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ASSESSING VISA PATHWAYS FOR AUSTRALIA'S TEMPORARY MIGRANT WORKFORCE

RÉSUMÉ

Cet article étudie la réglementation des voies d'entrée pour les migrants temporaires sur le marché du travail australien. Le programme australien de migration de main-d'œuvre temporaire représente un dixième du marché du travail et a considérablement augmenté au cours des trois dernières décennies. Bien qu'il existe un programme spécifique de migration de main-d'œuvre dédié aux travailleurs temporaires qualifiés, les migrants temporaires non qualifiés et peu qualifiés apportent également une contribution substantielle aux programmes d'étudiants internationaux et de vacanciers qui travaillent.

MOTS CLÉS: *Migration de travail temporaire, droit du travail, exploitation, travail.*

ABSTRACT

This article considers the regulation of entry pathways for temporary migrants into the Australian labour market. Australia's temporary labour migration program accounts for one tenth of the labour market and has increased substantially in the last three decades. Although there is a discrete dedicated labour migration program for temporary skilled workers, there is also a substantial contribution made by unskilled and low skilled temporary migrants through the international student and working holiday maker programs.

KEYWORDS: *Temporary Labour Migration, Labour Law, Exploitation, Work.*

Australia's regulatory approach to managing labour migration has undergone radical transformation from the 1990s to the present day. Although Australia's post-WWII migration program was founded upon the ideals of permanent migration, nation-building and citizenship¹, temporary labour migration has now become the norm. The number of temporary labour migrants has quintupled since 1996². Although only the Temporary Skill Shortage visa and new labour market programs for Pacific workers are for a dedicated work purpose, both international students and working holiday makers have work rights and a significant amount of what is deemed «unskilled» and «low-skilled» work is done by temporary migrants on these visas³. The composition of the temporary program influences the permanent program. Temporary migration is now a vital source of permanent migrants with the majority of skilled migrants in the permanent visa stream having initially entered and worked in Australia as temporary migrants⁴.

It is now generally accepted that Australia's temporary labour migration program creates dual labour markets between local citizen labour and temporary migrant labour. Howe and Reilly contrast the level of regulation of visas for a work purpose and visas for a non-work purpose and argue that this produces a backdoor low skilled labour migration pathway without sufficient worker-protective regulation⁵. Tham, Campbell and Boese refer to visas for a work and non-work purpose as «dedicated» and *de facto* labour migration programs respectively⁶. Forsyth depicts this distinction as producing a two-tiered labour

- 1 M. E. Crock, «Contract or Compact: Skilled Migration and the Dictates of Politics and Ideology», *Georgetown Immigration Law Journal*, vol.16, 2001, p. 133.
- 2 There were 25 786 subclass 457 visa grants in 1996-97 compared with 125 070 in 2011-12: see J. Phillips and H. Spinks, «Skilled Migration: Temporary and Permanent Flows to Australia», *Parliamentary Library*, 2012, p. 40; «Trends in Migration: Australia 2010-2011», Australian Government, Department of Immigration and Citizenship, 2012, p. 37.
- 3 *Migration Regulations 1994* (Cth), Australian Government; A. Boucher, «Australia's De Facto Low Skilled Migration Programs», in *Migration: the Economic Debate*, November 2016, chap. 2.
- 4 Approximately 50 000 457 visa holders became permanent residents in 2015-16, «Making up close to 40 per cent of Australia's total annual (permanent) skilled migration intake»: see P. Mares, «The 457 Visa is Dead! Long Live the TSS?», *Inside Story* (online), 20 April 2017: <http://insidestory.org.au/the-457-visa-is-dead-long-live-the-tss/>
- 5 J. Howe and A. Reilly, «Meeting Australia's Labour Needs: The Case for a New Low-Skill Work Visa», *Federal Law Review*, vol. 43, 2015, p. 259.
- 6 J.-C. Tham, I. Campbell and M. Boese, «Why is Labour Protection for Temporary Migrant Workers so Fraught?: A Perspective from Australia», in J. Howe and R. Owens (eds), *Temporary Labour Migration in the Global Era: The Regulatory Challenges*, Hart Publishing, 2016, p. 173.

market in which regulated, dedicated labour market programs represent «the high water mark» whereas the de facto pathways contain «little or no associated regulatory framework regarding labour market needs or protection from exploitation»⁷. Wright and Clibborn use the motif of «doors» to identify the type and conditions associated with each labour migration entry pathway⁸. Also drawing on the motif of «doors», in a separate analysis, Howe, Charlesworth and Brennan examine how immigration control and selection in Australia and New Zealand has been underpinned by a gendered construction of skill⁹. Each of these studies identify how immigration rules contribute to labour market segmentation in Australia.

In this article, we examine the various entry pathways within Australia's temporary migration program. This demonstrates that although Australia's official entry pathway for migrant workers is of a more limited nature and subject to stricter regulation, visas for international students and backpackers provide an unregulated pathway for temporary migrants to perform work in a broad range of occupations across the Australian labour market. There is a clear disjuncture in the level of regulation, size and impact of these various entry pathways.

The main labour migration pathway is the Temporary Skill Shortage (TSS) visa. The TSS has two streams. The first stream is for occupations that have been identified as being of high value to the Australian economy and aligned to the government's longer term training and workforce strategies. This stream allows a visa term of 4 years and provides a pathway to permanent residency. The second stream has been called the «short-term stream» and is for occupations for which there is an immediate need. This has been designed as a purely temporary stream, with the visa expiring after two years and with no access to permanent residency.

As with its predecessor (the 457 visa), the TSS visa does not allow for the temporary migration in low skilled occupations. It is conceived as a highly skilled temporary work visa. However, there were certain periods in the 457 visa's history where low and semi-skilled temporary migrant workers were permitted front door entry into the Australian labour market, which are important to examine briefly. During the early 2000s, the 457 visa was «deregulated»¹⁰ and opportunities arose for employers to access lower-skilled workers, despite the official orientation of the program being for skilled temporary migrant workers¹¹. A regional agreement stream was created¹², which allowed regional employers to form regional agreements if they applied for a certificate from the Regional Certifying

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- 7 A. Forsyth, *Victorian Inquiry into the Labour Hire Industry and Insecure Work* (Final Report), Industrial Relations Victoria, 2016, p. 316.
 - 8 C. F. Wright and S. Clibborn, «Back Door, Side Door or Front Door? An Emerging De-Facto Low-Skilled Immigration Policy in Australia», *CLLPJ*, 2017, p. 165.
 - 9 J. Howe, S. Charlesworth and D. Brennan, «Migration Pathways for Frontline Care Workers in Australia and New Zealand: Front Doors, Side Doors, Back Doors and Trap Doors», *University of New South Wales Law Journal*, 2019, vol. 42, no. 1.
 - 10 I. Campbell and J.-C. Tham, «Labour Market Deregulation and Temporary Migrant Labour Schemes: An Analysis of the 457 Visa Program», *Australian Journal of Labour Law*, 2013, vol. 26, p. 239.
 - 11 J. Howe, «Is the Net Cast Too Wide?», *Federal Law Review*, 2013.
 - 12 *Migration Regulations 1994* (Cth), Australian Government, *op. cit.*

Body that «the position cannot reasonably be filled locally»¹³. From late 2002, a provision existed to waive the salary and skill thresholds for the 457 visa for regional agreements so that employers in regional areas were permitted to pay their workers only 90 per cent of the minimum salary requirement¹⁴. Employers were also able to engage workers for occupations deemed as being of lower skill, for example, such as a «Personal Care Assistant» identified as an Australian Standard Classification of Occupations (ASCO) Skill Level 6 occupation¹⁵.

Propelled by integrity concerns and the growing use of the 457 visa for lower-skilled occupations, significant reforms to the 457 visa were made in 2008-09 which reoriented the visa as being for high skilled work. This followed a number of comprehensive reviews into the program¹⁶, which each saw a strong desire to avoid the 457 visa shifting from its original anchorage as a skilled migration program. In 2008 the Visa Subclass 457 External Reference Group reported the 457 visa had become, by default, a «general labour supply visa» and advocated it be rebalanced in favour of skilled temporary migration¹⁷. This echoed an earlier sentiment made by the Joint Standing Committee on Migration in 2007 strongly opposed to the 457 visa being used to meet unskilled labour shortages as it would «put at risk its acceptability to the general community»¹⁸. The *Deegan Report* also argued for a rigorous compilation of the occupational shortage lists so as to ensure that genuine skill shortages existed in the occupations that could be sponsored by employers. The rationale for this was to avoid the «risk of the visa program being manipulated to import unskilled labour, or skilled labour where there is a plentiful supply available locally»¹⁹.

As a result of these reviews, the federal government abolished the regional agreements stream under the 457 visa and the concessional minimum salary rate for regional employers²⁰, thereby removing a front door migration pathway for frontline care workers. ANZSCO Skill Level 5-7 occupations were no longer eligible for temporary labour migration

- 13 Department of Immigration and Citizenship, Australian Government, *Frequently Asked Questions: Permanent Employer Sponsored Program Reforms July 2012* (May 2012) 14: https://rdanorthernrivers.org.au/download/industry_and_economic_development/rsms/rsms-pes-faq.pdf. «Regional» was broadly defined. The only employers excluded from making a regional agreement were employers in Sydney, Newcastle, Wollongong, Melbourne, Brisbane, the Gold Coast and Perth; B. Kinnaird, «Current Issues in the Skilled Temporary Subclass 457 Visa», *People and Place*, 2006, vol. 14, p. 49.
- 14 J. Phillips, «Temporary (Long Stay) Business Visas: Subclass 457» (Research Note no. 15), *Parliamentary Library*, Parliament of Australia, 2007.
- 15 Australian Bureau of Statistics, «Australian Standard Classification of Occupations (ASCO) Second Edition» (no. 1220.0, 31 July 1997): <http://www.abs.gov.au/ausstats/abs@.nsf/0/7F887D870E0673BECA25697E00185133?opendocument>
- 16 Visa Subclass 457 External Reference Group, «Final Report to the Minister for Immigration and Citizenship» (Department of Immigration and Citizenship, 23 April 2008): <https://www.voced.edu.au/content/ngv:41113>; Joint Standing Committee on Migration, «Temporary Visas...Permanent Benefits: Ensuring the Effectiveness, Fairness and Integrity of the Temporary Business Visa Program» (Parliament of Australia, August 2007); B. Deegan, «Visa Subclass 457 Integrity Review» (Final Report, October 2008): <https://archive.homeaffairs.gov.au/WorkinginAustralia/Documents/457-integrity-review.pdf> (*Deegan Report*).
- 17 Visa Subclass 457 External Reference Group, *op. cit.*, no. 66, p. 37.
- 18 Joint Standing Committee on Migration, «Temporary Visas ... Permanent Benefits», *op. cit.*, p. 12.
- 19 *Deegan Report*, *op. cit.*, p. 34.
- 20 Australian Government, «Temporary Visas ... Permanent Benefits: Ensuring the Effectiveness, Fairness and Integrity of the Temporary Business Visa Program: The Government Response to the Report», *op. cit.*, 2007, p. 10.

to the regions. Employers wishing to access lower-skilled temporary migrant workers had to now do so via the labour agreement pathway. Additionally, the minimum salary rates requirement was replaced by a new market salary rates requirement and a salary floor for temporary migrant workers on the 457 visa²¹. Another set of reforms occurred in 2013 when employer-conducted labour market testing was introduced for certain occupations and the market salary rates requirement was strengthened²².

Thus, in its final iteration before it morphed into the TSS, the 457 visa only permitted entry of ANZSCO Skill Level 1-3 occupations and therefore, did not provide a temporary migration pathway for other low and semi-skilled occupations²³. This approach was continued with the introduction of the TSS visa. Nonetheless, the 457 visa and its successor, the TSS visa, does permit the entry of secondary visa holders (partners and dependents of the primary visa holder) who are not subject to the same restrictions as the primary visa holder, and may undertake work at any skill level. Although there is no collected data on the work contribution of secondary visa holders it is likely that some of this group is employed in low and semi-skilled work.

Aside from the TSS, the development of new labour migration programs for Pacific workers provides new, albeit small, front doors facilitating the temporary migration of workers from the Pacific into the Australian labour market for low and semi-skilled work. The rationale for these new initiatives is to expand employment opportunities – particularly for women – while developing skills and increasing remittance flows²⁴, and responding to labour market needs in the Australian economy. In 2016 a new five year pilot programme was introduced which provides up to 250 places for workers from the Pacific microstates with access to a three year Microstate Pilot Visa (MPV) to work in lower-skilled occupations in Northern Australia²⁵. Although this pilot targets non-seasonal occupations with identified labour shortages such as accommodation, tourism, hospitality and aged care, visa holders are eligible to work in any sector²⁶. The first group of workers arrived in October 2016 and was employed in housekeeping and stewarding roles²⁷. More groups of Pacific microstates visa workers are planned to arrive and two aged care employers are registered with the Department of Foreign Affairs and Trade (DFAT) as eligible to access workers under the program, with a third aged care provider currently in negotiations with DFAT²⁸.

21 For an analysis of these reforms, see J. Howe, «The Migration Legislation Amendment (Worker Protection) Act 2008: Long Overdue Reform, but Have Migrant Workers Been Sold Short?», *Australian Journal of Labour Law*, vol. 23, 2010, p. 251.

22 For an analysis of these reforms, see J. Howe, «Is the Net Cast Too Wide?», *op. cit.*

23 As of 1 July 2010, the DIBP began using ANZSCO instead of ASCO to classify occupations.

24 Australian Government, «Our North, Our Future: White Paper on Developing Northern Australia» (White Paper, June 2015): <http://northernaustralia.gov.au/files/files/NAWP-FullReport.pdf>. See also Joint Standing Committee on Migration, «Seasonal Change: Inquiry into the Seasonal Worker Programme» (Report, Commonwealth of Australia, May 2016), 5 [2.8].

25 *Ibid.*, 6 [2.10], 13 [2.34].

26 Radio Australia, *Pacific Beats*, 17 October 2016 (Concetta Fierravanti-Wells): <http://ministers.dfat.gov.au/fierravantiwells/transcripts/Pages/2016/cftr161017.aspx?w=p2wUlmE1t7kKl1%2BiOm3gqg%3D%3D>

27 *Ibid.*

28 *Ibid.*

In September 2017 this approach to regional development and labour market challenges in Australia was extended with the announcement of a new Pacific Labour Scheme (PLS). The PLS extends and formalises the Microstates Pilot Visa scheme in a range of ways and singles out the care sector as the largest of three growth sectors covered by the PLS²⁹. The PLS is an employer-sponsored scheme that will commence in July 2018 with an initial intake of 2000 workers from Kiribati, Nauru and Tuvalu, in keeping with the MPV's emphasis on extending developmental benefits of labour migration to the smallest Pacific Island Countries (PICs). Recruitment will take place via a new Pacific Labour Facility (PLF), intended to allow DFAT to mediate between employers and PIC workers for Seasonal Worker Programme and PLS recruitment. As the PLS is still being designed and developed, at this stage it is difficult to assess the significance of this front door migration pathway for frontline care workers.

Aside from the myriad of temporary labour migration pathways, Australia's permanent program is also highly significant, both in terms of the number of workers and the complexity of its design. Australia's migration program consists of 190 000 places, with 128 550 of these allocated for skilled migrants³⁰. Migrant refugees are another possible source of labour within the permanent program, although their capacity to find and secure work is often limited by a lack of local networks, local work experience and in some cases, English language ability³¹. Once an asylum seeker has been given refugee status, they have unlimited work rights in Australia.

Attached to the standard skilled migration pathway through the TSS visa and its predecessor, the 457 visa, there exists a «labour agreements» pathway that allows employers to access workers who do not have the work skills or English language ability required under the standard pathway. The labour agreements stream has existed since the inception of the 457 visa scheme in 1996 and its chief attraction for employers is the ability to access workers in occupations categorised as ANZSCO Skill Levels 4-7 and the opportunity to negotiate concessions on the regulatory requirements associated with the standard 457 visa. Labour agreements must meet a «no less favourable» requirement to ensure that the wages and conditions of the 457 visa worker are commensurate to the equivalent domestic worker³², and a labour market testing requirement. Because labour agreements have to be individually negotiated over a period of months with the Department of Home Affairs, the intention is that safeguards can be embedded within the labour agreement making process to protect job opportunities for local workers and the vulnerability of the temporary migrant workers. However, this regulatory approach is by no means foolproof as persistent calls from employer groups to deregulate and simplify the labour agreement process, means that the integrity of the labour agreement pathway is contingent upon ministerial discretion regarding the framework for how labour agreements should be negotiated³³.

29 Department of Foreign Affairs and Trade 2017 c. «Pacific Labour Scheme», Canberra, Australian Government, Department of Foreign Affairs and Trade.

30 Productivity Commission, «Migrant Intake into Australia: Productivity Commission Inquiry Report» (Inquiry Report no. 77, 13 April 2016), p. 75.

31 See generally, G. Hugo, «A Significant Contribution: The Economic, Social and Civic Contributions of First and Second Generation Humanitarian Entrants», Summary of Findings, Department of Immigration and Citizenship, 2011.

32 Migration Regulations 1994 (Cth), Australian Government, *op. cit.*

33 *Ibid.*

An important step in improving the public transparency and accountability of the labour agreements stream was the decision in 2017 to release publicly the names of businesses using a labour agreement and to update this on a quarterly basis³⁴. Although the utility of this information is of limited value, as the webpage does not provide information on the concessions granted, how many migrant workers are permitted entry under each labour agreement and for which locations, it does provide an indication of the types of industries and employers that are using the labour agreements stream³⁵.

Labour agreements into particular regions in Australia are also made possible through a Designated Area Migration Agreement (DAMA)³⁶. These enable employers to access temporary migrant labour through an umbrella agreement which has been negotiated between a designated area representative such as a council or government body. Individual employers can apply to the designated area representative for a labour agreement which sits underneath the umbrella agreement. The DAMA guidelines permit concessions to be made on salary, occupation and English language requirements contained within the TSS visa program³⁷. Whereas the TSS visa only permits entry of workers sponsored to work in occupations categorised as ANZSCO Skill Level 1-3, the DAMA program permits workers to be sponsored to work in ANZSCO Skill Level 4 occupations³⁸. The first DAMA has been finalised for the Northern Territory and includes a number of semi-skilled occupations³⁹. Because these occupations are classified as «vulnerable», an English language concession is not allowed, however a visa holder under a DAMA working in these occupations can receive a lower salary than the Temporary Skilled Migration Income Threshold (TSMIT)⁴⁰. Workers entering under a DAMA are subject to a stricter skills testing regime than higher-skilled workers. They are required to have their skills assessed once in Australia, with their work experience verified as being genuine and their employer must complete a statutory declaration confirming that the visa holder has the necessary work experience and qualifications required to meet the requirements of the occupation⁴¹. Employers are required to apply to the DAMA administrator in order to sponsor workers and are subject to certain labour market testing requirements, although as these are largely based on employer attestation of labour shortages, the rigour of this measure is somewhat

34 For two critiques, see J.-C. Tham, «Law-Making and Temporary Migrant Labour Schemes: Accountability and the 457 Visa Scheme», 2009, 17, *Australian Journal of Administrative Law*, p. 18. For an examination of the problems of accountability and transparency with the subclass 457 visa program in general, see J. Howe, «Accountability and Transparency under the Subclass 457 Visa Program: Is There Cause for Concern?», 2014, 21, *Australian Journal of Administrative Law*, p. 139.

35 Department of Home Affairs, «List of Current Labour Agreements» (12 November 2018): <https://immi.homeaffairs.gov.au/visas/employing-and-sponsoring-someone/sponsoring-workers/nominating-a-position/labour-agreements/list-of-current-labour-agreements>

36 Department of Immigration and Border Protection, «Designated Area Migration Agreements».

37 *Ibid.*

38 *Ibid.*

39 Migration Corporation of Australia, «Occupations Accessible under the DAMA» (2016): <http://www.migrationcorporation.com.au/wp-content/uploads/2016/04/04.2016-Occupations-accessible-under-the-DAMA.pdf>

40 *Ibid.*

41 Migration Corporation of Australia, «DAMA FAQs - Factsheet 4: Market Rates»: <http://www.migrationcorporation.com.au/wp-content/uploads/2015/01/DAMA-FAQs-1.pdf>

questionable⁴². Although DAMAs require approval by the federal government and can take a substantial time to negotiate and finalise, this program does open a migration pathway for semi-skilled workers to work in Australia in certain locations and subject to a number of additional conditions to the standard TSS visa program.

A number of visas for a non-work related purpose exist but are important to the overall picture of care migration because a significant amount of work is performed by these visa holders. Working holiday visas (visa subclasses 417 and 462) allow temporary migrants from 41 countries of between 18 and 30 years of age to work while they holiday in Australia for up to a year⁴³. Working holiday visas provide work entitlements for the full 12 months of their visa, but only six months work with any one employer⁴⁴. In November 2005, the law was changed to make it possible for working holiday visa holders to apply for a second working holiday visa if they have worked for three months in «specified work» in mining, construction and agriculture in regional Australia⁴⁵. Despite this visa being for a non-work related purpose, the DIBP has acknowledged the work motive of working holiday makers. It reports that the recent increase in working holiday makers «largely appears to be associated with the wider global economic situation» in 2011-12 as labour market opportunities in some «partner countries remain uncertain»⁴⁶. Numbers in the program have risen steadily since its inception⁴⁷. The enhanced interest from young Taiwanese and South Korean workers in obtaining a second year on the Working Holiday Maker visa could be linked to the «substantially lower minimum wage frameworks in both countries»⁴⁸, a point noted by the Fair Work Ombudsman⁴⁹. Notably, the top three source countries of working holiday makers applying for a second year on the Working Holiday visa are the United Kingdom, Taiwan and South Korea⁵⁰.

Although scholars have noted the significant labour market impact of working holiday makers⁵¹, official government documents consistently affirm the «cultural exchange»

42 J. Howe, «Does Australia Need an Expert Commission to Assist with Managing its Labour Migration Program?», *Australian Journal of Labour Law*, 2014, p. 233.

43 See Department of Home Affairs, «Working Holiday Maker Visa Program Report», Report, 31 December 2017: <https://www.homeaffairs.gov.au/research-and-stats/files/working-holiday-report-dec17.pdf>. Australia has also signed Work and Holiday visa agreements with Austria, the Czech Republic, Ecuador, Greece and Papua New Guinea but these agreements were not yet in effect as at 31 December 2017.

44 *Migration Regulations 1994* (Cth) regs 417.611, 462.611. See also, Department of Immigration and Citizenship, «Working Holiday Maker Visa Program Report», Report, 30 June 2013, p. 4.

45 Department of Immigration and Citizenship, «Working Holiday Maker Visa Program Report», *op. cit.*, no. 104.

46 *Ibid.*, no. 7.

47 Department of Immigration and Border Protection, «Working Holiday Maker Visa Programme Report», 30 June 2015, p. 7: <https://www.homeaffairs.gov.au/research-and-stats/files/working-holiday-report-june15.pdf>

48 As of 1 July 2015 the minimum wage was \$5.06 AUD in Taiwan and \$6.69 AUD in South Korea, compared to \$17.29 in Australia.

49 Fair Work Ombudsman, «Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program», Commonwealth of Australia, October 2016, p. 10.

50 Department of Home Affairs, «Working Holiday Maker Visa Program Report», *op. cit.*, p. 7.

51 See, eg, J. Howe and A. Reilly, *op. cit.*; A. Reilly, «Low-Cost Labour or Cultural Exchange? Reforming the Working Holiday Visa Programme», *Economic and Labour Relations Review*, 2015, vol. 26, p. 474.

purpose of the programme with «work incidental to the purpose of the visa»⁵². The Department of Home Affairs states in its policy guidance that «work in Australia *must not* be the main purpose of the visa holder's visit»⁵³. It is significant, then, that in a number of places, the Explanatory Memorandum for a 2016 reform package for the Working Holiday Maker visa recognises the central role of the Working Holiday Maker scheme in meeting labour shortages in the Australian economy⁵⁴. This promoted the work contribution of these visa holders and suggests that a shift is taking place amongst policymakers' perspective of the role of this visa. For example, the Explanatory Memorandum states that its proposed reforms «recognise the important contribution of working holiday makers to the Australian economy»⁵⁵, the program's role as «a strong contributor of supplementary labour»⁵⁶, and visa holders' role as «drivers of future economic growth»⁵⁷. This official acknowledgment of the work contribution of working holiday makers was coupled with changes to allow working holiday makers to work for the same employer for 12 months in two separate regions.

International students are permitted to work part-time during the course of their studies⁵⁸. Since 2008, the opportunity to work has been automatically included in student visas whereas previously students had to apply to be able to work. In 2013, international students became eligible for Graduate (Temporary) Visa subclass 485 to provide new opportunities to live and work in Australia after the completion of their course of study. The rationale for the liberalisation of work rights for international students is to give Australia a competitive advantage over its major competitors for international students, the United States (US), Canada and the UK where work rights either do not exist or are not as generous⁵⁹.

This picture reveals a current Australian labour migration program with myriad pathways into the labour market, each of which provide visa holders with a varying degree of tenure, status and security in Australia. Previously many migrants arrived as permanent

52 Department of Immigration and Citizenship, «Working Holiday Maker Visa Program Report», *op. cit.*, p. 3.

53 Department of Home Affairs, «What is the Working Holiday Maker Program?»: <https://archive.homeaffairs.gov.au/lega/lega/form/immi-faqs/what-is-the-working-holiday-maker-program>

54 Income Tax Rates Amendment (Working Holiday Maker Reform) Act 2016 (Cth).

55 Explanatory Memorandum, Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016 (Cth) 10 [1.4].

56 *Ibid.*, 43 [3.12].

57 *Ibid.*, 49 [3.39].

58 See generally, A. Reilly, «Protecting Vulnerable Workers: The Case of International Students», *Australian Journal of Labour Law*, 2012, vol. 25, p. 181.

59 For Canada, see Immigration and Citizenship, Government of Canada, *Work Off Campus as an International Student* (27 December 2017): <http://www.cic.gc.ca/english/study/work-offcampus.asp>.

For the UK, see UK Visas and Immigration, «Immigration Rules», *Policy Paper*, 31 January 2012, para. 245ZW: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/271060/29nov131.pdf.

In relation to the US, see A. Labi, «Britain's New Student Visa Policy Tightens Restricts Work but Not as Much as Feared», *The Chronicle of Higher Education* (online), March 22 2011: <https://www.chronicle.com/article/Britains-New-Student-Visa/126862>.

For Australia, see Department of Home Affairs, Check Visa Details and Conditions: <https://www.homeaffairs.gov.au/Trav/Stud/More/Work-conditions-for-Student-visa-holders>

migrants. Today, a growing proportion of newly arrived migrant workers rely on temporary side door and back door labour migration pathways to enter the Australian labour market. A striking aspect of the Australian regulatory approach to migration law and policy is the dominant role of employers in determining the composition of the temporary and permanent labour migration programs with the ascendancy of the demand-driven model after 1996. Two entry channels (special visas for Pacific workers and labour agreements) seek to address the labour needs of particular regions or particular employers by reference to an employer-sponsorship model. These pathways each include additional regulatory safeguards to ensure that the vulnerability of visa holders coming through these pathways is addressed, although it is uncertain the extent to which these safeguards adequately protect these workers from exploitation at work and non-compliance with Australian labour law. Two other temporary labour migration channels involve temporary visas for a non-work related purpose but without any additional labour market protections to account for their vulnerability. Both international students and working holiday makers perform a significant amount of low and semi-skilled work in Australia. Their contribution in the labour market needs to be accounted for, especially in light of recent reforms to both visas which further promote the performance of work. Additionally, recently settled migrants and secondary visa holders also feature in Australia's workforce.

Conclusion

Aggregating the number of visa holders within each of Australia's migration pathways described in this article, there are now well over 1 million temporary migrant workers in Australia with a range of work rights, operating in the same labour market as local Australian workers. This amounts to temporary migrants accounting for one tenth of the Australian workforce. It is striking that there are a number of entry pathways for temporary migrants and that these are subject to different levels of regulation and oversight. Although Australia's official temporary labour migration is oriented towards importing high skilled temporary migrant labour, there is a strong supply of low and semi-skilled migrant workers through visas for international students and backpackers. Cumulatively, these visa programs have led to a heavy reliance on temporary migrant workers by Australian employers.

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Research Topics: Transnational Migration Flows, Temporary Labour Migration, Worker Protection.

Publications:

~ J. Howe, with S. Charlesworth & D. Brennan, «Migration Pathways for Frontline Care Workers in Australia and New Zealand: Front Doors, Side Doors, Back Doors and Trap Doors», *University of New South Wales Law Journal*, 2019.

~ J. Howe, with S. Le Mire, «Medical referral for abortion and freedom of conscience in Australian law», *Journal of Law and Religion*, 2019.