Australia's international trade commitments and the 457 visa

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Executive summary

This paper examines the extent to which Australia's international trade commitments limit the ability of the Australian Government to change the 457 visa.

The Rudd Labor Government asserts that on account of Australia's "international trading position and legal obligations", it is not able to require employers:

- to give preference to hiring Australians (citizens and permanent residents) over temporary foreign workers in the 457 visa program, through formal "labour market testing" or LMT.

- to give preference to retaining Australian workers over 457 visa workers in redundancy situations.

It is further asserted that these international trade commitments also mean that Australia:

- is constrained in the extent to which it can change the gazetted list of occupations for which 457 visas may be granted.

- cannot impose a cap or numerical limit on the number of 457 visa grants in a particular year, in total or in specific sectors or occupations.

The most recent formal statement by the Rudd Government on Australia's international trade commitments and the 457 visa was made on 10 September 2009. This was in a Response to a report on the 457 visa program, tabled in the House of Representatives.

This Response says in summary:

- Any changes to the 457 visa must be consistent with Australia's international trade commitments under the WTO General Agreement on Trade in Services (WTO GATS) and Free Trade Agreements (FTAs); and Australia "should also be cautious about measures that could limit our capacities in future negotiations".

- Australia has made certain commitments, under the WTO GATS, to allow the entry and temporary stay of some persons *without* labour market testing (executives, senior managers, independent executives and service sellers), and of "specialists" (persons with trade, technical and professional skills) *subject to individual compliance with labour market testing* (emphasis added).

- These existing commitments under WTO GATS "largely relate to Australian classifications of ASCO 1-4 occupations".

- Australia has offered, as part of its Mode 4 offer for the Doha Round of trade negotiations, additional concessions regarding the entry and temporary stay of skilled persons, "including the removal of labour market testing for specialists".

- Some Free Trade Agreements (FTAs) also commit Australia to temporary entry without limits and without labour market testing, for certain categories as intra-corporate transferees (executives, managers and specialists, independent executives and "contractual service sellers").

- Some Free Trade Agreements (FTAs) have specific occupational concessions beyond WTO GATS commitments. The example given was the Thailand Australia Free Trade Agreement (TAFTA), which has special concessions for Thai chefs.

The relevant provisions in these international agreements and trade offers are:
- Specific commitments or offers relating to LMT
- More general commitments, to treat nationals of other countries as Australian nationals, through provisions known as" National treatment" and "Market access".

An examination of these finds that:

1. Australia's only existing binding WTO/GATS commitments date from 1995. They prohibit LMT in the 457 visa specifically for intra-company transfers, in a specified range of "classifications" including executives, managers and "specialists". "Specialists" includes ASCO 4 trades occupations. LMT is also not required for *individual* positions within labour agreements.

2. Australia made a *non-binding* offer in the Doha trade Round in 2005 under the Howard government, which is still current. This included the offer to remove LMT for specialists in all 457 situations, not just intra-company transfers, in all occupations on the gazetted list of occupations eligible for 457 visas, including ASCO 4 trades occupations.

3. Australia could change its 2005 Doha offer at any time – it could therefore withdraw the offer to remove LMT for "specialists" in the 457 program.

4. But the Rudd government has made a policy decision that it will not change Australia's 2005 Doha offer. Its position is that it would be criticized for "bad faith" in the Doha negotiations if it did so.

5. The Government's current blanket ban on LMT in the 457 program is based on the argument that LMT would be in breach of Australia's non-binding Doha offer, not Australia's existing binding WTO commitments. The Rudd Government's blanket ban on LMT goes further than the Howard government's position, which was that Australia's international trade obligations only prevented LMT "in certain circumstances".

6. FTAs – Australia has 5 FTAs with specific commitments on temporary entry, and is negotiating 7 other FTAs as at December 2009. The most recent FTA signed by the Rudd Labor government in 2009 – with ASEAN and NZ – provides that LMT "may be required for some occupations", subject to the outcome of WTO Doha negotiations.

1 Introduction

Most Australians would be surprised to learn that the Rudd Labor Government asserts that on account of Australia's "international trading position and legal obligations", it is not able to require employers:

- to give preference to hiring Australians (citizens and permanent residents) over temporary foreign workers in the 457 visa program, through formal "labour market testing" or LMT.

- to give preference to retaining Australian workers over 457 visa workers in redundancy situations.

The Minister for Immigration and Citizenship set out this position in writing to the CFMEU, in a letter 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.

In addition, the Rudd Labor Government asserts that Australia's international trade commitments also limit its ability to change the 457 visa program in several other areas, so that:

- Australia is constrained in the extent to which it can change the gazetted list of occupations for which 457 visas may be granted.[1]

- Australia cannot impose a cap or numerical limit on the number of 457 visa grants in a particular year, in total or in specific sectors or occupations.[2]

This contrasts with the US which has imposed a cap of 65,000 on the number of skilled temporary H-1B visas issued each year.

2 Background – the Rudd Government's stance

The Minister's September 2009 letter did not elaborate further on the content of Australia's "international trading position and legal obligations" and how these prevented "preferential treatment for Australian workers".

[1] The Rudd government has said any changes to this list "must be consistent with Australia's international trade commitments", but did not elaborate further – see Attachment 1.

[2] "Australia has undertaken not to use …quotas to control or limit the temporary entry of certain categories of persons". Email dated 17 March 2008 from Melissa Kelly, Office of Trade Negotiations, DFAT.

But a formal Government Response to a report on the 457 visa program, tabled in the House of Representatives the same day as the letter (10 September 2009)[3], does elaborate on these matters.

This Response says in summary:

- Any changes to the 457 visa must be consistent with Australia's international trade commitments under WTO GATS and FTAs; and Australia "should also be cautious about measures that could limit our capacities in future negotiations".

- Australia has made certain commitments, under the WTO General Agreement on Trade in Services (GATS), to allow the entry and temporary stay of some persons *without* labour market testing (executives, senior managers, independent executives and service sellers), and of "specialists" (persons with trade, technical and professional skills) *subject to individual compliance with labour market testing* (emphasis added).

- These existing commitments under WTO GATS "largely relate to Australian classifications of ASCO 1-4 occupations".

- Australia has offered, as part of its Mode 4 offer for the Doha Round of trade negotiations, additional concessions regarding the entry and temporary stay of skilled persons, "including the removal of labour market testing for specialists".

- Some Free Trade Agreements (FTAs) also commit Australia to temporary entry without limits and without labour market testing, for certain categories as intra-corporate transferees (executives, managers and specialists, independent executives and "contractual service sellers").

- Some Free Trade Agreements (FTAs) have specific occupational concessions beyond WTO GATS commitments. The example given was the Thailand Australia Free Trade Agreement (TAFTA), which has special concessions for Thai chefs.

The relevant section from the 10 September 2009 Government Response is reproduced in full in Attachment 1.

It was part of the response to Recommendation 12 in the 2007 JSCM Report which recommended (among other things) that the government should trial "a limited labour market testing process to agreed standards for a narrow range of identified occupations".[4]

It is puzzling that the Rudd Government has chosen to make a detailed formal response to the September 2007 JSCM report under the previous government, but has not done the

[3] By the Leader of the House, Mr Albanese. See Hansard, 10 September 2009, p9295.
[4] Joint Standing Committee on Migration (JSCM), *Temporary migrants…..permanent benefits*, September 2007, p81.

same for the October 2008 Report on the 457 visa which it commissioned, namely the *Visa Subclass 457 Integrity Review, Final Report*, or Deegan Report.

3 Australia's "international trading position and legal obligations"

The relevant international agreements and/or negotiations are:

- WTO/GATS of 1995
- Australia's 2005 Doha Round offer
- Free Trade Agreements

The relevant provisions in these appear to be:

- Specific commitments or offers specifically relating to LMT
- More general commitments, subject to certain reservations, to treat nationals of other countries the same as Australian nationals, through provisions known as" National treatment" and "Market access".

4 Labour market testing (LMT)

An examination of the Government's September 2009 response to the JSCM report (set out in Attachment 1) plus the actual text of the WTO GATS and related FTAs, and other information on the public record leads to the following conclusions:

In relation to **labour market testing (LMT**) -

1. Australia's only existing binding WTO/GATS commitments date from 1995. They prohibit LMT in the 457 visa specifically for intra-company transfers, in a specified range of "classifications" including executives, managers and "specialists". "Specialists" includes ASCO 4 trades occupations. LMT is also not required for *individual* positions within labour agreements.

2. Australia made a non-binding offer in the Doha trade Round in 2005 under the Howard government, which is still current. This offer included the offer to remove LMT for specialists in all 457 situations, not just intra-company transfers, and in all occupations on the gazetted list of occupations eligible for 457 visas. ASCO 4 trades occupations are in this 457 list.

3. Australia could change its 2005 Doha offer at any time – it could therefore withdraw the offer to remove LMT for "specialists" in the 457 program.

4. But the Rudd government has made a policy decision that it will NOT change Australia's 2005 Doha offer. Its position is that it would be criticized for "bad faith" in the DOHA negotiations if it did so.

5. The Government's current blanket ban[5] on LMT in the 457 program is based on the argument that LMT would be in breach of Australia's non-binding Doha offer, not Australia's existing binding WTO commitments.

The following sections expand on these points.

In summary, DFAT described the LMT position as follows in a September 2008 submission[6] to the Joint Standing Committee on Treaties (JSCOT) consideration of the Australia-Chile FTA:

> "Current WTO commitments – committed to not apply LMT for Executives and Managers as ICTs, Business Visitors, Independent Executives, and Specialists under labour market agreements or those with specialized knowledge at an advanced level.
> SAFTA – Committed to not apply LMT for all categories under Chapter.
> TAFTA - Committed to not apply LMT for all categories under Chapter.
> Chile FTA – no commitment.
> WTO Doha offer - no commitment."

4.1 WTO/GATS 1995

The WTO GATS agreement is a positive list agreement, which means that in most areas, only the specific commitments made by each government are legally binding.

Australia's current commitments in the WTO GATS agreement on movement of temporary skilled workers who are not executives or independent service sellers are in Mode 4 commitment clause 4d), which reads as follows:

> "4d) Specialists, **subject to individual compliance with labour market testing**, for periods of initial stay up to a maximum of two years with provision of extension provided the total stay does not exceed four years.
>
> Specialists being natural persons with **trade**, technical or professional skills who are responsible for or employed in a particular aspect of a company's operations in Australia. Skills are assessed in terms of the applicant's employment experience, qualifications and suitability for the position.
>
> Labour market testing is **not** required for
>
> (i) natural persons who have specialized knowledge at an advanced level of a proprietary nature of the company's operations and have been employed by the company for a period of not less than two years and

[5] But LMT is in fact required in some parts of the 457 program, notably for labour agreements (now called 'work agreements'), including the on-hire work agreement – introduced by the Howard government in 2007.

[6] DFAT, Submission 13, Australia-Chile FTA: JSCOT Consideration, DFAT response to submissions, dated 17 June 2008 (received by JSCOT 1 September 2008)
http://www.aph.gov.au/house/committee/JSCT/17june2008/subs/sub13.pdf

(ii) if the position in question is within a labour agreement in force at the time of application.

A labour agreement is an agreement between the Australian Government, employers or industry organisations **and unions**[7] for the entry of specialists from overseas.

The above commitments do not apply in cases of labour/management disputes". (emphasis added)

4.2 Australia's 2005 offer in Doha Round of WTO GATS

In 2005, Australia (under the Howard administration) made a non-binding offer in the WTO GATS negotiations (known as "the Doha Round"). This offer (among other things) removes:

- the labour market testing provisions, and
- the reference in the earlier1995 WTO GATS commitments which excluded these commitments from applying in cases of industrial disputes (cited above).

Negotiations about GATS have been ongoing over the last ten years as part of the Doha round of WTO negotiations.

The 2005Australian government offer changed the earlier 1995 commitments consistent with the then current provisions for the 457 visa (457 LMT had been removed in 2001.

The 2005 Australian offer is available on the DFAT website at www.dfat.gov.au/trade/negotiations/services/downloads/wto_revised_offer.doc

But most importantly, as with all offers, the documents clearly states:

> **"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" (p.1),** emphasis added.

This means the offer is not legally binding on the Australian government. The only legally binding WTO commitments are the current WTO GATS commitments, outlined in the previous section.

Attachment 2 sets out the exact text of clause 4d) in the Doha offer which relates to "Contractual service suppliers" and which excludes the LMT requirement from the 1995 commitments.

[7] In fact, this is not true. At the time of this 2005 offer, unions were not parties to labour agreements and were not even consulted on proposed agreements. After the Rudd Labor government was elected in November 2007, the Immigration Minister directed that relevant unions be consulted about proposed agreements. But unions are still not parties to labour agreements.

The DFAT explanation of that 2005 offer referred to "Australia's commitment to respond to demand for skilled temporary entrants without recourse to the overly burdensome requirements of labour market testing".[8]

This was the position of the Howard government on LMT, not the ALP's. The ALP was committed to LMT in the 457 program.

So was the ACTU, which formally put to the then Australian government that LMT should be retained in the Doha offer, and not excluded without prior agreement with the unions (which was not sought):

> Further, we support the right of Australian governments to establish and retain labour-market testing requirements in the case of specialists, and to make the waiver of such a requirement dependent upon agreement with unions.[9]

4.3 Free Trade Agreements

Australia has entered into the following 5 FTAs that have specific commitments on temporary entry, as at 1 December 2009:

Singapore - SAFTA
Thailand - TAFTA
Chile - CAFTA
USA - USAFTA
ASEAN NZ - AANZFTA

As at December 2009, some 7 other FTAs are also being negotiated with:

•Australia-China FTA Negotiations
•Australia-Gulf Cooperation Council (GCC) FTA Negotiations
•Australia-Japan FTA Negotiations
•Australia-Korea FTA Negotiations
•Australia-Malaysia FTA Negotiations
•Pacific Agreement on Closer Economic Relations (PACER) Plus
•Trans-Pacific Partnership Agreement

Free Trade Agreements are also under consideration with India and Indonesia with Feasibility Studies underway in both cases.

[8] Department of Foreign Affairs and Trade, "WTO General Agreement on Trade in Services (GATS) Revised Offer 2005, Explanatory Guide", pp2-3.(Cited in AFTINET Submission to the Joint Standing Committee on Treaties on the ASEAN/Australia/New Zealand Free Trade Agreement on behalf of the Australian Fair Trade and Investment Network (AFTINET), p20.
[9] ACTU Submission To The Office of Trade Negotiations On The GATS Negotiations and Australia's Initial Offer, 3 April 2003.

4.4 The ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA)

The AANZFTA is the most recent FTA. It was signed in February 2009 under the Rudd administration and comes into force on 1 January 2010. The AANZFTA text has an annex which is a schedule of Australia's commitments on Movement of Natural Persons.

This annex is at the end of the text of the AANZFTA and is available on the DFAT website at:

http://www.dfat.gov.au/trade/fta/asean/aanzfta/annexes/aanzfta_annex4_australia_mnpschedule.pdf

The Australian commitments use the same wording as the 2005 GATS offer, in relation to "Contractual service suppliers", ***except that they include a possible requirement for labour market testing***, described as follows:

> "Labour market testing may be required for some occupations, to the extent that this is not inconsistent with Australia's commitments under the WTO and other international trade agreements to which it is a party as at entry into force of this Agreement**."**

The meaning of this is not entirely clear. It would seem to mean that if a Doha agreement is concluded, and Australia's current 2005 Doha offer (removing LMT) is accepted, then the ASEAN agreement would **not** include LMT.

But if agreement is not reached in the Doha GATS negotiations before 1 January 2010 when the AANZFTA comes into force, the ASEAN agreement will or may include LMT – if the WTO GATS Doha negotiations were the only consideration.

But the reference to 'other international trade agreements' complicates the issue, because some of these *exclude* any requirement for LMT for certain categories, eg the Chile FTA (discussed below).

This could mean for example, that even if the WTO GATS agreement negotiations are not completed (and Australia's current legal GATS obligations remain as per the 1995 commitments), LMT could not be applied under AANZFTA in circumstances excluded under the Chile FTA, outlined below.

This AANZFTA wording would also appear to confirm that the 2005 GATS offer is not legally binding at present, since its application in AANZFTA is conditional on agreement being reached in the Doha GATS negotiations.

This is despite the following statement on the DFAT website that appears to say the opposite regarding the Movement of Natural Persons (MPN) provisions in AANZFTA:

> The MNP chapter provides a platform for countries to broaden and deepen their commitments in future **and thereby facilitate freer movement of skilled labour within the region across all sectors of the economy**.[10] (emphasis added)

In the AANZFTA schedule of Australia's commitments on Movement of Natural Persons, clause 2d) reads as follows, with the LMT paragraph in bold:

"Contractual service suppliers (including independent professionals/specialists)

Contractual service suppliers (CSS) being natural persons with trade, technical or professional skills.

Entry and stay of such natural persons is subject to employer sponsorship. Employer sponsorship requirements for this category include sponsorship by a bona fide overseas business or business operating lawfully and actively in Australia and a contract for the supply of a service within Australia. That business must have employed the natural person seeking entry and must intend that person to assist in fulfilling its Australian services contract.

The natural person seeking entry must be assessed as having the necessary qualifications, skills and work experience accepted as meeting the Australian standards for his or her nominated occupation, which must fall within the list of gazetted occupations. Employer sponsorship requirements may change from time to time.

Labour market testing may be required for some occupations, to the extent that this is not inconsistent with Australia's commitments under the WTO and other international trade agreements to which it is a party as at entry into force of this Agreement.

Full details of employer sponsorship requirements, including the list of gazetted occupations, are available on the website of the Australian government department responsible for immigration matters. (As at the date of this schedule, the address of that website was www.immi.gov.au)

Entry is for periods of stay up to 12 months, with provision for an extension."

Spouses of temporary entrants covered by (D) are also accorded full working rights where stay of those temporary entrants is greater than 12 months. For such spouses, entry and stay is for the same period as for the temporary entrant.

4.5 Other FTAs

The earlier FTAs with Singapore and Thailand (SAFTA and TAFTA) both contain commitments not to apply LMT "for any category of temporary entrant covered by the Chapter"[11].

[10] DFAT website, ASEAN-Australia-New Zealand Free Trade Area (AANZFTA): Australian Guide to Annexes and Associated Documents.
http://www.dfat.gov.au/trade/fta/asean/aanzfta/guide/australian_guide_annexes.html

[11] DFAT, Submission 13, Australia-Chile FTA: JSCOT Consideration, DFAT response to submissions, dated 17 June 2008 (received by JSCOT 1 September 2008)
http://www.aph.gov.au/house/committee/JSCT/17june2008/subs/sub13.pdf

The Australia-Chile Free Trade Agreement, ratified in 2008 by the Rudd Labor government, contains provisions for temporary entry of "contractual service suppliers" and specialists as intra-company transferees.

The wording is similar to the wording in the GATS 2005 offer, and does **not** contain any reference to, or requirement for, LMT. The text of the Agreement is at:

www.austlii.edu.au/au/other/dfat/treaties/2009/6/13.html

and an extract of the relevant sections is shown in Attachment 3.

As to the meaning of "contractual service suppliers", a DFAT senior official said in evidence to the JSCOT inquiry into the Australia-Chile FTA that this has a very narrow meaning and is apparently confined to intra-company transferees – and by implication, *excludes* tradespersons:

> ..contractual service suppliers, who are people with high-level technical or professional qualifications, skills and experience *who are already employed by a contractual service supplier of the other country*. So it is not a question of forming an employment relationship directly. Somebody has pointed out that this chapter does not apply to measures affecting nationals seeking access to the employment market. So many of the concerns of the CFMEU representative are not really germane to what this agreement does.[12] (emphasis added)

5 "National treatment" commitments

The GATS National Treatment obligation requires each WTO member country in areas nominated in its Schedule of Commitments, to:

> "…accord to services and service suppliers of any other member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers."

The National Treatment provisions from the FTA with Singapore are shown in Attachment 4. Article 4, para 1 mirrors the GATS wording, as follows:

> Each Party shall accord to services and service suppliers of the other Party, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

Similar provisions are included in other FTAs and Australia's 1995 WTO GATS commitments.

[12] Ms Trudy Witbreuk, Assistant Secretary, Office of Trade Negotiations, DFAT, Evidence to JSCOT Inquiry into Australia-Chile FTA, *Transcript of Evidence*, 13 October 2008, pp33-34.

"Market access provisions" in WTO GATS are also said to limit the extent to which national governments can require "preferential treatment" for its own nationals as against foreign "service sellers" from other WTO countries.

The question is: what do these commitments to the principles of "National treatment" and "market access" mean for the government's ability to regulate foreign nationals seeking employment, or already employed, in Australia as 457 visa holders?

According to the view of senior DFAT officials, these commitments have major and far-reaching implications. In discussions in 2008 and 2009, DFAT officials said that it would be" inconsistent with the principle of national treatment" for the Australian government to introduce reforms (of the 457 visa) that place foreign services suppliers seeking to export their services (by working in Australia temporarily in order to supply them) at a meaningful disadvantage vis-à-vis the local suppliers of services with which they are competing (ie, the Australian workers).

The DFAT officials gave the following examples. While measures intended to ensure wage *parity* between local and foreign workers would be consistent with "national treatment", it would be inconsistent with "national treatment" to introduce:

- measures that make it *more expensive or difficult* to engage foreign service suppliers (eg mandatory requirements that the employer bear the costs of required registrations or licences, children's education, or pay a salary above the relevant award or "market rate").

If this DFAT view is correct, then regulations to require employers to give preference to retaining Australian workers over 457 visa holders in redundancy situations MIGHT be in conflict with "national treatment" commitments – but it is not certain.

In DFAT's examples quoted above, the test seems to be whether the measure in question imposes additional costs on the *employer* for hiring the foreign worker vs the Australian worker – but a regulation governing the order of retrenchments in redundancy situations would not necessarily do that.

At the heart of this issue is the WTO GATS notion that a "service seller" includes foreign nationals selling nothing but their labour; and that principles of "National treatment" and "Market access", developed to govern international trade in goods and merchandise, can be transposed to international labour movements.

6 UK temporary work visas and WTO GATS

A recent UK report by the government-appointed Migration Advisory Committee (MAC) also addressed the implications of WTO GATS for changes to the temporary work visa regime for intra-company transferees.

The August 2009 MAC Report is noteworthy for its clear explanation of exactly what limitations the WTO GATS places on the UK's ability to change its visa conditions; and more significantly, the Report's recommendation that the conditions of the visa be made *more restrictive*, in one important area – the length of employment with the overseas company required for intra-company transferee visas. The Report said:

> **General Agreement on Trade in Services (GATS)**
>
> 2.54 The UK is a party to the General Agreement on Trade in Services (GATS) overseen by the World Trade Organisation (WTO). This Agreement was created to extend to the service sector the system for merchandise trade set out in the General Agreement on Tarrifs and Trade. The Agreement entered into force in January 1995.
>
> 2.55 Under the GATS, the UK is committed to allow the temporary presence for up to three years of intra-company transferees where: they are managers or specialists: and are transferred to the UK by a company established in the territory of another WTO member; and are transferred here in the context of the provision of a service through a commercial presence in the UK. The UK is committed to doing this where the worker has been employed by the sending business for at least one year. It is also committed to do it without applying an economic needs test, such as the RLMT (or Resident Labour Market Test).
>
> 2.56 The UK's existing provisions under this intra-company transfer route give effect to its GATS commitments. The GATS would only become significant if the UK sought to restrict the intra-company transfer route in such a way that it no longer complied with the UK's GATS obligations. For instance, the argument was put to us that the intra-company transfer route should require over three years' previous experience with the company. Such a requirement would be in conflict with the UK's GATS obligations and we have taken account of this fact in our recommendations.[13]

The UK government accepted the MAC Report's recommendations that:

- the qualifying period with the company overseas should be doubled from the current 6 months to 12 months, that is, up to the maximum permitted by the UK's WTO GATS commitments[14];

- separate arrangements (only 3 months prior experience with the company) be introduced for graduate intra-company transfers to the UK on training programs, for a maximum stay of one year.

Interestingly, the August 2009 MAC Report made no mention at all of the UK's offer in the Doha Round of WTO GATS. If the UK's Doha offer was a legally binding obligation, the MAC would have been expected to have mentioned this. The fact that it

[13] Migration Advisory Committee (MAC) Report UK, *Analysis of the Points Based System: Tier 2 and dependants*, August 2009, p33/34.
[14] Australia's WTO GATS commitments and FTAs also impose minimum periods of qualifying employment for intra-company transferees, but these do not appear to be enforced.

was not mentioned in the MAC Report discussion of GATS obligations tends to further support the view that Doha offers are not legally binding.

7 The threat of unskilled migration under WTO GATS and FTAs

According to the Government's September 2009 statement, Australia's current commitments in relation to the "Movement of Natural Persons" under WTO GATS and FTAs relate mainly to ASCO 1-4 occupations, that is, skilled occupations including tradespersons.

But many of the countries in the WTO or with whom Australia has or is negotiating FTAs have stronger interests in securing access to the Australian labour market for their semi-skilled and unskilled workers.

Currently the 457 visa program permits temporary work visa grants for lower-skilled occupations within the ASCO 5-7 band, but only through the mechanism of a "work agreement" (formerly a labour agreement). This is rarely used.

In October 2009, the Immigration Minister publicly stated that Australia "is going to need overseas unskilled labour at some stage" and that he was "leading the argument" for this proposition. Senator Evans said at Senate Estimates, 20 October 2009:

> In no way are we trying to stop bringing in overseas labour. I am a great advocate for it. We are going to need it. In fact, I have been leading the argument that we are going to need overseas unskilled labour at some stage….
> But that is a debate we are going to have to have in Australia. [15]

This is a complete reversal of the Minister's position. In 2008, he was quoted in *The Australian Financial Review* as completely against unskilled temporary migration.

It is of great concern that unskilled migration is now apparently on the government's agenda, at the same time as it is claiming that its ability to regulate temporary migration is severely limited by its international trade commitments.

8 Comments and conclusions

The Rudd government's current position on Australia's international trade commitments and the 457 visa, as set out in this paper, raises serious issues:

1. Australia's *current* legally binding international trade commitments do not prevent the Government from regulating the 457 visa in certain areas (eg, by LMT).

[15] Senator Evans, Minister for Immigration and Citizenship, Senate Estimates (Legal and Constitutional), 20 October 2009, *Transcript*, pL&C39. http://www.aph.gov.au/hansard/senate/commttee/S12494.pdf

2. The Government's stance against LMT and other measures in the 457 visa that would give preference to Australian workers appears to be a policy position in support of the Howard government's 2005 Doha offer, and not a legally binding commitment. If this is so, then the policy can and should be changed.

3. In taking this policy position, the Rudd government appears to be giving more weight to Australia's so-called "offensive interests" in trade negotiations that to legitimate protections for Australian workers. DFAT has said:

> Australia has strong offensive interests in improved temporary access arrangements for Australians wishing to do business abroad, especially in the professional services sector (eg, Australian lawyers, accountants, engineers). In return for getting outcomes in this area, Australia has agreed to make similar commitments in trade agreements.[16]

4. The Rudd governments stance against LMT in the 457 visa, on the grounds of Australia's international trade commitments:

   - contradicts the ALP Platform commitment to implement labour market testing in the 457 visa program, which Labor took to the November 2007 election.

   - contradicts the personal assurances on LMT for 457 visas that Kevin Rudd gave as Leader of the Opposition in an interview just a few months before the election. In August 2007, Mr Rudd said:

     "We have already indicated that there should be adequate labour market testing for 457s in locations prior to applications being made." [17]

   - goes beyond the position publicly claimed even by the Howard Government – which claimed only that Australia's international trade obligations only prevented labour market testing in the 457 visas "in certain circumstances", not in general.[18]

   - misrepresents the fact that LMT previously existed in the 457 visa program (from 1996 to 2001) and was only removed in 2001 under the Howard government.

5. There is a lack of clarity and transparency about the specific nature of Australia's international trade commitments and trading position, and exactly how these limit the Government's ability to change the 457 visa. On the one hand, there is the Rudd government's September 2009 statement that these impose real constraints on the 457 program. Yet in September 2008, DFAT said more re-assuringly:

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[16] DFAT September 2008 Submission to JSCOT Inquiry into Australia-Chile FTA.
[17] Kevin Rudd, Press Conference - 28th August 2007, http://www.alp.org.au/media/0807/pcloo280.php

[18] Commonwealth Submission to the Joint Standing Committee on Migration (JSCM) Inquiry into *Eligibility requirements and monitoring, enforcement and reporting arrangements for temporary business visas* (Submission No 33), February 2007, p3. This submission was co-ordinated by the Department of Prime Minister and Cabinet.

Australia's own trade commitments in this area do not provide permanent access to the Australian employment market. Nor do they limit the Government's ability to regulate to ensure the protection and well-being of people working temporarily in Australia.[19]

- See also Attachment 5, detailing comments in the Final Deegan Report. These clearly show that Commissioner Deegan regarded Australia's international trade commitments in regard to not using LMT as applying "only to ceratin categories of service suppliers".

6. This lack of clarity will undermine public confidence in the 457 visa. It is not consistent with the Immigration Minister's and the Rudd Government's commitment to greater transparency in the 457 visa program, to restore public confidence in the program and in the immigration program generally.

[19] DFAT JSCOT Submission, September 2009.

Attachment 1 Extract from the Government's Response (dated 10 September 2009) to the JSCM Report on temporary visas

JSCM Recommendation 12
The Committee recommends that, to ensure the 457 visa program is limited to skilled occupations where there are demonstrated skills shortages and there is no negative impact on Australian jobs, the Department of Immigration and Citizenship and the Department of Employment and Workplace Relations:

- regularly review the gazette list of approved occupations and give consideration to ensuring that it lists only skilled migration occupations in demand—for example, through the possible implementation of a Temporary Migration Occupations in Demand List; and
- work with industry and other stakeholders to trial a limited labour market testing process to agreed standards for a narrow range of identified occupations.

The Government notes this recommendation…….

However, any changes to the gazette list of approved occupations or consideration to introduce labour market testing (LMT) procedures must be consistent with Australia's international trade commitments. Under the WTO General Agreement on Trade in Services (GATS) Australia has made certain commitments to allow the entry and temporary stay of executives and senior managers, independent executives and service sellers and to allow the entry and temporary stay of specialists (persons with trade technical and professional skills) subject to individual compliance with labour market testing.

Our commitments largely relate to Australian classifications of ASCO 1-4 occupations.

Australia's free trade agreements also commit Australia on the temporary entry of executives, managers and specialists as intra corporate transferees, independent executives, and contractual service suppliers-without limits and without labour market testing. Australia has also made sectoral commitments which relate to certain specific professions, specifically Thai chefs in the Thailand Australia Free Trade Agreement (TAFTA).

It is important to avoid reforms that could be inconsistent with Australia's commitments Under World Trade Organization/General Agreement on Trade in Services (WTO/GATS) and free trade agreements.

As part of the current Australian Mode 4 offer for the Doha round of negotiations Australia has offered additional concessions regarding the entry and temporary stay of skilled persons, including the removal of labour market testing for specialists.

Some Free Trade Agreements have specific occupational concessions beyond WTO GATS commitments, which must be complied with. Australia should also be cautious about measures that could limit our capacities in future negotiations.

The Government has decided to include a sponsorship criterion that employers demonstrate a record of employing local labour and non-discriminatory employment

practices.[20]

[20] The Government's Response (dated 10 September 2009) to the Report of the Joint Standing Committee on Migration, *Temporary visas... Permanent benefits: Ensuring the effectiveness, fairness and integrity of the temporary business visa program*, pp11/12.
http://www.aph.gov.au/house/committee/mig/457visas/report/gov%20response.pdf

Attachment 2 Extract from Australian 1995 Doha offer

"(d) Contractual service suppliers (including independent professionals/specialists).

Contractual service suppliers (CSS) being natural persons with trade, technical or professional skills.

Entry and stay of such natural persons is subject to employer sponsorship.
Employer sponsorship requirements for this category include sponsorship by a bona fide overseas business or business operating lawfully and actively in Australia and a contract for the supply of a service within Australia.
That business must have engaged the natural person seeking entry and must intend that person to assist in fulfilling its Australian services contract.
The natural person seeking entry must be assessed as having the necessary qualifications, skills and work experience accepted as meeting the Australian standards for his or her nominated occupation, which must fall within the list of azette occupations.
Employer sponsorship requirements may change from time to time.
Full details of employer sponsorship requirements, including the list of azette occupations, are available on the website of the Australian government department responsible for immigration matters. (As at May 2005, the address of that website was www.immi.gov.au.)

Entry is for periods of stay up to 12 months, with provision for an extension."

Attachment 3 Extract from the Chile Australia FTA

The relevant parts of the text of the **Chile FTA** are as follows:
Article 13.1: Definitions

contractual service supplier means a national:

(i) who has high level technical or professional qualifications, skills and experience and:

(A) who is an employee of an enterprise of a Party that has concluded a contract for the supply of a service within the other Party and which does not have a commercial presence within that Party; or

(B) who is engaged by an enterprise lawfully and actively operating in the other Party in order to supply under a contract within that Party; and

(ii) who is assessed as having the necessary qualifications, skills and work experience accepted as meeting the domestic standard in the granting Party for their nominated occupation.

Nothing in (A) or (B) above shall preclude a Party from requiring an employment contract between the national and the enterprise operating in the granting Party.

ANNEX 13-A
TEMPORARY ENTRY FOR BUSINESS PERSONS
Section 2

Long Term Temporary Entry

(b) Australia shall, upon application by a contractual service supplier, an executive or an intra-corporate transferee, who is a national of Chile who meets Australia's criteria for the grant of an immigration formality, grant that person, through a single immigration formality, the right of temporary entry to, and stay, work and movement in, Australia. These rights shall be granted for an initial period of time, sufficient to supply relevant services and consistent with the purpose of the visit, for:

(i) an intra-corporate transferee, who meets the definition of an intra-corporate transferee and who is a manager, for a period of up to four years, with the possibility of further stay;

(ii) an intra-corporate transferee, who meets the definition of an intra-corporate transferee and who is a specialist, for a period of up to two years, with the possibility of further stay; and

(iii) a contractual service supplier for a period of up to one year, with the possibility of further stay.

(c) When a national:

(i) has been granted the right to temporary entry under Article 13.4 for longer than 12 months; and

(ii) has a spouse;

Australia shall, upon application by an accompanying spouse of a national of Chile who meets Australia's criteria for the grant of an immigration formality, grant that accompanying spouse the right of temporary entry, stay, work and movement, for an equal period to that of the national.

[1]3-1In addition to the requirements in Article 13.1(b)(i) to (iii), temporary entry will only be granted to business persons who also meet the requirements of a Party's immigration measures.

13-[2] In addition to the requirements in Article 13.1(i)(A) to (C), temporary entry will only be granted to business persons who also meet the requirements of a Party's immigration measures.

Attachment 4 "National Treatment" extract from Singapore-Australia FTA (SAFTA)

"ARTICLE 4
National Treatment

4. Each Party shall accord to services and service suppliers of the other Party, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.

2. A Party may meet the requirement of Article 4.1 by according to services and service suppliers of the other Party, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Party compared to like services or service suppliers of the other Party.

4. This Article shall not be construed to require any Party to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers."

http://www.dfat.gov.au/trade/negotiations/safta/chapter_7.pdf

Attachment 5 The Deegan Report and Australia's international trade obligations

The 2008 Deegan Report on the Integrity of the 457 visa recommended a limited form of LMT in the 457 visa, for employers seeking to sponsor more than 20 workers (excepting those with salaries in excess of $100,000), who would be required to be a party to a Labour Agreement [21].

The Australian government has announced that it did **not** accept this recommendation.

The Final Deegan report discussed the case for and against LMT in the 457 visa program essentially in terms of its effectiveness and the burden it placed on employers.

In relation to Australia's international trade obligations and their implications for government action regarding the 457 program, Deegan's Final Report was clear that these obligations had only very limited implications:

> Australia has committed, at the World Trade Organisation and under Free Trade Agreements, not to use LMT for some categories of persons that seek to enter Australia temporarily to supply a service, invest or sell goods. For example, the visa application of a manager or executive who wishes to transfer temporarily from the foreign office of a company to an Australian office of that company must not be subject to LMT. Australia has also committed not to limit the numbers of service suppliers from other countries that can take advantage of Australia's specific commitments on temporary entry.
>
> It should be noted that such commitments do not restrict the Government's ability to assess the eligibility of each individual who applies for a visa (including the use of LMT in certain circumstances) or to deny entry to specific persons that do not meet such criteria. **As noted above, Australia's current international obligations with regard to not using LMT apply only to certain categories of service suppliers.** [22] (emphasis added)

This was the same view put by Commissioner Deegan in her first Issues Paper No 1, released in July 2008 (p17). If this view was in error, it would surely have been corrected by the time of her Final Report.

[21] Visa Subclass 457 Integrity Review, *Final Report*, November 2008, p38-40.
[22] Ibid, p39.