>> (accessed 11 May 2008).

¹⁵⁴ See Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Temporary Sponsored Visas) Bill 2013 [Provisions]*, Parliament of Australia, Canberra, 2013 (Dissenting Report).

¹⁵⁵ Migration Act 1958 (Cth) s 140GB(2); Migration Regulations 1994 (Cth) reg 2.72AA.

¹⁵⁶ Migration Act 1958 (Cth) s 140GB(3)(a), 140GB(4).

experienced Australian citizen or Australian permanent resident is readily available to fill the position’;¹⁵⁷ and

- ‘a suitably qualified and experienced Australian citizen or Australian permanent resident is not readily available to fill the nominated position.’¹⁵⁸

Satisfaction of the second condition is to be reached having regard to prescribed information.¹⁵⁹ In the main,¹⁶⁰ such information consists of evidence of labour market testing provided by the sponsoring employer, including information about its efforts to recruit suitably qualified and experienced Australian citizens or permanent residents to the position and any other similar positions.¹⁶¹

These requirements clearly represent a re-regulation of the 457 visa program in terms of the protection of employment opportunities of local workers. Since its inception, the mainstream of this program, which aims to fill skill shortages, has relied on employer attestation and has lacked any requirement for sponsoring employers to demonstrate a skill shortage prior to employing 457 visa workers.¹⁶² It is this crucial omission that the labour market testing requirements seek to address.

As plainly spelt out by their express terms, these requirements allow for an approval of a nominated position under the 457 visa program only if there is no suitably qualified and experienced Australian citizen or permanent resident. Sponsoring employers can only employ 457 visa workers after efforts to recruit suitable Australian citizens and permanent residents have failed.

This re-regulation is not, however, as emphatic as it could be. These statutory requirements of labour market testing do not apply to Labour Agreements. While labour market testing is currently carried out in relation to these agreements

¹⁵⁷ Ibid s 140GBA(7).

¹⁵⁸ Ibid s 140GBA(3)(d)(i). The Act also requires that the Minister be satisfied that ‘a suitably qualified and experienced eligible temporary visa holder is not readily available to fill the nominated position’: ibid s 140GBA(3)(d)(ii). The definition of ‘eligible temporary visa holder’ restricts the application of this requirement to the agricultural sector: see ibid s 140GBA(7).

¹⁵⁹ Ibid s 140GBA(3)(d).

¹⁶⁰ The Minister is also obliged to have regard to information concerning any redundancies or retrenchments from positions in the nominated occupation in a business or associated entity of the sponsoring employer involving Australian citizens or permanent residents that occurred in the previous four months: Ibid s 140GBA(3)(b)(ii), (d).

¹⁶¹ Ibid s 140GBA(5). Such information must include details of advertising and the fees paid for such advertising: ibid s 140GBA(6)(a).

¹⁶² See text above accompanying n 57.

(including EMAs and RMAs), such a practice occurs by virtue of departmental guidelines, guidelines that can be changed without any legislation.¹⁶³ In other words, the labour market testing requirements fail to re-regulate Labour Agreements, preserving them as an avenue for deregulation through executive discretion.

Moreover, the labour market testing requirements do not apply to standard business sponsors in three situations. First, they do not apply if they would be inconsistent with ‘any international trade obligation of Australia’ as determined by the Immigration Minister through a legislative instrument.¹⁶⁴ Second, they do not apply when there is a major disaster exemption issued by the Immigration Minister in place.¹⁶⁵ Third, and most importantly, the labour market testing requirements do not apply when there are skill and occupational exemptions. Here, the *Migration Amendment (Temporary Sponsored Visas) Act 2013* (Cth) confers upon the Immigration Minister a discretion to exempt by legislative instrument¹⁶⁶ certain occupations from the labour market testing requirements: 1) occupations that require a bachelor degree or higher qualification, or five or more years of relevant experience; and 2) occupations that require a relevant associate degree, advanced diploma or diploma covered by the Australian Quality Framework, or three or more years of relevant experience.¹⁶⁷ The occupations of engineering and nursing, however, cannot be exempt from the labour market testing requirements.¹⁶⁸

The exemptions relating to international trade obligations and major disasters are not as wide-ranging as those relating to skill and occupations, since the former are restricted to specified circumstances while the latter are founded upon broad discretions, constrained only by the (newly inserted) purposes of the 457 visa program.¹⁶⁹ Here, as with Labour Agreements, a path remains open up for

¹⁶³ See text above accompanying nn 121-124.

¹⁶⁴ Migration Act 1958 (Cth) s 140GBA(1)(c), (2).

¹⁶⁵ Ibid s 140GBB.

¹⁶⁶ The Act overrides the default position under the Legislative Instruments Act 2003 (Cth) and provides these instruments can be disallowed by either House of Parliament: Migration Act 1958 (Cth) s 140GBC(5).

¹⁶⁷ Migration Act 1958 (Cth) s 140GBC(1)-(3).

¹⁶⁸ This results from ‘protected qualification’ and ‘protected experience’ being excluded from the scope of this discretion to exempt. The terms are respectively defined as qualifications and experience in the field of engineering and nursing: Migration Act 1958 (Cth) s 140GBC(6).

¹⁶⁹ Ibid s 140AA.

deregulation of the program through executive discretion. Even in a context of re-regulation, there seems to be a rhythm of two steps forward and one step back.

Migration Legislation Amendment Regulation 2013 (No 3) (Cth)

Many of the changes enacted by this regulation are not of substantial significance, for instance, the provisions tightening up training obligations,¹⁷⁰ the introduction of a requirement that a nominated position is genuine,¹⁷¹ and clarification that the 457 visa worker is required to be an employee of the sponsoring employer.¹⁷²

The substantial change made by this set of regulations relates to the ‘market’ salary regime. Prior to these regulations taking effect, this regime was instituted through the requirement that that terms and conditions of 457 visa worker be ‘no less favourable’ than the terms and [conditions](#) provided to an Australian citizen or an [Australian permanent resident](#) ‘for performing equivalent work in the person's workplace at the same location’. This requirement was both a condition of approving nominations under the 457 visa program and also imposed on all sponsoring employers (including those approved through Labour Agreements) as a sponsorship obligation.¹⁷³

This requirement was significant not only for protecting the working conditions of 457 visa workers but also for protecting the employment opportunities and working conditions of local workers, as it sought to impede the prospect that the wages and conditions of 457 visa workers could under-cut those of local workers. Yet, as discussed earlier,¹⁷⁴ this regulation had serious limitations as its benchmark was based on the terms and conditions at the 457 visa worker’s *workplace*.

These limitations were frankly acknowledged by DIAC in its 2012 discussion paper to the Ministerial Advisory Council on Skilled Migration, *Strengthening the Integrity of the Subclass 457 Program*.¹⁷⁵ In its words:

¹⁷⁰ Amendments to regs 2.59, 2.68, 2.82(2)(c)(ii), 2.87B of the Migration Regulations 1994 (Cth).

¹⁷¹ Amendment to reg 2.72(10)f of the Migration Regulations 1994 (Cth).

¹⁷² Amendment to sch 2, para 457.223(4)(b) of the Migration Regulations 1994 (Cth).

¹⁷³ Migration Regulations 1994 (Cth) reg 2.72(10)(c); reg 2.79(2).

¹⁷⁴ See text above accompanying nn 158-161.

¹⁷⁵ DIAC, *Ministerial Advisory Council on Skilled Migration Discussion Paper: Strengthening the Integrity of the Subclass 457 Program*, DIAC, Canberra, 2012, at <http://www.immi.gov.au/about/discussion-papers/_doc/strengthening-integrity-457-program.pdf> (accessed 20 June 2013).

The current market salary rate provisions are not sufficient to ensure equitable remuneration arrangements or that Australians are not disadvantaged. On this basis, it may be possible for a 457 visa holder to displace an Australian employee on less beneficial terms and conditions of employment for performing the same work in the same location.

Where a sponsor determines the market salary rate according to the methodology specified in accordance with the Regulations, the Department cannot refuse a nomination if the market salary rate is believed to be uncompetitive compared to other employers.¹⁷⁶

The paper also provided an example which powerfully illustrated the flaws of a ‘market’ salary regime based on workplace terms and conditions:

Under the current Regulations, there is potential for the employer to create their own market rate through sourcing just one Australian citizen or permanent resident worker willing to work for a particular wage, even though other employers in the same geographical region may remunerate equivalent workers at a higher rate. The risk of this occurring is considered particularly high in businesses which employ predominately 457 workers.¹⁷⁷

It is these concerns that prompted The *Migration Legislation Amendment Regulation 2013 (No 3)* (Cth) deletes of the phrase, ‘in the person’s workplace’, from the provision relating to condition of approval of nomination in relation to standard business sponsors.¹⁷⁸ This change, which took effect on 1 July 2013,¹⁷⁹ means that it is a condition of approving nominations made by a sponsoring employer that the terms and conditions provided to the 457 visa worker be ‘no less favourable’ than the terms and [conditions](#) provided to an Australian citizen or an [Australian permanent resident](#) ‘for performing equivalent work ~~in the person's workplace~~ at the same location’.

¹⁷⁶ Ibid at 11.

¹⁷⁷ Ibid at 12.

¹⁷⁸ Migration Legislation Amendment Regulation 2013 (No 3) (Cth) sch 3, item 7.

¹⁷⁹ Ibid s 2.

This change comes somewhat closer to establishing a ‘market’ salary regime. Whether the changes will amount to effective re-regulation is, however, unclear. This is because of the various meanings can be attributed to the term, ‘location’. This term, which is not defined by the *Migration Act*, can variously mean the workplace of the 457 visa worker, the town, the region, State and even country in which the worker is employed. The Explanatory Statement to the regulation is not entirely correct when it says that the change to the ‘market’ salary regime will ‘*require* sponsors to provide overseas workers with at least the terms and conditions of employment given to an Australian worker performing the same work in the same geographic region’.¹⁸⁰ The truer position is captured in a later page of the Statement which says that:

This amendment ensures that the Minister is *not limited* to only considering the terms and conditions of employment of an Australian worker performing equivalent work in the workplace of the person identified in the nomination. Under the amendments, the Minister *would* be able to consider the terms and conditions of employment for Australian workers outside of the workplace of the person identified in the nomination.’¹⁸¹

The lack of clarity surrounding the term, ‘location’, allows room for discretion in its interpretation by the Immigration Department, preserving a path for deregulation through executive discretion. We can also note that the changes made by the *Migration Legislation Amendment Regulation 2013 (No 3) (Cth)* do *not* apply to the ‘no less favourable requirement’ in Labour Agreements; here the ‘workplace’ benchmark still applies to Labour Agreements employers.

¹⁸⁰ Explanatory Statement, Migration Legislation Amendment Regulation 2013 (No 3) (Cth), Parliament of Australia, 2013, at 1 (Select Legislative Instrument 2013 No. 146) (emphasis added).

¹⁸¹ *Ibid* at 49 (emphasis added).

Conclusion

Key to coming to grips with the phenomenon of temporary migrant work in Australia is an understanding of the regulation governing such work. This article has sought to meet this challenge through the concept of 'labour market deregulation'. 'Deregulation', as defined by this article, is *not* equated with the removal of regulation; rather it is understood to mean the removal of a particular kind of regulation – protective regulation.

Applying this concept to Australia's main temporary labour migration scheme, the 457 visa program, the article identified three protective purposes: protection of the employment opportunities of local workers; protection of the working conditions of local workers; and protection of the working conditions of temporary migrant workers. The article went on to argue that the 457 program was deregulated under the Coalition Government (1996-2007) while it was subject to increased regulation under the current ALP Government (2007-present). It has, however, identified significant potential for deregulation through executive discretion under the current legislative framework - through Labour Agreements, exemptions from labour market testing requirements and ambiguity surrounding the benchmark underlying the 'no less favourable' obligation. Despite the 2013 amendments, this means that re-regulation under the current ALP Government remains partial.

This analysis of the 457 visa program has implications for future research into the regulation of temporary migrant work in Australia at two levels. First, it suggests that regulatory reform strategies should be multi-pronged given the various protective purposes of such regulation and, further, that reformers should be vigilant as to the potential for deregulation through executive discretion. Second, it provides a framework for analysing the proliferation of temporary migrant work schemes in Australia. There are presently more than a million temporary migrants in Australia, most of whom have legal rights to work. These migrants are, however, governed by a range of visa schemes (student visas, temporary graduate visas, Working holiday

maker visas, visas for New Zealanders).¹⁸² A conceptual approach based on ‘deregulation’ will enable a stronger grasp of such complexity and diversity. In doing so, it can also enable a fuller synthesis of the emerging scholarship on such schemes.¹⁸³

¹⁸² DIAC, *Temporary Entrants and New Zealand Citizens (as at 31 March 2013)*, Report BR0169, DIAC, at <<http://www.immi.gov.au/media/statistics/pdf/temp-entrants-newzealand-mar13.pdf>> (accessed 6 August 2013).

¹⁸³ See, for example, see M Jockel, *457 Visa Law: Addressing Australia's Skilled Labour Shortage*, Lawbook, Sydney, 2009; J Howe, ‘The Migration Legislation Amendment (Worker Protection) Act 2008: Long Overdue Reform, But Have Migrant Workers Been Sold Short?’ (2010) 23 *Australian Journal of Labour Law* 251; A Reilly, ‘Protecting vulnerable migrant workers: The case of international students’ (2012) 25 *Australian Journal of Labour Law* 181.