

Committee Secretary

Senate Education and Employment References Committee

By email: eec.sen@aph.gov.au

29 April 2015

Dear Secretary,

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

I welcome this inquiry for its breadth and focus. There have been important reviews of the 457 visa program (now entitled the Temporary Work (Skilled) visa),¹ but they do not amount to an inquiry into all temporary work visa programs - the 457 programme is not the only scheme that allows for temporary migrant work. Other schemes like the international student visa programs and the Working Holiday makers programs also permit visa-holders under these programs to participate in the Australian labour market and, indeed, do so in numbers that exceed the number of workers on 457 visas. This inquiry is the first to provide for a holistic assessment of all temporary work visas, and it does so with a proper and sharp focus on the impact of these visas on the labour market and on the migrant workers themselves. While there are many other important issues concerning temporary migrant workers - including their access to public goods like Medicare and education² - it is undeniable that the key issues turn on the conditions of their work and its broader impact on labour markets.

¹ Joint Standing Committee on Migration, Parliament of Australia, *Temporary Visas... Permanent Benefits:*

² See, eg, 'Inclusion and Community' in Migration Council of Australia, *More than Temporary: Australia's 457 Visa Program* (2013).

The emphasis on the impact of temporary work visas on the Australian labour market is crucial because it brings to the fore complex and challenging questions regarding the impact of temporary migrant work on the employment opportunities of local workers (Australian citizens and permanent residents) (see Term of Reference a)ii) - to what extent should priority be given to local workers in relation to employment opportunities and how should any such priority be given effect?

The simultaneous focus on the temporary migrant workers themselves, including the extent of their exploitation and mistreatment (see Term of Reference c)i), is equally crucial for two reasons; one narrow, the other broader. The narrow ground concerns the absence of a sustained discussion on the exploitation of 457 visa workers by the 2014 Independent Review into the Integrity in the Subclass 457 Programme ('2014 Integrity Review').³ This is to be contrasted with the Integrity Review of the programme by Commissioner Barbara Deegan in 2008 ('Deegan Review'), which had 'Integrity/Exploitation' as one of its principal topics.⁴

The broader – and more significant – reason is that this focus on temporary migrant workers strongly signals three critical points. Firstly, temporary migrant workers are not to be treated as objects of government policies. Secondly, temporary migrant worker rights and interests are not to be shaped and changed purely by reference to what is judged to be 'in the interest of Australia'. Thirdly, temporary migrant workers are not commodities to be moved around the Australian labour market according to the wishes of employers.

This emphasis says something vitally important about temporary migrant workers: they are human beings and should be accorded the dignity and respect that each human being is entitled to; they are workers and should generally enjoy the rights conferred upon other

³ John Azarias, Jenny Lambert, Peter McDonald and Katie Malyon, *Robust New Foundations: A Streamlined, Transparent and Responsive System for the 457 Programme: An Independent Review into Integrity in the Subclass 457 Programme* (2014). The review did examine non-compliance by sponsoring employers (see *ibid* 85-87); while this set of issues overlaps with the question of exploitation, it is not the same as the latter question turns on the working conditions of 457 visa workers.

⁴ See Visa Subclass Integrity Review, *Issues Paper #3: Integrity/Exploitation* (2008), www.immi.gov.au/skilled/skilled-workers/_pdf/457-integrity-review-issue-3.pdf.

workers; they and their families are members of the Australian community, and their significant contributions to this country should be recognised.

This submission concentrates on a problem that is of significance both to temporary migrant workers and the impact of their work on the Australian labour market – the problem of non-compliance with labour laws. It examines this problem as it relates to 457 visa workers and international student workers with its central contention that there is a structural risk of non-compliance with both groups of workers stemming from their precarious migrant status and, in many cases, from poorly regulated industries.

This submission does not directly deal with the question of employment opportunities for Australians and the effectiveness of the labour market testing provisions under the *Migration Act 1958* (Cth). Here, I refer the Committee to the submission I made in 2013 to the inquiry by the Senate Legal and Constitutional Affairs Committee into the Migration Amendment (Temporary Sponsored Visas) Bill 2013, where I strongly endorsed the requirement of labour-market testing. The 2013 submission is attached to the present submission.

Also of relevance in this context is a speech I gave in 2013 to the Australian Multicultural Council Roundtable on 'Productivity, Diversity and Migration in an Asian Century', which canvassed the understandings of justice that should apply to temporary migrant workers, including the extent to which priority be given to local workers in relation to employment opportunities. This speech is reproduced at pages 11-19 of the report available at www.amc.gov.au/wp-content/uploads/2013/11/amc-roundtable.pdf.

Finally, it should be emphasised that, in this submission, 'temporary migrant work' is understood as work performed by those who have a limited right of residence in Australia.⁵ This definition is useful in allowing us to go beyond visa programs like the 457 visa scheme and the Seasonal Work Program, which have the primary purpose of facilitating temporary migrant work to include other programs which have a range of purposes and allow temporary migrants to participate in the Australian labour market, notably the international student visa programs and the Working Holiday makers programs. This definition also enables attention to be paid to work performed by migrants who have no legal right to participate in the Australian labour market, for example, tourists and those with an irregular status.⁶ In other words, this broad definition of 'temporary migrant work' has powerful analytical advantages because it is not centred upon the principal or stated purposes of visa programs; rather it is anchored upon work performed by those with a particular migrant status.

This definition, in particular its 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 would have lived in this country for years. Neither are temporary migrant workers, according to this definition, necessarily 'temporary' in terms of their intention to continuing residing in Australia – many aspire to secure permanent residence in this country. Further, reliance on such workers is not necessarily 'temporary' – many key sectors like hospitality and agriculture heavily rely upon temporary migrant workers. These enduring aspects of temporary migrant work in Australia make it apt to speak of the 'permanence of temporary migration'.⁷

⁵ Martina Boese, Iain Campbell, Winsome Roberts and Joo-Cheong Tham, 'Temporary migrant nurses in Australia: Sites and sources of precariousness' (2013) 24 *The Economic and Labour Relations Review* 316, 317.

⁶ See Stephen Howells, *Report of the 2010 Review of the Migration Amendment (Employer Sanctions) Act 2007* (2010).

⁷ See P Mares, *The Permanent Shift to Temporary Migration* (17 June 2009) Inside Story, <http://inside.org.au/the-permanent-shift-to-temporary-migration/>.

I *Temporary Migrant Work and the Problem of Non-compliance with Labour Laws*

The problem of non-compliance with labour laws concerning temporary migrant work in Australia should be understood against two points of context. The first point of context is global, with evidence internationally that non-compliance with labour laws is endemic amongst temporary migrant workers. The International Labour Organization (ILO) has observed that:

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 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

The second point of context is national. It should not be readily assumed that Australian labour markets are characterised by broad compliance with labour laws. On the contrary, a major review of data collected by the workplace enforcement agencies concluded that 'achieving widespread employer compliance with minimum employment standards in Australia is a major and ongoing challenge in Australia'⁹ – this is a viewpoint that has been endorsed by the current Fair Work Ombudsman, Natalie James.¹⁰

To be sure, the problem of non-compliance with labour laws does not equally attend all parts of the Australian labour market; some sectors and industries have higher levels of compliance, while others experience a greater risk of non-compliance. An indication of the industries which fall into the latter group is given by the list of industries which are the subject of national campaigns presently conducted by the Fair Work Ombudsman. These industries include the following:

⁸ ILO, *Towards a fair deal for migrant workers in the global economy* (2004) 41.

⁹ 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* (2013) 10.

¹⁰ 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' (2014) 2.

- Textile clothing and footwear industry;
- Hospitality industry;
- Children services;
- Agricultural industry with a focus on the 'Harvest trail';
- Building and construction industry; and
- Cleaning industry.¹¹

These points of context put us in a better position to evaluate ministerial accounts of 457 visa worker exploitation. These accounts lay the blame on 'unscrupulous employers'¹² and 'rogue employers';¹³ employers which deviate from the norm in a situation where 'most employers do the right thing'.¹⁴

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 labour laws. It is not up to 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'.¹⁵ These governmental accounts are also right to moralise this duty – which is not just a legal duty,

¹¹ See Australian Government, *National Campaigns*, www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/national-campaigns (accessed on 26 April 2015).

¹² Senator the Hon Christopher Evans - Minister for Tertiary Education, Skills, Jobs and Workplace Relations, 'Australian jobs and foreign workers must be protected' (Media Release, 16 February 2011).

¹³ Brendan O'Connor MP - Minister for Immigration and Citizenship and Bill Shorten MP - Minister for Employment and Workplace Relations, 'Fair Work inspectors to monitor rogue 457 employers' (Media Release, 18 March 2013)
<http://pandora.nla.gov.au/pan/67564/201307010654/www.minister.immi.gov.au/media/bo/2013/bo194313.htm>.

¹⁴ Chris Bowen, Minister for Immigration and Citizenship, 'First ever termination of a labour agreement' (15 February 2012)
<http://pandora.nla.gov.au/pan/67564/201203200000/www.minister.immi.gov.au/media/cb/2012/cb182584.htm>; See also Senator Michaelia Cash - Assistant Minister for Immigration and Border Protection, 'Work visa scams. Don't pay the price' (Media Release, 1 October 2014)
www.minister.immi.gov.au/michaeliacash/2014/Pages/mc218247.aspx where it is stated 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 programmes.'

¹⁵ *Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (In Liquidation) & Ors* [2013] FCCA 52, para 35 (24 April 2013).

but also a moral duty to treat the workers with respect and dignity and to promote fairness in the workplace and the labour market.

These accounts, however, have two serious and related shortcomings. First, they are too sanguine about the extent of non-compliance in relation to temporary migrant work. As will be demonstrated below, such non-compliance is far from an aberration and, indeed, appears to be widespread in certain industries. Second, there are structural features of immigration laws and labour laws that facilitate non-compliance by those employing temporary migrant workers. In industries where there is a greater likelihood of non-compliance, these structural features bring about the reality of non-compliance. In such contexts, *non-compliance is structural*.

II *457 Visa Workers and the Problem of Non-compliance with Labour Laws*

The concept of 'precarious migrant status' is useful in appreciating the structural features of the 457 visa programme that pose a risk of non-compliance with labour laws. 'Precarious migrant status' refers to how migrant status can be accompanied by a shortfall of rights and entitlements when compared to those enjoyed by citizens, and how that shortfall can produce insecurity for the migrants. The dimensions of precarious migrant status which are of importance here are:

- Limited work authorisation;
- Limited right of residence;
- Dependence on a third party for the right of residence;
- Limited access to public goods.¹⁶

The main factor determining the vulnerability 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, most important of which is an aspect of precarious migrant status – dependence on a third party for the right of residence - as continued employment by the sponsoring employer tends to be necessary for the 457 visa worker to remain in Australia. 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 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.¹⁷

Before Visa Condition 8107 was amended to prohibit a 457 visa worker leaving the employment of his or her original sponsor (when the condition merely imposed a requirement to seek permission), Carr J considered the scenario whereby a sponsoring

¹⁶ See Luin Goldring, Carolina Berinstein and Judith K. Bernhard, 'Institutionalizing precarious migratory status in Canada' (2009) 13 *Citizenship Studies* 239.

¹⁷ Deegan Review, above n 1, 69.

employer could have its obligations as a sponsor ceased (thereby triggering the Immigration Department's discretion to cancel the 457 visa) by terminating the employment of the worker, a scenario that, in fact, currently applies. His Honour observed:

Such a situation could easily give rise to abuse by an unscrupulous employer.

The employee might be forced to accept illegally sub-standard conditions of employment on pain of having his or her visa cancelled. The migrant would be turned into a bondsman.¹⁸

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 DIAC.¹⁹

This power is clearly bound up with the lack of freedom to choose employment that is experienced by 457 visa workers. There is a complex two-way process at work here. The power of the sponsoring employers to terminate the employment of these workers thereby triggering a chain of events that might naturally lead to their removal induces a lack of mobility on the part of the workers. At the same time, sponsoring employers who sense that their workers lack the freedom to change employment may choose to engage in more exploitative practices. As the Deegan Review observed '[g]enerally it is the most vulnerable of the Subclass 457 visa holders who are exploited as a consequence of their lack of mobility, whether that lack is real or perceived'.²⁰

One consequence of the tight nexus between engagement by the sponsoring employer and the ability to remain in Australia is that the protection against dismissal, while formally

¹⁸ *Cardenas v Minister for Immigration and Multicultural Affairs* [2001] FCA 17, para 57. Carr J was making his comments in the context where Visa Condition 8107 merely imposed an obligation not to change employer or occupation in Australia without the permission of DIAC and *not* a positive obligation (as currently exists) to remain in the employment of the sponsoring business. Indeed, the current version of Visa Condition 8107 imposes a positive obligation that Carr J stated he would find 'surprising'.

¹⁹ Visa Subclass 457 Integrity Review, *Issues Paper #3: Integrity / Exploitation* (Commonwealth of Australia, 2008) 27.

²⁰ Deegan Review, above n 1, 67.

available to 457 visa workers, is largely illusory. Put simply, many of these workers are in no position to effectively invoke such protection because they are already back in their home country after 28 days (now 90 days).²¹ This nexus also explains why some 457 visa workers are reluctant to complain of ill-treatment or illegal conduct. As the Joint Standing Committee on Migration stated, 'they are fearful their employment will be terminated and they will be returned home'.²² This nexus further explains why some 457 visa workers are willing to abide by illegal or exploitative contracts. As one employer who was found to have underpaid 457 visa workers put it, the workers 'would sign anything' as they 'are frightened of . . . being sent back'.²³

Dependence is also conditioned by financial need and by the long-term aims of the worker. And here another aspect of precarious migrant status inserts itself - the limited right of residence of 457 visa workers - with many workers seeking to make more secure their right of residence by using the 457 visa as a pathway to permanent residence, and indeed a substantial number have succeeded in becoming permanent residents.²⁴ The main permanent visa categories which these workers use are: the Employer Nomination Scheme and the Regional Sponsored Migration Scheme, both of which depend on the sponsorship of an employer.²⁵ This formal dependence sits alongside a general perception that employer sponsorship is necessary for a successful permanent residence application. Both can result in a 457 visa worker being willing to work in breach of labour 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.²⁶

²¹ 457 workers who are able to secure a new visa will be able to invoke such protection: see *Mr L v the Employer* [2007] AIRC 457.

²² Joint Standing Committee on Migration, above n 1, 132.

²³ Quoted in *Jones v Hannsen Pty Ltd* [2008] FMCA 291, para 8.

²⁴ Visa Subclass 457 External Reference Group, above n 1, 23; Department of Immigration and Border Protection, *Filling the Gaps: Findings from the 2012 survey of subclass 457 employers & employees* (2014) 39-40.

²⁵ See Deegan Review, above n 1, 50.

²⁶ *ibid* 49.

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 labour laws, this can, in fact, strengthen the hand of the employer. For instance, a 457 visa worker who works in a job classification different (most likely lower) from that stated in his or her visa would be in breach of Visa Condition 8107. Not only would the visa be liable to cancellation in this scenario, but the worker would also be committing a criminal offence. Even when a violation of labour laws does not involve a breach of the worker's visa, there can still be a perception that the worker's participation in illegal arrangements, if disclosed, might jeopardise the visa, or his or her prospect of permanent residence. In these circumstances, continuing in illegal work arrangements might be seen as preferable to the regularisation of status.

These various aspects of the precarious migrant status of 457 visa workers create a risk of non-compliance with labour laws. Has such a risk resulted in serious non-compliance with labour laws in relation to 457 visa workers?

In reviewing the evidence of non-compliance with labour laws concerning 457 visa workers, it is vital to distinguish between the period prior to 2009 – prior to the *Migration Legislation Amendment (Worker Protection Act) 2008* (Cth) ('*Worker Protection Act*') and *Fair Work Act 2009* (Cth) taking effect – and the period after such legislation took effect.

In the period prior to 2009, there was a widespread perception that 457 visa workers were being exploited and engaged in breach of labour laws. Evidence to the Joint Standing Committee on Migration's 2006-2007 inquiry into the 457 visa scheme alleged cases of:

- underpayment of the MSL;
- unlawful deductions from wages (e.g. for travel, medical or accommodation costs);
- non-payment of overtime rates;
- obliging workers to work excessive hours (e.g. 15-18 hours per day, 7 days a week);

- employment of skilled workers in unskilled roles
- unfair termination of employment; and
- racial abuse and threat of physical harm.²⁷

The Australian Human Rights Commission's submission to the Deegan Review catalogued complaints it had received in relation to 457 visa workers. While bearing strong similarity to the allegations made to the Joint Standing Committee, this submission also included complaints of the following:

- limited access to sick leave and dismissal if workers take sick leave;
- dismissal because workers are pregnant;
- dismissal for taking leave to care for sick spouse or child; and
- sexual harassment.²⁸

The period prior to 2009 witnessed horrific instances of exploitation, some of which have been the subject of legal proceedings. A recent illustration is given by the case of *Ram v D&D Indian Fine Foods Pty Ltd*,²⁹ which concerned events taking place from 4 August 2007 to 4 December 2008.³⁰ Federal Circuit Court Judge Driver in this case 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 façade upon 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.³¹

There is now a strong perception that the increased regulation of the 457 visa programme through the *Worker Protection Act*, and the reregulation of the labour market through the

²⁷ Joint Standing Committee on Migration, above n 1, 112–14.

²⁸ Deegan Review, above n 1, 6.

²⁹ *Ram v D&D Indian Fine Foods Pty Ltd* [2015] FCCA 389 (Federal Circuit Court, 27 March 2015, Driver J).

³⁰ *ibid* para 11.

³¹ *ibid* para 76.

Fair Work Act, has reduced the incidence of non-compliance with labour laws in relation to 457 visa workers. The available evidence further suggests that such non-compliance is *not* widespread. The most comprehensive survey of 457 visa workers and their employers was conducted by the Commonwealth Department of Immigration in 2012, and it found that:

- 5% of the workers surveyed felt their employers were not meeting their sponsorship obligations; and
- 7% of these workers indicated that their conditions were not equivalent to those of their Australian co-workers.³²

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'.³³

Two points should be made about such evidence. The first is optimistic: such data strongly suggests that the risk of non-compliance stemming from the structural features of the 457 visa programme and, specifically, the precarious migrant status of the workers, do not inevitably translate into the reality of non-compliance; there can be effective countervailing measures put in place like the 'market salary rates' and robust monitoring.

The second sounds a cautious note. Such aggregate data does not tell the complete story; they do not preclude non-compliance in relation to 457 visa workers being pervasive in *certain industries*, as seems to be the case with non-compliance generally.³⁴ Indeed, the 2014 Integrity Review found that the level of non-compliance with sponsorship obligations is significantly higher with small businesses (0-9 employees) where the level of non-compliance was 17%, and also in certain industries including construction, hospitality and retail.³⁵ Referring to the hospitality, restaurant and tourism industries, the 2014 Integrity

³² Department of Immigration and Border Protection, *Filling the Gaps: Findings from the 2012 survey of subclass 457 employers & employees* (2014) 4.

³³ John Azarias et al, *Robust New Foundations: A Streamlined, Transparent and Responsive System for the 457 Programme: An Independent Review into Integrity in the Subclass 457 Programme* (2014) 85.

³⁴ See text above n 11.

³⁵ John Azarias et al, above n 33, 87.

Review said that 'these are industries in which the level of sanctioning is high and in which there is scope for nefarious practices'.³⁶

It is no coincidence that two of the industries singled out by the 2014 Integrity Review for posing a stronger risk of non-compliance with sponsorship obligations under the 457 visa programme are also the subject of national campaigns by the Fair Work Ombudsman, namely the hospitality and construction industries. For 457 visa workers engaged in these industries, not only is there a structural risk of non-compliance stemming from their precarious migrant status, there is also a structural risk of non-compliance from the labour market dynamics of these industries.

³⁶ *ibid* 43.

III *International Student Workers and the Problem of Non-compliance with Labour Laws*

International student workers are ubiquitous in the capital cities of Australia. Take a taxi in Sydney, there is a good chance the driver is an international student; walk into a café in Melbourne, the waiting staff are likely to include international students; purchase petrol in Adelaide and the service station employee may very well be an international student.

Despite such ubiquity, international student work does not strongly figure in public discussions of temporary migrant work – it is invisible in the policy discourse. A review of media releases by the Commonwealth Ministers responsible for higher education from 2010 to the present day did not find a single one dealing with work performed by international students.

This is despite the fact that there is a high proportion of international students engaging in paid employment. A survey in 2006 by Australian Education International found that 56% of respondents worked during term and 70% worked outside term.³⁷ In a 2005 study based on interviews with 200 international students in nine universities, 57 per cent of interviewees stated that they were employed at the time of the interview, and a further 13 per cent had worked at an earlier time during their studies in Australia.³⁸ Drawing upon these figures, in excess of 200,000 international students were estimated to be in paid employment in 2011, accounting for between one and two per cent of the total Australian workforce of 11.4 million people.³⁹

The 'invisibility' of international student work in the policy space also exists despite newspaper coverage of the exploitation of international student workers in *The Age*, evidence given of such exploitation to a Senate inquiry into the welfare of international

³⁷ Australian Education International, *2006 International Student Survey: Report of the consolidated results from the four education sectors in Australia* (2007).

³⁸ Simon Marginson, Christopher Nyland, Erlenawati Sawir and Helen Forbes-Mewett, *International Student Security* (2010) 134.

³⁹ Alex Reilly, 'Protecting vulnerable migrant workers: The case of international students' (2012) 25 *Australian Journal of Labour Law* 181, 185.

students,⁴⁰ and a major review of the student visa program by former New South Wales Minister Michael Knight ('Knight Review').⁴¹

Two (unsatisfactory) reasons underlie such invisibility of international student work. First, international students are typically seen as only consumers.⁴² Second, a narrow view has been taken of temporary migrant work which has artificially restricted such work to that performed by visa-holders under dedicated temporary labour schemes like the 457 visa scheme, rather than also including de facto temporary labour schemes like the international student programme and the Working Holiday Maker visas.

The 'invisibility' of international student work explains why there is much less systematic evidence of the problem of non-compliance as it relates to international student workers when compared to the situation of 457 visa workers. The available evidence is, however, extremely disturbing, and points to widespread non-compliance with labour laws in relation to international student work.

A 2005 study based on 200 interviews by Marginson et al found that 58% of interviewees were paid under minimum wage, earning between \$7 and \$15 per hour.⁴³ A recent survey by United Voice of more than 200 international students union found that:

- A quarter of those responding received \$10 or less an hour;
- Sixty per cent earned less than the national minimum wage (\$16.37 an hour).
- 79 per cent said they knew little or nothing about their rights at work;
- 76 per cent said they did not receive penalties for weekend or night work.⁴⁴

⁴⁰ Senate Education, Employment and Workplace Relations References Committee, *Welfare of International Students* (2009) 40-49.

⁴¹ Michael Knight, *Strategic Review of the Student Visa Program 2011* (2011) 83.

⁴² Simon Marginson, Christopher Nyland, Erlenawati Sawir and Helen Forbes-Mewett, *International Student Security* (2010) 116.

⁴³ *ibid* 136

⁴⁴ United Voice, *International students cop Melbourne's worst paid jobs*, www.unitedvoice.org.au/press-releases/international-students-cop-melbourne's-worst-paid-jobs (accessed on 26 April 2015).

I am presently conducting a case-study on temporary migrant work in Melbourne cafes, restaurants and take-away food services with several other colleagues. Preliminary analysis of this case-study - which involved interviews with 21 international students – has reached conclusions consistent with the 2005 study and the United Voice survey, with many of the interviewees engaged as casual workers and experiencing illegal working conditions in the form of underpayment and non-payment (including 'free' trials).

At first glance, it may seem puzzling that international student work seems to be the subject of widespread non-compliance with labour laws. 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. Precariousness arising from a desire to obtain permanent residence is also much more diminished when compared to 457 visa workers: not as many international students aspire to permanent residence and even when they do, their employers when they are students are unlikely to be the employers sponsoring their permanent residence applications.

These differences, in fact, highlight the significance of international student work in understanding the vulnerability of temporary migrant workers to non-compliance. International student work in Australia tells a salutary story as to how precarious migrant status other than dependence upon an employer can interact with financial necessity and the dynamics of poorly regulated industries to produce endemic non-compliance with labour laws.

With international student workers, their financial pressure has been compounded by: an aspect of precarious migrant status, limited access to public goods, particularly the lack of access to student allowances (Austudy payments) and the requirement to pay international student fees.

In addition, international students experience limited work authorisation in the form of the restriction on their hours of work (presently 40 hours a fortnight during term time). In some

cases, breach of this restriction can provide employers with the ability to leverage working conditions in breach of labour laws. As the Knight Review report stated:

There is anecdotal evidence, particularly from trade unions, that the most unscrupulous employers exploit international students once they agree to an initial breach of their work rights. Such employers then demand all sorts of things from their international student employees – work at reduced wages, breaches of occupational health and safety conditions, even sexual favours. In effect, the international students are blackmailed by the threat of the employer reporting the student for their initial breach. Under the current rules a reported breach of work rights can lead to a mandatory cancellation of the student visa.⁴⁵

Some international student workers are, as Carey Trundle, Director of the Overseas Worker Team in the Fair Work Ombudsman, put it, 'caught in a cycle':

When you're looking at student Visa's you're looking at 40 hours a fortnight. Well if you don't know your workplace rights and you're working in a restaurant and getting paid \$6 an hour and you're being told you've got to work more than that if you want to keep your job, you've also got to work more than that because you can't live on \$6 an hour, you're in a very vulnerable situation because you've got the employer who has the power over you and then you've also got this fear that you're in breach of your Visa so therefore immigration- you're fearful of immigration. So all those things contribute to a level of vulnerability.⁴⁶

This quote underscores how misleading it can be to focus principally on precarious migrant status as the explanation for non-compliance with labour laws in relation to international student work. What explains such non-compliance is the interaction of precarious migrant status with the dynamics of poorly regulated labour markets; labour markets where precarious migrant status can become the currency for non-compliance. This point will be

⁴⁵ Education, Employment and Workplace Relations References Committee, *Welfare of International Students* (2009) 40-49.

⁴⁵ Michael Knight, *Strategic Review of the Student Visa Program 2011* (2011) 85.

⁴⁶ Interview with Carey Trundle, Director, Overseas Worker Team, Fair Work Ombudsman (25 February 2015).

illustrated by reference to three industries where it appears that there are a significant number of international student workers: cleaning, taxi driving and hospitality.

The cleaning industry is one of the industries subject to national campaigns by the Fair Work Ombudsman. According to the Ombudsman, this industry has:

- layers of subcontracting, tight margins and a competitive tendering process;
- almost 25,000 businesses have nearly 100,000 workers with 64% of cleaners over 40, 55% female, 47% were born overseas and 10% are students.

It is also an industry characterised by high levels of non-compliance. A recent audit by the Ombudsman of 578 cleaning businesses found only 62% of these businesses were fully compliant with their workplace obligations.⁴⁷

The taxi driving industry is poorly regulated by labour laws, principally because taxi-drivers are not employees at law and are therefore outside the scope of most labour laws.⁴⁸ A key report documenting the findings from the Footscray Community Legal Centre's Taxi-driver Legal Clinic provides a powerful explanation of the precarious legal and practical position of taxi-drivers:

As 'bailees,' non-owner drivers are deemed to be independent business operators. In practice, however, the relationship between drivers and taxi owners has many features of an employment relationship: non-negotiable hours, uniform requirements and a high degree of control on the part of fleets, depots and radio networks. Yet, as 'bailees,' taxi drivers enjoy none of the benefits that most employees take for granted, such as minimum wages, sick leave, annual leave, superannuation, occupational health and safety training and protection against unfair dismissal. As a result, many drivers struggle to meet their day to day living expenses, despite working 12 hours a day, five or six days a week.⁴⁹

⁴⁷ www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/march-2015/20150312-national-cleaning-campaign-results

⁴⁸ *Fair Work Act 2009* (Cth) ss 11, 13.

⁴⁹ Lucie O'Brien, *In the Driver's Seat: Achieving Justice for Taxi Drivers in Victoria* (2012) 5.

The hospitality sector is characterised by a high level of casualization of workforce and, importantly, for the present submission, widespread non-compliance with labour standards. This is implicitly recognised by the national campaign being run by the Fair Work Ombudsman, and also by the 2014 Integrity Review in relation to non-compliance with sponsorship obligations under the 457 visa programme. It has also been explicitly recognised on numerous occasions in judicial decisions. Justice Gray of the Federal Court in *Plancor Pty Ltd v LHMU* observed that the hospitality industry is ‘an industry notorious for non-compliance with the standards imposed by industrial instruments’.⁵⁰ Similar observations have been made in several decisions by the Federal Circuit Court (previously the Federal Magistrates’ Court).⁵¹ The most recent decision is that of Judge Riethmuller in *Fair Work Ombudsman v Primeage Pty Ltd & Ors* where his Honour said the following:

The restaurant and hospitality industry have been recognised as notorious for non-compliance with workplace laws . . . In this case there is evidence before me that:

- a. The industry has attracted the highest volume of complaints (compared with other industries) to the Fair Work Ombudsman in the last four years;
- b. High volumes of contraventions of workplace laws have been identified by the Fair Work Ombudsman in this industry area;
- c. A high level of complaints come from young workers and visa holders; and
- d. The industry employs large numbers of low-skilled workers.⁵²

It is fair to say that industries like cleaning, taxi driving and hospitality are industries which are *governed by precarious work norms* – they are industries where it is considered normal for employers to provide poor working conditions, and normal for workers to experience poor working conditions which are, in many cases, in breach of labour laws. What is

⁵⁰ *Plancor Pty Ltd v Liquor Hospitality and Miscellaneous Union* [2008] FCAFC 170, para 37 (8 October 2008, Gray J).

⁵¹ See *Fair Work Ombudsman v Bento Kings Meadows Pty Ltd* [2013] FCCA 977 (1 August 2013, O’Sullivan J); *Fair Work Ombudsman v Hongyun Chinese Restaurant Pty Ltd (In Liquidation) & Ors* [2013] FCCA 52 (24 April 2013, Riley J); *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd & Anor* [2012] FMCA 258 (30 March 2012, Riethmuller FM); *Fair Work Ombudsman v Orwill Pty Ltd* [2011] FMCA 730 (28 September 2011, Lucev FM); *Fair Work Ombudsman v Sanada Investments Pty Ltd* [2010] FMCA 401 (9 June 2010, Jarrett FM).

⁵² *Fair Work Ombudsman v Primeage Pty Ltd & Ors* [2015] FCCA 139, para 32.

troubling, however, is that many international student workers seem to be employed in such industries. This has two related consequences, both of which undermine fairness in the Australian labour market: international student workers are becoming vulnerable to established practices of non-compliance and, at the same time, their exploitation can further entrench these practices.

IV *Conclusion*

The central thrust of this submission is that there is a structural risk of non-compliance with labour laws in relation to temporary migrant work with two interacting sources, precarious migrant status and poorly regulated industries. This risk does not necessarily translate into the reality of non-compliance – it can be mitigated through effective and robust laws that protect the working conditions of temporary migrant workers. But this risk can pave the way for widespread non-compliance when such laws are absent and precarious work norms govern industry practices – and this seems to be ugly reality of international student work and temporary migrant work in ‘high risk’ industries.

This structural risk of non-compliance cast light on the rhetoric of migrant workers ‘stealing’ the jobs of local workers. Such rhetoric touches upon the priority of employment opportunities for local workers but does so in a grossly distorted way. Insofar as migrant workers are displacing local workers because they constitute a cheaper and more flexible source of labour, such ‘attractiveness’ of migrant labour can be traced to the vulnerability of migrant workers and the structural risk of non-compliance they experience. It is terribly perverse and unjust to blame the migrant workers when they are relatively powerless, when they are principally the subject of the laws and practices.

If blame is to be attributed, responsibility must surely lie with those with far greater power, those with the ability to shape laws and practices: employers who take advantage of the vulnerability of migrant workers; industries governed by precarious work norms – and governments and Parliaments which establish legal frameworks that entrench the precarious migrant status of migrant workers.