Expanding the local workforce through migration: Problems of maintaining fair labour standards and enforcing labour laws for temporary overseas workers in Australia

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The problems of how to enforce labour standards and the efficacy of enforcement mechanisms beset many systems which regulate labour. The efficacy of enforcement usually affects the viability and fairness of regulatory regimes. This enforcement problem may differ when comparing overseas workers, whose right to stay in a country depends on ongoing employment, with local employees, whose residence in the country is secure. What works for enforcement for one group may not be appropriate for the other group.

European countries have long established guest-worker programmes to alleviate labour shortages. Australia, with strictly controlled immigration programmes, permits entry of workers on short-term visas in certain industries and the programme expanded in recent years before undergoing changes. Cases indicate that overseas labour, particularly from Asia, were subjected to sub-standard working conditions with low wages after 'deductions' by employers and exploitation by agencies arranging employment and this prompted some reviews, reforms and further changes.

The paper argues that the nature of temporary labour schemes tied to the possibility of permanent residence in the country inevitably results in a degree of exploitation of labour and that the inherent contradictory goals of employer, government, union and local employees and overseas workers lay the foundation for this exploitation. Whilst labour standards for temporary migrant workers are largely the same as for domestic workers, the paper argues that the consequences which flow from initiating complaints about breaches of standards may differ remarkably depending on whether the worker is overseas or local; and may push the overseas worker into the 'informal' economy.

FACETS OF TEMPORARY IMMIGRATION SCHEMES FOR THE SUPPLY OF LABOUR

There are many policy objectives of the schemes which countries adopt to permit overseas residents to enter the country on short-term work visas. The facets of these

short term schemes will be outlined, particularly relating to the scheme which has prevailed in Australia, from a number of viewpoints: the government; employers; local employees and unions; the community; and the overseas worker.

The government

Government policy permits labour to enter the country for the specific purpose of alleviating shortages in the supply of labour. These are schemes which sit side by side with immigration schemes which aim to increase population levels and/or long-term skills and professions. The short term schemes (the 457 visa scheme in Australia) aim to provide certain industries or occupations with additional labour for finite periods of time. However, in pursuing these policy objectives there is usually an awareness of the interests of other parties in addition to those economic interests of the nation and the interests of the employer, as outlined below. A feature of the Australian scheme was to essentially apply the same labour laws to temporary workers.

Employers

Domestic labour costs might increase due to domestic labour supply shortages. Expanding the available labour domestically though temporary visa schemes may then contain those labour costs. From the micro viewpoint of the individual employer's business, temporary migration schemes then may enable the employer to continue in production or to continue operating the business without becoming insolvent. However, employers may really be seeking cheap labour in order to maximise profits; so the employers may not want many, if any, limits on the numbers seeking right to work in this way. There might not be an exact coincidence of business and government perspectives, however, as governments strive to meet various interests. Where that government locates that balance may vary according to the government in power.

Local employees and unions

The workers in Australia and the unions will want to achieve the same aim of the businesses, that is, enable labour supply to be provided in order to keep businesses operating. However, they will want neither the pay nor the conditions of Australian workers undermined by the importation of 'cheap' labour. Similarly they will not want to the job security of Australian workers jeopardised by competition from less costly labour. The needs of the business to import labour to relieve staff shortages must be genuine, in the unions' view. CFMEU national secretary, John Sutton, described the Australian temporary visa scheme which operated for a decade as having 'become a cheap labour program'.[1]

Community perspective

From the community perspective, temporary labour schemes have an economic benefit of enabling businesses to continue to operate within the 'host' country, maintaining the domestic supply of goods and services and perhaps keeping prices stable.

The overseas worker

[1] CCH News article, 'Workers, unions tell Labor to 'overhaul' 457 visa scheme', by Julie Drape. http://www.cch.com.au/au/News/ShowNews.aspx?ID=28364&Type=F

The overseas worker wishes to seek entry in the main for employment reasons but also with the long-term goal of seeking permanent residence and entry in Australia. Research has shown that the latter reason may predominate; in a Survey of temporary 457 holders in Australia conducted in November 2003 and May 2004 with 1175 surveyed, it was found that:-

Nearly 60 percent [of immigrants surveyed] said they came as temporary entrants in order to apply for permanent residence. A large majority of 457 visa holder [temporary work permits] from Southeast Asia, Korea and the Middle East came with this intention and at least half of all the others also did.[2]

The stage is set for exploitation

The balancing of these (often competing) interests is difficult to achieve and nation states have had different success in operating and maintaining these programmes. Whilst governments and employers may wish to relieve skills or labour shortages and import labour from overseas economies through offering temporary permits to overseas workers, the great incentive for employers to willingly participate in such schemes is where the wages of temporary workers is less than their local counterparts. But governments unions and host country employees are mindful of local interests but what happens informally may undermine any protection given to overseas labour. Overseas workers, depending on their motivation to seek permanent residence and ultimately stay in the country, may endure substandard working conditions without complaint about the labour law breaches.

IN OUTLINE: AUSTRALIA'S TEMPORARY VISA SCHEME

This subclass 457 Visa Scheme operating under the *Migration Act* 1958 (Cth) permits workers in certain categories to enter Australia to work and be sponsored by an employer. Visas are given for up to four years. In Australia these visas permit entry for up to four years.[3] They bring with them certain rights, notably the right to work in the country pursuant to the terms of the visa and to receive certain labour minimum conditions. It did not bring the right to remain permanently in the country or to access social security or medical benefits. However 457 visa holders could apply for permanent residence.

The one scheme covers educated and relatively unskilled workers. There was a huge increase of primary visa holders over a decade from 30,880 primary and secondary visa holders in 1997-8 to 110,570 in 2007-8. Thus in the period to mid 2008, there was an almost a four-fold increase in both categories in the last 10 years to mid 2008. There was a slowing down of the rate in 2009, due in part to reduced demand for labour in the economic circumstances. In the period 1 July 2008 to 26 May 2009 there

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[2] *Temporary Skilled Migrants in Australia: Employment Circumstances and Migration Outcomes* by Siew-Ean Khoo, Peter McDonald and Graeme Hugo, Department of Immigration and Multicultural and Indigenous Affairs, Cth, Aust., June 2005, p 34.

[3] See Report by the Committee of Inquiry into Temporary Entry of Business People and Highly Skilled Specialists, *Business Temporary Entry- Future Directions* (Roach Report), Department of Immigration and Ethnic Affairs, August 1995

were 45,360 457 visas issued, which represented a decline of nearly 4% on the previous year.

The industries in which such visas were given in the financial year 2007-2008 is as follows:[4]

- Health and community services: 16%
- Construction: 10%
- Property and Business Services: 10%
- Manufacturing: 9%

Other industries which have by comparison a fairly low level of 457 visa holders are cultural and recreational services (2%); transport and storage (2%); and agriculture, forestry and fishing (2%).[5] Thus, one of the protections of the scheme is to limit the industries in which the visas may be available. Another safeguard relates to the obligations that the scheme imposes on employers and temporary visa holders.

The obligations of the scheme as it existed until August 2009 were set out in Regulations and include approximately 14 undertakings in relation broadly to:

a) costs to be met by employers, including return travel of the visa holder, superannuation and medical costs;
b) notification requirements, including notification that the visa holder has ceased to be employed by the employer.
c) compliance with workplace relations law and salary.

The main feature of the scheme which relates to the visa holder himself or herself is that entitlement to be and remain in Australia depended on the visa holder remaining in employment. If the sponsorship arrangement ceases and there is no new employer found for the employee, the visa holder must leave the country.

One of the protections within this scheme was the minimum salary (MSL) for 457 Visa holders, that is, the minimum level which should be paid to these visa holders, and which employers are bound to meet. It is set by the government and altered by regulation and is gazetted. It had not changed for the last two years but has recently increased by 3.8 per cent, based on Australian Bureau of Statistics figures for November 2006 to November 2007. The current figure, operative from 1 August 2008, is $43,440 (increased from $41,850) for a 38 hour week. The MSL was only linked to hours of work from 1 July 2006.[6]

The MSL was set in order to ensure, amongst other things, adequate earnings for visa holders (who are not entitled to many government benefits) as well as ensuring that the scheme is not used to undercut the wages and employment

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[4] '*Subclass 457 Business (Long Stay) - State/Territory Summary Report 2007-08, Financial Year to 30 June 2008*', (2008) Australian Government Department of Immigration and Citizenship, <http://www.immi.gov.au/media/statistics/pdf/457_stats_07_08.pdf> at 21 October 2008

[5] Ibid.

[6] There are some variations in the MSL for types of workers (ICT professionals) and regional areas.

conditions of Australian workers. The MSL was set at a rate higher than the national minimum wage. Thus, the living wage of the visa holder is addressed, together with the interests of the local workforce by the MSL.

To this end, where the MSL was lower than awards or collective agreements (generally industrial instruments), the employer is obliged to pay the award or agreement entitlements. This is a significant point – the standard entitlements which any other worker receives under a relevant award or agreement must be paid where these are higher than the MSL.

In September 2009, the market rate was to be paid to temporary visa holders. But the challenge to application of fair and appropriate labour standards came from the vulnerability of overseas workers at three points.

POINTS OF VULNERABILITY

These areas are ascertained and informed by the Australian scheme but many would have universal coverage.

Engagement and Contract

The standard labour laws in Australia must apply as to wages, conditions of work and occupational health and safety of temporary visa holders in the same way that they apply to local workers. Whilst the formal legal requirements are express, the actual wages in the informal contract, that is, the amount actually paid, may be less than the legal rate and the required conditions may simply not met or abided by. The contract states one thing de jure; however the de facto position might be another. The worker bent on permanent residence will accept the de facto contract.[7]

Investigations and compliance

In Australia, in recent times the Workplace Ombudsman has been responsible for investigating and prosecuting breaches of awards and minimum labour standards. It was reported on August 15, 2008, that in the previous two years, the Workplace Ombudsman had investigated more than 400 matters relating to 457 visa-holders.[8] More than $1.3 million in underpayments to overseas workers have been recovered. Thus, in absolute terms, there are a significant number of breaches which have been reported or discovered and in respect of which action has been taken and the matter finalised and totalling considerable underpayment. However of more concern are the instances where breaches and

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[7] In survey conducted on 457 visa holders it was found:
'There were also a few complaints that the visa made them very dependent on their employers –" a bit trapped in their contract "as one of them put it. They thought it was difficult to change employers and some employers had taken advantage of the situation by threatening to withdraw their sponsorship if the employee made any complaints.'
Temporary Skilled Migrants in Australia: Employment Circumstances and Migration Outcomes by Siew-Ean Khoo, Peter McDonald and Graeme Hugo, Department of Immigration and Multicultural and Indigenous Affairs, Cth, Aust., June 2005, page 29

[8] Media Release, Workplace Ombudsman, 15 August 2008, http://www.wo.gov.au

underpayments occur but where for reasons connected with the vulnerability of the visa holder, there will be no complaint, formal or informal, lodged by the visa holder with the relevant enforcement agency or notified to the union. The quantity in this category is not known - and probably will never be able to be precisely known - but the vulnerability of 457 visa holders compels the non-disclosure of breach. The desire for permanent residence, coupled with a distrust of unions and the first language of the worker not being English, compels the workers down the path of remaining silent about her or his rights.

Breaches of labour standard entitlements in the courts and penalty

The extent of the extent of the problem cannot be ascertained from the court decisions alone because not all breaches are prosecuted: most case are settled by the Fair Work Ombudsman without the need to institute formal court proceedings. However the types of non-compliance as revealed by the cases were:

- *Failure to pay wages, penalty rates, casual leave loading and holiday pay.*

- *Unlawful deductions of training costs without authority of the employee*[9]

- *Unlawful deduction of accommodation costs for the employee's accommodation* [10]

- *Failing to pay sum in lieu of accrued annual leave on termination of employment* [11]

- *Failing to keep time and wages records or failing to pay wages within required time: see Fryer v Yoga Tandoori House Pty Ltd* (in this instance no wages were paid at all to an Indian 457 visa holder working in a restaurant for seven weeks).

In addition to the standards arising from the former *Workplace Relations Act* 1996 (Cth) and currently the *Fair Work Act* 2009 (Cth), other areas of failure to comply might be in occupational health and safety relating to such matters as actual physical conditions of work and safety equipment. Local and overseas workers are treated the same in enforcement terms. However there are two aspects which suggest that overseas or vulnerable workers may not enjoy the same benefits.

One relates to the principle of law that permits a reduction in the total penalty (normally calculated by adding together the fines for every breach for every worker as separate and distinct breaches) to impose a more realistic penalty on employers. Where there are many overseas workers of the same employer

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[9] *Armstrong v Healthcare Recruiting Australia Pty Ltd (No 2)* [2008] FMCA 1050 (16 July 2008)
[10] Ibid
[11] *Fryer v Yoga Tandoori House Pty* [2008] FMCA 288 (13 March 2008)

affected by the breach, the total penalty will be reduced in this way and this may operate to diminish the deterrent for employers. The second is that the vulnerability of the overseas worker does not seem to be adequately addressed in the criteria used by the courts in assessing penalty. Again the deterrence effect is reduced and the overseas worker not adequately protected.

CONCLUSION

The way the temporary visa scheme was set and operated in Australia inevitably created the environment for exploitation of some types of workers on this scheme. Despite government being mindful of protecting overseas workers, there were strong factors operating to undermine the protection. The engagement on 'informal' contracts where the de facto terms were lower than the express terms, the unwillingness to complain or reveal the breaches of labour standards due to the vulnerability of the migrant workers who wish to ultimately obtain permanent residence in Australia and the principles applied by the courts in assessing fines all contributed to the exploitation of some temporary visa holders.