Senate Education and Employment References Committee

SDA & The McKell Institute Submission on 'The Impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders with particular reference to 7 Eleven workers'.

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Background

The Shop, Distributive and Allied Employee's Association (SDA) is one of Australia's largest trade unions with approximately 216,000 members. The majority of these members are young people and women. Registered in 1908, the SDA has coverage of areas including retail, fast food, warehouse, drug and cosmetic manufacturing and distribution, hairdressing, pharmacies and modeling.

The SDA has sought in this submission to focus on parts 1(c) and (d) of the terms of reference with particular emphasis on the recently exposed plight of 7 Eleven workers.

The fundamental purpose of this submission is to demonstrate, through the 7 Eleven case, the need for legislative amendments to address the problem of 'coerced breaches'. The notion of 'coerced breach' can be explained as a situation whereby the employer coerces the visa worker to breach the conditions of their visa and by doing so then use that breach as leverage to create a compliant and exploited workforce.

The McKell Institute was commissioned by the SDA to produce this report, which was authored by Dr. Joanna Howe, Senior Lecturer of Law at the University of Adelaide and a consultant with Harmers Workplace Lawyers.

Note

The opinions in this paper are those of the author and do not necessarily represent the views of the McKell Institute's members, affiliates, individual board members or research committee members. Any remaining errors or omissions are the responsibility of the author.

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About the Author

Dr Joanna Howe is a Senior Lecturer of Law at the University of Adelaide and a consultant with Harmers Workplace Lawyers. She holds a Doctorate of Philosophy in Law from the University of Oxford where she studied as a Rhodes Scholar. Dr Howe has also worked as a consultant for the International Labour Organisation, the McKell Institute and for the Equal Opportunity for Women in the Workplace Agency. Dr Howe is the holder of a prestigious grant from the Oñati International Institute for the Sociology of Law in Spain to convene a workshop on temporary labour migration bringing together international experts in 2015. Dr Howe is also a chief-investigator on an Australian Research Council Discovery Grant, 'Work Experience: Labour Law at the Boundary of Work and Education'. Dr Howe is regularly invited to advise government departments and reviews on Australia's temporary migration program. She is also the co-editor of the Work and Employment Column in the Australian Journal of Administrative Law and writes regularly for major media outlets. She is the author of two books - 'The Australian Standard of Employment Rights' (2009, Hardie Grant) and 'Rethinking Job Security' (2015-forthcoming, Ashgate Publishing) and numerous journal articles and book chapters. She is the recipient of the University of Adelaide's Women's Research Excellence Award 2015.

Executive Summary

This submission seeks to understand the reluctance of temporary migrant workers to bring to light instances of exploitation in the workplace.[1] Only one in ten complaints to the Fair Work Ombudsman (FWO) in 2013/2014 were from migrant workers voicing concern over their treatment in the Australian labour market. Yet, as this submission will show, both anecdotal evidence and independent assessments establish that far more temporary migrant workers than this experience exploitation at work.

This submission reveals how the regulatory design of Australia's visa arrangements for international students, working holiday makers and temporary skilled workers provide a strong disincentive for migrant workers to report exploitative treatment to the authorities. This is because each of these visas contains particular conditions pertaining to work, which, if breached, may lead to a visa holder being fined, detained or deported under Australian immigration law. This provides scope for unscrupulous employers to coerce temporary migrant workers to breach their visa's work condition and to then threaten to report them to the Department of Immigration if they fail to comply with employer requests or if they voice concerns about exploitative treatment.

This submission makes a number of recommendations aimed at encouraging temporary migrant workers to report to the FWO situations of exploitation at work and to substantially increase the enforcement capacity of the FWO to respond to and rectify complaints.

[1] The author is grateful to Professor Andrew Stewart for his feedback on an earlier draft of this submission. All errors are the author's own. Please note, this submission builds upon the recommendation made to the Productivity Commission in another joint submission the author was involved in. For a copy of that submission, see: A Stewart, S McCrystal and J Howe, 'Response to the Draft Report: Submission to the Productivity Commission Inquiry into the Workplace Relations Framework' (2015) <http://www.pc.gov.au/__data/assets/pdf_file/0020/193142/subdr0271-workplace-relations.pdf>.

List of Recommendations

1. A migrant worker who is in breach of their visa's work condition or is being remunerated or employed in violation of Australian law should not face the possibility of deportation and/or cancellation of their visa, where the breach is attributable to exploitation or coercion by the employer or a third party.
    a. Working below the correct wage or employment conditions is taken to evidence exploitation.
    b. A migrant worker can only have their visa cancelled for breach of its work condition and/or Australia law if the Department of Immigration can establish that the migrant worker freely sought to enter into an employment relationship in breach of the visa's work condition and/or Australian law.

2. The Fair Work Ombudsman's resources need to be increased substantially in order to enable the proper and systematic identification of the exploitation of migrant workers in the Australian labour market.

3. The identities of migrant workers who report instances of exploitation to the Fair Work Ombudsman or to any other body should not be provided to the Department of Immigration and Border Protection.

Introduction

The starting premise for this submission is that although some temporary migrant workers voice concerns about exploitative treatment in the workplace, the vast majority do not. Despite being amongst the most precarious group of workers in the Australian labour market, only one in ten requests for assistance to the Fair Work Ombudsman[2] come from temporary migrants.[3] Yet when the FWO investigates and acts on behalf of temporary migrant workers, its results are significant. In the 2013-2014 financial year the FWO recovered $1.1 million in unpaid wages and entitlements for 659 temporary migrant workers.[4] This figure was exceeded in the first nine months of the subsequent financial year with the FWO recovering $1.281 million for 345 temporary migrant workers.[5] Between 2009 and mid 2015 one fifth of the FWO's litigation activities regarded exploitative treatment of temporary migrant workers, in some cases leading to the award of significant penalties against employers.[6] Although the FWO is constrained in its effectiveness because of its limited resources, the sheer magnitude of the enforcement task confronting it and its particular suite of powers under the *Fair Work Act 2009* (Cth), a primary way its investigative and regulatory activities can be strengthened is if workers themselves come forward about exploitative treatment in the workplace. This begs the question: if the FWO is responsible for pursuing employers for exploiting temporary migrant workers, why do so few of these visa holders contact the FWO to voice concerns over their treatment at work?

This question is particularly pertinent given recent significant media investigations into the gross exploitation of temporary migrant workers that occurred in 2015. The appalling treatment of temporary migrant workers has been exposed, but in the main, this treatment went under the radar because of migrant workers' failure to come forward. In *'7-Eleven: The Price of Convenience'* and other cases, the allegations included that migrant workers were

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2 Hereafter referred to as 'the FWO'.

3 Fair Work Ombudsman, *Annual Report,* 2013-2014, p 30.

4 Ibid.

5 Ibid.

6 See *Fair Work Ombudsman v ACN 146 435 118 Pty Ltd (no 2)* [2013] FCCA 803 imposing a penalty of $343,860 against the company and its manager for deliberately underpaying six cleaners, including five migrant workers.

frequently paid wages below the legal minimum, worked long hours with no overtime payments, were subjected to sexual and other forms of harassment and were often housed in crammed accommodation.[7] A persistent theme in their exposés the willingness of employers to threaten visa holders with deportation by reporting their breach of visa conditions to the Department of Immigration and Border Protection.

This submission is divided into three substantive parts. Part One establishes how the current visa arrangements enable unscrupulous employers to coerce temporary migrant workers to breach their visa and/or Australian law. This part establishes a set of parameters for providing an amnesty for temporary migrant workers in the event of a breach because of coercion or exploitation. Part Two uses three case studies of international students, 457 visa workers and working holiday makers to illustrate how each of these visa classes provides an opportunity for unscrupulous employers to induce visa holders to breach the conditions of their visa pertaining to work and/or Australian law. Part Three concludes the submission and develops a set of recommendations for how the role of the Fair Work Ombudsman can be enhanced to more effectively identify and address the exploitation of temporary migrants in Australian workplaces.

[7] 'Slaving Away: The Dirty Secrets behind Australia's Fresh Food', *Four Corners*, Australian Broadcasting Commission, 4 May 2015; '7-Eleven: The Price of Convenience', *Four Corners*, Australian Broadcasting Commission and Fairfax Media, 31 August 2015.

Part I: Understanding how employers can coerce temporary migrant workers into breaching their visa

The reason employers can successfully threaten temporary migrant workers in this manner is because under Australian law, a minor, inadvertent or coerced breach of visa conditions pertaining to work, can render a temporary migrant worker liable for cancellation of their visa. Although the former two types of breach are fairly straightforward, the notion of a breach arising from exploitation or coercion is not. In this submission, we advance the latter notion to mean situations where an unscrupulous employer has induced a migrant worker to not comply with a visa's work condition. This could occur by an employer encouraging and/or requiring an international student to work additional shifts knowing this will put the worker in breach of a visa requirement of a fortnightly work limit of 40 hours during term time. Another example is if an employer sponsoring a 457 visa holder directs the worker to perform a job that is different to the occupation identified in the sponsorship agreement and/or for a wage lower than the Temporary Migration Income Threshold.[9] In the case of a working holiday maker, this could occur by an employer paying the worker in cash at a rate below the national minimum wage in order to retain the job. In each of these situations the temporary migrant worker has 'technically' acquiesced to the exploitative work arrangement but in reality, the employer has exercised their position of power and dominance in the relationship to coerce the worker into breaching either the visa's condition pertaining to work and/or Australian law. As a result, the regulation permitting deportation for breach of a visa's work condition and/or Australian law has the potential to lead to the consequence of making temporary migrant workers more susceptible to exploitation by unscrupulous employers who wish to tie them to an exploitative employment relationship. In this submission, we suggest that where a migrant worker breaches their visa or Australian law because of coercion or exploitation, this should provide a legally acceptable justification to what would otherwise be an unlawful act under Australian immigration law. As we will go onto explain, the law should be changed so that temporary migrant workers do not face punitive consequences for breaching their visa

[9] 457 visa holders' salaries must be above the Temporary Skilled Migration Income Threshold (TSMIT). The TSMIT is currently set at $53,900.

condition and/or Australian law in these type of situations.

A necessary starting point is to establish what is meant by 'exploitation'. Recognising the wealth of views on this question, this submission simply regards 'exploitation' as situations where workers are being deliberately engaged by employers below the legally correct wage and below the employment conditions for their occupation. Although a temporary migrant worker may have acquiesced to this arrangement to some degree, it is argued that such a situation is inherently exploitative given the significant power differentials between temporary migrant workers and their employers and the wealth of scholarly literature which establishes the precariousness of temporary migrant work.[10] Of course not all temporary migrant workers are exploited - indeed many are not. Nonetheless, there is enough evidence to show that exploitation tends to be endemic amongst temporary migrant worker programs worldwide.[11]

The central recommendation of this submission is that a migrant worker who is in breach of their visa's work condition or is being remunerated or employed in violation of Australian law should not face the possibility of deportation and/or cancellation of their visa, where the breach is attributable to exploitation or coercion by the employer or a third party. Working below the correct wage or employment conditions is taken to evidence exploitation. A migrant worker can only have their visa cancelled for breach of its work condition and/or Australia law if the Department of Immigration can establish that the migrant worker free sought to enter into an employment relationship in breach of the visa's work condition and/or Australian law.

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[10] For example, J Fudge, 'Precarious Migrant Status and Precarious Employment: The paradox of international rights for migrant workers' (201?) 34 *Comparative Labour Law and Policy Journal* 101; Judy Fudge and Kendra Strauss (eds) *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work* (Routledge 2014); M. J. Piore, *Birds of Passage: Migrant Labor and Industrial Societies* (Cambridge University Press:1979); Leah Vosko, *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Work* (OUP 2010); B Deegan, Visa Subclass 457 Integrity Review Issues Paper #3 Integrity/Exploitation, Department of Immigration and Citizenship, Canberra, September 2008. For anecdotal evidence of this phenomenon in the Australian context, see the stories of 457 visa holders reported on the ABC's Radio National programme: Claudia Taranto, 'Workers Without Borders: The Rise of Temporary Migrant Labour', 18 May 2015, http://www.abc.net.au/radionational/programs/earshot/the-rise-of-temporary-migrant-labour/6472368.

[11] ILO Fair Migration Report 2014; Global Commission on Migration report, 2005.

This submission does not take the view that all temporary migrant workers be given a blanket amnesty from breach of visa conditions pertaining to work. Our caution here is that it is quite foreseeable there will be circumstances where the temporary migrant worker is to blame for the payment of wages and conditions below the legal minimum. Just as not all employers are unscrupulous (in fact the vast majority probably are not), not all temporary migrant workers are blameless (although the vast majority probably are). Thus, we think it is a workable solution for temporary migrant workers to be provided a general amnesty unless the Department of Immigration can provide evidence to the contrary of a worker's culpability. Obviously, this applies in situations where there is systemic evidence of exploitation of temporary migrant workers, such as in the example of workers employed in Baida Poultry processing plants,[12] or in the case of 7-Eleven, but it also applies in individual cases where temporary migrant workers receive wages and conditions in violation of Australian law and did not actively seek to set up this arrangement. In each of these situations, the employer, whose resources and knowledge of Australian law are likely to far outstrip that of the temporary migrant worker, should have known better.

[12] Natalie James, 'The Fair Work Ombudsman's Inquiry into the labour procurement arrangements of Baida Group in New South Wales', 18 June 2015 < http://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/june-2015/20150618-baiada-group-statement-of-findings>.

Part II: The three main migrant worker visa schemes and the potential for coerced breach of visa conditions and/or Australian law under each:

This submission considers the three primary visa subclasses which provide for the performance of work in the domestic economy by temporary migrant workers. Although of the three, only the 457 visa is officially intended as a labour migration program, a large amount of low skilled and unskilled work is performed by visa holders who are international students or working holiday makers.[13] Each of these three visa subclasses has a specific regulatory framework which incorporate a number of particular work conditions. Breach of these conditions can lead to various punitive consequences for the migrant worker, the most serious being deportation. This submission shows how each of these regulatory frameworks can discourage temporary migrant workers from voicing concerns about exploitation in the workplace.

This submission establishes that there is an interaction between specific work conditions in particular visas which coalesce with specific punitive consequences that ensue from breach of visa conditions, which strongly discourage migrant workers from complaining about exploitative treatment, thereby providing scope for even more egregious exploitation by unscrupulous employers.

A. International students

The joint ABC-Fairfax media investigation into 7-Eleven's franchise operations exposed a regulatory problem inherent in Australia's visa arrangements for international students. In essence, this problem arises from the punitive consequences that ensue from breach of the fortnightly work hours requirement under the international student visa, which exacerbates the vulnerability of international students in the Australian labour market. The purpose of

[13] For example in 2013–14, visas were issued for 293,223 international students, 239,592 working holiday makers and 98,571 subclass 457 visa holders: Department of Immigration and Border Protection (2014), Annual Report, 2013–14, Commonwealth, Canberra, p 2.

the fortnightly work hours requirement is to encourage international students to focus on their education. However, its operation makes international students more susceptible to exploitation by unscrupulous employers. By minor, inadvertent or coerced breaches of the fortnightly work hours requirement, an international student can be liable for the cancellation of their visa. Increasingly, there is evidence of international students being coerced into breaching the fortnightly work hours requirement by unscrupulous employers which is then leveraged by these employers to create a compliant workforce that does not complain about exploitative pay and treatment. This submission calls for the urgent rectification of this situation.

The precarious position of international students as workers

As we will explain, the scholarly literature identifies the particularly vulnerable situation of international students in the workforce. A high proportion of international students work in the Australian labour market.[14] By virtue of their youth, lack of experience working in a foreign country, limited social and community connections, insecure residence status and limited knowledge of Australian labour laws and their workplace rights, international students are even more vulnerable than most temporary migrant workers. This is coupled with their financial need to cover living expenses whilst studying in Australia. A 2012 estimate found there was a $5500 shortfall between the money a student with no dependents is required to have in order to obtain an international student's visa and the minimum needed to live in Australia whilst studying.[15] Additionally, many international students are, in effect, undocumented workers as they work for employers who give them cash-in-hand payments. This effectively makes them 'illegal workers' whose presence in the labour market 'tends to result in sub-standard employment practices, breaches of health and safety laws and is associated with and encourages abuses of the welfare and taxation

[14] Australian Education International, *2006 International Student Survey: Report of the Consolidated Results from the Four Education Sectors in Australia* (Canberra, Commonwealth of Australia, 2007); Simon Marginson, Christopher Nyland, Erlenawati Sawir and Helen Forbes-Mewett, *International Student Security* (Cambridge, Cambridge University Press, 2010) 134.

[15] Alexander Reilly, 'Protecting Vulnerable Migrant Workers: The Case of International Students' (2012) 25 *Australian Journal of Labour Law* 181.

systems'.[16]

Recent empirical research has uncovered the vulnerable position of international students in the labour market and the tendency for international students to be employed in non-compliance with Australian labour law. A recent study by University of Sydney academic, Dr Stephen Clibborn, found that almost two thirds of international students were being paid below the national minimum hourly wage, with some being paid as little as $8 per hour.[17] This study also found that more than a third of those interviewed felt threatened or unsafe at work. Similarly, another study of international students working in the hospitality sector found 'extensive non-compliance with labour protection' and found almost half were employed in informal jobs with cash-in-hand payments and all but one of the interviewees had not been paid the correct wage.[18] These two recent studies echo the results of a comprehensive 2005 study based on 200 interviews of international students which found that 58% were being paid below the legal minimum and earning between $7 and $15 an hour.[19] It seems then that the majoritarian experience of international students in the Australian labour market is one of exploitation, albeit to varying degrees, with underpayment or non-payment of wages a systemic issue.

The current regulatory framework

One of the primary reasons for the persistent exploitation of international students in the Australian labour market is the fortnightly work hours requirement under the international student visa.

Under the Migration Regulations 1994 (Cth) an international student must not engage in

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[16] S Howells, 'Report on the Review of the Migration Amendment (Employer Sanctions) Act 2007', DIAC, 2010, p 25.

[17] S Clibborn, '7-Eleven: amnesty must apply to all exploited workers', *The Sydney Morning Herald,* 9 September 2015.

[18] Tham, Campbell and Boese, 'Why is Labour Protection for Temporary Migrant Workers so Fraught? An Australian Perspective' in *Temporary Labour Migration in the Global Era* edited by Howe and Owens.

[19] Simon Marginson, Christopher Nyland, Erlenawati Sawir and Helen Forbes-Mewett, *International Student Security* (Cambridge, Cambridge University Press, 2010) 136.

work in Australia for more than 40 hours a fortnight during semester.[20] The rationale for this limitation of international students' work rights is to ensure students focus primarily on their studies, however, if students breach this visa condition their work is deemed illegal and their visa can be cancelled.[21]

For all visa holders, the Minister may cancel a visa if its holder has not complied with a visa condition.[22] Further, for international students this cancellation can be done automatically through serving the international student with a notice.[23] An international student then has to apply for revocation of the cancellation,[24] and prove that the breach of the visa condition mandating a limit of 40 hours work per fortnight was due to 'exceptional circumstances' that were beyond their control.[25]

Proof of 'exceptional circumstances' would be extremely hard for an individual international student to provide to the Department of Immigration. Their youth, limited experience in these matters and lack of resources or access to support services means it would be difficult for an international student to gather the proof required in ordered to establish the presence of exceptional circumstances.

Given these visa rules, it is unsurprising then, that international students are reluctant to voice concerns over their exploitation in the labour market. Their fear of visa cancellation would override all else given the substantial sacrifices and investment made by international students and also by their families who are funding students' overseas education. Tellingly, the FWO's most recent annual report does not provide any reference to international students reporting to them concerns over exploitative work conditions.[26] The section of the

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[20] Migration Regulations 1994 (Cth), Schedule 8, Visa condition 8105.

[21] For example, see the Department of Immigration and Border Protection's clear advice to visa holders, 'breaching a visa condition can result in the cancellation of your visa.' <http://www.border.gov.au/Trav/Stud/More/Visa-conditions>.

[22] Migration Act 1958, section 116.

[23] Migration Act 1958, section 137J; Education Services for Overseas Students Act 2000 (Cth), section 20.

[24] Migration Act 1958, section 137K.

[25] Migration Act 1958, section 137L.

[26] Fair Work Ombudsman, Annual Report, p 30.

report dedicated to overseas workers focuses solely on 457 visa holders and working holiday makers.[27]

That international students' visas can be cancelled when a visa condition is breached allows unscrupulous employers to exploit this. Although the joint ABC-Fairfax media investigation into 7-Eleven uncovered one such example where this occurred, undoubtedly it exists elsewhere given that international students are most likely to be employed in sectors with a high rate of non-compliance with Australian labour laws such as hospitality and in low or unskilled work. The 7-Eleven investigation provided the following examples of how employers have exploited the visa rules to coerce international student workers into working longer hours for remuneration below the legal minimum and without complaint:

- Pranay Alawala resigned from his job after getting a back injury at work. He later confronted his employer for unpaid wages but his employer's solicitor sent him a letter threatening to report him to the Department of Immigration for working more than 20 hours a week.

- Sam Pendem was required to work 18 hour shifts in breach of his visa conditions and Australian labour law. He was threatened by his employer to go to the Department of Immigration to have his visa cancelled if he complained about his salary or visa conditions.

- Mohammed Rashid Ullat Thodi wanted to resign from his position at 7-Eleven but was threatened with deportation by his employer.

- Tejinder Jit Singh was employed in two 7-Eleven stores and was underpaid at both. Of his experience, Adele Ferguson, the journalist responsible for this story wrote, 'Jeet knows a lot of person working at 7-Elevens in Melbourne. He says none of them are getting paid the proper wages. Many are scared to speak up for fear they have breached their visa conditions and will be deported.'[28]

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[27] Ibid.

[28] A full account of these examples can be found here, A Ferguson and S Danckert, 'Revealed: How 7 Eleven is ripping off its workers', The Age, 29 August 2015 <http://www.theage.com.au/interactive/2015/7-eleven-revealed>.

The SDA telephone and website helplines have received numerous more examples of 7 Eleven franchises grossly underpaying staff after they had been coerced into breaching their student visas. Whilst Barat Kumar Khanna was prepared to go public on the 7:30 report, the vast majority have asked the SDA to keep their identify confidential.

A similar finding was made by the Knight Review report which stated:

> There is anecdotal evidence, particularly from trade unions, that the most unscrupulous employers exploit international students once they agree to an initial breach of their work rights. Such employers then demand all sorts of things from their international student employees — work at reduced wages, breaches of occupational health and safety conditions, even sexual favours. In effect, the international students are blackmailed by the threat of the employer reporting the student for their initial breach. Under the current rules a reported breach of work rights can lead to a mandatory cancellation of the student visa.[29]

Similarly, a submission by United Voice concerning the employment of international students in the cleaning industry found that it is common practice for contractors to 'push a student to work over their [maximum]…or risk losing their job or hours. Once they have done so, the contractor can use the threat of reporting students to …[the Department of Immigration] if they do not accept the conditions of employment the contractor sets'.[30]

B. Subclass 457 Visa Holders

Unlike international students, 457 visa holders are required to be sponsored by an employer. Employers initiate the migration process through making a request to the

[29] Michael Knight, *Strategic Review of the Student Visa Program 2011* (Canberra, Commonwealth of Australia, 2011) 85.

[30] J Mills and L Zhang, United Voice, Submission to DIAC, Strategic Review of the Student Visa Program, 2011, p 8.

Department of Immigration to sponsor a temporary migrant worker.[31] Only temporary migrant workers with a job offer from an Australian employer are eligible for a 457 visa. A few regulatory constraints moderate employer demand. For a start, a temporary migrant worker's occupation must be skilled and present on an occupational shortage list. A migrant worker's salary must exceed the threshold set by the government as well as being equivalent to the rate a local worker would receive for performing the same job.[32] In addition, for some occupations, an employer must test the labour market, although this requirement is not onerous, with one job advertisement, even if it is placed on social media, satisfying departmental requirements.[33] This combination of a limited form of government regulation and employer demand is consistent with its purpose. The 457 visa's objective is 'to enable employers to address labour shortages by bringing in genuinely skilled workers where they cannot find an appropriately skilled Australian'.[34]

Characteristics of 457 visas that present challenges for uncovering exploitation:

On one level, 457 visa holders are less vulnerable than international students because they tend to be performing higher skilled work because of the requirement that the occupation be skilled.[35] However, a source of vulnerability for 457 visa holders stems from their dependence on their employer in order to remain in Australia. Under the demand-driven 457 visa program, an employer holds the dual responsibility of being an employer of a migrant worker as well as their sponsor. Oxford scholar, Dr Cathryn Costello characterises

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[31] The federal government department responsible for the 457 visa is the Department of Immigration and Border Protection (DIBP). Prior to this change in 2014 it was called the Department of Immigration and Citizenship (DIAC). At the time of the 457 visa's introduction, it was called the Department of Immigration and Multicultural Affairs (DIMA). Hereafter, DIBP will be referred to as the 'Department of Immigration'.

[32] Migration Regulations 1994 (Cth), regulation 2.72.

[33] Department of Immigration and Border Protection, *Labour Market Testing in the Subclass 457 Visa Programme: Frequently Asked Questions* (Canberra, Department of Immigration and Border Protection, 2013).

[34] Department of Immigration and Border Protection, *Booklet 9 — Temporary Work (Skilled) (Subclass 457) Visa* (Canberra: Department of Immigration and Border Protection, 2014). This objective is set in policy, not legislation. The legislative and regulatory framework for the 457 visa does not include an objects clause, despite calls by some scholars that it include this. See: Joo-Cheong Tham, 'Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Migration Amendment (Temporary Sponsored Visas) Bill 2013', 21 June 2013.

[35] The occupation must be listed on the Consolidated Sponsored Occupations List. A copy of the current list can be found here: <https://www.border.gov.au/Trav/Work/Work/Skills-assessment-and-assessing-authorities/skilled-occupations-lists/CSOL>.

this as an additional layer of dependence, created by the tie of migration status to employment, which intensifies the inherently unequal nature of employment relationships.[36] Although a 457 visa holder has ninety days to secure a new sponsorship arrangement before being required to return to their country of origin,[37] if an alternative sponsorship arrangement is not secured in that time frame, withdrawal of support from the employer–sponsor may result in cancellation of the visa, rendering a migrant worker's position even more fragile and volatile. This threat, actual or perceived, may induce a temporary migrant worker to accept working conditions of any standard.

Another structural feature of the demand-driven nature of the 457 visa program which tends to entrench the precarity of visa holders is that, in most cases, employer sponsorship is a precondition for obtaining permanent residency.[38] The Deegan Report identified that the promise of permanent residency can be an incentive for migrant workers to accept poorer wages and conditions.[39] Its response was to propose that in determining eligibility for permanent residency more weight should be given to the length of time a visa holder has worked for any Australian employer rather than the willingness of one employer-sponsor.[40]

In a similar manner to the situation described above for international students, unscrupulous employers of 457 visa workers can coerce these workers into exploitative arrangements and threaten to deport them if they complain. This is made possible under the Migration Act 1994 (Cth) which makes it an offence to perform work that is not permitted under the terms of the visa.[41] For example, a breach occurs if a visa holder

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[36] Cathryn Costello, 'Migrants and Forced Labour: A Labour Law Response' in Alan Bogg et al (eds), *The Autonomy of Labour Law* (London, Bloomsbury, 2015) 210.

[37] Visa Condition 8107.

[38] Although these visa holders can apply for permanent residency under the points-based system, the primary route is the Employer Nomination Scheme and the Regional Sponsored Migration Scheme, both of which are contingent upon employer sponsorship.

[39] Visa Subclass 457 Integrity Review, *Final Report* (Canberra, Commonwealth of Australia, 2008) 32 ('*Deegan Report*') 51. For more on the ERG Review and the Deegan Review, see: Joanna Howe, 'The Migration Amendment (Worker Protection) Act 2008: Long Overdue Reform, But Have Migrant Workers Been Sold Short?' (2010) 24 *Australian Journal of Labour Law* 13.

[40] *Deegan Report* 51.

[41] Migration Act 1994(Cth), section 235.

acquiesces to an employer request that the employee work in a job that is not the occupation listed on their visa or to an employer request that the employee receive cash-in-hand payments for certain work.[42] Once a 457 visa worker accepts an employer's request in these regards, then they become culpable for performing work that is not permitted under the visa and punitive consequences can ensue. If these breaches are detected, under Australian immigration law a person may be fined, detained or deported. It is often asserted that temporary migrant workers should not accept work, wages or conditions that do not match their sponsorship agreement but this obscures the reality of their situation: they need work to support themselves as they are not eligible for social security and they are often in debt, having paid large amounts of money to procure a visa to enter Australia in the first place. They also may be unfamiliar with their legal rights under the sponsorship agreement or Australian labour law. Given this, it seems rather disingenuous and counterproductive to penalise them for acquiescing to exploitative work arrangements.

For 457 visa holders, a primary cause for their reluctance to voice complaints about exploitative treatment from their employer is the close relationship between the Fair Work Ombudsman and the Department of Immigration and the fact that information sharing occurs between the two agencies with regards to 457 visa workers. Since 2012, the role of the FWO has been extended to monitor employer obligations in relation to 457 visa holders under the Migration Amendment (Temporary Sponsored Visas) Act 2013 (Cth), which conferred on the FWO the powers exercised by inspectors under the Migration Act 1958 (Cth).[43] Any breaches discovered by the FWO must be reported to the DIBP.[44] The vesting of these powers in the FWO immediately raises some concerns in terms of the enforcement of labour standards. This leads to a strong perception by 457 visa holders that if they complain to FWO about their working conditions, then this information can be passed on DIBP which potentially could lead to their deportation.[45] This punitive action against temporary migrant

[42] For example, an SBS investigation uncovered the situation of 'Walter' who was on a 457 visa to work in Australia as a restaurant manager but was instead employed as a waiter: <http://www.sbs.com.au/news/article/2012/11/05/are-457-visa-holders-being-exploited>.

[43] Howe, J, Hardy, T and Cooney, S (2013), 'Mandate, Discretion and Professionalism at an Employment Standards Enforcement Agency: An Antipodean Experience' 35 Law and Society 1.

[44] For a description of the process of information sharing between the FWO and the DIBP, see: < http://www.fairwork.gov.au/find-help-for/visa-holders-and-migrants#working-holiday-visa>.

[45] P Dutton and M Cash (2015), 'Illegal Workers Targeted Nationally', media release, 28 May 2015.

workers found in exploitative work arrangements strongly deters them from informing authorities about their situation and inhibits their ability to trust that information they provide to the FWO will not be passed on to the DIBP. Additionally, a fundamental tenet of international norms on labour inspection is that labour inspection and effective enforcement should be clearly distinct from each other and must not be compromised by the fact that there is anything irregular about the status of migrant work: 'the primary duty of labour inspectors is to protect workers and not to enforce immigration law'.[46] Furthermore, conferring migration inspectorate roles on labour inspectors, like what has effectively happened to FWO inspectors, may result in reduced resources available to the central objective of enforcing labour standards.[47]

Furthermore, even though the only information that the FWO shares with the Department of Immigration relates to breaches of 457 visas, an impression is created amongst temporary migrant workers, however inaccurate it may, that FWO passes information onto DIBP concerning *all* breaches of work entitlements under visas. This naturally, has a flow on for other visa holders with work rights such as international students and working holiday makers, who will be less likely to complain because of the perception that the FWO's role is compromised. To remedy this, Dr Stephen Clibborn proposes that FWO and the department should 'formally and publicly establish independence from each other' and 'cease information sharing'.[48]

Drawing on Dr Clibborn's approach, and consistent with international principles on labour inspection, this submission recommends that institutional separation be clearly established between the FWO and DIBP. We recommend that the FWO be unable to pass on the identities of temporary migrant workers involved in its investigations to the DIBP. This recommendation is consistent with the Australian Government's better practice guide to

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[46] ILO (International Labour Organisation) (2006), Labour Inspection, Report of the Committee of Experts on the Application of Conventions and Recommendations, General Survey of the Reports Concerning the Labour Inspection Convention 1947 (No 81) (etc), International Labour Conference, 95th session, 2006. For more on this point, see Rosemary Owens, 'Temporary Labour Migration: Is Effective Enforcement Possible?' in *Temporary Labour Migration in the Global Era* edited by Howe and Owens.

[47] Ibid.

[48] S Clibborn, S (2015), 'Why Undocumented Immigrant Workers Should Have Workplace Rights' 26 Economic and Labour Relations Review 465.

complaints handling which identifies the importance of complainants' identities not being unnecessarily disclosed to others and recommends the use of a unique identification number for each complainant.[49] The guide also identifies the importance of special measures to protect the identity of whistleblowers to ensure their complaints are handled in confidence. The guide states, 'one of the underlying principles is that a whistleblower should not be subject to reprisals because they have made an allegation'.[50] Australian immigration law does not accord this special protection to temporary migrant workers who are whistleblowers: a 457 visa holder who reports to the FWO that they have received wages in breach of their sponsorship does this knowing that this information and their identity can be passed onto the DIBP. Under Australian law this could result in the cancellation of their visa and their right to remain in Australia. This submission calls for the urgent rectification of this situation.

C. Working Holiday Makers

Working holiday makers share many of the characteristics of international students which render them vulnerable to exploitation in the labour market. Typically working holiday makers are young,[51] have little experience of the labour market either in their country of origin or Australia and have limited community connections and access to support networks in Australia. Additionally their level of English may be fairly rudimentary and the work they preform tends to be low skilled or unskilled. These characteristics combine to render working holiday makers vulnerable to exploitation, a point which has been observed many times before by various government inquiries, media stories and scholarly articles, a brief overview of which is provided below. Most recently, the vulnerability of working holiday makers in the Australian labour market was poignantly exposed in the ABC's Four Corner's

[49] Commonwealth Ombudsman, 'Better Practice Guide to Complains Handling' (Commonwealth of Australia, 2009) <http://www.ombudsman.gov.au/docs/better-practice-guides/onlineBetterPracticeGuide.pdf>

[50] Ibid p 11.

[51] A requirement of both the Work and Holiday Visa (visa subclass 462) and the Working Holiday Visa (visasubclass 417) is that the visa holder be aged between 18 and 30. The visa which an individual should apply for is contingent upon their country of citizenship. For a recent analysis of the working holiday maker program, see Alexander Reilly, 'Low cost labour or cultural exchange? Reforming the Working Holiday Visa Programme,' (2016) *The Economic and Labour Relations Review* 1-16.

investigation into the plight of working holiday makers in the horticulture sector.[52] The program uncovered many instances of underpayment or non-payment of wages, reports of sexual harassment, crammed and substandard accommodation and the presence of migration intermediaries and contractors flagrantly abusing Australian law.

The vulnerability of working holiday makers in the Australian labour market has also been recognised by the courts as creating 'a particular class of employee who are potentially vulnerable to improper practices by their employer'.[53] Unlike under the 457 visa where it is a requirement that temporary migrant workers meet certain English language ability thresholds, under the working holiday program, only a basic level of English is required. The poor language ability of many working holiday makers has increased their vulnerability in the Australian labour market. Research shows there is a necessary role for language assistance as the basis for successful migrant settlement and/or labour market integration.[54]

Working holiday makers have often experienced severe exploitation in the Australian labour market. How else to describe a job to dive through murky ponds and lakes for golf balls and receiving less than $5 per hour,[55] or the kinds of exploitative treatment of workers at Baida Poultry processing plants,[56] or those in fruit-picking jobs exposed by the ABC Four Corners program?[57] This anecdotal sample is supported by both academic and government examinations of the proliferation of exploitative work carried out by many working holiday makers.[58] The potential for exploitation of working holiday makers is compounded by their

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52 'Slaving Away: The Dirty Secrets behind Australia's Fresh Food' *4-Corners*, Australian Broadcasting Commission, Monday 4th May 2015.

53 Fair Work Ombudsman v Go Yo Trading Pty Limited & Anor [2012] FMCA 865, [15].

54 James Japp, *From White Australia to Woomera* (Cambridge University Press, 2002).

55 Elise Worthington, 'Dutch golf-ball diving backpacker sues Queensland company for unpaid wages', *ABC Radio,* 20 July 2015; Marissa Calligeros, 'Dutch backpacker paid $5 an hour to retrieve golf balls from lakes', *The Sydney Morning Herald,* 22 July 2015.

56 Natalie James, 'The Fair Work Ombudsman's Inquiry into the labour procurement arrangements of Baida Group in New South Wales', 18 June 2015 < http://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/june-2015/20150618-baiada-group-statement-of-findings>.

57 Four Corners, ABC, 'Slaving away: The Dirty Secrets Behind Australia's Fast Food', 4 May 2015.

58 Joint Standing Committee on Migration (JSCM) (1997) Working Holiday Makers: more than tourists, August. Canberra: Australian Parliament House, 45; Tan Y, Richardson S, Lester L, et al. (2009) *National evaluation of Australia's Working Holiday Maker program*. National Institute of Labour Studies, Flinders University, Adelaide, SA, Australia, 27 February; Tan Y and Lester L (2012) Labour market and economic impacts of international working holiday temporary migrants to Australia. *Population, Space and Place* 18(3): 359–383.

use of a visa for a non-work purpose.[59] The presence of such a large and vulnerable migrant workforce, that is unregulated outside domestic labour law risks creating an underclass of workers who are invisible to the law. There is no way of knowing just how many, or where, working holiday makers engage in employment. The fact of their employment may only become visible when circumstances of exploitation occasionally come to light. In its 1997 report, the Joint Standing Committee on Migration noted evidence that 'employers often pay less than award wages to Working Holiday Makers, putting pressure on locals to accept the same conditions to secure the relevant job'.[60]

A number of work conditions present in the regulatory framework for working holiday visas provide scope for unscrupulous employers to coerce workers into breaching the conditions under their visa. Firstly, although all working holiday makers may work for the full duration of their 12 month stay in Australia, they may not remain with any one employer for longer than six months.[61] Although it is likely most working holiday makers would be aware of this requirement and should be capable for responsibly complying with it, where a working holiday maker inadvertently breached this and worked for longer than six months, an unscrupulous employer would have leverage over that employee and could threaten to report them to the Department of Immigration. Secondly, the requirement introduced in 2005 for 88 days of work in a regional location performing 'specified work' can also be open to abuse. It may lead to workers feeling tied to their employers in order to satisfy the requirement and may lead to a reluctance to voice concerns over substandard or exploitative wages and conditions in order to obtain the twelve month extension on their visa. Thirdly, a new requirement, applicable from 31 August 2015, for working holiday makers to provide pay slips evidencing their performance of 88 days work to support an application for a visa extension could potentially further the vulnerability of these workers.[62] As the onus is on the working holiday maker to provide the payslips to the Department of Immigration, this requirement could lead to situations where an employer withholds

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[59] Joanna Howe and Alexander Reilly, 'Meeting Australia's Labour Needs: The Case for a Low Skill Work Visa' (2015) 43 (2) *Federal Law Review* 59.

[60] JSCM, 1997: 45.

[61] Migration Regulations 1994 (Cth), Schedule 8, Visa condition 8547.

[62] <http://www.border.gov.au/WorkinginAustralia/Pages/employer-obligations-and-payslip-evidence.aspx>.

payslips or does not regularly issue them as leverage for inducing compliance with exploitative wages and conditions by working holiday makers.

Part III: Future Directions for Temporary Labour Migration in Australia

Although each of the three visa subclasses depicted in this submission are different, in the end, we are left with a profile of the contemporary temporary migrant worker as a visa holder, who relies on work to provide the means to live in Australia, but potentially to send remittances home and also as a means of transitioning onto a different visa subclass and/or with an intention of remaining in Australia. This contemporary temporary migrant worker is vulnerable in the workplace to exploitation and is highly constrained in being able to voice concerns over exploitative treatment to the FWO or to rebuff an employer request to accept a payment or perform a duty in breach of their visa condition and/or Australian law. This situation has been described in this submission as a breach occurring as a result of coercion or exploitation, to refer to situations where migrant workers do not actively seek to violate their visa or Australian law but are pressured into doing this by an unscrupulous employer.

We recommend that there be an amnesty for temporary migrant workers who have been induced into breaching their visa's work condition and/or Australian law. Without this amnesty there is no proper opportunity for temporary migrant workers to voice concerns over exploitative treatment in the workplace without fear of punitive repercussions, the worst of which, is deportation. Indeed, under the present regulatory framework it is not only that there is no opportunity but also a strong disincentive for migrant workers to come forward.

A number of rationales exist for this amnesty. Firstly and most importantly, it will assist the FWO's investigative efforts by providing an incentive for temporary migrant workers to act as informants. This will improve the FWO's effectiveness in weeding out exploitation of visa holders in the Australian workplace, which if allowed to continue in its present and resulting in more damaging media exposés, has the potential to seriously damage public confidence

in the temporary migration system which is necessary for its continuing functioning. Public confidence in immigration policy is a fundamental precondition for permissive visa regulations – without this confidence, the Australian Government could come under pressure to reduce our intake of temporary migrant workers.[63] Secondly, this amnesty creates greater incentives for employers to employ temporary migrant workers in compliance with Australian labour standards. This will improve the position of local workers and reduce the potential for unscrupulous employers to rely upon temporary migrant workers as a means of undercutting Australian wages and conditions. Thirdly, this amnesty is important for respecting the dignity of migrant workers by ensuring they feel less isolated from support services and ultimately, in enabling they are accorded 'a fair go' in the Australian workplace equivalent to their local counterparts.

A final and necessary point is this: in order for an amnesty to be effective, it must be accompanied by a substantial increase in the FWO's resources. Whilst the FWO has an important role in pursuing prosecutions of employers involved in exploiting temporary migrant workers,[64] its resources are limited and out of necessity the FWO adopts a strategy of pursuing high profile targets in order to maximise the impact of its investigative and prosecutorial work. Whilst enforcement initiatives of the FWO make sense and have been effective in some industries, the regulatory capacity of the FWO is necessarily bounded by the huge challenge presented by Australia's geography and the significant number of temporary migrant workers. It seems unlikely that the FWO's current resourcing is sufficient, a point which has been highlighted by recent media investigations into exploitation of temporary migrant workers.[65] FWO currently has 300 inspectors divided into teams: compliance, early intervention, alternative dispute resolution and campaigns. Its inspectorate is required to serve up to 11.6 million workers,[66] over 10% of which are

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63 See, for example: Christopher F Wright, 'How Do States Implement Liberal Immigration Policies? Control Signals and Skilled Immigration Reform in Australia' (2014) 27(3) *Governance: An International Journal of Policy, Administration and Institutions* 397.

64 For example, see: FWO, 'Litigation Policy' (Commonwealth of Australia: 3 December 2013, 4th edition).

65 Two investigative television programmes were particularly powerful: 'Slaving Away: The Dirty Secrets behind Australia's Fresh Food', *Four Corners*, Australian Broadcasting Commission, 4 May 2015; '7-Eleven: The Price of Convenience', *Four Corners*, Australian Broadcasting Commission and Fairfax Media, 31 August 2015.

66 Australian Bureau of Statistics, *Australian Labour Market Statistics,Cat.No.6105* (8 July 2014)

temporary migrants with work rights in the domestic economy.[67] The logistical challenges involved in enforcing the rights of temporary migrant workers, especially given the strong disincentive to complain to the FWO about mistreatment because of high wage differentials between most migrant workers' countries of origin and Australia, creates a vulnerability that might be openly exploited by some employers.

[67] For example in 2013-2014, visas were issued for 260 303 international students, 258 248 working holiday makers and 126 350 subclass 457 visa holders: DIAC, *Annual Report 2012-2013*, 2.