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Public Law and Policy Research Unit

Submission

The impact of Australia's temporary work visa programs
on the Australian labour market and on the temporary
work visa holders

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The Public Law & Policy Research Unit at the University of Adelaide contributes an independent scholarly voice on issues of public law and policy vital to Australia's future. It provides expert analysis on government law and policy initiatives and judicial decisions and contributes to public debate through formulating its own law reform proposals.

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Key Recommendations

Recommendation One

We recommend the development of a new low skill work visa. We propose a new low skill work visa to address the fact that a large amount of unskilled work is performed by migrant workers that is not subject to the same regulation as skilled migrant work. The establishment of a new low skill work visa would necessitate changes being made to the work rights of international students and working holiday makers.

The new low skill work visa would be subject to strict labour market testing requirements.

Recommendation Two

We commend the Government's recent decision to establish a Ministerial Advisory Council on Skilled Migration (MACSM). However, we submit that it is vital that the MACSM be established according to four core principles, namely, that the MACSM has a tripartite structure, is independent from government, adopts a rigorous, evidence-based approach and is publicly accountable and transparent in its methods and recommendations. These four core principles are expanded upon in this submission.

Recommendation Three

We recommend stronger workplace protections for visa holders on the Working Holiday visa (subclass 417 visa and 462 visa). This includes better tracking of WHMs in the workforce, stronger obligations on employers to formalise and report on the employment agreements they enter with WHMs, and more resources dedicated to the compliance monitoring work of bodies such as the Fair Work Ombudsman. Under current visa conditions it is almost impossible to provide adequate protection given the large numbers of WHMs and the lack of sponsorship obligations on employers.

The alternative we recommend is to introduce a low skill work visa (as per Recommendation One) while reinstating restrictions to the work rights of WHMs, such as removing the second WH visa.

Recommendation Four

We recommend that the work rights of international students (subclass 485 and 570-576 visas) should be linked to students' course of study, or if not directly linked to it, should have a cultural and language benefit. This points to a number of forms of restriction that could be imposed on current work rights for international students. First, international students could be excluded from working in certain industries that are not obviously related to their course of studies. Detailed consideration is needed to compile this list, but it would typically include a restriction on working in industries such as mining, construction, transportation and agriculture. The criteria for exclusion would be on the basis of the physical nature of the work, the risk of personal injury associated with the work, the suitability of the work for part-time employment and its proximity to higher education institutions.

Recommendation Five

We recommend that work rights for asylum seekers and refugees with temporary rights to protection be retained, and treated as a special class of temporary labour migration. The main challenge in relation to these workers is to maintain and enforce conditions of work free from exploitation.

1. Introduction

Globalisation has led to a dramatic increase in migration for work and other purposes. The International Organization of Migration estimates that 105 million persons are working in a country other than their country of birth. Labour mobility has become a key feature of globalization and the global economy with migrant workers earning US\$440 billion in 2011, and the World Bank estimating that more than \$350 billion of that total was transferred to developing countries in the form of remittances.¹ A clear economic benefit for Australia of temporary migration is its apparent responsiveness to changes in economic conditions. In theory, when permanent migrants lose their jobs, they are a burden on the Australian welfare state, whereas temporary migrants return home. In reality, many of these temporary migrants stay in Australia (in a process Birrell and Healy have called 'visa churning') as they seek employment through other temporary visas.² Both the mobility and flexibility of temporary labour migration comes at a potential cost to Australian workers. There is an incentive for employers to fill shortages of labour with temporary foreign workers rather than invest in skills training for local workers. For this reason, while we support the use of temporary migration programs, we argue below that they must be accompanied by rigorous labour market testing, the safeguarding of local wages and conditions and a commitment to the training of Australian workers. Furthermore, the visa pathways for temporary foreign workers need to be properly regulated, being restricted to areas of employment in demand and subject to requirements for minimum wages and conditions of work that are capable of enforcement by adequately funded agencies.

2. The Regulation of Unskilled Work

2.1 Skilled and unskilled labour migration in Australia

While there are good reasons to focus on skilled migration, we submit that it is important to acknowledge the amount of unskilled labour being performed by migrant workers in Australia. Although the mainstay of the 457 visa is the sponsorship of highly skilled workers, the labour agreements stream also allows for the sponsorship of semi-skilled workers, as does the new Designated Area Migration Agreements. In 2008, the Rudd Labor Government introduced a Pacific Seasonal Worker Scheme to allow workers from select Pacific Island countries to work in the Australian horticultural industry for up to 7 months. These *dedicated* labour migration pathways tell only part of the story of migrant work in Australia. Since the 1990s, a large and growing amount of low and semi-skilled work in Australia has been undertaken by young migrants on working holiday and international student visas, which are not subject to the same regulatory constraints as the subclass 457 visa.

As at July 2014, the Australian labour force consisted for 11,582,200 workers. At that time there were 195,080 subclass 457 visa holders working in Australia. In September 2014, there were 387,799 international students and temporary graduates with a right to work.³ International students are restricted to 40 hours work a fortnight in any employment, skilled or unskilled, and temporary graduates have no restrictions on their employment rights. In December 2014 there were also

¹ International Organization of Migration (2011) <<http://www.iom.int/cms/en/sites/iom/home/what-we-do/labour-migration.html>>.

² B Birrell and E Healy, *Immigration Overshoot*, CPUR Research Report, Centre for Population and Urban Research, November 2012.

³ DIBP, Student visa and Temporary Graduate visa programme quarterly report, 30 September 2014.

154,599 Working Holiday Makers (WHMs) in Australia with the only restriction on their right to work being that they cannot work for one employer for more than 6 months.⁴ In addition, the partners and children of 457 visa holders have the right to work in unskilled work without the restrictions of the primary visa holder. The work rights of international students and WHMs are not subject to the same regulatory controls as skilled temporary workers. For example, they do not need to be paid market wages, they are not limited to employment in specified industries in which there is a shortage of workers, and their employers are not required to demonstrate that they have attempted to employ Australian workers to fill the position.

In our submission, it is important to consider visas for non-work related purposes that contain work rights, such as the working holiday maker visa and international students visa. The Australian labour market is not neatly divided between skilled and unskilled work. There are genuine shortages of unskilled work in some industries in Australia, and these shortages should be filled primarily through dedicated labour migration programs with appropriate protections for both migrant and local workers, as is the case for shortages of skilled work.

The functioning of the WH visa program illustrates how visas that allow for engagement in work as a secondary purpose affect the dedicated labour migration pathways. Since its inception in 1975, the WH program has consistently been conceived of as a cultural program, facilitating the travel of young people to and from Australia to have a cultural experience, supplemented with a limited opportunity to work. With the number of WH visa grants reaching 239, 592 in 2013-14 and 258, 248 in the previous financial year,⁵ and with changes to the visa that allow more extensive work rights, and indeed, strong incentives to work in regional Australia in specific industries for a second year, the WH visa is in need of reconceptualization. The WH visa is now better conceived as a labour market program, used to fill perceived labour shortages in specified industries.

WH visas (visa subclass 417 and 462) provide work entitlements for the full 12 months of their visa, but only 6 months work with any one employer.⁶ In November 2005, the law was changed to make it possible for WH visa holders to apply for a second WH visa if they have worked for 3 months in 'specified work' in mining, construction and agriculture in regional Australia.⁷ Although WH visa holders enter Australia ostensibly for a non-work related purpose; namely, 'to allow [visa holders] to have an extended holiday while supplementing [their] funds with short-term work in Australia',⁸ the Department has acknowledged the work motive of WHMs. It reports that the recent increase in WHMs 'largely appears to be associated with the wider global economic situation in 2011-12 as labour market opportunities in some partner countries remain uncertain.'⁹ In 2013-14, there were 45,950 second WH visa grants. Of these, 11,295 (24.6%) were to WH visa holders from Taiwan.¹⁰ The growing proportion of WHMs from Taiwan, South Korea and Hong Kong, particularly with respect to second WH visas is an indicator that the visa is now being used primarily as a work visa, and only secondarily as a vehicle for tourism and cultural exchange. The number of WH visas helps

⁴ DIBP, Working Holiday Maker Visa Programme Report, 31 December 2014.

⁵ DIBP, Working Holiday Maker Report 2013-14.

⁶ Migration Regulations 1994 (Cth) regs 417.611, 462.611. See also, DIAC, WHM Visa Program Report, 30 June 2013, p 4.

⁷ DIAC, Working Holiday Maker Visa Program Report, 30 June 2013, 4.

⁸ DIPB, Working Holiday Program, Fact Sheet 49 <<http://www.immi.gov.au/media/fact-sheets/49whm.htm>>.

⁹ DIAC, Working Holiday Maker visa program report, 30, June 2012, 7.

¹⁰ DIPB, Working Holiday Maker Report 2013-14.

to explain the slow rate of take up of labour agreements in these industries.¹¹ Compared with employing WH visa holders, the bureaucratic hurdles required to enter a labour agreement for workers in these industries are immense.

2.2 A new low skilled work visa

One response to the apparent demand for unskilled work, and the burgeoning number of WHMs and international students engaging in this work, is to consider introducing a dedicated low skill worker visa. There are many factors to be considered in this suggestion.

Our proposal¹² is that the 457 visa become two-tiered so as to explicitly accommodate foreign workers of all skill levels via different streams, with each stream having different requirements for visa entrants and sponsors according to their skill level.

- a. The *first stream* is for high skill temporary workers. It replicates the existing subclass 457 employer nominated scheme. This stream would be lightly regulated and facilitate the entry of high skill temporary migrant workers. The rationale for the deregulation of this scheme is to enable businesses that have a need for high skill workers in occupations that cannot be filled locally to efficiently and expediently access this labour. This stream would operate in a similar way to the standard business sponsorship pathway under the current subclass 457 visa.
- b. The *second stream* is for low and semi-skill temporary workers not on the Consolidated Sponsored Occupation List who are currently the subject of labour agreements. This stream would be subject to a higher regulatory burden in the form of a stricter requirement for labour market testing to ensure employers are nominating workers in areas of labour shortage.

A key aspect of the second stream is the requirement for more rigorous labour market testing. In our view, this would require a combination of both objective and subjective measures to reveal a labour market shortage.

One of the rationales for a stricter labour market testing requirement for stream two is because of the dynamics of labour supply, in particular high youth unemployment in rural areas and the increased emphasis by the Government of removing welfare entitlements for under-30s in order to transition them into paid employment.¹³ Birrell and Healy identify the poor job outcomes for Australian-born young people as an example of where local workers could be employed in place of temporary migrant workers.¹⁴ Additional research needs to be done, and more resources deployed for

¹¹ Of the 182 signed labour agreements in effect as of 31 December 2012, 90 were with employers in the on-hire industry; 21 with employers in the meat industry; 16 with resource sector employers; and 55 with employers in other industries (including agriculture, fast-food, fishing, and snow sports industries). There were a further 72 labour agreements under negotiation: 22 with employers in the on-hire industry; 4 with employers in the meat industry; 16 with resource sector employers; and 30 with employers in other industries (including agriculture, fast-food, fishing, and snow sports industries). Email by Dr Brooke Thomas to the author, 4 March 2013 (copy on file with the authors).

¹² This proposal is mooted by the authors in an upcoming article in the Federal Law Review. For more details on this proposal, see Joanna Howe and Alex Reilly (2015-forthcoming) 'Meeting Australia's Labour Needs - The Case for a Low Skill Work Visa' 43(2) Federal Law Review.

¹³ Tom Allard, 'Reshaping welfare: are we entering an age of inequality?' *The Sydney Morning Herald*, 17 May 2014.

¹⁴ Unemployment for 15–19 year olds surged to 15% in July 2009 and to 6.8% for 20–24 year olds. The unemployment rate for the former group has not improved since this time and in the case of those in their early 20s this rate has

identifying how to transition local workers into these jobs.

Furthermore, as is the case with labour agreements, employers sponsoring workers on the new low and semi-skill work visa should demonstrate that they have a satisfactory record of, and an ongoing commitment to, the training of Australians. Employers should also continue to pay the equivalent of 2% of gross wages to an industry-training fund or allocate 1% of gross wages for structured training for the Australian employees of the business. Temporary migration arrangements should complement, not substitute for, investment in training initiatives for Australians. A welcome development is the proposal in the recently report 'Robust New Foundations' for an annual training contribution payable by employers who rely upon 457 visa holders. This innovative idea is based upon the notion of a "social licence", that is, the idea that, in return for being able to access temporary migrant labour, the sponsor should contribute to a national benefit.

An additional rationale for the tighter controls in the second stream is that low and semi-skill workers possess a reduced capacity to negotiate their own terms and conditions of employment. As noted in an issues paper released as part of the Deegan Review, visa holders at the lower end of the salary and skill scale are particularly vulnerable because they are reluctant to make any complaint which may put their employment at risk, and they possess less labour market power as their skill level is more easily replaceable than for high skill workers.¹⁵ The reason these low and semi-skill workers do not voluntarily return home when faced with exploitation by their sponsor is because of 'the large income inequalities between high and low income countries', which means that workers 'may sometimes be willing to trade economic gains for restrictions in personal rights to an extent that is likely to be considered unacceptable in most liberal democracies'.¹⁶ The existence of a genuine labour shortage in their area of employment reduces this disadvantage considerably.

On the other hand, the regulation of the second stream needs to be sufficiently light to make the visa pathway one that is attractive to employers. According to Martin Ruhs, one would expect workers to have fewer rights than in the low-skill temporary worker stream.¹⁷ If the low skill temporary worker pathway is too cumbersome and requires employers to provide pay and conditions that are too high, then employers will simply shun the scheme and look for labour elsewhere. In the absence of local workers to fill these positions, employers will fulfil their labour requirements using migrant workers who are less protected and more vulnerable to exploitation.

Therefore, a key challenge in creating a new visa subclass for low and semi-skilled work is to find a level of regulation that adequately protects workers but does not create such a burden of sponsorship on employers that it incentivises them to seek workers who are subject to less protection. In our view, regulation is necessary to ensure that employers seeking to access non-local, low-skill labour are able to prove there is a genuine need. Furthermore, these requirements do nothing more than ensure that visa holders are being used in areas of genuine skill shortage, and guarantee that their remuneration and conditions of employment are on a par with Australian workers. This prevents the creation of a

deteriorated to 8.1% by July 2012. The numbers are even worse in lower income metropolitan areas: Birrell and Healy, above (n 2) 26.

¹⁵ *Visa Subclass 457 Integrity Review Issues Paper #3: Integrity/Exploitation*, Department of Immigration and Citizenship, Canberra, September 2008, p 12.

¹⁶ Martin Ruhs, 'The Potential of Temporary Migration Programmes in Future International Policy', *Global Commission on International Migration*, 2005, 14; and see further A Reilly, 'The Ethics of Seasonal Labour Migration' (2011) 20 *Griffith Law Review* 127.

¹⁷ Ruhs, above (n 16) 39.

two-tier labour market and reduces incentives for unscrupulous employers to avoid maintaining Australian labour market standards by relying upon temporary migrant workers.

The price of employers switching to other forms of migrant labour – international students and WHMs – is a major consideration in determining the policy settings. The employment of international students and WHMs is not subject to labour market testing and there are no other labour protections, such as market wage requirements, for these visas. The risk of the new temporary low and semi-skill work visa being unattractive because of the free availability of migrant labour through the WH and international student visa pathways turns the focus squarely onto the conditions of employment of these visas. Greater restrictions may therefore be required on the work opportunities under these visas to avoid distortion of the labour market both for domestic workers and foreign workers in dedicated labour migration programs.

3. Reforms to existing visa pathways

3.1 Issues relating to the 457 Visa

Australia's temporary labour migration program, managed via the subclass 457 visa, is largely demand-driven. It is contingent upon employers seeking to access temporary migrant labour. We submit that this shift towards a demand driven skilled migration program needs to be rethought. For example, currently under the subclass 457 visa program, an occupation is taken to be in skill shortage if it listed on the CSOL and if an employer can show evidence of failed recruitment efforts. Given the sheer number of occupations listed on the CSOL and that the Department's guidelines for assessing employer-conducted labour market testing are not stringent (even a Facebook advertisement will suffice), it is clear that there already exists a deregulated process by which employers can seek to access temporary migrant labour. Put simply, Australia's demand driven model presumes the existence of a skill shortage because the employer's request for use of the visa is taken as confirmation that the job cannot be filled by a domestic worker. This deference to employer say-so fails to question whether the shortage is genuine by assessing the reasons for its existence. In some cases this may be because there is a genuine lack of local workers with the particular skill set required to perform the job, however other reasons for this shortage can exist: it may be caused by 'labour-related shortages' such as 'skills gaps', 'labour shortages' and 'recruitment difficulties'.¹⁸ In this way, the 457 visa is driven by employer-demand and is not closely linked to an independent assessment of Australia's skill needs.

The Federal Government's recent announcement of the establishment of a tripartite Ministerial Advisory Council on Skilled Migration is a step in the right direction. If properly constituted, the MACSM should operate in such a manner to provide checks and balances on employer demand. We submit that the MACSM should be constituted according to the following criteria:

1. Genuinely Tripartite

The MACSM should include representatives from both business and unions, as well as, representatives from government and academia. This is important for ensuring that its recommendations are balanced and credible.

A tripartite structure acts as a safeguard against regulatory capture by special interests. The report, 'Robust New Foundations', by the Independent Review into the Subclass 457 Visa Programme,

¹⁸ Sue Richardson, *What is a Skills Shortage?* (National Centre for Vocational Education Research, 2007).

recommends that a tripartite ministerial advisory council be established 'to provide stakeholders from divergent viewpoints the opportunity to collaborate and develop workable options for government'.¹⁹ The importance of tripartitism was emphasised by the report's authors because of the need for integrity and credibility to be overarching principles of the subclass 457 visa programme.²⁰ In the report's view, the status quo is insufficiently rigorous and transparent for maintaining public confidence that temporary migrant workers are only being deployed in occupations experiencing a skill shortage:

During our consultations it became clear that there are programme settings which have been constructed and implemented without a transparent and evidence-based approach. There are two policy issues that we consider to be core questions in the existing 457 programme, as they directly address one of the two objectives. These are: proving that the position cannot be filled by a local worker and determining the skilled occupations that are used for the programme. It is our considered view that these issues are not well served by the current policy approaches and can be improved by adopting a more robust evidence- based approach.²¹

2. Independent from Government

The MACSM needs to operate independently from the Government to ensure that its recommendations do not take into account political considerations but are predicated on the national interest.

American migration scholar, Marshall suggests that 'independence is strengthened through selecting highly respected professional members who serve for long, staggered terms that do not coincide with those of any administration, and ensuring a high level of visibility, transparency, and professionalism in the commission's deliberations'.²² This can be contrasted to an internal departmental approach where closed executive processes can exacerbate problems associated with capture by certain stakeholders at the expense of others.²³

We submit that Australia's MACSM should follow the UK example of an expert commission that is independent from government. The UK's expert commission, the 'Migration Advisory Committee' was established as a non-statutory, non-time limited non-departmental public body funded by the Home Office.²⁴ It is comprised of a Chair and four other committee members who are appointed as individuals to provide independent and evidence-based advice to the Government on migration

¹⁹ John Azarias et al, *Robust New Foundations A Streamlined Transparent and Responsive System for the 457 Programme An Independent Review to the Integrity in the Subclass 457 Programme*, September 2014, 49. This recommendation for an expert body to advise on the composition of an occupational shortage list was advanced by the author in her submission to the panel: see Joanna Howe, *Submission to the Independent Review of Integrity in the Subclass 457 Visa Programme*, 30 April 2014 and also in a recent scholarly article; see Joanna Howe, (2014) 'Does Australia need an Expert Commission to Assist with Managing its Labour Migration Program?' 27 *Australian Journal of Labour Law*.

²⁰ Azarias, above (n 19) 44.

²¹ Ibid 44.

²² R Marshall, 'The case for a foreign worker advisory commission' (2014) 11(1) *Migration Letters* 65, 76.

²³ See further Hermann Punder, 'Democratic Legitimation of Delegated Legislation – A comparative view on the American, British and German Law' (2009) 58 *International Comparative Law Quarterly* 353, 375.

²⁴ The Home Office is a Department of the UK Government concerned with immigration, counter-terrorism, police, drugs policy, and related science and research.

issues. Committee members are selected on the basis of their expertise in law and/or economics. The MAC's modus operandi is to receive questions from the Government, which it seeks to respond to in a timely fashion, usually within three to six months. The MAC's response is in the form of a public report that identifies the questions posed by the government, the economic analysis and its recommendations.²⁵ There has been no shortage of remits from the Government for the MAC to consider and advise on. Excluding publications that call for evidence or state an intention to consult, the Committee has produced 10 reports since August 2010, several of them of considerable length and complexity.²⁶ Although supported by a secretariat within the Home Office, the MAC is operationally independent and is not influenced by Home Office officials or the Minister. As such, the secretariat takes direction only from the MAC on the deployment of resources delegated to it by the Home Office.²⁷

From the perspective of stakeholders, the MAC's independence from the Home Office has given its recommendations more credibility and integrity as its work is freed from government intervention and political considerations.²⁸ Even though the secretariat for the MAC is located within a government department, this is not seen to compromise the Committee's independence as reporting lines are not to the Department but to the Committee.²⁹

We recommend that the MACSM receive support from relevant government departments such as the Department of Industry, the Department of Immigration and Border Protection, the Treasury and the Department of Employment. However, the MACSM should be operationally independent and not be subject to influence from any one government department or minister.

3. Evidence-Based

We have argued elsewhere that there are significant deficiencies in the ability of Australia's temporary labour migration program to identify and address domestic skill shortages.³⁰ This is because the subclass 457 visa is based on an undemanding employer attestation scheme coupled with a fairly lukewarm labour market testing requirement for certain occupations. The latter was introduced via the *Migration Amendment (Temporary Sponsored Visas) Act 2013* (Cth), however this has been implemented in a weak fashion by the Department. Section 140GB refers to any redundancies or labour market research conducted in the preceding four months prior to the making of a 457 visa application but the Department's guidelines allow the submission of evidence from the preceding twelve months.³¹ This dilutes the labour market testing requirement as any evidence of unsuccessful recruitment efforts in the preceding twelve months will suffice for the making of a 457 visa application. This is a significantly longer time period from which employers can access data in support of their application. Furthermore, the Department's guidelines also suggest that the posting of a single advertisement of a job vacancy on a business's website, any other website or on a social

²⁵ A list of MAC publications is available at <www.ukba.homeoffice.gov.uk/aboutus/workingwithus/indbodies/mac/>.

²⁶ These are available on the MAC's website, *ibid*.

²⁷ Migration Advisory Committee and Home Office, Migration Advisory Committee: Triennial Review, 2014.

²⁸ *Ibid* 8.

²⁹ *Ibid*.

³⁰ See: Joanna Howe, 'Is the Net Cast Too Wide? An Assessment of Whether the Regulatory Design of the 457 Visa Meets Australia's Skill Needs' (2013) 41 *FL Rev* 443; J Howe, 'Enterprise Migration Agreements under the Subclass 457 Visa: Much Ado about Nothing?' (2014) 27 *AJLL* 86, 95-96; J Howe, 'Accountability and Transparency under the Subclass 457 Visa Program: Is there Cause for Concern?' (2014) 21 *AJAL* 139.

³¹ DIBP, Labour Market Testing in the Subclass 457 Visa Programme: Frequently Asked Questions, November 2013, (copy on file with author).

media platform such as Facebook will also suffice. There is no minimum duration time for the advertisement or that advertising be paid. These insubstantial labour market testing requirements are supplemented by an additional obligation that a migrant worker's occupation be listed on the Consolidated Sponsored Occupations List (CSOL).³² However, the CSOL is not a genuine occupational shortage list, is compiled internally by the Department and includes over 600 occupations.³³

Whilst it is true that Australia's permanent migration program has relied upon a more transparent and accountable process for compiled its occupational shortage list,³⁴ the abolition of the Australian Workforce and Productivity Agency in 2014 means that it is likely that this will change.

A primary argument for the establishment of an expert commission in Australia is the opportunity this would provide to develop rigorous, transparent and credible occupational shortage lists for both the permanent and temporary labour migration programs. OECD researcher Johnathan Chaloff notes that there is an increasing trend amongst OECD countries to rely upon tripartite or external expert bodies to input into the compilation of shortage lists,³⁵ and states the following rationale for their presence:

Shortage lists...communicate to the public that a migration system is selective and focused on specific skills. Lists provide a focus for professional bodies, employers and unions to debate which occupations should be on or off the list, and may serve as a signal to employers by encouraging them to think of recruiting migrants if the occupation is on the list. Shortage lists may also signal to employers and government where training is required to address a shortage of domestic workers.³⁶

Although employers often contend that they are better placed than an expert commission to select migrant workers to meet their needs, it is doubtful whether employers act in the national interest in instances when this is opposed to their own interest. An employer-demand model, which is an apt description of both Australia's temporary and permanent labour migration programs, is not ideal as employers are profit-maximising entities in a competitive market. They serve a different function to governments and/or an expert commission. Given the possibility for employers to use labour migration for a motive other than to meet a genuine skill shortage, it is necessary to further scrutinise employer attestation that a skill shortage exists. This is to ensure 'the demand for migrant workers identified by employers is in fact a demand for workers who can be — and end up being — employed in compliance with existing employment laws and regulations'.³⁷ The presence of an expert commission to identify labour shortages is consistent with OECD advice that independent labour market testing is preferable for mapping domestic labour shortages because 'historically, requests by employers have not been considered a fully reliable guide in this regard, at least not without some verification by public authorities to ensure that the requests represent actual labour needs that cannot

³² Migration Regulations 1994 (Cth), regs 1.20G(2), 1.20H(1).

³³ Joanna Howe, 'Is the Net Cast Too Wide? An Assessment of Whether the Regulatory Design of the 457 Visa Meets Australia's Skill Needs' (2013) 41 *FL Rev* 443.

³⁴ The official title of this list is the Skilled Occupation List (SOL). For more on this list, see Part I.

³⁵ J Chaloff, 'Evidence based regulation of labour migration in OECD countries: setting quotas, selection criteria and shortage lists' (2014) 11 *Migration Letters*, 11, 12.

³⁶ *Ibid* 20.

³⁷ M Ruhs, 'The Potential of Temporary Migration Programmes in Future International Migration Policy' (2006) 145 *International Labour Review* 7, 14.

be filled from domestic sources'.³⁸

It is important to note that under the model we propose, the MACSM would not make final decisions about the composition of the occupational shortage list. This is a political responsibility best left to elected officials with accountability to the parliament and to the electorate through a cycle of regular elections. Nonetheless, as both the Austrian and English case studies demonstrate,³⁹ the presence of an expert commission can aid the integrity of the compilation process by relying upon both hard economic data and engagement with stakeholders to develop a view as to whether a particular occupation is in shortage *and* whether this shortage is best addressed through migration. As such, an Australian expert commission could make recommendations which parliament could modify, reject or allow to take effect. This would provide greater public confidence in the process as an expert commission could develop agreed-upon definitions and measures.

Again, Australia would do well to learn from the UK approach concerning the composition of an occupational shortage list. For the past five years since its inception, the MAC has provided recommendations to government on an annual basis using a combination of both hard economic data and input from stakeholders. With regards to the former, 12 top-down labour market indicators are relied upon to determine if a particular occupation should be deemed as being in shortage. Each indicator has to reach a certain threshold in order for the occupation to be in shortage. This data is publicly released by the MAC and the formulas involved are also available for external scrutiny. This is supplemented by evidence through an annual submissions process from employers, unions and others as to which occupations are in shortage. This combination of both objective and subjective factors (or what Ruhs terms 'top down' and 'bottom up' data) enables the MAC to develop a set of recommendations for government as to which occupations are deemed to be in shortage. MAC does not always recommend that an entire occupation be added to the occupational shortage list. Martin and Ruhs provide the example that whilst there may be no general occupational shortage in secondary school teachers, there may be a shortage in secondary school mathematics teachers.⁴⁰

It is an important that the MACSM does not merely place an occupation on the shortage list because there is currently a lack of Australian workers in that occupation. Further research and investigation is required. For example, just because an occupation is in shortage, does not automatically prompt the MAC to call for migrant labour in the occupation in question. The MAC seeks to differentiate between skill shortages that are best met by temporary migration and those that could be met by increased training of domestic workers. The MAC can request a formal review of the training system that trains British workers for that occupation in question.⁴¹ This facilitates a more nuanced identification of where resources for training purposes need to be placed to enable more strategic reliance on the migrant worker program and improve the employment prospects of local workers.⁴²

³⁸ OECD, *International Migration Outlook: Sopemi 2009*, OECD Publishing, 2009, 134.

³⁹ Joanna Howe, (2014) 'Does Australia need an Expert Commission to Assist with Managing its Labour Migration Program?' 27 *Australian Journal of Labour Law*.

⁴⁰ P Martin and M Ruhs, 'Independent commissions and labour migration: The British MAC' (2014) 11 *Migration Letters* 23, 29.

⁴¹ P Martin and M Ruhs, *Independent Commissions and Labor Migration*, Paper presented to the Expert Commissions and Migration Policy Making Conference, University of California, at April 18–19, 2013, at 7.

⁴² This is particularly important in occupations where apprenticeships and training pathways have shrunk. For more, see M Ruhs and B Anderson, *Who Needs Migrant Workers? Labor Shortages, Immigration and Public Policy*, OUP, 2010.

4. *Transparent and Publicly Accountable*

One of the key drawbacks of the current Australian approach to managing migration policy is that it is characterised by secrecy and there is a lack of transparency and accountability around decisions. When decisions are made in a non-transparent fashion and internally within government departments, there can be confusion as to whether these decisions were made on a sound basis or because of lobbying by a particular group. The recent addition of flight attendants to the CSOL by the Department is one such example. The addition of this occupation to the occupational shortage list for the subclass 457 visa occurred after the head of the Department met with the CEO of Qantas who was lobbying for the reform.⁴³ Although adding flight attendants to the CSOL was opposed by unions who were not consulted on this change, a week after the meeting occurred, the CSOL was amended.⁴⁴ No public justification was provided by the Department for this change. Whilst this decision may have been evidentially sound and based on data revealing a labour shortage in domestic flight attendants, this remains unproven because of the lack of accountability and transparency that characterises decision-making in the labour migration program.⁴⁵ Robert Baldwin and John Houghton identify a particular challenge of subordinate legislation (which tends to be extensively relied upon as part of Australia's labour migration program) as being that 'special groups and interests may exercise influence in lobbying, and representation may be weighted towards the interest of a pressure group or department'.⁴⁶

Thus, it is vital that the MACSM operates in a transparent and publicly accountable manner. This will enable the MACSM to lift the quality of public debate and promote informed government decision-making. This is because a more transparent and rigorous process for selecting occupations to be on a shortage list has the benefit of increasing public confidence that only occupations which are in shortage are eligible for labour migration. In this way, the MACSM can also assist in communicating to the public the shared prosperity and economic gains that ensue from labour migration, leading to greater public acceptance of the use of labour migration to address domestic shortfalls.

For example, in the UK, a key aspect of the MAC's effective operation is its transparency and accountability to the public. The MAC's website clearly identifies its methodology in determining which occupations are in shortage and both lists and justifies its recommendation to government. According to stakeholders, this means that:

The Committee [is] unafraid to offer advice that Ministers might not always find politically convenient. The openness which characterises the MAC's approach to its fact-finding and reporting is credited [as] not just with helping Ministers make sound decisions but with improving the understanding of the issues, and hence the quality of debate, more widely.⁴⁷

⁴³ Questions Taken on Notice, Supplementary Budget Estimates Hearing: 15 October 2012, Immigration and Citizenship Portfolio, answer to question by Senator Xenophon, (SE12/0336).

⁴⁴ Questions Taken on Notice, Budget Estimates Hearing: 21-22 May 2012, Immigration and Citizenship Portfolio, answer to question by Senator Xenophon, (BE12/0211).

⁴⁵ This has been explored elsewhere, see: S Cooney, 'The Codification of Migration Policy: Excess Rules? – Part II' (1994) 1 *AJ Admin L* 181; Tham, above n 16, at 20.

⁴⁶ R Baldwin and J Houghton, 'Circular Arguments' *The Status and Legitimacy of Administrative Rules* (1986) *Pub Law* 239 at 267.

⁴⁷ *Ibid* 5.

3.2 Observations on the Working Holiday Maker Visa

The influx of WHMs prepared to work temporarily in low skilled, casual work is a clear benefit to the economy. However, the benefit comes at considerable cost to local and migrant workers. For industries experiencing a shortage of workers, such as the horticultural industry, temporary work opportunities should be open to workers from all countries, and not just to young people from countries with which Australia has a WH agreement.

On the other hand, in industries with an over-supply of workers, and in which the competition for employment is high, such as in relation to many types of graduate employment and retail work in urban areas, there is a strong case for either preventing WHMs from participating in the labour market, or severely limiting their numbers so that the impact on local workers in these high demand industries is reduced.

WHMs are vulnerable workers in need of strong work place protections.⁴⁸ Stronger workplace protections include better tracking of WHMs in the workforce, stronger obligations on employers to formalise and report on the employment agreements they enter with WHMs, and more resources dedicated to the compliance monitoring work of bodies such as the Fair Work Ombudsman. Under current visa conditions it is almost impossible to provide adequate protection given the large numbers of WHMs and the lack of sponsorship obligations on employers. The alternative we recommend is to introduce the regional low skill visa while reinstating restrictions to the work rights of WHMs, such as removing the second WH visa.

These changes are likely to reduce the size of the WH program, making it easier to regulate the working conditions of WHMs, and reducing the chance of their exploitation in the workplace. If the work entitlements of WHMs are restricted to industries with a demonstrated shortage of labour, such as horticulture and tourism, there will be a more equal level of demand and supply of labour, reducing the power differential between employers and WHMs. It will also allow for the concentration of efforts of regulators to protect workers from exploitation. Of course, it does not eliminate the possibility of exploitation. The remoteness of many work places, particularly in horticulture, means that regulation is an on-going concern.

3.3 Observations on International student visas and work rights

Granting rights to students to work is believed to attract students to study in Australia. Australia is more generous with the provision of work rights than its competitors.⁴⁹ Surveys of international students suggest that the opportunity to work while studying is important to students.⁵⁰ However, shifts in the higher education sector may mean that the right to work while studying will be less of a pull for international students. The main attraction for international students remains the quality of

⁴⁸ Tan and Lester, 'Labour Market and Economic Impacts of International Working Holiday Migrants to Australia (2012) 18 *Population, Space and Place* 359; Tan et al (National Evaluation of Australia's Working Holiday Maker Program, 27 February 2009 (National Institute of Labour Studies, Flinders University, Adelaide, Australia).

⁴⁹ Alexander Reilly, Protecting Vulnerable Migrant Workers: The case of international students (2012) 25 *Australian Journal of Labour Law* 181, 201.

⁵⁰ See eg, Australian Education International, Student Voices: Enhancing the Experience of International Students in Australia, June 2012, 23, <https://www.aei.gov.au/research/Publications/Documents/Student%20voices%20-%20FINAL.pdf>.

their international education.⁵¹ As competition increases, particularly with improvements to higher education opportunities in Australia's major source countries for international students, China and India, the attraction of unskilled work during the period of study that is 'dirty and dangerous' may diminish.

There are more built in restrictions to the work of International Students than for WHMs, including the fortnightly time limits, and the requirement that they progress in their studies. Nonetheless, students work in a range of industries, 'clustered in low-paid industries where there is a high use of precarious forms of labour'.⁵² The time restriction in their visa is an important mechanism for reducing the amount of work in which students engage. However, it also increases their vulnerability to exploitation, if they work beyond the regulated maximum hours in any given fortnight.⁵³

The work rights of international students ideally should be linked to students' course of study, or if not directly linked to it, should have a cultural and language benefit. This points to a number of forms of restriction that could be imposed on current work rights for international students. First, international students could be excluded from working in certain industries that are not obviously related to their course of studies. Detailed consideration is needed to compile this list, but it would typically include a restriction on working in industries such as mining, construction, transportation and agriculture. The criteria for exclusion would be on the basis of the physical nature of the work, the risk of personal injury associated with the work, the suitability of the work for part-time employment and its proximity to higher education institutions.

3.4 Asylum seekers, Refugees and temporary work

As at 30 September 2014, a total of 30 003 bridging visas had been granted to asylum seekers arriving by boat in Australia. Of these, 24 775 were living in the community.⁵⁴ The visas of some of these asylum seekers in the community have work rights attached to them, and some do not. If these asylum seekers are successful in their claims for protection, they will then be eligible for either a three year Temporary Protection Visa (TPV) or a five year Safe Haven Enterprise Visa (SHEV). Both these visas come with work rights. The work rights of TPV holders are unrestricted. SHEVs must undertake to work in specified employment in regional Australia. If refugees on a SHEV remain employed in specified employment for 3.5 of the 5 years, they are eligible to apply for a further substantive visa.

Asylum seekers and refugees are a vulnerable class of migrant worker. They are desperate to work, often highly traumatized, and the consequences for breaching the conditions of their bridging visa are extreme – returning to immigration detention. Asylum seekers do not have the ready support of their family and community networks, and they are usually culturally and linguistically different from the Australian community. Given this profile of asylum seekers, it is important to acknowledge that granting them an entitlement to work opens them to the risk of exploitation in the workplace. Furthermore, the fact that the work of asylum seekers and refugees, like WHM and International

⁵¹ Phillip Altbach and Jane Knight, *The Internationalization of Higher Education: Motivations and Realities* (2007) 11 *Journal of Studies in International Education* 290-305;

⁵² J Mills and L Zhang, United Voice, Submission to DIAC, Strategic Review of the Student Visa Program, 2011, p 5.

⁵³ For a detailed analysis of the vulnerability of international students, see Alexander Reilly, 'Protecting Vulnerable Migrant Workers: The Case of International Students' (2012) 25 *Australian Journal of Labour Law* 181.

⁵⁴ DIBP, *Illegal Maritime Arrivals on Bridging E visas*, September 2014.

students, is not subject to employer sponsorship, or labour market testing, these temporary workers will also have an impact on the labour market.

The considerations in relation to the granting of asylum seekers and refugees work rights are different from those in relation to WHM and international students for a number of reasons. Most fundamentally, asylum seekers are in Australia seeking protection, and cannot be removed from Australia involuntarily. Australia has particular international obligations in relation to their welfare under the Refugee Convention. Denying asylum seekers the opportunity to work contributes to their vulnerability in the labour market. The longer asylum seekers live in the community, and the more familiar they are with the socio-cultural and political values of the community, the greater the impact of denying them an opportunity to work, and the greater the likelihood that they will engage in illegal work. The European Union has determined that asylum seekers should be granted work rights six months after they arrive in Europe seeking asylum.⁵⁵ We submit that this is a sensible time frame. People should not be kept in a forced state of idleness and welfare dependency beyond this length of time. On the other hand, for a period of up to six months the state might legitimately argue that it is not prepared to incorporate asylum seekers into the body politic while assessing their claim.

Granting work rights to asylum seekers on Bridging visas and to TPV and SHEV holders does not remove their precariousness in the Australian labour market. In a tightening job market, most asylum seekers and refugees with no skills, or with skills not recognized in Australia, are likely to remain unemployed, and reliant on welfare. However, granting asylum seekers and refugees the right to work removes an unnecessary structural barrier to living in and contributing to the Australian community. It removes difficult legal questions about what voluntary activities asylum seekers and refugees can engage in without remuneration, and removes a trigger for their involvement in exploitative labour relations. Regardless of whether asylum seekers' applications for protection visas are successful, the opportunity to work in Australia will enhance their life chances into the future. We therefore recommend that work rights for asylum seekers and refugees with temporary rights to protection be retained, and treated as a special class of temporary labour migration. The main challenge in relation to these workers is to maintain and enforce conditions of work free from exploitation.

⁵⁵ European Commission (2008), 'Proposal for a Directive laying down minimum standards for the reception of asylum seekers (recast)' 3 December 2008, COM (2008) 815, final; European Union (2003) Official Journal of the European Union, Council Directive 2003/9/EC of 27 January 2003, 'Laying Down Minimum Standards for the Reception of Applicants for Asylum in Member States, OJ L 31, 6 February 2003, <http://www.refworld.org/pdfid/3ddcfda14.pdf>.