

Submission to Senate Education and Employment Committee Inquiry into the impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders

I make this submission in my capacity as an independent researcher and writer on migration related issues.

My submission address the following terms of reference:

- a. the wages, conditions, safety and entitlements of Australian workers and temporary work visa holders, including:
 - i. whether the programs 'carve out' groups of employees from Australian labour and safety laws and, if so, to what extent this threatens the integrity of such laws,
 - d. whether temporary work visa holders have access to the same benefits and entitlements available to Australian citizens and permanent residents, and whether any differences are justified and consistent with international conventions relating to migrant workers;
- h) the relationship between the temporary 457 visa and other temporary visa types with work rights attached to them;
- i) any related matter.

I would be very happy to add to this written submission with verbal evidence to the committee should that be helpful.

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'the wages, conditions, safety and entitlements of Australian workers and temporary work visa holders, including: whether the programs 'carve out' groups of employees from Australian labour and safety laws and, if so, to what extent this threatens the integrity of such laws ... '

1.1 Fair Entitlement Guarantee (FEG)

When Tony Abbott was Employment Minister in the Howard government, he set up GEERs – the General Employee Entitlements and Redundancy Scheme. Its creation followed the collapse of a string of high-profile companies – One-Tel, HIH, Ansett and National Textiles. In December 2012, GEERs was subsumed into FEG – the Fair Entitlements Guarantee – but its function remains essentially the same – to assist people 'owed certain outstanding employee entitlements following the liquidation or bankruptcy of employers'.¹ To be eligible for payments under the FEG Act, however, a person must be 'an Australian citizen or, under the *Migration Act 1958*, the holder of a permanent visa or a special category visa'.² As a result of this qualification, temporary visa holders are denied government assistance when their employer goes bust owing them money. A relevant case in point was the Swan Services Cleaning Group that went into administration in May 2013 owing \$2.3 million in unpaid wages and \$ 7.2 million in annual leave entitlements to around 2500 workers.³ A large proportion of the Swan Services workforce – about half of its staff in Victoria – was made up of international students. Many were left with up to three weeks' worth of unpaid wages and some were owed close to \$3000.⁴

Clearly, in this relation to the FEG, the entitlements of temporary visa holders are inferior to the conditions enjoyed by Australian citizens, permanent residents and New Zealanders (Special Category Visa holders). In this sense, temporary workers have been 'carved out' of the rest of the workforce. This contravenes principles of fairness and equal treatment.

Recommendation 1. *The Fair Entitlements Guarantee Act 2012 should be amended so that temporary migrant workers are offered the same protection under the Act as Australian workers when a company goes into receivership with unpaid liabilities to its staff.*

¹ Department of Employment, General Employee Entitlements and Redundancy Scheme, <https://employment.gov.au/general-employee-entitlements-and-redundancy-scheme-geers>

² *Fair Entitlements Guarantee Act 2012 (Cth)* pt 2 div 1 sub-div A para 10 (1) (g) Special category visa holders are New Zealanders.

³ United Voice, 'Swan Cleaning Services Update' 5 June 2013, <http://www.unitedvoice.org.au/news/swan-cleaning-services-update>

⁴ Madeleine Heffernan and Clay Lucas, 'International students taken to the cleaners', *The Age*, 2 June 2013 <http://www.theage.com.au/national/international-students-taken-to-the-cleaners-20130601-2nily.html#ixzz2iQHeVVzW>
<http://www.theage.com.au/national/international-students-taken-to-the-cleaners-20130601-2nily.html#ixzz2iQHeVVzW>

1.2 Workers Compensation Schemes

A temporary migrant worker who suffers a debilitating life-long injury in a workplace accident will not necessarily have the same life-long entitlements as an Australian citizen or permanent resident in the same situation.

This is illustrated by the case of English nurse Claire Hewitt, who as a 457-visa holder, was severely injured while driving for work in the Northern Territory.⁵ The NT's WorkSafe scheme has paid all Ms Hewitt's medical bills and 75 per cent of her original salary in compensation for her being unable to work. If Ms Hewitt were a *permanent resident* of Australia then this wage payment would continue until the age of 67. If she was only able to return to work part time, or in a lower paying job than before, then the workers' compensation scheme would top up her salary so that her original income was maintained. Again this benefit would continue until she turned 67. As a *temporary migrant*, however, Ms Hewitt's longer-term entitlements were unclear. Her legal advice was that if she had to leave Australia and return to the UK, then her salary payments from NT WorkSafe would cut out after two, or possibly, four years (although any medical bills relating to her accident would continue to be paid).

In the event, after political and media interventions, Ms Hewitt was eventually granted a permanent visa to remain in Australia, so in her particular case the issue has been resolved. However the same situation could easily arise in relation to another temporary migrant worker.

As far as I can see, the NT *Workers Rehabilitation and Compensation Act* makes no reference to a worker's visa status and it appears to be based on the assumption that all workers are permanent residents or citizens. I do not know whether or not the same deficiency exists in other state, territory or commonwealth workers' compensation schemes, though I think there is a fair chance that they do.

Recommendation 2: *That there should be a legal audit of all workers rehabilitation and compensation schemes to determine whether temporary migrant workers who suffer a debilitating, life long disability as the result of a workplace accident would be treated equally with Australian citizens or permanent residents in similar circumstances. Specifically, the audit should determine if a temporary migrant worker's entitlements would be diminished or restricted in any way if that worker were no longer to reside in Australia. If so, these deficiencies should be corrected in the relevant legislation to ensure equal treatment.*

⁵ For a more detailed description of Ms Hewitt's case please see Peter Mares, 'Falling between the cracks of temporary migration', *Inside Story*, 1 Nov 2013, <http://insidestory.org.au/falling-between-the-cracks-of-temporary-migration>

2. term of reference d.

'whether temporary work visa holders have access to the same benefits and entitlements available to Australian citizens and permanent residents, and whether any differences are justified and consistent with international conventions relating to migrant workers'

Some differences in government entitlements between temporary migrants and permanent residents and citizens can be reasonably justified. These are rights and entitlements that do not emanate from an employment relationship in the workplace but from physical presence within the boundaries of a political community. Questions of fairness in relation to such entitlements run in two directions. One on the one hand we can ask whether it is fair that temporary migrant workers should pay taxes but be denied government services. On the other, we can ask whether it is fair that citizens and permanent residents should contribute via taxation to the welfare of migrants whose stay in Australia may only be temporary and whose contribution to government revenue and the society as a whole may be limited as a result.

The most sensible way to resolve such questions is by having a reasonable threshold qualification period for access to government payments and services – in other words, to only grant those services and entitlements after temporary migrants have spent a certain number of years living and working in Australia. A withholding period of 104 weeks already applies before newly arrived *permanent* migrants can access most government payments and benefits.⁶

I do not propose to make specific comment on what this waiting period should be in relation to temporary migrant workers, since I think the larger and more important issue is the timeframe for a pathway from temporary to permanent status, which is discussed in greater detail in section 3 of this submission.

I do argue, however, that there are certain free government services that should be immediately available to all temporary migrants with work rights, without any waiting period. These two services are free childhood immunisations and school education.

2.1 free childhood immunisation

It is a little known fact that the children of most temporary migrants are excluded from Australia's system of universal free childhood vaccinations, which is restricted to citizens, permanent residents, and other people eligible to hold a Medicare card.⁷ While international students and 457 visa holders are required to take out private

⁶ See Department of Human Services, 'Newly arrived resident's waiting period', <http://www.humanservices.gov.au/customer/enablers/newly-arrived-residents-waiting-period>

⁷ See for example, Department of Health, Victorian government, 'Free vaccine Victoria – criteria for eligibility', <http://www.health.vic.gov.au/immunisation/free-vaccine.htm> The Commonwealth Department of Health has confirmed to me that the same eligibility criteria apply nationwide (email correspondence, 13 October 2013).

health insurance that may rebate the cost of vaccinations (at least up to the level of the standard Medicare rebate), there is a risk that this restriction may result in immunisations being postponed or not carried out at all.

According to the National Centre for Immunisation Research and Surveillance, migrants and culturally and linguistically diverse communities are regarded as one of the 'special-risk and under-served populations' for immunisation.⁸ The National Health Performance Authority says tracking the percentage of children who are fully immunised is more difficult in areas with large immigrant populations.⁹ While immunisation providers are expected to have a comprehensive understanding of the eligibility rules for access to free or subsidised vaccines, research shows that 'differences in eligibility by vaccine and visa class add complexity and act as a barrier to the provision of catch-up immunisation' in communities that are 'particularly vulnerable to under-immunisation'.¹⁰ Excluding a proportion of that migration population from mass immunisation schemes on the basis of their visa status serves to further complicate an already complex situation.

The Abbott government is so concerned at the growing gaps in comprehensive childhood immunisation in Australia¹¹ that it recently moved, with Opposition support, to implement a 'no job, no pay' policy, penalising parents who decline to immunise their children by removing their access to government payments. Trying to force objectors to get their kids vaccinated on the one hand, while throwing up barriers to the children of temporary visa holders on the other, would appear to be a contradictory policy stance. It would surely be a logical step to extend universal free vaccination to all babies and children in Australia, regardless of their visa status.

Recommendation 3: *Extend universal free vaccination to the babies and children of all temporary migrants living in Australia, regardless of their visa status.*

8 National Centre for Immunisation Research and Surveillance, 'Biennial Report: January 2010–November 2011' (2012) p 52 <http://www.ncirs.edu.au/publications/reports/NCIRS-biennial-report-2010-2011.pdf>

9 National Health Performance Authority, 'Healthy Communities: immunisation rates for children in 2012-13' p vi
http://www.myhealthycommunities.gov.au/Content/publications/downloads/NHPA_HC_Report_Imm_Rates_March_2014.pdf

10 NHMRC Centre for Research Excellence in Population Health, 'Protecting Australia – Closing the gap in immunisation for migrants and refugees', (Proceedings from a stakeholder workshop), http://creimmunisation.com.au/sites/default/files/newsevents/events/CREMigrantRefugeeWorkshop_ProceedingsRecommendations.pdf

11 See for example The National Health Performance Authority, 'Childhood immunisation rates up, but some areas still low', Media Release, 24 March 2014.
<http://www.nhpa.gov.au/internet/nhpa/publishing.nsf/Content/Media-Release-Childhood-immunisation-rates-up-but-some-areas-still-low>

2.2 universal free school education

The children of 457 visa holders in NSW, the ACT and WA are required to pay international fees to attend state schools. (NSW charges \$4,500 for kindergarten, \$4,500 for junior high schooling and \$5,500 for senior high schooling of subclass 457 visa holders. The ACT charges \$9,320, \$12,500 and \$13,900 respectively, although subclass 457 visa holders can apply for an education fee waiver if they are involved in a job that appears on the Skilled Occupation List.¹² Since the beginning of 2015, WA charges \$4,000 per year for the first student and \$2000 per year for siblings, with an exemption for families earning less than \$75,00 per annum.¹³)

Political philosopher Joseph Carens points out that most government funded or subsidised services are automatically available regardless of an individual's visa status. You do not need to prove residency to drive on roads or call on the help of police or the fire brigade. Carens argues, and I agree, that the fundamental entitlement of school education should be treated in like manner:

Every democratic state has a system of free and compulsory public education, and again, temporary workers have a right to this education for their children if their children are present.¹⁴

Recommendation 4: *Extend free public schooling to all children of temporary migrants in all states and territories.*

¹² Gareth Larsen, 'The subclass 457 visa: a quick guide', Parliament of Australia, 11 November 2013, http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/QG/Subclass457Visa

¹³ Bethany Hiatt, '457 visa school fees cut again', *West Australian*, 14 November 2014 <https://au.news.yahoo.com/thewest/a/25512019/457-visa-school-fees-cut-again/>

¹⁴ Joseph H. Carens, 'Live-in Domestic, Seasonal Workers, and Others Hard to Locate on the Map of Democracy', *The Journal of Political Philosophy*, V 16, N.4 2008 p 429

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'the relationship between the temporary 457 visa and other temporary visa types with work rights attached to them'

3.1 The rise of two step migration and the risk of creating a cohort of migrants who are indefinitely temporary

Australia has a range of temporary visas with work rights, each of which evolved separately with its own rationale and internal logic, but which now interact with one another to create a system of 'two-step' migration. In other words, it is increasingly usual for a migrant to spend time in Australia on a temporary visa or a series of temporary visas (such as 457 and student visas), before taking the next step to become a permanent migrant.

This is evident in statistics: applicants who lodge their application for permanent residency 'onshore' make up an increasing share of Australia's annual permanent skilled migration program – in other words, these applicants are already living in Australia on a temporary visa when they apply. In 2013-14, 58% of skilled permanent visas were granted to onshore applicants.¹⁵ This trend also affects the family stream of the migration program: in 2013-14, 33% of family visas in the permanent migration program were granted onshore. This is often the result of temporary migrants partnering with Australian citizens and permanent residents.¹⁶

A two-step migration program has much to recommend it, but it has a potential downside. Since the annual *permanent* migration program is capped, but the *temporary* migration program is open-ended, there is a potential for a mismatch to emerge between the aspirations of temporary migrants to become permanent residents and their capacity to do so (in terms of places in the program).

This raises the very real possibility that a large and growing number of temporary migrants will extend their stay in Australia by moving from one temporary visa to another – thus raising the potential for Australia to have an emerging cohort of migrants who are indefinitely temporary.

The three visa programs that are relevant to this discussion are the 457 temporary skilled worker scheme, international student visas and working holidaymaker visas.

When it was first introduced in 1996, the original thrust of the **457 temporary skilled work visa** was to facilitate intra-company transfers of senior executives and specialist staff in line with the increasing internationalization of the Australian economy. The 457 program was also intended to create a breathing space that enabled the Australian training system to catch up with demand for certain skills

¹⁵ Department of Immigration and Border Protection, '2013-14 Migration Programme Report: programme to year 30 June 2014', Attachment A,

<https://www.immi.gov.au/media/statistics/pdf/report-migration-programme-2013-14.pdf>

¹⁶ Ibid.

that were temporarily in short supply domestically.¹⁷ In reality, the 457 visa program has continued to expand and is now entrenched as a relatively small but significant feature of the Australian labour market.

The **internationalization of Australia's education system** began in the mid-1980s, but really gained momentum after the mid-1990s, parallel to the rise of the 457 visa. What began as an adjunct source of university funding has now become so central to Australia's higher education system that there are powerful incentives to continue to expand the intake of overseas students through increasingly attractive visa options, including most recently the **485 post study work visa**.¹⁸ Internal modelling by the Department of Immigration and Border Protection suggests that by 2017-18 there could be more than 200,000 international student graduates living and working in Australia on 485 visas (roughly equivalent to the number of 457 visa holders living in Australia currently.)¹⁹

The **Working Holiday Maker scheme** has been around since 1975 and was initially limited to Canada, the UK and Ireland, with Japan joining in the 1980s.²⁰ The expansion of the scheme to fourteen other countries has coincided with the rapid growth of temporary migration to Australia over the past twenty years. In April 2005, in response to persistent lobbying from rural employers, the Commonwealth government changed the rules of the visa to encourage backpackers to take up seasonal agricultural jobs. It did this by offering a second 12-month visa to travellers who engaged in at least three months (88 days) of 'harvest work'.²¹ A year later, the range of jobs that qualified a second visa was expanded and it now includes plant and animal cultivation, tree farming and felling, fishing and pearling, mining and construction.²² The only requirement for a second visa is that the work is undertaken in a regional area, which includes anywhere in Australia except the ACT and eight major urban centres (Sydney, Wollongong, Newcastle, the NSW Central Coast, Melbourne, Brisbane, the Gold Coast and Perth). Originally too, a working holiday maker could only remain with any one employer for a maximum period of three months; this threshold was subsequently doubled to six months.²³ Over the course of the decade from 2001, the number of 417 visas issued each year grew 250 per cent, from fewer than 80,000 to almost 200,000. In other words the Working Holiday Maker program has outgrown its origins as an experiential and cultural

¹⁷ For background see Peter Mares, '457s and temporary migration: the bigger picture' *Inside Story* 26 June 2013 <http://insidestory.org.au/457s-and-temporary-migration-the-bigger-picture>

¹⁸ For more details see Peter Mares, 'We know about the 457. What about the 485?' *Inside Story* <http://insidestory.org.au/we-know-about-the-457-what-about-the-485>

¹⁹ Department of Immigration and Border Protection 'Proposal Paper: Simplification of the skilled migration and temporary activity visa programs' December 2014. p.26

²⁰ DIBP, 'Working Holiday Maker visa programme report', 30 June 2014

²¹ Amanda Vanstone, 'Enhancements to Working Holiday Maker Program to Help Address Seasonal Labour Shortages', Minister for Immigration and Multicultural Affairs, Media Release, 14 April 2005

²² Amanda Vanstone 'Working Holiday Visa Enhancements a Boost for Backpackers and Regional Employers' Minister for Immigration and Multicultural Affairs, Media Release, 9 May 2006; DIBP 'Working Holiday Visa (subclass 417)', <http://www.immi.gov.au/Visas/Pages/417.aspx>, accessed 4 April 2015

²³ Yan Tan et al, 'Evaluation of Australia's Working Holiday Maker (WHM) Program', National Institute of Labour Studies, Flinders University, 27 February 2009.

program linked to the promotion of tourism, to become a labour market program in its own right.

While there has been significant public discussion of all these visa groups, what is often overlooked is the interaction between them and the potential for the serial or combination use of these visas to produce a cohort of migrants who are indefinitely temporary.

Consider the following scenario: An international student arrives in Australia at age 16 to complete the final two years of high school, before a three year undergraduate degree, a year of honours and a two year masters program (or eight years of study in total). The student then spends three years on a 485 graduate post-study work visa. When this visa expires the student is granted a 457 visa for four years.

At the end of this period, this student graduate would be aged 31 and would have spent almost half his or her life in Australia – 15 formative years – on a series of temporary visas. The person in question, however, will not necessarily be on a pathway to becoming an Australian resident and enjoying the rights and entitlements that go with permanent residency and ultimately, citizenship – including the right to vote or stand for office that is fundamental to the meaningful operation of a system of representative democracy.

The above scenario may sound far-fetched, but consider the case of Italian migrant Ilaria de Fusco, who first visited Australia at the age of 19 in the year 2000, who has lived in Australia on a series of temporary student visas since 2001, and who, in 2015, still faces an indefinite wait to find out whether or not she will ever be able to become a permanent resident of this country (despite lodging a valid application more than five years ago). Ms de Fusco has established her life here. She is to all intents and purposes Australian, paying Australian taxes, abiding by Australian laws and regulations, and yet she cannot even get a mobile phone contract because she only has a temporary visa.²⁴

Also relevant in this connection is the increasing marketing of Australia's secondary education system to temporary migrant children. For example, Quentin Stevenson-Perks from the Australian Trade Commission recently enthused about the 'go earlier' strategy evident amongst Chinese parents sending their children to Australia for schooling:

I think they're seeing that the benefits of their children gaining English language or foreign language studies earlier, becoming more settled in their country which they wish to study in, and also the prospects of

²⁴ For Ilaria de Fusco's story see Peter Mares 'Living at the wrong end of the queue' *Inside Story*, 7 April 2015 <http://insidestory.org.au/living-at-the-wrong-end-of-the-queue>

*higher education provides a pretty good package for the Chinese parent.*²⁵

In other words, children as young as twelve or thirteen are being sent to study at Australian secondary schools in the full expectation that they will then go on to study at Australian institutions of higher education. This is being actively encouraged in the interest of promoting Australia's education export industry.

Does anyone pause to ask what happens at the end of this study process? Can we honestly describe a Chinese or other foreign student who has lived and studied in Australia from their early teens until their early twenties as a 'temporary migrant'? If, as a graduate, that student fails to qualify for a permanent residence visa after that time will we force them to leave Australia, despite the fact that they have spent their formative years as an adolescent and young adult in this country? (A more likely scenario of course is that if the student is unable to gain a permanent visa, then they will seek to extend their stay in Australia on some kind of temporary work visa such as a 485 or 457 visa, but this only serves to underline the potential for them to become indefinitely temporary.)

3.2 What the data does and doesn't tell us

It is impossible to quantify the number of *long term* temporary migrants in Australia – that is the number of people who have been living in the country on a series of temporary visas for more than, say, six years. This is because the Department of Immigration and Border Protection (DIBP) does not collect data in this form.

To calculate the continuous length of stay of migrants moving across different temporary visas would involve the complex and time-consuming matching or arrival and departure data across more than one million individuals, which DIBP is not in a position to do. The numbers, however, may be significant, and are almost certain to be increasing.

We know, for example, that in recent years around half the applications for a 457 visa have been lodged onshore – that is, they were lodged by people who were already present in Australia as temporary migrants of one kind or another. In the two years between June 2012 and June 2014, this amounted to more than 65,000 people moving from one temporary visa to another.²⁶ Some would have been 457 visa holders extending their stay; others would have been international students who had completed their studies and were moving onto a work visa.

²⁵ Bridget Brennan 'Chinese high school student numbers increasing in Australia' PM ABC Radio, 30 March 2015 <http://www.abc.net.au/pm/content/2015/s4207613.htm>

²⁶ Of the 81 550 primary applications for a subclass 457 visa lodged in 2012-13, the majority (42 610 or 52 per cent) were lodged onshore; in 2013-14, 24 460 out of 49 150 applications for 457 visas (50%) were lodged on shore. Department of Immigration and Border Protection, Subclass 457 State/Territory summary reports, 2012-13 & 2013-14 The largest categories of visa holders applying onshore for 457 visas were existing 457 visa holders, international students and student graduates and working holiday makers. Only a small number of tourists were included.

We know that over the same period – the two years to June 2014, approximately 93,000 international student graduates extended their stay in Australia by switching to a different temporary visa category with work rights – around 52,000 moved onto a 485 post study work visa; close to 34,000 moved onto a 457 temporary skilled work visa and 5700 moved onto a working holiday maker visa.²⁷ This was more than three times the number of student graduates that moved onto a *permanent* skilled visa.²⁸ In addition, almost 56,000 international students shifted from one type of study visa to another – from vocational education to university education for example.²⁹

In other words, it is now increasingly common for temporary visa holders to cycle through a range of different temporary visa options, thus increasingly the likelihood that there is a growing cohort of long term temporary migrants in Australia. (The definition of 'long term' is necessarily subjective, but I regard any stay over six years as long term.)

Of even greater concern is that some of these long-term temporary migrants become, in effect, indefinitely temporary.

To put the concern another way, within the statistics cited above, there could be a growing cohort of long term temporary migrants who desire to move along the path to permanent residency, but who fail to make any forward progress towards that goal, and instead move around in circles, jumping from one temporary visa to another. This is no longer two-step migration, but a frustrating game of stepping-stones.

3.3 The cohort of long term and indefinitely temporary migrants will grow over time

I anticipate that the number of long-term and indefinitely temporary migrants is likely to rise in coming years. This assertion is based on the following considerations:

1. We know that a large proportion of 457 visa holders aspire to permanent residency. (The most comprehensive available survey of 457 visa holders, for example, suggests that around 70 per cent intend to apply for permanent residency when their temporary visa expires.³⁰) If 457 visa holders aspire to residency, but are thwarted in that aspiration, then many will accept other options to remain in Australia, even if that means a succession of temporary visas.
2. We know that a large proportion of international students also aspire to permanent residency. ('Surveys of graduates revealed that 65 per cent of international students studying in Australia intended to apply for permanent

²⁷ Department of Immigration and Citizenship, Australian Government 'Student visa program quarterly report Quarter ending at 30 June 2014'

²⁸ Ibid.

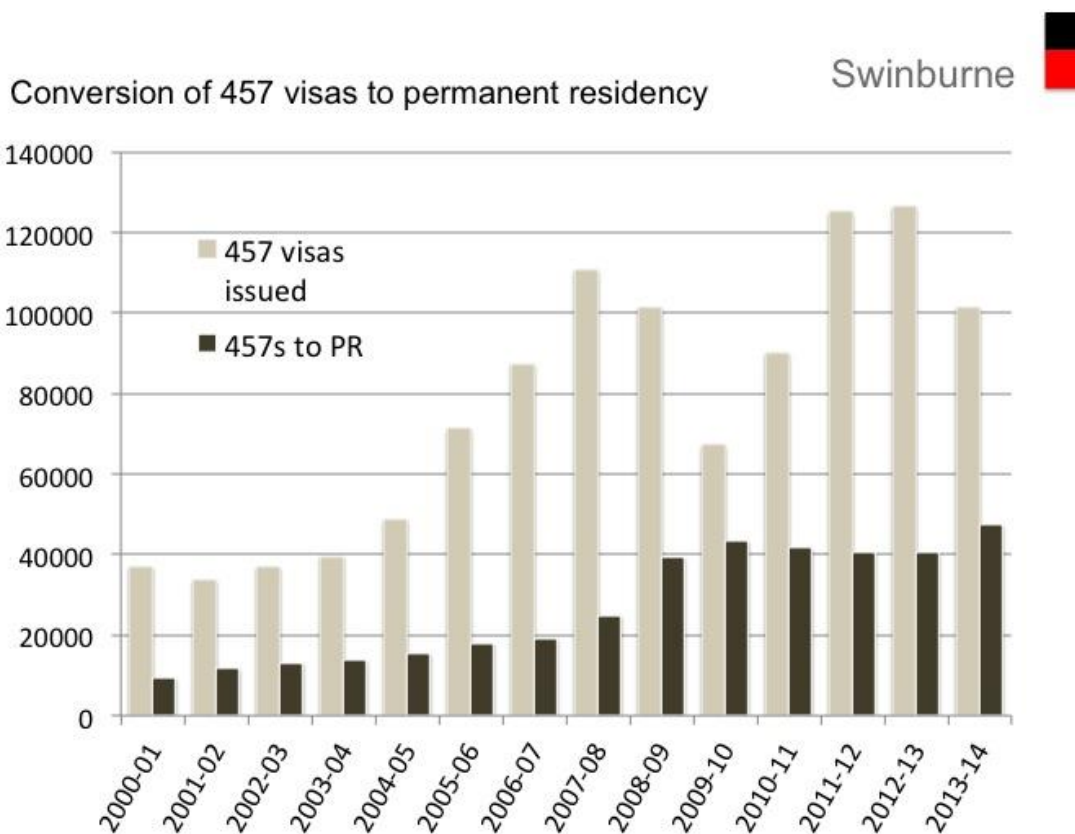
²⁹ Ibid

³⁰ Migration Council Australia *More than temporary: Australia's 457 visa program*, 2013
<http://www.migrationcouncil.org.au/assets/files/8168a3189.pdf>

residence status'.)³¹ Again, if student graduates aspire to permanent residency, but cannot achieve it, many are likely to remain in Australia as long as possible on a series of temporary visas, including 457 visas.

- As noted above, the permanent migration program is subject to an annual cap on places, but temporary visa programs, such as student, 457 and 485 visas are uncapped. As a result there is a considerable potential for demand for permanent places in the migration program to significantly and consistently outstrip supply, pushing would be residents onto a series of rolling temporary visas as a next best option. (This could also push people to seek permanency or extend their stay via illegitimate pathways such as through sham partner visas or protection visas.)

The data already shows a growing gap between the number of 457 visas issued each year and the number of 457 visa holders who convert to permanent residency. As can be seen in the chart below, the number of 457 visas converting annually to permanent residency has been relatively stable since 2008-9, despite a large increase in the number of temporary visas issued in subsequent years.



Data sources: Departmental annual reports to 2007; Subclass 457 State – Territory Summary Reports post 2007

³¹ Robertson, Shanthi *Transnational student-migrants and the state: The Education-Migration nexus* Palgrave MacMillan 2013 p.52 (quote Tilbrook, Cindy 'International students: perspectives and graduate outcomes', Australian International Education Conference, Melbourne, 2007)

It should be noted, in passing, that, since 2001, many New Zealanders on special category visas also fall into the category of being indefinitely temporary, since they cannot qualify for permanent residence via the skilled migration program.³²

3.4 The passage of time, moral rights and the threshold between temporary and permanent

As political philosopher Joseph Carens has argued, 'the passage of time' is 'the most important consideration' in strengthening migrants' 'moral claims' on the state.³³

*The ties that come from actually living in a state are the most powerful basis for a claim to membership. Home is where one lives, and where one lives is the crucial variable for interests and for identity, both empirically and normatively.*³⁴

As a result, Carens concludes that there must be a time threshold after which temporary migrants have the ability to become permanent residents should they choose to do so. He opts for a threshold of five years:

*Why five years rather than four or six? No one can pretend that the answer to this question entails any fundamental principle. ... But if one asks why five years rather than one or ten, it is easier to make the case that one is too short and ten too long, given common European understandings of the ways in which people settle into the societies where they live.*³⁵

Labour migration researcher Martin Ruhs agrees with Carens on this principle and considers four years – equivalent to a single term on a 457 visa – to be a 'reasonable' period (though like Carens he offers little justification for choosing this number beyond gut feeling – less than three years seems too short and more than five years seems too long).³⁶ The difference is that Ruhs considers putting an upper limit on the length of time a temporary migrant can remain in the host country so as to limit the build up of obligations towards that migrant on behalf of the receiving state. In other words, Ruhs contemplates forcing temporary migrants to leave Australia before they can become too settled.

In her 2008 review of the integrity of the 457 visa system, Industrial Relations Commissioner Barbara Deegan reached a similar conclusion to Ruhs, recommending

³² See Peter Mares, 'A Special Category', *Griffith Review*, 43 Jan 2014
<https://griffithreview.com/articles/9677/>

³³ Carens, Joseph H. *Immigrants and the right to stay* MIT Press 2010 p.6 (Carens was referring to irregular migrants but the same principle is applicable to temporary migrants.)

³⁴ Joseph Carens, *The Ethics of Immigration*, (Oxford University Press, 2013) p. 31

³⁵ Joseph H. Carens, 'Live-in Domestic, Seasonal Workers, and Others Hard to Locate on the Map of Democracy', *The Journal of Political Philosophy*, V 16, N.4 2008 p 422

³⁶ Ruhs, Martin *The Price of Rights: Regulating International Labour Migration*, Princeton University Press, 2013 p 192

that no 457 visa holder 'be permitted to remain in Australia for more than 8 years in total'. If they were unable to convert to permanent residency after that time, then they should be required to leave Australia.³⁷ (Deegan focussed only on 457 visas and did not appear to recognize the added complication of the potential interaction between 457 visas and other temporary visas such as student visas.)

Deegan also noted – as other submissions to this Committee have no doubt pointed out – that the link between employer nomination and the path to permanent residency can render temporary migrant workers vulnerable to exploitation, since an employer's ability to give or withhold sponsorship is very powerful and makes temporary migrants who 'have aspirations towards permanent residency' particularly 'vulnerable to exploitation as a consequence of their temporary status.'³⁸

It is not my intention here to endorse the specific 4, 5 or 8 year time limits proposed, respectively, by Ruhs, Carens and Deegan, but rather to argue that as a political community we need to give due consideration as to the acceptable length of time for a migrant to be temporarily resident in Australia.

Though they offer different policy responses, implicit in the arguments of Carens, Ruhs and Deegan is that they reject the option of repeatedly renewing temporary visas with work rights, as can happen in Australia today. Ruhs argues that without time limits on stay or thresholds for a transition to permanency, we risk creating a group of 'second-class residents' – residents who are not only at risk of being permanently temporary, but are also at risk of being permanently excluded from the political community of the nation and permanently denied the benefits and rights of citizenship.³⁹

In my view, it is not ethically acceptable to expect migrants to be permanently temporary, nor does it sit well with Australia's conception of itself as a settler society. Equally however, I think it is ethically problematic to suggest, as Deegan and Ruhs do, that we might allow someone to become a temporary member of society for as long as eight years, and then simply require them to leave because they have reached a certain threshold beyond which, ethically, we would owe them certain obligations as a nation.

There are potential alternative approaches. One would be to give time spent in Australia on a temporary visa much greater weight in applications for permanent residency. For example, a 2003 directive requires EU members to grant 'permanent or long term residence status to foreign nationals who have been long-term temporary residents, usually for at least five years duration' (with time spent on a student visa discounted by 50 per cent compared to time spent working).⁴⁰

³⁷ Deegan, Barbara, 'Visa subclass 457 integrity review: final report', October 2008

³⁸ Ibid.

³⁹ Ibid. p 191

⁴⁰ Robertson, Op Cit p.38

An alternative approach would be to put an annual cap Australia's various temporary migration programs – particularly the international student, 485 and 457 programs – to make it more difficult for a significant discrepancy to emerge between the number of temporary migrants seeking permanent residency and the number of places available in the permanent migration program. However, neither employers nor higher education administrators are likely to look favourably on such a proposal.

3.5 Conclusions and recommendations

A migrant who lives in Australia for a significant period of time, who contributes to the economic life of the nation through their labour and their taxes, who has quite possibly paid fees to study here, is a person who for all intents and purposes, makes Australia their home. As former Immigration Minister Scott Morrison acknowledged (in a speech he made whilst still in opposition):

When we arrive in this country, we become part of it – and it becomes a part of us – it becomes what [Sir Henry] Parkes described as 'the land of our adoption'. It changes us – and in doing so it provides the basis for our connection with one another.⁴¹

The more time temporary migrants spend living, working and studying in Australia, the more financial, cultural, psychological and emotional attachments they are likely to develop (a process that is aptly described as 'putting down roots'). As a result, these temporary migrants also accumulate rights – moral rights, if not legal ones. Consequently, we as citizens, via the government that represents us, also accumulate obligations towards these temporary migrants.

Recommendation 5: *That the Department of Immigration and Border Protection equip itself to routinely publish data on the number of temporary migrants resident in Australia by length of stay, accounting for movement across and between different types of temporary visas, and without restarting the clock if there for brief periods of time spent outside Australia during a transition between visa categories.*

Recommendation 6: *That time spent living in Australia on a temporary visa be given greater weight in consideration of applications for permanent residency and that a maximum of eight years continuous residence be sufficient to fully qualify a temporary migrant for a permanent visa (assuming no serious character concerns). (It is arguable that time on a student visa or working holiday visa should be discounted by 50% relative to time on a 457 visa.) This policy should also extend to New Zealanders on special category visas.*

⁴¹ Morrison, Scott, Address to the Affinity Intercultural Foundation, Sydney, 17 July 2013

4 Term of reference in 'any related matter'

Residency rights of the foreign parents of Australian citizen children

The rise of temporary migration in Australia increases the chances of Australian citizen children being born to foreign parents on temporary visas. An international student, for example, may form a relationship with an Australian citizen that results in a pregnancy. In the ordinary course of events, if the relationship between the parents is on going, then these foreign parents will have a pathway to permanency via a spousal (family) visa. However, if the parental relationship breaks down, then the temporary migrant parent may have few options for remaining in Australia and may be forced to leave and become permanently separated from his or her child.

If a child born in Australia has at least one parent who is an Australian citizen or permanent resident, then that child is an Australian citizen by birth. If, however, the other parent is not a citizen or permanent resident but a temporary visa holder, then that parent can potentially be removed from Australia when the temporary visa expires, thus breaking the essential bond between parent and child.

There is no straightforward pathway to permanent residency for the foreign parent of an Australian citizen child *unless that foreign parent is already present in Australia on a spousal visa*. The fact that the temporary visa holder is the parent of an Australian citizen child does not guarantee that they can remain in Australia.

In fact, in order to even apply for the right to stay in Australia with their child, that temporary visa holder may be forced to apply for a visa for which they are manifestly unqualified (such as a protection visa), so that they can then seek the intervention of the Immigration Minister under the Minister's public interest powers. The Minister can only use those powers after an applicant has been rejected at every other stage in the process of applying for a visa – in other words, become an applicant can seek to gain the attention of the Minister, they must first have been rejected by DIBP, and by the Migration of Refugee Review Tribunal. This process can take years, resulting in an extended period of uncertainty and stress before the status of the parent is resolved.

The cases of Eunsil Park⁴² and Francesca Teuau⁴³ are illustrative of the issues at stake.

Recommendation 7: *Create a straightforward permanent visa pathway for any temporary migrant who is the parent of an Australian citizen child.*

⁴² See for example, Matthew Killoran 'Ari Illingworth and mum, Eunsil Park, given Visa to stay in Australia following long-running battle' *The Courier Mail* 2 September 2014. <http://www.couriermail.com.au/news/queensland/ari-illingworth-and-mum-eunsil-park-given-visa-to-stay-in-australia-following-longrunning-battle/story-fnihsrf2-1227044335532>

⁴³ See Peter Mares, 'Australian children, foreign parents and the right to stay', *Inside Story*, 2 March 2015 <http://insidestory.org.au/australian-children-foreign-parents-and-the-right-to-stay>