Transforming Australia's Visa system

Putting Australian workers first, ending the rampant exploitation of temporary workers and moving towards permanent migration.

ACTU submission on visa simplification
October 2017

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Visa simplification

Authorised by S. McManus, ACTU Secretary, 365 Queen St, Melbourne 3000. ACTU D No. 126/2017

Introduction

The ACTU welcomes the opportunity to make a submission to this Visa Simplification Review.

The ACTU is the peak body for Australian unions, made up of 46 affiliated unions. We represent almost 1.8 million working Australians and their families.

Australian Unions have a long standing view that the migration system should preference permanent, rather than temporary migration in Australia. We believe the current trend towards temporary employer-sponsored migration is effectively outsourcing decisions about our national migration intake to employers and their short-term needs, over the national interest and a long-term vision for Australia's economy and society. This shift should not be blindly accepted as some inevitable, inexorable trend that must continue. Instead, it should be subject to critical questioning and debate. Unions continue to have concerns with a skilled migration program that relies excessively on temporary employer-sponsored migration, as is the case with the current system, and any simplification of the current visa system must not;

- Lead to a widening of the visa system where there are more temporary overseas workers, which are of significant risk of exploitation, operating in areas in which genuine skilled labour market shortages do not exist;
- Continue to operate with no or inadequate labour market testing which compromises the integrity of the visa system;
- Enable employers to avoid their responsibilities to first invest in domestic training and look to the local labour market for local workers before employing temporary overseas workers; and
- Facilitate the continual rorting of the visa system in which temporary visa holders are purported to be in Australia to fill a particular skilled shortage yet actually, when in the country, work in a low skilled position.
- Allow for exploitation of overseas workers, including affording overseas workers less workplace protections, compared to Australian workers.
- Allow for the undermining of local wages, workplace rights and local standards, such as health and safety.

Australian unions have well-documented concerns with the operation of our temporary visa program, but it is clear to us that the problems extend to a range of different visa types where overseas workers can find themselves in vulnerable situations.

There are currently more than 1.8 million temporary visa holders in Australia, including New Zealanders, and up to 1.4 million of these visa holders have work rights. This equates to around 10% of the total Australian labour force of over 12.4 million.

At a time when unemployment remains close to 6 per cent, there are over 1 million underemployed workers and youth unemployment is in double digits, the Australian community needs to have confidence that such a large and growing temporary work visa program is not having adverse impacts on employment and training opportunities for Australians, particularly young people.

Equally, the community needs to be assured that employers and others are not exploiting vulnerable temporary overseas workers who are unaware of their rights or not in a position where they feel able to exercise those rights.

Unfortunately, the evidence available from our affiliated unions and other sources is that both Australian and overseas workers are being disadvantaged and exploited on a regular basis under the current policy and program settings that govern temporary work visas.

This has been happening far too often and for far too long for it to be dismissed as a few isolated cases in an otherwise well-functioning program. It is time now for a fundamental reassessment of a skilled migration program that places such emphasis on temporary and employer-sponsored forms of migration without due recognition of the inherent flaws and dangers in doing so.

In the submission that follows, we set out a package of recommendations to help address these issues and ensure that the temporary work visa program, to the extent that it is required, operates in the best interests of all workers.

In support of our position, we will first outline the overall ACTU position on skilled migration matters, and provide some background information on the nature and dimensions of the temporary work visa program.

The interest of local workers must be paramount

The interests of local workers should be paramount. Temporary work visas, and the debate that surrounds them, should be driven by three key, interrelated, priorities.

1. The first is to maximise jobs and training opportunities for Australians - that is, citizens and permanent residents of Australia, regardless of their background and country of origin – and ensure they have the first right to access local jobs.

2. The second is to ensure that the overseas workers who are employed under temporary visas are treated well, that they receive their full and proper entitlements, and they are safe in the workplace – and if this does not happen, they are able to seek a remedy just as Australian workers can do, including by accessing the benefits of union membership and representation.

3. The third is to ensure that employers are not able to take an easy option and employ temporary overseas workers, without first investing in training and looking to the local labour market. This is also about ensuring those employers who do the right thing are not undercut by those employers who exploit and abuse the temporary work visa program and the workers under it.

Our position is that vigorous safeguards need to be in place to protect the interests of overseas workers on temporary visas. These workers are often vulnerable to exploitation by virtue of being dependent on their employer for their ongoing prospects in Australia, including, in many cases, their desire for sponsorship and permanent residency.

The migration system should preference permanent, rather than temporary, migration in Australia

The ACTU rejects the idea that migrants should be expected to live and perform labour in Australia for extended periods of time on a purely contractual and contingent basis, without any reasonable prospect of acquiring civic rights in the wider community.

Australia had a paradigm of permanent, rather than temporary, migration for most of the twentieth century. That system was predicated on the primacy of civic inclusion as an Australian ideal, the idea that if you lived

and worked in Australia, paid taxes and abided by the law, you should also get a say in the content of those laws, as well as the chance at full participation in our social, economic and political life (*See United Voice Submission 'Visa Simplification: Transforming Australia's Visa System' 9 October 2017*).

In the last twenty years, Australia moved towards a different migration paradigm: one in which a not insignificant proportion of the residential population are long-term temporary migrants. We highlight this in more detail below.

The shift away from permanent, independent migration

The size of the temporary visa workforce must be viewed in the context of the changing balance of the overall skilled migration program away from permanent migration.

Permanent migration has very much been the basis for the success story of immigration in Australia over a number of decades. As is well known, the Australian labour market absorbed large numbers of immigrants from the end of the Second World War onward, and these formed the basis for a major expansion in the manufacturing sector, as well as large-scale construction projects, such as the Snowy Mountains hydro-electricity scheme. The distinctive feature of this program of immigration, in contrast to the European experience of guest workers', was permanent settlement. In other words, these immigrants became Australian citizens and their families were raised in Australia.

As a consequence, the occupational trajectories of second-generation immigrants have shown marked differences to those of their parents, with the scenario of the children of factory workers becoming professionals not being uncommon. In terms of the macro-economy, immigration to Australia since the 1940s has generally been regarded as positive because it increases aggregate demand and it lowers the age profile of the workforce.

However, as the Department of Immigration and Border Protection (DIBP) itself has noted, in more recent years the focus has shifted markedly, with 'demand-driven' employer-sponsored migration increasingly holding sway under successive governments of both persuasions. The bulk of Australia's migrant workforce now comes from employer-sponsored and temporary migration, with a large component of 'guest workers' now in the Australian labour market in the form of visitors on temporary visas with work rights.

As we outlined above, this has included specific skills-based visas (457s and the new Temporary Skills Shortage visa), working holiday visas, student visas, and New Zealand citizen visas, with full working rights (though limited social security entitlements). The growth of these categories since the early 2000's has been dramatic: the first two categories each now almost match permanent skilled arrivals in terms of their magnitude and together far exceed permanent arrivals. The rise in student visas has been remarkable, as was the sudden drop when various restrictions were imposed to prevent rorting and the use of these visas as a backdoor into permanent residency.

This trend towards temporary and employer-sponsored migration is effectively outsourcing decisions about our national migration intake to employers and their short-term needs, over the national interest and a long-term vision for Australia's economy and society. This shift should not be blindly accepted as some inevitable, inexorable trend that must continue. Instead, it should be subject to critical questioning and debate within the Australian community.

Unions continue to have concerns with a skilled migration program that relies excessively on employer-sponsored migration. This is a concern that applies particularly to the temporary, employer-sponsored temporary Skills shortage visa (457) program, but it applies also to the permanent, employer-sponsored

programs; the Employer Nomination Scheme (ENS) and the Regional Sponsored Migration Scheme (RSMS). This concern plays out in different ways.

At the individual level, employer-sponsored visas, where workers are dependent on their employer for their ongoing visa status, increases the risk of exploitation as workers are less prepared to speak out if they are underpaid, denied their entitlements, or otherwise treated poorly. For example, this is one of the continuing objections that unions have to the RSMS visa because it virtually bonds the visa holder to the same employer for two years. If the visa holder leaves the employer within 2 years, the Department can cancel the visa. Regardless of how often the Department exercises its discretion to cancel the visa, the fact that it has the power to do so leaves a cloud hanging over those visa holders.

The now well-worn pathway from a temporary 457 visa to a permanent employer-sponsored visa, creates the same kind of problems in that temporary overseas workers with the goal of employer-sponsored permanent residency have their future prospects tied to a single employer. 457 visa workers must stay with their 457 sponsor for a minimum period of several years before becoming eligible for an employer-sponsored permanent residency visa with that employer.

Again, this makes them much more susceptible to exploitation and far less prepared to report problems of poor treatment in the workplace for fear of jeopardising that goal. This was a core problem identified during the Deegan review in 2008 and in subsequent reports.

By contrast, the DIBP appears to see employer-sponsorship only in a positive light, citing the benefits for the visa holder of guaranteed employment and arguing that it serves to protect the rights of employees and decreases the likelihood of exploitation. There is no recognition of the many problems associated with employer-sponsorship and dependence on a sponsoring employer that are played out on a regular basis. This includes a number of recent reported cases of visa holders and visa applicants being forced to pay their sponsors large sums of money in return for promises of future employment and sponsorship.

At a broader level, the concern referred to above is that the trend to 'demand-driven', employer-sponsored and temporary work visa programs effectively outsources decisions over an ever-increasing part of the migration intake to employers.

The risk here is that the migration program will increasingly be responding to what the DIBP itself describes as employers' 'immediate business needs', rather than being structured in a rational and coherent way that allows for longer-term skill needs of the Australian workforce and economy to be addressed.

The increasing shift to a more 'demand driven' skilled migration program, appears to rest on an assumption that the short term interests of employers are consistent with, and reflect, the long term interests of the Australian economy and of the migrant workers themselves. This is not necessarily the case. As Professor Sue Richardson has observed, "it is in the employers' interests to have more of a given skill available at all times: they do not consider the personal and social costs of oversupply of specific skills.

The OECD has also emphasised the risks associated with an excessive reliance on employer preferences:

'A regulated labour migration regime would, in the first instance, need to incorporate a means to identify labour needs which are not being met in the domestic labour market and ensure that there are sufficient entry possibilities to satisfy those needs. In theory, employers could be considered the group of reference for determining this, but historically, requests by employers have not been considered a fully reliable

guide in this regard, at least not without some verification by public authorities to ensure that the requests represent actual labour needs that cannot be filled from domestic sources.[1]'

This demonstrates again the need for all forms of employer-sponsored migration to be underpinned by rigorous labour market testing, monitored and enforced by the Department with independent, tripartite oversight.

The growing trend towards temporary and employer-sponsored migration, rather than permanent, independent, migration represents a major shift in how the migration program has traditionally operated, and it has occurred without any real debate. The ACTU position is that the current weighting of Australia's skilled migration program towards employer-sponsored pathways should be re-evaluated, with greater emphasis given to the permanent, independent stream as the 'mainstay' of the skilled migration program.

Our preference for permanent over temporary migration recognises that permanent migrants provide a more stable source of skilled workers with a greater stake in Australia's future and in integrating into all aspects of Australian community life. With permanent residency, migrants have a secure visa status. This makes them less susceptible (though not immune) to exploitation and less likely to generate negative impacts on other Australian workers in terms of wages, employment conditions and job and training opportunities.

Our preference for independent over employer-sponsored migration recognises the risks outlined below that are inherent in employer-sponsored visas where workers are tied to their sponsoring employer.

The migration system is currently employer driven rather than in the interests of working people and the country as a whole

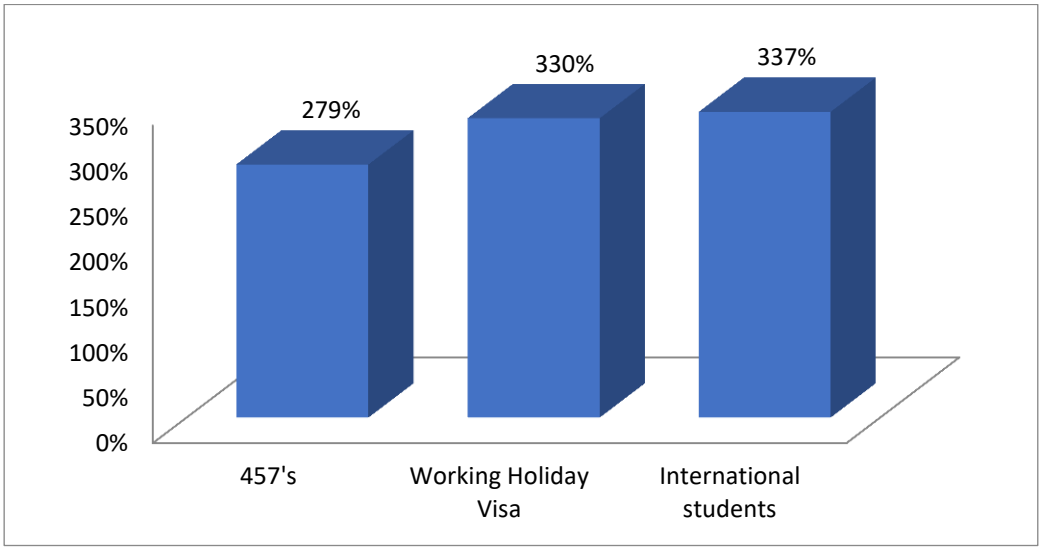
Over one million people live and work in Australia on a 'long-term temporary' basis, obliged to pay tax and abide by Australian laws but unable to vote, run for office, or access government services on an equal footing with Australian citizens.

The shift to admit large numbers of long-term temporary migrants was not the result of any democratic policy discussion, but rather has occurred incrementally, through the aggregate impact of myriad visa programs which cumulatively created a system of two-step (temporary, followed by permanent) migration, largely driven by the demands of employers.

There has been significant growth in the current number of temporary visa holders. We can clearly see below the shift to admit large numbers of long-term temporary migrants;

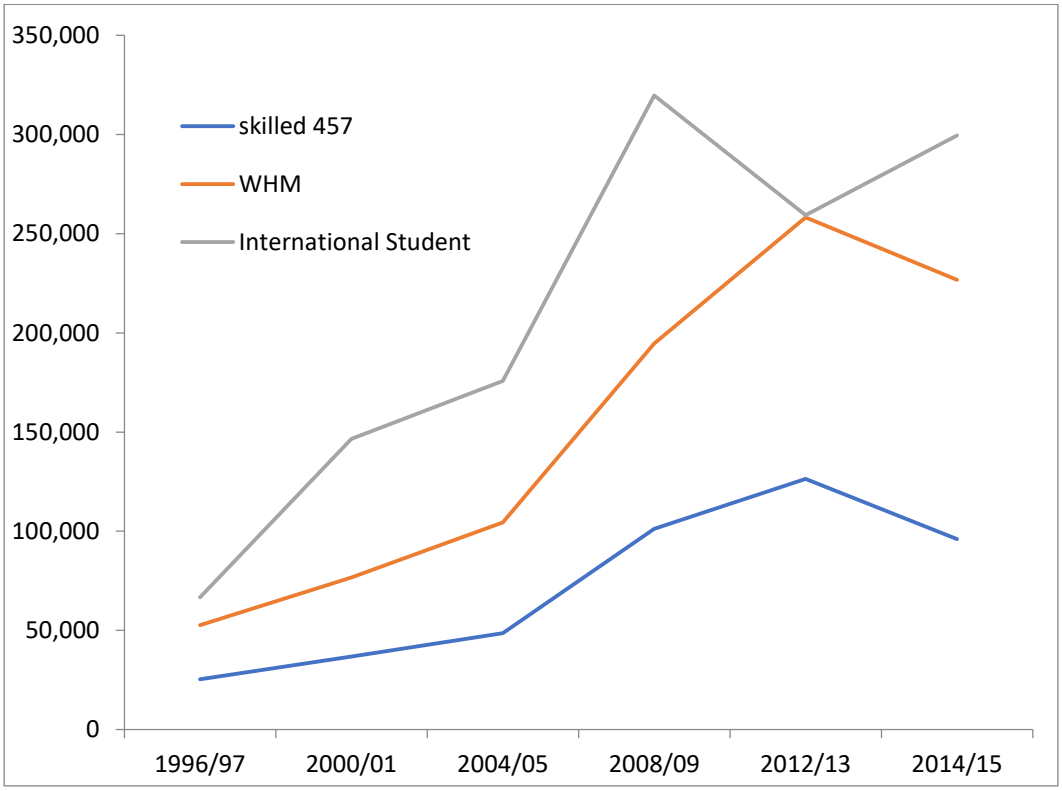
[1] OECD, *International Migration Outlook 2009*, 134

Growth in the number of Temporary Visa's 1996 - 2015



Source: Department of Immigration and Border Protection (various sources)

Significant growth in the number of Temporary Visa's 1996 - 2015



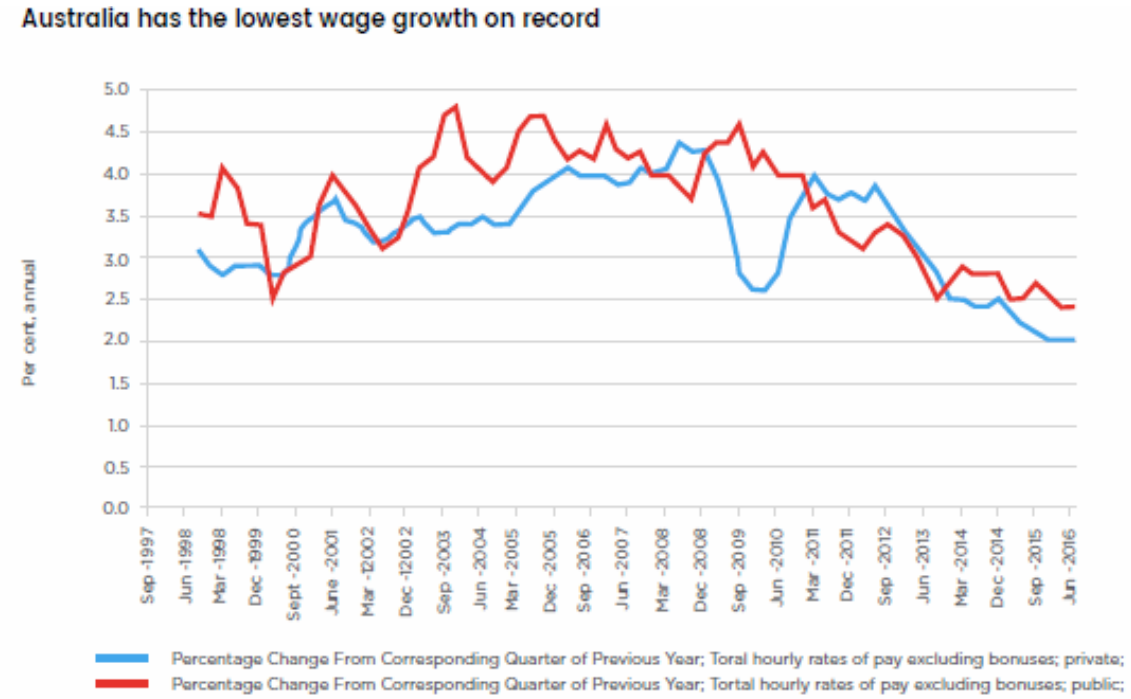
Source: Department of Immigration and Border Protection (various sources)

Problems in the Australian Labour Market demand that growing temporary work visa program is not having adverse impacts on Australian Workers

There are currently more than 1.8 million temporary visa holders in Australia, including New Zealanders, and up to 1.4 million of these visa holders have work rights. This equates to around 10% of the total Australian labour force of over 12.4 million.

At a time when unemployment remains close to 6 per cent, there are over 1 million workers underemployed, youth unemployment is in double digits and we have the lowest wage growth on record, the Australian community needs to have confidence that such a large and growing temporary work visa program is not having adverse impacts on employment and training opportunities for Australians, particularly young people.

Australia currently has record low wage growth. Economic decisions which normalize large numbers of workers being paid below the legal minimums will drag down wage growth in the rest of the labour market. The RBA and other respected institutions have noted our low wage crisis is a significant economic problem facing Australia.



Nationally Australia faces a high youth unemployment rate of 12.9% and as high as 16.1% in South Australia and 14.8% in Tasmania.

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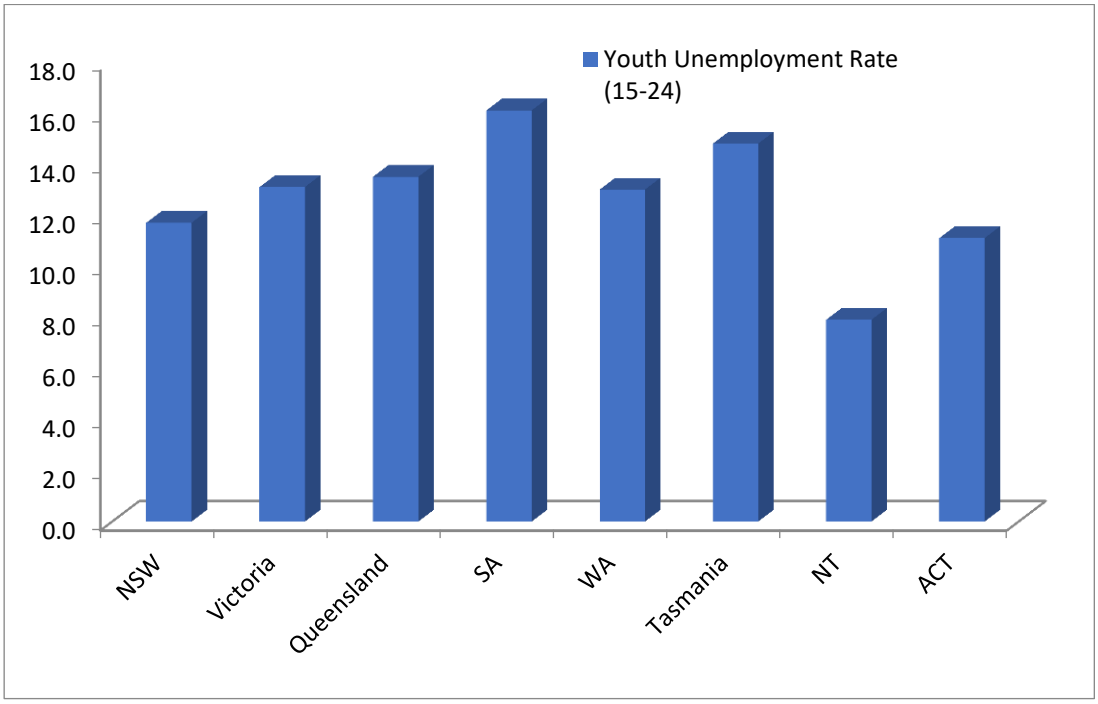
Australia faces high rates of youth unemployment



Source ABS July 2017

Australia must have a visa system with integrity that determines skilled labour market shortages

The current systems for determining whether Australia has labour shortages are ineffective. Current labour market testing mechanisms give too much power to employers to determine shortages and impose a very low burden on employers to satisfy requirements to show that there are no local workers available.

The Temporary Skilled Migration Income Threshold (TSMIT), is, in theory, a safeguard to ensure that 457/Temporary Skill Shortage (TSS) occupations are skilled and able to provide visa holders with a reasonable means of support while in Australia, has been frozen since 2013 at $53,900. It is fulfilling neither of these policy objectives.

Further degradations to the integrity of the skilled migration program are enabled by expansive labour agreements, which operate with little transparency and accountability, and enable employers to pay even less than the TSMIT, in some cases, over large geographic areas. Many occupations on the TSS list fall very far from the technical economic definition of a genuine skills shortage, which requires that employers be able to demonstrate an inability to recruit staff after increasing the salary offered.

The ostensibly tripartite Ministerial Advisory Council on Skilled Migration (MACSM) is heavily skewed in favour of industry representatives. We therefore support the proposal advanced by Joanna Howe, Alex Reilly and others for an independent, tripartite expert commission to identify genuine skills shortages. Such an authority must be genuinely independent, with its own research capacity, and mandated to determine not only whether a particular occupation is in shortage but also whether that shortage is best addressed through migration or

some other means, such as increased investment in local education, training and/or regulation to ensure better conditions of employment.

The importance of the integrity of the skills 'gate' in the migration system is difficult to overstate. There are lessons to be learned from jurisdictions in which low-skill work has been allocated to low paid temporary migrant workers, rather than being performed by a local workforce for pay and conditions that are adequate to support a decent standard of living[2].

Employers are not using the migration system to fill skilled shortages but actually want to avoid raising wages and training Australian workers

There is a difference between a recruitment difficulty, which can be resolved through training local workers or raising wages, and a genuine skill shortage. The ACTU fears employers are claiming skills shortages when in fact the situation more truly reflects a short term recruitment difficulty. There is an incentive for employers to do this because employers want to avoid paying proper wages or training local workers.

Wages need to rise to stimulate increased labour supply before a skills shortage can be deemed to exist. Situations where employers are not willing to raise wages in order to attract more potential candidates should not be regarded as a true labour shortage.

A recent report by Dr Chris F. Wright and Dr Andreea Constantin University of Sydney Business School "*An analysis of employers' use of temporary skilled visas in Australia*" surveyed employers that use temporary skilled visa holders. The report highlighted the following;

'*Only a very small proportion of employer respondents claim that they would seek to address skilled vacancies by increasing the salary being offered, which is generally considered a necessary precondition for a skills shortage to exist. Therefore, even where employers are using the 457 visa scheme because of skills shortages, the shortages that exist do not appear to be acute*.[3]'

In fact the report highlighted that 14% of employer sponsors using the 457 scheme claim not to have difficulties recruiting from the local labour market (which begs the question why they are using the 457 visa system), only 11% of employer respondents said that training existing employees is the strategy most preferred when they have difficulties recruiting skilled workers and less than 1% were prepared to increase wages or offer incentives to prospective candidates in order to address their recruitment problems.

The report came to the following conclusion;

".....The problem of the 457 visa not fulfilling its stated objective .....These employers should be encouraged to utilise alternative strategies to address their recruitment difficulties before using the 457 visa. Improving job quality to attract a wider pool of candidates, greater investment in structured training to facilitate career development opportunities for existing and prospective employees, and other measures likely to engender long term workforce commitment and retention are likely to be more effective than the 457 visa scheme for helping these employers to alleviate their recruitment problems in a more systematic manner.[4]"

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[2] *United Voice Submission 'Visa Simplification: Transforming Australia's Visa System' 9 October 2017*

[3] *Dr Chris F. Wright and Dr Andreea Constantin University of Sydney Business School "An analysis of employers' use of temporary skilled visas in Australia" 2015*

[4] *Ibid*

The new TSS visa does nothing to overcome this systematic use of temporary workers by employers as a means of avoiding wage increases.

Australia has a prevalent underclass of migrant workers that are second class citizens

Subclass 457 workers, international students and working holiday makers all suffer disproportionate levels of wage theft, discrimination, intimidation, unfair dismissal, and pressure to do unreasonable work.

- In Sydney 80% of surveyed international students working in hospitality and retail were found to be underpaid, with 35% reporting wages of $12 an hour or less.
- Another investigation found that 80% of foreign language job advertisements offered unlawful rates of pay.

There have also been examples of rampant exploitation on visas such as students and Working Holiday Maker visa holders. Exploitation of working holiday workers in the farm sector includes cases of underpayment, provision of substandard accommodation, debt bondage, and employers demanding payment by employees in return for visa extensions. Evidence released from the Fair Work Ombudsman last year revealed the systemic exploitation of working holiday makers where 28% did not receive payment for work undertaken and 35% stated they were paid less than the minimum wage. In addition over the past 18 months or more, we have witnessed a seemingly endless wave of stories of serious worker exploitation and intimidation in a number of well-known franchises, including 7-Eleven, Pizza Hut, Caltex, Domino's Pizza and United Petroleum. Yet the Government seems content to sit on its hands.

We have seen hundreds of examples where exploited vulnerable workers are paid under the legal rate of pay and face severe exploitation. Unfortunately this has become an all too common experience. Many of these exploitative activities have become normalised and are a business model for some unscrupulous employers.

When low-wage workers are cheated out of even a small percentage of their income, it can cause major hardships like being unable to pay for rent, child care, or put food on the table. Wage theft from low paid workers is also detrimental to society, as it contributes to widening income inequality, wage stagnation, and low living standards—interrelated problems that drive inequality in our society.

There should be increased workplace protections for temporary migrant workers:

There are important policy measures that could be introduced to better protect temporary migrant workers from exploitation. The Education and Employment References Committee in the report 'A National Disgrace: the Exploitation of Temporary Work Visa Holders', the Productivity Commission Inquiry Report, Workplace Relations Framework: Volume 2, as well as the recommendations in the recent Corporate Avoidance of the Fair Work Act 2009 report have highlighted many cases of exploitation and have made a number of strong recommendations that if implemented by government will significantly decrease the vulnerability of these workers.

One policy recommendation which has wide support, and has been identified, is that breaches of the Migration Act should not result in absence of protection under the Fair Work Act. The ACTU is concerned about the

pressure that certain employers have exerted on temporary visa workers to breach a condition of their visa in order to gain additional leverage over the employee. Unfortunately there have been examples where unscrupulous employers have exercised their power in the employment relationship and the employee has been rendered vulnerable to exploitation.

Productivity Commission Inquiry Report, *Workplace Relations Framework: Volume 2* (2015) 931

RECOMMENDATION 29.4

The Australian Government should amend the *Fair Work Act 2009* (Cth) to clarify that, in instances where migrants have breached the *Migration Act 1958* (Cth), their employment contract is valid and the *Fair Work Act 2009* (Cth) applies.

Senate Standing Committee on Education and Employment, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (2016)

Recommendation 23

8.263 The committee recommends that the *Migration Act 1958* and the *Fair Work Act 2009* be amended to state that a visa breach does not necessarily void a contract of employment and that the standards under the *Fair Work Act 2009* apply even when a person has breached their visa conditions or has performed work in the absence of a visa consistent with any other visa requirements.

We have also seen too many examples of the horrendous exploitation of temporary visa holders by unscrupulous labour hire companies. The ACTU is a firm advocate of a licensing regime for labour hire contractors as recommended by the recent Senate inquiry on the exploitation of work visa holders:

Recommendation 32

9.309 The committee recommends that a licensing regime for labour hire contractors be established with a requirement that a business can only use a licensed labour hire contractor to procure labour. There should be a public register of all labour hire contractors. Labour hire contractors must meet and be able to demonstrate compliance with all workplace, employment, tax, and superannuation laws in order to gain a license. In addition, labour hire contractors that use other labour hire contractors, including those located overseas, should be obliged to ensure that those subcontractors also hold a license.

Some industries and companies are now using labour hire agencies to provide bulk labour for their workplace. This has been at the expense of local workers as they are "cheaper" either through undercutting the enterprise agreement rates or through exploitation and sham contracting arrangements. The government needs to act to stop the negative effects of these work arrangements on the domestic labour force.

We also urge the government to take seriously the prevalence of the very worst forms of workplace exploitation in many labour hire companies. The government should act with urgency to deal with the exploitation of workers that unfortunately has become common practice in certain segments of the labour market.

To stop exploitation of migrant workers and underpayment of wages unions need to be empowered to inspect pay records and enforce laws

The Fair Work Act now restricts unions from conducting workplace checks on businesses suspected of underpaying and exploiting workers.

Union investigation powers were, until 1996, governed by the provisions of the Industrial Relations Act and supplemented by Federal Awards. These provisions recognised and expressed the policy merit providing such rights on the basis of "ensuring the observance of an award or order of the Commission".

From 1996, changes to relevant statutory provisions as well as the requirements of "award simplification" resulted in a far reduced capacity for Unions to perform this valuable role. Instead, the emphasis of the system has shifted toward union officials needing to have a prima facie case of non-compliance before exercising such rights, and needing to prove their own character as pre-condition of being able to access those rights at all.

Moreover, unions are placed in the ridiculous position of being required to give advance notice to enter premises where they know the relevant records are not stored, and then physically enter those premises, before they can legally require that the records they know to be held off site be made available for inspection. It is not possible for all of those requirements to be satisfied, and the records provided, even inside of two working weeks. Even if all relevant requirements are satisfied, it is not possible to require production of records that relate to former employees. In practice, this means that the worker who is the subject of the prima facie case can be dismissed in order to defeat the Union's legal right to investigate.

Recent scandals and work by Unions NSW has demonstrated rampant underpayments in many businesses. Despite this, unions are now only able to check the pay records of union members. The FWO undertakes audits of businesses to ensure compliance with workplace laws. These audits have recovered underpaid wages for workers, and have uncovered a number of repeat offenders, who despite being caught and fined, continue to underpay workers.

Unfortunately the FWO cherry picks easier cases and they drive small cases away with convoluted and intimidating processes. Its own compliance policy provides enormous discretion on which cases to take up and those discretions have little to do with seeking widespread compliance. Empowering unions is an efficient and cost effective way of achieving better compliance. If employers know they could be caught as unions are empowered to inspect records and recover stolen wages, this becomes a deterrent itself. At the moment employers know the chances of being caught are so low they deem it worth the risk.

The new ‘Temporary Skills Shortage’ visa program is nothing more than ‘457 lite’ and is the epitome of ‘press release politics’.

Despite recent government reforms that resulted in the new ‘Temporary Skills Shortage Visa’ an excessively large number (435) of occupations remain on skills shortage list, these include roof tilers, carpenters, joiners, chefs, cooks, midwives, nurses, and real estate agents. This in no way accurately reflects genuine and current labour shortages in Australia. The changes to the occupations list are only the equivalent of around one in 10 visa holders. This system will continue to prevent young Australian workers from getting their first job and do not contain sufficient safeguards to stop the exploitation of temporary visa holders.

Worryingly, with respect to labour market testing, there is a glaring gap in the new reforms. The core problem which has dogged the 457 visa is being carried over to the Government's new system — employer-constructed labour market testing. As the ACTU has raised on many occasions, employer constructed labour market testing is ineffective. For example, you can advertise on Facebook for one week and that satisfies the criteria. The Government has done nothing to change this flawed system.

These new reforms won’t also affect the carve outs from our Free Trade obligations. The Department of Immigration and Border Protection’s summary of the new reforms clearly states 'mandatory labour market testing unless an international obligation applies’. Thus, even with the Government rebranding 457 visas with new requirements, employers can just circumvent the system by picking a different visa instead. Free trade agreements such as the China-Australia Free Trade Agreement (ChAFTA) allow unlimited numbers of workers, like electricians, to be brought in without labour market testing or proper skills checking. Unfortunately this also brings the horrendous exploitation of temporary workers which we seen under ChAFTA agreement.

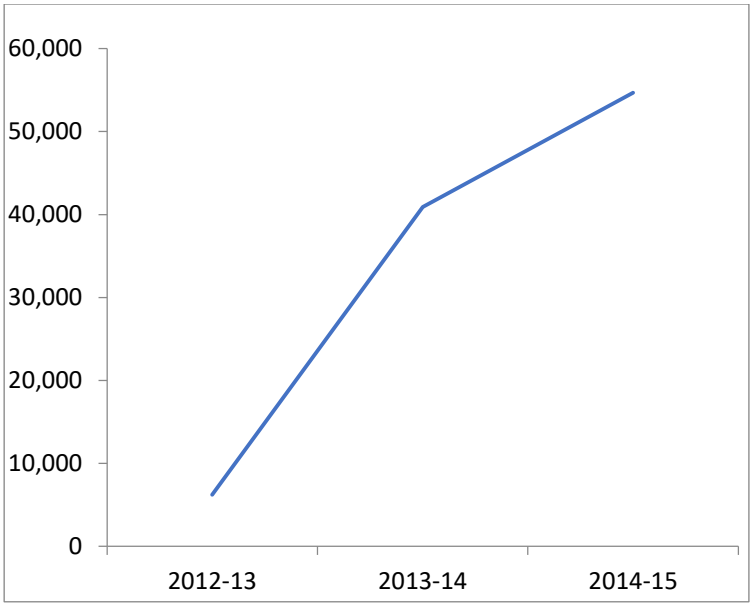
It is evident from DIBP’s own papers that the visa system has been rorted yet the new reforms to the 457 visa do nothing to address this. From the Department’s own papers there are fears that ‘marketing managers’ are being used as low skilled sales assistants, ‘pastry cooks’ as kitchenhands, ‘accountants’ as payroll clerks, ‘customer service managers’ in low skilled clerical positions and shamefully ‘massage therapists’ being exploited as sex workers. Internal Departmental papers even note that the NSW police have reported that 457 visa holders engaged as ‘transport and company managers’ are being used as truck drivers. In our view these occupations should have been removed from the skills shortage list.

The 400 Visa series is a “back door” visa for employers to circumvent the rules. This undermines the integrity of the visa system

Recent reports that migrant workers have been brought in to work via the subclass 400 visa, with some applications approved in as little as 24 hours, are deeply concerning.

There are now fifty thousand 400 visas granted each year.

Graph: Dramatic increases in the new 400 visa Series



There are entire business lines, firms and sectors whose business models rely heavily on the systematic undermining of wages and exploitation of temporary workers. We have seen this in fast food, convenience stores, agriculture, building, mining, accounting, IT, engineering, education, transport and the gig economy.

There have been clear examples of exploitation and abuse under the 400 visa series. Fairfax Media reported on Chinese welders being paid $US70 a day, a fraction of the going rate for a lift industry worker of $42 an hour. It is also below the national minimum wage which is currently $18.29 for a full-time adult worker. The workers received no pay slips, no penalties, no superannuation, and had no WorkCover insurance.

Recent media reports have highlighted the exploitation under this visa;

Exploitation under the 400 visa series[5]

In the past decade, hundreds of thousands of workers have been employed on short stay visa categories, including the 400's predecessor the 456, with at least 11 cases before the Fair Work Ombudsman. But experts warn despite the examples of exploitation, the Department of Immigration and Border Protection has little detail on the employment of these workers.

Among them, Chinese labourers flown in to dismantle the former Mitsubishi car plant in the Adelaide Hills paid $1.90 an hour, Filipino metal fabricators paid $4.90 an hour to install animal feed mills in NSW, and nine Indonesian timber workers flown into Tasmania and promised bonuses when they returned home.
"The fact that a couple of exploitation cases exist really shows that there is a real opportunity for this visa to be exploited," said Joanna Howe, an associate Professor in Law at the University of Adelaide.
"They have no local or community networks, they have very little English, it's very difficult for them to even know that the fair work ombudsman exists."

[5] http://www.smh.com.au/federal-politics/political-news/a-new-frontier-the-littleknown-alternative-to-the-457-foreign-worker-visa-20170901-gy8p0j.html

Documents seen by Fairfax Media show 400 visas are sometimes approved within 24 hours with seemingly minimal oversight. Despite the government's requirement that the work be "highly specialised", the visa has been used to fill semi-skilled positions for which apparently qualified Australian applicants were available…

Dr Chris F Wright, a senior lecturer at the University of Sydney Business School said… "For the 400 there is not much information at all. It's a sleeper visa category not much attention has been paid to it."
Dr Howe said the lack of transparency meant it was easier to use the 400 than the 457 "for any unscrupulous employer that wants to subvert Australian law, that wants to use a migrant workforce because they aren't unionised and less likely to complain".

In January, a Freedom of Information request from Dr Howe and colleague Irene Nikoloudakis showed the Department had "no documents" referring to the number of visa holders by occupation.

Exploitation of Working Holiday Makers

The Working Holiday Maker visa has unfortunately become synonymous with unscrupulous labour hire companies that abuse their workers. Exploitation of working holiday makers in the farm sector include cases of underpayment, provision of substandard accommodation, debt bondage, and employers demanding payment by employees in return for visa extensions.

There is a growing body of institutions and reports that recognise there is a problem of unregulated labour hire companies exploiting workers. This includes the March 2016 Senate Standing Committee on Education and Employment "A National Disgrace: The Exploitation of Temporary Work Visa Holders". Without the significant problem of unscrupulous labour hire companies being addressed we fear that there will be a continued exploitation of these workers

The original aim of the working holiday maker visa was cultural exchange

The ostensible basis of the WHM visa program is to provide a cultural exchange and to allow visa holders the opportunity to work during their holiday in Australia.

The WHM visa program began in 1975 and allows young adults (aged 18 to 30) from eligible partner countries to work in Australia while having an extended holiday. It has consistently been seen as a cultural program 'facilitating the travel of young people to and from Australia to have a cultural experience, supplemented with a limited opportunity to work'. Indeed, the DIBP states that 'work in Australia must not be the main purpose of the visa holder's visit.

The WHM was not meant to be a working visa to bring low-skilled labour into the country whose primary purpose was work - though it is clear this is how the visa is used in practice. The working holiday visa should be primarily about travel and cultural exchange supplemented by some incidental short-term work. The former Minister Scott Morrison clearly adopted the same view of it, stating "The WHM program is not a work visa and undertaking work is an optional part of a WHMs stay".

However for many young people, particularly for those from countries with high youth unemployment, it is likely that finding work is the primary purpose of their visit to Australia. In fact the Department of Immigration and Border Protection (DIBP) appear to concede this point, despite its stated position that the 417 visa is not a work visa, when it attributed a recent slight tapering off of working holiday visa grants to improving economic conditions in some partner countries - an acknowledgement that working holiday visa numbers are a reflection of people coming here to find work they cannot find in their home country.

The WHM should be capped

Governments should impose quotas or cap the working holiday visa numbers where labour market conditions require it, as they do in other countries such as Canada.

Given the current state of the labour market, unions recommend that now is such a time for a cap to be imposed in order to put a limit on further growth in the working holiday program, and that an annual quota be determined based on advice from an independent, tripartite Ministerial Advisory Council for Skilled Migration and taking into account the labour market conditions for young Australians. We note that section 85 of the Migration Act 1958 already gives the Minister the power to cap or limit the number of visas which can be granted each year in a particular sub-class.

The critical point is that it should be the labour market conditions in Australia that are the determining factor for working holiday visa numbers in Australia, not the labour market in the partner countries, as appears to be more the case at present.

The visa currently applies to any type of work, and is not subject to any sponsorship or skill requirements, such as labour market testing, and the visa numbers are uncapped.

The recent March 2016 Senate Standing Committee on Education and Employment "A National Disgrace: The Exploitation of Temporary Work Visa Holders" highlighted this issue;

"the large scale and widespread hiring of 417 visa workers severely curtails the employment prospects of local workers in rural and regional areas of Australia, areas that are already suffering from higher than average levels of unemployment and youth unemployment in particular.[2]*"*

Key Recommendations on the operation of the Visa System

There are currently more than 1.8 million temporary visa holders in Australia, including New Zealanders, and up to 1.4 million of these visa holders have work rights. This equates to around 10% of the total Australian labour force of over 12.4 million.

At the same time there are close to 800, 000 Australians out of work. Youth unemployment is 12.9%.
The temporary work visa program is virtually uncapped and has been growing in size for a number of years, without any regard for the state of the labour market in Australia.

In December 2007 there were around 840, 000 temporary work visa holders in Australia, about 7% of the total labour force of 11 million at the time. If both the labour force and the number of temporary work visa holders continued to increase at the same rate over the next 5 years as they did between 2007-2014, then by 2020

there would be close to 2 million temporary work visa holders in Australia, and they would make up around 14% of the total labour force.

This compares to the current permanent migration intake of around 130, 000 which is determined and capped on an annual basis.

Meanwhile, disturbing cases of exploitation and mistreatment of temporary work visa holders continue to be reported. This has been happening far too often and for far too long. These cases cannot continue to be dismissed as isolated cases in an otherwise well-functioning system. They point to the systematic, inherent problem of relying so heavily on a temporary work visa program where vulnerable workers are dependent on their employer for their ongoing visa status, and, in many cases, their desire for permanent residency.

It is time for a fundamental review and reassessment of the temporary work visa program in the interests of all workers - Australian citizens and permanent residents, and temporary overseas workers. This is also important for the Australian community as a whole and for Australia's international reputation as a fair and safe place for overseas nationals to work, as well as for all those employers who are doing the right thing in employing and training Australians, and where they do have a genuine requirement to use overseas workers, treating those workers well and in accordance with their legal entitlements.

We commend the following package of recommendations for consideration.

Key Recommendations;

1. Local workers should be considered first. Training and retraining Australians should be the first port of call for meeting skills needs as opposed to the use of exploited migrant labour

1.1 The first principle of any new visa simplification should be to maximise jobs and training opportunities for Australians - that is, citizens and permanent residents of Australia, regardless of their background and country of origin – and ensure they have the first right to access local jobs. The reforms ensure that employers are not able to take the easy option and employ temporary overseas workers, without first investing in training and looking to the local labour market. This is also about ensuring those employers who do the right thing are not undercut by those employers who exploit and abuse the temporary work visa program and the workers under it.

2. Recalibrate the balance of the skilled migration program toward permanent, independent migration

2.1 The current weighting of Australia's skilled migration program towards temporary and employer-sponsored pathways should be re-evaluated, with greater emphasis given to the permanent, independent stream as the 'mainstay' of the skilled migration program.

3. Address the prevalence of an exploited underclass of migrant workers

3.1 There are important policy measures that should be introduced to better protect temporary migrant workers from exploitation. These include, but are not limited to, the recommendations in the senate

inquiry report 'A National Disgrace: the Exploitation of Temporary Work Visa Holders'. Some crucial reforms include:

- Regulating high risk areas. For example by establishing a national licensing regime for labour hire firms.
- Providing equal workplace rights for temporary migrant workers. For example breaches of the Migration Act should not result in the absence of protection under the Fair Work Act.
- Unions should be empowered to inspect records and enforce laws.
- The reforms should help enable temporary migrant workers to effectively enforce their workplace rights. For example migrant workers should be put in contact with unions at the pre-departure and post-arrival.
- Prevent employers profiting from law-breaking. The onus of proof should be reversed when the employer has breached its pay-slip and record-keeping obligations in all circumstances[6].

4. Improved labour market testing

4.1 The ACTU recommends more rigorous evidentiary requirements for labour market testing to be incorporated into legislation and associated program guidelines to ensure the intent of the legislation is achieved and Australian employment opportunities are protected. This should include:

- A mandatory requirement for all jobs to be advertised as part of labour market testing obligations;
- The introduction of minimum requirements for mandatory job ads, similar to the UK Resident Labour Market Test;
- A requirement that jobs be advertised for a minimum of four weeks;
- A requirement that labour market testing has been conducted no more than 4 months before the nomination of a TSS (457) visa worker;
- A ban on job advertisements that target only overseas workers or specified visa class workers to the exclusion of Australian citizens and permanent residents;
- A crackdown on job ads that set unrealistic and unwarranted skills and experience requirements for vacant positions, with the effect of excluding otherwise suitable Australian applicants; and
- The Minister to use the provision at s.140GBA (5) (b) (iii) of the Migration Act 1958 to specify other types of evidence that should be provided as part of labour market testing, including evidence of relocation assistance offered to successful applicants, and evidence of specific measures to employ

[6] The Fair Work Act presently allows some employers to profit from breaching the Act due to the low likelihood of being caught and the inadequate penalties that apply if they are caught (especially in relation to pay-slip and record-keeping obligations). The increased penalties provided by the Protecting Vulnerable Workers Act go some way to addressing these gaps. So do its provisions reversing the onus of proof when the employer has breached its pay-slip and record-keeping obligations. The latter provisions, however, open up a potential loophole for employers to defeat the legitimate claims of workers by not reversing the onus where there is a 'reasonable excuse'. Rather the onus of proof should be reversed when the employer has breached its pay-slip and record-keeping obligations in all circumstances.

those disadvantaged or under-represented in the workforce, such as indigenous workers, the unemployed and recently retrenched workers, and older workers.

- Labour market testing should apply to all occupations under the TSS (457) visa program. Existing exemptions on the basis of skill level and occupation or because of international trade agreements should be removed.

- Where Governments nevertheless intend to make exemptions from labour market testing, including through trade agreements, unions and other stakeholders should be consulted before any decisions are made on such exemptions, including consultation through a new independent, tripartite Ministerial Advisory Council on Skilled Migration (MACSM).

- The Australian Government should not enter into any free trade agreements that trade away the right of the Australian Government and the Australian community to require that labour market testing occur and Australian workers are given first right to Australian jobs.

4.2 Where Australian Governments nevertheless continue to make commitments on the 'movement of natural persons' in free trade agreements that provide exemptions from domestic labour market testing laws, those commitments should not be extended to the category of 'contractual service suppliers' given the expansive meaning given to that term across professional, technical and trade occupations.

- The Migration Regulations be amended as necessary to make clear that labour market testing applies not only to 'standard business sponsors' under the standard TSS (457) visa program, but applies also to all positions nominated by 'approved sponsors' under any labour agreement, Enterprise Migration Agreement (EMA) or Designated Area Migration Agreement (DAMA).

- The current sponsorship obligation 'to keep records' be expanded to specifically include records of labour market testing undertaken.

- In the interests of transparency and community confidence in the TSS (457) visa program, the Department of Immigration and Border Protection (DIBP) make information and data on the operation of the labour market testing provisions publically available on at least a quarterly basis. Provision of such information and discussion of labour market testing should be a standing agenda item for the new independent, tripartite Ministerial Advisory Council on Skilled Migration.

5. Improved training benchmarks

5.1 That training benchmarks for the new TSS (457) visa program be informed by clear objectives. The following objectives are recommended:

- To ensure that employers who have a genuine need to sponsor and overseas workers to fill skill shortages are also training the future workforce, reducing their need to rely on temporary overseas workers in future.

- To increase training through trade apprenticeships, traineeships and graduate degrees in the specific occupations allegedly in short supply i.e. the occupations in which TSS (457) visa workers are being approved on the basis that no qualified Australian workers are available.

- To ensure that the TSS (457) sponsor approval criteria are sufficiently robust to screen out would-be sponsors who do not meet best practice Australian standards for apprenticeship and graduate training.

- To increase the cost of accessing TSS (457) visa workers relative to the cost of training Australian workers, especially young people in entry-level positions.

- Consistent with these objectives, introduce more robust training obligations on employers who use the TSS (457) visa program, including :

5.2 A requirement on sponsoring employers to be training and employing apprentices/trainees/graduates in the same occupations where they are using TSS (457) visa workers.

- Where four or more TSS (457) visa workers are sponsored by the employer in trade and technical occupations, apprentices must represent at least 25% of the sponsor's trade workforce.

- Smaller employers with fewer than four TSS (457) visa workers and who are not able to commit to directly training an apprentice should be required to train an apprentice through an industry group scheme on a ratio of one to one for the time they seek to engage a TSS (457) visa worker.

- Where employers are sponsoring TSS (457) visa workers in professional and managerial occupations, recent Australian higher education graduates with less than 12 months' paid work experience should represent at least 15% of the sponsor's managerial and professional workforce.

- A requirement on sponsors of TSS (457) visa workers to make payments into a dedicated training fund that is linked to broader training objectives. This concept is similar to that recommended by the Azarias review, but must be based on a more meaningful contribution. A contribution of $4000, which is based on the standard incentive payment an employer would have received if they had employed an apprentice through to completion, is a recommended benchmark contribution amount.

- Abolishing the existing, ineffective training benchmarks tied to payment of 1% and 2% of payroll.

- The DIBP be responsible for ensuring information on the domestic training effort of sponsoring employers under the TSS (457) visa program is collected and made publically available.

6. MACSM must be a genuine tripartite and independent council

6.1 If MACSM is to be meaningful it needs to be a genuine tripartite council. MACSM should be reconstituted as a genuinely tripartite, independent, and transparent body. MACSM in the past has been neither genuinely tripartite, nor sufficiently independent from government. Until recently, the ACTU was the sole union presence on MACSM. An impartial observer cannot help but conclude that MACSM did not represent a reasonably balanced range of views. MACSM needs to have a balanced representation from business, the unions, government and academia.\

7. Reform and Cap the Working Holiday Visa Program

7.1 The DIBP conduct a public assessment and review of the potential impact the additional labour supply from this visa program has on employment opportunities, as well as wages and conditions, for Australian

citizens, particularly on young Australians in lower-skilled parts of the labour market. The review should be conducted with the oversight of the Ministerial Advisory Council for Skilled Migration after the implementation of Recommendation 4.

- Governments should have the option of imposing quotas or capping working holiday visa numbers and exercise that option where labour market conditions require it. Given the current state of the labour market, now is such a time for a cap to be imposed. An annual quota for the visa should be determined based on advice from the tripartite Ministerial Advisory Council for Skilled Migration and taking into account the labour market conditions for young Australians.

- The DIBP provide consolidated and publically available information on the working patterns of working holiday visa holders. This should include the number of working holiday visa holders that do exercise their work rights, the duration of their employment, the number of employers they work for, their rates of pay, and the locations, industries, and occupations they work in. If this information is not currently able to be produced, then DIBP should report to the Ministerial Advisory Council for Skilled Migration on how this data can be collected.

- Job ads that advertise only for working holiday visa holders or that use the inducement of a second working holiday visa be banned.

- The second year working holiday visa be abandoned altogether, and WHM visas be removed from all free trade agreements.

- Remodel the work rights attached to the working holiday visa so that it operates as a genuine holiday visa with some work rights attached, rather than a visa which, in practice, allows visa holders to work for the entire duration of their stay in Australia.

Conclusions

We welcome this review of the visa system, however, it is clear from our analysis that the current framework of the visa system is not fit for purpose. Any moves towards a new system must not exacerbate the flaws that already currently exist.

Creating a visa system that is fit for purpose is best achieved by gradually reversing, rather than deepening, the trend toward increasing levels of temporary migration in Australia; increasing workplace protections for migrants, and obligating employers to train Australian workers.

Local workers must be paramount in any changes to the visa system. Local workers should be considered first and training and retraining Australians should be the first port of call for meeting skills needs as opposed to the use of exploited migrant labour. The normalisation of an exploited underclass of migrant workers, to serve the interests of big business, is nothing less than a national disgrace. Reforms to address this exploitation are urgently needed.