

18 June 2010

The Hon. Kevin Rudd MP
Prime Minister
Parliament House
Canberra ACT 2600

Dear Prime Minister,

I am writing to bring to your attention ongoing issues with the 457 temporary visa program and the need for further sensible reforms to the scheme, including the introduction of a requirement for labour market testing (LMT) in line with ALP policy. These matters have previously been raised with Ministers Crean and Evans respectively.

Before going to the specifics of our proposal on LMT, it is useful to provide some broader context around the union position on these matters.

The ACTU position on the 457 visa program

We accept that temporary migration has some role to play in meeting critical short-term skill needs, but we have two key concerns with the 457 visa pathway.

The first is to ensure that workers who come to Australia on a temporary basis are treated well as employees, that they are safe at work, they receive their full and proper entitlements and protections, and, if this does not happen, they are able to seek a remedy just as Australian workers can, including by accessing the benefits of union membership and representation.

The second, which is really an extension of the first, is to ensure that temporary migrant workers are not used and employed in a way that undercuts the rights of Australian workers to skilled jobs in Australia, puts them out of jobs, undercuts Australian wages and conditions, or allows employers to avoid their responsibilities to invest in, train and employ the local workforce.

In our view, the 457 visa program, particularly as it was configured under the previous government, has not achieved these aims. It has failed to protect temporary workers from abuse and exploitation from unscrupulous employers and has not adequately supported and protected employment and training opportunities for Australian workers.

To its credit, the Government introduced a series of legislative reforms that have improved the operation of the scheme and removed some of its worst excesses, particularly through the *Worker Protection Act 2009*. This included a requirement that 457 visa holders be paid no less than the equivalent Australian worker at their workplace. This still fell short of establishing a true market rate requirement for 457 workers, but was a significant improvement on the previous minimum salary level requirements.

Notwithstanding these reforms, the ACTU continues to have serious concerns with aspects of the 457 visa program. Some concerns relate to enforcement and compliance issues with the new requirements, such as market rates. The ACTU and affiliated unions are continuing to pursue these matters through the Skilled Migration Consultative Panel established by Minister Evans. However, there also continue to be fundamental design problems with the scheme that need to be rectified.

The importance of labour market testing

The key outstanding concern is the lack of any requirement for labour market testing to ensure that employers have made genuine efforts to employ local labour before resorting to 457 sponsorship. A related concern is that there have been cases where employers laid off Australian workers, while 457 visa holders were kept on.

In our view, a requirement for labour market testing is absolutely essential for the ongoing integrity of the 457 program and community support for it. Your government has clearly stated that "temporary overseas workers on subclass 457 visas are only to be employed if skilled labour cannot be sourced locally" (Immigration Minister Evans media release, 2 March 2010). To ensure this is in fact the case, there needs to be an effective and transparent way of determining if the work could not be done by Australian workers.

Since the removal of labour market testing in 2001, this has not been possible. Failure to restore LMT as part of the Rudd Government's 457 visa reforms means it is still not possible.

Currently, employers are only required to sign a document known as 'the sponsor attestation' in which they attest in writing that they have a strong record of, or a demonstrated commitment to, employing local labour, and non-discriminatory employment practices. However, employers do not have to produce any evidence to support their attestation and the Department of Immigration and Citizenship (DIAC) is not able to verify the employer's commitment to employing local labour.

A proper program of labour market testing would ensure there is sufficient evidence to satisfy DIAC that there is a genuine skills shortage and that the employer made genuine efforts to fill the vacancy at the proper market rate. For example, this could require employers to advertise the position for a specified time and demonstrate that the position cannot be filled locally before they can use 457 visas. It should also involve DIAC consulting with local unions, employer bodies, and employment agencies who are on the ground and best placed to verify the existence or otherwise of genuine skill shortages in their area.

This process should be undertaken before approval is given to employers wanting to become sponsors and/or obtain 457 visas. We believe this measure would significantly improve the program.

Several policy arguments against restoring LMT in the 457 program have been put to us in the course of our discussions with Ministers. One is that LMT is no longer necessary because the Rudd Government's reforms to the 457 visa program have removed the incentives for employers to hire 457 visa workers ahead of qualified Australian workers.

As I noted earlier, we acknowledge the real improvements made in this visa program. However, these reforms have not removed all such incentives. They may have raised the cost of employing 457 visa workers relative to the pre-September 2009 cost of doing so, but employers still have greatly disproportionate bargaining power relative to 457 visa workers, especially those workers anxiously seeking an employer-sponsored permanent residence (PR) visa. The government has given priority to employer-sponsored PR skilled migration, and over one-half of all 457 visa holders now seek PR.

A second argument is that traditional LMT is not effective, can be easily rorted and is an unjustified burden on business. We reject these assertions. A well-designed LMT system can be simple, low-cost, and effective in minimising abuses. I would also point out that while your government has been reluctant to move towards a system of LMT, it is regarded as a crucial element of an effective temporary migrant workers' policy in other developed countries such as the US, Canada, UK and various other EU countries.

The Government's legal argument against labour market testing

The Government has continued to cite Australia's international trading obligations and commitments as the major impediment to introducing a system of LMT to underpin the 457 visa program. For example, the Immigration Minister set out clearly how Australia's free trade position dictates its 457 visa policy, in a letter to the CFMEU dated 10 September 2009. This said in part:

"While the Government continues to promote and encourage the culture of employing Australian workers, we cannot create legal obstacles for overseas workers or introduce preferential treatment for Australian workers without compromising our international trading position and legal obligations."

The ACTU and its affiliates do not consider these are valid arguments for the Government failing to honour its pre-election commitments to introduce LMT.

The CFMEU prepared a paper last year which sought to examine the extent to which these trading commitments do in fact limit the capacity to have LMT. Essentially, the paper concludes that the Government's argument is overstated. Among other things, it found:

- Australia's current legally binding international trade commitments which date back to WTO GATS 1995 (and a limited number of free trade agreements) do not prevent the Government from regulating 457 visas through LMT. ¹
- The current ban on LMT is based instead on the argument that it would be in breach of Australia's non-binding Doha round offer in 2005 to remove LMT for 'specialists' (i.e. persons with trade, technical and professional skills); yet Australia could change its 2005 Doha offer at any time. ²
- The Government's stance against LMT contradicts the ALP platform commitment and public assurances given prior to the 2007 election.
- The Government's policy position in negotiating free trade agreements gives greater weight to Australia's 'offensive interests' in trade negotiations i.e. improving access for Australians wishing to do business overseas, while making secondary the provision of necessary protections for Australian workers at home.

As well, under the 'National treatment' provisions of WTO GATS and various free trade agreements, it appears that Australia presently cannot make laws giving Australian workers preference in redundancy situations over temporary foreign workers on 457 visas. The ACTU and its affiliates believe that most Australians would be surprised to learn their own national government took the view that it could not give preferential treatment in employment for

¹ The Australian Government commitments in the Uruguay Round provided that it would not impose LMT in intra corporate transfers of 'executives, senior managers, independent executives and service sellers', but the temporary entry of foreign 'specialists' (i.e., persons with trade, technical and professional skills) would be subject to LMT i.e. employers had to show there were no qualified Australians available to do the work.

² The 2005 Doha Offer provides that "Australia reserves the right to withdraw, modify, or reduce this offer in whole or part, at any time prior to the conclusion of the negotiations."²
Australia - Revised Services Offer, WTO Council for Trade in Services Special Session, 26 May 2005, p1 DFAT website (accessed 6 May 2010)

Australian residents (citizens and permanent residents) relative to 457 visa workers because of free trade considerations.


What needs to be done

The ACTU and affiliates believe these are serious issues on which there must be further consultation between the government and the Australian union movement. As a basis for consultation, we propose the following:

1. The Australian Government's policy should be guided by its binding commitment from the Uruguay Round in 1995 (WTO GATS) that LMT will not be imposed in relation to intra corporate transfers of "executives, senior managers, independent executives and service sellers".
2. In regard to all trade agreements currently being negotiated or under consideration by Australia (Doha and FTAs), the Rudd government should reassess its offer to make LMT concessions in relation to the 457 visa, with a view to:
 - maintaining the Australian Government's right to impose LMT for specialists (persons with trade, technical and professional skills) on 457 visas, as per our 1995 WTO GATS arrangements; and
 - restoring the Australian Government's ability to require employers to give preference to Australian workers over 457 visa-holders in redundancy situations.
3. The Rudd government should re-introduce LMT in the 457 visa program as promised in the 2007 ALP Election Platform, for all trades occupations (as a minimum).
4. There needs to be more informed public debate on Australia's position on free trade and access of foreign workers to the Australian labour market, and the implications of this for Australian workers at all levels. As a first step, the Australian government should publicly release an Information and Policy Paper setting out in plain language Australia's current commitments and offers, and their full implications for the rights of Australian workers relative to temporary migrant workers

I look forward to your response on these issues.

Yours sincerely,



Jeff Lawrence
Secretary

cc The Hon Simon Crean MP, Minister for Trade
Senator the Hon Christopher Evans, Minister for Immigration and Citizenship