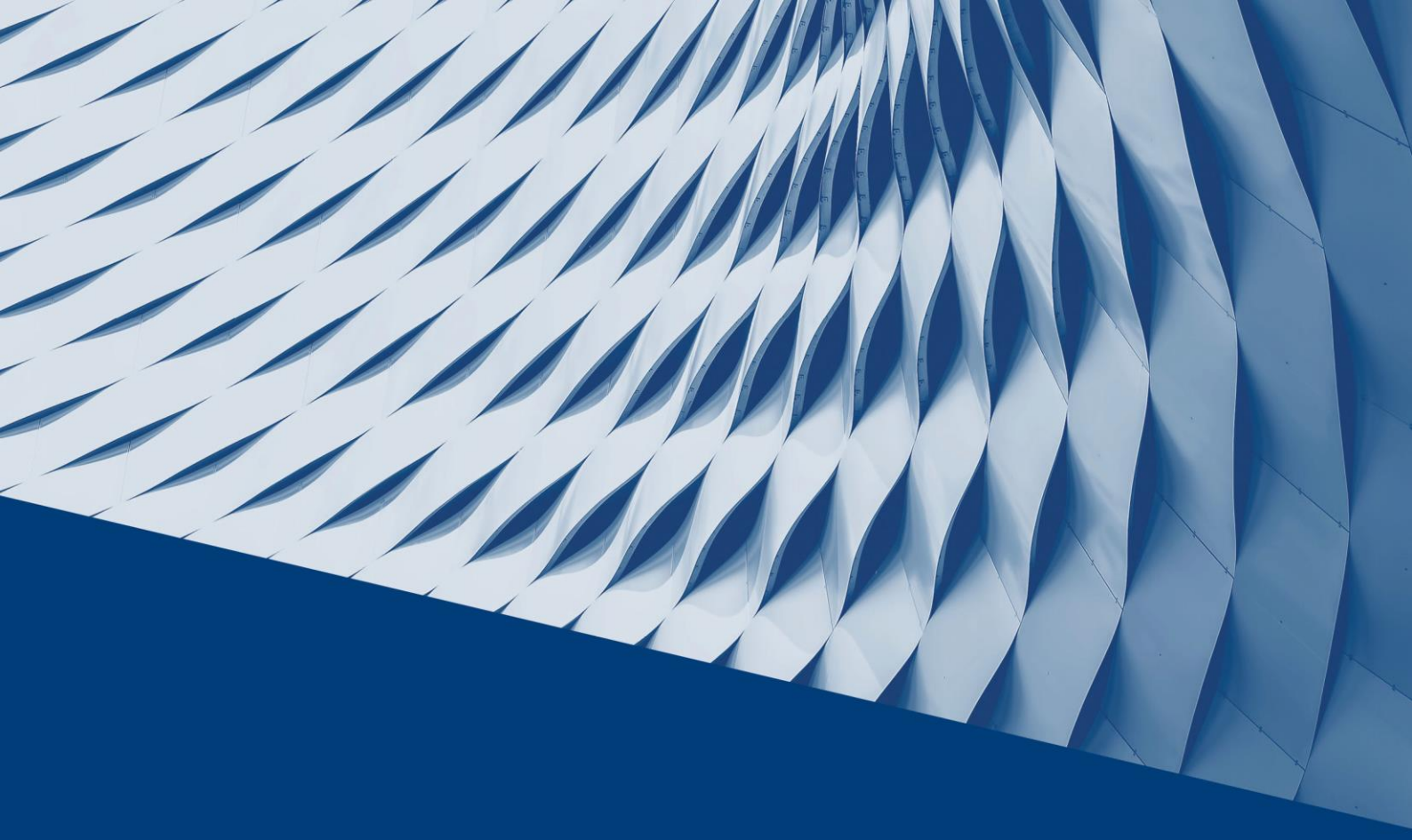

A Migration System for Australia's Future

ACTU Supplementary Submission

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ACTU
australian council of trade unions

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Introduction

About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. It has played the leading role in advocating for, and winning the improvement of working conditions, including on almost every Commonwealth legislative measure concerning employment conditions and trade union regulation. There are currently 43 ACTU affiliates who together represent almost 1.8 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

A Migration System for Australia's Future

Further to our previous submission to this inquiry, 'Skilling the Nation: Addressing Australia's skills and migration needs now and into the future'[1], which contains 18 recommendations to ensure Australia's migration strategy complements Australia's jobs and skills agenda and can respond effectively to the challenges ahead, we are pleased to provide additional comments to the Reviewers that build on our previous submission and respond to some proposals raised in this inquiry so far. Australia's migration system and skills system must be tripartite and closely linked to ensure alignment with labour market need, and the migration system must be reset to one based on permanent migration, where migrant workers are given security and have their rights respected.

A transparent, tripartite approach to labour migration

Since 1996, the temporary labour migration system has been largely 'demand driven,' with patchwork attempts to link the regime with genuine labour market needs – including by way of skilled occupation lists, income thresholds, labour-market testing and market salary analysis. But there is still no coherence between labour migration and workforce planning in Australia.

In the meantime, the various efforts to regulate the employer sponsorship regime have led to a visa process that is unwieldy, costly and inscrutable both to employers and applicants. Both

[1] ACTU Submission, 'Skilling the Nation: Addressing Australia's skills and migration needs now and into the future', https://www.actu.org.au/media/1450098/actu-job-summit-report-skilling-the-nation.pdf

employers and applicants must have access to a more transparent, straightforward migration process.

But the response cannot be the creation of a simplified 'employer demand' model, enabling employers to source migrant workers provided only that they have made out a genuine need for that worker in the context of their business. A version of such an unregulated model of employer sponsorship is proposed in submissions by Business Council of Australia[2] and the Australian Chamber of Commerce and Industry.[3] This model increases employer flexibility without any regard for the security of migrant workers or connecting the migration program with overall labour market planning. Adoption of this model will further entrench the problems in the current system disconnect the labour migration program from labour market needs and thus undermine social support and license for the program. An employer-driven model of migration must be replaced with one that is truly transparent, evidence-based and representative.

International best practice is based on the joint development of labour market policy by employers and workers through their unions, supported by advice from labour experts. Wright and Clibborn observe in their submission to the review:[4]

> This use of an evidence base to enable constructive negotiation between employers and unions is a critical element of the Danish system, for example, because it minimises disagreement over the "the facts".

The creation of the new Jobs and Skills Australia (JSA) provides an opportunity for Australia to establish a tripartite approach to labour market planning and integrating the migration system with the skills and training system. JSA will take over the functions of the National Skills Commission (NSC), but rather than adopt the flawed methodology of the NSC, which determines an occupation is in shortage when employers have recruitment difficulties for positions offered at current rates of pay and conditions[5], JSA should adopt a robust methodology and a tripartite, industry-based approach to ensure skill shortages are genuine: as distinguished from mere 'recruitment difficulties' which as Wright notes, 'may be the result of an employer offering uncompetitive wage

[2] Business Council Submissions, p 24.
[3] Australian Chamber of Commerce and Industry submission, pp. 11-12.
[4] Wright and Clibborn, p 9.
[5] National Skills Commission, 'Skills Priority List Methodology', https://www.nationalskillscommission.gov.au/sites/default/files/2021-12/Skills%20 p. 5

rates and unattractive working conditions, rather than skill shortages that are experienced by all employers in the same sector.'[6] In addition to the high risk of exploitation individual employer sponsorship arrangements pose to workers as described in the following section, this presents an additional reason for abolishing individual employer sponsorship arrangements for both the temporary and permanent migration programs: it is simply not an accurate way of determining or addressing skill shortages, which if they are genuine would be present across an entire industry or section of the labour market – not just experienced by individual employers.

The UK's Migration Advisory Committee (MAC) provides an example of a more rigorous methodology for determining labour market need and whether migration is the sensible response. MAC's methodology is based on analysing both 'top down' quantitative data including national statistics and surveys, and 'bottom up' qualitative sources including sectoral consultation with both unions and employers. MAC also considers a range of indicators to determine whether it is 'sensible' to fill the shortage by accessing migrant workers, including considering measures such as training local workers or raising wages and improving employment conditions to attract local workers.[7]

Industries – that is, employers and unions together – are best placed to identify labour market shortages and develop a plan for responding to the shortage over the short, medium and long term, which could include skilled migration. We propose tripartite industry councils are created which adopt a similar 'top down' and 'bottom up' methodology, drawing on both JSA's expert workforce analysis and projections, and feedback from employers and unions in the industry to undertake planning for their industry sectors and how the skills gaps can be addressed, which could include skills training, offering improved wages and conditions to attract workers, and skilled migration. Migration should only be identified as a response if employers in the industry have first tested offering improved wages and conditions to attract local workers.

If migration is identified as a sensible response, the tripartite industry council would set the number of places available for skilled migration, which would be reviewed quarterly, and would initiate

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6 https://www.smh.com.au/business/workplace/skills-crisis-can-be-solved-with-training-and-good-faith-bargaining-20220908-p5bgiz.html

7 Migration Advisory Committee, 'Identifying skilled occupations where migration can sensibly help to fill labour shortages', February 2008, https://www.compas.ox.ac.uk/wp-content/uploads/ER-2008-Need_Migrant_Labour_MAC.pdf., p. 30.

industry-sponsorship of a cohort of migrant workers through the Department of Home Affairs. These workers would not be tied to any individual employer and would have the ability to move between employers and roles in the industry – thereby removing a key driver of exploitation by reducing the power imbalance between migrant workers and their employers, enabling workers to leave an employer if they are not being treated fairly. The tripartite industry council would have oversight of which employers were engaging migrant workers, and employers wishing to engage migrant workers would have to meet particular obligations, including reporting to JSA regarding the migrant workers they are engaging and allowing the relevant union/s to conduct an on-arrival induction with migrant workers.

Protecting temporary migrant workers

Protecting the workplace conditions and fundamental rights of all temporary migrant workers must be at the heart of any proposed reforms to the migration regime: not an afterthought, or a matter of 'additional information and support,' as has been suggested by stakeholders such as the Business Council of Australia.[8] That is so for two critical reasons:

First, there is now a decade of policy and research evidence of the systematic exploitation and underpayment of migrant workers. This includes the findings of the 2018 wage theft survey undertaken by the Migrant Justice Institute,[9] the 2019 Migrant Workers Taskforce[10] and the 2021 Senate Select Committee on Temporary Migration.[11] All evidence points in the same direction: the employer-dependence of the current labour migration regime primes migrant workers to accept systematic underpayment and breach of labour laws in order to secure a permanent future in the country.

Second, temporary migration can no longer be viewed in entirely mechanistic fiscal terms. As Wright and Clibborn point out in their submission to this review, *'the migration system is preoccupied with short-term economic efficiency objectives'* and unconcerned with the human consequences it generates. The result of more than a decade of policy-making is a migration

[8] Business Council of Australia submission, p 19.
[9] https://www.migrantjustice.org/publications-list/report-wage-theft-in-silence.
[10] https://www.dewr.gov.au/migrant-workers-taskforce/resources/report-migrant-workers-taskforce.
[11] https://apo.org.au/node/313897.

regime fundamentally geared towards employer sponsorship and mass, uncapped temporary migration. In human terms, the consequence has been hundreds of thousands of aspiring migrants entering Australia each year, with dwindling prospects of permanent residency. According to the Department's most recent population statement, an annual number of 66,000 temporary migrants 'reside in Australia for several years but never transition to permanent residency.'[12] That figure is not disaggregated but presumably includes long-term temporary residents who are precluded from permanent residency, such as the holders of Temporary Skills Shortage (Subclass 482) visa in the 'short term stream.' These features of the current regime, and the widespread evidence of the systemic exploitation of migrant workers, mean that it no longer operates with social license. Fundamental changes must be envisaged to restore public support for, and international faith in, Australia's migration system.

In our view, the current employer-centred sponsorship-based model of labour migration cannot be reformed in such a way as to eliminate the risk of exploitation. The fundamental inequality in bargaining power between sponsors and workers – dependent upon their employment not just for subsistence but visa security and a pathway to permanent residency – cannot be overcome no matter how the individual employer sponsorship arrangements are modified.

Attempts to introduce protections for sponsored workers into the *Migration Act 1958* (Cth) have been entirely ineffective. In 2018, a series of enhanced sanctions were introduced to the Act relating to employer-sponsors[13] – including civil and criminal penalties for failing to satisfy sponsorship obligations.[14] Yet the number of proceedings commenced against employer-sponsors under those provisions are negligible, precisely because the key witnesses in such proceedings, the sponsored workers, would risk visa cancellation and their pathway to permanent sponsorship if they were to report breaches by their employer.

The risk of exploitation cannot be entirely mitigated by limiting the employer sponsorship regime to 'highly skilled' or highly paid workers. There is evidence of underpayment, exploitative 'cash-

[12] Centre for Population, *2022 Population Statement*, https://population.gov.au/sites/population.gov.au/files/2023-01/population_statement_2022.pdf
[13] *Migration and Other Legislation Amendment (Enhanced Integrity) Bill* 2017.
[14] *Migration Act 1958* (Cth), ss 140K, 140Q.

back' arrangements and other breaches of standard labour laws amongst highly skilled workers across a number of sectors. For instance:

- In 2014, several first-class **welders** sponsored by Hitec Welding Pty Ltd took action against the company for unfair dismissal. In the first matter of *Garcia v Hitec Welding Pty Ltd* [2014] FWC 9457, the applicant, Mr Garcia, was paid a base annual salary of $63,232.00[15] well above the relevant Temporary Skilled Migration Income Threshold of $51,400 at the time he was sponsored.[16] As to his conditions and treatment at Hitec Welding, DP Ashbury held as follows:

  [67] *As previously noted, Mr Garcia is a vulnerable worker due to his visa status. The termination of his employment in his personal circumstances has had an additional harsh effect in that he is not eligible for any social services.* It has also impacted on his family and his desire to bring them to Australia. I accept Mr Garcia's evidence about these matters.

  [68] I also note that this is the second dismissal effected by Hitec where an employee who has been invited to a meeting to discuss an allegation of misconduct, and who has requested assistance from a Union representative, has been dismissed upon making such a request. The same treatment was afforded to Mr Clarito, whose application for an unfair dismissal remedy was heard immediately prior to this matter.

  [69] *This is an appalling manner in which to treat employees who are accused of serious misconduct. It is exacerbated by the fact that in both cases, the employees have been vulnerable employees who are working under s. 457 visas.*

- Recent examples from ACTU affiliate the Australian Nursing and Midwifery Federation (ANMF) concerning two different employers in the health industry highlight the unscrupulous practices of some employers in relation to wages and payment of entitlements on termination. Both cases involved **nurses** subject to a TSS 482 visa who were leaving their employment. In one case, a large, well-resourced private health care provider withheld almost $4000 from the nurse's final termination pay 'to refund the cost of her sponsorship fee'. Following intervention from the Union the employer repaid the money to the employee. In the other, a nurse who resigned to work with another organisation and was informed a sum of over $2000 would be withheld from her termination pay by deducting annual leave owed to her, again, to cover 'visa sponsorship and relocation costs'. The Union is pursuing the matter on behalf of the employee.

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[15] Garcia v Hitec Welding Pty Ltd [2014] FWC 9457 at [83].
[16] Reg 2.72(10)(cc) and legislative instrument IMMI12/047, with effect from 1 July 2012.

- ACTU affiliate Professionals Australia observe significant numbers of IT, engineering and pharmacy professionals working in Australia on temporary visas working in small to medium sized businesses have reported exploitation, including underpayment, excessive working hours, and not being afforded the same conditions of employment as their colleagues from Australia. Invariably these workers reported wanting to become permanent residents and were concerned that if they complained to their employer about their working arrangements they would lose their jobs, not be able to secure another professional position and lose the opportunity to become permanent residents. For example:
    - A **pharmacist** who was working in a regional community was paid $10 an hour when the current award rate for their classification was $29.93 but feared taking action to recover the underpayments. Another pharmacist working in a rural pharmacy was only being paid $15 an hour. She was also living in accommodation owned by her employer and was required to pay more than the going rate for the type of accommodation she was living in. She was also required to do the pharmacy owner's cooking and cleaning without receiving any additional compensation. She did commence action against the employer to recover underpayments owed to her. With the assistance of the Union she obtained other work but was harassed by her employer before she moved to the city; with the assistance of the Union she eventually received compensation through a settlement with the employer.
    - An **engineer** working in a medium sized construction business was receiving an annual salary of $62000 (when the award minimum at the time was $61817). He was working seven days a week for at least 10 hours a day and received no additional payments for the extra hours worked. He did not want to take action due to concerns about losing his job and being unable to secure permanent residency in the longer term.
    - An **architect** who was working in a medium sized business was made redundant with one day's notice and not paid their redundancy or accrued leave entitlements. The architect did not wish to take action to recover the monies owed, fearing they would be unable to secure another role and have to leave the country
    - Three **information technology professionals** who were working for a small to medium sized computer business were all required to work more than 10 hours a day. They were only receiving the award minimum rate and no additional compensation for the additional hours worked. They asked the Union to intervene on their behalf. Shortly after the employer agreed to pay them more and to employ another person, the employer made them all redundant. All three were ineligible

for social security assistance and two of them left the country. The remaining person had to rely on community charities until they were able to obtain other work.

It is clear from the above examples that individual employer sponsorship and employer-nominated pathways to permanency are a significant driver of exploitation for higher-wage migrant workers as well as lower-wage migrant workers, and present significant barriers to workers reporting exploitation, and potentially dire consequences for those that do. A shorter transition period to permanent residency will not sufficiently protect employer-sponsored workers from exploitation. Indeed, a two-year transition to permanent residency might expose sponsored workers to hyper-exploitation during that period, as employers have a shorter time to recuperate their investment in the sponsored worker. Sponsored workers would be forced to endure whatever misconduct they were exposed to during that shortened transitional period, as they would remain at the whim of their employer. Even employer-sponsored or nominated visas in the permanent migration program where a worker is required to work for the sponsoring employer for a particular period of time exposes workers to increased risk of exploitation due to their lack of labour market mobility during that period.

The current individual employer sponsorship-based model for both temporary and permanent migration must be abolished and provision made for onshore applicants who have been subject to those arrangements.

Permanent pathways for all temporary migrant workers

Until 1996, permanent residency was an assumed outcome of all labour migration programs in Australia. Since that period, and particularly from 2001 onwards, the link between temporary migration and permanent settlement has been significantly weakened. With the introduction of the TSS visa in 2018, which contemplates that holders in the 'short term stream' will not transition to permanent residency, the migration regime now formally enshrines the condition of 'permanent temporariness.'[17] In 2021, Wright and Clibborn observed that:[18]

[17] Discussion Paper, p 10.
[18] Wright and Clibborn, 'A guest-worker state? The declining power and agency of migrant labour in Australia' (2020) 31(1) *Economic and Labour Relations Review.*

> Australia's immigration system increasingly resembles a guest-worker system, where temporary migrants' rights are restricted, their capacity to bargain for decent working conditions with their employers is curtailed and their agency to pursue opportunities available to citizens and permanent residents is diminished. The ability of temporary migrants in Australia to seek redress if they are underpaid or otherwise mistreated is limited by visa rules that place considerable power in the hands of employers. Like the guest-workers of post-war Western Europe, temporary migrants in Australia 'constitute a disenfranchised class'.[19]

The social costs of that shift are incalculable. They result in a growing population of temporary migrants forced to accept sub-standard conditions of work and living to facilitate their continued stay in a country they consider home. In the longer term, the system risks creating a population of undocumented migrants who have spent years in Australia and are unable to return to their home countries. Australia can no longer sustain a migration system that has permanent temporariness as its result.

Further, as we observed in our first submission to this review:[20]

> Temporary migrant workers contribute to our community and our economy. Temporary migrant workers pay taxes and actively contribute to the Australian economy, although they are excluded from subsidies and welfare benefits. Urgent reform of the migration system is required to recognise the contribution migrant workers make to this country and ensure they are given permanency and their rights are respected.

Restricting access to permanent residency to select groups, such as the highest paid or 'highly skilled,' is both socially and economically unsound. In its submission to the review, the Grattan Institute[21] proposes that permanent labour migration be available to migrant workers in any occupation with an annual salary over $85,000 and should be withheld from 'less-skilled' workers, based on claims these workers contribute less financially to the nation, and that they might try and get higher paying jobs if granted permanency. They assume that 'lower-skilled' workers would enter Australia under an employer sponsored model, and therefore have no bargaining power within their industries. On that assumption, poor wages and conditions in those industries, if predominantly

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[19] Walzer, 1983: 59
[20] ACTU Submission ', p 7.
[21] https://grattan.edu.au/wp-content/uploads/2022/12/Australias-migration-opportunity-how-rethinking-skilled-migration-can-solve-some-of-our-biggest-problems.pdf

reliant upon temporary workers, would remain static, such that those workers would have incentive to leave the industry immediately upon acquiring permanent residency.

But the concerns regarding diminished bargaining power would be substantially allayed if workers entered through a self-nominated, untied migration program governed by the advice of JSA. Further, because of the planning levels set quarterly by JSA under the model we propose, it would not be open to employers to simply recruit additional overseas workers in order to resist efforts to improve conditions and wages. The bargaining capacity of workers entering through a migration scheme that allows them mobility would be fundamentally different from those currently on tied, employer sponsored visas. The labour market outcomes of such workers cannot be confidently modelled – precisely because the data upon which such modelling is based emanates from the existent and compromised employer-driven model.

We further note that the Grattan Institute has not modelled the financial and labour market impact that possible visa overstaying might have in industries where permanent pathways are not available. Long-term temporary migrants make new lives in Australia: they become part of the community and have significant incentive to remain at the end of their visa period, even in the absence of temporary pathways. Precluding certain groups of temporary labour migrants from accessing permanent residency opens the door to those migrants remaining in the industry even after their visas expire, in the most precarious bargaining position imaginable.

We note finally that the economic contribution of 'less-skilled' workers to sectors currently reliant upon them has not been modelled. For instance, the economic contribution of undocumented and other temporary workers in the horticulture sector has not been modelled, precisely because there are no current formal visa pathways based on their employment and so their rates of participation in the industry are unknown.

From both economic and social perspectives, it is critical that all workers who enter through temporary labour migration schemes have access to permanent residency.

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