# 8

# *Why is Labour Protection for Temporary Migrant Workers so Fraught?*

## A Perspective from Australia

JOO-CHEONG THAM, IAIN CAMPBELL AND MARTINA BOESE*

### I. THE BROKEN PROMISE OF PROTECTION FOR TEMPORARY MIGRANT WORKERS

THE TWENTY-FIRST CENTURY has witnessed a global resurgence of interest in temporary labour migration schemes as a policy measure.[1] Even nations that were traditionally countries of permanent settlement like Australia have experienced a sharp growth in temporary migrant workers.[2]

This development is surrounded by fierce controversy. At one level, there is strong debate concerning the effects of temporary labour migration—whether it secures, as its advocates claim, a triple 'win' for migrants (wages and enhancement of skills), their countries (remittances) and host countries (addressing labour shortages) or, on the other hand, whether it paves the way for the exploitation of migrant workers, stunted development of their countries and displacement of local workers in host countries. At another level, there are highly contested questions concerning the rights of temporary migrant workers: To what extent should such

* Research for this chapter was funded by an Australian Research Council grant for the project 'Precariousness in Law and Labour Markets: The Case of Temporary Migrant Workers'. Special thanks to Jason Goliszek for his excellent research assistance.

[1] See Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action* (Geneva, GCIM, 2005).

[2] Graeme Hugo, 'Globalization and Changes in Australian International Migration' (2006) 23(2) *Journal of Population Research* 107.

workers have rights equal to those enjoyed by the permanent residents and citizens of their host country?[3] When is it justifiable to 'trade off' the rights of these workers for greater openness of their host countries' labour markets?[4] What entitlement, if any, should these workers have to permanent residence in their host countries?[5]

There is, however, a clear point of consensus in this complex and evolving debate: temporary migrant workers should effectively enjoy whatever legal protection is provided in relation to their working conditions.[6] The International Labour Organization's (ILO) Multilateral Framework on Labour Migration, for one, states that the rights of migrant workers 'should be protected by the effective application and enforcement of national laws and regulations'.[7]

It is not difficult to see why there is such strong consensus on this principle. There is a cluster of compelling justifications relating to the legitimacy of the host state: the legitimacy of law as a (key) instrument of the state; the rule of law as a liberal principle; and, in democratic societies, the rule of law as a democratic principle. There is also a cluster of policy rationales for this principle that relate to temporary labour migration: preventing exploitation of migrant workers; protecting the employment opportunities and working conditions of local workers; ensuring that the intake of migrant workers properly addresses labour shortages and that a 'level playing field' exists amongst employers. What is least controversial may, however, be the most intractable.

Non-compliance with labour protection appears to be widespread in relation to temporary migrant work. As the ILO states:

> For many, migrating for work may be a rewarding and positive experience, but for an unacceptably large proportion of migrants, working conditions are abusive and exploitative, and may be characterized by forced labour, low wages, poor

[3] See Judy Fudge, 'Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' (2012) 34 *Comparative Labour Law and Policy Journal* 95; Joo-Cheong Tham and Iain Campbell, *Temporary Migrant Labour in Australia: The 457 Visa Scheme and Challenges for Labour Regulation*, Working Paper No 50 (Melbourne, Centre for Employment and Labour Relations Law, 2011) 26–34.

[4] Martin Ruhs and Phillip Martin, 'Numbers v Rights: Trade-Offs and Guest Worker Programs' (2008) 42(1) *International Migration Review* 249; Martin Ruhs, *The Price of Rights: Regulating International Labor Migration* (Princeton, NJ, Princetown University Press, 2013) ch 7.

[5] Joseph H Carens, 'Live-in Domestics, Seasonal Workers, and Others Hard to Locate on the Map of Democracy' (2008) 16(4) *Journal of Political Philosophy* 419.

[6] 'Labour protection', or 'protective regulation', can be found in various areas of law including labour laws, immigration laws, anti-discrimination laws, occupational health and safety laws, and social security laws.

[7] International Labour Organization, *Multilateral Framework on Labour Migration: Non-binding Principles and Guidelines for a Rights-Based Approach to Labour Migration* (Geneva, ILO, 2006) 19.

> working environment, a virtual absence of social protection, the denial of freedom of association and union rights, discrimination and xenophobia, as well as social exclusion, all of which rob workers of the potential benefits of working in another country.[8]

Why is this the case? Why is labour protection for temporary migrant workers so fraught?

This chapter provides an Australian perspective on these questions, with a focus on two key groups of Australian temporary migrant workers: workers on the Temporary Work (Skilled) (Subclass 457) visas (457 visa workers) and international student workers. Our principal argument is that that the problem of non-compliance with protective regulation relating to these temporary migrant workers results from the interaction of their vulnerability—including their precarious migrant status—with employer practices in poorly regulated industries.

The chapter begins by outlining the contemporary features of temporary labour migration and its regulation in Australia, focusing on two major groups: 457 visa workers and international student workers. We then present evidence of non-compliance with protective regulation in relation to both groups of workers. This is followed by an analysis of underlying causes of such non-compliance: the vulnerability of these workers and its interaction with dominant employer practices in poorly regulated industries. We conclude by criticising the view that non-compliance with labour protection is an aberration, and argue that the risk of non-compliance experienced by temporary migrant workers is structural and that this risk needs to be addressed through an integrated suite of immigration and labour law strategies.

## II. TEMPORARY LABOUR MIGRATION AND ITS REGULATION IN AUSTRALIA: THE CASE OF 457 VISA WORKERS AND INTERNATIONAL STUDENT WORKERS

### A. Threshold Definitions

We define a 'temporary migrant worker' as a worker who has a limited right of residence in their host country and who works for pay during the period

[8] International Labour Organization, *Towards a Fair Deal for Migrant Workers in the Global Economy* (Geneva, ILO, 2004) 41. For the Canadian and UK experience, see respectively Fay Faraday, *Made in Canada: How the Law Constructs Migrant Workers' Insecurity* (Toronto, Metcalf Foundation, 2012) 5–6; Catherine Barnard, 'Enforcement of Employment Rights by Migrant Workers in the UK: The Case of EU-8 Migrants' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford, Oxford University Press, 2014).

of residence. We define 'temporary migrant work' as the work performed by these workers, and define 'temporary labour migration programmes' as government schemes that permit temporary migrant work.[9]

This cluster of definitions is anchored upon the work performed by those with a particular migrant status—the activity that should be the principal focus of studies on temporary labour migration. In this respect, it is consistent with the definition adopted by the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which defines a 'migrant worker' as 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national'.[10]

These definitions have two important implications. First, they do not turn on the intentions for migration. As such, these definitions contrast with the definitions adopted in the relevant ILO conventions, which refer to a 'migrant for employment', defined as 'a person who *migrates from one country to another with a view to being employed* otherwise than on his own account and includes any person regularly admitted as a migrant for employment'.[11] (emphasis added) Such an emphasis on original intentions is too rigid, and does not allow for the changes in intentions and plans that frequently accompany any migration experience.

Second, our definition of 'temporary labour migration programmes' is not restricted to schemes that have the primary purpose of facilitating temporary migrant work (dedicated temporary labour migration programmes). It extends to other schemes which have a range of purposes and allow temporary migrants to participate in the labour market of the host country (de facto temporary labour migration programmes).

These definitions, in particular their use of the descriptor 'temporary', should, however, be carefully understood. Temporary migrant workers are only 'temporary' in the sense that they have a limited right of residence. They are not necessarily 'temporary' in terms of the length of their residence in Australia—many of them have lived in this country for years. Neither are temporary migrant workers, according to these definitions, necessarily 'temporary' in terms of their intention to continue residing in Australia—many aspire to secure permanent residence in this country through what has been called 'two-step' or 'staggered' migration.[12]

[9] Martina Boese, Iain Campbell, Winsome Roberts and Joo-Cheong Tham, 'Temporary Migrant Nurses in Australia: Sites and Sources of Precariousness' (2013) 24 *Economic and Labour Relations Review* 316, 317.

[10] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) art 2(1).

[11] ILO Migration for Employment Convention (Revised) 1949 (No 97) (entered into force 22 January 1952) art 11. See also ILO Migrant Workers (Supplementary Provisions) Convention 1975 (No 143) (entered into force 9 December 1978) art 11(1).

[12] Robert Gregory, *The Two-Step Australian Immigration Policy and its Impact on Immigrant Employment Outcomes*, Discussion Paper no 8061 (Bonn, IZA, 2014); Shanthi Robertson and Anjena Runganaikaloo, 'Lives in Limbo: Migration Experiences in Australia's Education–Migration Nexus' (2014) 14(2) *Ethnicities* 208.

Furthermore, reliance by employers on such workers is not necessarily 'temporary'—many key sectors like hospitality and agriculture have come to rely heavily on temporary migrant workers. These enduring aspects of temporary migrant work in Australia make it apt to speak of the 'permanence of temporary migration'.[13]

## B. Temporary Labour Migration Programmes, Temporary Migrant Workers and Temporary Migrant Work in Australia

The principal dedicated temporary labour migration programme in Australia is the 457 visa scheme (officially entitled the Temporary Work (Skilled) visa (subclass 457)). This scheme provides for employer-sponsored visas in a range of occupations for up to four years per visa (which can be renewed).[14] The other—much smaller—dedicated temporary labour migration programme is the Seasonal Worker Program (subclass 416). This scheme allows employers, mainly in the horticulture industry, to sponsor workers from nine Pacific Island countries and Timor-Leste.[15]

Alongside these two dedicated temporary labour migration programmes is a proliferation of de facto temporary labour migration programmes. There is the range of visas provided under the international student programme (subclasses 570–75).[16] Related to this programme is the temporary graduate visa (subclass 485), which enables international students who have recently graduated from an Australian education institution to work in Australia. This programme has two streams: the graduate work

[13] See Peter Mares, 'The Permanent Shift to Temporary Migration', *Inside Story*, 17 June 2009, http://inside.org.au/the-permanent-shift-to-temporary-migration/; Jenna Hennebry, *Permanently Temporary? Agricultural Migrant Workers and Their Integration in Canada* (Montreal, IRPP, 2012).

[14] Migration Regulations 1994 (Cth) sch 2, subclass 457. For analysis of the regulatory framework of the 457 visa scheme, see Joanna Howe, 'The Migration Amendment (Worker Protection) Act 2008: Long Overdue Reform, But Have Migrant Workers been Sold Short?' (2010) 24(2) *Australian Journal of Labour Law* 13; Iain Campbell and Joo-Cheong Tham, 'Labour Market Deregulation and Temporary Migrant Labour Schemes: An Analysis of the 457 Visa Program' (2013) 26 *Australian Journal of Labour Law* 239; 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(3) *Federal Law Review* 443; Joanna Howe, 'Accountability and Transparency under the Subclass 457 Visa Program: Is there Cause for Concern' (2014) 21 *Australian Journal of Administrative Law* 139; Joanna Howe, 'Enterprise Migration Agreements under the Subclass 457 Visa: Much Ado about Nothing?' (2014) 27 *Australian Journal of Labour Law* 86; Laurie Berg, *Migrant Rights at Work: Law's Precariousness at the Intersection of Immigration and Labour* (London, Routledge, 2015) 107–45.

[15] Migration Regulations 1994 (Cth) sch 2, subclass 416. See Alexander Reilly, 'The Ethics of Seasonal Labour Migration' (2011) 20 *Griffith Law Review* 127.

[16] Migration Regulations 1994 (Cth) sch 2, subclasses 570–75. For discussion of the regulatory framework for international students, see Alexander Reilly, 'Protecting Vulnerable Migrant Workers: The Case of International Students' (2012) 25 *Australian Journal of Labour Law* 181; Berg, *Migrant Rights at Work* (n 14) 95–101.

stream and the post-study work stream. Under the graduate work stream, those graduates with skills and qualifications that relate to an occupation on the Skills Occupation List are eligible for an 18-month visa. Under the post-study work stream, international students who graduate with a higher education degree from an Australian education provider, regardless of their field of study, are eligible for a visa of up to four years (depending on their qualification).[17]

There are two other significant de facto temporary labour migration programmes in Australia. First is the working holiday programme, which encompasses subclass 417 (Working Holiday) and subclass 462 (Work and Holiday) visas. This programme allows people aged between 18 and 30 from a range of countries with which Australia has a relevant bilateral arrangement to have a working holiday in Australia.[18] Second is the Special Category Visa (subclass 444), which is granted upon entry to New Zealand citizens (regardless of the purpose of their visit to Australia) and allows them to live and work in Australia without restriction.[19]

With the exception of the Work and Holiday (462) visa, these programmes are uncapped, and the numbers achieving visa grants have increased rapidly over the past decade. Table 8.1 provides the stock figures for visa holders under the various programmes as at 31 December 2014.[20] In total, they numbered nearly 1.3 million visa holders with work rights, at a time when around 11.6 million people were employed in the Australian workforce.[21]

[17] Migration Regulations 1994 (Cth) sch 2, subclass 485. For a recent discussion of the experiences of temporary graduate visa holders, see Shanthi Robertson, 'Time and Temporary Migration: The Case of Temporary Graduate Workers and Working Holiday Makers in Australia' (2014) 40(12) *Journal of Ethnic and Migration Studies* 1915.

[18] Migration Regulations 1994 (Cth) sch 2, subclasses 417 and 462.

[19] Ibid sch 2, subclass 444. New Zealand citizens in Australia constitute a distinctive group amongst temporary migrants. Subclass 444 is a '[t]emporary visa permitting the holder to remain in Australia while the holder is a New Zealand citizen' (ibid sch 2, cl 444.511). Hence, holders of the 444 visa have an unrestricted ability to stay in Australia and in that sense are not 'temporary' migrants. Yet, they are said to hold a 'temporary visa' (see definition of 'temporary visa' in *Migration Act 1958* (Cth) s 30(2)) and, in key respects, do not enjoy the rights and entitlements of Australian permanent residents. See discussion in Peter Mares, *Temporary Migration and its Implications for Australia*, Papers on Parliament No 57 (Canberra, Parliament of Australia, 2012).

[20] All except the figures pertaining to the Seasonal Worker Program 3 are sourced from Department of Immigration and Border Protection, *Temporary Entrants and New Zealand Citizens in Australia—As at 30 June 2014* (Canberra, Department of Immigration and Border Protection, 2014).

[21] Australian Bureau of Statistics, *Labour Force, Australia—April 2015*, Cat No 6202 (Canberra, ABS, 2015) 7.

**Table 8.1: Visa-holders under Temporary Labour Migration Programmes in Australia (Number of Persons)**

| **Dedicated temporary labour migration programmes** | **Stock figures (31 December 2014)** |
|---|---|
| 457 visa scheme | 167,910 |
| Seasonal Worker Program | 2014[22] |
| **De facto temporary labour migration programmes** | |
| International student programme | 303,170 |
| Temporary graduate visa scheme | 19,510 |
| Working holiday programme | 160,940 |
| New Zealand citizens | 623,440 |
| **Total** | **1,276,984** |

Stock figures of visa holders under the temporary labour migration programmes do not equate to the actual number of temporary migrant workers. They count the number of visa holders with work rights—potential temporary migrant workers—but not all of these migrants exercise their work rights at the one time. We can presume that all migrants in the Seasonal Worker Program are employed, and the same is true for primary 457 visa holders. But some secondary 457 visa holders (dependents of primary 457 visa holders), international students, temporary graduates, working holiday makers and New Zealand citizens do not exercise their work rights at all during their period of temporary residency, and others may be employed only for part of their period of temporary residency. On the other hand, the above-mentioned list does not include the estimated 100,000 migrants working without legal permission who do fit the definition of temporary migrant workers.[23]

How many temporary migrant workers are in Australia then? Unfortunately, no precise answer can be given to this question. Though the trend is steadily upward, the number is likely to fluctuate, depending on factors such as the season, the phases of the education system, labour market conditions and the vagaries of policy decisions on possible paths to permanent

[22] The figure for the Seasonal Worker Program for the 2013–2014 financial year is found in Department of Employment, *Seasonal Worker Program Report: July to September 2014* (Canberra, Department of Employment, 2015) 7.

[23] Stephen Howells, *Report of the 2010 Review of the Migration Amendment (Employer Sanctions) Act 2007* (Canberra, Commonwealth of Australia, 2010) 12; see also Stephen Clibborn, 'Why Undocumented Immigrant Workers should have Workplace Rights' (2015) 26(3) *Economic and Labour Relations Review* 465.

residence. Nevertheless, the impact on the labour market is likely to be substantial.[24]

Some employment information is available for the dedicated schemes.[25] There is, however, a stark absence of labour market information on visa holders under the de facto temporary labour migration schemes. This gap highlights the 'invisibility' of de facto temporary labour migration schemes in policy discourse on temporary labour migration, reflecting a narrow view of temporary labour migration schemes that is confined to dedicated schemes. The case of international student workers illustrates this point. A review of media releases from the Commonwealth ministers responsible for higher education from 2010 to the present did not find a single media release which dealt with work performed by international students. This is despite the ubiquity of international student workers in Australian capital cities; the high proportion of international students engaged in paid employment (estimated to be more than half);[26] and the significance of international student workers to the Australian labour market. A 2011 estimate suggested that these workers constitute between one and two per cent of the total Australian workforce.[27]

## C. Labour Protection of Temporary Migrant Work

The key sources of labour protection for local workers are also available to temporary migrant workers. The principal statute is the Fair Work Act 2009 (Cth), which establishes a national system of labour law.[28] The Fair Work Act provides labour protection in various ways, including by providing a 'guaranteed safety net of fair, relevant and enforceable minimum terms and conditions' (s 3(b)) through the National Employment Standards which deal with 10 matters (s 61); modern awards which provide for minimum terms and conditions in particular industries or occupations (part 2-3); and national minimum wages (part 2-6), set at $17.29 per hour in the 2015–16 financial year.[29] The Fair Work Act also establishes the Fair

[24] For an early discussion of impact, see Graham Hugo, 'Temporary Migration and the Labour Market in Australia (2006) 37(2) *Australian Geographer* 211.

[25] Department of Immigration and Border Protection, *Subclass 457 Quarterly Report—Quarter Ending at 31 March 2015* (Canberra, Department of Immigration and Border Protection, 2015).

[26] 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.

[27] Reilly, 'Protecting Vulnerable Migrant Workers' (n 16) 185.

[28] Fair Work Act 2009 (Cth) ss 13–14.

[29] *Annual Wage Review 2014–2015* [2015] FWCFB 3500.

Work Ombudsman, the national enforcement agency for the Act,[30] while maintaining elements of the historic reliance on trade unions as enforcement actors[31] and providing for an individual complaints process.[32]

Another source of labour protection for workers in Australia (including temporary migrant workers) are anti-discrimination laws. Such laws are significant given discrimination in the workplace is often identified as a source of ill-treatment experienced by migrant workers.[33] Such discrimination against migrant workers can occur for various reasons (migrant status, nationality, skin colour, ethnicity, religious beliefs, level of English proficiency). Some of this discrimination will be illegal due to the statutory prohibitions against racial discrimination—these prohibitions generally make illegal discrimination based on colour, ethnicity and nationality in relation to employment.[34] Discrimination based on the level of English proficiency is not, however, prohibited, and discrimination based on religious beliefs is not uniformly prohibited in Australia, with such prohibition existing only at the Commonwealth level and in New South Wales.

It is unclear whether discrimination based on migrant status is illegal, and this poses complicated and unresolved issues concerning the scope of statutory prohibitions against racial discrimination. In most jurisdictions, these prohibitions do not explicitly cover migrant status. It is possible, however, that 'race'—which is inclusively defined in many instances[35]—may extend to migrant status. It is also possible that migrant status may still

[30] Pt 5-2. For research on the Fair Work Ombudsman, see Glenda Maconachie and Miles Goodwin, 'Does Institutional Location Protect from Political Influence? The Case of a Minimum Labour Standards Enforcement Agency in Australia' (2011) 46(1) *Australian Journal of Political Science* 105; Tess Hardy and John Howe, 'Too Soft or Too Severe? Enforceable Undertakings and the Regulatory Dilemma facing the Fair Work Ombudsman' (2013) 41 *Federal Law Review* 1; Tess Hardy, John Howe and Sean Cooney, 'Less Energetic But More Enlightened? Exploring the Fair Work Ombudsman's Use of Litigation in Regulatory Enforcement' (2013) 35 *Sydney Law Review* 565; John Howe, Tess Hardy and Sean Cooney, 'Mandate, Discretion and Professionalisation in an Employment Standards Enforcement Agency: An Antipodean Experience' (2013) 35 *Law & Policy* 81.

[31] Tess Hardy and John Howe, 'Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Employment Standards in Australia' (2009) 22 *Australian Journal of Labour Law* 306.

[32] Fair Work Act 2009 (Cth) s 539.

[33] ILO, *Towards a Fair Deal* 46–48; Bridget Anderson and Martin Ruhs, 'Migrant Workers: Who Needs Them? A Framework for the Analysis of Staff Shortages, Immigration, and Public Policy' in Martin Ruhs and Bridget Anderson (eds), *Who Needs Migrant Workers? Labour Shortages, Immigration and Public Policy* (Oxford, Oxford University Press, 2010) 27–28.

[34] Racial Discrimination Act 1975 (Cth) s 15; Anti-Discrimination Act 1977 (NSW) s 8; Anti-Discrimination Act 1991 (Qld) ss 13–15A; Equal Opportunity Act 1984 (SA) ss 30–34; Anti-Discrimination Act 1998 (Tas) s 22(1)(a); Equal Opportunity Act 2010 (Vic) ss 16–29; Equal Opportunity Act 1984 (WA) s 4; Discrimination Act 1991 (ACT) ss 10–17; Anti-Discrimination Act (NT) s 31; Fair Work Act 2009 (Cth) s 351.

[35] Anti-Discrimination Act 1977 (NSW) s 4; Anti-Discrimination Act 1991 (Qld) dictionary; Anti-Discrimination Act 1998 (Tas) s 3; Equal Opportunity Act 2010 (Vic) s 4; Equal Opportunity Act 1984 (WA) s 4; Discrimination Act 1991 (ACT) dictionary; Anti-Discrimination Act (NT) s 4.

be covered through nationality and/or national origin. The foregoing reasons are arguably why the Australian Human Rights Commission interprets the prohibition in the Commonwealth Racial Discrimination Act against discrimination on the basis of 'race, colour, descent or national or ethnic origin'[36] to include 'immigrant status'.[37]

This broad interpretation of the Racial Discrimination Act, as well as the explicit prohibitions against discrimination based on immigrant status in Tasmania and the Northern Territory,[38] raise a further question: does immigrant status extend to *temporary* migrant status given that an immigrant is usually understood as a person who migrates to live permanently in the host country?[39]

A further source of labour protection for temporary migrant workers under *dedicated* temporary labour migration programmes in Australia is immigration law: the Migration Act 1958 (Cth) and the Migration Regulations 1994 (Cth). Workers under the 457 visa scheme are required to be paid no less than the Temporary Skilled Migration Income Threshold stipulated by the Immigration Minister (presently AUD$53,900 per annum)[40] as a condition of approval of the nomination of the worker.[41] The terms and conditions of employment of the 457 visa worker are required to be 'no less favourable than the terms and conditions of employment that the person provides, or would provide, to an Australian citizen or an Australian permanent resident to perform equivalent work in the person's workplace at the same location'. The 'no less favourable' requirement is both a condition of approval of the worker's nomination[42] and also a sponsorship obligation.[43] The responsibility for administering these provisions lies primarily with the Immigration Department; whilst the Fair Work Ombudsman possesses inspection—but not enforcement—powers in relation to sponsorship obligations.[44]

## III. EMPLOYER NON-COMPLIANCE AND TEMPORARY MIGRANT WORKERS IN AUSTRALIA

When it comes to labour protection (regulation protecting working conditions), non-compliance refers to employer practices in breach of

[36] Racial Discrimination Act 1975 (Cth) s 9(1).
[37] Australian Human Rights Commission, *Racial Discrimination: Know Your Rights* (Sydney, AHRC, 2012) 2.
[38] Anti-Discrimination Act 1998 (Tas) s 3(e); Anti-Discrimination Act (NT) s 4(a).
[39] Oxford University Press, *Oxford Dictionaries* (2015), www.oxforddictionaries.com/us/definition/american_english/immigrant.
[40] Migration Regulations 1994 (Cth), Specification of Income Threshold and Annual Earnings 2015, IMMI 15/050.
[41] Migration Regulations 1994 (Cth) reg 2.72(10)(cc).
[42] Ibid reg 2.72(10)(c).
[43] Ibid reg 2.79.
[44] Migration Act 1958 (Cth) s 140V.

the standards laid down by such regulation.[45] It may involve technical breaches, but it is usually identified with the imposition, by the employer, of poor quality wages and working conditions. Non-compliance can involve practices in breach of the Fair Work Act such as underpayment of wages (eg below national minimum wage) and non-payment of wages (eg non-payment for probationary periods). It can also involve employer breaches of anti-discrimination law and, in the case of temporary migrant workers, breaches of protective regulation found in immigration law.

Employer non-compliance with labour protection is not uncommon in Australia. Indeed, a major review of data collected by the workplace enforcement agencies has concluded that 'achieving widespread employer compliance with minimum employment standards in Australia is a major and ongoing challenge in Australia',[46] and this viewpoint has been endorsed by the current Fair Work Ombudsman, Natalie James.[47] In a similar vein, earlier studies suggest that employer non-compliance with minimum employment standards 'has been both significant and sustained', and that it is likely to have increased in the wake of labour market deregulation and the decline of trade union strength.[48]

The problem of non-compliance appears to be particularly acute in relation to temporary migrant workers, which is highlighted by ongoing controversies surrounding the exploitation of these workers.[49] In 2012, the Fair Work Ombudsman established an Overseas Worker Team as a response to the growing number of complaints from temporary migrant workers.[50] In 2013–14, complaints from these workers accounted for more than 10 per cent of all complaints received by the ombudsman, an increase

[45] There are other types of non-compliance with labour laws including by workers and trade unions.

[46] John Howe, Tess Hardy and Sean Cooney, *The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's Activities from 2006–2012* (Melbourne, Centre for Employment and Labour Relations Law, Melbourne Law School, 2013) 10.

[47] Natalie James, *FWO's Response to the University of Melbourne's Research Report 'The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's Activities from 2006–2012'* (Canberra, FWO, 2014) 2.

[48] Glenda Maconachie and Miles Goodwin, 'Employer Evasion of Workers' Entitlements 1986–1995: Why, What and Whose?' (2010) 52(4) *Journal of Industrial Relations* 419, 420. See also Glenda Maconachie and Miles Goodwin, 'Recouping Wage Underpayment: Increasingly Less Likely' (2006) 41(3) *Australian Journal of Social Issues* 327.

[49] See, eg Abby Dinham, 'Dodgy Employers Investigated over "Exploitation" of 457 Visa Holders', *SBS*, 8 October 2014, www.sbs.com.au/news/article/2014/10/07/dodgy-employers-investigated-over-exploitation-457-visa-holders; Caro Meldrum-Hanna and Ali Russell, 'Slaving Away', *Four Corners*, 4 May 2015, http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm; Adele Ferguson and Klaus Toft, '7-Eleven: The Price of Convenience', *Four Corners*, 31 August 2015, http://www.abc.net.au/4corners/stories/2015/08/30/4301164.htm.

[50] Interview with Carey Trundle, Director, Overseas Worker Team, Fair Work Ombudsman, 25 February 2015.

of 25 per cent from 2012–13.[51] As an indication of the seriousness of the breaches involved, one third of the ombudsman's current legal actions involve migrant workers.[52] In the following sections, we set out evidence of non-compliance in relation to workers covered by Australia's principal dedicated temporary labour migration programme (the 457 visa programme), and by one of Australia's key de facto temporary labour migration programmes (the international student programme).

## A. 457 Visa Workers

The evidence concerning the extent of employer non-compliance in relation to primary visa holders under the 457 visa scheme is conflicting. One body of evidence suggests that non-compliance is *not* widespread. A Department of Immigration online survey of almost 4,000 457 visa workers in 2012 found that:

— Five per cent of the workers surveyed felt their employers were not meeting their sponsorship obligations; and
— Seven per cent of these workers indicated that their conditions were not equivalent to those of their Australian co-workers.[53]

Similarly, the 2014 Integrity Review, after assessing the data on cases monitored by the Immigration Department, observed that, '[w]ith the exception of 2011 (when it was lower), the overall level of serious non-compliance averaged a little over one per cent of all active cases'.[54]

On the other hand, figures from the Fair Work Ombudsman suggest a more significant problem of non-compliance. In 2013–14, the Ombudsman assessed 1,029 entities employing 1,902 primary visa holders under the 457 visa scheme. More than 20 per cent (243) of these entities were referred to the Immigration Department due to concerns that 338 employees were either not being paid their nominated salary and/or not working in their nominated occupation.[55] A similar story emerges from the audit by the Ombudsman of 560 primary visa holders on the 457 visa scheme, with

[51] Fair Work Ombudsman, *Annual Report: 2013–2014* (Canberra, FWO, 2014) 30.
[52] Nick Toscano, 'Many Migrants Exploited at Work, Audit Reveals', *The Age*, 30 May 2015, 7.
[53] Department of Immigration and Border Protection, *Filling the Gaps: Findings from the 2012 Survey of Subclass 457 Employers & Employees* (Canberra, Department of Immigration and Border Protection, 2014) 4.
[54] John Azarias, Jenny Lambert, Peter McDonald and Katie Malyon, *Robust New Foundations: A Streamlined, Transparent and Responsive System for the 457 Program: An Independent Review into Integrity in the Subclass 457 Program* (Canberra, Department of Immigration and Border Protection, 2014) 85.
[55] Fair Work Ombudsman, *Annual Report: 2013–2014* 30.

20 per cent of these workers suspected of not being paid their nominated salary and/or not working in their nominated occupation.[56]

The evidence from monitoring by the Fair Work Ombudsman is consistent with reports from investigative journalists and trade unions. In its submission to a 2015 Senate Inquiry into temporary work visas, the Australian Council of Trade Unions (ACTU) compiled a list of cases involving non-compliance in relation to 457 visa workers, arguing that these cases point to a pattern of abuse.[57]

It should be remembered that not all discrimination against 457 visa workers is illegal, and whether it is depends very much on the reason for the discrimination. That noted, the 2012 Immigration Department survey indicates that overt discrimination in the workplace against 457 visa workers only affects a minority of these workers. Whilst 16 per cent of the survey's respondents stated that they had been discriminated against based on skin colour, ethnic origin and/or religious beliefs in the past 12 months, only 0.5 per cent indicated that such discrimination occurred *in the workplace*.[58] Of the 5 per cent of respondents who felt that their sponsors were not meeting their obligations, less than 0.5 per cent thought this was due to discrimination against them on the basis of being a migrant.[59]

It should be emphasised that, even if non-compliance affects a minority of 457 visa workers, this nevertheless points to serious consequences for workers. The ACTU submission to the Senate inquiry into temporary work visas includes frightening accounts of gross underpayment and non-payment (including non-payment for six weeks), employer provision of sub-standard accommodation (eg almost 30 workers living in a five-bedroom house) and extreme overwork (eg 6–7 days a week, up to 10–12 hours a day).[60] There are some horrific instances of exploitation of 457 visa workers, some of which have been the subject of legal proceedings. One illustration of this is the case of *Ram v D&D Indian Fine Foods Pty Ltd*,[61] which concerned events that took place between 4 August 2007 and 4 December 2008. In this case, Federal Circuit Court Judge Driver said the following:

> I find that Mr Ram, a man who was functionally illiterate, spoke virtually no English and had no contacts in the Australian community, was brought from India to work 12 hours per day, seven days per week in the respondents' restaurant. Over 16 months, Mr Ram was not paid, beyond the small foreign exchange transfers sent to his wife, and received no leave. The respondents built a facade upon

[56] Toscano, 'Many Migrants Exploited at Work' (n 52).

[57] Australian Council of Trade Unions, *Submission to the Senate Inquiry into the Temporary Work Visa Program* (1 May 2015) 62–68, app 4.

[58] Department of Immigration and Border Protection, *Filling the Gaps* (n 53) 31.

[59] Ibid.

[60] ACTU, *Submission to the Senate Inquiry* 62–68, app 4.

[61] *Ram v D&D Indian Fine Foods Pty Ltd* [2015] FCCA 389 (Federal Circuit Court, 27 March 2015, Driver J).

> sham documents, to deceive the Department of Immigration and the ATO and attempted to deceive this Court, in an effort to create the illusion that there was an employment arrangement in accordance with Australian law.[62]

### B. International Student Workers

The 'invisibility' of international student work in terms of policy discourse explains why there is less systematic evidence on the problem of non-compliance as it relates to international student workers. The available evidence is, however, disturbing. It points to extensive non-compliance with labour protection in relation to international student work, to an extent that is clearly greater than that for 457 visa workers. For international students, securing 'safe and fair' employment is a pressing challenge.[63]

A 2005 study based on 200 interviews by Marginson et al found that 58 per cent of interviewees who reported an hourly rate were paid under the minimum wage, earning between $7 and $15 per hour.[64] The authors argue that all students, when employed, can experience 'ultra-exploitation and other problems at work', but international students seem to experience worse treatment.[65] An ethnographic study conducted by Baas in 2005 cited extensive breaches of the law, which were regarded as normal by many of the Indian international students involved in the study.[66] Similarly, recent reports of the experiences of international students in the cleaning industry point to phenomena such as poor working conditions, sham contracting and cash-in-hand arrangements that involve underpayments and undercutting of collective agreements.[67]

The submission of the Victorian Human Rights and Equal Opportunity Commission to the Victorian Government Taskforce on Overseas Student Experience, which documented the racism and exploitation suffered by international student workers in Victoria, as reflected from the complaints it received, indicates that discrimination in breach of laws is another area of non-compliance.[68] Studies suggest that international students do face discrimination in the labour market with some elements of this reported

[62] Ibid para 76.
[63] Australian Human Rights Commission, *Principles to Promote and Protect the Human Rights of International Students* (Sydney, AHRC, 2012) 5.
[64] Marginson et al, *International Student Security* (n 26) 136.
[65] Ibid 16.
[66] Michiel Baas, *Imagined Mobility: Migration and Transnationalism among Indian Students in Australia* (London, Anthem Press, 2012) ch 5.
[67] Victorian TAFE International and United Voice, *Taken to the Cleaners: Experiences of International Students Working in the Australian Retail Cleaning Industry* (Melbourne, United Voice, 2012); United Voice, *A Dirty Business: The Exploitation of International Students in Melbourne's Office Cleaning Industry* (Melbourne, United Voice, 2013).
[68] Victorian Human Rights and Equal Opportunity Commission, *Submission to Victorian Overseas Student Taskforce* (2008).

discrimination likely to be illegal (based on skin colour, religious beliefs, ethnicity), while other elements are not necessarily so (perceived lack of English proficiency, lack of permanent residence). They further indicate that such discrimination tends to occur at the point of entry to the workplace—securing a job—rather than through inferior working conditions within the workplace. In the Marginson et al study, a small number of respondents said that they experienced overt discrimination within the labour market, with most references to discrimination relating to the inability to find decent work.[69] That discrimination against international students tends to occur in relation to securing a job does not mean that it is not a source of vulnerability. On the contrary, such discrimination can produce vulnerability by channelling international student workers into precarious jobs, including those with illegal working conditions, through their resignation to inferior working conditions.

## IV. THE UNDERLYING CAUSES OF NON-COMPLIANCE IN RELATION TO TEMPORARY MIGRANT WORK IN AUSTRALIA

What explains the non-compliance with labour protection in relation to 457 visa workers and international student workers? A useful starting point, often stressed in the literature, concerns the vulnerability of particular groups of workers. Particular groups of workers are more vulnerable to employer non-compliance with labour protection. They include young workers, female workers[70] and those engaged in precarious work (eg low-wage work).[71] Migrant workers—including temporary migrant workers—count amongst such 'at-risk' workers.

Vulnerability to employer non-compliance can derive from several different sources. It is associated most closely in the literature on vulnerable workers with personal attributes and circumstances such as age, skill level and social support.[72] More recently, a vigorous literature has sprung up to stress the special impact of immigration regulations on the vulnerability of different groups of temporary migrant workers, thereby contributing to their concentration in precarious work.[73] This centres on the shortfall of rights

[69] Marginson et al, *International Student Security* (n 26) 138–42.

[70] Maconachie and Goodwin, 'Employer Evasion' (n 48).

[71] See David Weil, 'Enforcing Labour Standards in Fissured Workplaces: The US Experience' (2011) 22 *Economic and Labour Relations Review* 33, 34–35.

[72] Anna Pollert and Andy Charlwood, 'The Vulnerable Worker in Britain and Problems at Work' (2009) 22(3) *Work, Employment and Society* 343.

[73] Luin Goldring, Carolina Berinstein and Judith K Bernhard, 'Institutionalizing Precarious Migratory Status in Canada' (2009) 13 *Citizenship Studies* 239; Bridget Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24(2) *Work, Employment and Society* 300; Fudge, 'Precarious Migrant Status' (n 3). For the fullest application of the argument to Australia, particularly in connection with 457 visa workers, see Berg, *Migrant Rights at Work* (n 14).

and entitlements experienced by temporary migrant workers compared to those enjoyed by citizens (or permanent residents). Goldring, Berinstein and Bernhard have characterised this shortfall as 'precarious migrant status' and suggested that it includes dimensions such as:

— limited work authorisation
— limited right of residence
— dependence on a third party for the right of residence, and
— limited access to public goods.[74]

The two sources of vulnerability are not completely distinct. They can interact and indeed overlap, as can be seen with factors such as financial pressure, which is a characteristic of most workers under capitalist employment relations, but is often exacerbated for temporary migrant workers, who may incur high levels of debt as a result of their migration pathway, are distant from family support, and are generally excluded from access to social security and other forms of social support in the host country. Similarly, a lack of familiarity with employment regulations can be linked with youth and inexperience but also with recent arrival from a country with distinct customs, traditions and forms of labour protection.[75]

## A. Vulnerability of 457 Visa Workers

The extent of vulnerability experienced by 457 visa workers is contested. On the one hand, 457 visa workers may be regarded as being insulated against vulnerability because they are highly skilled workers in demand from employers. This, however, is often an appearance rather than the reality. Though many primary visa holders are indeed classified as 'skilled', this is not necessarily true of secondary visa holders who are working in Australia. Moreover, even for primary visa holders the definition of skilled occupations is broad, and can allow room for the employment of less skilled workers.[76] Similarly, the requirement of labour market testing is subject to broad-ranging exceptions relating to skills and occupations and obligations under international trade agreements.[77]

[74] See Goldring et al, 'Institutionalizing Precarious Migratory Status'.

[75] Malcolm Sargeant and Eric Tucker, 'Layers of Vulnerability in Occupational Health and Safety for Migrant Workers: Case Studies from Canada and the United Kingdom' (2010) 7(2) *Policy and Practice in Occupational Health and Safety* 51; Sylvia Yuan, Trudie Cain and Paul Spoonley, *Temporary Migrants as Vulnerable Workers: A Literature Review* (Wellington, Ministry of Business, Innovation and Employment, 2014).

[76] The list of eligible occupations is provided by the Consolidated Sponsored Occupations List, https://www.border.gov.au/Trav/Work/Work/Skills-assessment-and-assessing-authorities/skilled-occupations-lists/CSOL.

[77] Migration Act 1958 (Cth) ss 140GBA, 140GBC.

On the other hand, many 457 visa workers are subject to definite sources of vulnerability associated with both their personal characteristics and circumstances and their precarious migrant status. For example, one important aspect of vulnerability is a lack of understanding of workplace entitlements.[78] This lack of understanding may result from the fact that some 457 visa workers are new entrants to the Australian labour market and, therefore, are only just beginning to gain knowledge of the laws that apply to their work—a point that applies especially to 457 visa workers who have just migrated to Australia. It may also result from a lack of proficiency in the English language. It is also likely to result from the lack of proper information concerning their workplace entitlements.

457 visa workers may share with local workers sources of vulnerability such as lack of understanding of workplace entitlements and lack of access to information concerning such entitlements, but this combines with sources that are distinctive to temporary migrant workers. As Piore has argued, many temporary migrant workers operate with a 'dual frame of reference' that assesses the wages and conditions they experience in the receiving country with reference to those in their country of origin.[79] Given global disparities in wealth, many 457 visa workers are migrating from countries that have a large 'wage gap' with Australia. This may lead to a willingness to accept conditions that are in breach of Australian laws in the belief that these conditions are superior to those that would be experienced in their country of origin, a willingness that might be openly exploited by some employers.[80] Another circumstance that might compound this source of vulnerability is the extent to which 457 visa workers are 'remittance workers' who transfer a considerable portion of their wages to their country of origin.[81]

With respect to precarious migrant status, the main factor determining the 'structural vulnerability'[82] of 457 visa workers to non-compliance is the high level of dependence on the sponsoring employer built into the design of the scheme. This dependence stems from various circumstances, the most important of which is dependence on a third party for the right of residence. As the Deegan Review states:

> Despite the views of some employers and employer organisations, Subclass 457 visa holders are different from other employees in Australian workplaces. They

[78] As the 2014 Integrity Review of the 457 visa programme states, '457 visa holders who have a good understanding of their workplace rights are less susceptible to exploitation': Azarias et al, *Robust New Foundations* (n 54) 75.

[79] Michael Piore, *Birds of Passage: Migrant Labour and Industrial Societies* (Cambridge, Cambridge University Press, 1979).

[80] Anderson and Ruhs, 'Migrant Workers' (n 33) 29.

[81] Yuan et al, *Temporary Migrants as Vulnerable Workers* (n 75) 38.

[82] Mary Crock, Sean Howe and Ron McCallum, 'Conflicted Priorities? Enforcing Fairness for Temporary Migrant Workers in Australia' in Costello and Freedland (eds), *Migrants at Work* (n 8) 437–38.

> are the only group of employees whose ability to remain in Australia is largely dependent upon their employment and to a large extent, their employer. It is for these reasons that visa holders are vulnerable and are open to exploitation.[83]

In this context, the ability of the sponsoring employer to terminate the employment of the 457 visa worker can amount to a power to remove the worker from Australia. Not surprisingly, the Deegan Review found that there is a perception amongst 457 workers that the sponsoring employer can cancel their visas, despite this power formally residing with the Immigration Department.[84]

Dependence is also conditioned by the long-term aims of workers, who often wish to stay and work in Australia beyond the term of their current visas. As these aims need to be realised in an increasingly employer-driven migration programme that requires employer sponsorship for the main temporary and permanent labour migration visas, this can result in further dependence on the sponsoring employer. This is clearly the case with 457 visa workers seeking another 457 visa. Most of the 457 visa workers seeking a pathway to permanent residence[85] rely on the Employer Nomination Scheme or the Regional Sponsored Migration Scheme, both of which depend on the sponsorship of an employer.[86] This formal dependence sits alongside a general perception that employer sponsorship is necessary for a successful permanent residence application. Both can result in a willingness to work in breach of workplace laws. As the Deegan Review notes:

> where a visa holder has permanent residency as a goal that person may endure, without complaint, substandard living conditions, illegal or unfair deductions from wages, and other forms of exploitation in order not to jeopardise the goal of permanent residency.[87]

Cutting across the various sources of dependence is the shadow of irregular status stemming from another aspect of precarious migrant status: limited work authorisation. It is a cruel irony that if a 457 visa worker is engaged by an employer in violation of protective laws, this can, in fact, strengthen the hand of the employer. For instance, 457 visa workers who work in a job classification different (most likely lower) from that stated in their visas would be in breach of Visa Condition 8107. Not only would the visa be

[83] Visa Subclass 457 Integrity Review, *Final Report* (Canberra, Commonwealth of Australia, 2008) 69 ('Deegan Review').

[84] Visa Subclass 457 Integrity Review, *Issues Paper #3: Integrity/Exploitation* (Canberra, Commonwealth of Australia, 2008) 27.

[85] Visa Subclass 457 External Reference Group, *Final Report to the Minister for Immigration and Citizenship* (Canberra, Commonwealth of Australia, 2008) 23; Department of Immigration and Border Protection, *Filling the Gaps* (n 53) 39–40.

[86] See Deegan Review (n 83) 50.

[87] Ibid 49.

liable to cancellation in this scenario,[88] but the worker would also be committing a criminal offence.[89]

More than this, visa breaches (eg working in a job classification different from that stated in the visa) can profoundly impact upon the enforceability of labour laws. The limited Australian case law adopts a 'non-protection' approach,[90] with authorities disturbingly finding that breaches of a visa have the consequence of voiding any contract of employment, thereby resulting in the non-application of labour laws.[91]

These sources of vulnerability highlight the constrained ability of many 457 visa workers to enforce their rights. 457 visa workers also face other barriers in enforcing their legal rights. Under the Fair Work Act, complaints through legal proceedings remain a key avenue for enforcing rights, alongside the enforcement activities of the Fair Work Ombudsman and trade unions. But legal proceedings imply procedural hurdles and legal costs that are generally 'loaded against the worker who must carry the claim against the employer'.[92]

A different kind of constraint operates in relation to breaches of labour protection under the Migration Act and the Migration Regulations. As explained earlier, employers of 457 visa workers are subject to various sponsorship obligations including the requirement to provide them 'no less favourable' working conditions. Breaches of these obligations cannot, however, be enforced by the 457 visa workers or their representatives (eg trade union officials), as the power to enforce resides solely with the Immigration Minister and the Immigration Department.[93] While having a formal right to enforce through a complaint-based system is problematic, having no right to enforce is even more so.

## B. Vulnerability of International Student Workers

International students can be seen as a particularly vulnerable group in the labour market, as a result of personal characteristics such as youth, limited employment experience and low English-language proficiency, as well

[88] Migration Act 1958 (Cth) s 116.

[89] Ibid s 235.

[90] Elaine Dewhurst, 'The Right of Irregular Immigrants to Back Pay: The Spectrum of Protection in International, Regional and National Legal Systems' in Costello and Freedland (eds), *Migrants at Work* (n 8) 217–19.

[91] See discussion in Graeme Orr, 'Unauthorised Workers: Labouring Beneath the Law' in Christopher Arup et al, *Labour Law and Labour Market Regulation* (Sydney, Federation Press, 2006); Reilly, 'Protecting Vulnerable Migrant Workers' (n 16).

[92] Chris Arup and Carolyn Sutherland, 'The Recovery of Wages: Legal Services and Access to Justice' (2009) 35 *Monash University Law* Review 96, 105.

[93] Migration Regulations 1994 (Cth) regs 140K–140RB.

as aspects of precarious migrant status such as insecure financial position, insecure residence status and the impact of restrictions on work entitlements.[94] Some attributes are shared with local workers, especially local students, but others appear distinctive to their position as international students.[95]

International students are usually new entrants to the Australian labour market. This circumstance is often compounded by the relative youth of international students—a fact that can be a source of vulnerability due to limited labour market experience and the perception of some employers that young workers are more amenable to poor working conditions.

As with 457 visa workers, there can be a lack of understanding of their workplace rights due to lack of access to adequate information concerning these rights and to poor levels of English proficiency. Like 457 visa workers, international student workers can also experience vulnerability due to their precarious migrant status. Limited access to public goods, particularly the lack of access to student allowances (Austudy payments) and the requirement to pay (substantial) international student fees, can exacerbate the financial pressure faced by these workers.

In addition, international students—except for those on the Postgraduate Research (Subclass 574) visa who have unlimited work rights—are subject to Visa Condition 8105, which stipulates that 'the holder must not engage in work in Australia for more than 40 hours a fortnight during any fortnight when the holder's course of study or training is in session'.[96] In some cases, breach of this restriction can enable employers to leverage working conditions in breach of labour laws. As the Knight Review report states:

> 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.[97]

The precariousness resulting from breaches of the working hours visa condition also contributes to vulnerability in relation to the enforcement of workplace rights of international student workers. Like 457 visa workers, international student workers confront case law which holds that visa breaches translate into the non-enforceability of labour protection;

[94] Reilly, 'Protecting Vulnerable Migrant Workers' (n 16) 186–95; Berg, *Migrant Rights at Work* (n 14) 97–101.

[95] Reilly, 'Protecting Vulnerable Migrant Workers' (n 16).

[96] Migration Regulations 1994 (Cth) sch 8, Visa Condition 8105.

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

international student workers may also fear that complaints concerning these rights might result in the Immigration Department being notified of their visa breaches, thereby jeopardising their ability to stay in Australia.[98] These sources of vulnerability combine with the difficulties that all workers generally experience in bringing legal proceedings to produce formidable hurdles to international student workers enforcing their workplace rights.

A simple comparison of international students and 457 visa workers suggests that the former are less vulnerable than the latter. In particular, international students do not seem to be as susceptible to the impact of precarious migrant status. Though some suffer an impact, vulnerability due to precarious migrant status does not generally apply to *all* international student workers; not all international student workers experience financial pressures due to limited access to public goods, and clearly not all international student workers experience vulnerability upon breaching the working hours restrictions in their visas, restrictions that still permit substantial part-time work. Moreover, since 2013, the harshness of these restrictions has been ameliorated as mandatory cancellation of visas has been replaced with discretionary cancellation.[99]

Moreover, unlike employer-sponsored migrant workers like the 457 visa workers, international student workers are not dependent upon employment and their employers for continued residence in Australia. They also experience less precariousness arising from a desire to obtain permanent residence than 457 visa workers: for international student workers who aspire to permanent residency, their employer when they are students is unlikely to be the employer sponsoring their permanent residence applications. Further, the wage gap between the country of origin and Australia is less salient, because international student workers are—overwhelmingly—coming to Australia with the primary motivation to study rather than to engage in paid work. Correspondingly, it will be rare for international student workers to be 'remittance' workers; indeed, the flow of money would typically be in the opposite direction, with families in the country of origin providing money to fund the education of international student workers.

The argument that international students are less vulnerable than 457 visa workers may appear paradoxical in the light of the evidence that wages and working conditions are poorer and that employer non-compliance is more widespread for international students (as starkly illustrated by the systemic under-payment of international student workers by 7-Eleven franchisees).[100] The answer to this apparent paradox can be found by looking more closely at the industries in which international students and 457 visa workers are employed.

[98] Andrew Stewart and Rosemary Owens, *The Nature, Prevalence and Regulation of Unpaid Work Experience, Internship and Trial Periods in Australia* (Canberra, FWO, 2013) 181.
[99] Migration Legislation Amendment Regulation 2013 (No 1) repealing reg 2.43(2)(b).
[100] Ferguson and Toft, '7-Eleven' (n 49).

## V. EMPLOYER PRACTICES IN POORLY REGULATED INDUSTRIES

The vulnerability of temporary migrant workers is an attribute of their workplace relationships—particularly with their employers. Given this, analysis of employer non-compliance in the case of 457 visa holders and international students needs to reach beyond factors of vulnerability located at the level of the workers, whether this is framed in terms of personal characteristics, such as lack of knowledge of employment standards, or in terms of precarious migrant status. Such factors define the *risk* that workers will experience precarious working conditions based on employer non-compliance. Whether that risk is realised, however, depends on employer labour-use practices. It is, therefore, necessary to look directly at employers and the broad range of factors that shape their labour-use practices.[101]

Employer practices are sometimes considered just at an enterprise or workplace level, in effect at an individual level. Thus, ministerial accounts of the exploitation of 457 visa workers often lay the blame on 'unscrupulous employers'[102] and 'rogue employers'[103] 'who do not operate within the law'.[104] These are employers that deviate from the norm in a situation where 'most employers do the right thing'.[105] These accounts are correct to place the actions of employers at the centre of non-compliance: it is the duty of employers to ensure compliance with laws that protect working conditions. It is not up to the workers to ensure that the practices of their employers are legally compliant. Rather it is the duty of employers to take affirmative steps to ascertain their obligations to their employees and to fulfil these obligations. As Judge Riley of the Federal Circuit Court stated, 'it is incumbent upon employers to make all necessary enquiries to ascertain their employees' proper entitlements and pay their employees at the proper rates'.[106] These governmental accounts are also right to state that

[101] Jill Rubery and Frank Wilkinson (eds), *Employer Strategy and the Labour Market* (Oxford, Oxford University Press, 1994); Ruhs and Anderson (eds), *Who Needs Migrant Workers?* (n 33).

[102] Christopher Evans, Minister for Tertiary Education, Skills, Jobs and Workplace Relations, 'Australian Jobs and Foreign Workers must be Protected', media release, 16 February 2011.

[103] Brendan O'Connor, Minister for Immigration and Citizenship, and Bill Shorten, Minister for Employment and Workplace Relations, 'Fair Work Inspectors to Monitor Rogue 457 Employers', media release, 18 March 2013.

[104] Peter Dutton, Minister for Immigration and Border Protection, and Michaelia Cash, Assistant Minister for Immigration and Border Protection, 'Illegal Workers Targeted Nationally', media release, 28 May 2015.

[105] Chris Bowen, Minister for Immigration and Citizenship, 'First Ever Termination of a Labour Agreement', media release, 15 February 2012. See also Michaelia Cash, Assistant Minister for Immigration and Border Protection, 'Work Visa Scams: Don't Pay the Price', media release, 1 October 2014, which states that 'Minister Cash said although the overwhelming majority of people do the right thing, it is a small minority who don't abide by their obligations or attempt to defraud our migration programs'.

[106] *Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (In Liquidation) & Ors* [2013] FCCA 52, para 35 (24 April 2013).

employers have not just a legal duty, but also a moral duty to treat workers with respect and dignity and to promote fairness in the workplace and the labour market.

These accounts, however, neglect the fact that employer non-compliance is not just the product of individual attitudes or moral dispositions; instead it is heavily influenced by structural or contextual conditions. One crucial structural factor is what can be loosely described as the industry setting. It is increasingly recognised in the literature that employer labour-use practices are nestled in industry settings. Thus, employer non-compliance is concentrated in what could be called 'hazardous' industries, while other industries enjoy high levels of employer compliance.[107] The list of industries currently subject to national campaigns from the Fair Work Ombudsman indicate which industries are experiencing pressing issues of non-compliance. They include:

— hospitality industry;
— children's services;
— agricultural industry with a focus on the 'Harvest Trail';
— building and construction industry;
— cleaning industry;
— textile, clothing and footwear industry.[108]

Why are industry settings important as a structural factor? They express relations of inter-employer competition (and learning), which link together employers in particular industries. They often express common technical or technological imperatives or common features to do with work organisation, job and task descriptions, relative importance of labour costs, and size. In addition, employers are often connected at the industry level in employer associations and in dealings with trade unions, and, even if they stand outside formal industrial relations, they may orient their employment practices in terms of what they identify as custom and practice in the local industry.

One aspect of industry settings, which is particularly important in Australia, is that it positions employers similarly in terms of labour market regulation. The main vehicle of protective regulation in Australia has been through detailed awards, generally structured at an industry level, and the differences amongst such awards have created a complex patchwork of rights and entitlements. The process of labour market deregulation since the early 1990s, driven by dominant philosophies of neo-liberalism, has not simplified the industry pattern of protective regulation. On the contrary, labour market deregulation has itself proceeded according to distinct

[107] Maconachie and Goodwin, 'Employer Evasion' (n 48); Weil, 'Enforcing Labour Standards' (n 71) 35–36.

[108] See Fair Work Australia, 'National Campaigns', www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/national-campaigns.

industry patterns and continues to produce distinct results.[109] As a result, some industries are characterised by effective protective regulation, producing high minimum labour standards, and opportunities for employee voice through union membership and enterprise bargaining. Other industries appear more poorly regulated in the sense that award reliance is high and minimum labour standards are low, often marked by low wages and extensive opportunities for use of casual employment and other forms of precarious employment and subcontracting.[110]

The divergence between well-regulated and poorly regulated industries provides a platform for industry or sectoral patterns of employer non-compliance.[111] Not only are standards lower in the poorly regulated industries, they also tend to be those industries with high levels of employer non-compliance. The absence of trade unions deprives workers of the main collective mechanism for enforcing workplace rights, leaving workers either to acquiesce when suspecting breaches of their rights or, in rarer instances, to rely upon individual enforcement strategies which suffer from formidable barriers and questionable effectiveness. Another factor is the dominance of casual work and other forms of precarious employment, which conceal and indeed often legitimise poor treatment of workers.[112] Generally understood by both employer and employee as payment by the hour without the accrual of any rights and entitlements, casual work readily spills over into informal or illegal work, which is off the books and remunerated according to what the employer rather than labour law deems fair and appropriate.

Employer non-compliance in 'hazardous' industries can affect many, though by no means all, workers in such industries. It particularly affects vulnerable workers, including the two groups of temporary migrant workers analysed in this chapter. As noted above, employer non-compliance affects a significant minority of 457 visa holders. These workers share a common vulnerability as a result of their precarious migrant status, which produces substantial dependence on the employer. The extent to which this vulnerability leads to poor quality or precarious work, founded on employer non-compliance, depends heavily on factors associated with the industries in which they are employed.

457 visa holders are spread through a number of industries. In the latest statistics (31 March 2015), the top five industry divisions employing these visa holders were: (1) accommodation and food services; (2) construction;

[109] Mark Bray and Elsa Underhill, 'Industry Differences in the Neoliberal Transformation of Australian Industrial Relations' (2009) 40(5) *Industrial Relations Journal* 372.

[110] Ibid. See also Campbell and Tham, 'Labour Market Deregulation' (n 14).

[111] David Weil, 'Rethinking the Regulation of Vulnerable Work in the USA: A Sector-Based Approach' (2009) 51(3) *Journal of Industrial Relations* 411; Maconachie and Goodwin, 'Employer Evasion' (n 48) 429–35.

[112] Maconachie and Goodwin, 'Employer Evasion' (n 48) 423–24.

(3) other services; (4) health care and social assistance; and (5) information media and telecommunications.[113]

Existing studies, both quantitative and qualitative, indicate that the work experiences of 457 visa holders vary dramatically according to the industry in which they are employed.[114] For example, the general field of health care and social assistance seems to produce relatively few concerns. We conducted an extensive case study in this sector in 2012, which involved in-depth interviews with 26 registered nurses on 457 visas, predominantly in public hospitals. The study found that these nurses were well integrated within the health care workforce in terms of formal wages and conditions, with little evidence of employer non-compliance with minimum employment standards (even though there was precariousness in other aspects of their migration pathways). This situation could be attributed above all to features of the industry such as good labour regulation, based on high levels of union membership amongst nurses, with union density exceeding 90 per cent, and effective bargaining with large employers, many in the public sector, who were committed to decent wages and working conditions.[115] Though key informants spoke of problems in the past, especially in association with the registered individual contracts allowed during the Howard government (1996–2007), and problems continued to be evident in parts of the aged care sector, in general the situation was relatively good.[116] Other industries such as mining may also offer good employment conditions with little employer recourse to non-compliance.[117]

On the other hand, there are several industries in which non-compliance is clearly more of a problem for 457 workers. It is noteworthy that the three main industry divisions in which 457 visa holders are employed are also 'hazardous' industries known for high levels of non-compliance for all workers. As a result, 457 visa holders have been caught up in practices prevalent within these industries. The 2014 Integrity Review found that the level

[113] Department of Immigration and Border Protection, *Subclass 457 Quarterly Report*. The occupational distribution tells a similar story; thus, the top five nominated occupations of these visa holders were: (1) cook; 2) café or restaurant manager; (3) marketing specialist; (4) chef; (5) developer programmer (ibid 15).

[114] Department of Immigration and Border Protection, *Filling the Gaps* (n 53). A qualitative study of Indian 457 visa holders contrasts experiences in the IT sector, where working conditions were generally good, with the experiences of unionised blue-collar workers and with the highly precarious work of those in the hospitality sector, 'who had little union representation and faced a combination of factors that aggravated their situation of precariousness': Selvaraj Velayutham 'Precarious Experiences of Indians in Australia on 457 Temporary Work Visas' (2013) 24(3) *Economic and Labour Relations Review* 359.

[115] Boese et al, 'Temporary Migrant Nurses' (n 9) 333.

[116] Ibid; Nick Blake, 'Nursing Migration: Issues of Equity and Balance' (2010) 18(2) *People and Place* 19.

[117] Susanne Bahn, 'Workers on 457 Visas: Evidence from the Western Australian Resources Sector' (2013) 39(2) *Australian Bulletin of Labour* 50.

of non-compliance with sponsorship obligations is significantly higher in construction, hospitality and retail.[118] The review said that the hospitality, restaurant and tourism industries 'are industries in which the level of sanctioning is high and in which there is scope for nefarious practices'.[119] The 2012 survey of employers sponsoring 457 visa holders revealed a similar industry pattern, with employers in accommodation and food services, and to a lesser extent construction and manufacturing, citing access to behavioural traits such as 'increased loyalty', 'hard work' and 'better attitude' as benefits of using the programme,[120] traits that can often be a proxy for a 'greater willingness to do the job *on the employer's terms*'.[121] (emphasis added)

As noted above, employer non-compliance is widespread in connection with international students. International students are more concentrated than 457 visa holders and the industries in which they are concentrated, such as accommodation and food services, cleaning and retail, are precisely those that are identified as poorly regulated and 'hazardous' industries. As a result, the risks associated with their vulnerability tend to be readily translated into precarious working conditions.

Unfortunately, detailed studies of work and working conditions for international students are lacking in Australia. However, evidence for their concentration in a small range of industries, starting with cafes, restaurants and retail outlets, is straightforward.[122] This industry distribution maps well with compelling evidence of poor wages and working conditions, including those that are associated with employer non-compliance. Specific industry studies are few, though a union, United Voice, has produced some stimulating studies in the cleaning industry.[123] Our own case study of cafes, restaurants and takeaway food services in the Melbourne CBD included in-depth interviews with 21 international students, which revealed poor working conditions and extensive non-compliance. Most jobs held by the 21 interviewees were classified as casual, almost half could be described as informal jobs (without a tax file number, with cash-in-hand payments), and all but one of the interviewees had experience of some sort of underpayment or non-payment of wages. Many of the international students that we interviewed complained of discrimination in recruitment practices, which in effect pushed them into poor quality or precarious jobs in a narrow range

[118] Azarias et al, *Robust New Foundations* (n 54) 87.
[119] Ibid 43.
[120] Chris Wright and Andreea Constantin, *An Analysis of Employers' Use of Temporary Skilled Visas in Australia*, Working Paper (Sydney, University of Sydney, 2015).
[121] Anderson and Ruhs, 'Migrant Workers' (n 33) 30.
[122] Marginson et al, *International Student Security* (n 26).
[123] Victorian TAFE International and United Voice, *Taken to the Cleaners*; United Voice, *A Dirty Business*.

of industries. These findings are consistent with those in a 2015 report by the Fair Work Ombudsman on restaurants, cafes and catering which found 58 per cent of the 1,066 audited businesses failed to meet all their workplace obligations, with most breaches relating to wage entitlements.[124]

To sum up, for both 457 visa holders and international students, experiences of employer non-compliance seem to be based on an interaction of factors of vulnerability with employer practices in poorly regulated industries.

## VI. CONCLUDING THOUGHTS

The analysis in this chapter, using the Australian examples of 457 visa holders and international students, suggests that the problem of non-compliance with protective regulation relating to temporary migrant workers results from the interaction of their vulnerability—including their precarious migrant status—with employer practices of poorly regulated industries. We reject the common explanations of employer non-compliance that are exclusively focused at the level of the individual, either the vulnerable individual migrant worker or the individual employer, who is seen as a 'rogue' employer who has stepped outside the mainstream moral consensus. These explanations are too narrow and cast non-compliance as aberrant. Instead, we argue that employer non-compliance must be seen as shaped by structural preconditions and causes (see Table 8.2).

**Table 8.2: Non-compliance as Aberration Versus Non-compliance as Structural**

| Non-compliance as aberration | Non-compliance as structural |
|---|---|
| Causes arise from outside the law<br>Engaged by employers that are not part of the mainstream | Causes shaped by the law<br>Attends many employment relationships to a greater or lesser degree |
| State of exception in labour markets where legality is the norm | Subversion of labour protection is the norm in key parts of the labour market |

Key implications follow from viewing non-compliance as structural in relation to temporary migrant workers. The first is a rejection of an inevitability thesis that would condemn temporary migrant work to the realm of illegal working conditions. If non-compliance arises from particular immigration

[124] See Fair Work Ombudsman, *National Hospitality Industry Campaign: Restaurants, Cafes and Catering (Wave 2)* (Canberra, FWO, 2015) 4.

and labour market structures, these structures are amenable to change—the choices made by the receiving state, its political community and employers shape these structures. Second, given that the structural risk of non-compliance in relation to temporary migrant workers stems from the interaction of their vulnerability, particularly their precarious migrant status, and employer practices in poorly regulated labour markets, it follows that such risk needs to be addressed through an integrated suite of immigration and labour law strategies and that immigration law strategies by themselves are unlikely to provide effective countervailing measures.