

**The Legal Construction of Migrant Work Relations:  
Precarious Status, Hyper-Dependence and Hyper-Precarity**

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# **The Legal Construction of Migrant Work Relations: Precarious Status, Hyper-dependence and Hyper-precarity**

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## **Abstract**

This thesis is concerned with the ways in which the laws and policies governing labour migration shape the relationship between migrant workers, employers, and labour markets in advanced industrialised countries. Specifically, it elucidates the intersections of immigration and labour market regulatory norms, structures, and processes that have salient implications for migrants' work relations. The notions of 'hyper-dependence' and 'hyper-precarity' are developed as the main analytical and normative lenses in this thesis for examining the particular vulnerabilities associated with migrants' precarious statuses under contemporary labour migration regimes. Hyper-dependence refers to an acute dependence that transcends the immediate context of an employment relationship, where other aspects of a worker's life critically depend on that employer. For migrant workers, hyper-dependence may arise where their legal statuses is tethered to a specific employer sponsorship, accompanied by other *de jure* and *de facto* restrictions on their labour mobility. Hyper-precarity seeks to capture the multifaceted insecurities and uncertainties in migrants' work relations and their broader migration projects, which are linked to their exclusion, in law and in practice, from a wide array of social, economic, and civil rights in the host state.

Engaging with the various and often competing goals and concerns of immigration law and labour law, the two concepts of hyper-dependence and hyper-precarity are developed and applied through an in-depth comparative analysis of the legal and regulatory architectures of two contemporary temporary migrant workers' programmes (TMWPs): Australia's Temporary Work (Skilled) Subclass 457 Visa ('457 visa') scheme and the United Kingdom's Tier 2 (General) visa scheme. In recent years, TMWPs in advanced industrialised countries have been touted by global and national policymakers as a desirable labour migration instrument that delivers 'triple wins' for host states, home states, and migrants and their families. I situate the normative concerns of the legally constructed hyper-dependence and hyper-precarity in the ethical debates on TMWPs in liberal states. I also consider how the worst extremes of the two 'hyper' conditions combined in highly exploitative work relations could be ameliorated, and in doing so propose some ideas for reforming key features of current TMWPs to enable migrants to exit any employment relationship and to resort to a range of voice mechanisms in the workplace.

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### **Table of Abbreviations**

|        |   |
|--------|---|
| ABS    | Australian Bureau of Statistics                                   |
| ACTU   | Australian Council of Trade Unions                                |
| ANZSCO | Australian and New Zealand Standard Classification of Occupations |
| AQF    | Australian Qualifications Framework                               |
| ASCO   | Australian Standard Classification of Occupations                 |
| AWA    | Australian Workplace Agreements                                   |
| AWPA   | Australian Workplace Productivity Agency                          |
| CBI    | Confederation of British Industry                                 |
| CoS    | Certificate of Sponsorship  |
| CSOL   | Consolidated Sponsored Occupation List                            |
| DBIS   | Department of Business, Innovation and Skills                     |
| DEEWR  | Department of Education, Employment and Workplace Relations       |
| DIAC   | Department of Immigration and Citizenship                         |
| EAA    | Employment Agencies Act 1973                                      |
| EASI   | Employment Agency Standards Inspectorate                          |
| EAT    | Employment Appeal Tribunal  |
| ECHR   | European Convention on Human Rights                               |
| ECtHR  | European Court of Human Rights                                    |
| EEA    | European Economic Area  |
| EEC    | European Economic Community                                       |
| ENS    | Employer Nomination Scheme  |
| ENSOL  | Employer Nominated Sponsored Occupation List                      |
| ESTEL  | Employer Sponsored Temporary Entry List                           |

|        |   |
|--------|---|
| EU     | European Union  |
| FTER   | Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations                                    |
| GATS   | General Agreement on Trade in Services  |
| GLA    | Gangmasters Licensing Authority   |
| GSM    | General Skilled Migration   |
| HDP    | Hyper-dependent precarity   |
| HPD    | Hyper-precarious dependency   |
| ICCPR  | International Covenant on Civil and Political Rights  |
| ICESCR | International Covenant on Economic, Social and Cultural Rights  |
| ICPRMW | International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families |
| ICT    | Intra company transferees   |
| ILO    | International Labour Organization   |
| ILR    | Indefinite Leave to Remain  |
| ITC    | Information Technology and Communications   |
| MAC    | Migration Advisory Committee  |
| MARA   | Office of the Migration Agents Registration Authority   |
| MIF    | Migration Impacts Forum   |
| NHS    | National Health Service   |
| NQF    | National Qualifications Framework   |
| NVQ    | National Vocational Qualification   |
| OSIC   | Office of the Immigration Services Commissioner   |
| PAM3   | Procedures Advice Manual 3  |
| PBS    | Points-based system   |
| RLMT   | Resident Labour Market Test   |

|      |   |
|------|---|
| SAWS | Seasonal Agricultural Workers Scheme                |
| SOC  | Standard Occupational Classification                |
| SOL  | Shortage Occupation List                            |
| TMWP | Temporary migrant workers' programme                |
| TUC  | Trades Union Congress                               |
| TUPE | Transfer of Undertakings (Protection of Employment) |
| UK   | United Kingdom                                      |
| UN   | United Nations                                      |
| UKBA | UK Border Agency                                    |
| WHM  | Working holidaymakers                               |

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# 1. Introduction

## 1.1 The Legal Construction of Migrant Work Relations

At the beginning of the 21<sup>st</sup> century, the admission of migrant workers has become a prevalent policy instrument for advanced industrialised countries to meet their labour market requirements and to pursue broader economic productivity and competitiveness goals.<sup>1</sup> The rapid growth of international labour migration has been recognised as an important factor underlying fundamental changes in the structure and organisation of work.<sup>2</sup> Over the past three decades, many industrialised countries have seen the decline of a ‘standard employment relationship’ (SER) model. Although there are local variants of the SER, it generally entailed a full-time, continuous, and socially protected job with a single employer over one’s working life. Vosko asserts that the state has been the ‘spatial container for the SER’.<sup>3</sup> Through immigration controls, the state not only wields power over the entry and exit of non-citizens in its territory, but also constructs a variety of legal statuses that are associated with different employment and residence rights and restrictions for different categories of non-citizens.<sup>4</sup> Similar to other labour market regulatory regimes, immigration laws can shape distinct parts of the workforce that are excluded

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<sup>1</sup> Patrick Taran, ‘The Need for a Rights-based Approach to Migration in the Age of Globalisation’ in Ryszard Cholewinski, Paul de Guchteneire and Antoine Pecoud (eds), *Migration and Human Rights: The United Nations Convention on Migrant Workers’ Rights* (CUP 2009) 150-151; Martin Ruhs, ‘Greasing the wheels of the flexible labour market: East European labour immigration in the UK’ in Jennifer Smith-Bozek (ed), *Labour mobility in the European Union: New members, new challenges* (Centre for European Policy Analysis 2007).

<sup>2</sup> ILO, ‘The scope of the employment relationship’ (Report V, International Labour Conference, 91st Session 2003); Harald Bauder, *Labour Movement: How Migration Regulates Labour Market* (OUP 2006).

<sup>3</sup> Leah Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (OUP 2010) 10.

<sup>4</sup> Bridget Anderson, ‘Migration, immigration controls and the fashioning of precarious workers’ (2010) 24 *Work, Employment and Society* 300, 301.

from the SER.

Accompanying the deterioration of SER in contemporary labour markets of industrialised countries, precarious work has ‘spread to all sectors of the economy’<sup>5</sup> and across the skills spectrum.<sup>6</sup> In the late 1980s, Rodgers and Rodgers pointed to several indicators of precarious work: a low degree of certainty of continuing paid work, limited control over the labour process, a lack of regulatory protection, and low income.<sup>7</sup> Recognising the broader social conditions, structures, and processes that interact with employment and labour market insecurity, Vosko offers a multidimensional analysis of the forces that shape precarious work:

Precarious employment is shaped by the relationship between *employment status* (i.e. self- or paid employment), *form of employment* (e.g. temporary or permanent, part-time or full-time), and dimensions of labour market insecurity, as well as social context (e.g. occupation, industry, and geography) and *social location* (or the interaction between social relations, such as gender, and legal and political categories, such as citizenship).<sup>8</sup>

Borrowing from this literature on precarious work, Goldring, Berinstein, and Bernhard use the term ‘precarious migrant statuses’ to convey a ‘combination of ongoing risk and uncertainty, or ongoing vulnerability to precariousness’ which is associated with immigration controls.<sup>9</sup> Precarious migrant status seeks to capture an array of migrant statuses that is ‘less than permanent’ or ‘less than full’ legal status,

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<sup>5</sup> Arne L Kallenberg, ‘Precarious Work, Insecure Workers: Employment Relations in Transition’ (2009) 74 *American Sociological Review* 1, 5-6.

<sup>6</sup> See, for example, Leah F. Vosko, ‘The Precarious Status of the Artist: Freelance Editors’ Struggle for Collective Bargaining Rights’ in Cynthia J Cranford, Judy Fudge, Eric Tucker and Leah Vosko (eds), *Self-employed workers organize: law, policy, and unions* (McGill-Queen’s University Press 2006); Stephen Bach, ‘Health sector reform and human resource management: Britain in comparative perspective’ (2000) 11 *The International Journal of Human Resource Management* 925.

<sup>7</sup> Gerry Rodgers and Janine J Rodgers (eds), *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* (ILO 1989) 1.

<sup>8</sup> Vosko, *Managing the Margins* (n 3) 102.

<sup>9</sup> Luin Goldring, Carolina Berinstein and Judith K. Bernhard, ‘Institutionalizing precarious migratory status in Canada’ (2009) 13 *Citizenship Studies* 239, 246.

and the vulnerabilities that such statuses engender.<sup>10</sup> This nuanced conceptualisation points to the fluidity of a legally constructed space between a supposed ‘default’ status of ‘legality’/‘regularity’ and the myriad shades of ‘illegality’/‘irregularity’. Notably, this continuum of precarious statuses shift our normative focus away from the moral legitimacy of migrants’ ‘legal’/‘illegal’ entry into the host state, to the pathways through which the multifaceted precariousness in their work and other aspects of their lives are constituted and sanctioned by the law itself. Fudge points to the role of immigration law and policy in creating ‘a variety of migrant statuses, some of which are highly precarious, that in turn produce a differentiated supply of labour that produces precarious workers’.<sup>11</sup> Anderson underscores the intersecting role of immigration controls and employment laws in shaping a captive workforce ‘trapped in precarious work, or particularly susceptible to precarious employment’.<sup>12</sup>

Building on these valuable insights on the intersection between precarious work and migrant status, a major task of this thesis is to introduce and develop two novel concepts for thinking about the distinct vulnerabilities that may be found in migrants’ work relations that are associated with their precarious legal statuses, which we have coined ‘hyper-dependence’ and ‘hyper-precarity’.<sup>13</sup> Hyper-dependence refers to a certain form of acute dependence or subordination of the worker that goes beyond the conventional personal and economic dependence in an

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<sup>10</sup> *ibid.*

<sup>11</sup> Judy Fudge, ‘The Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers’ (Metropolis British Columbia Working Paper Series No 11-15, 2011) 6.

<sup>12</sup> Bridget Anderson, ‘Battles in Time: the Relation between Global and Labour Mobilities’ (Proceedings of the International Conference on New Migration Dynamics: Regular and Irregular Activities on the European Labour Market, Nice, December 2007).

<sup>13</sup> The terminologies were originally suggested by Professor Mark Freedland and have been developed in discussions with him and Professor Cathryn Costello, for which I am indebted to them.

employment relationship. The migrant on a sponsored temporary work permit and visa has a heightened dependence on that sponsor/employer for her legal authorisation to work and reside in the host state: this is an aspect of the worker's life outside the immediate context of the employment relationship but critically hinges on that specific relationship. Reinforcing the 'tie-in' nature of hyper-dependence are de jure and de facto restrictions on the migrant's freedom to circulate in the host state's labour market. As Skrivankova puts it, 'The fewer options a worker has to change employer, the easier it is for an employer to put undue pressure on him as regards performance, conditions of work or terms of employment'.<sup>14</sup>

A related but distinct concept is that of hyper-precarity, which refers to the multidimensional insecurities and uncertainties of the employment relationship that permeate into other spheres of a worker's life. In the context of migrants sponsored under TMWPs, employment with the specific sponsor forms the very basis of their legal permission (and that of any sponsored family members) to be in the host state. Hyper-precarity of their employment and residence statuses arises from the employer's prerogative to dismiss the migrant and withdraw her visa sponsorship at any time. Migrants' precarious statuses, as shaped by the regulatory architecture of these labour migration regimes, also restrict and impede their access, in law and in practice, to a range of employment and social protections in the host state that citizens and permanent residents generally enjoy.

Hyper-precarity seems to imply temporary and insecure work relations, whereas hyper-dependence suggests that the worker is bound to a longer-term relationship with an employer or labour user. Although the two concepts are distinct, they can also intersect and reinforce each other's presence in highly exploitative

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<sup>14</sup> Klara Skrivankova, *Trafficking for forced labour UK country report* (Anti-Slavery International 2006) 22.

work relations that can be described as hyper-dependent precarity (HDP) or hyper-precarious dependence (HPD). I draw on the idea of exit and voice to conceptualise these situations of HDP/HPD where workers cannot freely exit the employment relationship or resort to voice mechanisms such as joining trade unions and collectively organise and mobilise to protect their rights and interests. There is an extremely acute degree of labour unfreedom in these situations, which I seek to distinguish from contemporary legal and political discourses of ‘unfree labour’ such as slavery, servitude, and forced labour that are often used (rather problematically) to describe the exploitation of migrant workers.

The concepts of hyper-dependence and hyper-precarity are developed in this thesis as the main analytical and normative lenses to examine how the legal design and operation of contemporary labour migration regimes construct and mould certain types of work relations. In recent decades, temporary migrant workers’ programmes (TMWPs) have expanded in a number of industrialised countries, including countries that have traditionally emphasised permanent settlement policies. ‘Well targeted’ and ‘carefully designed’<sup>15</sup> TMWPs have been touted in international, supranational, and national policy arenas as an appropriate and even commendable instrument for industrialised countries of the Global North to meet labour market needs while placating domestic political concerns regarding permanent migration; for sending states of the Global South to benefit from remittances and skills transfer and to address problems of ‘brain drain’; and for migrants to access employment opportunities abroad through legal channels.<sup>16</sup> However, critics maintain that these

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<sup>15</sup> GCIM, *Migration in an Interconnected World: New Directions for Action* (GCIM 2005) 16.

<sup>16</sup> Martin Ruhs, ‘The potential of temporary migration programmes in future international migration policy’ (2006) 145 *International Labour Review* 7, 7-36; Graeme Hugo, ‘Best Practice in Temporary

‘labour import’ regimes continue to have highly exploitative elements built into them, where migrants are denied a vast array of social, economic, political and civil rights.<sup>17</sup>

Compared to the earlier guest worker programmes in Western Europe and the United States in the 1950s-1970s, the backdrop to contemporary TMWPs in the Global North is a new political economy characterised by the internationalisation of production, liberalisation of cross-border flows of capital, investment, trade, and services, corporate restructuring, economic interdependence among states, and the growing influence of neo-liberal ideas of market supremacy and efficiency on government economic and social policies. This transformed landscape has also shifted and reconfigured power relationships in the labour market, with the industrial and political stature of trade unions in numerous industrialised countries such as Australia and the UK dwindling considerably vis-à-vis employers. In this political and regulatory climate, employers’ preferences and demands have largely prevailed in the design and implementation of labour market policies, including labour migration regimes.

Unlike post-war guest worker schemes, during which employer demand for migrant labour was more general, there is an increasingly a differentiated appetite for migrant workers under contemporary TMWPs to be slotted into segments of the economy ‘where deficiencies in domestic training institutions, rapidly and newly

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Labour Migration for Development: A Perspective from Asia and the Pacific’ (2009) 47 *International Migration* 23, 23-74.

<sup>17</sup> Stephen Castles, ‘Guestworkers in Europe: A Resurrection?’ (2006) 40 *International Migration Review* 741; Stuart Rosewarne, ‘Globalisation and the Commodification of Labour: Temporary Labour Migration’ (2010) 20 *ELRR* 99; Delphine Nakache and Paula J. Kinoshita, ‘The Canadian Temporary Foreign Worker Program: Do Short-Term Economic Needs Prevail over Human Rights Concerns?’ (2010) 5 *IRPP Study* 1; Kerry Preibisch, ‘Pick-Your-Own Labor: Migrant Workers and Flexibility in Canadian Agriculture’ (2010) 44 *International Migration Review* 404.

emerging sectors, and employer preferences for flexibility imply shortages'.<sup>18</sup> In other words, the growth of TMWPs in recent times is not a case of employers wanting to admit more migrants regardless of their skills profile. Instead, as Menz argues, employers are actively seeking migrant labour that could accommodate existing firm strategies as well as skills requirements that local educational and training facilities have not produced.<sup>19</sup> In response to these types of employer demands, TMWPs have expanded across all sectors and both ends of the skills spectrum, including more highly skilled work in areas such as healthcare and information technology.

As instructive cases to elucidate the links between immigration laws and labour market regulation, the construction of precarious migrant statuses, and the ensuing implications for migrants' work relations, this thesis examines the legal frameworks of the Temporary Work (Skilled) Subclass 457 Visa ('457 Visa') in Australia and the Tier 2 (General) visa in the UK. Both schemes show core commonalities in their regulatory purpose and form, such as a demand-driven model of employer sponsorship aimed at filling 'skill shortages' in the resident labour market on a temporary basis. An in-depth comparison of the two schemes reveals how key features of their regulatory architecture, from the conditions of admission to various restrictions on migrants' rights in the host state, can shape the vulnerabilities of hyper-dependence and hyper-precarity in migrants' work relations and their broader migration projects.

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<sup>18</sup> Georg Menz and Alexander Caviedes, 'Introduction: Patterns, Trends, and (Ir)Regularities in the Politics and Economics of Labour Migration in Europe' in George Menz and Alexander Caviedes (eds), *Labour Migration in Europe* (Palgrave Macmillan 2010) 19.

<sup>19</sup> Georg Menz, 'Employers, Trade Unions, Varieties of Capitalism, and Labour Migration Policies' in Georg Menz and Alexander Caviedes (eds), *Labour Migration in Europe* (Palgrave Macmillan 2010).

## 1.2 Thesis Aims and Contributions

This thesis broadly aims to investigate the complex and dynamic intersections between labour law and immigration law in the regulation of labour migration. There has traditionally been very little engagement between scholars in these two regulatory realms, which may be aptly described as ‘two ships passing through the night’. The conventional field of labour law has rarely been occupied with issues of immigration. The disinterest has been ‘mutual’,<sup>20</sup> with the study of immigration law tending to ‘conceal the labour market rationales that drive much of the development’<sup>21</sup> of immigration regulation. The legal statuses of migrants are generally treated as a matter of immigration law. This is underpinned by the assumption that immigration law simply concerns itself with the system of executive control over the entry and residence of migrants in the state’s territory. Meanwhile, labour law is presumed to only engage with matters related to the regulation of the terms and conditions of employment, generally without any distinctions on the basis of workers’ nationality. Yet the legal framework regulating migrants’ work relations sits at the interface of immigration law and labour law, which is often embedded with tensions and conflicts as to their respective regulatory goals, concerns, institutions, and structures.

Analyses of precarious migrant labour have generally focused on the bottom echelon of the labour market, generally characterised by dangerous, dirty, and

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<sup>20</sup> Graeme Orr, ‘Unauthorised Workers: Labouring Beneath the Law’ in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds), *Labour Law and Labour Market Regulation: Essays on the construction, constitution and regulation of labour markets* (The Federation Press 2006) 677.

<sup>21</sup> Anthony O'Donnell and Richard Mitchell, ‘Immigrant Labour in Australia: The Regulatory Framework’ (2001) 14 AJLL 269, 271.

difficult jobs with low wages and poor working conditions.<sup>22</sup> There have been numerous studies of unskilled and low-skilled temporary migrant labour in sectors such as agriculture,<sup>23</sup> food processing,<sup>24</sup> and domestic work.<sup>25</sup> In these sectors, it may be reasonably argued that all workers ‘regardless of their migrant status, are denied basic labour standards and rights’.<sup>26</sup> At the same time, migrant status can ‘produce precarious workers that cluster in particular jobs and segments of the labour market’.<sup>27</sup>

In this thesis, I examine two TMWPs that are targeted at admitting ‘skilled’ migrants. There are several reasons for the selection of these case studies. First, while other smaller-scale TMWPs for low skilled and seasonal labour migration exist in both countries, the 457 visa and the Tier 2 (General) visa schemes are the primary TMWPs in Australia and the UK respectively. The two schemes are also unique among TMWPs in offering eligible migrants with the possibility of applying for permanent residence status after a minimum number of years, although this generally relies on the employer’s continued sponsorship and support. Second, the two case

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<sup>22</sup> Jane Wills, Kavita Datta, Yara Evans, Joanna Herbert, Jon May and Cathy McIlwaine, *Global Cities at Work: New Migrant Divisions of Labour* (Pluto Press 2010); TUC Commission on Vulnerable Employment, *Hard Work, Hidden Lives: The Full Report of the Commission on Vulnerable Employment* (TUC 2008).

<sup>23</sup> Kerry Preibisch, ‘Migrant Workers and Changing Work-place Regimes in Contemporary Agricultural Production in Canada’ (2011) 19 *International Journal of Sociology of Agriculture and Food* 62; Jenna L. Hennebry and Kerry Preibisch, ‘A Model for Managed Migration? Re-Examining Best Practices in Canada’s Seasonal Agricultural Worker Program’ (2012) 50 *International Migration* 19; Rochelle Ball, Laura Beacroft and Jade Lindley, *Australia’s Pacific Seasonal Worker Pilot Scheme: Managing vulnerabilities to exploitation* (Australian Institute of Criminology, 2011).

<sup>24</sup> Sam Scott, Gary Craig and Alistair Geddes, *Experiences of Forced Labour in the UK Food Industry* (Joseph Rowntree Foundation 2012).

<sup>25</sup> Judy Fudge, ‘Global Care Chains, Employment Agencies and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada’ (2011) 23 *Canadian Journal of Women and The Law* 235; Joseph H. Carens, ‘Live-in Domestic, Seasonal Workers, and Others Hard to Locate on the Map of Democracy’ (2008) 16 *Journal of Political Philosophy* 419.

<sup>26</sup> See Fudge, *Precarious Migrant Status* (n 11) 43.

<sup>27</sup> Anderson, ‘Migration, immigration controls’ (n 4) 302.

studies shed light on how precarious legal statuses can create particular vulnerabilities of hyper-dependence and hyper-precarity for workers who are typically assumed to have a certain (high) degree of control over the processes and conditions of their work and bargaining power in the labour market due to their sought-after skills. Third, I aim to make explicit and problematise the assumptions underpinning the principal rationales of these TMWPs such as the notion of ‘skill shortages’. Employers’ need for migrant workers to fill actual or perceived ‘skill shortages’ is frequently used to justify the key structural features of TMWPs such as restrictions on migrants’ labour mobility.

The broader contribution of this thesis is situated in the rethinking of labour law as a field of study, its scope, and its relationship with other labour market regulatory domains. There has been a movement in labour law scholarship in recent decades to examine a wider matrix of laws, policies, practices, institutions, and structures that regulate the world of work.<sup>28</sup> This thesis seeks to contribute to the recent wave of labour law scholarship that offers a timely and critical reflection on how the boundaries of this field are continually being tested by the nature and effects of regulatory controls over the movement of labour across nation-states’ restrictive yet porous borders in the global economy.<sup>29</sup>

This thesis is also about an investigation of the profound reach of immigration laws and policies into other regulated spheres of human activities such as the protection of fundamental employment and social rights. In conceiving the

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<sup>28</sup> Christopher Arup and others, *Labour Law and Labour Market Regulation* (n 20); Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (OUP 2005).

<sup>29</sup> Adelle Blackett, ‘Development, the movement of persons and labour law’ in Tonia Novitz and David Mangan (eds), *The Role of Labour Standards in Development: Sustainable Theory in Practice* (OUP for the British Academy 2011) 144. See further forthcoming collection of papers: Mark Freedland and Cathryn Costello, *Migrants at Work: An Edited Collection of Essays* (OUP 2014 forthcoming).

notions of hyper-dependence and hyper-precarity as particular vulnerabilities in migrants' work relations that are associated with their precarious legal statuses, a normative goal is to challenge the rationalisations for the laws, policies, and practices associated with contemporary labour migration regimes. The 'hyper' concepts are further used to identify the type of normative constraints that *should* be placed on liberal states' prerogative to differentiate non-citizens admitted into their labour markets with respect to the various employment and residence restrictions associated with their legal statuses. In making this normative contribution, my thesis seeks to explore whether the current legal and regulatory architectures of TMWPs may be redesigned to address the concerns of hyper-dependence and hyper-precarity.

Finally, this thesis aims to contribute timely arguments to the highly topical and controversial policy debates on labour migration in Australia, the UK, and other industrialised countries. In the lead up to the 2013 Australian federal election, the then Labor Government announced a 'crackdown' on the 457 visa scheme 'to stop foreign workers being put at the front of the queue with Australian workers at the back'.<sup>30</sup> In the UK, the current Coalition Government has sought to reduce non-EEA net migration 'from hundreds of thousands a year, to just tens of thousands'<sup>31</sup> through restricting Tier 2 visas, among other policies.<sup>32</sup> Public debates on labour migration are frequently intermingled with concerns over national security and border control, political and religious extremism, multiculturalism and social integration. In mainstream political and media discourses, the 'migrant worker' —

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<sup>30</sup> Julia Gillard, 'Speech at the University of Western Sydney' (3 March 2013, University of Western Sydney); Julia Gillard, 'Address to the ACTU Community Summit on Creating Secure Jobs and a Better Society' (14 March 2013, Old Parliament House, Canberra).

<sup>31</sup> David Cameron, *Immigration speech* (Ipswich, 25 March 2013).

<sup>32</sup> Home Office, *Statement of Intent: Codes of Practice for skilled workers* (2013); Home Office, *Statement of Intent and Transitional Measures: Tier 2 of the Points Based System* (2012).

often (mis)represented as any person of actual or perceived foreign origin — is demonised and blamed for all kinds of social, economic, and political ills. Seeking to transcend the heavily politicised rhetoric in public and policy debates on labour migration in Australia and the UK, it is hoped that the analytical and normative concepts of hyper-dependence and hyper-precarity advanced in this thesis can contribute to such debates a much-needed critical understanding of how migrants experience and interact with the legal and institutional regimes that directly shape their working lives and migration projects.

### **1.3 Terminology and Scope of Thesis**

It is important to clarify at the outset certain key terms that I refer to in this thesis. Some of these terms may be subject to different usages and definitions in scholarly research and public debates on labour migration. As a starting point, the term ‘migrant’ has been used and construed in diverse contexts to refer to a wide range of persons, including those who are not subject to immigration controls.<sup>33</sup> For instance, in the UK, references to ‘migrants’ can include nationals of European Economic Area (EEA) states or those with indefinite leave to remain.<sup>34</sup> Although there is no universally accepted definition of ‘migrant’, the United Nations (UN) has defined ‘long-term international migrants’ as persons who have resided outside their country of usual residence for more than a year, so that the country of destination effectively

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<sup>33</sup> See further Bridget Anderson and Scott Blinder, *Who Counts as a Migrant? Definitions and their Consequences* (COMPAS Briefing 2012).

<sup>34</sup> Up until 1 January 2014, the UK maintained transitional restrictions regulating the labour market access of nationals from Bulgaria and Romania (‘A2’ EU accession states). The restrictions included requiring A2 nationals to apply for an accession worker card and for their employer to apply for a work permit. The other scheme for A2 nationals was a quota-based Seasonal Agricultural Workers Scheme for low-skilled, short-term agricultural work. A2 nationals could have also resided in the UK by being self-employed, self-sufficient or a student.

becomes their new country of residence.<sup>35</sup> Meanwhile, the UN's definition of 'short-term migrants' refer to persons who move to another country other than that of their usual residence for a period of three to twelve months, excluding those who move for business and tourism purposes.<sup>36</sup> Unless otherwise specified, this thesis refers to 'migrants' as persons who have moved to a country outside that of their usual residence and do not have legal citizenship or long-term residence rights in that host state.

The definition of a 'migrant worker' is also a highly variable term. At an international level, the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICPRMW) and the two ILO Conventions pertaining to migrant workers<sup>37</sup> use different definitions. The ICPRMW provides for a broader definition of a person 'engaged in a remunerated activity', compared with the ILO Conventions that refer to persons 'employed otherwise than on his own account'.<sup>38</sup> It should be noted that Mode 4 of the General Agreement on Trade in Services (GATS) does not consider as labour migration the temporary

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<sup>35</sup> United Nations, *Recommendations on Statistics of International Migration – Revision 1* (United Nations Publication ST/ESA/STAT/SER.M/58/Rev.1 2008) para 36.

<sup>36</sup> *ibid.*, para 37.

<sup>37</sup> ILO Convention (No.97) concerning Migration for Employment (Revised) (adopted 1 July 1949, entered into force 22 January 1952) 120 UNTS 71 (ILO Convention No. 97); ILO Convention (No. 143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (adopted 24 June 1975, entered into force 9 December 1978) (ILO Convention No. 143). See also: ILO Recommendation (No. 86) concerning Migration for Employment (Revised) (adopted 1 July 1949) and ILO Recommendation (No. 151) concerning Migrant Workers Recommendation (24 June 1975).

<sup>38</sup> According to Article 2(1) of the ICPRMW, a 'migrant worker' refers to 'a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a state of which he or she is not a citizen'. Article 11(1) of ILO Convention No. 97 define a 'migrant for employment' as 'a person who migrates/has migrated from one country to another with a view to being employed otherwise than on his own account'. This is slightly different to the wording in Article 11(1) of ILO Convention No. 143 where a migrant worker is defined as 'a person who migrates/ has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker'. This definition under Convention No. 143 is only applicable for the 'Equality of Opportunity and Treatment' part of the Convention.

admission of foreign ‘service providers’,<sup>39</sup> who are defined by a contract to deliver specific services (not by an employment contract).<sup>40</sup>

It should be further recognised that there are different yet overlapping categories of migrants who perform paid work in the host state on a temporary basis, including students, working holidaymakers, family members, etc. My reference to ‘temporary migrant workers’ or ‘migrants under TMWPs’ is specifically understood as migrants who are granted entry and residence in the host state under a formal arrangement for the specific purpose of undertaking paid work (regardless of the nature of the contract) for a fixed period of time. I refer to TMWPs as labour migration regimes that do not create an automatic right or entitlement to permanent residence. Under TMWPs, there may be conditional pathways for migrants to apply for permanent residence down the track, but these pathways usually require a minimum period of residence as well as continued employer sponsorship in the host state.

Given the limited scope of a doctoral thesis, it is also necessary to bracket out some potential issues that may be relevant but not as critical to my chosen framework of analysis. Firstly, this thesis does not attempt to delve into a full range of economic and labour market effects of TMWPs on host states, such as their fiscal, welfare, and unemployment outcomes. There has already been extensive research on many of these issues, showing a mixed picture of contested measurements, claims, and

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<sup>39</sup> General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1 B, 1869 U.N.T.S. 183, 33 I.L.M 1153, Annex on movement of natural persons supplying services under the Agreement (GATS), para 1. GATS does not ‘apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis’: GATS, para 2.

<sup>40</sup> International Organization for Migration, ‘Migration and Labour’ in IOM (ed), *Essentials of Migration Management*, vol 2.6 (IOM 2004) 8.

evidence.<sup>41</sup> Second, the scope of my inquiry excludes issues and concerns related to TMWPs from the perspective of migrants' home or sending countries, such as developmental impacts, the role of remittances, and the 'brain drain' effects arising from these schemes. Such matters already occupy a prominent space in the current debates on international labour migration, particularly in the discussions on the migration and development nexus. Their proper analysis would require considerable inquiry beyond the scope of this thesis. Third, the normative issues regarding TMWPs are centred on the perspectives of liberal democratic host states. For these political communities, restricting the rights of a subset of residents admitted into their territory poses certain moral conundrums for established liberal principles of non-discrimination and inclusion.

Finally, my analysis of migrants' work relations under TMWPs focuses on the function and effect of their legal statuses. As Vosko points out, there are a multitude of factors embedded in the labour market structures, social processes, contexts, and locations that shape precarious work. The interplay of market pressures, employer demands, and political forces can create a labour market that is differentiated not only based on human capital (such as the level of education, skills, training, and qualifications) but also gender, race, age, ethnicity, origins, location,

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<sup>41</sup> See for example: Siew-Ean Khoo, Peter McDonald and Graeme Hugo, *Temporary Skilled Migrants in Australia: Employment Circumstances and Migration Outcomes* (Department of Immigration and Multicultural and Indigenous Affairs 2005); Susanne Bahn, Llandis Barratt-Pugh and Ghialy Yap, 'The Employment of Skilled Migrants on Temporary 457 Visas in Australia: Emerging Issues' (2012) 22 *Labour and Industry* 379; Bob Birrell and Ernest Healy, *Immigration Overshoot* (2012); Anitha George, Mumtaz Lalani, Geoff Mason, Heather Rolfe and Chiara Bondibene, *Skilled immigration and strategically important skills in the UK economy (Final Report to the Migration Advisory Committee)* (National Institute of Economic and Social Research 2012); Christian Dustmann, Tommaso Frattini and Albrecht Glitz, *The impact of migration: a review of the economic evidence* (Centre for Research and Analysis of Migration, University College London 2007); Centre for Research and Analysis of Migration, *What do we know about migration? Informing the Debate* (University College London 2014).

and legal status among other factors.<sup>42</sup> Ideally one would like to analyse all of these factors and their intersections in greater depth. However, this thesis draws out pertinent aspects of labour market and social stratifications that intersect with migrants' legal statuses under the two TMWPs, and which may create and/or exacerbate the risks of hyper-dependence and hyper-precarity in migrants' work relations.

## 1.4 Methodology

This thesis' field of inquiry is situated at the methodologically exciting and challenging crossroads of labour law and immigration law. In exploring the linkages, it is necessary to engage with the goals and concerns of each regulatory domain, as well as their overlaps, tensions, and conflicts. This is particularly important in light of the normative assumptions underpinning the concerns of hyper-dependence and hyper-precarity. Both critical concepts invoke the underlying goals and values of labour law with respect to its worker-protective purpose, as a 'countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in employment relationship'.<sup>43</sup> It is this normative function that Hugh Collins once described as 'labour law as a vocation'.<sup>44</sup>

Yet, this traditional worker-protective mission has not been an inclusive one, as labour law itself differentiates between categories of 'employees' and 'workers' with varying degrees of access to its protections. Furthermore, in recent decades, the

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<sup>42</sup> Stephen Castles, 'Understanding Global Migration: A Social Transformation Perspective' (2010) 36 *Journal of Ethnic and Migration Studies* 1565; Leah Vosko, *Temporary work: the gendered rise of a precarious employment relationship* (University of Toronto Press 2000).

<sup>43</sup> Otto Kahn-Freund, *Labour and the Law* (Stevens & Sons 1983) 18.

<sup>44</sup> Hugh Collins, 'Labour Law as a Vocation' (1989) 105 *LQR* 469, 469.

domain of labour law has taken up a variety of labour market regulatory objectives such as promoting efficiency and flexibility in production, as well as macro-economic goals such as facilitating income and employment policy and contributing to national competitiveness.<sup>45</sup> For example, the increasingly prominent discourse of ‘flexicurity’ in the EU espouses the aim of reconciling protective elements of labour law with the creation of ‘flexible’ jobs.<sup>46</sup> While this has resulted in initiatives aimed at removing the regulatory anomalies around flexible employment (for example, providing for ‘equal treatment’ of part-time, fixed-term, and agency workers vis-à-vis full time, permanent employees), many of these legislative and policy measures have been underpinned by a strong normative push to promote such work arrangements.<sup>47</sup>

At first glance, the norms, principles, and rules of immigration law appear to operate with a different logic to those of labour law. The long-established starting point is that sovereign states generally have wide-ranging authority over ‘the right to protect borders, confer nationality, safeguard national security, and admit and expel non-nationals’.<sup>48</sup> From this perspective, immigration law is ‘primarily concerned with... regulating the numbers, origin, and material and other circumstances of those whom entry will be granted, not primarily concerned with the protection of their

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<sup>45</sup> Hugh Collins, ‘Regulating the employment relation for competitiveness’ (2001) 30 ILJ 17; Paul Davies and Mark Freedland, *Labour Legislation and Public Policy* (Clarendon Press 1993).

<sup>46</sup> Commission, ‘Green Paper: Modernising labour law to meet the challenges of the 21st century’ COM (2006) 708.

<sup>47</sup> Nicola Countouris, *The Changing Law of the Employment Relationship: Comparative Analyses in the European Context* (Ashgate 2007); Jill Murray, ‘Normalising Temporary Work: the Proposed Directive on Fixed Term Work’ (1999) 28 ILJ 269; Mark Jeffrey, ‘Not Really Going to Work? Of the Directive on Part-time Work, Atypical Work and Attempts to Regulate It’ (1998) 27 ILJ 193.

<sup>48</sup> Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross, *Foundations of International Migration Law* (CUP 2011) 6.

rights'.<sup>49</sup> Nevertheless, as I will examine in the next chapter, the evolution of supranational frameworks governing the rights and duties of persons involved in migration, embodied in a plethora of international, regional, and bilateral instruments, has challenged this conventional position.

At the same time, immigration laws are not only concerned with the regulation of entry and residence of non-citizens in the state's territory. Labour migration regimes have become labour market instruments which not only affect the supply and demand of labour, but also the wages, employment conditions, and rights of migrant and resident workforces, as well as the power relations between workers and employers. Tensions run along the fault lines of labour law and immigration law, which have overlapping and conflicting normative goals and concerns. For example, the protective goals and functions of labour law can be undermined by de jure and de facto restrictions on employment rights that are associated with migrants' legal statuses. At the same time, there are converging similarities in the labour market regulatory rationales underpinning much of contemporary labour and immigration laws and policies. My analysis of the regulatory frameworks of TMWPs in Australia and the UK aims to provide illustrative cases of these intersecting dynamics. Recognising the interplay between immigration law and labour law also opens up questions as to what types of labour migration regimes are normatively acceptable as well as politically feasible.

Although this research is primarily situated in legal scholarship, I am acutely aware of its dynamic multidisciplinary and interdisciplinary dimensions. Although the regulation of labour migration has not been a particularly prominent area of inquiry to date for legal scholars, it is an issue that has commanded the considerable

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<sup>49</sup> Gina Clayton, *Textbook on Immigration and Asylum Law* (4th edn, OUP 2010) 97.

attention of other disciplines such as politics, sociology, economics, anthropology, geography, gender studies, philosophy, and history. I draw on salient insights from scholarship in some of these disciplines to critically analyse the norms, institutions, and processes associated with the regulation of labour migration. Hugh Collins had described the ‘productive disintegration’ of labour law in the 1990s as moving beyond the traditional frame of reference ‘of a sociological interpretation of industrial relations to a contemporary diversity of competing interpretations drawn from economics, political theory, and social policy’.<sup>50</sup> Labour lawyers can and do utilise an array of disciplines and perspectives to make sense of the law, such as those associated with the discourses of human rights and economics. This thesis is thus attentive to the challenges identified by Anne Davies with regards to the methodology, ‘internal problems’, and assumptions each discipline brings to the table.<sup>51</sup>

There is immense value in drawing on the conceptual and methodological tools and resources from other disciplines to enrich the analysis of hyper-dependence and hyper-precarity in migrants’ work relations. For example, geographers, sociologists, and political economists have emphasised the importance of the temporal and spatial contexts in which labour migration and precarious work occur.<sup>52</sup> Understanding the forces that constitute migrants’ work relations requires multi-scalar and historical perspectives of evolving regulatory contexts that construct precarious migrant statuses. Labour mobility and the restrictions on that mobility are

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<sup>50</sup> Hugh Collins, ‘The Productive Disintegration of Labour Law’ (1997) 26 ILJ 295, 297.

<sup>51</sup> Anne C. L. Davies, *Perspectives on Labour Law* (CUP 2004).

<sup>52</sup> See, for example, Anderson ‘Battles in Time’ (n 12); Vosko, *Managing the Margins* (n 3); Martha MacDonald, ‘Spatial dimensions of gendered precariousness: challenges for comparative analysis’ in Leah Vosko, Martha MacDonald and Iain Campbell (eds), *Gender and the contours of precarious employment* (Routledge 2009).

important aspects of these temporal and spatial dynamics as migrants move across space and over time.

The analytical and normative frameworks in this thesis are grounded in a comprehensive analysis of the legal and institutional architecture of two main TMWPs in Australia and the UK: the 457 visa and Tier 2 (General) visa respectively. In conducting this comparative inquiry, it is important to choose the appropriate jurisdictions and systems to examine. Zweigert and Kötz emphasise that a basic selection principle in comparative law methods is that of functionality, which guides all other rules for determining the choice of laws to compare and the scope of the undertaking.<sup>53</sup> Vogenauer further underscores the need for considering the sources of law as they are created, applied and interpreted in any given system.<sup>54</sup>

Due to colonial ties, Australia and Britain have shared foundations in their political and legal systems, such as the Westminster parliamentary and executive structures and institutions and the common law tradition. Despite these common features, there are important differences between the two countries in their immigration policy legacies, institutions, and contexts. In the literature on comparative immigration politics, Australia is typically seen as a ‘traditional destination state’ where mass immigration intakes were ‘a routine and permanent feature of the nation’s life’ for population expansion and nation-building.<sup>55</sup> In contrast, for much of the 20<sup>th</sup> century, the UK has been regarded as a ‘reluctant immigration state’ where permanent immigration is the exception rather than the

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<sup>53</sup> Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, OUP 1998) 34.

<sup>54</sup> Stefan Vogenauer, ‘Sources of Law and Legal Method in Comparative Law’ in Reinhard Zimmermann and Mathias Reimann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 872.

<sup>55</sup> Gary P Freeman, ‘Political science and comparative immigration politics’ in Michael Bommes and Ewa Morawska (eds), *International Migration Research: Constructions, Omissions and the Promises of Interdisciplinarity* (Ashgate 2005) 231.

rule.<sup>56</sup> Yet both countries have seen notable deviations from these categorisations.<sup>57</sup> Notably, there has been a shift from permanent to temporary labour migration in Australia in the past two decades. Meanwhile, the UK's labour migration policies were significantly liberalised under Tony Blair's Labor Government from 1997 to mid-2000s.

The differing geo-political statuses of the two countries also have implications for their respective immigration laws, policies, and practices. The UK's control over immigration from other European Union (EU) member states is limited by its EU Treaty obligations in relation to free movement. Its domestic laws can be influenced by the EU's supranational legal and institutional framework. It should be noted that the UK has chosen not to partake in virtually all of the EU Directives concerning non-EU immigration.<sup>58</sup> On the other hand, Australia does not have the same geo-political institutional constraints on its immigration laws. It has only one agreement with New Zealand that provides for the free movement of labour between the two countries. In addition, geo-political forces can affect the respective different border control capacity of the UK and Australia to deal with regular and irregular flow of immigration.<sup>59</sup>

There are also important divergences between Australia and the UK in terms of labour law and industrial relations frameworks and institutions. For much of the

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<sup>56</sup> Philip L Martin, *Managing Labour Migration: Temporary Worker Programs for the 21st Century* (International Institute for Labour Studies, International Labour Organisation 2003) 3.

<sup>57</sup> Chris Wright, 'Policy legacies, visa reform and the resilience of immigration politics' (2012) 35 *West European Politics* 726.

<sup>58</sup> Cathryn Costello and Emily Hancox, *Policy Primer: The UK, the Common European Asylum System and EU Immigration Law* (The Migration Observatory, COMPAS 2014).

<sup>59</sup> John Salt, 'Skilled migration: The UK and Australia' in Bob Birrell, Lesleyanne Hawthorne and Sue Richardson (eds), *Evaluation of the General Skilled Migration Categories* (Department of Immigration and Multicultural Affairs 2006) 280-282.

20<sup>th</sup> century, Australia had a system of state-driven compulsory industrial conciliation and arbitration, which has shifted towards decentralised forms of individual and collective enterprise bargaining since the 1980s.<sup>60</sup> The British industrial relations tradition has been notably characterised by Otto Kahn-Freund as a ‘collective laissez faire’ system that emphasised voluntarism over state regulation.<sup>61</sup> Nevertheless, changes in labour market regulation in both countries over the past three decades have reflected the pursuit of similar goals of enterprise flexibility, competitiveness, and economic efficiency.<sup>62</sup>

Pertinent points of contrast between the two countries’ labour migration regimes are illuminated in the analysis of the two TMWPs. The purpose of this comparative inquiry is not to ‘construct idiosyncratic national models’<sup>63</sup> but to draw attention to the relevant particularities in local institutional and regulatory arrangements such as systems of industrial relations and labour market regulation that influence the direction and contour of labour migration regimes. The national contexts of the two schemes remain a necessary starting point to examine the historical, institutional, and juridical boundaries of the regulation of labour migration. To the extent that numerous commonalities between the two schemes are highlighted in this thesis, there is a recognition that policy responses to employer and labour market demands for migrant labour do not develop exclusively in national settings. There can be emulation between states’ labour migration regimes arising from global

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<sup>60</sup> Mark Wooden, *The Transformation of Australian Industrial Relations* (The Federation Press 2000).

<sup>61</sup> Otto Kahn-Freund, ‘Labour Law’ in Morris Ginsberg (ed), *Law and Opinion in England in the 20th century* (Stevens 1959).

<sup>62</sup> Richard Mitchell, Peter Gahan, Andrew Stewart, Sean Cooney and Sarah Marshall, ‘The Evolution of Labour Law in Australia: Measuring the Change’ (2010) 23 AJLL 1; Deirdre McCann, *Regulating Flexible Work* (OUP 2008).

<sup>63</sup> Gary P Freeman, ‘National models, policy types and politics of immigration control in liberal democracies’ (2006) 29 West European Politics 227.

competitive pressures, from attracting the highly skilled in a ‘global race for talent’<sup>64</sup> to the need for low-skilled, low-waged labour in sectors such as agriculture, food-processing, construction, domestic and care work.

In collecting and analysing data for this thesis, I draw on a variety of primary and secondary sources. Primary sources include applicable legislation, statutory instruments, and case law related to Australia’s 457 visa scheme and the UK’s Tier 2 (General) visa (and its predecessor, the work permits system). I also examine official policy documents and publications such as Hansard transcripts, ministerial speeches and press releases, Parliamentary debates, inquiries and reports of parliamentary committees and ministries, and press releases and reports. The differences in the legal effect of these instruments should be noted. In Australia, Ministerial Directions authorised under the Migration Act 1958 (Cth) establish policies and procedures related to the legislation which must be followed by decision-makers as a matter of law. The Department of Immigration and Citizenship (DIAC) also produces guidance for interpreting the Migration Act and Regulations, namely the Procedures Advice Manual 3 (PAM3) and the Migration Series Instructions (MSIs). While these documents are not binding on decision-makers, they are generally followed except where the policy concerned is inconsistent with the law and/or its application would cause injustice in a particular case.<sup>65</sup> Misapplication of the guidance may be significant in establishing some error on the part of a decision-maker.<sup>66</sup> Similarly, the

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<sup>64</sup> Ayelet Shachar, ‘The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes’ (2006) 81 NYU Law Review 101; Christiane Kuptsch and Eng Fong Pang, *Competing for Global Talent* (International Institute for Labour Studies 2006).

<sup>65</sup> *Drake v MIEA (No. 2)* (1979) 2 ALD 674.

<sup>66</sup> *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189, 208 (French and Drummond JJ).

UK Border Agency (UKBA)<sup>67</sup> publishes official Policy Guidance and Codes of Practice that contain instructions for decision-makers, sponsors, and visa applicants. The only legally effective parts of these documents are those set out in the Immigration Rules and properly laid before Parliament.<sup>68</sup>

Beyond the analysis of textual sources of law and policy pertaining to the two TMWPs in Australia and the UK, I have sought to incorporate other materials such as empirical studies, statistical data, government reports, and media sources to shed some light on the ‘law in action’. It should be noted that there has been limited empirical research to date that specifically examines workers on the 457 visa and (especially) the Tier 2 (General) visa. There remain considerable gaps in the publicly available data on the two schemes, such as the duration of visas, rate of visa renewals, length of actual residence, and visa-holder demographics breakdown, among others.

## 1.5 Structure of Thesis

My key arguments are developed over five main chapters in this thesis. Chapter 2 expounds the theoretical tenets of hyper-dependence and hyper-precarity as the central analytical and normative lenses in this thesis. These critical concepts seek to expand the emerging body of socio-legal scholarship that explores the nexus between migrant status, labour market regulation, and precarious work. I situate hyper-

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<sup>67</sup> The UKBA was an executive agency from 1 April 2008 until 31 March 2013. As of 1 April 2013, its executive agency status has been removed and its functions have been split into two organisations that form part of the Home Office.

<sup>68</sup> *Home Department v Pankina* [2010] EWCA Civ 719; *R (Alvi) v Secretary of State for the Home Office* [2012] UKSC 33. The Codes of Practice pertaining to Tier 2 visa applications were added to the Rules in July 2012 following *ibid* which held that substantive requirements in immigration control must be subject to parliamentary scrutiny.

dependence and hyper-precarity as normative concerns in the debates on the ethics of labour migration regulation generally and TMWPs specifically. The orthodox nationalist position is that states have a broad sovereign prerogative over the admission of non-citizens into their territory and these non-citizens' access to their labour markets. In contrast, arguments based on cosmopolitan or post-national citizenship highlight liberal democratic states' commitments to the equal moral status of all human beings which are embedded in a web of human rights norms, institutions, and systems that constrain states' free reign over immigration laws and policies.

The different ethical positions raise the question of the moral standing that ought to be given to migrants relative to countries of which they are not citizens. Host states' pursuit of selective goals and interests under contemporary TMWPs, such as optimising labour market flexibility and economic competitiveness, has largely prevailed over normative concerns regarding the various restrictions of migrant workers' rights arising from these schemes. Justifications of these restrictions include nationalist arguments that point to the democratic polity's sanctioning of such labour migration regimes<sup>69</sup> or utilitarian and consequentialist rationales as embodied in a purported trade-off between the numbers of migrants admitted (or the 'openness' of admission policies) and the rights granted to migrants.<sup>70</sup> Others have sought to argue that exploitative TMWPs that restrict migrants' rights may be acceptable under certain conditions, such as where migrants have 'consented' to the transaction in question and/or where 'non-exploitative'

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<sup>69</sup> Jonathan Seglow, 'The Ethics of Immigration' (2005) 3 *Political Studies Review* 317.

<sup>70</sup> Martin Ruhs, *The Price of Rights: Regulating International Labor Migration* (Princeton University Press 2013).

alternatives to these schemes may not lead to better outcomes for migrants.<sup>71</sup>

There are nevertheless normative constraints on the wide discretion of states to design and implement TMWPs as they see fit. I focus on the potential and limitations of two current important constraints: the framework of international human rights standards pertaining to migrant workers and their families and the legal regimes addressing forms of ‘unfree labour’. Both discourses provide a normative baseline of rights and protections for migrant workers. Yet, as I argue, the migrants’ rights discourse at present does not ultimately challenge states’ prerogative to produce a range of precarious migrant statuses that structure the vulnerabilities of non-citizens who enter their territory and access their labour markets. Furthermore, the ‘unfree labour’ discourse does not adequately tackle the shifting and complex realities of a continuum of exploitative work relations. The notions of hyper-dependence and hyper-precarity therefore seek to capture the multidimensional vulnerabilities in migrants’ work relations that are produced and institutionalised through the legal regimes of labour migration.

Applying the conceptual framework laid out in Chapter 2, I engage in a substantive comparison of the regulatory architecture of Australia’s 457 visa and the UK’s Tier 2 (General) visa schemes over the course of Chapters 3, 4, and 5. This in-depth comparative inquiry starts with setting the scene of the two TMWPs within the historical and institutional frameworks of the regulation of labour migration in the two countries. Chapter 3 explicates how the ‘regulatory crucible’ of national immigration contexts and policy legacies, economic, political, and social institutions such as labour market norms and structures has influenced the goals, design, and operation of the 457 visa and Tier 2 (General) visa schemes. Besides normative

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<sup>71</sup> Robert Mayer, ‘Guestworkers and exploitation’ (2005) 67 *Review of Politics* 311; Howard Chang, ‘Guest workers and Justice in a Second-Best World’ (2008) 34 *University of Dayton Law Review* 3.

constraints on the regulation of labour migration, domestic institutional factors play an important role in mediating the ways in which the pursuit of certain regulatory objectives translates into actual laws and policies. A proper contextual understanding of the variations of this regulatory crucible between countries and over time is also vital for developing any proposals for reforming the TMWPs concerned.

Chapter 4 examines in detail the conditions of entry under the 457 visa and Tier 2 (General) visa schemes, including the number of migrants admitted, the occupations, sectors, and/or geographical regions where they are recruited, as well as their skills and personal attributes. I unpack the main espoused aim of the two employer-driven schemes, which is to respond to ‘skills shortages’ that cannot be met from within the resident labour force. This rationalisation underpins the binding of the migrants’ legal status to an employer sponsorship and other restrictions on their labour mobility that are built into such schemes. These features, as examined in Chapter 5, are critical sources of migrants’ hyper-dependence and hyper-precarity. The problem with the ‘skills shortages’ rationale of these schemes arises from the much-contested notions of ‘skills’ and ‘shortages’. The admission criteria of the 457 visa and Tier 2 (General) visa demonstrate varying degrees of deference to employers in identifying ‘skills shortages’ based on their ‘need’ for particular types of migrant labour. The 457 visa scheme has adopted a more *laissez faire* model of employer-driven admission compared to the more restrictive criteria and processes of the Tier 2 (General) visa. Furthermore, the labour market profiles and characteristics of migrant workers, as shaped by the schemes’ conditions of entry, can affect their bargaining power and propensity to experience hyper-dependence and hyper-precarity.

In Chapter 5, I probe into the legal design and operation of the two TMWPs

that intersect with other labour market regulatory norms, structures, and processes to produce various sources of hyper-dependence and hyper-precarity in migrants' work relations and migration projects. The key features of these regulatory intersections include: the binding of migrants' legal status to an employer sponsorship and other de jure and de facto restrictions on their labour mobility in the host state; the insecurities around their employment and residence statuses that are subject to the employer/ sponsor's discretion; the absence of protective measures for migrants' residence status and their ability to claim unfair dismissal remedies when their employment is terminated; the impediment of their precarious statuses to the enforcement of employment protections; the scope for precarious intermediated work relations; migrants' exclusion from a range of social rights and protections; barriers to their ability to exercise trade union and collective labour rights; their additional dependence on the sponsor/employer to apply for permanent residence status; and the 'watchdog' role of employers over migrants' compliance with immigration controls, along with the pitfalls of employer sanctions regimes that may render migrants' statuses even more precarious.

Finally, Chapter 6 sets out a narrative for reform that is aimed at ameliorating the most problematic aspects of the legally constructed hyper-dependence and hyper-precarity arising from the architecture of contemporary TMWPs that have been identified in the analysis of the 457 visa and Tier 2 (General) visa schemes. My intention is not to prescribe a blueprint for any kind of ideal scheme, especially given the contextual specificities that mould the regulatory crucibles of national labour migration regimes. Rather than proposing the complete abandonment of TMWPs, I recognise that these schemes may be the most politically feasible means at present for some industrialised countries to provide migrants with legal channels of access to

their labour markets. I focus on proposing some immediate possibilities for reforming current TMWPs that are aimed at enabling migrants' freedom to exercise 'exit' and 'voice' mechanisms at any point of their work relations and their migration projects.

Immigration laws and policies not only draw the line between citizens and non-citizens within a state, but also produce a spectrum of statuses that stratify categories of non-citizens in terms of differential access to social, economic, political and civil rights in the state's territory. As this thesis highlights, there are nonetheless normative and institutional constraints on the attempts of liberal democratic states such as Australia and the UK to regulate labour migration as they see fit in order to pursue particular economic and political objectives. Beyond the two case studies examined in this thesis, the conceptual and normative concepts of hyper-dependence and hyper-precarity have a wider applicability to other studies that inquire into the intersections between immigration law, labour law, and other realms of labour market regulation. It is hoped that the lessons learned and the reform proposals put forward in the course of this thesis can make a valuable contribution to the scholarly and public debates on TMWPs and international labour migration.

## **2. The Analytical and Normative Framework**

### **2.1 Introduction**

This chapter seeks to elucidate the concepts of hyper-dependence and hyper-precarity with a two-fold objective. First, it examines how migrants' precarious statuses that are associated with the legal and institutional architecture of TMWPs can shape particular vulnerabilities in their work relations. Second, it identifies the potential normative constraints on states' design and implementation of these labour migration regimes. In this chapter, the analytical and normative framework of the thesis is developed in three parts. I start with situating the two 'hyper' concepts within an emerging body of socio-legal scholarship aimed at theorising the relationship between migrant status and precarious work.

The two concepts are then brought to bear in relation to the legitimatisations for the state's construction of the precarious legal statuses associated with its labour migration regimes. I first draw on salient perspectives from a wider debate on the ethics of states' prerogative in regulating labour migration before turning to assess the specific rationales for contemporary TMWPs within a labour market regulatory tapestry aimed at the flexibilisation of employment relations. I argue that these broader and specific justifications underline the limited moral standing afforded to the interests of migrant workers relative those of the host state and its citizens. Furthermore, arguments in favour of TMWPs mostly reflect utilitarian approaches such as the 'numbers versus rights' proposition that are based on a cost-benefit analysis of these schemes' economic and labour market consequences for the host state.

Finally, I inquire into two important normative constraints on the regulatory

architecture of labour migration regimes: international human rights instruments, specifically those conceived to protect migrant workers and their families, and legal regimes seeking to combat forms of ‘unfree labour’ such as slavery, servitude, and forced labour. Despite providing a comprehensive range of social and economic rights to migrant workers (at least on paper), international migrants’ rights instruments remain deferential to states’ sovereign powers to construct precarious statuses for those non-citizens they admit into their territory. A range of supranational and national legal frameworks to combat slavery, servitude, and forced labour, particularly in the increasingly prominent discourse of trafficking, impose certain obligations on states to address the most severe forms of labour exploitation. Yet, as I argue, these regimes do not adequately tackle the situations of HDP and HPD along a complex and shifting continuum of exploitation.

## **2.2 The Notions of Hyper-dependence and Hyper-precarity**

### ***Precarious work and precarious migrant status***

Precarious work is a complex and multifaceted concept that seeks to capture a combination of ‘instability, lack of protection, insecurity and social or economic vulnerability’<sup>72</sup> and the ‘flux and uncertainty’<sup>73</sup> associated with certain kinds of work arrangements and employment relations. The definition, expression, and usage of the concept have varied between places and over time.<sup>74</sup> Barbier notes that ‘the French debate about employment precariousness is closely intertwined with an assessment of

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<sup>72</sup> Rodgers and Rodgers, *Precarious Jobs* (n 7) 5.

<sup>73</sup> Anderson, ‘Migration, immigration controls’ (n 4) 303.

<sup>74</sup> Louise Waite, ‘A Place and Space for a Critical Geography of Precarity?’ (2009) 3 *Geography Compass* 412; Leah Vosko, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (McGill-Queen’s University Press 2006).

a much wider precariousness... Life in general is precarious, as well as social life'.<sup>75</sup> As highlighted earlier, Vosko presents a multidimensional analysis of precarious work that is 'attentive to social context and to social location' at multiple levels.<sup>76</sup>

Precarious work is not merely a phenomenon arising from economic and organisational restructuring of contemporary global markets but inextricably linked with social, political, legal, and institutional choices and structures that shape the context in which such work takes place.<sup>77</sup> For example, there is a sustained anchoring of labour legislations, collective agreements, judicial/tribunal interpretations, and firm practices to a normative model of the SER. At the same time, labour market policies and regulation aimed at the flexibilisation of employment relations have promoted and legitimised the growth of 'non-standard' forms of work. Yet precarious work should not simply be equated to forms of 'non-standard' employment. A dualistic dichotomy of 'standard' and 'non-standard' employment fails 'to capture the deterioration of full time permanent employment — the closet proxy for the SER'.<sup>78</sup>

There is a wealth of comparative research on the interrelationship between legal categorisations of employment statuses and the personal scope of labour and social protections.<sup>79</sup> A less explored dimension of this line of inquiry is the

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<sup>75</sup> Jean-Claude Barbier, *A survey of the use of the term précarité in French Economics and Sociology* (2002).

<sup>76</sup> Vosko, *Precarious Employment* (n 74) 12.

<sup>77</sup> Kerry Rittich, 'Rights, Risk, and Reward: Governance Norms in the International Order and the Problem of Precarious Work' in Judy Fudge and Rosemary Owens (eds), *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Hart Publishing 2006) 31-32.

<sup>78</sup> Vosko, *Precarious Employment* (n 74) 11.

<sup>79</sup> Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2012); Guy Davidov, 'Who is a Worker?' (2005) 34 ILJ 57; Judy Fudge, Eric Tucker and Leah Vosko, *The Legal Concept of Employment: Marginalizing Workers (Report for the Law Commission of Canada)* (2002).

interconnected function of legal statuses associated with labour migration regimes. Immigration laws and policies are not only concerned with the entry and exit of non-citizens, but also the construction of precarious legal statuses that structure the vulnerabilities of non-citizens through exclusions of and restrictions on their social, economic, political, and civil rights and entitlements in a host state. Vosko has referred to the role of citizenship as a legal and political category in maintaining the ‘spatial container for the SER’.<sup>80</sup> The idea of ‘partial citizenship’ has also been used to describe the selective and qualified extension of rights to migrants once they are inside the host state.<sup>81</sup> As Fudge argues, ‘migrant status’ is a more precise term than ‘citizenship’ for encapsulating ‘the state’s power to control entry into its territory, and the conditions it imposes’,<sup>82</sup> as well as the extent to which immigration law performs the ‘dirty work’ of citizenship.<sup>83</sup>

Goldring, Berinstein, and Bernhard refer to the concept of ‘precarious migrant status’ to capture a spectrum of ‘less than full’ migrant statuses. Precarious migrant status is marked by the absence of features that are generally associated with permanent residence and citizenship: work authorisation, the right to remain permanently, a right of residence that does not depend on a third party, and social citizenship rights in the host state.<sup>84</sup> The notion highlights the constitutive role of immigration law in shaping migrants’ ‘ongoing vulnerability to precariousness’.<sup>85</sup>

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<sup>80</sup> Vosko, *Managing the Margins* (n 3) 10, 102.

<sup>81</sup> *ibid* 10.

<sup>82</sup> Fudge, *Precarious Migrant Status* (n 11) 11.

<sup>83</sup> Catherine Dauvergne, ‘Citizenship, Migration Laws and Women: Gendering Permanent Residency Statistics’ (2000) 24 *Melbourne University Law Review* 280, 495.

<sup>84</sup> Goldring, Berinstein and Bernhard, ‘Institutionalizing precarious migratory status’ (n 9) 240-241.

<sup>85</sup> *ibid* 245.

There can be unpredictable, non-linear, voluntary, and involuntary movements along the spectrum of precarious statuses. For example, a migrant may have initially entered on a valid temporary work visa but her status can become irregular if she and/or her employer failed to comply with the conditions associated with the visa. Ruhs and Anderson also refer to these situations of ‘semi-compliance’ where migrants ‘who are legally resident but working in breach of the employment restrictions attached to their migrant status’.<sup>86</sup>

Anderson examines how immigration controls ‘work with and against migratory processes to produce workers with particular types of relations to employers and labour markets’ through creating categories of legal entrants, imposing certain types of employment relations, and institutionalising uncertainty.<sup>87</sup> Fudge supplements this analytical framework by identifying indicators of the three aspects of this interaction.<sup>88</sup> First, conditions of entry include the demographics of the migrant (such as skill level, age, gender, country of origin, marital status), family accompaniment, occupations and sectors, duration and mobility conditions of their visas. The second dimension is that of employment relations, as indicated by workers’ dependence on employers, the duration, terms, and conditions of employment, legislative protection, and unionisation. Third, ‘institutionalised insecurity’ can be examined through social citizenship entitlements, pathways to more secure migrant status, and prospects of family reunification.<sup>89</sup>

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<sup>86</sup> Martin Ruhs and Bridget Anderson, ‘Semi-compliance and illegality in migrant labour markets: An analysis of migrants, employers and the state in the UK’ (2010) 16 *Population, Space and Place* 195, 196.

<sup>87</sup> Anderson, ‘Migration, immigration controls’ (n 4) 306.

<sup>88</sup> Fudge, *Precarious Migrant Status* (n 11).

<sup>89</sup> *ibid.*

Building on these insights, the notions of hyper-dependence and hyper-precarity seek to provide a useful set of analytical and normative lens to explore the dynamic interrelationship between immigration laws, policies, and practices (specifically, their production of precarious migrant statuses) and the labour market norms, institutions, and processes that shape particular vulnerabilities migrants' work relations.

### ***Hyper-dependence***

The notion of dependence in an employment relationship is typically regarded as a defining characteristic of an employee under a contract of service. The employer is deemed to have decisional power and control over the employee's duties and various aspects of their labour such as the time, place, content, and performance of work. Having surrendered this control over their labour, the legal characterisation of employees — who are said to be personally dependent or subordinate in an employment relationship — is distinguished from those who have independence and autonomy over their work. This division between the statuses of employees and independent contractors has largely underpinned the exclusion of self-employed persons from the scope of employment protection laws. However some forms of 'self-employment' may actually be disguised employment relationships. Accordingly, the notion of 'economic dependence' has emerged as an alternative test for assessing the economic reality of individuals who may be contractually defined as 'self-employed' but who are in fact dependent on a single client or principal as the source of their income.<sup>90</sup>

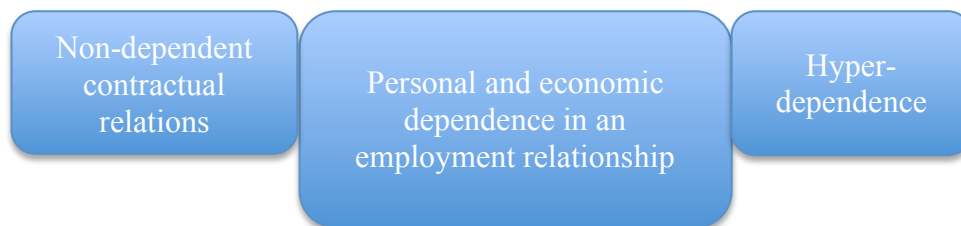
The notion of hyper-dependence transcends the conventional boundaries of

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<sup>90</sup> Alan Supiot, *Beyond Employment. Changes in Work and the Future of Labour Law in Europe* (OUP 2001) 6.

personal and economic dependence in an employment relationship. Diagram 1 below illustrates a continuum of dependence across different categories of contractual relations.

**Diagram 2.1 Hyper-dependence in work relations**



At one end, there are genuinely independent ‘contractors for services’ who do not have any personal or economic dependence on their clients. Then there are employment relationships (including disguised forms of self-employment) characterised by personal and economic dependence on the employer. At the far end, hyper-dependence is a condition of extreme socioeconomic dependence where other aspects of a worker’s life — beyond the immediate context of the employment relationship — hinge critically on the relationship with the employer.

In the context of migrants’ work relations, the shaping of hyper-dependence is intimately linked to their precarious legal statuses. Migrants’ legal authorisation to work and reside in the host state is structurally tethered to a specific employer’s sponsorship under most TMWPs. Where some TMWPs provide for conditional routes to permanent residency, these pathways are not guaranteed and often require continued sponsorship by the employer over a minimum period of time and the employer’s support for the application. Such requirements can create or exacerbate migrants’ hyper-dependence on their current employer/sponsor not only for continued legal residence status in the host state (and that of any accompanying sponsored family members), but also for the possibility to eventually access the full

range of rights associated with permanent residence and potentially citizenship.

In further unpacking the notion of hyper-dependence in migrants' work relations, it is essential to scrutinise the de jure and de facto restrictions on labour mobility in the host state. Labour mobility is conceptualised broadly here, referring to all aspects of movement across jobs, employers, sectors, labour markets, and geographical locations. Historically there have been legal constraints placed on workers' freedom to move from place to place, from job to job, and from employer to employer.<sup>91</sup> Labour mobility was viewed as 'extremely threatening in an advancing capitalist economy, both to the economic interests of the propertied classes, and to the social fabric of the wider political community'.<sup>92</sup> Legal restrictions ranged from vagrancy statutes that attempted to control the geographical and labour mobility of the poor<sup>93</sup> to contracts of indentured servitude enforced by the courts.<sup>94</sup>

With the *raison d'être* of addressing labour and skills shortages, TMWPs usually contain de jure restrictions on migrants' labour mobility with varying degrees of constraints on migrants' choice of employment to a specific employer, occupation, and/or sector. In some cases, a migrant's status can also be tied to particular workplaces and/or geographical location. She may be required to live in the employer's premises<sup>95</sup> or to work only in a regional or rural labour market.<sup>96</sup> De facto

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<sup>91</sup> Paul Craven and Douglas Hay, 'The criminalization of 'free' labour: Master and servant in comparative perspective' (1994) 15 *Slavery & Abolition* 71.

<sup>92</sup> Julia O'Connell Davidson, 'New slavery, old binaries: human trafficking and the borders of 'freedom'' (2010) 10 *Global Networks* 244, 247.

<sup>93</sup> Bridget Anderson, *Us and Them? The dangerous politics of immigration control* (OUP 2013) ch 1.

<sup>94</sup> Robert J Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350–1870* (University of North Carolina Press 1991).

<sup>95</sup> For example, under the Canadian Live-in Caregiver's programme, the migrant domestic worker is required to live in with their employer. The most powerful incentive for migrants to participate in the programme is the eligibility for permanent residency after two years of employment. See Fudge, 'Global Care Chains' (n 25).

restrictions can also render the migrant worker hyper-dependent on the sponsor/employer by prohibiting or making it extremely difficult to transfer a work permit from one sponsor/employer to another. For example, migrants may be only given a very narrow timeframe once their employment has ceased with one employer to seek sponsorship with another approved employer. Such restrictions can significantly undermine the migrant's ability to leave an employer and exit an employment relationship. Hyper-dependence therefore entails a very high degree of unfreedom embedded in migrants' work relations, which are subject to immigration controls that constrain their choice over whom they can work for and the terms and conditions of their employment.

### ***Hyper-precarity***

Migrant workers with precarious legal statuses can experience multidimensional insecurities in their work relations and broader migration projects, which the notion of hyper-precarity seeks to encapsulate. Under employer sponsored TMWPs, the duration of migrants' work arrangements is usually based on the length of their sponsored work permits and visas. Yet, some schemes may allow for consecutive renewals of migrants' work permits/visas. These regulatory features can provide the sponsor/employer with enormous control over the withdrawal, extension, or renewal of the migrants' visa sponsorship. For the migrant worker, this particular discretion of the sponsor/employer can create considerable uncertainty and instability in their employment and residence statuses in the host state at any given time.

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<sup>96</sup> For example, Australia's Skilled Regional Sponsored Visa (subclass 489) provides a route for skilled migrants who do not have sufficient points to obtain an Independent visa to work in Australia. Applicants must obtain sponsorship from an eligible relative living in a designated rural area or be nominated by an Australian State or Territory government. They must live for two years and work for at least twelve months in a designated area. The visa is valid for four years and provides a pathway to permanent residence.

Another important source of hyper-precarity in migrants' work relations is the effect of their precarious statuses on the availability, application, and enforcement of employment and social protections in the host state. In liberal democratic states, the formal scope of labour laws usually applies to migrant workers with lawful residence in the host state. However, the 'temporary' duration of migrants' permission to work and reside in the host state under TMWPs can directly structure certain forms of employment arrangements such as fixed-term work that are not subject to a full range of rights and protections underpinned by SER-centric norms. Even as bearers of rights on paper, migrants under TMWPs may not be able to enforce their rights in practice due to fears of antagonising the sponsor/employer and endangering their visa sponsorship.

The role of precarious migrant status in shaping hyper-precarity is further manifested in circumstances where the employer deliberately or inadvertently breaches the conditions attached to the migrants' visa, sponsorship obligations, or any other immigration laws and regulations. These situations may include: changing the migrant's job duties in a manner that is inconsistent with visa conditions, paying below the requisite salary threshold for the sponsored position, or submitting the wrong paperwork to immigration authorities. Such transgressions can involve the direct or indirect complicity of the migrant, for example, where the migrant 'agrees' to take on duties beyond the permissible conditions of her visa. As migrants' statuses may fall into irregularity in these situations, their contractual and statutory employment rights become even more difficult to enforce in law and in practice. This hyper-precarity, which heightens the migrant's disposition to exploitative work relations, is reinforced by the employers' threat of denouncing the migrant's irregular status.

Hyper-precarity also entails the severe circumscription of workers' freedom to exercise collective organisation for safeguarding their rights and for counteracting employers' bargaining power to influence the terms and conditions of their employment. Migrants who are channelled into certain sectors of the labour market may be legally excluded from the right to join trade unions and to bargain collectively, such as farm workers in Canada.<sup>97</sup> Migrants' exercise of these fundamental labour rights can also be thwarted in practice by the sponsor/employer's threat of dismissal and withdrawal of their sponsorship. Furthermore, the length of stay in the host state can affect migrants' disposition to engage in trade union activities. The temporariness and uncertainty of their stay in the host state can diminish the perceived relevance of union membership. Membership fees may seem excessive for those whose primary goal is to maximise their savings and remittances. Drawing on Piore's analysis of migrants' time horizons, McKay argues that those who 'become more embedded in the local community and labour market' over time can acquire greater expectations of wages and working conditions, which increase their likelihood of participating in union activities.<sup>98</sup>

The involvement of many intermediaries in the labour migratory process can additionally structure migrants' experiences of hyper-precarity. Private intermediaries and agencies have become key actors in the formal and informal conduits of global labour migration. There are varying levels of regulatory oversight of this transnational network of employment agencies, private recruiters, migration advisers, moneylenders, transportation, sponsoring agencies, facilitators, and

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<sup>97</sup> See, for example, *Ontario (Attorney General) v Fraser* [2011] SCC 20.

<sup>98</sup> Sonia McKay, *Trade unions and recent migration: organising challenges in an enlarged EU* (2008) 6-7.

brokers.<sup>99</sup> These intermediaries can often charge a range of lawful and unlawful fees that may generate considerable debt for migrants.<sup>100</sup> Labour intermediaries that recruit and sponsor migrants under TMWPs to supply their ‘service’ to end-user clients can create problematic contractual relationships, sometimes contrived to avoid sponsor/employer obligations under immigration and employment laws. Moreover, intermediated work relations that involve different labour users can entail substantial insecurities and uncertainties that come with frequent changes in migrants’ working conditions, workplaces, and duties performed. Under these arrangements, migrants can be exposed to increased risks of breaching specific employment-related restrictions attached to their visas and/or work permits.

Hyper-precarity also incorporates a condition of insecurity and instability that extends beyond the world of work for migrant workers, including their limited ability to make long-term plans.<sup>101</sup> Unlike workers with permanent residence or citizenship status, the hyper-precarity experienced by temporary migrants is structured by the uncertainty of their legal permission to remain in the host state, which affects wider spheres of migrants’ lives beyond the workplace as well as those of their family members either accompanying them or remaining in their home countries. For migrants under TMWPs, access to permanent residence is not guaranteed. Routes to more secure status can critically depend on continued employment with and/or the support of a specific sponsor. Hyper-precarity therefore seeks to capture these migrants’ profound inability to plan for the future, where immigration laws and

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<sup>99</sup> Judy Fudge, ‘Global Care Chains: Transnational Migrant Care Workers’ (2012) 28 *IJCLIR* 63.

<sup>100</sup> Julia O’Connell Davidson, ‘Troubling freedom: migration, debt, and modern slavery’ (2013) 1 *Migration Studies* 176.

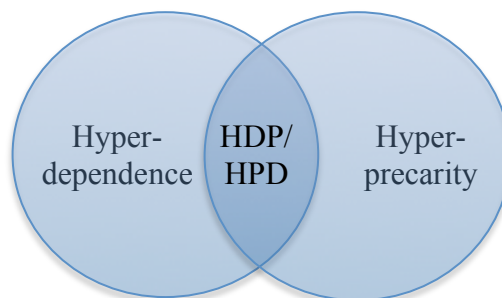
<sup>101</sup> See Pierre Bourdieu, *Acts of resistance: Against the tyranny of the market* (The New Press 1998); Brett Neilson and Ned Rossiter, ‘From precarity to precariousness and back again: life, labour and unstable networks’ (2005) 5 *Fibreculture*.

policies not only shape the precariousness of employment but also of other aspects of their lives, including housing, debt, family relations, and the formation of social relations in the host community.

### ***Hyper-dependent precarity and hyper-precarious dependence***

The idea of hyper-precarity seems to imply extremely insecure and temporary work relations, whereas hyper-dependence suggests a longer-term relationship where the worker is bound to an employer or labour user. However, as depicted by Diagram 2, there can be certain situations where hyper-dependence and hyper-precarity intersect, which may be usefully described as HDP or HPD.

**Diagram 2.2 Hyper-dependent precarity and hyper-precarious dependence**



It is useful to draw on the idea of exit and voice in work relations to elaborate on the phenomena of HDP and HPD. Insights from Hirschman's 'Exit, Voice, and Loyalty'<sup>102</sup> proposition have been applied to situations of dissatisfied workers who can respond through 'exiting' the employment relationship to seek better working conditions elsewhere, or through 'voice' mechanisms such as trade unionism and collective bargaining.<sup>103</sup> Voice and exit are commonly seen as trade-offs, where a lack of 'voice' can increase the likelihood for 'exit' and vice versa, as exemplified in

<sup>102</sup> Albert O. Hirschman, *Exit, Voice, and Loyalty* (Harvard University Press 1970).

<sup>103</sup> See Richard B. Freeman and James L. Medoff, *What Do Unions Do?* (Basic Books 1984).

Freeman's association of unionism with lower quit rates.<sup>104</sup> However, this trade-off may be an illusion for those with precarious migrant statuses in HDP or HPD situations.

Legal pressures including the 'absence of citizenship rights, labour rights and other protective legal and social liberties'<sup>105</sup> can directly and indirectly impede migrants' ability to exit the employment relationship. As examined earlier, the key regulatory features of TMWPs can impose restrictions on changing employers/sponsors, occupations, sectors, and/or workplaces as well as exclusions from social protections (such as unemployment support) that could enable migrants to leave exploitative work relations. Migrants whose visas are sponsored by a specific employer could lose their authorisation to remain in the host state upon the cessation of their employment. Given that migrants are, in principle, 'free' to return to their countries of origin and sell their labour there, one may argue that their exit options are not be completely undermined by the controls on their labour mobility in the host state, however restrictive these controls may be. Yet, the original assumption underpinning 'exit' is the freedom to move elsewhere for better work opportunities, wages, and conditions. Thus migrants' freedom to quit their job with the sponsor/employer in the host state is shaped by the contours of their set of alternatives, including the availability and quality of work opportunities back at home and/or in another potential host state.

Some migrants may not have a substantive exit option if they become

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<sup>104</sup> Richard B Freeman, 'The Exit-Voice Tradeoff in the Labor Market: Unionism, Job Tenure, Quits, and Separations' (1980) 94 *The Quarterly Journal of Economics* 643.

<sup>105</sup> John O'Neill, *Varieties of Unfreedom* (Manchester Papers in Political Economy Working Paper No 4, 2011) 7.

‘trapped within the host society by the failure of their plans of return’.<sup>106</sup> This dilemma can arise in such circumstances as where migrants must repay large amounts of debt incurred in financing their migratory process, whether or not taking on this debt was a ‘voluntary’ decision in the first place. The difference in the level of wages between their host and home states can also affect their ability to repay such debts. Thus for some migrants, the ‘freedom of exit’ through returning to their home countries may be illusory. O’Connell Davidson highlights that migrant indebtedness is in part constructed by the ‘systems of labour import and export’ that immigration regimes foster, as well as the state’s policies and practices that discriminate between citizens and migrants, not only in terms of access to social protections but also access to cheaper, well-regulated sources of credit and legal protection of debtors in the host state.<sup>107</sup> The debt incurred during the migratory process can significantly limit their ability to exit the employment relationship and/or to exit their migration projects in the host state altogether.

In situations of HDP and HPD, it can be said that workers are deprived of the possibility to resort to exit as well as voice mechanisms. According to Hirschman, initial high costs of entry and stiff penalties and sanctions for exit can diminish and repress the salience of both exit and voice. Hirschman identifies these entry fees and exit penalties as devices for organisations to generate or reinforce the loyalty of consumers or employees. In other words, loyalty disrupts the functioning of exit and voice by causing consumers or employees to stay with an organisation.<sup>108</sup> Entry costs can include an enormous amount of time, money, resources, and energy invested by

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<sup>106</sup> Valeria Ottonelli and Tiziana Torresi, ‘Inclusivist Egalitarian Liberalism and Temporary Migration: A Dilemma’ (2012) 20 *Journal of Political Philosophy* 202, 219.

<sup>107</sup> O’Connell Davidson, ‘Troubling Freedom’ (n 100).

<sup>108</sup> Hirschman, *Exit, Voice, and Loyalty* (n 102) 93.

the migrant (and potentially her family and community) to embark on the migration project, including finding a job and sponsor and obtaining the required legal authorisation to work and reside in the host state. At the same time, there can be hefty penalties for exit. If the migrant under a TMWP quits her job with her sponsor/employer, she could be subject to the adverse consequences of losing her legal authorisation to remain in the host state, including the risk of deportation. Other sanctions for exit may arise from repayment of significant debt and/or the shame and humiliation of returning home early.

Where the penalties for exit are extremely high, voice mechanisms become all the more important for workers to protect their rights and advance their interests. Yet the power of exit or voice to effect change exists where the other option is possible. The tethering of migrants' legal status to an employer sponsorship under TMWPs can be perceived as imposing or mandating the 'loyalty' of highly immobile migrant workers through substantial entry fees and prohibitive exit penalties. The use of 'voice' through resorting to individual and collective, formal and informal channels such as legal proceedings, collective bargaining, and internal grievance procedures, is undermined in these situations. Migrants may be extremely reluctant to voice any form of discontent and complaint against their sponsor/employer where exit is not a viable possibility. The combination of hyper-dependence and hyper-precarity can therefore stifle exit and silence voice, which project migrants' work relations towards highly exploitative situations of HDP or HPD.

### **2.3 Rationales for TMWPs**

Having introduced the normative concerns of hyper-dependence and hyper-precarity, I now turn to examine the rationales and justifications for states' labour migration

regimes that structure these particular vulnerabilities in migrants' work relations. Rather than engage in depth with the broader moral and philosophical debates over the justice of 'open' versus 'closed' borders, I draw on relevant insights with respect to the ethics of liberal democratic states' construction of precarious legal statuses that are associated with a range of restrictions on migrants' rights. In this section, I engage in a critique of the various legitimisations and defences of contemporary regimes of TMWPs in industrialised countries which reveal the limited moral standing accorded to migrants' rights compared to the selective economic and labour market goals and interests of host states.

### *The sovereign state and the moral standing of non-citizens*

As Cholewinski notes, the orthodox starting position is that: 'Regulation of labour migration today remains largely a matter for states, which retain the sovereign prerogative to determine which non-nationals may enter and take up employment in their territory'.<sup>109</sup> National sovereignty is usually invoked to justify the 'free hand' of states in deciding which migrants to admit and the terms under which they are admitted, premised on the view that immigration laws and policies are an integral exercise of the Westphalian state's authority and assertion of exclusive territorial jurisdiction. Similar justifications extending from the idea of sovereignty have involved claims that immigration controls are necessary for states 'to preserve their economy, security, political capacity, and/or cultural distinctiveness'.<sup>110</sup> For example, Miller underlines the state's interest in protecting the special relationship shared by a

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<sup>109</sup> Ryszard Cholewinski, 'International labour migration' in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (CUP 2011) 283.

<sup>110</sup> Christopher Heath Wellman and Phillip Cole, *Debating the Ethics of Immigration: Is There a Right to Exclude?* (OUP 2011) 48.

relatively unified group of compatriots based on social trust and mutual identification.<sup>111</sup> Dauvergne describes the liberal nationalist's theorisation of the way migration laws embed and reflect national identification: 'Migration laws are essential to the construction of such (liberal) nations because in order for the nation to exist it must have both members and boundaries'.<sup>112</sup>

At the heart of the debate on the ethics of immigration controls is the 'uncertain moral standing'<sup>113</sup> of individuals such as temporary migrants relative to that of the host state where they are not citizens or even permanent residents. From a nationalist point of view, those within a bounded political community are generally entitled to determine the immigration laws and policies that would maximally benefit the interests of current citizens.<sup>114</sup> Pevnick justifies the special claim of citizens to self-determine their own immigration laws and policies on the basis of their 'associate ownership' of the state's institutions such as social benefits, internal order, and infrastructure.<sup>115</sup> Citizens' efforts and contributions towards building and maintaining these institutions, such as by paying taxes and obeying the law, entitles them to some discretion in making decisions over these institutions and resources, including the exclusion of non-citizens from usage. Yet, Pevnick does not spell out clearly the types and threshold of the labour, efforts, or contributions required to give rise to an associative ownership claim, such as the case of temporary migrants whose

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<sup>111</sup> David Miller, 'Immigration: The Case for Limits' in Andrew Cohen and Christopher Wellman (eds), *Contemporary Debates in Applied Ethics* (Blackwell Publishing 2005).

<sup>112</sup> Catherine Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) 67 *Modern Law Review* 588, 590.

<sup>113</sup> Colin Grey, 'Book Review: Ryan Pevnick *Immigration and the Constraints of Justice*' (2013) 63 *University of Toronto Law Journal* 516, 516.

<sup>114</sup> George Borjas, *Heaven's Door* (Princeton University Press 1999).

<sup>115</sup> Ryan Pevnick, *Immigration and the Constraints of Justice* (CUP 2011) 27.

labour is ‘needed’ by (certain groups of) citizens and whose contributions to the state’s institutions ought to give them some degree of ownership.

In examining the rationale for the state’s differentiation of rights and entitlements under labour migration regimes, Kolb provides a theoretical understanding of the state as a ‘club’ that provides a bundle of services to its members. It thus seeks to increase the membership of those who can contribute positively to this bundle, which becomes a key consideration in states’ labour migration policies.<sup>116</sup> This shapes the selection criterion for the admission of potential new members to its territory, as well as the conditions associated with their admission and potential membership. Kolb looks at the case of highly skilled migrants. These migrants are actively sought out by many countries, based on the actual or perceived ability of these potential new members of the ‘club’ to contribute to the maintenance or even upgrading of the state-provided bundle of goods.<sup>117</sup> Therefore, in the context of a competitive global market for human capital, states often attempt to attract the ‘best and brightest’ through granting permanent residence status and the full range of rights and benefits enjoyed by its citizens.

Then there are arguments based on ideas of cosmopolitan or post-national citizenship that call for the legitimatisation of rights, obligations, and protections in law on the basis on personhood, regardless of legal status. Legal statuses that distinguish between and create a stratification of rights of citizens and different groups of non-citizens would affront the idea of post-national citizenship, particularly in light of liberal states’ espoused commitment to the equal moral status of all human

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<sup>116</sup> Holger Kolb, ‘Emigration, Immigration, and the Quality of Membership: On the Political Economy of Highly Skilled Immigration Politics’ in Georg Menz and Alexander Caviedes (eds), *Labour Migration in Europe* (Palgrave Macmillan 2010).

<sup>117</sup> *ibid* 85.

beings. As Soysal points out:

‘The normative framework for, and legitimacy of, this model derives from transnational discourse and structures celebrating human rights as a world-level organizing principle... It is such postnational dictums that undermine the categorical restraints of national citizenship and warrant the incorporation of postwar migrants into host polities.’<sup>118</sup>

From this perspective, the evolution of global legal norms and institutions underpinning a ‘universal’ discourse of human rights therefore legitimatises a model of post-national citizenship where non-nationals can advance rights claims ‘in a state not their own’.<sup>119</sup> As explored later in this chapter, in addition to a canopy of general international human rights instruments, there are also specific instruments that spell out a fairly comprehensive regime of social, economic, civil, and political rights for migrant workers.

The corollary of post-national citizenship is the normative constraint it places on states’ wide discretion over immigration controls. As Sassen puts it:

‘The state finds itself caught itself caught in a broader web of rights and actors that hem in its sovereignty in decisions about immigrants... [t]here is an emerging de facto regime centred in international agreements and conventions as well as in various rights gained by immigrants, that is limiting the state’s role.’<sup>120</sup>

Furthermore, Hollifield asserts that the ‘embedded liberalism’ in the legal and political systems and institutions can make it very difficult for regulatory attempts that offend established human rights norms in Western liberal societies: ‘Such simple constitutional protections as equality before the law and due process act as

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<sup>118</sup> Yasemin N Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press 1994).

<sup>119</sup> Martin A. Schain, ‘The State Strikes Back: Immigration Policy in the European Union’ (2009) 20 *European Journal of International Law* 93, 98.

<sup>120</sup> Saskia Sassen, *Guests and Aliens* (New Press 1999) 54.

constraints'.<sup>121</sup> Dauvergne further highlights the 'protean potential' of the rule of law to offer an expansion on the human rights discourse for challenging the traditional free reign of the executive branch of government over immigration law.<sup>122</sup> In the case of the UK, the interplay of domestic and regional norms and institutions associated with its membership of the EU and the Council of Europe can shape formidable constraints on the exercise of executive power over immigration law and policy, and be an important source of the development and extension of rights and protections for migrants.

In a different vein of critique, Walzer objects to liberal states' differentiation between citizens/permanent residents and non-citizens only when political communities decide to admit the latter. Based on the experiences of Western Europe's guest worker schemes in the 1950s-1960s, he describes the 'tyranny' of citizens over non-citizens which emerges from the denial of permanent residence and citizenship to guest workers who are admitted into the state. As Walzer argues:

The market for guest workers... is not free from all political constraints. State power plays a crucial role in its creation and then in the enforcement of its rules. Without the denial of political rights and civil liberties and the ever-present threat of deportation, the system would not work... While they are guests, they are also subjects. They are ruled... by a band of citizen-tyrants.<sup>123</sup>

He sets out the only choices available for a democratic political community: either it brings in migrant workers and is prepared to enlarge its membership, or it must find ways within the domestic labour market 'to get the socially necessary work done'.<sup>124</sup>

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<sup>121</sup> James F. Hollifield, 'Migration and International Relations: Cooperation and Control in the European Community' (1992) 26 *International Migration Review* 568, 575.

<sup>122</sup> Dauvergne, 'Sovereignty, Migration and Rule of Law' (n 112).

<sup>123</sup> Michael Walzer, *Spheres of Justice: a Defense of Pluralism and Equality* (Basic Books 1983) 58.

<sup>124</sup> *ibid* 61.

Yet, the essence of Walzer's objection to guest worker programmes is not concerned with the types of normative constraints on immigration controls advocated by liberal egalitarianism and cosmopolitanism positions that emphasise the moral standing of migrants. Rather, his argument stems from the foundation that liberal democratic communities have the right to decide whom to admit and whom to exclude. Walzer is more concerned with the internal restrictions on democratic participation within the political community that arises from denying those who are admitted under these schemes the prospect of citizenship. Therefore, for Walzer, admitting no migrants at all is less disagreeable to admitting them with second-class citizenship. Miller also adopts a similar position towards guest worker programmes where he asserts that liberal democratic states face a particular conundrum: that immigrants 'have to be admitted as equal citizens, and they have to be admitted on the basis that they will be integrated into the cultural nation'.<sup>125</sup> Since the 'logic' of these states 'point towards inclusiveness', Miller explains how guest worker programmes such as those in Germany eventually evolved into 'full-blown' citizenship schemes.<sup>126</sup> Unlike Walzer, Miller stops short of concluding that states have a 'free hand' to admit and exclude migrants on whatever grounds they see fit: 'immigrants who are refused entry are owed an explanation'.<sup>127</sup>

As Ruhs put it, the above positions occupy an 'ethical space' that distinguishes normative approaches to labour migration regulation based on the

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<sup>125</sup> David Miller, 'Immigrants, Nations, and Citizenship' (2008) 16 *Journal of Political Philosophy* 371, 376.

<sup>126</sup> *ibid* 377.

<sup>127</sup> Miller, 'Immigration: The Case for Limits' (n 111) 204.

consequentialism and moral standing accorded to non-citizens.<sup>128</sup> He highlights that labour migration regimes are characterised by some degree of evaluating the policy's consequences, which raises the question of how to 'determine for whom consequences should be taken into account'.<sup>129</sup> The spectrum of moral standing that national policymakers may extend to non-citizens ranges from a minimal degree (consistent with a nationalist position) to maximal standing (advocated by cosmopolitanism and liberal egalitarianism). Ruhs and Chang argue that variations in the rights accorded to migrants depend on where social actors and decision-makers locate themselves on this cosmopolitan-nationalist spectrum.<sup>130</sup> As Ruhs puts it, states generally pursue a 'consequentialist nationalism' position where labour migration policies are driven by evaluating the consequences for national interests and goals such as economic efficiency, distribution, national identity and social cohesion, and national security and public order.<sup>131</sup>

The notions of hyper-dependence and hyper-precarity are attentive to the consequences of labour migration regimes for migrant workers' rights and their interests in not being subject to highly exploitative work relations. These concerns are therefore comparable to cosmopolitan views that emphasise the moral standing of migrant workers. At the same time, my normative position recognises how labour migration regimes (that create a more compliant and exploitative workforce) may adversely affect the interests of resident workers seeking to maintain prevailing standards of wages and working conditions as well as access to employment

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<sup>128</sup> Ruhs, *Price of Rights* (n 70) 162.

<sup>129</sup> *ibid* 159.

<sup>130</sup> Martin Ruhs and Ha-Joon Chang, 'The Ethics of Labor Immigration Policy' (2004) 58 *International Organization* 69, 91.

<sup>131</sup> Ruhs, *Price of Rights* (n 70).

opportunities. Arguably it is also in the moral interest of a liberal democratic society not to compromise its own ethos by denying a range of rights to temporary residents in their territory and subjecting them to social and economic relations of extreme domination, subordination, and precarity, in the pursuit of market imperatives. In order to advance this argument, it is necessary to understand the regulatory goals that have been driving the rise of TMWPs in numerous industrialised countries in recent times.

### *TMWPs and flexible labour markets*

For host states, one of the most commonly espoused labour market rationales for TMWPs is to address short-term domestic labour shortages in a flexible manner so as to respond to competitive pressures in a globalised economy. ‘Regulating for flexibility’ has become a dominant theme in debates on labour market thinking and policy in many high-income countries since the 1980s. Central to this discourse have been a range of regulatory instruments aimed at enhancing business competitiveness with ‘facilitating and stabilising flexible employment relations’ at their core.<sup>132</sup> Labour immigration regimes have played an increasingly important role in this discourse. As Preibisch puts in, countries have responded to new competitive pressures in the global political economy through numerous strategies, including ‘using immigration policy to restructure labour-capital relations within their borders’.<sup>133</sup>

It is necessary to unpack the elusive term of ‘flexibility’ in contemporary work relations. Deakin and Reed identify two main approaches in this regard: first, as

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<sup>132</sup> Collins, ‘Regulating the employment relation for competitiveness’ (n 45). See further Paul Davies and Mark Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s* (OUP 2007).

<sup>133</sup> Preibisch, ‘Pick-Your-Own Labor’ (n 23) 432.

changing patterns of demand and supply for labour; and second, as a function of the system of labour market regulation.<sup>134</sup> The first approach entails a ‘flexible firm’ model that examines a firm’s strategies to manage micro-level demand based on different types of ‘flexibility’.<sup>135</sup> External numerical flexibility involves changing the quantity of labour input to meet fluctuations in external demand. Internal numerical or time flexibility is the variability of the number and distribution of working hours. Functional flexibility describes the possibility of redeploying workers to perform different tasks and to adapt their skills to changing organisational demands. Financial flexibility refers to employers’ ability to adjust standardised pay structures.<sup>136</sup>

TMWPs can play an important role in ‘employer strategies of flexibilisation’.<sup>137</sup> Although the hiring of migrants may initially require additional resources compared to recruiting resident workers, TMWPs may facilitate numerical flexibility by providing employers with relative ease of firing. Numerical flexibility can be a competitive advantage for employers in sectors that experience rapid and/or seasonal demand fluctuations.<sup>138</sup> The length of migrants’ employment is structurally limited by the duration of their legal permission to remain in the host state that depends on the employer’s sponsorship. At the same time, employers also retain the powers of retention over a captive workforce where temporary visas may be

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<sup>134</sup> Simon Deakin and Hannah Reed, ‘The Contested Meaning of Labour Market Flexibility: Economic Theory and the Discourse of European Integration’ in Jo Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart 2000) 4.

<sup>135</sup> John Atkinson, *Flexibility, Uncertainty and Manpower Management* (IMS Report No 89, Institute of Manpower Studies 1985).

<sup>136</sup> Lia Pacelli, Francesco Devicienti, Agata Maida, Matteo Morini, Ambra Poggi and Patrik Vesan, *Employment security and employability: A contribution to the flexicurity debate* (European Foundation for the Improvement of Living and Working Conditions 2008) 6.

<sup>137</sup> Goldring, Berinstein and Bernhard, ‘Institutionalizing precarious migratory status’ (n 9).

<sup>138</sup> Alexander Caviedes, ‘The Sectoral Turn in Labour Migration Policy’ in Georg Menz and Alexander Caviedes (eds), *Labour Migration in Europe* (Palgrave Macmillan 2010).

repeatedly renewed, combined with restrictions on migrants' labour mobility in the host state.<sup>139</sup> TMWPs can also facilitate time, functional, and financial flexibility needs of the employer. Temporary migrants may seem more 'willing' than resident workers to accept changes in working time, be redeployed to perform other tasks, and adapt to changing work organisation as required by the employer.<sup>140</sup> In certain sectors where wages are structurally depressed in order to generate profits, employers may have a strong interest in the wage flexibility of a temporary workforce that is prepared to tolerate lower wages than the level demanded by resident workers.<sup>141</sup> The modes of flexibility provided by this workforce can thus shape firms' preferences for TMWPs that differentiate between migrant and resident workers with respect to employment security, rights, and social benefits.

Flexibility can also be viewed as a supply-side issue, reflecting changes in workers' priorities, lifestyle choices, and household division of labour.<sup>142</sup> Flexibility is frequently conveyed as not only benefiting employers, but also offering workers greater 'choice' in working pattern, time, and location.<sup>143</sup> For example, gender differences in employment statuses have raised the query of whether women prefer part-time, fixed-term, and other 'non-standard' work arrangements. Flexible employment is therefore legitimised in public policy discourses as the preference of workers, notwithstanding the structural characteristics of the labour market and social reproductive regimes that can appreciably constrain such 'choice'.

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<sup>139</sup> Anderson, 'Migration, immigration controls' (n 4) 310.

<sup>140</sup> Gareth Matthews and Martin Ruhs, *Are you being served? Employer demand for migrant labour in the UK's hospitality sector* (COMPAS, University of Oxford 2007).

<sup>141</sup> Caviedes, 'The Sectoral Turn in Labour Migration Policy' (n 138) 59-60.

<sup>142</sup> Deakin and Reed, 'The Contested Meaning of Labour Market Flexibility' (n 134) 5.

<sup>143</sup> Family Friendly Working Hours Taskforce (Department for Work and Pensions), *Flexible Working: working for families, working for business* (2009).

A similar argument has been put forth with regards to temporary migrants: they have ‘chosen’ to undertake such labour migration projects in the host state which fit into their life plans,<sup>144</sup> a proposition that I will examine later in the chapter. Furthermore, the ‘flexible’ migrant worker is premised on the image of an ‘atomised’ worker who does not have extensive family and caring responsibilities or who is separated from family members remaining in the home state. This absence of family members in the labour market profile of some migrants may be an actual or perceived ‘flexibility’ advantage for the employer, since they are more likely to tolerate unpredictability in working time such as the availability to work anti-social hours.

Secondly, flexibility can also be approached as a function of labour market regulation. Since the 1980s, there has been a prevailing view in labour market policy discourses that employment protection laws such as redundancy, unfair dismissal, working time, centralised collective bargaining, and social security protections not only impede employers’ flexibility at the firm-level, but also distort otherwise efficient markets. Flexibility was perceived as the ‘consequence of the absence of regulation’ and a ‘condition of unregulated markets’.<sup>145</sup> However, ‘de-regulation’ has not necessarily been the approach taken to achieve more flexible and ‘freer’ markets. While some forms of statutory employment protections have headed down a de-regulatory path, ‘re-regulation’ is arguably a more accurate term to capture the

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<sup>144</sup> Ottonelli and Torresi, ‘Inclusivist Egalitarian Liberalism’ (n 106).

<sup>145</sup> Deakin and Reed, ‘The Contested Meaning of Labour Market Flexibility’ (n 134) 7.

reconfiguration of other forms of labour market regulation aimed at promoting ‘flexibility’.<sup>146</sup>

Labour migration regimes can produce certain categories of admission to facilitate the entry of migrants who are more prepared to undertake flexible working arrangements, such as accepting longer or more antisocial hours compared to those with family and caring responsibilities. Anderson argues that immigration controls can be used to shape aspects of the migratory process so that the migrants admitted are likely to be younger and/or have no accompanying family members.<sup>147</sup> There may be restrictions on or exclusion of the right to family accompaniment or reunification. Some schemes may target categories of entrants under a certain age, such as working holidaymakers who are unlikely to have any dependents. Where family accompaniment or reunion is allowed, there may be prohibitions on access to social programmes in the host state that can discourage migrants from bringing any dependents. Furthermore, employers may be reluctant to sponsor family members due to additional administration costs as well as their preference for flexible, ‘atomised’ workers without family and social caring responsibilities.

At a macro-level, policymakers often frame the regulatory goal of skilled TMWPs as a flexible and efficient means of meeting immediate skills shortages in the resident labour market. In contrast to the procedures for permanent skilled migration routes, TMWPs can frequently entail less onerous admission criteria, fast-track skills assessment, and visa processing procedures. The UK Home Office once

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<sup>146</sup> Guy Standing, ‘Globalization, Labour Flexibility and Insecurity: The Era of Market Regulation’ (1997) 3 *European Journal of Industrial Relations* 7.

<sup>147</sup> Anderson, ‘Migration, immigration controls’ (n 4) 308.

prided itself on processing 90 per cent of work permit applications within a day.<sup>148</sup> Since the inception of the 457 visa scheme, DIAC has set rising targets to speed up visa processing times to ‘provide a fast and flexible process for the entry of overseas workers’.<sup>149</sup>

The role of labour migration regimes in creating a ‘flexible’ workforce raises the crucial question of who ultimately controls labour mobility. Labour mobility across firms, occupations, and geographical regions is often portrayed as desirable if not essential to labour market flexibility. Yet, employers not only want the powers to hire and fire but also control over workers’ freedom to quit and move elsewhere.<sup>150</sup> The tethering of workers’ legal authorisation to work and reside in the host state to an employer sponsorship can provide the employer with a strong means of control over the recruitment, dismissal, and retention of labour that facilitates flexibility for that specific employer at the firm level, but not necessarily for the broader labour market. Intersecting with labour migration regimes is the weakening of employment protections such as unfair dismissal laws in order to provide greater numerical flexibility for employers to adjust their workforces. Hepple describes the UK Government’s recent employment policies as being ‘locked into a model where there is a presumption that regulation interferes with the efficient working of free markets by limiting the employer’s freedom to manage and hire and fire without restraint’.<sup>151</sup>

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<sup>148</sup> Will Somerville, *Success and Failure under Labour: Problems of Priorities and Performance in Migration Policy* (Discussion Papers, 2006) 35.

<sup>149</sup> Chris Bowen, Minister for Immigration and Citizenship, ‘New accreditation scheme for 457 visas’ (Canberra, 2 November 2011) <<http://www.minister.immi.gov.au/media/cb/2011/cb179959.htm>> accessed 30 April 2012.

<sup>150</sup> Anderson ‘Battles in Time’ (n 12) 8-9.

<sup>151</sup> Bob Hepple, ‘Employment Law under the Coalition Government’ (2013) 42 ILJ 203, 220.

### *‘Numbers versus rights’?*

Beyond host states’ labour market policy rationales underpinning TMWPs, another justification for the expansion of such schemes has been advanced from the perspective of promoting migrants’ interests. A major aspect of the ‘triple-win’ claims regarding TMWPs is the purported benefits arising from opportunities for migrants to access employment in high-income host states. Such arguments generally presume that most temporary migrants are often not seeking long-term membership of the host state, but merely access to its economic opportunities so as to ‘improve their lives’<sup>152</sup> upon returning home. Advocates of contemporary TMWPs argue that such schemes expand the legal channels for global labour migration in the face of strong push and pull factors. Without these avenues, it is claimed that migrants can be pushed into informal and less regulated sectors of the labour market where they are more vulnerable to exploitation.<sup>153</sup> As Pevnick points out:

It is unlikely that foreign workers would prefer a system that promised full legal rights, but accepted very few (thus ushering many into illegal immigration) to a relatively humane guest-worker program that allowed entry for enough to satiate labour demand.<sup>154</sup>

TMWPs are thus considered as a ‘second-best’ policy in contrast to the ‘politically unfeasible’ alternative of granting migrants permanent residence. Chang argues that the latter policy would create fiscal burdens that are unlikely to be accepted by residents of the host state.<sup>155</sup>

Arguments supporting the expansion of TMWPs give considerable weight to

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<sup>152</sup> Daniel Bell, ‘Justice for Migrant Workers? Foreign Domestic Workers in Hong Kong and Singapore’ in Sor-hoon Tan (ed), *Challenging Citizenship: Group Membership and Cultural Identity in a Global Age* (Ashgate 2005).

<sup>153</sup> GCIM, *Migration in an Interconnected World* (n 15).

<sup>154</sup> Pevnick, *Immigration and the Constraints of Justice* (n 115) 179.

<sup>155</sup> Ha-Joon Chang, ‘The Immigration Paradox: Poverty, Distributive Justice, and Liberal Egalitarianism’ (2003) 52 *De Paul Law Review* 759.

the proposition of a ‘numbers versus rights’ trade-off. In his analysis of TMWPs in over 50 high-income countries, Ruhs finds that the more ‘open’ the admission policy (such as granting entry to larger numbers of migrants), the more restricted the bundle of rights that are granted to migrants admitted; and vice versa.<sup>156</sup> He maintains that migrants’ rights not only have an intrinsic value as underlined by human rights approaches, but also an instrumental role in shaping the effects of labour migration for receiving states, sending states, and migrants themselves. For Ruhs, the rights granted to migrants are based on policymakers’ assessment of the costs and benefits for the population in the receiving country.<sup>157</sup> He cautiously acknowledges the moral weight of human rights, but argues that rights rationales often fail to consider the economic welfare benefits for migrants, mainly the interests of future migrants in seeking access to the labour markets of high-income countries. The ‘price’ of granting more rights and/or insisting on equal rights (as citizens) for existing migrants is likely to be restrictive admission policies towards future migrants.

However, it is foreseeable that this line of argumentation can be misused to justify the deprivation of virtually all rights of migrants that entail some kind of cost. Ruhs’ utilitarian approach, premised on the ‘numbers versus rights’ trade-off, poses serious normative dilemmas for liberal democratic states committed to basic principles of human rights and moral equality. Ruhs has attempted to clarify that although ‘some rights generate costs’, this ‘does not mean that there is a moral justification for condoning or even advocating for such restrictions’.<sup>158</sup> Yet the

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<sup>156</sup> Martin Ruhs, *Openness, Skills and Rights: An empirical analysis of labour immigration programmes in 46 high- and middle- income countries* (Centre on Migration, Policy and Society, 2011, 2011).

<sup>157</sup> Ruhs, *Price of Rights* (n 70) 13.

<sup>158</sup> *ibid* 4.

‘price’ of rights seems to imply that certain regulatory goals such as economic efficiency ought to be prioritised over others. Such a narrative can diminish the intrinsic moral legitimacy and weight of human rights and their key principles of universality, alienability, and indivisibility. Castles has rightly raised the normative question of whether it is acceptable to trade off workers’ rights for economic gains.<sup>159</sup> As Taran puts it, rights should not be ‘commodified as negotiable bundles that may be traded, sold or renounced in exchange for the economic benefits deriving from access to foreign labour markets’.<sup>160</sup>

The ‘numbers versus rights’ postulation has also been challenged empirically, casting doubts over the possibility of objectively assessing and measuring the actual impacts of rights restrictions on the number of future migrants admitted. Using international and regional databases and indices of migrants’ rights, Cummins and Rodriguez did not find obvious support for a negative correlation between the stock of migrants in OECD countries and the inclusiveness of rights accorded to them.<sup>161</sup> Ruhs has responded by highlighting the methodological problems with the select cross-national indices and measures used by Cummins and Rodriguez to disapprove his hypothesis.<sup>162</sup> From this debate, it can be seen that attempts to theorise the types of trade-offs made in labour migration policies require, as Ruhs himself acknowledged, more ‘systematic empirical research... that investigates alternative

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<sup>159</sup> Castles, ‘Guestworkers in Europe: A Resurrection?’ (n 17) 749.

<sup>160</sup> Taran, ‘Need for a Rights-based Approach’ (n 1) 158.

<sup>161</sup> Matthew Cummins and Francisco Rodriguez, *Is There a Numbers versus Rights Trade-off in Immigration Policy? What the Data Say* (UNDP 2009).

<sup>162</sup> Martin Ruhs, ‘Numbers versus Rights in Low-Skilled Labour Immigration Policy? A Comment on Cummins and Rodríguez’ (2010) 11 *Journal of Human Development and Capabilities* 305. See also the response from Cummins & Rodriguez: Matthew Cummins and Francisco Rodríguez, ‘A Rejoinder to Ruhs’ (2010) 11 *Journal of Human Development and Capabilities* 311.

explanations'.<sup>163</sup>

### ***Temporary migration projects?***

Ottonelli and Torresi examine the dilemma posed by temporary migration for liberal egalitarian inclusivists who advocate for the extension of citizenship rights to migrants in the host state.<sup>164</sup> They refer to the notion of 'temporary migration projects' which entails persons migrating to a host state for a certain period of time and acquiring the expertise and money required to advance long-term goals upon returning to the home state. They argue that 'the effectiveness and meaning of civil, social and political rights are grounded on a web of economic and social preconditions that are simply lacking in the case of temporary migrants'.<sup>165</sup> These 'preconditions' are based on the particular orientation of the migrant's life plans that involves returning to their country of origin.

Although TMWPs usually entail social and legal exclusion, Ottonelli and Torresi contend that these migrants have also '*chosen* temporary migration as a worthwhile, albeit sometimes painful, part of their life-plans'.<sup>166</sup> Regardless of the limited duration of their visas, their intention is not to remain and settle in the host state in the long term. Accordingly, as Ottonelli and Torresi maintain, temporary migrants engage with the resident labour market and host society with the view to serve their life plans upon returning home. Therefore temporary migrants tend to work longer hours, take on insecure jobs, tolerate inferior wages and conditions,

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<sup>163</sup> Martin Ruhs, 'Migrant Rights, Immigration Policy and Human Development' (2010) 11 *Journal of Human Development and Capabilities* 259, 276.

<sup>164</sup> Ottonelli and Torresi, 'Inclusivist Egalitarian Liberalism' (n 106).

<sup>165</sup> *ibid* 213.

<sup>166</sup> *ibid* 202.

accept standards of housing, public education, and health care far below those that the host state sets for its own citizens. Their strategies also involve maximising earnings and savings, and pursuing a ‘life of austerity’ during their short stay in the host state. In addition, they generally show little political participation and social engagement with the host society and invest little time in ‘making themselves at home in the new country’.<sup>167</sup>

These projects entail a high degree of vulnerability for those involved, who are exposed to the risk of losses arising from failed migration projects (due to a lack of necessary resources and/or difficulties of returning home) and from acquiring a lesser and marginal status in the host society.<sup>168</sup> Ottonelli and Torresi allude to the prospect of personal failures or successes of temporary migration projects that ‘can be induced by institutional factors, and in the case of immigrants, as in the case of nationals, liberal states set up the relevant conditions for success by enacting the appropriate social policies’.<sup>169</sup> However, they do not venture further into how these ‘institutional factors... that are under the control of the liberal state’<sup>170</sup> structure migrants’ vulnerability to the risks of failure in their projects. The missing link in their assumptions is that these ‘institutional factors’ include the circumscribed rights under TMWPs. Institutional arrangements can have a bearing on the contours of migrants’ choices and goals under their migration projects in the host state, such as their freedom to change employment and/or employer and their right to remain in the host state.

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<sup>167</sup> *ibid* 209-210.

<sup>168</sup> *ibid* 210-211.

<sup>169</sup> *ibid* 212.

<sup>170</sup> *ibid*.

Moreover, the idea of temporary migration projects does not address the predicament of migrants with ‘temporary’ legal status who have life-plans that involve seeking permanent residency and citizenship in the host state. Piore has highlighted how migrants’ perspectives and orientations can change over time: as migrants ‘develop a more permanent attachment, their time horizon expands: instability of employment is no longer a matter of indifference’.<sup>171</sup> Therefore migrants who acquire a more permanent presence in the host state may start to display expectations akin to those of the resident workforce. Yet their precarious legal statuses can create a cohort of long-term but ‘temporary’ residents without an unconditional right to remain in the host state. Despite the expectation that temporary migrant workers shall return home once their labour is expended, Castles and Miller point out the ‘inexorable pressures for settlement and community formation’ that come with time. Such pressures expose the inherent contradictions in TMWPs that presume migration projects will indeed be temporary and that legal distinctions between the statuses of citizens, permanent residents, and temporary migrants would be a clear criterion for the differentiation of rights between these groups.<sup>172</sup>

### ***‘Consent to exploitation’?***

Critics of TMWPs have often pointed to these schemes’ restrictions on migrants’ access to a range of social, economic, civil, and political rights, which allow employers to take unfair advantage of their vulnerable position in the host state’s labour market. Advocates of TMWPs usually dismiss ‘exploitation’ types of arguments by drawing attention to the ‘consent’ of migrants who have voluntarily

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<sup>171</sup> Michael J Piore, *Birds of Passage: Migrant Labor and Industrial Societies* (CUP 1979) 64.

<sup>172</sup> Stephen Castles and Mark Miller, *The Age of Migration: International Population Movements in the Modern World* (Palgrave-Macmillan 2003).

contracted to work in the host state and have waived certain rights for a period of time in exchange for this opportunity. As Pevnick claims, objections to TMWPs ‘on the grounds that it creates a second-class status paternalistically suggests that, for their own protection, foreigners must not even be given the option to participate in these programmes’.<sup>173</sup> Yet, such defences based on the notion of ‘consent’ presume that migrants are indeed ‘willing’ participants entering into contractual arrangements with full information of what to expect under TMWPs. In reality, this may not be the case for migrants who lack requisite knowledge of and/or have been misinformed by sponsors and intermediaries regarding their employment and residence arrangements and conditions in the host state.

More fundamentally, arguments emphasising ‘consent’ are premised on particular accounts of ‘exploitation’. Mayer argues that exploitative guest worker schemes may be acceptable under some conditions: ‘the unfairness may be tolerated if the exploitation is modest, not severe, and if the most likely non-exploitative alternative worsens the plight of disadvantaged’.<sup>174</sup> Others have claimed that ‘non-exploitative’ alternatives, such as no admitting migrants at all, may not lead to better outcomes for migrants and their countries of origin.<sup>175</sup> Defenders of TMWPs have advanced a sufficiency theory of exploitation that distinguishes between on one hand, a situation where a temporary migrant accepts an offer that she could not refuse, on pain of being left with insufficient resources to lead a minimally decent life, and on the other hand a transaction that is less beneficial or more costly than it would be if she bargained from a position of sufficiency to begin with. As Mayers claims, ‘we

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<sup>173</sup> Pevnick, *Immigration and the Constraints of Justice* (n 1) 182.

<sup>174</sup> Mayer, ‘Guestworkers and exploitation’ (n 71).

<sup>175</sup> Ruhs, *Price of Rights* (n 70) 167-172; Chang, ‘Guest workers and Justice in a Second-Best World’ (n 71).

judge their exploitability by whether they will have enough if they do not migrate, and we judge exploitable workers to be exploited if they gain less than one with enough at home would likely accept'.<sup>176</sup> In other words, if migrants' wages and working conditions are equivalent to a living wage in their home countries, then (based on Mayer's reasoning) the scheme should not be deemed as exploitative.

However, such an account of exploitation runs into problems for a liberal democratic society committed to its own standards of non-discrimination and principles of justice. In other words, it is difficult to argue that the reference point of normatively acceptable working standards for these societies ought to be those of migrants' countries of origin. Walzer rebuts the contractualist argument by contending that the 'consent' of temporary migrant workers may be sufficient to 'legitimise market transactions', but not for the exercise of political power in liberal democracies which require the ongoing consent of its subjects.<sup>177</sup> For Walzer, guest workers' exploitation stems from the denial of equal membership rights and access to citizenship. This political oppression and subordination of this 'exploited or oppressed class' institutionalise and lock them into a position where they are dominated and 'governed without their consent' by 'a band of citizen-tyrants', akin to a 'family with live-in servants'.<sup>178</sup>

Meanwhile, Attas adopts a conceptualisation of exploitation under TMWPs based on an 'unequal exchange' explanation that posits the unfair advantage taken from the vulnerable position of these workers who are denied equal economic rights as citizens. Due to the restrictions placed on their employment rights (such as on the

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<sup>176</sup> Mayer, 'Guestworkers and exploitation' (n 71) 322.

<sup>177</sup> Walzer, *Spheres of Justice* (n 123) 58.

<sup>178</sup> *ibid* 52, 54, 59.

right to free choice of employment), guest workers are forced to accept wages lower than the equilibrium price for their labour in a competitive marketplace. Viewing the source of guest workers' exploitation as arising from their economic subordination, he argues that 'although there may not be sufficient grounds to require the admission of guest workers to full political citizenship, full economic membership seems justified. This might be all that is needed to expel the spectre of exploitation'.<sup>179</sup> For Attas, the specific economic rights which would remove the cause of 'unequal exchange' include the rights to: freedom of occupational choice, freedom of movement and organisation, participation in trade unions, collective bargaining, and industrial action, and access to social entitlements such as unemployment benefits and compensation for loss of income.

Although the above accounts provide some theoretical insights into whether or not migrants under TMWPs are exploited, there need to be more specific analyses of whether and how these programmes are exploitative. In this thesis, hyper-dependence and hyper-precarity have been conceptualised as particular vulnerabilities to exploitative work relations that are associated with migrants' precarious legal statuses under TMWPs. The two concepts also draw attention to a more nuanced 'continuum'<sup>180</sup> of exploitation that captures the realities of work relations, as will be explored later on in this chapter. Furthermore, the legal construction of hyper-dependence and hyper-precarity problematises the nature of 'consent' to exploitation by highlighting the multifaceted coercions and constraints on migrants' set of choices *throughout* their work relations and migration projects

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<sup>179</sup> Daniel Attas, 'The Case of Guest Workers: Exploitation, Citizenship and Economic Rights' (2000) 6 Res Publica 73, 88.

<sup>180</sup> Klara Skrivankova, *Between decent work and forced labour: examining the continuum of exploitation* (Joseph Rowntree Foundation, 2010).

under TMWPs, and not simply at the point of choosing whether or not they should enter into such contractual relations.

Moreover, as the analysis of the two TMWPs in this thesis reveals, the types of contractual relations under these schemes can differ vastly between groups of migrants. Mayer contends that it would be difficult to view skilled temporary migrants, who are sponsored by a specific employer, as exploited: ‘If the pay is good and the workers have alternatives, it does not seem unfair to ask them to yield their (alleged) right to freedom of occupation in exchange for admission’.<sup>181</sup> However, a distinction needs to be made between highly paid executives and specialists on the one hand, and semi-skilled migrants who are paid considerably less on the other. Both groups may be admitted under the same ‘skilled’ TMWP. As Chapter 4 demonstrates, admission and selection criteria can shape the occupations and sectors that migrants are recruited into, along with other characteristics such as their countries of origin, age, gender, and marital/family status. These factors can have an important bearing on migrants’ bargaining power and propensity to experiencing the vulnerabilities of hyper-dependence and/or hyper-precarity.

## **2.4 Normative Constraints on TMWPs**

This last section of the chapter situates the concerns of the legally constructed hyper-dependence and hyper-precarity within two important spheres of normative constraint on liberal states’ design and implementation of contemporary labour migration regimes: international human rights standards pertaining to migrant worker; and the legal frameworks for combating slavery, servitude, forced labour,

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<sup>181</sup> Mayer, ‘Guestworkers and exploitation’ (n 71) 317.

and trafficking. The potential and limitations of each discourse for addressing the two ‘hyper’ vulnerabilities in migrants’ work relations will be discussed in turn.

### ***International human rights and temporary migrant workers***

As noted earlier, the international human rights architecture is commonly invoked to restrain states’ broad prerogative over the regulation of immigration, including labour migration regimes. The intrinsic boundary setting nature of human rights have a certain legal and normative weight. Regardless of how economically instrumental or politically populist labour migration regimes may be, the human rights discourse may provide a substantive restraint on such measures, which is premised on a belief that something fundamental is at stake and ought to be protected. There is an expectation that the migrant as a ‘rights-holder’ can demand certain protection, promotion, and respect for their rights from the ‘duty-bearers’, principally the state that has signed up to the relevant obligations enshrined in human rights instruments. Thus an established legal framework of standards, norms, institutions, and processes can be called upon to provide appropriate protection to migrant workers.<sup>182</sup> The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) apply to all persons including migrant workers and members of their families, irrespective of their legal status. The body of international labour standards enshrined in ILO instruments also does not distinguish between workers based on their nationality or legal status.

There are also additional normative international standards and measures specifically aimed at protecting migrant workers. The founding documents of the

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<sup>182</sup> Pia Oberoi, ‘Empowering migrants: human security, human rights and policy’ in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens* (CUP 2010) 264-265.

ILO recognised the need for ‘protection of the interests of workers when employed in countries other than their own’ in the preamble to its 1919 Constitution. Subsequently, two general ILO Conventions for the protection of migrant workers have been adopted. Convention No. 97 was conceived in a post-war context of state-organised migration, establishing equal treatment between nationals and regular migrants in relation to access to a range of employment and social rights. Convention No. 143 went further to establish international norms for protecting migrant workers with irregular status, tackling the exploitation and trafficking of migrants, and facilitating the integration of regular migrants in host states.

These two ILO Conventions formed the basis for the drafting of the UN’s ICPRMW, which extended the recognition of a wide array of economic, social, cultural, and civil rights of migrant workers. The ICPRMW starts from the premise that each state party undertakes to respect the basic human rights of all migrant workers, including irregular migrants. It brings together and situates the norms enshrined in the general international human rights instruments in the specific context of the fundamental rights and freedoms of migrant workers and their family members. The ICPRMW also contains additional rights and safeguards specifically applicable to migrant workers, including: prohibiting the confiscation and destruction of identity documents by any person other than a duly authorised public official (Article 21); protection against collective expulsion (Article 22); right to transfer remittances during and at the end of their stay (Article 32); and rights to information throughout the migratory process (Article 33). The Convention is comprehensive in its application to the whole migration process, from the recruitment process to the rights of migrants once they have been admitted as well as returning to their home countries.

However, there has been sluggish progress in the ratification of the ICPRMW, in addition to the extensive lag between its initial adoption in 1990 and its entry into force in 2003. Among the 43 countries that have ratified the Convention to date (with another 15 signatories without ratification), none of the major (liberal) receiving countries of the Global North are included in this list. Australia and the UK have neither signed nor ratified the ICPRMW. Taran further points to the increasing explicit opposition among many liberal democratic Western governments to the Convention's wider ratification. This political resistance has placed the legitimacy of migrants' rights under attack with the UN itself ceding ground.<sup>183</sup> Obstacles to the ratification of the Convention have been categorised into three broad imperatives of states that migrant workers' rights are perceived to threaten: market forces, sovereignty, and security.<sup>184</sup>

The two main ILO Conventions pertaining to migrant workers have also suffered from a low rate of ratification, with Convention No. 97 ratified by 49 countries and Convention No. 143 by 23 countries at the time of writing.<sup>185</sup> In recent times, the ILO has adopted a Multilateral Framework on Labour Migration<sup>186</sup> that consists of principles and guidelines on a range of issues including migrant workers'

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<sup>183</sup> Taran, 'Need for a Rights-based Approach' (n 1).

<sup>184</sup> Paul de Guchteneire and Antoine Pecoud, 'Introduction: The UN Convention on Migrant Workers' Rights' in Ryszard Cholewinski, Paul de Guchteneire and Antoine Pecoud (eds), *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (CUP 2009).

<sup>185</sup> Australia has neither signed nor ratified the two ILO Conventions. The UK has ratified Convention No. 97 with the exclusion of Annex I (relating to migrant workers who are recruited otherwise than under government-sponsored arrangements for group transfer) and Annex III (relating to personal effects, tools and equipment of migrant workers). See ILO, 'Ratification of C097 - Migration for Employment Convention (Revised), 1949 (No. 97)' (2014) <[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312242:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242:NO)> accessed 20 July 2014; ILO, 'Ratifications of C143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)' (2014) <[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312288:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288:NO)> accessed 20 July 2014.

<sup>186</sup> ILO, *International labour migration: A rights-based approach* (2011).

rights. The development of this non-binding Multilateral Framework is supposedly grounded in political pragmatism to avoid an ‘all or nothing’ situation in a regulatory arena where states seek to retain utmost sovereignty.<sup>187</sup> This approach also reflects the ILO’s turn to a more ‘soft law’ strategy since adopting the 1998 Declaration on the Fundamental Principles and Rights at Work.

The ILO’s adoption of the Domestic Workers Convention 2011 (No. 189)<sup>188</sup> assumes notable significance in the context of the shift away from new legally binding instruments in the realm of international labour standards.<sup>189</sup> Although it is not a specific migrants’ instrument, the Convention recognises (in its preamble) the particular salience for a predominantly female transnational workforce of migrant domestic workers and contains numerous provisions to address their special vulnerabilities. Such measures include the requirement of a written job offer or employment contract (prior to the migration journey) that is enforceable in the country where the work is to be performed (Article 8), safeguards for domestic workers to live outside the employer’s household and to retain their own travel and identity documents (Article 9), and obligations on states to regulate private employment agencies that act as intermediaries between migrant domestic workers and employers (Article 15).

The apparent universality of labour and human rights of migrant workers as espoused by these instruments is nevertheless compromised by categories of exclusion and differentiations based on migrants’ statuses. A division of substantive

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<sup>187</sup> Antoine Pécoud, ‘The UN Convention on Migrant Workers’ Rights and International Migration Management’ (2009) 23 *Global Society* 333.

<sup>188</sup> ILO Convention (No. 189) concerning Decent Work for Domestic Workers (adopted 16 June 2011, entered into force 5 September 2013).

<sup>189</sup> Einat Albin and Virginia Mantouvalou, ‘The ILO Convention on Domestic Workers: From the Shadows to the Light’ (2012) 41 *ILJ* 67.

rights exists for ‘regular’ and ‘irregular’ migrants in these instruments. For example, Part IV of the ICPRMW only applies to documented and regular migrants and affords them with additional rights such as family reunion. Moreover, Article 7 of the ICPRMW does not explicitly prohibit discrimination on the basis of immigration status.<sup>190</sup> There are further exclusions and qualifications of rights for some categories of migrants based on their temporary status in the host state. Under the ICPRMW, states may limit or exclude certain rights of seasonal workers, project-tied workers, itinerant workers, and specified-employment workers.<sup>191</sup> ILO Convention No. 143 also contains seemingly broad rights exclusions for migrant workers on fixed-term contracts that are directed at specific tasks or projects.<sup>192</sup>

Furthermore, these migrants’ rights instruments explicitly leave room for states to restrict migrants’ labour mobility and free choice of employment. For example, ILO Convention No. 143 stipulates two types of restrictions that can be imposed:

A Member state may:

- a) make the free choice of employment, while assuring migrant workers the right to geographical mobility, subject to the conditions that the migrant workers have resided lawfully in its territory for the purpose of employment for a prescribed period not exceeding two years or, if its laws or regulations provide for contracts for a fixed term of less than two years, that the worker has completed his first work contract;
- b) restrict access to limited categories of employment or functions where this is necessary in the interests of the state. Under this provision, migrant workers can claim the right to seek a job different from the one allocated to them under their first work contract after their first two years

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<sup>190</sup> The non-discrimination provision in Article 7 of ICPRMW stipulates the following grounds: ‘sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status’.

<sup>191</sup> Part V of ICPRMW excludes the application to of Part IV (Other Rights of Migrant Workers and Members of their Families who are Documented in a Regular Situation) to these groups of workers.

<sup>192</sup> ILO Convention No. 143, art 11(1)(e).

in the country or after completion of their first contract if this is shorter in duration.<sup>193</sup>

In comparison, the wording of the relevant provision in ICPRMW seems to narrow the scope that states may restrict migrants' labour mobility (based on industry or occupation): 'a government is not prohibited from restricting a worker recruited abroad to employment in one industry or occupation. But such restrictions cannot be maintained for more than two years'.<sup>194</sup>

The international migrants' rights regime at present does not ultimately challenge the role of immigration controls in shaping migrants' precarious employment and residence statuses in host states. Fudge argues that these instruments defer to 'the principle of state sovereignty over immigration policy and accept the right of states to impose restrictions on non-national's employment rights in exchange for the privilege to enter host state territory'.<sup>195</sup> Tham and Campbell emphasise the limits of the principles of equal treatment in human rights instruments which 'leave the precarious migration status of temporary migrant workers to the discretion of states'.<sup>196</sup> The sanctity of states' sovereignty over the regulation of labour migration is fundamentally preserved in these instruments, as embodied in Article 79 of the ICPRMW:

Nothing in the present Convention shall affect the right of each state Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, state Parties shall be subject to the limitations set forth in the present Convention.

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<sup>193</sup> *ibid*, art 14.

<sup>194</sup> ICPRMW, art 52.

<sup>195</sup> Fudge, *Precairous Migrant Status* (n 11) 45.

<sup>196</sup> Joo-Cheong Tham and Iain Campbell, 'Equal Treatment for Temporary Migrant Workers and the Challenge of Their Precariousness' (Proceedings of the 16th ILERA World Congress, Philadelphia, July 2012) 2.

Such a provision reflects a supposed delineation between the sovereign domain of states in determining admissions and entry criteria on the one hand, and states' obligations under the Convention relating to the conditions of migrants' employment and residence on the other.<sup>197</sup> Yet, as this thesis seeks to highlight, migrant workers are admitted under a variety of statuses associated with differentiated employment and residence rights.

Dauvergne and Marsden further point to the exclusionary power of sovereign states that 'undermines attempts to articulate rights claims for those with any type of temporary status'.<sup>198</sup> From their perspective, rights solutions 'may serve to lessen specific instances of oppression and exploitation'.<sup>199</sup> However, rights cannot address the very condition of temporary migrant labour that is 'anchored in a fundamental subordination'<sup>200</sup> associated with the absence of secure and equitable membership status in the host state. In other words, this subordination stems from their precarious legal statuses as temporary migrants who lack the rights and entitlements associated with permanent residence and citizenship, which, as I argue, constitute a critical source of their hyper-dependence and hyper-precarity under these labour migration regimes.

### ***The legal discourse of 'unfree labour'***

The exploitation of migrant workers has been 'often described in terms of forced

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<sup>197</sup> Grey, 'Book Review: Pevnick' (n 113) 522.

<sup>198</sup> Catherine Dauvergne and Sarah Marsden, 'The Ideology of Temporary Labour Migration in the Post-Global Era' (Citizenship In A Globalized World: Perspectives From The Immigrant Democracies 2011).

<sup>199</sup> *ibid* 24.

<sup>200</sup> *ibid* 22.

labour and slavery-like situations'.<sup>201</sup> In comparison to the migrants' rights discourse, there is considerably more regulatory attention at international, supranational, and national levels to combating forms of exploitation that have been categorised as 'unfree labour' including slavery, servitude, and forced labour. According to Allain, slavery remains the pivot of the international legal regime concerning forms of 'human exploitation'.<sup>202</sup> The 1926 Slavery Convention defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.<sup>203</sup> The 1956 Supplementary Convention further obliges states to abolish 'institutions and practices similar to slavery', including debt bondage, serfdom, servile marriage, and child exploitation.<sup>204</sup>

Contemporary understanding of the 1926 definition of 'slavery' has evolved from exercising the right of legal ownership over an individual per se (in the traditional sense of chattel slavery) to the exercise of the powers attaching to the right of ownership.<sup>205</sup> In other words, this definition also applied to de facto situations where a person could be in a condition of slavery 'in fact, if not in law'.<sup>206</sup> The Bellagio-Harvard Guidelines on the Legal Parameters of Slavery sought to unpack the different powers attaching to the right of ownership:

In cases of slavery, the exercise of 'the powers attaching to the right of

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<sup>201</sup> Taran, 'Need for a Rights-based Approach' (n 1) 150.

<sup>202</sup> Jean Allain, *Slavery in International Law: of Human Exploitation and Trafficking* (Martinus Nijhoff 2012) 8.

<sup>203</sup> Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253, art 1(1) ('Slavery Convention').

<sup>204</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957) 2263 UNTS 3.

<sup>205</sup> Jean Allain, 'Definition of Slavery in International Law' (2009) 52 *Howard Law Journal* 239.

<sup>206</sup> Jean Allain and Kevin Bales, 'Slavery and its Definition' (2012) 14 *Global Dialogue*. See further the Australian High Court Case of *Queen v Tang* (2008) 249 ALR 200.

ownership’ should be understood as constituting control over a person in such a way as to significantly deprive that person of his or her individual liberty, with the intent of exploitation through the use, management, profit, transfer or disposal of that person. Usually this exercise will be supported by and obtained through means such as violent force, deception and/or coercion.<sup>207</sup>

Although the Slavery Convention recognised that forced labour can develop ‘into conditions analogous to slavery’,<sup>208</sup> forced labour has been considered as a distinct legal category.<sup>209</sup> The ILO’s Forced Labour Convention No. 29 provides the widely recognised definition of forced labour as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.<sup>210</sup> Certain practices are excluded from the definition, including military service, civic obligations, and prison labour.<sup>211</sup> Despite this international definition of forced labour, there continues to be extensive differences in national legislations and court jurisprudence.<sup>212</sup> The ILO has developed a typology of indicators to help national regulators identify situations of forced labour, including: threats of or actual physical harm; restriction of movement and confinement to the workplace or a limited area; debt bondage; withholding of wages;

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<sup>207</sup> Research Network on the Legal Parameters of Slavery, *Bellagio-Harvard Guidelines on the Legal Parameters of Slavery* (2012), Guideline 2.

<sup>208</sup> Slavery Convention, art 5.

<sup>209</sup> ILO, *A global alliance against forced labour: Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (2005) 8.

<sup>210</sup> ILO Convention (No. 29) concerning Forced or Compulsory Labour Convention (adopted 28 June 1930, entered into force 1 May 1932) 39 UNTS 55, art 2(1). See further: Allain, *Slavery in International Law: of Human Exploitation and Trafficking* (n 202) ch 5.

<sup>211</sup> ILO Convention (No. 29) concerning Forced or Compulsory Labour Convention (adopted 28 June 1930, entered into force 1 May 1932) 39 UNTS 55, art 2(2). Some of these exceptions, such as punishment for strikes or as a means of labour discipline, were abolished in the supplementary ILO Convention (No. 105) concerning Abolition of Forced Labour Convention (adopted 25 June 1957, entered into force 25 June 1957) 320 UNTS 291. Article 4(3) of Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) also states similar exceptions (prison labour, military service, emergency service, and civic service) from the prohibition of ‘forced or compulsory labour’.

<sup>212</sup> ILO, *A global alliance against forced labour* (n 209) 8.

retention of travel and identity documents; and threat of denunciation to relevant authorities.<sup>213</sup> A Protocol to the Forced Labour Convention has recently been introduced that reiterates Member states' obligations to adopt protective measures such as expanding labour laws to 'at-risk' sectors, enhancing labour inspections, and safeguarding migrants from abusive recruitment practices among others. Notably, Article 4 of the Protocol also requires governments to ensure that all victims, regardless of their legal status or presence in a country, have access to justice and remedies including compensation.<sup>214</sup>

Another legal discourse that often becomes conflated with slavery and forced labour is that of human trafficking. The legal regulation of trafficking has emerged from international efforts to combat transnational organised crime. The UN's Palermo Protocol to supplement the 2000 Convention against Transnational Organized Crime defines 'trafficking' as:

the recruitment, transport, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.<sup>215</sup>

Exploitation is further defined in the Protocol as including 'at a minimum...forced labour or services, slavery or practices similar to slavery, servitude.'<sup>216</sup> Thus a key aspect of trafficking is the intended purpose of 'exploitation', including forced labour. From the above definition, it must be made clear that trafficking is not in

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<sup>213</sup> ILO, *Human Trafficking and Forced Labour Exploitation: Guidelines for Legislators and Law Enforcement* (2005).

<sup>214</sup> ILO Protocol to Convention 29 - Protocol to The Forced Labour Convention, 1930 (adopted 11 June 2014).

<sup>215</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention on Transnational Organised Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319, art 3(a).

<sup>216</sup> *ibid.*

itself a form of unfree labour, but a process by which slavery, servitude, and forced labour can be brought about.

The difficulties in drawing clear and coherent lines between these legal discourse can be gleaned through the case law on Article 4 of the ECHR which prohibits slavery, servitude, and forced or compulsory labour. In *Siliadin v France*,<sup>217</sup> the European Court of Human Rights (ECtHR) held that the deprivation of personal autonomy was not sufficient to constitute slavery without the exercise of a genuine right of legal ownership that reduced the person to ‘the status of an object’.<sup>218</sup> Instead, the applicant was held to be in ‘servitude’, defined by the Court as ‘an obligation to provide one’s services that is imposed by the use of coercion, and is to be linked with the concept of “slavery”’.<sup>219</sup> In *C.N. and V. v France*,<sup>220</sup> the ECtHR further framed ‘servitude’ as ‘aggravated’ forced or compulsory labour. The distinctive element of ‘servitude’ was the victim’s feeling that her condition could not be altered and that there was no potential for changing her situation.<sup>221</sup>

Perhaps the most problematic conflation of the legal categorisations of ‘unfree labour’ has been the incorporation of trafficking within the parameters of Article 4 of the ECHR. In *Rantsev v Cyprus and Russia*, the Court noted that trafficking was, similar to slavery:

by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment... It involves the use of violence and threats against victims, who live and work

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<sup>217</sup> *Siliadin v France* (2006) 45 EHRR 16 (*‘Siliadin’*).

<sup>218</sup> *ibid* 37.

<sup>219</sup> *ibid* 124.

<sup>220</sup> *C.N. and V. v France* App no 67724/09 (ECHR, 11 October 2012).

<sup>221</sup> *ibid* 90-94.

under poor conditions.<sup>222</sup>

The Court avoided pronouncing specifically on whether or not trafficking falls within any of the prohibited practices stipulated in Article 4. Instead it skirted around this definitional issue by asserting that:

There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of the obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment... constitutes 'slavery', 'servitude', or 'forced and compulsory labour'.<sup>223</sup>

Although the ECtHR has struggled to distinguish between the different categories of 'unfree labour', it has recognised that precarious migrant statuses can shape workers' vulnerability to experiencing situations of unfree labour. In *CN and V v France*, the ECtHR recognised the link between migrant status and vulnerability of the claimant, finding that the 'menace of some penalty' could, in certain circumstances, include the threat of expulsion from the host state.<sup>224</sup> In *Siliadin*, the Court acknowledged that the claimant's lack of legal status in France was linked to her work being 'exacted... under the menace of any penalty': being 'unlawfully present on French territory and in fear of arrest by the police', her employers 'nurtured that fear and led her to believe that her status would be regularised'.<sup>225</sup>

In *Rantsev*, the ECtHR went beyond a criminal prosecution approach to trafficking by finding that Cyprus had failed its obligation under Article 4 to put in place an appropriate legal and administrative framework that includes ensuring its

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<sup>222</sup> *Rantsev v Cyprus and Russia* App no 25965/04 (ECHR, 7 January 2010) ('*Rantsev*') para 281.

<sup>223</sup> *ibid* 282.

<sup>224</sup> *C.N. and V. v France* (n 220) 78.

<sup>225</sup> *Siliadin* (n 217) 117-118.

‘immigration rules... address relevant concerns relating to encouragement, facilitation or tolerance of trafficking’.<sup>226</sup> The Court concluded that the regime of ‘artise visas’ did not afford Ms Rantsev ‘practical and effective protection against trafficking and exploitation’.<sup>227</sup> It noted the reports presented by the Council of Europe Commissioner for Human Rights which highlighted: ‘the system itself, whereby the establishment owner applies for the permit on behalf of the woman, often renders the woman dependent on her employer or agent, and increases the risk of her falling into the hands of trafficking networks’.<sup>228</sup> What the Court specifically found to be problematic in this case was the visa requirement on cabaret owners and managers ‘to lodge a bank guarantee to cover potential future costs associated with artistes which they have employed’.<sup>229</sup> However, it did not venture into the systemic and institutional features of the immigration regime, as highlighted by the Commissioner of Human Rights’ report, that shape the migrant’s extreme dependence on the employer.

The above legal regimes raise critical theoretical and empirical questions about the nature of unfree labour and the conceptualisations of unfreedom, coercion, and exploitation. The epistemological distinction of free/unfree labour is usually associated with debates in political economy on the patterns of development within capitalist societies.<sup>230</sup> Workers were ‘free’ from pre-capitalist ‘old relations of

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<sup>226</sup> *Rantsev v Cyrus and Russia* (n 222) 284.

<sup>227</sup> *ibid* 293.

<sup>228</sup> Council of Europe, *Follow-up Report of 26 March 2006 by the Council of Europe Commissioner for Human Rights on the progress made in implementing his recommendations* (CommDH 12 2006) 57.

<sup>229</sup> *Rantsev v Cyrus and Russia* (n 222) 293.

<sup>230</sup> For an overview of these debates, see Kendra Strauss, ‘Coerced, Forced and Unfree Labour: Geographies of Exploitation in Contemporary Labour Markets’ (2012) 6 *Geography Compass* 137.

clientship, bondage, and servitude’, and also ‘free of all property; dependent on the sale of its labour capacity’.<sup>231</sup> In Marxist terms, wage labour was ‘free’ to the extent that the individual’s labour-power became commodified. Workers were ‘free agents’ to contract with buyers of their labour-power and to circulate in the labour market. Marx sardonically described the labour contract as epitomising ‘freedom, because both buyer and seller of... labour-power, are constrained only by their own free will. They contract as free agents, and the agreement they come to, is but form in which they give legal expression to their common will’.<sup>232</sup> Yet, his characterisation of ‘free’ wage labour was not ontologically ‘truly free’.<sup>233</sup> As workers were separated from the land as their means of subsistence, they are compelled to sell their labour-power to survive.<sup>234</sup> Therefore ‘free’ wage labour in capitalist societies necessarily entailed economic compulsion.

This tension in the Marxist understanding of ‘free’ and ‘unfree labour’ is ‘also at the heart of attempts to define and regulate unfreedom in contemporary labour markets’.<sup>235</sup> According to the ILO’s definition of forced labour, a situation of pure economic necessity is not sufficient in itself to constitute the ‘menace of

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See further: Robin Cohen, *The New Helots: Migrants in the International Division of Labour* (Avebury / Gower Publishing Group 1987); Robert Miles, *Capitalism and unfree labour : anomaly or necessity?* (Tavistock 1987); Vic Satzewich, ‘Unfree Labour and Canadian Capitalism: The Incorporation of Polish War Veterans’ (1989) 28 *Studies in Political Economy* 89; Tom Brass, *Towards a Comparative Political Economy of Unfree Labour: Case Studies and Debates* (Frank Cass Publishers 1999).

<sup>231</sup> Karl Marx, *Grundrisse* (Penguin 1973) 507.

<sup>232</sup> Harry Clare Pentland, *Labour and capital in Canada, 1650-1860* (Lorimer 1981) 189.

<sup>233</sup> Kendra Strauss and Judy Fudge, ‘Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work’ in Judy Fudge and Kendra Strauss (eds), *Temporary Work, Agencies and Unfree Labour: Insecurity in the New World of Work* (Routledge 2014) 14-15.

<sup>234</sup> Karl Marx, *Capital: A Critique of Political Economy*, vol 1 (International Publishers 1967) 713.

<sup>235</sup> Strauss and Fudge, ‘Temporary Work, Agencies and Unfree Labour’ (n 233) 14.

penalty'.<sup>236</sup> The legal regimes of 'unfree labour' as examined above are only subsets of a wider spectrum of labour unfreedom as an ontological condition. It has been acknowledged by the ILO that 'the line dividing forced labour in the strict legal sense of the term from extremely poor working conditions' can be very difficult to distinguish.<sup>237</sup> This spectrum of labour unfreedom includes multiple forms and relations of commodification and exploitation, some of which are perceived to 'represent a contractual (and therefore consensual) market relationship'<sup>238</sup> and thus not deemed to be the kind of 'unfree labour' that ought to be 'condemned' in modern capitalist societies.

Steinfeld argues that there is no natural line existing between unfree and free labour: 'the distinction itself serves as a proxy for... a moral/political judgement about the kinds of pressures to enter and remain at work that are considered legitimate and those that are not'.<sup>239</sup> He offers an understanding of labour freedom and unfreedom not as binary opposites but as 'a combined scale of pressures, legal, physical, economic, social, psychological all running along a continuum from severe to mild'.<sup>240</sup> This continuum directs us to: 'see that the real focus of inquiry should be upon the choice sets with which individuals are confronted as they make their

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<sup>236</sup> ILO, *A global alliance against forced labour* (n 209).

<sup>237</sup> ILO, *A global alliance against forced labour: Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work* (2005) 8.

<sup>238</sup> Nicola Phillips, 'Unfree labour and adverse incorporation in the global economy: comparative perspectives on Brazil and India' (2013) 42 *Economy and Society* 171, 177.

<sup>239</sup> Robert Steinfeld, 'Coercion/ Consent in Labour' (COMPAS Working Paper No 66 2010) 13.

<sup>240</sup> *ibid* 2.

decisions about conducting their lives, and the ways in which these choice sets may be altered by changing legal arrangements'.<sup>241</sup>

Legal pressures in the form of immigration controls can intersect with economic, physical, physiological, and other pressures to limit the contour of choices for migrants at different points of their work relations and their migration projects. For example, migrants in abusive employment relationships may face legal constraints on their mobility in the resident labour market as well as pressures from repayment of large debts incurred during the migration process. Such pressures can narrow the possibilities for exiting migration project if migrants are likely to face shame and humiliation upon returning home early, especially where there has been substantial investment by their families and communities in their projects. Examining the spectrum of pressures and constraints under which migrants offer, perform, and withdraw their labour and under which they are 'willing' participants of TMWPs sheds light on the complexity and fluidity of unfreedom at different points of their work relations and migration projects, which shift over time and across space and place.

Skrivankova develops the idea of a 'hierarchy of suffering' along a continuum of labour exploitation 'ranging from the positive extremity (desirable situation) of decent work to the negative extremity of forced labour'.<sup>242</sup> The continuum is a useful framework to understand 'how the denial of rights to certain categories of workers (allowing for their exploitation) fills the space between the desirable and the unacceptable'.<sup>243</sup> A continuum of exploitative work relations

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<sup>241</sup> *ibid.*

<sup>242</sup> Skrivankova, *Continuum of exploitation* (n 180) 18.

<sup>243</sup> *ibid* 18.

recognises the complexity and fluidity of migrants' experiences at work that shift over time and space. In capturing the various forms of exploitation and the changing realities of work relations, this continuum further enables the identification of effective regulatory interventions to remedy 'any situation in which a worker might find himself or herself that differs from decent work'.<sup>244</sup> For example, exploitation that entails violations of labour standards may not be remedied by the intervention of criminal law. Nevertheless, Strauss points out that the ILO's Decent Work agenda has entailed the dilution of its commitment to labour decommodification, and thus the poles of this continuum should be reconstituted to recognise the distinctions between 'truly free' labour relations, decommodified labour, free wage labour, and unfree labour.<sup>245</sup>

Building on this continuum approach, Strauss and Fudge propose a framework for understanding 'how labour market norms, institutions, regimes of governance and forms of agency and resistance interact to produce the dynamic social construction of labour markets'.<sup>246</sup> Their framework maps out the relationship between labour (un)freedom and labour market polarisation between the 'top end' (primary sector) and 'bottom end' (secondary sector). They argue that strong relationships exist between high-end jobs and freedom that are associated with decent pay, security, occupational welfare benefits, control over labour process, recourse to employment protection, and mobility; and between low-end and unfreedom which are characterised by the withholding of wages or debt bondage, immigration status tied to the employment relationship, labour immobility, the presence of threats,

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<sup>244</sup> *ibid* 16.

<sup>245</sup> Strauss, 'Unfree Labour' (n 230) 174-176.

<sup>246</sup> Strauss and Fudge, 'Temporary Work, Agencies and Unfree Labour' (n 233) 14-15.

intimidation, and violence, low pay, job insecurity, a lack of control, and few or no social benefits.

Finally, the political discourses surrounding slavery, servitude, forced labour, and trafficking can lead to incongruous and counterproductive regulatory interventions. Fudge and Strauss examine how these political discourses, along with the processes of their legal characterisation, have produced different yet overlapping realms of governance in criminal, immigration, human rights, and labour law that have their own regulatory concerns and techniques.<sup>247</sup> For example, the anti-trafficking discourse has been incorporated into a political agenda that focuses on the ‘absence of stringent border surveillance and border control as the principal reason’ for migrants’ exploitation.<sup>248</sup> The two dominant policy responses to combating trafficking have been criminalisation and ‘tougher’ immigration controls. However, the treatment of trafficking as primarily a matter of criminal law and immigration law can marginalise or ignore the relevance of the application and enforcement of employment rights and protections for ameliorating migrants’ vulnerabilities to exploitation, including the particular vulnerabilities of hyper-dependence and hyper-precarity.

## 2.5 Conclusion

In this chapter, I have elaborated on the fundamental tenets of the thesis’ analytical and normative framework, which pivot on the critical notions of hyper-dependence and hyper-precarity to capture the particular vulnerabilities in migrants’ work

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<sup>247</sup> *ibid* 15.

<sup>248</sup> Jyoti Sanghera, ‘Unpacking the Trafficking Discourse’ in Kamala Kempadoo (ed), *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (Paradigm Publishers 2005) 5-6.

relations associated with their precarious legal statuses. These ‘hyper’ vulnerabilities are shaped by the multi-layered intersections between immigration laws, policies, and practices, and labour market norms, institutions, and mechanisms under contemporary labour migration regimes. I have argued that the justifications for the regulatory architecture of TMWPs in numerous industrialised countries today reflect the little moral standing afforded to migrant workers relative to interests of the host state, as well as the ‘trump card’ of market imperatives over the labour and human rights of migrants.

International migrants’ rights instruments and the legal regimes underpinning slavery, servitude, and forced labour offer important normative constraints on states’ design and implementation of TMWPs. However, these discourses do not fundamentally challenge the states’ construction of precarious legal statuses that shape migrants’ vulnerabilities of hyper-dependence and hyper-precarity or address the complex and shifting realities of work relations on a continuum of exploitation. The normative lenses of hyper-dependence and hyper-precarity (along with their combination in situations of HDP/HPD) are revisited in Chapter 6 with the aim of reforming the most problematic aspects of TMWPs for migrants’ work relations. Over the next three chapters (3-5), I apply the foundational insights of this chapter to an in-depth comparative analysis of the conditions of entry and rights of employment and residence of migrant workers admitted under Australia’s 457 visa and the UK’s Tier 2 (General) visa schemes.

### **3. The National Contexts of Temporary Labour Migration**

#### **3.1 Introduction**

The legal and regulatory architecture of the 457 visa and Tier 2 (General) visa schemes cannot be analysed in isolation from their historical, institutional, and political contexts. This chapter examines how the two schemes came into being and evolved over time in response to changing political and economic needs of Australia and the UK throughout the 20<sup>th</sup> century. Distinct immigration policy legacies, labour market structures, and political institutions of the two countries have influenced the goals, design, and implementation of the two TMWPs and their interaction with other labour market regulatory instruments. Beyond the normative constraints on states' wide discretion to regulate labour migration regimes (as examined in Chapter 2), the following analysis highlights the various factors that mould the 'regulatory crucible' of labour migration regimes, which can 'mediate the ways in which the pursuit of certain objectives translates into actual policies'.<sup>249</sup> I examine how the regulatory crucibles of the two TMWPs have varied between countries and over time. The Australian and UK contexts are discussed in turn.

#### **3.2 Australia: a Paradigm Shift?**

Immigration policy has played a central role in Australia's nation-building in the post-colonial era. The Federation of the colonies at the beginning of the 20<sup>th</sup> century was motivated by the colonies' desire to control immigration and to build a new

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<sup>249</sup> Ruhs, *Price of Rights* (n 70) 33.

national identity.<sup>250</sup> Underpinned by the projection of a ‘society built by white, permanent and free workers’,<sup>251</sup> Australia sought to expand its population and economy through deliberate, planned, and selective immigration intakes. A historical aversion to temporary foreign labour was intermeshed within a so-called ‘protectionist settlement’ of labour regulation, trade protectionism, and racial exclusion.<sup>252</sup> The strictness of controls placed on temporary labour migration began to unravel towards the end of the 20<sup>th</sup> century under a new political economy. Successive governments increasingly adopted the view that market needs were best served by businesses themselves and not by the state. This perspective was the premise for major labour market regulatory reforms in the 1990s, which included the adoption of an employer-driven temporary work visa scheme.

### ***Labour immigration at Federation: ‘white and free’ (1800s-1940s)***

Immigration and labour regulations have had a longstanding symbiotic relationship in Australia. Since the country’s early days, immigration law has been directed at sourcing workers from overseas ‘to suit specific domestic labour market rationales’.<sup>253</sup> With the end of convict transportation to Australian colonies in the 1830s, colonial and British governments sought to actively encourage assisted settlement for British subjects in Australia as well as facilitate indentured migration to address problems of labour scarcity arising from the colonies’ remoteness. As

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<sup>250</sup> Mary Crock, *Immigration and refugee law in Australia* (Federation Press 1998) ch 2.

<sup>251</sup> Mary Crock, Sean Howe and Ron McCallum, *Conflicted Priorities? Enforcing Fairness for Temporary Migrant Workers in Australia* (Migrants at Work Conference, Oxford, June 2012).

<sup>252</sup> Stephen Castles, *Australian Public Policy and Economic Vulnerability* (Allen and Unwin 1988) 93.

<sup>253</sup> Mary Crock and Leah Friedman, ‘Immigration Controls and the Shaping of Australia’s Labour Market: Conflicting Ideologies or Historical Imperatives?’ in Christopher Arup and others (eds), *Re-Thinking Labour Market Regulation* (The Federation Press 2006) 322.

O'Donnell and Mitchell note, reliance on a 'largely immigrant and highly mobile workforce' gave rise to colonial master and servant statutes that were 'more extensive, more interventionist and more coercive, containing specific provisions for the enforcement of contracts — including contracts of indenture — made outside of the colonies and specifying offences unknown in British law'.<sup>254</sup> For example, Queensland's Masters and Servants Act 1861 provided that servants could not strike, negotiate for higher wages during a contract, form trade unions, or leave indentured service prior to the expiry of their agreements.<sup>255</sup>

The existence of temporary migrant labour in Australian colonies was associated with forms of 'unfree labour'. Over 62,000 labourers, known as 'kanakas', were brought in from the Pacific Islands between 1863 and 1904 to work on sugar plantations in Queensland and New South Wales, some of whom were 'imported' through so-called 'blackbirding' practices of physical abduction.<sup>256</sup> After the British had outlawed slavery, concerns were voiced over these workers' mistreatment in its distant colonies. The Queensland government attempted to regulate this labour trade through the Polynesian Labourers Act 1868 and Pacific Island Labourers Act 1872. These laws established three-year indenture contracts that set minimum wages, health care, clothing, and sustenance for these workers and provided for either re-engagement or repatriation at the end of the contracts. At the same time, a regulatory framework was established for government supervision of indentured labourers on plantations and for immigration checks upon arrival.

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<sup>254</sup> O'Donnell and Mitchell, 'Immigrant Labour in Australia' (n 21).

<sup>255</sup> Clive Moore, 'The Counterculture of Survival: Melanesians in the Mackay District of Queensland, 1865-1906' in Brij V. Lal, Doug Munro and Edward D. Beechert (eds), *Plantation Workers: Resistance and Accommodation* (University of Hawaii Press 1993) 75.

<sup>256</sup> Owen W Parnaby, *Britain and the Labour Trade in the Southwest Pacific* (Duke University Press 1964) 203.

Immigration controls underpinned by the ‘preservation of the character of the white population’ were a vital pillar of the Federation that established the foundation for the White Australia policy that remained in force for much of the 20<sup>th</sup> century.<sup>257</sup> Racial hostility against non-white, non-British immigrants, particularly ‘Asiatics’ who were perceived as ‘innately servile’, was inseparable from the fear that these workers would undercut resident workers’ wages and conditions and weaken organised labour in industrial conflicts.<sup>258</sup> For this reason, prior to Federation, all Australian colonies had enacted specific laws that were primarily aimed at restricting Chinese immigration.

At Federation, the new Constitution provided the Commonwealth Parliament of Australia with powers to legislate on ‘naturalisation and aliens’ and ‘immigration and emigration’ matters, although the states retained administrative control over immigration until 1920. The forerunner bills to be passed by federal Parliament concerned the restriction of coloured migrants. The enactment of the Pacific Islander Labourers Act 1901 gave federal authorities the power to deport a vast majority of kanaka labourers already in Australia and to prohibit their further entry, with the exception of those entering under a license (but only until 1906; from then on a complete ban applied). The Immigration Restriction Act 1901 was also introduced with the aim of excluding non-white immigrants by way of a notorious dictation test where the customs officer had wide discretion in deciding, at the point of entry, the language of the test to be taken by the migrant.<sup>259</sup>

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<sup>257</sup> Mary Crock, Sean Howe and Ron McCallum, ‘Immigration Controls’ (n 253).

<sup>258</sup> Stephen Castles and Ellie Vasta, ‘Australia: New Conflicts around Old Dilemmas’ in Wayne A. Cornelius (ed), *Controlling Immigration: A Global Perspective* (Stanford University Press 2004) 142.

<sup>259</sup> James Jupp, *From White Australia to Woomera: the Story of Australian Immigration* (CUP 2002) 9.

The Contract Immigrants Act 1905 further reflected the political antipathy against the use of temporary, non-white immigrant workers at the time. The legislation was aimed at regulating migrants under a contract or agreement to perform manual labour in Australia. It set down rules and requirements for their lawful admission, such as that the contract must be in writing, made by or on behalf of a resident in Australia, and approved by the Minister of External Affairs. The Act provided that the contract was ‘not made in contemplation of or with a view of affecting an industrial dispute’, and the remuneration and other terms and conditions are ‘as advantageous to the contract immigrant as those current for workers of the same class at the place where the contract is to be performed’.<sup>260</sup> Furthermore, the Minister had to be satisfied that there was a difficulty ‘in the employer’s obtaining within the Commonwealth a worker of at least equal skill and ability’, however this provision did not apply to British subjects either born in the UK or a descendant.<sup>261</sup>

Racially selective labour migration controls was embedded in an interlocking mesh of regulatory pillars of Australia’s economic and social policy at the time that formed a ‘protectionist settlement’.<sup>262</sup> Not only were immigration policies seen as a foundation for nation-building based on British homogeneity, they also sought to protect the labour market position of the resident workforce. After widespread strikes in the late 19<sup>th</sup> century, the formation of a compulsory conciliation and arbitration system with tripartite involvement of the state, employers, and workers’ organisations for resolving labour disputes was central to the Federation architects’ vision for industrial peace. The system of arbitrated awards through industrial

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<sup>260</sup> Contract Immigrants Act 1905 (Cth) ss 5(2)(a) and 5(2)(c).

<sup>261</sup> *ibid*, s 5(2)(b).

<sup>262</sup> Ray Broomhill, ‘Australian economic booms in historical perspective’ (2008) 61 *Journal of Australian Political Economy* 12, 16.

relations tribunals also placated unions' concerns over employers using migrant labour to undercut wages and conditions.<sup>263</sup> The famous 'Harvester Judgment' of the Conciliation and Arbitration Court articulated a standard of 'fair and reasonable wage' for a white European male breadwinner to adequately support his family members.<sup>264</sup> Meanwhile, employers received benefits of industry and trade protection through high tariff walls and compensation, such as payments to sugar producers for employing white workers.

### ***Post-war immigration for economic expansion (1945-1972)***

A period of planned mass migration from 1945 to early 1970s was driven by objectives of economic self-sufficiency as well as national defence capability. The importance of immigration to demographic expansion was notably captured by the slogan: 'populate or perish', and the formation of the Commonwealth Department of Immigration in 1945 to oversee and administer policies for selecting and allocating immigrants to meet regional and national labour market needs.<sup>265</sup> This mass immigration intake largely relied on the 'assisted passage' of 1.7 million European immigrants between 1946 to 1970, facilitated mainly through bilateral agreements with numerous states and with the International Refugee Organization.<sup>266</sup> Notwithstanding the effect of short-term economic cycles on annual immigration

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<sup>263</sup> Michael Quinlan and Constance Lever-Tracy, 'From labour market exclusion to industrial solidarity: Australian trade union responses to Asian workers: 1830-1988' (1990) 14 Cambridge Journal of Economics 159, 161.

<sup>264</sup> *Ex Parte H.V. McKay* (Harvester Case) (1907) 2 CAR 1.

<sup>265</sup> Jupp, *From White Australia to Woomera* (n 259) 11.

<sup>266</sup> Moira J Salter, *Studies in the Immigration of the Highly Skilled* (ANU Press 1978) 15.

targets, the overall population-building goal of expansive immigration policies continued until early 1970s.

In the initial post-war period, some 171,000 displaced persons from war-torn Europe arrived in Australia via the Displaced Persons Program up until 1953. Many of them were recruited into semi-skilled or unskilled jobs in rural areas and public works. Male migrants were allocated as manual labourers and women as domestic workers.<sup>267</sup> The scheme was underpinned by two key principles: displaced persons were allocated work for which no Australian labour was available, and their employment conditions would be the same as those that applied in the relevant industry.<sup>268</sup> Migrants had to undertake two years of employment with an approved employer as chosen by the Commonwealth Employment Service to fill vacancies across the country, regardless of migrants' skills and qualifications. The post-war Labour Government further introduced a requirement that the legally arbitrated wages and conditions granted to resident workers had to be applied equally to displaced persons.<sup>269</sup>

Given the shortfalls in British migration, the White Australia policy was attenuated to allow post-war immigration from across Europe. Stringent controls over the entry of Asian nationals were maintained until 1966 when the policy was relaxed to enable high-skilled non-European immigration.<sup>270</sup> There was growing emphasis on higher skilled immigration in the 1960s to meet the needs of expanding secondary

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<sup>267</sup> James Jupp, 'Australia and Labour Migration' in Elspeth Guild and Sandra Mantu (eds), *Constructing and imagining labour migration: perspectives of control from five continents* (Ashgate Publishing 2011) 177.

<sup>268</sup> Bruce Pennay, *Receiving Europe's Displaced: Bonegilla Reception and Training Centre, 1947-53* (Parklands Albury-Wodonga 2010) 4.

<sup>269</sup> Jupp, 'Australia and Labour Migration' (n 267) 177.

<sup>270</sup> Victor Callan, 'Anglo-Australian attitudes toward immigrants: A review of survey evidence' (1983) 17 *International Migration Review* 120, 124-125.

industries. The notorious dictation test was abandoned with the passage of the Migration Act 1958. At the same time, the new legislation conferred on the Minister for Immigration an absolute discretion in issuing landing permits. The Commonwealth government gained control in setting the policy agenda, determining the intake size and composition, recruiting and selecting immigrants, as well as facilitating migrants' labour market and social integration.<sup>271</sup> During this period, the state played a central role in brokering the interests of businesses, trade unions, and other pressure groups that were present on tripartite immigration planning and advisory councils.<sup>272</sup>

### ***The dismantling of the 'protectionist settlement' (1973-1995)***

Race and nationality were abandoned as immigration selection principles as the Whitlam Labor Government officially ended the White Australia policy in 1973, making way for a new approach to immigration policy. The creation of the Structured Selection Assessment System in 1973 was a first attempt at developing a more objective selection mechanism for permanent migration, which assessed a range of economic, personal, and social factors.<sup>273</sup> A quantitative, numerically weighted scheme based on the Canadian system was introduced in 1979 that prioritised 'human capital' as a key selection criterion. The effects of this policy change were not immediately felt, since the adjustment of immigration intake

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<sup>271</sup> Leonie Hardcastle, Andrew Parkin, Alan Simmons and Nobuaki Suyama, 'The making of immigration and refugee policy: Politicians, bureaucrats and citizens' in Howard Adelman, Allan Borowski, Meyer Burstein and Lois Foster (eds), *Immigration and Refugee Policy: Australia and Canada Compared*, (University of Toronto Press 1994) 121-122.

<sup>272</sup> Constance Lever-Tracy and Michael Quinlan, *A Divided Working Class: Ethnic Segmentation and Industrial Conflict in Australia* (Routledge 1988).

<sup>273</sup> Freda Hawkins, *Critical Years in Immigration: Canada and Australia Compared* (McGill-Queen's University Press 1991) 106.

occurred through a major reduction in demand for labour during the economic downturn of the 1970s and early 1980s.

Shifts in immigration policy were also linked to the dismantling of the 'protectionist settlement' through policies that exposed Australian industry to greater international competition. In 1973 the Whitlam Government implemented a 25 per cent across the board reduction in import tariffs. From 1983 onwards, the Hawke Labor Government undertook major micro-economic reforms that included deregulation of banking and financial markets and withdrawal of state support for economically unviable industries. These structural reforms gave way to the growth of services and export-oriented resources sectors, and the demise of secondary industries such as manufacturing. The government further sought to increase investment to develop the skills of the resident workforce and to reduce reliance on migrants as a source of skilled labour. Employers wanting to recruit migrants not only had to show that no resident workers were available but also adequate investment on workforce training had been made.<sup>274</sup>

By the late 1980s, Australia's permanent skilled migration regime consisted of an employer nomination route and a general points-based scheme where applicants did not have to possess a job offer but must reach a 'pass mark' based on criteria such as skill level, qualifications, age, and English language proficiency. At the same time, immigration selection policies favoured family reunification for settled immigrants. However, citing public concerns over 'immigrant networks' that were supposedly driving policy away from broader community interests, the Committee to Advise on Australia's Immigration Policy in 1988 recommended that immigration policy 'must be given a convincing rationale' by adopting a 'sharper economic

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<sup>274</sup> Crock, *Immigration and refugee law in Australia* (n 250) 94-95.

focus’, and concluded that human capital criteria such as skills, youth, entrepreneurship, and English language should be prioritised in immigration selection.<sup>275</sup>

In the early 1990s, the rationale for the ‘protectionist settlement’ as perceived by the Federation founders had eroded. As race-based immigration controls and tariff-based industry protection had been removed, the remaining pillar of the ‘settlement’ — the conciliation and arbitration system — was being dismantled. Labour market reform was high on the agenda as influential business lobby groups called for reforming the federal arbitrated awards system that was perceived as preventing structural efficiency and flexibility of the labour market.<sup>276</sup> The Keating Labor Government embarked on the decentralisation of the conciliation and arbitration system through promoting enterprise-level bargaining. Enterprise flexibility agreements were introduced by the Industrial Relations Act 1993 (Cth) which provided for direct negotiations of agreements between an employer and employees without the involvement of trade unions.

### ***The genesis and rise of the 457 visa scheme (1996-2007)***

For much of the 20<sup>th</sup> century, labour migration policies in Australia have emphasised permanent settlement over temporary entry. In the backdrop of the internationalisation of markets and business operations, policymakers began to heed calls of business groups for a new approach to the efficient entry of skilled temporary migrants into Australia. The government’s desire to promote greater labour market

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<sup>275</sup> CAAIP, *Immigration: A commitment to Australia* (1988) xi-xiii.

<sup>276</sup> Business Council of Australia, *Enterprise-based Bargaining Units: a Better Way of Working* (1989).

flexibility also prompted a rethinking of Australia's labour migration policies.<sup>277</sup> An immediate impetus for reform was the WTO's Uruguay Round of trade liberalisation talks in 1995 that concluded GATS. Under GATS, Australia made general and specific undertakings including a scheme of commitments to liberalise its laws and policies governing the temporary admission of service providers.<sup>278</sup>

In response to Australia's GATS commitments and business groups seeking more flexible arrangements to bring in skilled overseas workers on a temporary basis, the Keating Labor Government commissioned a Committee Inquiry into the Temporary Entry of Business People and Highly Skilled Specialists (the Roach Committee) in 1994.<sup>279</sup> The Committee's terms of reference focused on examining the effectiveness of existing temporary visa arrangements in light of objectives to make the Australian economy more internationally competitive. The inquiry reflected the government's recognition that liberalising policies governing temporary entry, at least in relation to the 'smooth movement of key personnel into and out of this country', was necessary for Australia to benefit from the global exchange of 'ideas, skills and technology'.<sup>280</sup> It further asserted that since 'a country of Australia's size cannot expect to be completely self-sufficient at the leading edge of all skills', employers could no longer be expected to source all their required labour domestically.<sup>281</sup>

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<sup>277</sup> Clive Brooks, Jill Murphy and Lynne Williams, *The Role of Skilled Temporary Residents in the Australian Labour Market* (Bureau of Immigration and Population Research ed, Australian Government Publishing Service 1994).

<sup>278</sup> GATS/SC/6/Suppl.1 (4 October 1995) AUSTRALIA – Schedule of Specific Commitments.

<sup>279</sup> Roach Committee, *Business Temporary Entry: Future Directions* (1995).

<sup>280</sup> CAAIP, *Immigration: A commitment to Australia* (n 275) 15.

<sup>281</sup> Roach Committee, *Business Temporary Entry* (n 279) 19.

Under the previous system set up in 1989, there were no less than 17 different visa sub-classes pertaining to temporary migrant workers. The former regulations also required employers to undertake labour market testing and demonstrate investment in training resident workers. In some cases where a business sought to bring in a group of migrants, agreements had to be negotiated with the Minister for Immigration, trade unions, and employers groups.<sup>282</sup> According to the Roach Committee report: ‘business, economic and trade agencies were expressing concern that existing procedures were too complex and time consuming, and impeded business in becoming internationally competitive’.<sup>283</sup> The recommendations sought to enhance procedural simplicity and efficiency for businesses to hire overseas personnel, including streamlining visa categories into one temporary visa class, removing labour market testing, and accelerating visa processing turnaround. In 1996, the newly elected Liberal-National Coalition Government under John Howard adopted almost all of the Roach Committee’s recommendations and continued its predecessor’s commitment to enhancing economic competitiveness and labour market flexibility through labour migration policies.<sup>284</sup>

The 457 visa scheme was created initially to facilitate the admission of executives, managerial, and highly skilled professionals.<sup>285</sup> Although eight different streams existed under the initial scheme, the main route has been the standard business sponsorship where employers directly sponsored migrants to work in a

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<sup>282</sup> Mary Crock, ‘Contract or Compact: Skilled Migration and the Dictates of Politics and Ideology’ in Mary Crock and Kerry Lyon (eds), *Nation Skilling: Migration, Labour and the Law* (Desert Pea Press 2002) 58.

<sup>283</sup> Roach Committee, *Business Temporary Entry* (n 279) 1.

<sup>284</sup> Immigration Minister (Philip Ruddock MP), ‘Streamlined temporary business entry sponsorship starts’ *Ministerial press statement 43/96* (1 August 1996).

<sup>285</sup> Roach Committee, *Business Temporary Entry* (n 279) 4-6.

nominated position on visas with duration of three months to four years. A less common stream was Labour Agreements where the terms of sponsorship were directly negotiated with DIAC and in some cases also with the Department of Education Employment and Workplace Relations (DEEWR). The demand-driven 457 visa had no annual cap, unlike the target-regulated permanent migration categories. The scheme also adopted a key recommendation from the Roach Committee: that employers no longer needed to ‘test’ the labour market before sponsoring a migrant who performed a ‘key’ activity essential to the business’s operations. Labour market testing was initially maintained for migrants performing ‘non-key’ activities, but this requirement was removed altogether in 2001. Furthermore, concessions were introduced for 457 visa sponsorships in regional/rural Australia where the salary and skills requirements under standard business sponsorships may be waived.

With few worker-protective measures, the regulatory design of the 457 visa scheme assumed a degree of ‘equality’ in bargaining power between the originally targeted group of highly skilled migrants and their sponsor/employer. Yet as the sponsorship and entry criteria under the scheme became watered down, there were a growing proportion of migrants admitted in semi-skilled, lower-paid occupations with weaker labour market power. The scheme paid scant attention to the ability of these migrants to negotiate on equal terms with their sponsor/employer. At the same time, there were significant changes to Australia’s industrial relations regulatory landscape that increasingly privileged employer prerogative, undermined collective labour, and eroded various forms of employment protection.

The Howard Government embarked on a successive wave of industrial relations reforms that began with the Workplace Relations Act 1996 (Cth) (‘WR

Act'). With the espoused principal objects of promoting 'higher productivity' and a 'flexible and fair labour market', the WR Act sought to emphasise 'a more direct relationship' between employers and employees and the determination of wages and conditions at the workplace level.<sup>286</sup> It introduced a new statutory instrument for bargaining between employers and individual employees, known as Australian Workplace Agreements (AWAs), which could override provisions in collective agreements. The federal awards system that set minimum wages and conditions was not dismantled but the Act narrowed the scope for awards to cover only twenty 'allowable' matters. The WR Act further restricted union rights and outlawed mandatory union membership.

In its fourth term, the Howard Government introduced the Workplace Relations Amendment (WorkChoices) Act 2005 (Cth) ('WorkChoices'). The main thrust of the legislation was to further privilege the status of AWAs over collective bargaining arrangements. WorkChoices further removed the function of setting minimum wages and conditions from the arbitral mechanisms of the (then) Australian Industrial Relations Commission. Instead, it introduced a 'safety net' of legislated minimum standards and a new statutory body to set the federal minimum wage that focused on macro-economic goals. The reforms also included the weakening of unfair dismissal rights (limiting eligibility to workers with large employers of 100+ personnel) and further restrictions on permitted industrial action and other forms of union activities.

Around the time of WorkChoices, the 457 visa scheme increasingly came under public scrutiny as trade unions and the media exposed a number of high-profile cases of employers hiring migrants where there was no demonstrated skills shortage

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<sup>286</sup> Workplace Relations Act 1996 (Cth) (repealed) s 3.

and of highly exploitative treatment of some 457 visa holders.<sup>287</sup> This controversy added to the impetus for the Howard Government to put in place measures for strengthening employers' compliance with sponsorship undertakings, which included the allocation of additional funding for Departmental investigations into potential abuses of the scheme<sup>288</sup> and legislative amendments to increase sponsorship obligations and introduce civil sanctions for breach.<sup>289</sup> A Parliamentary inquiry by the Joint Standing Committee on Migration was also set up to review the adequacy of eligibility requirements and the effectiveness of monitoring, enforcement, and reporting arrangements under the scheme.<sup>290</sup>

### ***After the Deegan Review: a case of 'cosmetic retouching'? (2007-2013)***

The unpopularity of WorkChoices contributed to the election of the Rudd Labor Government in 2007. Upon assuming office, the Rudd Government introduced the Fair Work Act 2009 (Cth) that sought to restore collective bargaining as the primary means for negotiating wages and conditions at the workplace. These reforms abolished the framework of AWAs, retained a basic set of national legislated minimum standards, and introduced a system of 'modern awards' covering specific

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<sup>287</sup> AMWU, *Temporary Skilled Migration: A New Form of Indentured Servitude* (University of Western Sydney 2006); Michael Bachelard and Nick O'Malley, 'Foreign workers forced onto illegal contracts' *The Age* <<http://www.theage.com.au/news/national/foreign-workers-forced-onto-illegal-contracts/2006/10/09/1160246071542.html>> accessed 16 February 2014; Hamish Fitzsimmons, 'Korean welders claim they have been misled' *The 730 Report* (18 May 2006) <<http://www.abc.net.au/7.30/content/2006/s1642109.htm>> accessed 16 February 2014.

<sup>288</sup> Joint Standing Committee on Migration, *Temporary visas ... permanent benefits. Ensuring the effectiveness, fairness and integrity of the temporary business visa program* (2007) 121-122.

<sup>289</sup> Migration Amendment Regulations 2007 (No 11) (Cth); Migration Amendment Regulations 2007 (No 5) (Cth).

<sup>290</sup> Joint Standing Committee on Migration, *Temporary visas* (n 288).

industries and occupations.<sup>291</sup> Reforming the 457 visa scheme was also on the agenda of the Rudd Government as it immediately launched two inquiries: a business-led review by an External Reference Group of industry experts,<sup>292</sup> and a broader review of the ‘integrity’ of the scheme by the (then) AIRC Commissioner Barbara Deegan (‘Deegan Review’).<sup>293</sup>

The inquiries resulted in a number of legislative changes to the scheme which included: abolishing the skills and wages concessions under regional sponsorships,<sup>294</sup> a ‘no less favourable’ condition concerning migrants’ wages and conditions,<sup>295</sup> an increase of the English language proficiency requirement,<sup>296</sup> and requiring the sponsor to attest to having a record of or commitment to employing local workers and non-discriminatory employment practices.<sup>297</sup> The Migration Legislation Amendment (Worker Protection) Act 2008 (Cth) further increased employers’ sponsorship obligations and civil penalties for breaches of such obligations, as well as expanded DIAC’s monitoring and inspection powers. The ‘tightening’ effect intended by these reforms was somewhat absorbed through the decline in labour demand arising from the global economic crisis, which saw a modest 11 per cent decrease in the number of applications lodged in 2008-2009 compared to the

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<sup>291</sup> These ‘modern awards’ differed from the formerly arbitrated awards in the way they were created from a process of streamlining and rationalising existing State-level and federal-level awards.

<sup>292</sup> Visa Subclass 457 External Reference Group, *Final Report to the Minister for Immigration and Citizenship* (2008).

<sup>293</sup> Barbara Deegan, *Visa Subclass 457 Integrity Review Final Report* (DIAC 2008) (‘Deegan Review’).

<sup>294</sup> Migration Amendment Regulations 2009 (No 5) (Cth) sch 1 inserting Migration Regulations 1994 (Cth) reg 2.72(1)(f)–(g).

<sup>295</sup> *ibid*, sch 1 inserting reg 2.72(10)(cc).

<sup>296</sup> Migration Amendment Regulation 2009 (No 3) (Cth).

<sup>297</sup> Migration Amendment Regulations 2009 (No 5) (Cth) sch 1 inserting Migration Regulations 1994 (Cth) reg 2.59(f).

previous financial year.<sup>298</sup> However, the overall rising trajectory of 457 visa applications in recent years suggests that employers' demand for temporary migrant labour may have become a permanent feature in some sectors of the Australian economy.

In 2011-2012, Julia Gillard's Labor Government introduced two new types of Labour Agreements: Enterprise Migration Agreements (EMAs) and Regional Migration Agreements (RMAs). EMAs were targeted at the skills needs of the resources sector through facilitating substantial intakes of 457 visa holders to work on major projects under streamlined sponsorship arrangements that covered sub-contractors.<sup>299</sup> Under RMAs, States/Territories and local governments could sponsor 457 visa holders in regional/rural areas with labour shortages 'in circumstances that are not otherwise permitted under the standard migration programs'.<sup>300</sup> These new agreements came into the public spotlight when the first EMA was approved for the sponsorship of 1,715 migrants under 457 visas to work on an iron-ore project owned by mining magnate Gina Rinehart.<sup>301</sup> A minor political storm ensued over a lack of consultation between the Immigration Minister and the Prime Minister's Office,<sup>302</sup>

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<sup>298</sup> DIAC, *Subclass 457 Business (Long Stay) — State and Territory Summary Report, 2008-2009* (2009) 2.

<sup>299</sup> DIAC, 'Fact Sheet 48a — Enterprise Migration Agreements' (2012) <<http://www.immi.gov.au/media/fact-sheets/48a-enterprise.htm>> accessed 1 August 2013.

<sup>300</sup> DIAC, 'Regional Migration Agreements' (2013) <<http://www.immi.gov.au/skilled/regional-migration-agreements.htm>> accessed 1 August 2013.

<sup>301</sup> Minister for Immigration and Citizenship, 'First Enterprise Migration Agreement approved' (2012) <<http://www.minister.immi.gov.au/media/cb/2012/cb187050.htm>> accessed 1 August 2013.

<sup>302</sup> Phillip Coorey, 'PM in the dark on Rinehart visa deal' *Sydney Morning Herald* (26 May 2012) <<http://www.smh.com.au/federal-politics/political-news/pm-in-the-dark-on-rinehart-visa-deal-20120525-1za4c.html>> accessed 1 August 2013.

against the backdrop of some unions' vocal opposition to employers' abuse of this 'guest worker' scheme.<sup>303</sup>

The mining and resources sector is not the only part of the Australian economy showing greater reliance on temporary migrant labour. The emergence of sector-specific TMWPs has also seen the introduction of a Seasonal Workers Program in 2012 to allow the temporary admission of migrants from select Pacific Island countries for low-skilled seasonal horticultural work. Migrants are sponsored by government-approved employers and labour hire agencies for a period of 14 weeks to six months. The Program's espoused aims are to contribute to the economic development of its regional neighbours and to help Australian horticultural employers address acute labour shortages.<sup>304</sup> As some commentators have suggested, the TMWP had the potential to 'clean up' the exploitative employment and immigration practices prevalent in the sector.<sup>305</sup> Although the actual number of migrants admitted under a three-year pilot scheme was only 1,623,<sup>306</sup> its pertinence for Australia's labour migration regime should not be underestimated in light of historical legacies that shunned the importation of unskilled 'contract' foreign labour.

Related to the expansion of the 457 visa scheme is the growing emphasis on employer sponsored permanent migration programmes in Australia. The Employer Nomination Scheme has become the primary channel for 457 visa holders to apply for permanent residency. There has been a pronounced policy shift away from

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<sup>303</sup> Judith Ireland, 'Union fury over Rinehart migration deal' *Sydney Morning Herald* (25 May 2012) <<http://www.smh.com.au/federal-politics/political-news/union-fury-over-rinehart--migration-deal-20120525-1z9fh.html>> accessed 1 August 2013.

<sup>304</sup> DEEWR, *Pacific Seasonal Worker Pilot Scheme* (2013).

<sup>305</sup> Ball, Beacroft and Lindley, *Australia's Pacific Seasonal Worker Pilot Scheme* (n 23) 3-5.

<sup>306</sup> DIAC, *Pacific Seasonal Worker Pilot Scheme Data Summary (February 2009 - September 2012)* (2012).

supply-driven ‘independent’ migration towards demand-driven employer sponsorship in both the permanent and temporary visa categories.<sup>307</sup> As Chapter 4 examines in more detail, there has been an increasing devolution of authority from the state to employers over decisions regarding the number of migrants to admit and the criteria for selection under Australia’s labour migration regimes.<sup>308</sup>

The expansion of the 457 visa scheme has generally received bipartisan support from successive governments on both sides of politics. Recent Labor Governments have faced certain pressures from its trade union constituencies, which have led to some tinkering of the scheme with the primary aim of deterring alleged abuses by employers substituting foreign labour for domestic labour. At the time of writing, a limited form of labour market testing has been introduced for occupations below a certain skill level.<sup>309</sup> Nevertheless, these changes mostly appear to be ‘cosmetic retouching’, leaving intact the scheme’s main thrust of meeting employers’ demand for flexible temporary migrant labour. Notwithstanding the historical aversion to temporary migrant labour, the 457 visa scheme has become the centrepiece of Australia’s labour migration regime in less than two decades.

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<sup>307</sup> Chris Evans, Minister for Immigration and Citizenship, ‘Changes to the 2008-09 Skilled Migration Program’ (Canberra 17 December 2009).

<sup>308</sup> Mary Crock and Lauri Berg, ‘The Business of Temporary Labour Migration’ in Mary Crock and Laurie Berg (eds), *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (The Federation Press 2011).

<sup>309</sup> Migration Amendment (Temporary Sponsored Visas) Act 2013 (Cth) sch 2: inserting Migration Act 1958 (Cth) s 140GBA.

### 3.3 The UK: Forward to the Past?

For much of the 20<sup>th</sup> century, the UK has been described as a ‘reluctant immigration state’ with one of the strictest immigration regimes among industrialised states.<sup>310</sup> It was not until Tony Blair’s New Labour Government that one saw the major liberalisation of the national labour migration regime. The work permits system was made more responsive to labour market demand, and the annual number of applications rose from 38,617 to 155,216 between 1995 and 2002.<sup>311</sup> This policy shift was premised on the belief that migrant labour created substantial economic benefits for the UK, including making its labour market more flexible.<sup>312</sup> Yet this liberalisation was only fleeting as subsequent political backlash brought back a restrictionist policy in recent years.<sup>313</sup> The Tier 2 (General) visa is presently situated within an increasingly complex, rigid, and restrictive points-based system (PBS) aimed at reducing net non-EEA migration from ‘hundreds of thousands’ to ‘tens of thousands’.

#### *Evolution of work permits in a ‘reluctant’ immigration state (1900s-1960s)*

At the turn of the 20<sup>th</sup> century, there were no legal restrictions on the entry of foreign nationals into the UK, based on a prevailing belief among the political elite at the time that ‘labour migration was a necessary concomitant of a successful trading

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<sup>310</sup> Wright, ‘Policy legacies’ (n 57) 728.

<sup>311</sup> James Clarke and John Salt, ‘Work permits and foreign labour in the UK: a statistical review’ (2003) November Labour Market Trends 563, 565.

<sup>312</sup> Martin Ruhs, ‘Economic research and labour immigration policy’ (2008) 24 Oxford Review of Economic Policy 403, 404.

<sup>313</sup> Wright, ‘Policy legacies’ (n 57).

economy' and was in the interests of the British empire.<sup>314</sup> The Aliens Act 1905 represented the first modern law to impose controls on 'aliens' entering the UK.<sup>315</sup> A legal distinction between 'aliens' and 'British subjects' emerged. The latter category included those born outside Britain in the colonies and dominions who were not subject to immigration control.<sup>316</sup> An administrative framework was set up to grant the Home Secretary powers to prevent the entry of and to deport 'undesirable' and 'destitute' aliens.<sup>317</sup>

Specific controls on labour immigration emerged from 1914 to 1920. The Aliens Order 1920 established a work permits system for non-Commonwealth nationals to undertake certain types of skilled work in the UK. An alien who was 'desirous of entering the service of an employer' had to obtain a 'permit in writing of his [sic] engagement issued to the employer by the Minister of Labour'.<sup>318</sup> The Ministry of Labour had the power to issue work permits under specified conditions, including that the employer had adequately sought to recruit from the domestic labour force, that the proposed employment of the alien was reasonable and necessary, that the wages and working conditions were no less favourable than those offered to British workers for similar work, and that no British subject would be displaced.<sup>319</sup> These criteria for the issuing of work permits remained largely

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<sup>314</sup> Bernard Ryan (ed) *Labour Migration and Employment Rights* (The Institute of Employment Rights 2005) 10.

<sup>315</sup> Helena Wray, 'The Aliens Act 1905 and the Immigration Dilemma' (2006) 33 *Journal of Law and Society* 302.

<sup>316</sup> Ann Dummett and Andrew G L. Nicol, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (Weidenfeld & Nicholson 1990) 94-100.

<sup>317</sup> Robert Winder, *Bloody Foreigners: the Story of Immigration to Britain* (Abacus 2004) 259-260.

<sup>318</sup> Vaughan Bevan, *The Development of British Immigration Law* (Croom 1986) 72-73.

<sup>319</sup> Diana Kay and Robert Miles, *Refugees Or Migrant Workers?: European Volunteer Workers in Britain, 1946-1951* (Routledge 1992) 37.

unchanged until the end of the century. Such a system of work permits facilitated the recruitment of non-British subjects to work in Britain for a temporary period of time. Crucially, they could only work in the designated job and employer specified on the work permit for which they were recruited. Upon the expiry of their work permits, they were required to return to their countries of origin.

In 1945, the UK government established large-scale special temporary migration schemes to fill Britain's post-war labour needs. The European Voluntary Workers' Scheme was set up to recruit nearly 100,000 displaced Europeans into jobs and sectors assigned by the Ministry of Labour on three-year contracts. These migrants initially had to arrive without any dependants and had no settlement rights. Kay and Miles argue that the government sought to create a guest worker programme 'whereby specific labour shortages were to be resolved by the temporary recruitment of foreign labour under contract in order to prevent permanent settlement and to retain the recruited workers in the sectors experiencing the shortage'.<sup>320</sup> At the time, the work permits system was also expanded, with a majority of permits issued to migrants in domestic service in private households, hospitals, and educational institutions.<sup>321</sup>

There were further attempts to recruit migrants from Commonwealth states and colonies. The British Nationality Act 1948 affirmed the right of a Citizen of the United Kingdom and Colonies to enter and work in the UK without restrictions.<sup>322</sup> Following this Act, the growth in immigration from 'New Commonwealth' countries

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<sup>320</sup> *ibid* 37-38.

<sup>321</sup> Robert Miles and Paula Cleary, 'Britain: Post-Colonial Migration in Context' in Dietrich Thränhardt (ed), *Europe, a New Immigration Continent: Policies and Politics in Comparative Perspective* (2nd edn, Lit Verlag 1992) 160; Clarke and Salt, 'Work permits' (n 311) 563.

<sup>322</sup> Bevan, *British Immigration Law* (n 318) 75.

of Asia, Africa, and the Caribbean became the source of public debates on immigration and race relations for the next few decades.<sup>323</sup> The Commonwealth Immigration Act 1962 was introduced in response to populist agitation surrounding ‘coloured migration’. The Act stipulated that British subjects seeking primary labour immigration must have a ‘voucher’ issued by the Ministry of Labour under three quota-based categories: pre-arranged employment (Category A), specific skills in short supply (Category B), and lower-skilled labour shortage occupations (Category C). More restrictive regulations were implemented throughout the 1960s, substantially reducing the number of vouchers available in Categories A and B vouchers, and abolishing Category C altogether.

### ***Immigration restrictions and labour market reforms (1970s-1996)***

A bipartisan political approach in favour of restricting immigration of New Commonwealth nationals led to the Immigration Act 1971, which discarded the system of quota-based labour vouchers. All non-British nationals without the ‘right of abode’ had to apply through the work permits system. The Department of Employment had the powers to restrict the number of migrants through deciding which applicants would be granted permits. Prospective employers had to show that the position had special characteristics that required foreign labour; that there was no suitable resident labour available and that the position would not displace or exclude a local worker by advertising the position in appropriate local, national, and European Economic Community (EEC) media; that wages and conditions were not less favourable to those received by resident workers doing similar work; and that the

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<sup>323</sup> Anthony Messina, ‘The Impacts of Post-WWII Migration to Britain: Policy Constraints, Political Opportunism and the Alteration of Representational Politics’ (2001) 63 *The Review of Politics* 259, 264; Bevan, *British Immigration Law* (n 318) 76.

work required a professional qualification, skill, or experience. Permit holders were admitted for an initial period of 12 months, with the possibility of annual extensions. It was only after four years of working in the approved position that they could apply for the right to remain in the UK.<sup>324</sup>

There was a large decline in the number of permits issued from the early 1970s to the early 1980s, with only 5,700 long-term work permits issued in 1982.<sup>325</sup> This partly flowed from the deep recession of the 1970s and early 1980s that reduced industry's demand for labour. The restrictive labour migration policies at the time also responded to populist pressures as well as the changing foreign policy priorities for the UK.<sup>326</sup> The UK's joining of the EEC in 1973 meant that its membership obligations under the principle of free movement of labour facilitated growing labour migration inflows and outflows between the UK and EEC member states. While the door for 'New Commonwealth' nationals closed, avenues for Irish and EEC immigration to the UK were left open.

As Flynn argues, the 'border police' approach that emerged from 1962 onwards was underpinned by two assumptions: first, that the rights of some migrants could be eroded on the basis of politicians' perceptions of the 'public good'; second, that politicians had the powers to decide who should and should not enter the UK, and to enforce these powers through a regime of control.<sup>327</sup> The fixation on immigration control became deeply entrenched in the public discourse that

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<sup>324</sup> Bevan, *British Immigration Law* (n 318) 278.

<sup>325</sup> Clarke and Salt, 'Work permits' (n 311) 564.

<sup>326</sup> Ian Spencer, *British Immigration Policy since 1939: The Making of a Multi-Racial Britain* (Routledge 1997) 155; Christian Joppke, *Immigration and the Nation-State: The United States, Germany, and Great Britain* (OUP 1999) 102; Wright, 'Policy legacies' (n 57).

<sup>327</sup> Don Flynn, *British Immigration Policy, New Labour, and the rights of migrants: A critical assessment* (Signs of the Times, 2002).

contributed to Margaret Thatcher's electoral victory in 1979.<sup>328</sup> Under Thatcher's premiership, policymakers sought to make the UK as close as possible to a 'zero immigration' state through controls that exemplified an 'exceptionally strong and unrelenting hand in bringing immigration down to the inescapable minimum'.<sup>329</sup>

Despite the Conservative Party's 1979 election pledge to 'severely restrict the issue of work permits',<sup>330</sup> a 1981 review of the scheme did not lead to any appreciable reforms. As labour market deregulation was being rolled out, businesses' calls for greater labour mobility also became apparent. As the economy started to recover from the mid-1980s onwards, there were stronger 'pull factors' for labour immigration coming from the rising global competition for skilled labour and the shift from manufacturing to the service sector in the UK that was accelerated by financial deregulation.<sup>331</sup> The anti-immigration tough-talk of the Thatcher Government may have seemed at odds with its broader free-market, neo-liberal economic reform agenda. Yet as Castles argues, the deregulation policies (largely continued by New Labour) created a labour market that was open to casual and informal work relations, which facilitated employers' ease of engaging irregular migrants.<sup>332</sup>

Furthermore, these market reforms in the 1980s saw the rise of temporary and contingent work, increased employer flexibility to 'hire and fire', and the decline of union-negotiated collective agreements that often included clauses on training.

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<sup>328</sup> Earl Aaron Reitan, *The Thatcher Revolution: Margaret Thatcher, John Major, Tony Blair, and the Transformation of Modern Britain* (Rowman & Littlefield 2002) 34.

<sup>329</sup> Joppke, *Immigration and the Nation-State* (n 326) 100.

<sup>330</sup> Thatcher Archive, *Conservative General Election Manifesto 1979* (1979).

<sup>331</sup> Clarke and Salt, 'Work permits' (n 311) 564.

<sup>332</sup> Castles, 'Guestworkers in Europe: A Resurrection?' (n 17).

Arulampalam and Booth maintain that these changes diminished the commitment of UK employers to invest in training of the resident workforce.<sup>333</sup> Employers' preferences for voluntarist training arrangements, coupled with the government's hands-off approach to national training coordination (based on its ideology that workforce training was best left to the market),<sup>334</sup> did little to alleviate the labour market's structural weaknesses in responding to labour shortages arising from the pressures of a growing economy and increasing globalisation.

By the onset of the 1990s, labour migration policies in the UK were being gradually liberalised to respond to labour and skills shortages. The work permits system was perceived by employers as imposing high barriers and costs to engage foreign skilled labour, which led to calls for a more efficient and responsive system.<sup>335</sup> In 1991, the Major Government introduced reforms that entailed a 'two-tiered' system for processing work permit applications. The first tier involved a faster, streamlined procedure for applications that demonstrably warranted approval and satisfied occupation skills criteria. All other applications fell under the second tier that required the employer to provide fuller justification. The rationale was to simplify work permit applications for highly skilled and senior executive and managerial positions, especially intra-company transferees. A new category of 'keyworker' permits was also introduced for migrants with specialised language,

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<sup>333</sup> Wiji Arulampalam and Alison L. Booth, 'Training and labour market flexibility: Is there a trade-off?' (1998) 36 BJIR 521.

<sup>334</sup> Desmond King, 'Employers, training policy, and the tenacity of voluntarism in Britain' (1997) 8 *Twentieth Century British History* 383.

<sup>335</sup> Clarke and Salt, 'Work permits' (n 311) 565.

cultural, or culinary knowledge that was not readily available in the UK and EEA. Such permits were often granted to hotel, restaurant and catering skilled staff.<sup>336</sup>

On the whole, these adjustments to the work permits system in the early 1990s did not essentially change the embedded restrictionist policy legacy of immigration controls from the preceding decades. Messina argues that an ‘illiberal and restrictive’ policy orthodox was so ingrained by the time Blair came into office that expansionary labour policies were simply not considered a politically viable option.<sup>337</sup> The economic and business case for labour migration had little salience in public debates at the time. Yet, this restrictionist approach was considerably challenged during the first two terms of the Blair Government, with labour immigration intakes reaching the peak since the post-war period.

### ***Liberalisation of labour migration under New Labour (1997-2005)***

During its first term (1997-2001), the Blair Labour Government’s immigration policy embraced the rhetoric of ‘modernisation’, epitomised in its first White Paper in 1998.<sup>338</sup> This White Paper articulated three key themes: the benefits of immigration for the UK; the expansion in demand for legitimate economic and business migration; and concern over the growth in asylum claims. The proposed policy reforms included the expansion of the scope for skilled labour migration to the UK. Flynn argued that the liberalisation aspects of New Labour’s labour migration policies, such as the admission of skilled migrants, had been consciously de-

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<sup>336</sup> Ian MacDonald and Nicholas Blake, *Immigration law and practice in the United Kingdom* (Butterworths 1995) 291.

<sup>337</sup> Messina, ‘Impacts of Post-WWII Migration to Britain’ (n 323) 267-268.

<sup>338</sup> Home Office, *Fairer, Faster and Firmer: A Modern Approach to Immigration and Asylum* (1998).

politicised by government ministers who insisted on an ‘objective’ and ‘evidence-based’ approach to such measures.<sup>339</sup>

Skilled labour migration became an important tenet of the Blair Labour Government’s case for promoting the economic and social benefits of immigration. The pre-budget review in 1999 highlighted the need for the UK to ‘attract the most skilled and most enterprising people from abroad to add to the skill pool of resident workers... address skills gaps, both where there are transient shortages in particular areas, for example, among IT workers, or where skills shortages persist’.<sup>340</sup> In a speech to the Institute for Public Policy in 2000, the then Immigration Minister Barbara Roche formally launched the case for reforming Britain’s labour migration policies:

We are in competition for the brightest and the best talents, the entrepreneurs, the scientists, the high technology specialists who make the global economy tick... the evidence shows that economically driven migration can bring substantial overall benefits both for growth and the economy.<sup>341</sup>

It was not only labour market shortages at the top end of the skills spectrum that the Blair Governments’ labour migration reforms sought to address. Other policy components included the expansion of lower-skilled immigration through sector-specific schemes and the facilitation of greater European labour market mobility.

The main work permits system remained the primary route of labour migration for non-EEA nationals. A review conducted in 2000 led to reforms that sought to make the system more flexible, efficient, and responsive to employer demand in the public and private sectors. The requisite level of applicants’

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<sup>339</sup> Flynn, *British Immigration Policy* (n 327).

<sup>340</sup> Cited in: Nicolas Rollason, ‘International Mobility of Highly Skilled Workers: the UK Perspective’ in OECD (ed), *International Mobility of the Highly Skilled* (2002) 333.

<sup>341</sup> Barbara Roche MP, *UK Migration in a Global Economy* (2000).

qualifications and experience was attenuated. The reforms also relaxed the requirement of a resident labour market test (RLMT) that required employers to demonstrate the unavailability of UK/EEA nationals for the position (through locally advertising the vacancies). Exceptions to the RLMT were introduced, such as for board-level executives and managers. Employers were also not required to re-advertise the position when applying for extensions to work permits, provided that the job remained the same as the one originally approved.

Sector panels, comprising of employer and trade union representatives, were established to assess and monitor skills shortages in their respective sectors, and to make appropriate recommendations to the administering body, Work Permits (UK). New categories of Information Technology and Communications (ITC) occupations were added to the shortage occupation list. Provided that the employer could show that the job matched one of the occupations on the list and that the migrant met the work permit scheme's basic skills criteria, the position did not have to be advertised.<sup>342</sup> However, many of these ITC occupations were later removed from the list in 2002 arising from a major sectoral downturn and from the growth of reported fraudulent work permit applications in the sector.<sup>343</sup>

Other notable changes to the work permit scheme flowing from the 2000 review included: incorporating the former 'keyworker' category into the main work permit scheme; introducing multiple-entry work permits for workers who enter the UK regularly for short periods; increasing the maximum duration of a work permit from four to five years; eliminating the need for an additional work permit to engage in supplementary employment (employment beyond the primary position for which

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<sup>342</sup> Rollason, 'International Mobility' (n 340) 336.

<sup>343</sup> Nicolas Rollason, 'Labour Recruitment for Skill Shortages in the United Kingdom' in OECD (ed), *Migration for Employment: Bilateral Agreements at a Crossroads*, vol 19 (OECD 2004) 136-137.

the permit was issued); and providing a path for foreign students to switch to work permits without leaving the UK.<sup>344</sup> The administrative bureaucracy was also restructured. The unit responsible for issuing work permits, formerly known as Overseas Labour Service, was renamed Work Permits (UK), and transferred from the Department for Education and Skills to the Home Office in 2001. This was an attempt to link the work permits system with other immigration domains.<sup>345</sup> Work Permits (UK) sought to accelerate the processing of work permit applications and set a turn-around target of deciding 90 per cent of complete application within one day and 90 per cent of all applicants within one week, which was largely achieved.<sup>346</sup>

At the beginning of its second term in office (2001-2005), the Blair Government produced a second White Paper, titled 'Secure Borders, Safe Haven', which was largely penned by the then new Home Secretary David Blunkett. As Spencer has observed, the arrival of Blunkett at the Home Office reflected a clear shift in the language and policy from that of 'immigration control' to 'managed migration'.<sup>347</sup> As the former secretary of state for Employment, Blunkett oversaw the rise in labour migration through the work permits system, which had not (at that stage) provoked much public opposition. He thus brought to the Home Office the 'recognition of the economic benefits of migration into a department that had traditionally focused only on keeping migrants out'.<sup>348</sup> In the White Paper, reforms to the work permits system since 2000 were set out in detail, and the increase in the

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<sup>344</sup> Rollason, 'International Mobility' (n 340) 333-334; Will Somerville, *Immigration Under New Labour* (Policy Press 2007) 30-31.

<sup>345</sup> Clarke and Salt, 'Work permits' (n 311) 564.

<sup>346</sup> *ibid* 565.

<sup>347</sup> Sarah Spencer, 'Immigration' in Anthony Seldon (ed), *Blair's Britain: 1997-2007* (CUP 2007) 350.

<sup>348</sup> *ibid*.

number of skilled migrants under the system was presented as ‘the badge of success’.<sup>349</sup>

The White Paper also provided an opportunity to integrate the domains of labour migration, asylum, family migration, and citizenship policies that Blunkett perceived as interconnected. The White Paper highlighted that the lack of legal routes for labour migration would encourage illegal immigration and asylum claims.<sup>350</sup> Proposals to open up channels for low-skilled migration through seasonal and sector-based schemes were put forward. This led to the creation of the quota-based Sector Based Scheme SBS to allow employers to recruit non-EEA migrants for temporary employment in hospitality and food processing sectors. The rules were also relaxed for existing low-skilled routes that included the seasonal agricultural workers scheme (SAWS) and working holidaymakers (WHM) scheme. The annual quota for SAWS was increased from 15,000 in 2001 to 25,000 in 2002, the sectors and periods of operation broadened, the age limit for applicants removed, and the maximum visa period extended from three to six months. The WHM scheme, a two-year youth mobility visa primarily aimed at cultural exchange, became more akin to a labour migration scheme. The maximum age for visa holders were raised, and previous restrictions on the amount and type of work that could be engaged were removed. WHM visa holders could further apply for transfer to a work permit after a year.<sup>351</sup>

At the other end of the skills spectrum, a Highly Skilled Migrants Programme (HSMP) was launched in 2002 that saw a relatively small number of migrants

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<sup>349</sup> Flynn, *British Immigration Policy* (n 327).

<sup>350</sup> Home Office, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* (2002) 77-78.

<sup>351</sup> Anaïs Loizillon, ‘Principal Labour Migration Schemes in the United Kingdom’ in OECD (ed), *Migration for Employment: Bilateral Agreements at a Crossroads*, vol 19 (OECD 2004) 114; Somerville, *Immigration Under New Labour* (n 344) 143-145.

admitted. Instead of being based on employer demand, the HSMP was aimed at boosting the UK's skilled labour supply. Without requiring any prior job offer from an employer, highly skilled migrants who met the admission criteria could enter the UK to look for work or be self-employed. The initial period of leave granted was one year and could be extended for a further three years after which they may apply for settlement. This programme broke new ground in the UK's labour migration framework for non-EEA migrants.<sup>352</sup> Unlike work permits, the HSMP granted permission to individual migrants who were not tied to a specific job with a particular employer. In addition, a points system was introduced for the first time, where applicants had to score sufficient points from evidence of their qualifications, work experience, past earnings, achievement in chosen field, and HSMP priority occupations.

The major aspect of labour migration policies under the Blair Government was the UK's response to EU enlargement of A8 countries in 2004. The UK was the only large EU-15 economy that provided A8 nationals with full labour market access at the onset of enlargement. A Worker Registration Scheme was established to keep track of A8 nationals' employment and access to social benefits. This policy arose from a variety of foreign policy, border control, and economic imperatives. Blair himself was strongly supportive of an enlarged EU that incorporated the former communist states.<sup>353</sup> Besides, the UK could not legally prevent the entry of A8 nationals and would have had to lift any transitional restrictions on their access to the labour market by 2011 under the EU Accession Treaty. Blunkett firmly argued that imposing restrictions would encourage illegal working and undermine the

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<sup>352</sup> Clarke and Salt, 'Work permits' (n 311) 572-573.

<sup>353</sup> Anthony Seldon, *Blair Unbound* (Simon and Schuster 2007) 407-408.

government's 'managed migration' strategy.<sup>354</sup> The economic case for facilitating EU labour mobility to enhance labour market flexibility, productivity, and growth was also strongly put forward.<sup>355</sup>

As Wright maintains, during the period of 2000 to 2004, labour immigration controls in the UK were liberalised to a greater degree than in any other reluctant immigration state, even comparable to the policies of traditional destination states.<sup>356</sup> Employers lobbied for the further liberalisation of labour migration policies, with well-publicised campaigns for skilled migrants in certain sectors such as ITC. Trade unions preferred a 'managed migration' system to irregular migration. Thus, there was a certain consensus around the opening up of legal channels for labour migration.<sup>357</sup> The relaxation of the work permits system largely slipped under the public radar compared to the highly visible campaign to 'act tough' on asylum-seeker policy. Yet, these liberal reforms were short-lived. The larger-than-anticipated entry of A8 nationals into the UK labour market created considerable public backlash and a widespread perception that the Blair Government had lost control over immigration.<sup>358</sup>

### ***From 'hundreds of thousands' to 'tens of thousands' (2005-present)***

Public backlash saw a reversion to restrictionist labour migration policy measures under the third term of the Blair Government (2005-2007). A Home Office report in

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<sup>354</sup> David Blunkett, *The Blunkett Tapes: My Life in the Bear Pit* (Bloomsbury 2006) 593-594; Spencer, 'Immigration' (n 347) 352.

<sup>355</sup> Wright, 'Policy legacies' (n 57) 739-741.

<sup>356</sup> *ibid* 733.

<sup>357</sup> Camilla Devitt, 'Labour migration governance in contemporary Europe. The UK case' (FIERI 2012) 7.

<sup>358</sup> Spencer, 'Immigration' (n 347).

2006 laid the framework for a new PBS that had several objectives of: increasing public confidence; reducing abuse of immigration rules; simplifying rules and enhancing the transparency of admission criteria for migrants, employers, and decision-makers; ensuring immigration controls respond effectively to changing economic and social needs; and improving the UK's economic and international competitiveness.<sup>359</sup> Authority over the administration of immigration policies was transferred from the Immigration and Nationality Directorate of the Home Office to the newly established executive agency, the UKBA.

The first stage of the PBS was to take effect in 2008, consolidating over 80 former visa routes for non-EEA migrants into a five-tiered structure. Tier 1 replaced the HSMP for 'highly skilled individuals to contribute to growth and productivity' who could enter the UK without a job offer. Tier 2 superseded the work permit scheme and consists of four categories: General, Intra Company transferee (ICT), Minister of Religion, and Sportsman. Tier 3 was originally intended as a quota-based TMWP to meet specific low-skilled shortages, but was suspended prior to the PBS's implementation on the premise that low-skilled workers would be sourced from EEA nationals. Tier 4 visas were issued to students for the purpose of undertaking a degree with an approved education provider. Finally, Tier 5 covered youth mobility visas (formerly the WHS) and those entering the UK for a short period of time for cultural, charitable, religious, or international development reasons.

Two advisory bodies were set up with the introduction of the PBS: the Migration Advisory Committee (MAC) and the Migration Impacts Forum (MIF). Comprising of a small appointed group of economists, the MAC's main function has

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<sup>359</sup> Home Office, *A Points-Based System: Making Migration Work for Britain* (2006).

been to provide the Government with ‘independent and evidence based advice’ on how immigration selection under the PBS could best address domestic labour needs.<sup>360</sup> MAC undertakes two key tasks: to identify the jobs that fall within the ‘skilled’ requirement of Tier 2, and compiles and updates the shortage occupation list (SOL) for Tier 2. MAC has also responded to government requests for reviews of a variety of labour and economic immigration issues. The lesser-known group, MIF, comprises of government agencies and non-government representatives who advise on the wider impact of migration on local communities, including the provision of public services and community integration.<sup>361</sup> The MIF has had virtually no activity since it last met in June 2009.<sup>362</sup>

As Gordon Brown stepped in after Blair’s resignation as Prime Minister in 2007, one of his first public announcements was a ‘crackdown on migrant workers’, pledging ‘British jobs for every British worker’.<sup>363</sup> The Brown Labour Government’s decision not to allow free movement for A2 nationals of upon the EU accession of Bulgaria and Romania in 2007 largely took into account the political backlash against the earlier liberalisation reforms. At the same time, stamping out ‘illegal’ migration gained extensive attention in immigration policy and rhetoric. As Anderson observed, a notable feature of this political discourse was the presentation of immigration controls as a means of protecting vulnerable migrant workers and ‘as

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<sup>360</sup> MAC, *Skilled Shortage Sensible: the recommended shortage occupation lists for the UK and Scotland* (2008).

<sup>361</sup> Secretary of State for the Home Department, *The Economic Impact of Immigration* (2008) 25, 27.

<sup>362</sup> Alasdair Murray, *Britain's points based migration system* (CentreForum 2011) 32.

<sup>363</sup> Ben Russell, “Jobs for every Briton,” says Brown in crackdown on migrant workers’ *The Independent* (London, 10 September 2007) <<http://www.independent.co.uk/news/uk/politics/jobs-for-every-briton-says-brown-in-crackdown-on-migrant-workers-401873.html>> accessed 30 July 2013.

protecting British workers and businesses from illegitimate competition'.<sup>364</sup> The Home Office's strategy for 'tougher enforcement' was premised on concerns over the 'exploitation underpinning illegal immigration' that 'undermines the terms and working conditions of British workers'.<sup>365</sup> A wave of enforcement measures was introduced, including a biometric identification system, a civil penalty scheme for employers engaging workers with irregular status, and a new criminal offence for employers who knowingly engaged such workers.

David Cameron's Coalition Government, elected in 2010, has further pursued a highly restrictionist labour migration policy. Since the UK is precluded by its EU membership from curbing EU nationals' access to its labour market, the Cameron Government's policy changes have centred on dramatically shrinking non-EEA net immigration from 'hundreds of thousands to tens of thousands'. In a major policy speech on labour immigration in 2013, Cameron articulated some of his Government's key goals for reforming the PBS, including: preventing abuse of the previous work permits scheme and ensuring that only the 'best and brightest' come to work in the UK; breaking the link between temporary work and the route to settlement; and facilitating welfare reform and training opportunities for UK citizens.<sup>366</sup>

As Chapter 4 explores in greater detail, recent admission criteria under the Tier 2 (General) visa scheme have become increasingly restrictive. From 2011, an annual limit of 20,700 applies to new out-of-country visa applications. It may be said that the PBS has broadly become a policy instrument for reducing non-EEA

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<sup>364</sup> Anderson, 'Migration, immigration controls' (n 4) 302.

<sup>365</sup> Home Office, *Enforcing the rules: A strategy to ensure and enforce compliance with our immigration laws* (2007) 2.

<sup>366</sup> Cameron, *Immigration speech* (n 31).

migration arising from domestic political pressures, instead of seeking to ‘maximise the economic benefits’ of labour migration. This is further reflected in the changes across other tiers of the PBS, such as the closure of the two main Tier 1 categories: the ‘General’ route that allowed highly skilled migrants to enter the UK without a job or sponsor, and the post-study work route for foreign students to remain in the UK after graduation to search for work.

While taking a restrictionist stance on immigration, the current Coalition Government has instigated a comprehensive Employment Law Review (ELR) to ensure that the UK’s employment laws offer ‘maximum flexibility for employers and employees’<sup>367</sup> and a ‘Red Tape Challenge’ to reduce regulatory burdens on business.<sup>368</sup> Proposed and implemented changes under the Coalition Government have included: reducing the qualifying period for unfair dismissal claims from one year to two years of continuous employment,<sup>369</sup> capping unfair dismissal compensation to twelve months’ pay,<sup>370</sup> introducing new employment tribunal fees for claimants,<sup>371</sup> weakening strict liability provisions under health and safety legislation,<sup>372</sup> halving the collective redundancy consultation period from 90 to 45

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<sup>367</sup> DBIS, ‘Reviewing employment law’ (2013) <<https://www.gov.uk/government/policies/making-the-labour-market-more-flexible-efficient-and-fair/supporting-pages/reviewing-employment-law>> accessed 1 August 2013.

<sup>368</sup> Cabinet Office and HM Government, ‘Red Tape Challenge: Employment related law’ (2011) <<http://www.redtapechallenge.cabinetoffice.gov.uk/themehome/employment-related-law/>> accessed 1 August 2013.

<sup>369</sup> Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012.

<sup>370</sup> Unfair Dismissal (Variation of the Limit of Compensatory Award) Order 2013.

<sup>371</sup> The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013.

<sup>372</sup> Enterprise and Regulatory Reform Act 2013, s 69.

days and excluding completed fixed-term contracts from consultation,<sup>373</sup> relaxing employer obligations under The Transfer of Undertaking (Protection of Employment) (TUPE) rules,<sup>374</sup> and repealing provisions of the Equality Act such as the removal of employer liability for third-party harassment.<sup>375</sup>

As the Minister for Employment Relations stated in a progress report of the ELR: ‘The Government will promote flexibility by regulating the labour market in a light-touch way. The approach we take means the UK labour market is one of the most lightly regulated labour markets in the OECD’.<sup>376</sup> Yet, the goals of these reforms — to ‘cut unnecessary red tape for businesses’ and promote an ‘efficient labour market that allows employers to access labour’<sup>377</sup> — do not seem to sit easily next to an increasingly restrictive labour migration regime. Reforms to the Tier 2 (General) visa scheme in recent years have attracted opposition from British businesses and industry groups.<sup>378</sup> Notwithstanding the rhetoric of enhancing flexibility, transparency, and simplicity of the UK economic and labour migration regime, the PBS has arguably become a highly rigid, opaque, and complex regime with the persistent tinkering of rules.

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<sup>373</sup> Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013.

<sup>374</sup> DBIS, *Employment Law 2013: Progress on Reform* (2013) 19.

<sup>375</sup> Enterprise and Regulatory Reform Act 2013.

<sup>376</sup> DBIS, *Employment Law 2013: Progress on Reform* (n 374) 7.

<sup>377</sup> *ibid* 4.

<sup>378</sup> London Chamber of Commerce and Industry, *Migration reform: caps don't fit* (2011); Asa Bennett, ‘David Cameron's Attack on Immigration is 'Anti-Growth' and 'Complete Nonsense', Say Business Groups’ Huffington Post UK (London, 23 July 2013) <[http://www.huffingtonpost.co.uk/2013/07/24/david-cameron-immigration-business\\_n\\_3643556.html](http://www.huffingtonpost.co.uk/2013/07/24/david-cameron-immigration-business_n_3643556.html)> accessed 1 June 2014.

### 3.4 The ‘Regulatory Crucible’ of TMWPs

Some salient insights may be gained from the above analysis of the parallels and variations in the ‘regulatory crucibles’ of labour migration policies between the two countries and over time. First, the liberalisation of the two TMWPs in Australia and the UK from 1996 to 2005 sought to meet employers’ labour demands during a sustained period of economic growth, situated in a broader labour market policy context of promoting increased labour productivity and competitiveness through more flexible and deregulated labour markets. These developments also occurred against the backdrop of the endorsement of liberalising the global mobility of ‘human capital’ by certain international organisations including the World Trade Organisation and supranational institutions such as the European Commission.

The prevailing labour market regulatory regimes and structures have been an important factor in influencing the liberalisation of TMWPs across the skills spectrum in both countries. Since the 1980s, successive governments in Australia and the UK have embarked on policies aimed at ‘facilitating and stabilising flexible employment relations’.<sup>379</sup> Drawing on the influential (albeit contested) ‘varieties of capitalism’ literature, Ruhs argues that immigration policy in ‘liberal market economies’ such as Australia and the UK can be an instrument for promoting labour market flexibility by providing employers with workers ‘who can help maintain relatively low-cost production systems’. In comparison, ‘coordinated market economies’ are likely to face greater pressures to employ migrants at collectively

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<sup>379</sup> Collins, ‘Regulating the employment relation for competitiveness’ (n 45) 1.

agreed wages, in part due to the involvement of unions in developing and implementing labour migration policies.<sup>380</sup>

Menz also examines how employer preferences for certain migrant profiles are shaped by the exigencies of production strategies and education and training schemes associated with the system of political economy or variety of capitalism they are embedded in.<sup>381</sup> British employers' reliance on 'imported' skilled labour has partly arisen due to deficiencies in domestic training institutions. These deficiencies have shaped firms' human resource strategies such as poaching practices that are preferred to the more costly alternative in-house training. Furthermore, in a deregulated and fluid labour market, employers in the UK are more likely to delay the introduction of new technology in their production strategies in favour of relying on low-skill and low-wage labour, especially in food processing, agriculture, and construction sectors. These particularities can thus affect employer preferences for migrant labour at both ends of the skills spectrum.<sup>382</sup>

In Australia, there has been a shift away in labour migration policymaking from consideration of the broader macro-economic impacts of migration to the selection of migrants with 'fully formed' skills to fit into specific jobs.<sup>383</sup> The rise of the 457 visa scheme embodies this emphasis on 'who is available to perform specific tasks' as required by employers.<sup>384</sup> Birrell argues that the scheme's liberalisation was

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<sup>380</sup> Ruhs, *Price of Rights* (n 70) 38.

<sup>381</sup> Georg Menz, 'Employer Preferences for Labour Migration: Exploring 'Varieties of Capitalism'-Based Contextual Conditionality in Germany and the United Kingdom' (2011) 13 *The British Journal of Politics & International Relations* 534; Menz, 'Varieties of Capitalism and Labour Migration Policies' (n 19).

<sup>382</sup> Menz, 'Employer Preferences for Labour Migration' (n 19) 542-545.

<sup>383</sup> Crock and Friedman, 'Immigration Controls' (n 253).

<sup>384</sup> Crock and Berg, 'The Business of Temporary Labour Migration' (n 308) 13.

tantamount to ‘papering over the cracks in Australia’s domestic training system’.<sup>385</sup> These structural cracks have been compounded by labour market regulatory reforms since the 1990s such as the shifts from industry to enterprise-level bargaining and from government and industry-led training models to market-based regimes. These changes have been accompanied by cuts in public and private investment in skills formation across many occupations and industries.<sup>386</sup> Similar to the UK experience, Australian employers have relied on external recruitment or ‘poaching’ of skilled workers rather than invest in training of its own workforce.<sup>387</sup> To address these systemic labour market shortages, employers have become increasingly reliant on the use of flexible temporary migrant labour.

Nevertheless, market imperatives are not the only forces moulding the regulatory crucible of TMWPs in both countries. Policymakers are only too aware of the ‘political capital which could be gained’<sup>388</sup> in the realm of immigration. Changes to labour migration policies can often result from the pressures of political exigencies such as public attitudes towards immigration. The UK’s recent experience illustrates how populist demands for tighter immigration controls can exert a stronger influence on labour migration policies than employers’ demands for migrant workers. The political dynamics of the regulatory crucible also point to the manifold interests of and pressures from different actors in and beyond the labour market. The ‘national interests’ of the host state can thus encompass opposing interests of various groups of citizens that policymakers must respond to and weigh up. What it is clear from the

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<sup>385</sup> Bob Birrell, ‘Immigration on the rise: The 2001-2002 immigration program’ (2001) 9 *People and Place* 21, 28.

<sup>386</sup> Australian Senate Employment Workplace Relations and Education References Committee, *Bridging the Skills Divide* (2003) xxv.

<sup>387</sup> *ibid* 55.

<sup>388</sup> Bevan, *British Immigration Law* (n 318) 118.

above analysis is the general absence of considerations of migrants' rights and interests in these policy deliberations and decisions forged within the regulatory crucible of both TMWPs.

Finally, past policy legacies continue to influence the regulatory crucible of contemporary labour migration regimes. In Australia, the selective admission of migrants for permanent settlement served as a crucial nation-building tool to expand the population and economy for much of the 20<sup>th</sup> century. Although the traditional policy emphasis on permanent migration has been turned on its head since the inception of the 457 visa scheme, the rise of temporary labour migration has not escaped political controversy that was especially visible during the implementation of the WorkChoices industrial relations regime. Public debates on the 457 visa scheme have echoed tones of the country's historical 'awareness of the potential for unregulated foreign labour to undercut the terms and conditions of local workers'.<sup>389</sup> In the UK, the Blair Government inherited a restrictionist policy legacy that constrained its ability to create a convincing policy narrative around the benefits of liberalising labour migration. The ensuing political backlash led to the return of policy measures aimed at curbing the admission of non-EEA migrants, including those on Tier 2 (General) visas. Despite 'cutting red tape for businesses' through employment law reform, the current Cameron Coalition Government is overseeing an increasingly complex and restrictive labour migration regime under the PBS, with frequent recalibrations at every sign of political pressure.

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<sup>389</sup> Crock, Howe and McCallum, *Conflicted Priorities?* (n 251).

### **3.5 Conclusion**

The trajectories of the 457 visa and the Tier 2 (General) visa schemes have taken place in a ‘regulatory crucible’ that is continually forged by past policies as well as economic, political, and social institutional contexts including labour market regulatory norms and structures. In Australia, permanent settlement has played a central nation-building role over much of the 20<sup>th</sup> century, while temporary migrant labour was once shunned as the antithesis of a ‘white, permanent and free’ workforce. In contrast, the UK has long been characterised as having one of the most restrictive post-war labour migration regimes among industrialised countries. Yet, both countries liberalised the regulation of TMWPs around the same period (1997-2005), which was driven to a large extent by certain policy objectives of facilitating labour market flexibility and economic competitiveness. Nevertheless, a range of institutional forces and political dynamics in the regulatory crucible may restrain the dominance of market-driven imperatives on the design and implementation of labour migration policies. The next chapter explores the admission criteria and processes under the 457 visa and Tier 2 (General) visa schemes in light of their main espoused rationale of addressing skills shortages in the resident labour market. The following analysis further highlights how the multifarious and often-conflicting interests of employers, resident workers, and migrant workers in the regulatory crucible play out in the conditions of entry under the two TMWPs.

## **4. The Admission of Temporary Migrant Workers**

### **4.1 Introduction**

Having established a thorough contextual understanding of the 457 visa and Tier 2 (General) visa schemes in the previous chapter, I now turn to examine the admission criteria and processes which have significant implications for the interests of and relations between migrants, resident workers, and employers in the host state. First, the conditions of entry under TMWPs not only affect the supply of labour in the host state in quantitative terms, but also shape the qualitative profiles of migrant and resident workforces. Second, the espoused labour market objective of both the 457 visa and Tier 2 (General) visa schemes is to address, on a ‘temporary’ basis, skills shortages that cannot be immediately met by the resident workforce. Assessing claims of ‘skills’ and ‘shortages’ is a contested component of regulating admission under TMWPs, which raises important questions for policymakers over the number of migrants to admit, their demographics and countries of origin, the sectors and occupations they are recruited into.

Employers may desire a *laissez faire* model of admission under TMWPs where they have a significant role in determining the types of migrant labour to admit and the conditions of entry. At the same time, policymakers may recognise the interest of resident workers in having privileged access to the labour market since the intent of these schemes is not to displace resident workers or to undercut their wages and working conditions. The conditions of entry can also significantly affect the interests and rights of migrants admitted under TMWPs. In particular, the rationale of addressing resident labour shortages is commonly used to justify restrictions on

migrants' freedom to change employers, jobs, sectors, and/or geographical location of work in the host state.

This chapter critically analyses the admission framework of the two TMWPs in light of their *raison d'être* under an employer sponsored regulatory model. I begin with a review of the numbers and demographics of migrants admitted under the two schemes, which have changed with the admission criteria over time. This is followed by a close examination of the conditions of entry under the two schemes, which can be categorised into: the employer's sponsorship obligations, the job or occupation to be performed by the migrant, and the skills and attributes of the migrant. These conditions are mapped onto a typology of numerical, demand, and supply-related conditions of admission under the two schemes. The final section discusses how admission policies that are largely driven by employer demand may characterise employers' expression of a need for specific types of 'skilled' labour, as well as the implications of these policies for alternative responses to address skills shortages in the resident labour market.

## **4.2 Who are Admitted under these Schemes?**

### ***The 'headline' numbers***

In Australia, the number of primary visa applications lodged rapidly expanded from 16,550 in 1997-1998 to 71,840 in 2011-2012.<sup>390</sup> The fastest period of growth occurred from 2004-2005 to 2007-2008, coinciding with the WorkChoices labour law reforms. There was a slight decline in the number of 457 visa applications and grants in 2008-2009, partly arising from the effects of the global economic crisis on

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<sup>390</sup> DIAC, *Subclass 457 State/Territory summary report 2011-12 to 31 January 2012* (DIAC 2012) table 1.1.

labour demand and from reforms to the scheme in 2008 that closed several routes of sponsorship. However, the number of 457 visas returned to its longer-term growth trajectory from 2010 onwards. As of February 2013, the total number of primary 457 visa holders in Australia was at a record high of 107,510,<sup>391</sup> almost matching the capped permanent skilled migration intake. The total number of 457 visas (both primary and secondary) granted in 2011-2012 was 125,707, compared to 30,880 in 1997-1998.<sup>392</sup>

In the UK, the liberalisation of labour migration policies under New Labour saw the number of work permits issued to migrants and their dependants rise from 62,975 in 1997 to 137,035 in 2005. Excluding dependants, the number of work permit holders given leave to enter was 43,655 in 1997 and 91,515 in 2005.<sup>393</sup> However, the implementation of a more selective PBS from 2005 onwards saw a considerable decline in the admission of migrant workers from non-EEA countries, including those on Tier 2 visas. In 2009, the number of migrants admitted under the Tier 2 scheme was 33,685 (including 24,460 main applicants and 9,220 dependants).<sup>394</sup> Among this group of Tier 2, the General category consisted only of 8,970 main applicants, with 14,200 visas granted under the ICT route.<sup>395</sup> Since 6 April 2011, Tier 2 (General) visa has been subject to an annual limit of 20,700 places for out-of-country new applicants seeking entry clearance. In 2012, only 9,421 out-

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<sup>391</sup> DIAC, *Subclass 457 State/Territory summary report: 2012-13 to 28 February 2013* (DIAC 2013) 2.

<sup>392</sup> *ibid*; Joint Standing Committee on Migration, The Parliament of the Commonwealth of Australia, 'Temporary visas ... permanent benefits: Ensuring the effectiveness, fairness and integrity of the temporary business visa program' (August 2007) table 1.1.

<sup>393</sup> UK Parliament, *Hansard - Written Answers (12 September 2007: Column 2161W)* (2007) table 2.

<sup>394</sup> Home Office, *Control of Immigration Statistics: United Kingdom 2009* (2010) 21.

<sup>395</sup> Home Office, *Immigration Statistics: October to December 2012* (2013) table ad.03.w.

of-country visas were issued.<sup>396</sup> The number of grants for extension of stay under Tier 2 (General) has also seen a steady decline, from 12,900 grants to main applicants in 2009 to 11,295 in 2012.<sup>397</sup>

### ***Migrants' occupations, industries, and countries of origin***

In its early form, the 457 visa scheme admitted mostly managerial and professional workers.<sup>398</sup> The relaxation in its admission criteria from 2000-2005 saw a rapid growth in the number and proportion of 457 visas granted to those in semi-skilled and trades occupations such as welders, metal fabricators, motor mechanics, chefs and cooks,<sup>399</sup> as well as lower skilled occupations like meat workers and aged-care assistants.<sup>400</sup> In 2011-2012, technicians and trades workers constituted nearly 25 per cent of total number of primary visas granted.<sup>401</sup> The sectors with the highest number of 457 visa applications granted included: construction (13.4 per cent) health care and social assistance (11.5 per cent), and information media and telecommunications (11 per cent).<sup>402</sup> The top five nominated occupations for 457 visa applications in the financial year to 30 April 2013 were: cooks (4.2 per cent), program/project administrators (3.2 per cent), software developers and programmers (2.6 per cent),

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<sup>396</sup> *ibid*, table wk.01.

<sup>397</sup> *ibid*, table ex.02.

<sup>398</sup> Siew-Ean Khoo, Carmen Voight-Graf, Graeme Hugo and Peter McDonald, 'Temporary Skilled Migration to Australia: The 457 Visa Sub-Class' (2003) 11 *People and Place* 27, 38.

<sup>399</sup> Phillip Toner and Richard Woolley, 'Temporary migration and skills formation in the trades: a provisional assessment' (2008) 16 *People and Place* 47.

<sup>400</sup> Peter Mares, 'Border Control in Australia' in John Higley, John Nieuwenhuysen and Stine Neerup (eds), *Immigration and the Financial Crisis: the United States and Australia Compared* (Edward Elgar Publishing 2009) 86.

<sup>401</sup> DIAC, *Subclass 457 State/Territory summary report 2011-12 to 31 January 2012* (n 390) table 1.12.

<sup>402</sup> *ibid*, table 1.10.

café or restaurant managers (2.6 per cent), and general medical practitioners (2.3 per cent).<sup>403</sup>

The US, UK, and Ireland have been the major countries of origin for 457 visa holders admitted in the early years of the scheme.<sup>404</sup> As the scheme expanded, the range of countries of origin also widened, with a growing proportion of participants from developing countries. In 2011-2012, India (17.7 per cent), the Philippines (7.3 per cent), and China (3.8 per cent) were among the top six countries of origin of visa applications granted.<sup>405</sup> In the financial year to February 2013, the number of primary visas granted to Indian nationals (20.3 per cent) exceeded those granted to UK nationals (20.2 per cent).<sup>406</sup> In terms of gender breakdown, there is no Departmental data available. Based on a Migration Council Australia study in 2013 with a significant sample size of 3,811 visa holders (representing 5 per cent of all 457 visa holders at the time), 2,454 (64 per cent) were male and 1,357 female (36 per cent).<sup>407</sup> The majority of primary grant holders have been under 35.<sup>408</sup>

It has been suggested that the rise in visa applicants from developing countries is linked to their motivations for partaking in the scheme, such as the income differential between Australia and their country of origin,<sup>409</sup> and the

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<sup>403</sup> DIAC, *Subclass 457 State/Territory summary report: 2012-13 to 28 February 2013* (n 391).

<sup>404</sup> Khoo and others (n 398).

<sup>405</sup> DIAC, *Subclass 457 state/Territory summary report 2011-12* (2012) table 1.05.

<sup>406</sup> DIAC, *Subclass 457 State/Territory summary report (2012-13 to 30 April 2013)* (DIAC 2013) 2.

<sup>407</sup> Migration Council Australia, *More than temporary: Australia's 457 visa program* (2013) 11, 72.

<sup>408</sup> Siew-Ean Khoo, Graeme Hugo and Peter McDonald, 'Which skilled temporary migrants become permanent residents and why?' (2008) 42 *International Migration Review* 193, 205

<sup>409</sup> Bob Birrell, Ernest Healy and Bob Kinnaird, *Immigration and Nation Building and Jobs Plan* (2009).

opportunity to apply for permanent residency down the track.<sup>410</sup> The changes in demographics of 457 visa holders appear to be also linked to the reasons for the increasing usage of the scheme by employers. Such reasons not only include the rationale of addressing skill shortages but also certain perceived advantages of hiring migrant workers such as the ability to exercise more control, extract greater worker commitment, and reduce labour costs.<sup>411</sup>

Under the UK's work permits system in 2002, Clarke and Salt found that the largest national group was Indians with 18,999 visa grants (21 per cent of total), which rose from only 1,007 (8 per cent) in 1995.<sup>412</sup> There were also notable large increases for Filipinos, South Africans, and Malaysians between 1997-2002. Combining the data for nationalities and occupations, Clarke and Salt further found that many of the migrants from the Philippines, Zimbabwe, and Nigeria were health associate professionals, those from India were engineers and computer specialists, and those from Japan and the US filled managerial and administrative positions. Specifically, Filipinos accounted for a third of health associate professionals, and Indians 70 per cent of engineers and technologists and 78 per cent of computer analysts or programmers on work permits. Around 21 per cent of grants to Chinese nationals were for catering occupations.<sup>413</sup>

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<sup>410</sup> Siew-Ean Khoo, Peter McDonald, Carmen Voight-Graf and Graeme Hugo, 'A Global Labor Market: Factors Motivating the Sponsorship and Temporary Migration of Skilled Workers to Australia' (2007) 41 *International Migration Review* 480, 499.

<sup>411</sup> Joo-Cheong Tham and Iain Campbell, 'Temporary Migrant Labour in Australia: The 457 Visa Scheme and Challenges for Labour Regulation' (Centre for Employment and Labour Relations Law, Working Paper No 50, March 2011) 7; Siew-Ean Khoo, Graeme Hugo and Peter McDonald, 'A Global Labor Market: Factors Motivating the Sponsorship and Temporary Migration of Skilled Workers to Australia' (2007) 41 *International Migration Review* 480.

<sup>412</sup> Clarke and Salt, 'Work permits' (n 311) 572.

<sup>413</sup> *ibid.*

In 2011-2012, India remained the top country of origin of Tier 2 visa applicants for grants of out-of country entry clearance visas: 17,900 out of 33,700 for all categories of Tier 2 and 3,600 out of 10,100 for Tier 2 (General) visas, as well as for grants of extension of stays: 7,520 out of 18,195 for Tier 2 all categories and 2,853 out of 11,295 Tier 2 General). These numbers well exceed the rest of the league table, such as the US, China, the Philippines, South Africa, and Pakistan. Notably, the vast majority (almost 70 per cent) of the Tier 2 ICT visas are issued to Indian nationalities.<sup>414</sup> The top five sectors under which the majority of the 40,740 sponsorship certificates issued in 2012 related to Information and Communication (43 per cent), Professional, Scientific, and Technical Activities (18 per cent), Financial and Insurance Activities (13 per cent) Manufacturing (6 per cent), and Education (5 per cent). These sectors also accounted for 70 per cent of the 27,815 certificates used for applications for extensions.<sup>415</sup> Recent data combining a breakdown of sectors with nationalities was not available, although the MAC noted that the Information and Communication sector, by a large margin, is the largest user of Tier 2 (especially the ICT route) to bring in migrant workers, predominantly from India.<sup>416</sup>

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<sup>414</sup> Home Office, *Immigration Statistics: October to December 2012* (n 395).

<sup>415</sup> *ibid.*

<sup>416</sup> MAC, *Analysis of the Points Based System: Tier 2 and dependants* (2009) 8.

## 4.3 Conditions of Entry

### *The 457 visa scheme*

In contrast to the more extensive formal application procedures for permanent migration categories, the 457 visa scheme entails a much faster processing track with less stringent admission criteria. At its inception, the scheme contained eight different sponsorship pathways.<sup>417</sup> Since then, the different streams have been simplified into two main routes of entry: standard sponsorships by an Australian or overseas business, and Labour Agreements negotiated with DIAC. The following analysis focuses on the standard business sponsorship through which a vast majority of 457 visas are obtained. This standard route consists of three stages: first, the sponsoring employer must apply to DIAC for approval as a business sponsor; the approved sponsor then lodges a business nomination which sets out the position of the migrant; and finally, the migrant applies for the visa on the basis of the sponsorship and business nomination.

### **Employer sponsorship requirements**

Under the initial scheme in 1996, Australian business sponsors could be approved as a pre-qualified business sponsor (PQBS) or a standard business sponsor.<sup>418</sup> A PQBS that had satisfied certain criteria (such as the sponsor's size, business performance, financial standing and demonstration of a continuous need for large numbers of overseas workers) could nominate an unlimited number of overseas workers within the two-year period of that status. In comparison, standard business sponsors were

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<sup>417</sup> Migration Regulations 1994 (Cth) sch 2, cl 457.223(1).

<sup>418</sup> *ibid*, reg 1.20D (as in force on 1 July 2003).

subject to a specified quota per nomination. Legislative changes in 2003 merged both routes with the aim of ‘speeding up’ processing procedures.<sup>419</sup> Since then, all standard business sponsors could apply for an unlimited number of 457 visa nominations.

As a basic requirement, standard business sponsors must show that their business is viable, operating lawfully, and no adverse information is known about the business or a person associated with the business.<sup>420</sup> Sponsors are also required to satisfy certain sponsorship undertakings, including: cooperating with immigration inspectors,<sup>421</sup> paying travel costs to enable the visa holder to leave Australia,<sup>422</sup> paying costs incurred by the Commonwealth to locate and remove unlawful non-citizens,<sup>423</sup> keeping records,<sup>424</sup> providing records and information to the Minister,<sup>425</sup> notifying DIAC when certain events occur,<sup>426</sup> ensuring the primary visa holder only works in the specific nominated position,<sup>427</sup> and to not recover certain costs of recruitment or sponsorship from the visa holders.<sup>428</sup>

Since 2009, sponsors are also required to attest to having a ‘strong record of, or demonstrated commitment to employing local labour and non-discriminatory work

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<sup>419</sup> Migration Amendment Regulations 2003 (No 5) (Cth).

<sup>420</sup> Migration Regulations 1994 (Cth) reg 2.59.

<sup>421</sup> *ibid*, reg 2.78.

<sup>422</sup> *ibid*, reg 2.80.

<sup>423</sup> *ibid*, reg 2.81.

<sup>424</sup> *ibid*, reg 2.82.

<sup>425</sup> *ibid*, reg 2.83.

<sup>426</sup> *ibid*, reg 2.84.

<sup>427</sup> *ibid*, reg 2.86.

<sup>428</sup> *ibid*, reg 2.87.

practices'.<sup>429</sup> This provision seeks to reinforce the message that the scheme is not intended to replace resident workers,<sup>430</sup> but it only requires the sponsor to provide a written attestation. As Ruhs notes, the 'trust the employer' attitude inherent in self-attestation measures under labour migration regimes is usually associated with limited verification measures.<sup>431</sup> Legislative changes in 2009 also introduced a new criterion based on 'training benchmarks' for standard business sponsors.<sup>432</sup> If a sponsor has been trading for over 12 months in Australia, it would need to meet the specified legislative benchmarks for training Australian citizens and permanent residents. Sponsors that have been trading for less than 12 months must have an auditable plan to meet such benchmarks. Either one of the benchmarks must be met: spending equivalent of at least 2 per cent of the company's payroll to an industry training fund (a statutory authority); or evidence of spending the equivalent of 1 per cent of the payroll on training its own employees.<sup>433</sup>

### **Nomination of position**

Once a business has been approved as a sponsor, it may then nominate the position in which the visa holder would be engaged.<sup>434</sup> However, there is little scope for DIAC to independently assess the materials in the nomination applications, which generally

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<sup>429</sup> *ibid*, reg 2.59(f).

<sup>430</sup> Minister for Immigration and Citizenship, 'Employers must put locals first' (Canberra, 2 March 2010) <<http://www.minister.immi.gov.au/media/media-releases/2010/ce10018.htm>> accessed 14 April 2012.

<sup>431</sup> Ruhs, *Openness, Skills and Rights* (n 70) 10.

<sup>432</sup> Migration Regulations 1994 (Cth) reg 2.59(d)-(e): inserted by Migration Amendment Regulations 2009 (No 5) (Cth) sch 1.

<sup>433</sup> Migration Regulations 1994 - Specification under subregulations 2.59(d) and 2.68(e) -Training Benchmarks - IMMI 09/107 (2009).

<sup>434</sup> Migration Regulations 1994 (Cth) reg 2.72.

rely on employers' written attestations and self-assessment certifications. The only way to assess the veracity of employers' nominations is through random audits and inspections for compliance, which can be difficult in the context of general resource constraints on enforcement efforts. The problem with this undemanding form of self-attestation, where the employers' request for engaging migrant labour is deemed to be sufficient proof per se, is the absence of an independent labour market test to verify employer's labour needs.<sup>435</sup> There have been numerous reported cases of sponsored workers performing activities outside the scope of their nominated position<sup>436</sup> and without the necessary skills.<sup>437</sup>

For much of its existence, the 457 visa scheme did not require employers to undertake a labour market test to demonstrate the unavailability of suitably skilled resident workers for the nominated position. The initial scheme distinguished between 'key activity' and 'non-key activity' positions. Nominations of 'key activity' positions 'essential to the business operations'<sup>438</sup> were not subject to any requirement of labour market testing. For 'non-key' positions of over 12 months in duration, the sponsor had to show that a suitably qualified Australian citizen or permanent resident was 'not readily available to fill the position'.<sup>439</sup> An 'employer say-so' approach could be found in the approval of nominations involving 'key activity', which was

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<sup>435</sup> Philip Martin, 'Towards Effective Temporary Work Programs: Issues and Challenges in Industrial Countries' (International Migration Paper No 89 2007) 29.

<sup>436</sup> *Mason v Harrington Corporation Pty Ltd, trading as Pangaea Restaurant and Bar* [2007] FMCA 7.

<sup>437</sup> *Victorian WorkCover Authority v Lakeside Packaging Pty Ltd* (Broadmeadows Magistrate's Court, unreported, 2 July 2008).

<sup>438</sup> Migration Regulations 1994 (Cth) reg 1.20B (as in force on 1 August 1996).

<sup>439</sup> *Ibid* reg 1.20H(3) (as in force on 1 August 1996)

based merely on the employer's attestation.<sup>440</sup> Furthermore, labour market testing for non-key activities was abolished altogether in 2001. It was not until 2013 that saw the return of a limited form of labour market testing.<sup>441</sup> For occupations below a certain skills level, sponsors must show evidence that the position had been advertised in the local labour market as well as provide information regarding any redundancies of Australian workers from the relevant division of their business within a four-month period preceding the 457 visa nomination.<sup>442</sup>

From 2001 to 2007, the scheme had in place a gazetted minimum salary level (MSL) to prevent employers from 'over-classifying' a nominated position to meet the requisite skill requirements for visa applications.<sup>443</sup> If there was a gazetted minimum salary in force for the visa holder's position, the sponsor must undertake to pay at least the MSL or any specified wages of applicable industrial instruments, whichever is higher. The sponsor could not reduce the migrant's salary below the MSL aside from certain allowable tax deductions. Subsequent amendments in 2008 replaced the MSL with the requirement that the wages and conditions of the nominated position must be 'no less favourable' than those that are provided, or would be provided, to an Australian citizen or permanent resident for performing equivalent work in the same

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<sup>440</sup> Tham and Campbell (n 411) 12.

<sup>441</sup> Migration Act 1958 (Cth) s 140GBA(3); inserted by Migration Amendment (Temporary Sponsored Visas) Act 2013 (Cth) sch 2.

<sup>442</sup> Migration Act 1958 (Cth) s 140GBA(3).

<sup>443</sup> DEWR, *Review of Australia's Skilled Labour Migration and Temporary Entry Programs: Submission to the Joint Standing Committee on Migration* (2002) 6.

workplace.<sup>444</sup> Furthermore, this rate must be higher than the Temporary Skilled Migration Income Threshold (TSMIT) as set and varied over time by the Minister.<sup>445</sup>

The nominated position must also meet a minimum skills threshold. From 2001 to 2010, the skills threshold was based on the Australian Standard Classification of Occupations (ASCO). A gazetted list, formerly known as Employer Sponsored Temporary Entry List (ESTEL), was created in 2001 and defined the occupations eligible for the 457 visa as those in ASCO major groups 1 to 4. These groups included: managers and administrators, professionals, associate professionals, and tradespersons and related workers.<sup>446</sup> In 2004, the ESTEL became linked with the Employer Nominated Skilled Occupations List (ENSOL), the list of skilled occupations eligible for the permanent employer sponsored migration route of the Employer Nomination Scheme (ENS), although a unique list of eligible occupations for the 457 visa scheme was later created.

Prior to 2007, the regulatory framework permitted sponsors from regional Australia to nominate workers in occupations in ASCO groups 5 to 7 (which included clerical, sales and service workers, production, and transport workers) and to pay 10 per cent less than the gazetted MSL. These concessions were supposedly in place to recognise the ‘special skill needs of regional Australia’.<sup>447</sup> ‘Regional’ was also broadly defined to encompass all of Australia except for a handful of metropolitan cities. Employers could obtain certification from a local Regional Certifying Body (RCB) that the ‘genuine full-time position’ was necessary to its

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<sup>444</sup> Migration Regulations 1994 (Cth) reg 2.79.

<sup>445</sup> *ibid*, reg 2.72(10)(cc).

<sup>446</sup> ASCO major groups 1 to 4 had an entry-level prerequisite of a completed trade certificate (Australian Qualifications Framework Certificate III) or higher-level, tertiary qualification that usually required at least three years full-time study.

<sup>447</sup> Joint Standing Committee on Migration, *Temporary visas* (n 392) 40.

operation and could not be ‘reasonably’ filled locally.<sup>448</sup> RCBs were given enormous powers in certifying exemptions from the standard skills and salary requirements. There have been numerous concerns raised over the neutrality, transparency, and consistency of RCBs’ constituency and deliberations,<sup>449</sup> such as the potential for conflicts of interest when the RCBs were also regional chambers of commerce.<sup>450</sup>

The significant implication of this regional nomination stream was that the 457 visa scheme ceased to be an exclusively ‘skilled’ avenue of labour immigration. Hugo’s study of regional 457 visas in South Australia revealed the use of this concessional stream to recruit semi-skilled and lower-skilled migrants in low-paid, low-status occupations and industries that could not attract resident workers.<sup>451</sup> From mid-2005 to the end of 2006, there were 378 of these visas granted in South Australia (since the entire state is deemed as ‘regional’), with 63.2 per cent being outside of metropolitan Adelaide. The largest occupational categories were slaughter workers, farm workers, agricultural scientific officers, and machinery operators/drivers. Notably, nominations of slaughter workers (who would not otherwise meet the standard sponsorship skills requirement) were approved under this concessional route to meet labour shortages in regional abattoirs.

Legislative amendments in 2008 ended these regional concessions,<sup>452</sup> but less-skilled occupations can still be nominated through Labour Agreements. The skilled occupations for which a standard 457 visa could be directly granted must fall

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<sup>448</sup> Migration Regulations 1994 (Cth) reg 1.20GA(1)(a)(ii)-(iii) (as in force on 1 July 2003).

<sup>449</sup> Deegan, *Final Report* (n 293) 48

<sup>450</sup> Joint Standing Committee on Migration, *Temporary visas* (n 392) 71-76.

<sup>451</sup> Graeme Hugo, ‘Immigrant Settlement Outside of Australia’s Capital Cities’ (2008) 14 *Population, Space and Place* 553, 563-564.

<sup>452</sup> Migration Legislation Amendment (Worker Protection) Act 2008 (Cth).

within ASCO groups 1 to 3. The immediate effect of these reforms was a dramatic reduction in the number of visa grants for ASCO groups 5 to 7, with only 10 out of 34,790 primary visas granted to workers in these occupations in 2009-2010.<sup>453</sup> The granting of visas within ASCO groups 1 to 4 also became more selective in favour of managers and professionals. In 2009-2010, 91 per cent of primary visa grants went to ASCO groups 1-3 and 9 per cent were to tradespersons (ASCO group 4), compared to 82 per cent and 18 per cent respectively in the preceding year.<sup>454</sup> The ASCO system switched to the Australian and New Zealand Standard Classification of Occupations (ANZSCO) system from 1 July 2010. The same occupations remained eligible for 457 visas and were simply assigned new codes and descriptions. The list of eligible 457 occupations was merged with the ENSOL in 2012 to become the Consolidated Sponsored Occupation List (CSOL).

#### **Visa application of the nominated worker**

After DIAC's approval of the employer's sponsorship and nomination, the third and final step is the visa application by the nominated worker who must have the necessary skills, qualifications, and experience to perform the nominated position. However, an independent process to actually verify visa holders' skills and qualifications did not exist for much of the scheme's existence. Skills verification can serve two important purposes: to ensure that the scheme brings in genuinely skilled migrants to fill domestic shortages; and to identify workplace health and safety risks that may arise from inadequate skills for the job. Again, there seems to be a considerable degree of reliance on employers' self-attestation that the visa applicant

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<sup>453</sup> DIAC, *Subclass 457 Business (Long Stay) — State and Territory Summary Report, 2009-2010* (Department of Immigration and Citizenship 2010) table 1.12.

<sup>454</sup> *ibid.*

has the requisite skills. The only way to check is for DIAC to undertake compliance audits.<sup>455</sup> As part of reforms to the scheme in 2009, formal assessments of skills claimed by applicants in certain trade occupations conducted by an independent assessment body have been introduced.<sup>456</sup>

An English language competency requirement was only introduced in 2007 for primary 457 visa applicants under standard business sponsorships. Applicants must demonstrate language proficiency that is equivalent to a score of 5 in each of the test components (speaking, reading, writing and listening) of the International English Language Testing System (IELTS) examination, or a higher score if it forms part of the nominated occupation's licensing or registration.<sup>457</sup> However, exemptions exist for 457 visa holders earning over a certain base salary (the threshold in 2014 was AUD 96,400 per annum).<sup>458</sup> Similarly, language concessions may be obtained under a Labour Agreement.

### **Labour Agreements**

Although only a small proportion of 457 visas are granted under Labour Agreements,<sup>459</sup> the regulatory significance of this route is the possibility for businesses to request concessions from the Minister that deviate from standard sponsorship arrangements. Employers who are party to Labour Agreements generally

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<sup>455</sup> Deegan, *Final Report* (n 293) 35-37.

<sup>456</sup> DIAC, *Important changes to the Subclass 457 Business (Long Stay) visa program* (2009).

<sup>457</sup> Migration Amendment Regulations 2007 (No 5) (Cth) sch 6.

<sup>458</sup> Migration Regulations 1994 - Tests, Scores, Period, Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas - IMMI 14/009 (2014) reg 6.

<sup>459</sup> At June 2010, there were 162 labour agreements in effect and another 71 under negotiation. Around three per cent of all 457 visas are granted under Labour Agreements: DIAC, *Subclass 457 changes: a labour agreements perspective* (DIAC 2013).

do not have to satisfy the conditions under standard business sponsorships, such as the minimum skills, salary, and/or language requirements. The policy intent is that since Labour Agreements are directly negotiated with DIAC, there would be additional protections for 457 visa holders in a weaker labour market position while employers can still access this flexible route to meet special labour needs.<sup>460</sup> Since 2011, Labour Agreements must include an obligation to ensure that the employment terms and conditions of visa holders are ‘no less favourable’ to those that would be provided to an Australian worker performing the same duties at the same location.<sup>461</sup>

For certain industries, Labour Agreements are the only route to access 457 visa holders. For example, the meat industry has been a major user of Labour Agreements. This labour-intensive sector is generally characterised by low-paid, low-status, ‘dirty’, and strenuous work with high levels of workplace injuries. Labour Agreements have been used to provide a supply of 457 visa holders working in this sector, where the standard skills and language requirements could be waived.<sup>462</sup> Another industry that may only use Labour Agreements rather than standard business sponsorships is the ‘on-hire’ (or labour hire) sector. Since 2008, on-hire firms can no longer sponsor 457 visa holders on standard arrangements for the purpose of contracting out their labour. Such businesses must enter into ‘On-hire Labour Agreements’ with DIAC and DEEWR after meeting certain training benchmarks.<sup>463</sup>

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<sup>460</sup> Deegan, *Final Report* (n 293) 43.

<sup>461</sup> Migration Regulations 1994 (Cth) reg 2.79.

<sup>462</sup> Australasian Meat Industry Employees Union, ‘AMIEU Submission to Joint Standing Committee on Migration Inquiry into Temporary Business Visas’ (AMIEU, 2007) <[www.aph.gov.au/HOUSE/committee/mig/457visas/subs/sub023.pdf](http://www.aph.gov.au/HOUSE/committee/mig/457visas/subs/sub023.pdf)> accessed 21 March 2013, 10.

<sup>463</sup> DIAC, *On-hire labour agreements: Information for employers about labour agreement submissions* (2012).

Two new types of Labour Agreements, EMAs and RMAs, have been introduced in 2011 to meet the special labour needs of employers in the resources industry and in regional and rural Australia. These agreements are aimed at streamlining negotiation arrangements and achieving faster processing times for 457 visa applications in these special categories. EMAs are available for resources projects with a capital expenditure of at least AU\$2 billion and a peak workforce of 1,500 workers. For EMAs to be approved, the projector owner generally needs to submit a training plan that includes the up-skilling of the resident workforce.<sup>464</sup> RMAs are agreements between the Australian Government and a state or territory government or local council in regions with less than 150,000 in population and show high labour market participation rate and growth in employment. RMAs provide regional employers access to ‘specialised semi-skilled occupations where a need can be established’.<sup>465</sup> The former skills concessions for regional employers under RCB certification arrangements (prior to the 2007 legislative arrangements) have, in effect, been brought into the remit of the new RMAs.

DIAC guidelines indicate that the negotiation of a Labour Agreement requires employers to demonstrate that they have made genuine and extensive attempts to recruit local labour for filling their vacancies. DIAC further examines the company’s resident workforce training and up-skilling strategies as well as other evidence of labour market need (such as local unemployment, nearby industries, and remoteness of location). However, the Deegan Review raised concerns about the lack of

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<sup>464</sup> DIAC, ‘Fact Sheet 48a – Enterprise Migration Agreements’ (n 299).

<sup>465</sup> DIAC, ‘Fact Sheet 48c - Regional Migraton Agreement’ (*Commonwealth of Australia*, 2011) <<http://www.immi.gov.au/media/fact-sheets/48c-rma.htm>> accessed 1 August 2013.

transparency in the process of negotiations.<sup>466</sup> Tham points out that the making of these Labour Agreements is purely based on the exercise of executive power at the Minister's discretion and the contents are not made public.<sup>467</sup>

### ***The Tier 2 (General) visa scheme***

From 2008 onwards, Tier 2 (General) visa under the PBS replaced the UK's previous main work permits system. The idea behind the PBS is that the admission of migrants could and should be assessed by reference to a set of objectively verifiable criteria for which points are allocated.<sup>468</sup> Migrants would be granted entry clearance and/or leave to enter or remain provided that they score sufficient points for the specified attributes of the relevant tier. At the time of writing, the breakdown in the Tier 2 (General) visa's 70-points allocation is as follows: 30 points for having a sponsor and a valid certificate of sponsorship (CoS),<sup>469</sup> 20 points for meeting an appropriate salary and allowances threshold, 10 points for English language proficiency, and 10 points for demonstrating a minimum level of maintenance funds.<sup>470</sup> If the occupation is on the government's Tier 2 Shortage Occupation List (SOL), the applicant will automatically receive 50 points for the assignment of a CoS

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<sup>466</sup> Barbara Deegan, *Visa Subclass 457 Integrity Review, Issues Paper No. 1: Minimum Salary Levels/Labour Agreements* (DIAC 2008) 22.

<sup>467</sup> Joo-Cheong Tham, 'Opinion: 457 reasons for reform' *Sydney Morning Herald* (29 May 2012) <<http://www.smh.com.au/federal-politics/political-opinion/457-reasons-for-reform-20120528-1zf6y.html>> accessed 1 August 2013.

<sup>468</sup> David Jackson, George Warr, Julia Onslow-Cole and Joseph Middleton, *Immigration Law and Practice* (Bloomsbury Professional 2008) para 10.3.

<sup>469</sup> In procedural terms, the CoS is a 'virtual document' assigned by the licensed sponsor to the migrant applying for a Tier 2 visa. The migrant must quote the CoS reference number when applying for permission to enter or remain in the UK.

<sup>470</sup> UKBA, *Tier 2 of the Points Based System - Policy Guidance (version 07/14)* (2014) 16.

but must still satisfy the English language proficiency and minimum maintenance requirements.

The admission criteria under the Tier 2 (General) visa therefore encompass three sets of conditions. First, in order to issue a CoS to the visa applicant, the employing business must be licensed as a Tier 2 sponsor by meeting eligibility and suitability criteria. Second, the job offered to the migrant must fall within the SOL or pass a resident labour market test (RLMT). The job must further meet a general minimum level of skills and earnings, as well as any specific requirements for that occupation and sector. Finally, the applicant must meet the English language competency and maintenance requirements. There is no requirement on the employer to show that the sponsored worker actually possesses the skills and qualifications for the job, since the requirement pertains only to the nature of the job. The following analysis discusses these three sets of conditions in turn.

### **Becoming a licensed sponsor**

The employer must apply to the UKBA for a license by demonstrating its eligibility and suitability to be a sponsor. As a basic eligibility condition, the employer must demonstrate that it is a ‘genuine organisation operating lawfully in the UK’.<sup>471</sup> The suitability criterion is concerned with the capability of the employer to carry out the required duties of a licensed sponsor. These duties include: informing the UKBA if the migrant has not turned up for work or has been absent without permission for a significant period; reporting to the UKBA if the migrant’s employment is terminated earlier than the date indicated on the CoS, or if there are any significant changes to

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<sup>471</sup> UKBA, *Tiers 2 and 5 of the Points Based System - Guidance for Sponsors (Version 04/14)* (2014) 3.

the employment circumstances of the migrant (such as change of tasks or salary); and keeping proper records of sponsored migrants, among other requirements.<sup>472</sup>

The employer's suitability is assessed on the basis of its human resource processes and practices, compliance with immigration laws, and criminal convictions and/or civil penalties (if any) against the business and any key personnel.<sup>473</sup> Following the evaluation, the UKBA may issue an A-rating or B-rating, refuse the application, or even revoke any existing sponsor licence.<sup>474</sup> An A-rating is given if the employer can show it has 'all the necessary systems in place' to meet the sponsorship duties and there is no evidence of abuse of immigration laws. Where the employer cannot prove its ability to fully comply with sponsors' duties (such as not having proper systems in place or there is previous evidence of non-compliance with immigration laws), it may still be issued with a B-rating. The granting of a B-rating is considered 'transitional' by UKBA, as the employer must pay for and adhere to a three-month 'sponsorship action plan' (prepared by UKBA) that sets out the necessary steps to be taken in order to gain (or regain) an A-rating, or risk the revocation or suspension of its license. According to the UKBA Sponsors' Guidance, the action plan may include: better recordkeeping, improving control over staff who are employed to assign CoS, or enhancing communication between different branches of the business to better ascertain whether a migrant has been absent from

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<sup>472</sup> *ibid* 46-49.

<sup>473</sup> *ibid* 3, 20, 25.

<sup>474</sup> *ibid* 30-31.

work.<sup>475</sup> The compliance of migrants themselves with immigration rules also plays a role in determining a business' suitability for a sponsor license.<sup>476</sup>

The sponsor license lasts for four years from the date of issuance and must be renewed before it expires if the business wants to continue acting as a sponsor. At the time of application for a license, the business is asked for an estimate of the number of CoS it expects to assign each year in the relevant visa tiers and categories. Once the sponsor licence has been granted, the business can apply to extend the scope of tiers and categories on which its CoS is assigned. Based on the estimate provided by the business, the UKBA sets an annual allocation for the number of 'unrestricted' CoS which the sponsor may issue. 'Unrestricted' CoS are distinct from 'restricted' CoS, the latter of which have been subject to a UK-wide annual limit of 20,700 places since 6 April 2011. The quota for 'restricted' CoS applies for new hires earning less than £150,000 who require entry clearance into the UK, and for dependents of a migrant already in the UK whose last leave was under Tier 4 and seeks to switch to a Tier 2 (General). The annual limit does not apply to applications seeking to extend leave under Tier 2 or switching from an existing eligible category to a Tier 2 visa. 'Restricted' CoS are divided into monthly allocations by the UKBA and sponsors must apply through a separate application process, since an unrestricted CoS cannot be allocated in its place. Sponsors with a B-rating or suspended license cannot apply for 'restricted' CoS.

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<sup>475</sup> *ibid* 56-58.

<sup>476</sup> *ibid* 48.

**Requirements of the position**

When assigning a CoS under Tier 2 (General), the sponsor must guarantee that the job offered to the migrant passes a RLMT or is exempt from the test. The RLMT essentially requires the sponsor to make appropriate efforts to seek suitable resident jobseekers for vacancies before seeking out non-EEA migrant workers. The RLMT procedure must be done through advertising the vacancy for 28 days on the government's Jobcentre Plus website and one other medium as permitted in the relevant sector-based codes of practice set by UKBA. The sponsor must specify in the advertisement the job title, job description, location, salary, requisite qualifications, skills, experience, and closing date for applications.<sup>477</sup> Certain jobs are exempted from the requirement of advertising through Jobcentre Plus, but still must follow the method set out in the sector code of practice. The CoS must be assigned within six months from when the vacancy is first advertised (or twelve months for PhD-level occupations). The policy intent is to ensure that the 'results of advertising reflect the current availability of the skills' required.<sup>478</sup> Moreover, the sponsor cannot 'refuse to employ a settled worker if they lack qualifications, experience or skills (including language skills) that were not asked for in the job advertisement'.<sup>479</sup>

The RLMT is not required in a range of circumstances, including where the non-EEA migrant already has permission to stay in the UK under the former Tier 1 (post-study work) visa or specialised graduate schemes where the migrant is undertaking medical speciality training in the UK and needs to apply for further leave under the Tier 2 (General) visa to complete the training; or where the migrant is

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<sup>477</sup> *ibid* 86-90.

<sup>478</sup> *ibid* 91.

<sup>479</sup> *ibid* 87.

graduating from a UK university with a recognised degree and switching from Tier 4 into Tier 2. A RLMT is also not required where the gross annual salary package for the job will be £150,000 or above. If the CoS is issued for an extension of leave, a RLMT would not be required since the applicant must continue to work in the same occupation for the same sponsor as stated in the original CoS.<sup>480</sup>

In addition to the RLMT, the job must also be at or above a minimum skill and qualifications level. At the inception of the PBS, the minimum skill level for Tier 2 (General) occupations was at National Vocational Qualification (NVQ)<sup>481</sup> Level 3, broadly corresponding to A-levels qualifications. Since 2010, this requisite skills threshold has steadily increased. In 2012, it was raised from National Qualifications Framework (NQF)<sup>482</sup> / NVQ Level 4 (equivalent to diplomas and certificates of higher education) to a much higher NQF Level 6 (corresponding to a bachelor's degree). There are currently very few exemptions from the NQF6+ requirement, which primarily comprise of creative occupations such as artists, authors, actors, dancers and choreographers, and product, clothing, and related designers.<sup>483</sup>

Furthermore, all positions under Tier 2 (General) visa are subject to a 'default' minimum annual salary threshold of £20,300<sup>484</sup> or the appropriate rate of pay set out for the occupation and job title based on the Standard Occupational

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<sup>480</sup> *ibid* 128.

<sup>481</sup> The NVQ is a work-based qualification and accreditation framework designed to measure competence in a professional role, based on national occupational standards. NVQ has been progressively being replaced with Qualifications and Credit Framework in England, Wales, and Northern Ireland.

<sup>482</sup> The NQF is a credit transfer system developed for qualifications in England, Wales, and Northern Ireland. There are nine NQF levels covering all levels of learning in secondary education, further education, vocational and higher education.

<sup>483</sup> MAC, *Full review of the recommended shortage occupation lists for the UK and Scotland, a sunset clause and the creative occupations* (2013) 19.

<sup>484</sup> Home Office, *Statement of Intent: Codes of Practice for skilled workers* (n 32) 7.

Classification (SOC)<sup>485</sup> in the relevant sector code of practice, whichever is higher. The only exception to this minimum salary requirement applies to nurses and midwives who are undergoing a period of learning or supervised practice to gain Nursing and Midwifery Council registration. This group is paid at £15,190 in the Section Q (human health and social work activities) code of practice, and can be sponsored under Tier 2 below the minimum pay threshold for a period of time until they have gained their registration.<sup>486</sup>

The main exemption from the RLMT criteria, minimum skills, and earnings threshold is where the position falls within the UK Government-approved Tier 2 SOL, provided that the employment is for at least 30 hours per week. Priority is given to visa applicants under the SOL should the annual limit of 20,700 places for out-of-country applicants be reached.<sup>487</sup> This list details the occupations and job titles that are considered to be experiencing a current labour shortage in the whole of the UK and/or Scotland only and would be sensibly filled by non-EEA labour. MAC is periodically commissioned by the Government to review and make recommendations on updating the contents of the list. In its approach, MAC analyses three 'skilled, shortage, and sensible' questions: Is the occupation or job title sufficiently skilled? Is there an identified national labour shortage? Is it demonstrably sensible to fill this shortage using immigration from outside the EEA?<sup>488</sup>

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<sup>485</sup> The SOC is a classification system of occupational information for the UK which is produced and revised every ten years by the Office for National Statistics. It classifies job titles into groups of occupations marked by similar skills and knowledge level. The latest version is SOC 2010 which classifies 27,966 jobs into 369 occupations.

<sup>486</sup> MAC, *Analysis of the Points Based System: List of occupations skilled at NQF level 6 and above and review of the Tier 2 codes of practice* (2012) 23.

<sup>487</sup> MAC, *2013 SOL Review & Sunset Clause* (n 483) 1.

<sup>488</sup> MAC, *2008 SOL review* (n 360).

MAC's methodology entails examining a range of top-down indicators, commissioned research, its own analysis, as well as bottom-up evidence submitted by stakeholders (such as public and private sector employers that are major users of the Tier 2 visa, employer groups, unions, and other interested parties). In its assessment, MAC first looks at indicators of whether an occupation is skilled at NQF 6+, such as the SOC skill level, earnings, formal qualifications, on the job training or experience, and level of innate ability required. It generally seeks evidence from stakeholders in relation to certain job titles that are not within an occupation skilled at NQF6+ but may nonetheless be equivalent. Second, to ascertain if an occupation is experiencing a labour 'shortage', MAC considers 12 top-down (employer-based, price-based, volume-based, and other) indicators, as well as any relevant bottom-up evidence from the stakeholders. Finally, MAC considers the sensibility of using migrant labour to fill shortages on a case-by-case basis by inquiring into alternatives to employing immigrants, the skills acquisition of the UK workforce, the effect on investment, innovation, and productivity growth, and impact on the wider UK labour market and economy.<sup>489</sup>

The current UK Coalition Government's policy commitment to curb non-EEA migration has been reflected in the tightening of requirements for the RLMT and SOL routes. The RLMT has been subject to criticisms of being too undemanding and lacking rigour in its enforcement, with the Home Affairs Committee noting the potential abuses of the test: 'It is vital that unscrupulous employers are prevented from obeying merely the letter, and not the spirit, of the test by advertising in obscure

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<sup>489</sup> MAC, *2013 SOL Review & Sunset Clause* (n 483) 33-43.

locations or at unrealistic rates'.<sup>490</sup> During the 2009-2010 economic downturn, there were recurring calls for the RLMT route to be abolished altogether, leaving the SOL the only route for skilled migrants under the Tier 2 (General) visa.<sup>491</sup> The MAC concluded there was no economic case for closure of the RLMT route, since it allowed for employers to account for local shortages while the SOL was concerned only with national shortages.<sup>492</sup>

### **Attributes of the visa applicant**

Under the Tier 2 (General) visa, the minimum skill threshold is concerned with the occupation itself, rather than the applicant's own skills. It is assumed, based on the employer's attestation, that the applicant has the necessary skills to perform the occupation. This approach differed from the former work permits system that required the applicant to demonstrate her qualifications and skills during the application process. Prior to 2000, the general work permit scheme required the applicant had to possess a UK degree-equivalent qualification and two years of experience, or at least five years of senior level experience. The requisite level of qualifications and experience was attenuated by a relaxation of admission rules in 2000, which required only one of the following: the equivalent qualification of a UK bachelor's degree; three years of senior level experience in the relevant specialised area; a higher national diploma (HND) enabling the applicant to do the specific job; a

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<sup>490</sup> House of Commons Home Affairs Committee, *Managing Migration: The Points Based System* (2009) para 80.

<sup>491</sup> Clayton, *Immigration & Asylum Law* (n 49) 367.

<sup>492</sup> Instead of closing the RLMT route, MAC recommended an extended period of advertisement and further enforcement measures for 'high-risk' sponsors: MAC, *Tier 2 and dependants* (n 416) 8-9.

HND and one year of relevant experience; or three years of relevant experience in a skilled occupation at NVQ level 3 or above.<sup>493</sup>

Tier 2 (General) visa applicants must also demonstrate a minimum level of English language competence and sufficient maintenance funds for themselves and their family members. The language requirement is at a ‘basic conversation’ level, equivalent to B1 on the Council of European Framework of Reference. The requirement can be met if: the migrant is a national of a majority English-speaking country or pass an approved English language test; or holds a degree that was taught in English and is equivalent to a UK bachelor’s degree.<sup>494</sup> The maintenance requirement stipulates that applicants must provide evidence of having personal savings of at least £900 in their bank accounts over a consecutive period of three months. Alternatively, an A-rated sponsor may undertake to provide maintenance and accommodation for the migrant and family members for the first month of employment in the UK.<sup>495</sup>

#### **A brief note on the Tier 2 (ICT) category**

Although the focus of this thesis is not on Intra Company transferees (ICT), it should be noted that the growth of visas issued in this category has occurred at the same time as the decline in Tier 2 (General) visas in recent years. Unlike the General category, the ICT route is not subject to an annual cap. The number of ICT visas issued to main applicants and dependants has increased from 29,069 in 2009 to 64,277 in 2012 (47,221 out-of-country visas plus 17,056 in-country grants of

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<sup>493</sup> Somerville, *Immigration Under New Labour* (n 148) 30-31.

<sup>494</sup> UKBA, *Tier 2 Policy Guidance* (n 470) 27.

<sup>495</sup> *ibid* 32.

extensions).<sup>496</sup> The majority of new visa grants under Tier 2 have been in the ICT category in recent years, constituting nearly 70 per cent of all main out-of-country visas issued in 2012.<sup>497</sup> Tier 2 (ICT) visa applicants require 60 points in total, with 30 points available for the assignment of a CoS, and 20 points for appropriate earnings threshold, and 10 points for maintenance funds.

As the admission criteria under the Tier 2 (General) route have become more demanding, some employers may resort to sponsoring migrants on ICT visas. Based on data in 2009, the approval rate for ICT visas (93.4 per cent) was higher than general migrants (79.2 per cent).<sup>498</sup> Although the earnings threshold for ICT is higher than the General route (£40,000 per annum for long-term staff and £24,000 for short-term staff and graduate trainees), the process of obtaining an ICT visa is less rigorous. Notably, there is an absence of any RLMT or SOL requirement pertaining to the ICT occupation. The skills threshold of the job must be at NQF6+. Prior to the PBS, the employer had to show that the sponsored ICT applicant had the required company-specific knowledge and experience that could not be offered by a resident worker.<sup>499</sup> Under the PBS, the applicable criterion is that the applicant has been employed for at least 12 months with the sponsor immediately preceding the application, either in the UK (in an ICT or related category) or outside the UK.<sup>500</sup>

The ICT route, with its less demanding criteria compared to Tier 2 (General), has been criticised for being a 'loophole' that is prone to abuse. These concerns have

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<sup>496</sup> John Salt, *International Migration and the United Kingdom: Report of the United Kingdom SOPEMI Correspondent to the OECD* (2010) table 5.1; UKBA, *Immigration statistics: out of country visas to the UK issued and in country extensions of stay by work categories* (2012).

<sup>497</sup> UKBA, *Work data tables: Immigration Statistics July - September 2012* (2012).

<sup>498</sup> Salt, *International Migration and the UK* (n 496) 93.

<sup>499</sup> Clayton, *Immigration & Asylum Law* (n 49) 368.

<sup>500</sup> UKBA, *Tier 2 Sponsors' Guidance (04/14)* (n 471) 99-100.

focused on practices in the IT sector where contracting firms has brought in non-EEA migrants on ICT visas to engage in short-term project assignments for clients.<sup>501</sup> The top ten users of ICTs in 2010 and 2011 were IT, software, and technology businesses.<sup>502</sup> Trepidations over ICT visas being used to displace resident workers' jobs and undercut wages and conditions were raised in successive MAC reviews.<sup>503</sup> Since 2009, the Government has tightened up aspects of this route, including: increasing the required period of previous employment with the company (from six to 12 months), raising the minimum income threshold for long-term visa holders, and ending this category as a route to permanent settlement. Many of the more contentious features have remained, such as its uncapped nature and the absence of any labour market testing or shortage occupation requirements.

#### **4.4 A Typology of Restrictions on Admission**

The conditions of entry under the two schemes can be broadly categorised into three main considerations: the number of migrants to admit, obligations on the sponsoring employer, and requirements that prospective migrants must satisfy. Ruhs identifies these three types of controls respectively as: quotas, demand-side, and supply-side restrictions on admission.<sup>504</sup> First, numerical restrictions can comprise of 'hard' caps or 'soft' targets, and may be based on sector, occupation, and region. Second,

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<sup>501</sup> Jenny Cuffe, 'British Jobs' *BBC File on 4* (2 June 2009) <[http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/02\\_06\\_09\\_fo4\\_itjobs.pdf](http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/02_06_09_fo4_itjobs.pdf)> accessed 1 August 2013; Migration Watch UK, *The abuse of ICT visas in the IT sector* (2010).

<sup>502</sup> Public Accounts Committee, *Immigration: the Points Based System - Work Routes* (2011) figure 3.

<sup>503</sup> MAC, *Tier 2 and dependants*; MAC, *Limits on Migration: Limit on Tier 2 (General) for 2012/13 and associated policies* (2012) 10.

<sup>504</sup> Ruhs, *Openness, Skills and Rights* (n 70).

demand-side restrictions on admission include: the requirement of a job offer from the sponsor, labour market testing, sectoral and occupational restrictions, wage and salary thresholds, work permit fees, and trade union involvement. Finally, nationality and age, gender and marital status, skills, language, and self-sufficiency requirements are examples of supply-side constraints. This typology is augmented with an additional demand-side control: the level of ‘regulatory burden’ for employers arising from the cost of immigration compliance and administration. In my extended analysis, the skills prerequisite of the occupation is framed as a demand-side restriction, a condition that is distinct from the skills and qualifications of the migrant.

### ***An unlimited supply of temporary migrant workers?***

Determining how many migrants to admit is often a core aspect of labour migration policy, especially when there is constant headline attention devoted to the ‘numbers’ in this politically sensitive arena. At the same time, there is considerable manipulability of ‘numbers’ in the compilation and usage of immigration statistics. For policymakers, quotas, caps, and targets are the most direct instruments to restrict the scale and size of the intake under migration programmes. There may be ‘hard’ caps that cannot be exceeded where the quota is reached for the year. Alternatively, ‘soft’ targets may be implemented as a guideline rather than fixing a numerical ceiling. Caps and targets can apply to migrants across the skills spectrum, specific sectors and occupations, geographical regions, and/or in some cases, countries of origin. Permanent migration programmes in traditional settlement countries like Australia commonly feature an overall planning target that is adjusted from year to

year.<sup>505</sup> In contrast, the more flexible mechanism of TMWPs is less likely to have a set quota, where employers' demand for migrant workers is the primary determinant of the number of temporary work permits and visas issued.

As Ruhs asserts, 'the level of labour immigration that is in the interest of individual employers is unlikely to coincide with that in the best interest of the economy as whole'.<sup>506</sup> Numerical restrictions that function as a 'brake' on employer demand can reflect other labour market interests, such as the resident workforce's employment and training opportunities and the standard of wages and conditions. The uncapped, demand-driven 457 visa scheme has been heralded by policymakers as highly responsive to the changing needs of the Australian economy.<sup>507</sup> However, critics have pointed to the potential for employers to have permanent access to an unlimited supply of temporary migrant workers that would substitute the resident workforce.<sup>508</sup> Furthermore, concerns have emerged over the rapid growth of this uncapped scheme as a 'backdoor' entry to permanent residence for which entry is strictly quota-controlled.<sup>509</sup>

In contrast, the current UK Coalition Government has introduced an annual 'hard' cap limiting the number of Tier 2 (General) visa applicants from outside the

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<sup>505</sup> OECD, 'Managing Migration – Are Quotas and Numerical Limits the Solution?' in OECD (ed), *International Migration Outlook* (2006).

<sup>506</sup> Ruhs, 'Potential of temporary migration programmes' (n 16) 14-15.

<sup>507</sup> DIAC, '457 visa program responds well to economic needs' (3 February 2013) <<http://www.newsroom.immi.gov.au/channels/Visas/releases/457-visa-program-responds-well-to-economic-needs-3>> accessed 1 August 2013.

<sup>508</sup> Bob Birrell and Ernest Healy, 'Scarce Jobs: Migrants or Locals at the end of the Queue?' (Centre for Population and Urban Research, Monash University 2013).

<sup>509</sup> Peter Mares, 'The permanent shift to temporary migration' *Inside Story* (17 June 2009) <<http://inside.org.au/the-permanent-shift-to-temporary-migration/>> accessed 30 April 2013.

country as part of its policy to reduce non-EEA migration.<sup>510</sup> Prior to this, the work permits system/ Tier 2 (General) visa had no set limit, as the scheme was perceived to be an ‘automatic stabiliser’ in adjusting to cyclical changes in labour demand.<sup>511</sup> Employers have often criticised numerical limits on admission as a ‘blunt’ instrument for hindering their flexibility and competitiveness in ‘accessing the migrant labour they value most highly’.<sup>512</sup> However, as Ruhs and Anderson put it, ‘what employers want’ is influenced by what they ‘think they can get’ from different groups of workers.<sup>513</sup> In other words, the demand and supply for migrant labour are interrelated and mutually conditioning. Restrictions on the supply and demand of migrant labour are not only concerned with placing limits on the number to admit, but also the selection of who to admit and how they are admitted, as will be explored in the next two subsections.

### ***Demand-side restrictions***

#### **Job offer as a precondition for entry**

The attainment of a job offer is at the heart of an employer demand-driven TMWP where migrants are recruited by employers to fill specific vacancies. Under the 457 visa and Tier 2 (General) visa, the job offer forms the basis of a mandated employer sponsorship of the migrants’ visa. Therefore the migrant’s legal authorisation to enter and work in Australia and the UK is predicated on a contract of employment with an

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<sup>510</sup> Melanie Gower, *April 2011 changes to Tier 1 and Tier 2 of the points-based system and indefinite leave* (House of Commons Standard Note, SN/HA/5922 2011) 1.

<sup>511</sup> MAC, *Tier 2 and dependants* (n 416) 1.

<sup>512</sup> Murray, *Britain's points based migration system* (n 362) 8.

<sup>513</sup> Martin Ruhs and Bridget Anderson, ‘Migrant Workers: Who Needs Them? A Framework for the Analysis of Staff Shortages, Immigration, and Public Policy’ in *Who Needs Migrant Workers?: Labour shortages, immigration, and public policy* (OUP 2010) 16.

eligible sponsor at the time she applies for her visa. In comparison, supply-driven independent migration schemes usually admit the migrant if she has met certain criteria such as education and work experience. However, the migrant is not bound to take up any employment with a particular sponsoring employer after her admission. Australia's General Skilled Migration (GSM) programme and the UK's Tier 1 visa would be characterised as supply-driven schemes associated with efforts to attract highly skilled migrants based on their human capital.

Advocates of an employer-driven admission model premised on a job offer argue that it facilitates greater labour market efficiency and flexibility than supply-led schemes, since migrants' skills and attributes would more directly and immediately match the specific demand of employers.<sup>514</sup> These programmes are also claimed to be more responsive to cyclical fluctuations in the labour market, as a slowdown in employer demand for labour would (theoretically) reduce immigration intakes without requiring any time-consuming and cumbersome policy changes.<sup>515</sup> Sponsorship arrangements are also perceived to offer further advantages for employers seeking workers in targeted areas of the labour market, such as in remote locations or sectors/occupations that experience acute shortages. This may be more difficult under supply-driven schemes where there are fewer restrictions on migrants' labour mobility.

There is a further claim that an employer-led admission model is more likely to obtain better labour market outcomes since skilled migrants on employer sponsored visas already arrive in the host state with a job offer. They are also more likely to work in a job relevant to their skills and qualifications, since the admission

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<sup>514</sup> Demetrios G. Papademetriou, Will Somerville and Hiroyuki Tanaka, *Hybrid Immigration-Selection Systems: The Next Generation of Economic Migration Schemes* (Migration Policy Institute 2008).

<sup>515</sup> OECD, *International Migration Outlook: SOPEMI 2011* (2011) 107.

criteria generally require that they have the necessary skills and experience for the nominated position.<sup>516</sup> Employer selection from the onset is said to prevent the risk of an initial period of unemployment that a migrant may face under a supply-led scheme, particularly where there is a failure to recognise the migrant's skills and credentials.<sup>517</sup> There is purportedly higher labour market 'absorption' or integration of migrants on employer sponsored programmes compared to supply-driven routes.<sup>518</sup>

Underpinning some of these claims is an 'employers-know-best' approach to identifying and addressing labour and skills shortages. However, employer-driven admission procedures do not necessarily mean that migrants' skills are better matched with labour market needs, which are distinct from the employer's specific needs. A migrant worker can still be over-qualified or under-qualified for the job that forms the basis of her sponsorship. Under a system of employer sponsorship, the labour market outcomes for migrants can critically depend on the employer's goodwill and the worker's relative bargaining power. As Chapter 5 examines in detail, this model of employer sponsorship under the two TMWPs can be a critical source of hyper-dependence and hyper-precarity.

### **Labour market testing: trust the employer?**

Usually accompanying the requirement of a job offer is labour market testing to assess whether employers' requests for migrant labour represent genuine shortages that cannot be filled in the domestic labour market. Labour market testing seeks to

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<sup>516</sup> OECD, *International Migration Outlook: SOPEMI 2010* (2009) 104.

<sup>517</sup> Demetrios G. Papademetriou and Madeleine Sumption, *Rethinking Points Systems and Employer-Selected Immigration* (2011) 4.

<sup>518</sup> Mark Cully, 'Skilled migration selection policies: recent Australian reform' (2011) 1 Migration Policy Practice 4, 6.

ensure that employers can bring in workers under TMWPs only after making reasonable attempts to recruit resident qualified candidates. The policy intent is to protect and privilege the employment opportunities of the resident workforce. Forms of labour market tests can be broadly categorised into self-attestation by the employer and a stronger ‘certification’ test by a government agency or institution.

The self-attestation approach is largely based on employer ‘say-so’ in declaring that they have been unsuccessful in searching for suitably qualified resident workers to fill the vacancy. Government enforcement and checks on employers’ local recruitment efforts do not feature heavily under this ‘trust the employer’ approach. In comparison, certification generally requires stricter evidential requirements to obtain confirmation or verification from a particular body (such as a public employment agency) that the requirements of the labour market test have been met before any applications are submitted. The effectiveness of certification depends on the design and enforcement of pre-admission checks.<sup>519</sup> These forms of labour market testing may apply to all sectors and occupations covered by a TMWP, or in some cases certain sectors or occupations may be exempted, such as those where there is a known shortage of resident workers.<sup>520</sup>

The 457 visa scheme initially had a weak labour market test for ‘non-key’ occupations based on employer self-attestation, but this was abolished altogether in 2001. There was no form of labour market testing for standard 457 visa applications until June 2013 (which apply only to lower-skilled occupations). The negotiation process for Labour Agreements does not formally require employers to undertake labour market testing either. The former concessions for regional employers to

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<sup>519</sup> MAC, *Tier 2 and dependants* (n 416) 79.

<sup>520</sup> Ruhs, *Openness, Skills and Rights* (n 70) 10-11.

sponsor lower skilled occupations had a limited de facto labour market test, since RCBs had to ensure that a position could not ‘reasonably be filled locally’ before certifying the concession. In general, the absence of labour market testing and the availability of skills and salaries concessions under the 457 visa scheme seemed to confirm the ‘emphasis that is placed on the needs and wishes of employers’.<sup>521</sup>

In comparison, the Tier 2 (General) visa scheme entails a stronger form of labour market testing. The RLMT requires employers to follow detailed sector-based guidance to advertise the vacancy at a certain wage level in specified forms of media for at least 28 days. Although this is closer to a certification mechanism, there is still a substantial degree of ‘trust the employer’ since the sponsors/employers essentially test the market themselves. There is a risk that the RLMT may simply be a tick-box exercise without sufficient pre-admission checks. The benefits of the RLMT have been described by the Confederation of British Industry (CBI) as allowing ‘firms to test the market themselves and ensur(ing) employers can hire with flexibility and speed’.<sup>522</sup>

#### **‘Shortage’ occupations and sectors**

A common alternative to labour market testing is the creation and periodic review of a specified list of shortage occupations at national and/or regional/sector levels. This list may be drawn up by the labour and/or immigration department, or by independent expert panels and/or a group of stakeholders such as employers, industry groups, trade unions, and local authorities. Employers can bring in migrants to fill vacancies for occupations on this list, usually without needing to undertake a labour

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<sup>521</sup> Mary Crock, ‘Immigration and Labour Law: Targeting the Nation's Skills Needs’ in Andrew Frazer, Ron McCallum and Paul Ronfeldt (eds), *Individual Contracts and Workplace Relations* (Working Paper No 50, ACCIRT 1997).

<sup>522</sup> Murray, *Britain's points based migration system* (n 362) 41.

market test. A shortage occupation list, as a method of admission under TMWPs, raises challenging questions about how to accurately and objectively determine the nature and duration of particular shortages in the labour market.

There may be short-term, cyclical shortages based on fluctuations in the demand for skilled labour. Shortages can also be of a medium to long-term structural nature, arising from the rapid growth of certain sectors (for example, the mining and resources sector in Australia) and the lack of sufficiently skilled and trained resident workers. A specific type of structural shortage pertains to public or public-funded jobs, such as those in health and social care, where constraints on public spending can create a mismatch between supply and demand by generating a prevailing level of wages that is too low for resident workers.<sup>523</sup> MAC has further distinguished another category of shortages known as ‘global talent’ where some employers must compete in a world market for the very best talent, such as skilled ballet dancers or top musicians.<sup>524</sup>

As outlined earlier, the SOL under the Tier 2 (General) is regularly reviewed by MAC, which makes robust and detailed expert analysis of skills shortages in and across sectors by examining top-down indicators and bottom-up evidence from stakeholders. The Government has largely drawn on MAC’s recommendations to update the SOL. In this respect, the MAC is a vital institution in the architecture of the Tier 2 (General) visa scheme in fulfilling its key rationale of meeting genuine skills shortages. During the recent economic recession, the MAC’s new recommended lists reflected occupations that mostly fell into structural and (some)

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<sup>523</sup> Ruhs and Anderson, ‘Migrant Workers: Who Needs Them?’ (n 513) 44.

<sup>524</sup> MAC, *Skilled Shortage Sensible: Full review of the recommended shortage occupation lists for the UK and Scotland* (2011) 1-2.

global talent shortages.<sup>525</sup> On the whole, the SOL appears to be used for occupations that tend to have a lower salary than those on the RLMT route and predominantly within certain industries such as skilled trades (including chefs and cooks), textiles, printing, and caring and personal services.<sup>526</sup>

As of September 2012, the SOL contains occupations that employ less than 1 per cent of the UK workforce.<sup>527</sup> In 2011-2012, the SOL route accounted for 15 per cent of the CoS granted for Tier 2 (General) visas.<sup>528</sup> This partly reflected the substantial ‘cull’ of over 100 occupations on the SOL since MAC’s first review in 2008. The number of (British and migrant) workers in the UK employed in SOL occupations has fallen from over a million in 2008 to only 180,000 in 2012-2013.<sup>529</sup> This raises the question of its practical value given the availability and greater accessibility of the RLMT route for employers to recruit migrant workers. MAC investigated the Government’s requests for consultation on closing the RLMT route<sup>530</sup> and on combining the two routes,<sup>531</sup> but concluded that RLMT remained a necessary avenue for employers to address local shortages.

MAC was further asked in 2012 to advise on the proposed inclusion of a ‘sunset clause’ in SOL that would automatically remove occupations from the list after two years. With an emphasis that the SOL would only provide temporary relief

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<sup>525</sup> *ibid.*

<sup>526</sup> MAC, *Limits on Migration: Limits on Tier 1 and Tier 2 for 2011/12 and supporting policies* (2010) 90-91.

<sup>527</sup> MAC, *Skilled Shortage Sensible. Call for Evidence: Review of the shortage occupation lists for the UK and Scotland and Creative Occupations* (2012) 6.

<sup>528</sup> MAC, *2012 Review of NQF* (n 486) 19.

<sup>529</sup> MAC, *2013 SOL Review & Sunset Clause* (n 483) 5.

<sup>530</sup> MAC, *Tier 2 and dependants* (n 416).

<sup>531</sup> MAC, *Limits on Tier 1 and Tier 2* (n 526).

to labour shortages, the Government's rationale for the proposal was: 'to discourage complacency and over-reliance on migrant labour among employers'; 'motivate employers to train and up-skill resident workers'; and 'alert education providers and governing bodies to the efficacy of their attempts to address skill shortages'.<sup>532</sup> MAC recommended the retention of frequent reviews of the SOL rather than introducing a sunset clause. It reasoned that the clause would not take sufficient consideration of individual sectors' economic conditions or the time required to train domestic workers. A sunset clause was also considered a 'disproportionate response' since immigration inflows under SOL were so small compared to other routes of entry.<sup>533</sup>

In contrast, the gazetted CSOL of specified occupations for which the 457 visas could be sponsored reflects a very broad range of occupations above a certain ANZSCO skills threshold that are not restricted to occupations with a demonstrated national or regional shortage. It has been unclear the extent to which the government departments responsible for drawing up the list, DIAC and DEWR, 'customise the gazetted list in terms of listing not only 'skilled' occupations but also migration occupations in demand'.<sup>534</sup> In other words, this gazetted list seems to be less attuned to 'shortages' than to the 'skilled' requirement. Both the Joint Standing Committee on Migration Inquiry into the 457 visa scheme and the Deegan Review recommended the adoption of more rigorous procedures to ensure that the list corresponds to skilled occupations experiencing current shortages.<sup>535</sup>

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<sup>532</sup> MAC, *2013 SOL Review & Sunset Clause* (n 483) 46.

<sup>533</sup> *ibid* 1.

<sup>534</sup> Joint Standing Committee on Migration, *Temporary visas* (n 288) 80.

<sup>535</sup> *ibid* 81; Deegan, *Final Report* (n 293) 21.

In contrast, the Skilled Occupation List for the permanent GSM category is compiled and regularly updated by DIAC on the annual advice of an independent statutory body, the Australian Workplace Productivity Agency (AWPA). AWPA rigorously analyses a wide range of evidence — from labour market, economic, and demographic data to information gathered from stakeholder consultations — to identify occupations where independent skilled migrants will assist in meeting medium and long-term skill needs.<sup>536</sup> In 2013, this List contained only 187 occupations — a vast majority of which are at ANZSCO Skill Levels 1 and 2.<sup>537</sup> The CSOL, which combined the sponsored occupation lists for the 457 visa and the permanent ENS, has over 600 occupations.<sup>538</sup> While a majority of CSOL occupations are at ANZSCO Skill Levels 1 and 2, there are a substantial proportion at Level 3 and some at Levels 4 and 5 (the lowest in the ANZSCO skill hierarchy).

Nevertheless, a shortage list, even one that is regularly updated like the UK's SOL, is inherently limited in its ability to fully capture industry, sector, regional, and local variations. The Deegan Review of the 457 visa scheme recognised that even where there was general agreement among stakeholders on shortages in certain industries, this did not equate to agreement that such shortages existed throughout the whole country.<sup>539</sup> Moreover, the possible inclusion of lower-skilled occupations on these lists raises the question of whether employers are facing labour shortages rather than specific skills shortages. As discussed further in the next part, the 'skilled' focus

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<sup>536</sup> AWPA, 'Skilled Occupation List' (2013) <<http://www.awpa.gov.au/our-work/labour-market-information/skilled-occupation-list/Pages/default.aspx>> accessed 1 August 2013.

<sup>537</sup> DIAC, 'Annual Update of Skilled Occupation Lists' (2013) <<http://www.immi.gov.au/skilled/general-skilled-migration/skilled-occupation-list.htm>> accessed 1 August 2013.

<sup>538</sup> DIAC, *Consolidated Sponsored Occupation List* (2013).

<sup>539</sup> Deegan, *Final Report* (n 293) 32, 33, 39.

of these TMWPs may thus be compromised. Yet shortage lists can serve an important political function by communicating to the public that such schemes are highly selective and focused on specific skills most needed in the resident labour market.<sup>540</sup> Compared to labour market testing, the very specificity of a shortage list can lead to substantial contestation between stakeholders over the nature and extent of particular shortages, as employers, business and industry groups, professional bodies, and trades unions seek to influence the compilation and review of such lists.

### **The malleability of ‘skills’**

Both TMWPs are restricted to the sponsorship and nomination of migrants in skilled occupations. However, the indicators or criteria for identifying the notion of ‘skills’ are highly contested. The formal frameworks for ascertaining the requisite level of skills for eligible occupations under the 457 visa and Tier 2 (General) visa have largely been academic and vocational qualifications. For example, the threshold for Tier 2 (General), NQF Level 6, is described with reference to qualifications equivalent to Bachelor’s degrees with honours, graduate diplomas and certificates. ANZSCO appears to combine relevant experience and on-the-job training with formal qualifications. ANZSCO Skill Level 3 is described as a level of skill commensurate with Australian Qualifications Framework (AQF) Certificate IV or AQF Certificate III plus at least two years of on-the job training. Three years of relevant experience may substitute for these formal qualifications.<sup>541</sup>

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<sup>540</sup> Jonathan Chaloff, ‘Structuring Evidence-based Regulation of Labour Migration’ (Expert Commissions and Migration Policy Making conference, UC Davis, 23 April 2013) 8.

<sup>541</sup> ABS, ‘Appendix 2 ANZSCO skill levels’ (ABS, 2005) <<http://www.abs.gov.au/ausstats/abs@.nsf/0/C4BECE1704987586CA257089001A9181?opendocument>> accessed 1 August 2013.

If the skills frameworks under TMWPs are too rigidly defined and applied in a tick-box manner, this may create problems for certain occupations and sectors that have a stronger focus on ‘soft’ skills. An illustrative example is the social care sector, where the formal qualifications of carers (including those with many years of experience) can often be lower than the requisite formal skills threshold but entail a high level of interpersonal skills that are difficult to measure. Care work was excluded from the MAC’s first list of ‘skilled’ occupations for Tier 2 (General) visa in 2008. Subsequently, in 2009, MAC added the position of senior skilled care workers if certain criteria were met, including the possession of NVQ2+ qualifications, minimum experience and pay, and supervisory responsibility in the post to which they are recruited.<sup>542</sup>

Yet the problems associated with defining ‘skills’ can mean that ‘skills shortages’ can become so far-reaching as to include the shortage of any job that requires some degree of ‘skill’.<sup>543</sup> The concessional arrangements under the 457 visa scheme, which opened up the possibility for employers to recruit semi-skilled migrants in a range of occupations and sectors, arguably undermined its emphasis on admitting ‘skilled’ migrants. As noted earlier, the current CSOL of eligible occupations is extremely expansive and has been criticised for not being related to the ‘skilled’ aspect of labour shortages. Although the skills threshold under the Tier 2 (General) visa has increased since 2009, certain occupations such as senior care workers, butchers and meat cutters, and chefs have remained on the SOL. The MAC have found that some occupations with acute shortages, as a whole, did not meet its

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<sup>542</sup> MAC, *Skilled Shortage Sensible. Second review of the recommended shortage occupation lists for the UK and Scotland: Autumn 2009* (2009) 177.

<sup>543</sup> Ken Mayhew, ‘Migrant Workers: Who Needs Them? A Commentary’ in Martin Ruhs and Bridget Anderson (eds), *Who Needs Migrant Workers* (OUP 2010) 54.

‘skill’ criteria but recommended their inclusion on the SOL subject to a minimum pay and relevant experience thresholds.<sup>544</sup> It should be noted that many (except for the highly qualified) of these occupations have been taken off the list in 2011 as the limits on admission under the Tier 2 (General) visas have become more restrictive.

Chefs and cooks working in ethnic cuisine restaurants, an occupation that has featured in the gazetted list of eligible occupations and SOL, is an example of employer demand for particular groups of ‘skilled’ migrants. This demand may be related to these migrants’ authentic culinary skills, knowledge (including the customs and language of the workplace), and experience of a particular culture or tradition that may not easily be transferrable to resident workers — a reason cited in a MAC review of why some ethnic restaurants and food businesses continue to rely on migrant labour even in recessions.<sup>545</sup> However, this demand may in practice stem from reasons other than the migrant’s ‘cultural capital’,<sup>546</sup> including a willingness to work unsocial hours and for lower wages compared to resident workers.<sup>547</sup>

Ruhs and Anderson argue that a flexible approach to defining and assessing skills and skill requirements in the admissions criteria for TMWPs could go beyond formal credentials and account for the shifting nature of job skill demands in an economy with a large, growing services sector and rapid technological change.<sup>548</sup> At the same time, it should be emphasised that employers play a critical role in shaping the demand for particular types of ‘skills’. There have also been arguments that employers are better judges of the ‘soft’ skills and capabilities that they find

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<sup>544</sup> MAC, *SOL Review 2009* (n 542) 160.

<sup>545</sup> *ibid.*

<sup>546</sup> Ruhs and Anderson, ‘Migrant Workers: Who Needs Them?’ (n 513) 33.

<sup>547</sup> MAC, *SOL Review 2009* (n 542) 155, 159.

<sup>548</sup> Ruhs and Anderson, ‘Migrant Workers: Who Needs Them?’ (n 513).

valuable, such as an ability to work in teams, problem solving capabilities, and customer service skills.<sup>549</sup> Yet these ‘soft’ skills may actually be referring to certain traits, attitudes, and qualities of a more acquiescent workforce that employers can more easily control.

### **Wages requirement**

Employers’ demand for migrants to fill domestic shortages can depend on the prevailing level of wages and employment conditions which may not attract a sufficient supply of resident workers. Thus skills and labour ‘shortages’ can be created in a way that gives credence to employers’ demand for migrants who may be willing to accept the lower wages and conditions offered. Even where the wages in the ‘shortage’ occupation and/or sector are much higher than the labour market average (for example, the mining and resources industry in Australia), employers’ use of migrant labour can help moderate wage demands by resident workers. Thus the risk of migrants ‘undercutting’ or ‘underpricing’ and thereby potentially displacing resident workers is a recurring theme in the political discourses associated with the two TMWPs.

Both TMWPs impose restrictions on wages and other employment conditions at which the migrants must be employed. Such restrictions may serve as a de facto limit on the admission of migrants under these demand-driven schemes if employers find it more expensive to source labour from overseas than to hire and/or to upskill resident workers. Ruhs distinguishes three types of wage restrictions based on their degree of openness. The most open policy would simply require the employer to comply with the legal minimum wage. A more restrictive ‘intermediate’ approach

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<sup>549</sup> Elizabeth Collett and Fabian Zuleeg, *Soft, Scarce, and Super Skills: Sourcing the Next Generation of Migrant Workers in Europe* (Migration Policy Institute 2008).

would entail paying migrants at least the average or prevailing wage in relevant occupation and/or sector. Finally, the most restrictive policy would require employers to meet prevailing industrial standards as determined by collective agreements, which is most common in strong coordinated market economies and welfare states.<sup>550</sup>

The wage and salary requirements under the 457 visa and the Tier 2 (General) visa arguably fall into the intermediate category. Both schemes adopt a two-tier restriction based a general minimum salary threshold as well as a market rate or an appropriate rate of pay specific to the sector and/or occupation in question, with the requirement that the higher rate is adopted. However, determining the average or prevailing wage in a certain sector and/or occupation can be very challenging, given that the rates of pay can vary widely across workplaces and geographical locations within the same sectors and occupations. Furthermore, this variance of pay can be more pronounced under decentralised systems of wage determination (at the enterprise level) that have been promoted in Australia and the UK over the past two decades.

Under the Tier 2 (General) scheme, the ‘appropriate’ annual salary rates for certain occupations are set out in one of 13 sector-based codes of practice issued and revised by the UKBA,<sup>551</sup> generally following the recommendations of MAC. A majority of occupational rates are determined based on the Annual Survey of Hours and Earnings produced by the Office for National Statistics. These rates are divided into ‘new entrant’ and ‘experienced worker’ categories, with ‘new entrant’ threshold set at the 10<sup>th</sup> percentile of the pay distribution for full-time employees in that

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<sup>550</sup> Ruhs, *Openness, Skills and Rights* (n 70) 12.

<sup>551</sup> Immigration Rules, Appendix J.

occupation, and ‘experienced workers’ at the 25<sup>th</sup> percentile. New entrants are subject to the 25<sup>th</sup> percentile threshold when applying for leave to remain after three years (that is, extension and settlement applications). Bespoke pay scales apply for a number of occupations in health, education, architecture and barristers undertaking pupillages.<sup>552</sup>

Instead of determining a fixed market salary rate, the 457 visa has a ‘no less favourable’ requirement. Where there is an Australian worker performing equivalent work in the sponsor’s workplace, the ‘no less favourable’ rate is determined by the industrial arrangement that applies to that resident worker. However, this principle operates only at the workplace level, which means the applicable rate can still be lower than the prevailing market rate. Even within a workplace, the differentiation of pay rates based on employment status, length of service, working time arrangements, applicable allowances, and overtime rates can pose obstacles to ascertain the rate received by an ‘equivalent’ worker. Where there is no equivalent worker, Departmental guidelines state that the sponsor should refer to applicable industry awards or enterprise agreements, or provide any other evidence to substantiate the nominated salary rate.<sup>553</sup> However, given the complex, multi-layered wage determination mechanisms in Australia, ascertaining the relevant market rate is not an easy or straightforward task in practice.

It should be noted that the ‘no less favourable’ rate was introduced in 2008 after reviews of the scheme identified numerous deficiencies in the operation of the previous MSL. While the MSL was aimed at preventing employers from undercutting wage standards, it did not ensure 457 visa holders would receive

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<sup>552</sup> MAC, *2012 Review of NQF* (n 486) 7; Home Office, *Statement of Intent: Codes of Practice for skilled workers* (n 32) 5.

<sup>553</sup> DIAC, *Temporary Business (Long Stay) (subclass 457) visa* (DIAC 2012) 24.

equivalent wages to those of resident workers in the same occupations, sectors, and workplaces. For some 457 visa holders in semi-skilled occupations, the MSL fell well short of the market rate.<sup>554</sup> A contributory factor was the calculation of the standard MSL based on a seasonally adjusted average of the Australian Bureau of Statistics' average weekly ordinary time earnings (AWOTE) data. The AWOTE calculation was based on the earnings of all employees, including part-time, casual, and junior workers, and included lesser skilled occupations that were not eligible under 457 visas. This lowered the standard MSL below the prevailing market rate for the 457 visa holder who was a full-time, adult, and skilled worker.

Furthermore, prior to the 2008 legislative reforms, the 457 visa scheme had provided for a separate regional MSL that was set at 90 per cent of the standard MSL for positions nominated by regional sponsors.<sup>555</sup> This lower MSL was supposedly based on lower average incomes outside major metropolitan centres.<sup>556</sup> However there was evidence of employers using this concession to source semi-skilled migrants on salaries lower than market rates.<sup>557</sup> The effectiveness of the MSL as a wage safeguard was further undermined by the absence of data collection by DIAC on actual base salaries paid by employers after the granting of visa approvals. This compliance deficiency was particularly troubling given that 82 per cent of successful complaints by 457 visa holders to DIAC concerned breaches of MSLs.<sup>558</sup>

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<sup>554</sup> Deegan, *Final Report* (n 293) 27.

<sup>555</sup> Migration Regulations 1994 (Cth) - Minimum Salary Levels and Occupations for the Business Long Stay Visa (Regulations 1.20B, 1.20G(2) and 1.20GA(1)(a)(i)) - IMMI 06/036 (2006).

<sup>556</sup> Barbara Deegan, *Visa Subclass 457 Integrity Review, Issues Paper No. 1: Minimum Salary Levels/Labour Agreements* (DIAC 2008) 15.

<sup>557</sup> Harry Williams, *457-Visas; The International Brigade of The Reserve Army of Labour* (Centre of Full Employment and Equity, The University of Newcastle, 2007) 5.

<sup>558</sup> Deegan, *Issue Paper 1* (n 558) 17.

### **The regulatory costs for employers**

Under an admission model that is centred on employer sponsorship, there may be responsibilities, undertakings, and obligations on the employer that entail a certain degree of administration and compliance costs. Both the 457 visa and Tier 2 (General) visa schemes charge sponsors/employers varying degrees of administrative fees for lodging sponsorship and visa applications. In 2012, DIAC charged a fee of AU\$455 for each 457 visa application, which doubled in 2013 as part of the then Labor Government's attempts to tighten the scheme.<sup>559</sup> The statutory fees for in-country and out-of-country Tier 2 (General) visa applications were £578 and £494 respectively in 2013. The application fee for sponsorship licenses for a 'Large Sponsor' and a 'Small Sponsor'<sup>560</sup> were £1,545 and £515 respectively. The administrative fee for issuing a CoS was £184.<sup>561</sup>

However, these administrative fees seem relatively modest when compared to the costs of gaining sponsorship licensing or approval from immigration authorities, such as setting up and maintaining a comprehensive monitoring, record-keeping, and reporting system in the workplace and/or having a 'track record' of training and employing resident workers. There are additional recruitment costs for sponsors with respect to undertaking labour market testing under the Tier 2 (General) visa and paying the travel costs of migrants and their family members under 457 visa scheme. There may be further legal costs associated with preparing visa applications and complying with sponsorship undertakings. Notably, the regulatory costs associated

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<sup>559</sup> Edwina Farley and Anna Vidot, 'Hike in costs for 457 visas' *ABC News* (14 May 2013) <<http://www.abc.net.au/news/2013-05-14/nrn-fedbudget-457costs/4689874>> accessed 1 August 2013.

<sup>560</sup> A 'Small Sponsor' refers to the small companies regimes as set out in the Companies Act 2006. Organisations with charitable status are also eligible to pay the 'Small Sponsor' license fee: UKBA, *Tier 2 Sponsors' Guidance (04/14)* (n 471) 6.

<sup>561</sup> Home Office, *Charging for Immigration and Nationality Services 2013-14* (2013).

with Tier 2 sponsorship obligations have attracted much criticism from employers and business groups, with the CBI estimating a cost of £500,000 to meet sponsorship rules.<sup>562</sup> Under the PBS, employers are expected to take on greater responsibility for monitoring migrants' compliance with immigration laws. The Home Affairs Committee has noted specific concerns over the 'significant financial investment in fees, legal advice, and employing HR staff with the requisite expertise',<sup>563</sup> which may make Tier 2 sponsorship unfeasible for small and medium-sized firms.

### ***Supply-side restrictions***

#### **Personal attributes and grounds**

Some labour migration programmes have explicit restrictions or preferences based on the personal characteristics of migrants such as their nationality or country of origin, age, gender, or marital status. Australia's Pacific Seasonal Workers Programme only admits migrants from a handful of Pacific Island countries. The UK's SAWS (under former rules of the scheme) restricted the age of applicants. Age can also be a factor in prioritising the admission of migrants under permanent migration programmes such as the points-based GSM scheme in Australia. Marital status can also affect applications under this GSM scheme, with extra points granted for the skills of spouses.

Neither the 457 visa scheme nor the Tier 2 (General) visa scheme have conditions of entry that overtly admits workers based on these grounds and attributes. However, due to the demand-driven nature of the schemes, employers have

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<sup>562</sup> Murray, *Britain's points based migration system* (n 362) 36.

<sup>563</sup> House of Commons Home Affairs Committee, *Managing Migration* (n 490) 47.

substantial latitude to seek out migrants with desirable personal characteristics whom they prefer to sponsor, notwithstanding the operation of anti-discrimination and equality laws. For instance, employers may prefer to recruit younger migrants without dependants, since this group is likely to be more 'flexible' and willing to work longer and unsociable hours. The sponsoring employer can further save on the time, resources, and costs associated with spousal and dependant visa applications and travel arrangements.

Nationality and country of origin can also influence employers' selection of migrant workers. As Ruhs and Anderson observe, national stereotyping in recruitment is often not 'reducible to simple individual prejudices, but is related to how employers respond to, and perpetuate, wider structural imbalances and inequalities in local and global markets'.<sup>564</sup> Migrants' frame of reference for what constitutes an 'acceptable' level of wages and working conditions in the host state could be contingent on the standards back in their home states. For instance, a skilled doctor from India or a nurse from the Philippines, who is sponsored under the Tier 2 (General) visa or 457 visa, may agree to a level of wages and conditions less than those that a doctor or nurse from Western Europe would be prepared to accept. Preibisch further observes the diversification of ethnic and cultural backgrounds and countries of origin of migrants admitted under Canada's Seasonal Agricultural Workers' Program as instances of employers' strategies to divide and control the workforce, such as through the regular labour replacement or substitution of one group by another.<sup>565</sup>

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<sup>564</sup> Ruhs and Anderson, 'Migrant Workers: Who Needs Them?' (n 513) 28.

<sup>565</sup> Preibisch, 'Pick-Your-Own Labor' (n 17).

Skilled occupations and sectors of the labour market are segmented across age, gender, nationality, and countries of origin, among other factors. For instance, a vast majority (78 per cent) of Tier 2 primary visa applicants are men, which may reflect the male-dominated sectors such as IT and financial services that are the largest users of the scheme.<sup>566</sup> Murray argues that there may be a gender bias inherent in the PBS arising from its focus on ‘hard education qualifications’ rather than ‘soft skills’ and from its minimum salary requirement that generally favour male entrants.<sup>567</sup> The UK Trade Union Congress (TUC) has also raised the concern that the English language skills, previous salary, and skills/qualifications under the PBS could be:

‘discriminatory on grounds of race, gender and age... These factors will almost certainly favour young male applicants from established (mostly majority white) industrialised countries where salaries are easily comparable and educational qualifications more readily accepted’.<sup>568</sup>

### **Language skills requirements**

Migrants are required to have a certain level of English language skills, a prerequisite that was introduced relatively late under both schemes. The espoused objectives of this prerequisite (introduced in 2007) under the 457 visa scheme were to ensure that migrants can ‘understand and respond to occupational health and safety risks and practices’, ‘raise any concerns about their welfare with appropriate authorities’, ‘benefit Australia by sharing their skills with other workers’, and ‘participate more

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<sup>566</sup> Murray, *Britain's points based migration system* (n 362) 39-40.

<sup>567</sup> *ibid.*

<sup>568</sup> TUC, *Making a rights-based migration system work: TUC response to the Home Office consultation document "Selective admission: Making migration work for Britain"* (2006) para 4.3.

effectively in the Australian labour market'.<sup>569</sup> Crock and Berg further suggest that the requirement may be aimed at reducing foreign competition for local jobs, and not just be directed at reducing the vulnerability of temporary migrant workers.<sup>570</sup> Up until 1 July 2013, the language requirement only applied to Technicians and Trade Workers, but not to most of the skilled occupations eligible for 457 visas. An important exemption exists where the sponsor indicates that the visa applicant's base salary is above the English Language Salary Exemption Threshold.<sup>571</sup> The Deegan Review noted that since the language requirement was introduced in 2007, there was an increase in the number of visa applications at ASCO groups 4 and below where nominated salaries were set above the exemption threshold.<sup>572</sup> Questions have arisen over the potential for misuse of the exemption by sponsors who 'inflate' salaries to circumvent the requirement.<sup>573</sup>

There have been claims that employers are best able to judge the required language standards of sponsored workers, which depend on the nature of the nominated occupation.<sup>574</sup> Under the Tier 2 (General) visa scheme, employers have contended that for some job specifications such as those in the creative arts and ethnic catering businesses, language proficiency may not actually be necessary or

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<sup>569</sup> Barbara Deegan, *Visa Subclass 457 Integrity Review, Issues Paper No. 2: English Language Requirement/ Occupational Health and Safety* (DIAC 2008) 11.

<sup>570</sup> Crock and Berg, 'The Business of Temporary Labour Migration' (n 308) 279.

<sup>571</sup> The threshold is regularly indexed and specified in a legislative instrument: Migration Regulations 1994 - Tests, Scores, Period, Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas - IMMI 14/009 (2014).

<sup>572</sup> Deegan, *Issue Paper 2* (n 569) 12.

<sup>573</sup> *ibid* 13.

<sup>574</sup> *ibid*; House of Commons Home Affairs Committee, *Managing Migration* (n 490) 41-44.

vital to core tasks of the job.<sup>575</sup> Another objection to the English language proficiency requirement came from the trade union Unite, which argued before the Home Affairs Committee that it introduced ‘bias in favour of migrants from English speaking countries and against those from the developing world’.<sup>576</sup>

The Deegan Review considered the migrant’s vulnerability to be the primary justification for the English language requirement under the 457 visa scheme.<sup>577</sup> This rationale was underlined in a case that involved a workers’ compensation claim by a 457 visa holder who fell into irregular status when he was severely injured at work (in his job as a tiler) and was unable to work subsequently. When the migrant approached his employer to seek compensation for his injury, the employers reported him to the immigration authorities for overstaying his visa. He was subsequently detained and deported back to his home country, South Korea. It was also alleged that the employer falsely imprisoned and assaulted him. In granting the compensation claim, the judge stressed the vulnerable position of the applicant who did not speak English and was completely reliant on his employer in a foreign country with no knowledge of its medical and legal system.<sup>578</sup> There have been other reported cases of occupational health and safety prosecutions over workplace incidents involving 457 visa holders who spoke little English and were not trained in respect of their duties nor given health and safety training.<sup>579</sup>

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<sup>575</sup> House of Commons Home Affairs Committee, *Managing Migration* (n 490) 42.

<sup>576</sup> *ibid.*

<sup>577</sup> Deegan, *Final Report* (n 293) 55.

<sup>578</sup> Australian Associated Press, ‘Guest worker wins compo after assault’ *Sydney Morning Herald* (21 September 2007) <<http://www.smh.com.au/news/National/Guest-worker-wins-compo-after-assault/2007/09/21/1189881756672.html>> accessed 12 June 2014.

<sup>579</sup> *Lakeside Packaging P/L*; Stefanie Toh and Michael Quinlan, ‘Safeguarding the global contingent workforce? Guestworkers in Australia’ (2009) 30 *International Journal of Manpower* 453.

### **Self-sufficiency**

Requirements of demonstrating ‘self-sufficiency’ on the part of migrants and their families primarily reflect the policy consideration of minimising migrants’ access to the host state’s public funds and social welfare. Tier 2 (General) visa applicants must meet and demonstrate sufficient personal savings or the eligible sponsoring employer must undertake to maintain and accommodate them during the first month of their employment. In contrast, the 457 visa scheme does not have a direct requirement, but migrants and their families must take out their own health care insurance. Requirements of self-sufficiency may pose certain challenges for visa applicants from developing countries, either because of insufficient savings and/or poor documentation.<sup>580</sup> The disparity in incomes and savings between the host states and some home states can make it extremely difficult for even those in skilled, professional jobs to meet the criterion prior to their visa application. Some migrants may have to rely more on their sponsoring employers to provide the necessary assurance of maintenance to meet such requirements.

### **4.5 Meeting Skilled Labour Shortages?**

It can be seen that employers play a key regulatory role in decisions regarding admission of migrants under the two TMWPs, including the number, demographics, profile, and skill composition of migrants to admit. In the case of the 457 visa scheme, Birrell and Healy argue that the government has ‘put an increasing emphasis on outsourcing the selection of migrants to employers, who it claims are the best

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<sup>580</sup> House of Commons Home Affairs Committee, *Managing Migration* (n 490) 39-40.

judges of Australia's skill needs'.<sup>581</sup> The main espoused objective of the 457 visa and Tier 2 (General) visa schemes is to respond to resident labour market needs by providing employers with access to migrant workers where genuine 'skill shortages exist. Yet, employers' needs for migrant labour can often proxy for general labour market needs under an employer-driven admission regime. As examined in this chapter, there are a number of features under both schemes to identify skill shortages and to prevent employers from sponsoring low-skilled occupations. In this regard, the more stringent requirements regarding the nominated position under the Tier 2 (General) visa, along with an annual cap on the number of applications, stand in marked contrast to the more 'laissez faire' employer-driven admission conditions under the 457 visa scheme.

It should be noted that the overall usage of the two schemes by the number of employers in Australia and the UK as a proportion of the total business population has been relatively small. As of January 2013, 29,305 employers were registered for sponsoring skilled migrants under Tier 2,<sup>582</sup> out of 4.8 million private sector businesses in the UK.<sup>583</sup> Under the 457 visa scheme, there were 22,450 active sponsors in 2011-2012,<sup>584</sup> among 1.9 million companies registered in Australia.<sup>585</sup> However, these aggregate figures do not take into account specific sectors and occupations in the labour market that rely on temporary migrant labour to address ongoing, longer-term skills and labour shortages. For example, the National Health

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<sup>581</sup> Birrell and Healy, *Immigration Overshoot* (n 41) 4.

<sup>582</sup> Home Office, *Immigration Statistics: October to December 2012* (n 395).

<sup>583</sup> DBIS, *Statistical Release: Business Population Estimates for the UK and Regions* (2012).

<sup>584</sup> DIAC, *Sponsorship Obligation Amendments: Strengthening the Effectiveness of the Worker Protection Reforms - Regulation Impact Statement* (2013) 17.

<sup>585</sup> ABS, *Counts of Australian Businesses, including Entries and Exits, June 2008 to June 2012 (ABS 8165.0)* (2013) app 1.

Service (NHS), which engages the highest proportion of UK public sector employment, has long relied on recruiting overseas health and care workers on work permits.<sup>586</sup>

An important question arises as to the extent to which these TMWPs, framed as meeting skills shortages on a temporary basis, are being used to counteract the decline in training of the resident workforce. This concern was reflected in the admission criterion introduced to the 457 visa scheme in 2008 that required employers to demonstrate a satisfactory record of training resident workers. Under the Tier 2 scheme, the MAC's approach to formulating the SOL and other Tier 2 related policies has taken into account the 'sensitivity' of employing migrant labour, including its impact on employers' incentives to invest in training and upskilling UK workers.<sup>587</sup> The increasingly restrictive immigration policy in the UK from 2009 onwards has prompted the formalisation of a more coordinated government policy on immigration, education and training, and skills development. To a large extent, this was 'a reaction to the limits to be imposed on immigration and a concern with ensuring that employers would be able to source skills'.<sup>588</sup>

The contested nature of 'skills shortages' has seen the establishment of independent advisory bodies such as MAC to assist governments formulate policies and identify shortages in the labour market through expert research and analysis. Notwithstanding the use of expert knowledge and evidence, the concept of 'skills' is itself notoriously difficult to define. Beyond formal qualifications and experience

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<sup>586</sup> Stephanie Snow and Emma Jones, 'Immigration and the National Health Service: putting history to the forefront' *History & Policy* (8 March 2011) <<http://www.historyandpolicy.org/policy-papers/papers/immigration-and-the-national-health-service-putting-history-to-the-forefront>> accessed 20 July 2014.

<sup>587</sup> MAC, *2013 SOL Review & Sunset Clause* (n 483) 39.

<sup>588</sup> Devitt (n 357) 29.

(which are emphasised in the skills criteria under both schemes), employers' conceptualisation of 'skills' is much broader, encompassing 'soft skills' and other desirable personal attributes of workers. Furthermore, the notion of 'shortage' may reflect employers' demand for migrants who are willing to tolerate prevailing wages and working conditions in certain occupations that cannot attract a sufficient supply of resident workers.

There has been substantial scope under the 457 visa scheme for admitting migrants in 'semi-skilled' occupations deemed to be in 'shortage' and in rural areas where it may be difficult to attract resident workers in certain sectors at lower wages. These concessional routes beg the question of whether the design of these TMWPs, originally aimed at higher skilled migrants, can adequately protect those at the lower end of the skills and salary spectrum. Cases of exploitation under the 457 visa scheme have largely involved semi-skilled migrant workers admitted in lower-paid occupations that were arguably not in short supply and migrants from developing countries with poor English language ability. The scheme's overall design and operation have reflected an assumption of a more or less equal bargaining relationship between the parties, which may be the case for the original target group of highly skilled and highly paid migrants, but not for subsets of 457 visa holders admitted in an inferior labour market position.

Furthermore, 'system effects' from labour market structures, institutions, and regulatory frameworks can dissuade employers from alternatives other than recruiting migrants to respond to actual and perceived skill shortages.<sup>589</sup> This can lead to a long-term reliance on temporary migrant labour. For instance, the de-regulatory and decentralised labour market policies in Australia and the UK since

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<sup>589</sup> Martin Ruhs and Bridget Anderson, 'Introduction' in Bridget Anderson and Martin Ruhs (eds), *Who Needs Migrant Workers?: Labour Shortages, Immigration, and Public Policy* (OUP 2010) 42-44.

1980s saw the government's retreat from national training policy coordination and the decline of trade union influence in negotiations over workplace training. As noted in Chapter 3, employer preferences for certain skills profiles of migrants are shaped by the exigencies of production strategies as well as education and training schemes associated with the particular liberal market economies of Australia and the UK. The promotion of flexible employment in both countries has increased the proportion of the workforce in temporary and contingent jobs, with diminished employer 'responsibilities for training and developing its workers as part of a more enduring commitments towards employees'.<sup>590</sup>

There can also be broader 'system effects' from other realms of social and economic policies that impact on employers' responses to labour shortages in private and public sectors. An illustrative example is the heavy reliance on both temporary and permanent migrant labour across a range of occupations in the social care and assistance sector in Australia and the UK. Improving the wages, working conditions, career prospects, and social status of jobs in this sector would arguably attract more resident workers. However, this could require governments to increase expenditure on public provided care. In the current context of cutbacks in public spending, regulatory requirements on staffing levels, and organisational reforms to increase efficiency and flexibility in this sector,<sup>591</sup> the ensuing 'systems effects' are likely to intensify employers' reliance on temporary migrant labour.

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<sup>590</sup> Peter Sheldon and Louise Thornthwaite, 'Employability skills and vocational education and training policy in Australia: An analysis of employer association agenda' (2005) 43 *Asia Pacific Journal of Human Resources* 404, 405.

<sup>591</sup> Ruhs and Anderson, 'Migrant Workers: Who Needs Them?' (n 513) 44.

## 4.6 Conclusion

The 457 visa and Tier 2 (General) visa schemes can be largely characterised as an employer-driven model of admission. The key prerequisite of a migrant's legal authorisation to enter the host state is an offer of employment from a specific approved sponsor. Such a model reflects a degree of the devolution of the state's control over immigration admission to employers whose demand for migrant labour drive the criteria and processes of recruitment and selection. Under both schemes, there is considerable deference to employers' self-attestation and assurance that the admission requirements have been fulfilled, such as whether or not the sponsored migrant actually possesses the skills and qualifications for the job.

As this chapter has shown, the need for migrants under TMWPs to fill 'skills shortages' — the primary justification for restrictions on their labour mobility — is highly contested. In balancing the interests of different labour market actors in the host state, it would be expected that the policymakers seek to ensure that the admission criteria do not give employers a completely free hand to substitute resident workers with cheaper and more compliant temporary migrant labour. In this regard, there are notable differences between the two schemes in the degree and types of restrictions on employers' recruitment of migrant labour. In comparison to the 457 visa scheme, admission under the Tier 2 (General) visa is much more restrictive with an annual quota, higher skills threshold, requirement of labour market testing, a SOL compiled by an expert body, and more onerous procedures of sponsorship.

The conditions of entry under the two TMWPs directly shape the labour market profiles of the migrants admitted which in turn have a critical bearing on their bargaining power in the host state. The relaxation of the admission criteria under the 457 visa has led to employer sponsorships of a substantial group of migrants at the

lower end of the skills and salary spectrum with considerably less labour market power compared to that of the scheme's intended target group of highly skilled labour. As the Deegan Review pointed out, the scheme 'as it applies to the more highly skilled and paid employees may be insufficient to protect workers at the "lower" end of the market'.<sup>592</sup> In particular, the range of restrictions on the employment and residence rights of migrants admitted under such TMWPs can shape migrants' hyper-dependence and hyper-precarity, especially for those admitted with weaker bargaining power. The next chapter analyses in detail the key sources of the two 'hyper' vulnerabilities in migrants' work relations under the 457 visa and Tier 2 (General) visa schemes.

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<sup>592</sup> Deegan, *Final Report* (n 293) 33.

## **5. Hyper-dependence and Hyper-precarity under TMWPs**

### **5.1 Introduction**

In this chapter, I analyse the legal construction of hyper-dependence and hyper-precarity arising from the design and operation of the 457 visa and Tier 2 (General) visa schemes once migrants have been admitted into the host state. I consider how the key features of the two schemes constitute migrants' precarious statuses and intersect with other labour market regulatory norms, structures, and processes to shape the particular vulnerabilities of hyper-dependence and hyper-precarity. These features will be discussed in turn: the restrictions on migrants' labour mobility that include the tethering of their legal permission to work and reside in the host state to an employer sponsorship as well as other *de jure* and *de facto* constraints on their free choice of employment; the uncertainty of migrants' employment and visa sponsorship which can be renewed, extended, or ceased at the discretion of the employer/sponsor at any time; the lack of legal protections for migrants upon their dismissal; the legal impediments to enforcing their employment protections; the scope for precarious intermediated work relations; barriers to exercising trade union and collective labour rights; migrants' exclusion from a range of social rights and benefits; conditional routes to permanent residency that depend on the employer's continued sponsorship and support; and finally, the potential abuse of employers' monitoring and reporting duties and the pitfalls of employer sanctions that are aimed at enforcing immigration controls over migrants with precarious statuses.

## 5.2 Restrictions on Labour Mobility

An important observation from the historical analysis of the two TMWPs in Chapter 3 is the relationship between migrants' statuses and their labour mobility. From contracts of indenture for Pacific Island labourers to the post-war Displaced Persons Programme in Australia, certain groups of migrant workers could not freely circulate in the labour market due to the immigration restrictions associated with these schemes. Similarly, in the UK, the earliest form of work permits for 'aliens' (non-British subjects) in 1920 required them to only work in the designated job on their permit for the employer who recruited them. The binding of migrants' legal status to a specific employer and job under these historical schemes has continued to the contemporary labour migration regimes of the 457 visa and the Tier 2 (General) visa.

As highlighted in Chapter 4, a key espoused aim of the two TMWPs is to address 'skills shortages' in specific areas of the resident labour market. Accordingly, built into the schemes are *de jure* and *de facto* restrictions on migrants' right to change employers, occupation, sector, and/or even geographical area. In Australia, primary 457 visa holders are subject to a mandatory Visa Condition 8107 that circumscribes their ability to change employers and to perform different work to their sponsored occupation.<sup>593</sup> The only exemption from this condition applies to medical practitioners and general managers. Visa holders in these occupations can work for employers other than their sponsor but must still work in their nominated occupation.<sup>594</sup> A breach of this condition constitutes a ground for the cancellation of

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<sup>593</sup> Migration Regulations 1994 (Cth) sch 8, cl 8107.

<sup>594</sup> Migration Regulations 1994 (Cth) IMMI 10/030: Specification of Occupations for Nominations in Relation to Subclass 457 (Business (Long Stay)) for Positions other than in the Business of the Nominator (2010).

the migrant worker's visa.<sup>595</sup> As of 2012, the statutory provision setting out this condition is as follows:

***Visa condition 8107***

The holder must not:

- (a) if the visa was granted to enable the holder to be employed in Australia:
  - (i) cease to be employed by the employer in relation to which the visa was granted; or
  - (ii) work in a position or occupation inconsistent with the position or occupation in relation to which the visa was granted; or
  - (iii) engage in work for another person or on the holder's own account while undertaking the employment in relation to which the visa was granted.

There may be further restrictions on the visa holder's physical mobility. Under the former rules of the 457 visa scheme (in 2003), if it was a term of the approval of the 457 visa nomination that the sponsored migrant was employed in a particular location, the employer must undertake to notify DIAC of any change in location.<sup>596</sup> For instance, where a visa was granted based on an approved regional nomination (outside a major metropolitan city), the visa holder would be in breach of visa conditions if they were found to be working in a non-regional area.<sup>597</sup> Such restrictions can reinforce the existing disadvantages for migrant workers that flow from being geographically 'quarantined' in small and often remote rural towns with already few labour market mobility options.

For much of the scheme's existence, 457 visa holders who wished to change employers or positions within an organisation were required to lodge a new visa application. Their new sponsoring employer or existing employer also had to lodge a fresh sponsorship and nomination application to DIAC. Since legislative reforms in 2009, visa holders now no longer have to apply for a new visa when they changed

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<sup>595</sup> Migration Act 1958 (Cth) s 116(1)(b).

<sup>596</sup> Migration Regulations 1994 (Cth) reg 1.20CB(1)(j) (as in force 1 July 2003).

<sup>597</sup> *ibid*, regs 2.43(1) and 2.43(la) (as in force 1 July 2003).

jobs and/or employers. The new employer must still nominate the worker and have the nomination approved by DIAC. However, it should be noted that the approval of a new nomination only provides for a change of employer or occupation but does not extend the term of the visa nor change the conditions attached. The migrant must apply for a new visa if their existing visa is due to expire.<sup>598</sup>

In practice, employers can take advantage of these visa restrictions to shape further misperceptions among migrants that they are unable to change their employment and/or employer, especially where workers are not familiar with the specifics of their visa conditions and rely heavily on the advice of their employer or recruiting agent. A recent study of the experiences of Indian nationals in Australia on 457 visas found that some workers had often signed unlawful contracts that actually or purportedly ‘dictated that they could not seek alternative employment, and if they did, their visa would cease and they would have to leave the country’.<sup>599</sup>

As a condition of their leave to enter or remain in the UK, Tier 2 (General) visa holders can only work for the sponsor in the job recorded on their CoS.<sup>600</sup> However, unlike the 457 visa scheme, they can engage in work that is ‘supplementary’ to their main work.<sup>601</sup> This refers to employment in either a job on the SOL, or a job in the same profession and at the same professional level as the work for which the visa holder’s CoS was assigned. The supplementary employment must be 20 hours or less per week and outside the normal working hours for which

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<sup>598</sup> DIAC, ‘Employer Sponsored Workers: Skilled workers and their Family Members’ Obligations’ (2012) <<http://www.immi.gov.au/skilled/skilled-workers/sbs/obligations-employee.htm>> (accessed 30 April 2013).

<sup>599</sup> Selvaraj Velayutham, ‘Precarious experiences of Indians in Australia on 457 temporary work visas’ (2013) 24 ELRR 340, 357.

<sup>600</sup> Immigration Rules, pt 6A, paras 245HC(e)(iii)(1) and 245HE(g)(iii)(1).

<sup>601</sup> *ibid*, pt 6A, paras 245HC(e)(iii)(2) and 245HE(g)(iii)(2).

the migrant's CoS was assigned.<sup>602</sup> It does not need to meet the standard resident labour market test and the supplementary employer does not have to be a licensed sponsor.<sup>603</sup> Provided that the work meets the above criteria, the visa holder does not need to advise the UKBA of any supplementary employment. However, it is important that the migrant must continue to work for the sponsor of their CoS.<sup>604</sup>

The UKBA Sponsor Guidance also states that a Tier 2 (General) visa holder may engage in additional 'secondary employment' with another UKBA licensed sponsor.<sup>605</sup> The sponsor of the secondary employment must assign a new CoS to the migrant based on the full criteria for Tier 2 (General) visas, including carrying out a resident labour market test. The migrant must also submit a fresh application to vary their leave.<sup>606</sup> The migrant can only apply for secondary employment after starting work with their first sponsor. They cannot start working for their second sponsor until the application for secondary employment has been approved.<sup>607</sup>

If they wish to change their sponsor, Tier 2 (General) visa holders must make new application for leave supported by a CoS from their new sponsor. The new sponsor must have a valid sponsor license. If the migrant remains with the same employer and there are changes to her role, a new CoS must be applied for under certain circumstances: where the changes to her core duties represent a change to a different SOC code quoted in her original CoS; a change from a job which is currently on the shortage occupation list to one that is not; where the change of jobs

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<sup>602</sup> UKBA, *Tier 2 Policy Guidance* (n 470) 49.

<sup>603</sup> UKBA, *Tier 2 Sponsors' Guidance (04/14)* (n 471) 133.

<sup>604</sup> UKBA, *Tier 2 Policy Guidance* (n 470) 49.

<sup>605</sup> UKBA, *Tier 2 Sponsors' Guidance (04/14)* (n 471) 133.

<sup>606</sup> *ibid.*

<sup>607</sup> UKBA, *Tier 2 Policy Guidance* (n 470) 49-50.

under TUPE Regulations 2006 is in the same SOC code but the new salary is lower than that was on the original CoS or is less than the appropriate rate for the new job under the relevant code of practice; or where the migrant's pay is otherwise reduced from the level indicated on the current CoS.<sup>608</sup>

While in principle the migrant worker can change employers under the 457 visa and Tier 2 (General) visa schemes, the process may be very difficult in practice. Switching employers is contingent upon the migrant finding another licensed or approved sponsor who is willing to undertake a new sponsorship, in an occupation that meets all relevant criteria, and subject to the authorisation of immigration authorities. In the UK, finding a new licensed sponsor can be even more difficult when taking into account the annual allocated CoS quotas. Potential new employers may also be reluctant to undertake complex and onerous sponsorship obligations. Thus the 'option' of changing one's existing employer may not be practically feasible for some migrants.

An implication of these immigration restrictions on workers' labour mobility is the scope for employer practices that could render migrants' statuses more precarious. A sponsor/employer who violates immigration laws and/or labour laws can also create transgressions of the migrant's visa conditions — for example, where the employer directs the sponsored migrant to perform duties outside the scope of her approved position, or where the employer pays the worker below the requisite salary threshold. In Australia, a breach of visa conditions can result in DIAC cancelling the visa of the primary 457 visa holder and any secondary visas of accompanying family members. Future visa applications by the migrant may also be refused.<sup>609</sup>

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<sup>608</sup> *ibid* 47-48.

<sup>609</sup> Migration Regulations 1994 (Cth) sch 2, cl 457.221.

Furthermore, temporary visa holders subject to a ‘prescribed condition restricting work’ who contravenes that condition commits an offence of strict liability, which can attract a fine of up to AU\$10,000.<sup>610</sup> In the UK, migrants’ failure to observe a condition of their leave also raises the prospect of visa cancellation as well as liability for a summary offence with a maximum sentence of a Level 5 fine or imprisonment of up to six months or both.<sup>611</sup>

With the risk of visa cancellation and potential deportation, the prospect of sliding into more precarious status may deepen the migrant’s dependence on her sponsor/employer. The shadow of irregular status constantly looms over this particular vulnerability of hyper-dependence. The worker may believe that reporting any labour law violations will disclose their own ‘illegal’ work arrangements (even if they are not at fault) and jeopardise their present and future migrant status. Given the temporariness of their legal authorisation to work and reside in the host state under TMWPs, some migrants may decide to continue to work irregularly rather than seeking to regularise their status.<sup>612</sup>

Certain groups of migrants under TMWPs may be more prone to experiencing the hyper-dependence that arises from immigration restrictions on their freedom to change employers and employment. Research on migrants in the food industry in the UK revealed that the operation of work permits could de facto tie some workers to their employer/sponsor. Should the migrant wish to leave their sponsor, the practicality of quickly finding another sponsor within the very narrow

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<sup>610</sup> Migration Act 1958 (Cth) s 235.

<sup>611</sup> Immigration Act 1971, s 24(1)(b)(ii).

<sup>612</sup> Tham and Campbell (n 411) 39-40.

timeframe of their remaining leave can be extremely problematic.<sup>613</sup> Several studies on Chinese migrants in the UK also reported difficulties with changing employers under work permits arrangements where it combined with other features of the migratory process such as sponsorship through family networks, working in certain sectors such as in Chinese catering and hospitality businesses, or where the migrant had incurred large debts.<sup>614</sup>

There is an additional source of hyper-dependence on the sponsor/employer that affects those skilled migrants with difficulties in obtaining recognition for their overseas qualifications or are required to attain occupational licensing and registration in the host state. Submissions to the Deegan Review suggested that should the 457 visa holder wish to change employers, they might need to provide evidence of their skills to the new employer which can be prohibitively costly and time-consuming. For some workers, this barrier can effectively ‘tie’ them further to their original sponsor for the duration of their visa.<sup>615</sup> Rogaly and Anderson’s research revealed that migrant nurses who received their training abroad and were sponsored by private homes and NHS trusts on work permits usually had to complete a probationary period of three to six months of ‘adaptation’ before they can register as nurses with the Nursing and Midwifery Council.<sup>616</sup> During this period, they were paid at a lower scale as care assistants. Since the sponsoring employer signed off on the migrant’s completion of the adaptation, there were cases where registrations had

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<sup>613</sup> Scott, Craig and Geddes (n 24) 56.

<sup>614</sup> Carolyn Kagan, Sandy Lo, Lisa Mok, Rebecca Lawthom, Sylvia Sham, Mark Greenwood and Sue Baines, *Experiences of forced labour among Chinese migrant workers* (Joseph Rowntree Foundation 2011); Bin Wu, Lan Guo and Jackie Sheehan, *Employment Conditions of Chinese Migrant Workers in the East Midlands - A Pilot Study in a Context of Economic Recession* (ILO 2010).

<sup>615</sup> Deegan, *Final Report* (n 293) 27.

<sup>616</sup> Bridget Anderson and Ben Rogaly, *Forced Labour and Migration to the UK* (Trade Union Congress 2005) 34-35.

been delayed so the employer could continue to pay the lower rate. Migrant nurses often could not complain since they required the employer's declaration for the registration. This hyper-dependence is particularly acute for those who have accrued debts in the migration process, as the difference in pay between nurses and care assistants made a difference to repaying such debts.<sup>617</sup>

### **5.3 'Temporary' but Renewable**

Inherent in the two schemes is the insecure and uncertain nature of migrants' 'temporary' entitlement to work and reside in Australia and the UK, which can be a substantial source of hyper-precarity. The authorised period of leave as stipulated in their visas effectively limits the tenure of their employment. At the same time, the length of their employment contract with the sponsor serves as the basis for the duration of their visas, with the possibility of further extension and/or renewal. In Australia, 457 visas can be issued by DIAC for a period between three months and four years, based on the length of the migrant's nominated position as determined by the sponsoring employer.<sup>618</sup> For Tier 2 (General) visa holders, the duration of entry clearance that can be granted is either a period of three years and one month, or a period equal to the length of the period of engagement on their CoS plus 1 month, whichever is shorter.<sup>619</sup>

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<sup>617</sup> *ibid* 35.

<sup>618</sup> Migration Regulations 1994 (Cth) sch 2, cl 457.511.

<sup>619</sup> Immigration Rules, pt 6A, para 245HC (a). For those already in the UK, the duration of their leave to remain will be granted for the length of the period of engagement by their sponsor plus 14 days, or a period of three years plus 14 days, or a period of six years minus the continuous period of time during which the applicant has had entry clearance, leave to enter or leave to remain on a Tier 2 visa, whichever is shorter. For those applicants who previously had leave under the Rules in place before 6 April 2011 on a Tier 2 visa, the leave to remain will be granted either for the length of the period of engagement plus 14 days, or a period of three years plus 14 days: Immigration Rules, pt 6A, para 245HE.

Under the 457 visa scheme, the employer may repeatedly renew the migrant's sponsorship through lodging a new nomination application. The possibility for unlimited renewals means that the employer could, in principle, repeatedly sponsor 457 visas based on successive fixed-term contracts with durations as short as three months. These 'rolling fixed-term contracts' do not usually give rise to an ongoing employment relationship in law.<sup>620</sup> In practice, the cost and time involved in the sponsorship process can act as a deterrent against frequent renewals of short-term contracts. However, there is no publicly available data on the duration of 457 visas issued or the number of renewals. A survey of 1,175 migrants on 457 visas conducted in 2005 indicated that as high as 47 per cent of respondents were on a renewed visa. However, the authors cautioned that this percentage seemed rather high, with 'some possibility that respondents might have misunderstood the question'.<sup>621</sup>

In comparison, the Tier 2 (General) visa holder's permission to stay or 'further leave to remain' in the UK can only be extended for up to a further three years provided that the sponsor issues a new CoS for the extended period.<sup>622</sup> The maximum period that a migrant can remain on a Tier 2 (General) visa is six years in total. Furthermore, she will not be able to re-apply to return to the UK under another Tier 2 (General) visa until one year after her previous leave under that visa has expired.<sup>623</sup> In 2011, there were 12,500 UKBA decisions on applications for extension

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<sup>620</sup> *Linda Davis v RMIT University Student Union* [2010] FWA 9968.

<sup>621</sup> Khoo, McDonald and Hugo, *Employment Circumstances and Migration Outcomes* (n 41) 13.

<sup>622</sup> UKBA, *Tier 2 Sponsors' Guidance (04/14)* (n 471) 127-128.

<sup>623</sup> UKBA, *Tier 2 Policy Guidance* (n 470) 43.

of stay under the Tier 2 (General) category.<sup>624</sup> Under the former work permits scheme, 40,300 out of the 91,500 work permits issued in 2005 were less than 12 months in duration (with shorter periods favoured by immigration instructions) and 68,980 applications for extensions.<sup>625</sup> While there is no available statistical breakdown of the duration of recent Tier 2 visas, it is plausible that sponsors may be issuing CoS with longer durations in light of the more onerous and stringent rules and procedures. The main point I want to make here is that the sponsor/employer has very broad prerogative in deciding on the duration of the initial CoS and any subsequent CoS for extensions of stay issued to the migrant. It is this decision by the sponsor that forms the basis for the migrant's period of leave granted by the UKBA.

Although the duration of migrants' employment is structurally limited by the length of their visas under both schemes, they may nevertheless be retained by the sponsor/employer and have their visa extended or renewed. The actual decision on whether or not to grant the visa renewal or extension rests with the immigration authorities. However, the sponsor/employer can exercise substantial control over the length of the migrants' employment contracts that in turn forms the basis for DIAC or UKBA's decisions regarding visa extensions or renewals. For sponsored migrants and their accompanying family members, especially those with aspirations of longer-term residency in Australia and the UK, there can be a significant degree of insecurity over their legal permission to remain in the host state that hinges on the sponsor/employer's discretion over their visa sponsorships. This condition of hyper-precarity arising from their precarious migrant statuses is not only manifested in the uncertainty of their work relations, but also in the instability of their migration

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<sup>624</sup> UKBA, *Work data tables: Immigration Statistics July - September 2012* (n 497) table ex.01.

<sup>625</sup> Anderson 'Battles in Time' (n 12) 14.

projects where it becomes extremely difficult to plan for the future. As I will examine later on, the conditional routes to permanent residency via the 457 visa and Tier 2 (General) visa can further shape migrants' hyper-dependence on their sponsor/ employer.

## **5.4 Termination of Employment**

As highlighted earlier, a key feature under both TMWPs is the tethering of migrants' authorisation to work and to reside in the host state to an employer sponsorship. In this section, I examine how this feature can structure migrants' hyper-dependence and hyper-precarity in situations where their employment is voluntarily or involuntarily terminated. The simultaneous termination of their employment and withdrawal of sponsorship arrangements by the employer/sponsor can leave migrants in an extremely vulnerable situation where their precarious legal statuses may subject them to immigration enforcement actions (including the prospect of deportation) as well as impede their access to unfair dismissal protections.

### ***Withdrawal of employer sponsorship***

In circumstances where migrants involuntarily lose their employment due to reasons of illness or the termination of employment by the employer, the international standard contained in Article 8 of ILO Convention No. 143 provides that:

1. On condition that he has resided legally in the territory for the purposes of employment, the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorization of residence or, as the case may be, work permits.
2. Accordingly, he shall enjoy equality of treatment with nationals in respect in particular of guarantees of security of employment, the provisions of alternative employment, relief work and retraining.

ILO Convention No. 143 does not, however, grant migrants the right to stay in the country after the two years of presence or when their first contract has expired. Article 8(1) refers solely to migrant workers who lose their employment, as opposed to those whose employment comes to an end as foreseen in the employment contract.

The legal statuses of 457 visa holders and Tier 2 (General) visa holders can become highly precarious upon the termination of their employment, with the ensuing withdrawal of their visa sponsorship. There is a narrow timeframe for the migrant to find other ways to maintain their legal authorisation to remain in the host state. Until legislative reforms in June 2013, a migrant's 457 visa was liable to cancellation within a mere 28 days from the cessation of her employment (this has now been extended to 90 days).<sup>626</sup> During this period, the migrant must find a new approved sponsor, apply for another substantive visa,<sup>627</sup> or make preparations to depart the country. In the UK, the sponsor must immediately notify the UKBA upon the termination of the migrant's employment. The UKBA then curtails the migrant's leave to 60 days from the date of its decision. The migrant can apply for leave to remain under another immigration route or to be employed by another approved Tier 2 sponsor within this period.<sup>628</sup> However, once this period of leave expires, the migrant would be deemed as an 'overstayer' and subject to enforcement actions

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<sup>626</sup> Migration Regulations 1994 (Cth) sch 8, paras 8107(3)(b) and (3B)(b): amended by Migration Amendment (Temporary Sponsored Visas) Act 2013 (Cth) sch 3(1)

<sup>627</sup> A substantive visa refers to any visa except a Bridging visa, a Criminal Justice Visa or an Enforcement Visa: Migration Act 1958 (Cth) s 5.

<sup>628</sup> UKBA, *Tier 2 Policy Guidance* (n 470) 51-52. The only exception to this provision is where they are moving to a new sponsor with TUPE or similar protection to continue in the same job, in circumstances where TUPE is triggered.

including deportation. Overstaying this period can also cause future applications to enter and/or remain in the host state to be refused.<sup>629</sup>

It should be noted that power of visa cancellation by DIAC is discretionary.<sup>630</sup> Similarly, the UKBA can exercise discretion in its the decision to curtail the visa holder's leave. The 60-day time frame is also calculated from the time that the UKBA makes their decision to curtail leave, rather than from the date of termination. Therefore it is possible for the migrant to convince immigration authorities to maintain the validity of her visa for a period long enough to lodge unfair dismissal claims and/or other meritorious claims against the sponsor/employer. However, there appears to be no standard process under either schemes through which workers with such claims can be granted a bridging visa to regularise their status beyond these stipulated time periods.

Although the power of visa cancellation formally resides with immigration authorities, the employer's prerogative to terminate the visa holder's employment and to withdraw sponsorship at any given time can create a misconception among migrants that the employer is able to directly cancel their visas.<sup>631</sup> The threat or actual practice of dismissals by employers can generate migrants' apprehension of the potential consequences for their legal statuses. Submissions to the Deegan Review raised numerous examples of 457 visa holders who were dismissed after raising matters such as salary deductions, underpayment of wages, and union membership. In some cases where there were a large proportion of 457 visa holders

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<sup>629</sup> Migration Regulations 1994 (Cth) sch 2 cl 457.221; UKBA, *Tier 2 Policy Guidance* (n 470) 36.

<sup>630</sup> Migration Act 1958 (Cth) s 116.

<sup>631</sup> Deegan, *Final Report* (n 293) 78.

in the workplace, migrants were ‘put on the next plane home as an example to the rest of the workforce’.<sup>632</sup>

### ***Recourse to unfair dismissal protections***

Similar to resident workers, migrants on the 457 visa and Tier 2 (General) visa are formally entitled to access unfair dismissal protections if they meet certain criteria such as a minimum length of continuous service and/or earn below a maximum income threshold. In Australia, the claimant must have been continuously employed by the employer for at least six months in order to pursue a claim. For small businesses employing less than 15 employees, the minimum period of continuous service is twelve months.<sup>633</sup> Furthermore, the worker must be covered by either an enterprise agreement or a modern award or earn less than the maximum income threshold (set at AU\$133,000 in 2013). In the UK, recent reforms to unfair dismissal laws have increased the qualifying period from one year of employment to two years if the employee was hired on or after 6 April 2012.<sup>634</sup> In both countries, the remedies available to a successful claimant include reinstatement or re-engagement of employment or compensation.<sup>635</sup>

However, the fixed-term nature of migrants’ employment arising from the ‘temporary’ duration of their visas can effectively exclude them from the scope of unfair dismissal protections. Under Australia’s Fair Work Act, fixed-term workers, whose employment terminates at the end of a specified period of time, will not be

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<sup>632</sup> *ibid* 23.

<sup>633</sup> Fair Work Act 2009 (Cth) ss 382 and 383.

<sup>634</sup> Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012.

<sup>635</sup> Fair Work Act 2009 (Cth) s 390(1)-(2); Employment Rights Act 1996, pt X, ch II.

deemed as having been ‘dismissed’.<sup>636</sup> Fixed-term employees are also excluded from two important protections in the legislated minima of the National Employment Standards: a minimum notice of termination and redundancy pay.<sup>637</sup> These exclusions do not apply to situations where a fixed-term employee is dismissed before the end of the contract term.<sup>638</sup>

The duration of a 457 visa could constitute evidence of fixed-term employment where there had been a common understanding between the employer and employee that the visa conditions determined the nature of employment. In a case before the full Bench of the (then) AIRC,<sup>639</sup> the tribunal found that the Appellant was ‘an employee engaged under a contract of employment for a specified period of time’, which excluded him from unfair dismissal protections under the former WR Act. The Appellant’s 457 visa was part of a Labour Agreement between the Minister for Immigration and the Queensland Dive Tourism Association. The Agreement detailed the arrangements for employers to nominate and sponsor migrants as diving instructors on 457 visas that were issued ‘for a maximum of two years unless an employment contract is sighted at the time of lodgement of nomination for a longer period’.<sup>640</sup> Two other relevant conditions were attached to the visa: first, the visa holder could remain in Australia until 1 July 2000; and the second, he was unable to change employer or occupation without written permission from DIAC. The full Bench of the AIRC agreed with the earlier tribunal finding that the Appellant knew that his employment with the Respondent was dependent on the

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<sup>636</sup> Fair Work Act 2009 (Cth) s 386(2)(a).

<sup>637</sup> *ibid*, s 123.

<sup>638</sup> *ibid*, s 386(3).

<sup>639</sup> *Motomu Izawa v Ocean Spirit Dive Pty Ltd* PR900784 [2001] AIRC 82.

<sup>640</sup> *ibid* [4].

terms of his visa at the time of the creation of his contract, and that the employment would not be able to continue beyond the 1 July 2000 even if he had expectations of its extension.

In the UK, the expiry and non-renewal of a fixed-term contract can amount to a statutory dismissal and give rise to an unfair dismissal claim, particularly if the employer did not follow the statutory dismissal procedures.<sup>641</sup> Fixed-term employees with more than two years of service with the employer are also entitled to statutory redundancy payments if their position is made redundant.<sup>642</sup> They are also treated as permanent employees if they have been engaged on successive fixed-term contracts with the same employer for four years, unless the employer can objectively justify a good reason not to do so.<sup>643</sup> While protections for fixed-term workers in the UK may at first seem more generous than the Australian regime, the qualifying threshold of two years for unfair dismissal claims in the UK would appear to be more prohibitive for those migrants sponsored on shorter-term visas.

Even where migrants on 457 visas and Tier 2 visas are entitled to bring an unfair dismissal claim, they may struggle to do so in practice within the narrow timeframe after the termination of their employment before they must either leave the country, find a new sponsor, or apply for another immigration route. A lack of familiarity with local labour laws and limited access to channels of assistance can be additional obstacles. These problems can be gleaned from a case before the (then) AIRC concerning an application by a 457 visa holder to extend the statutory time

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<sup>641</sup> Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (FTER 2002) reg 6.

<sup>642</sup> The FTER 2002 removed the ability of a fixed term employee to waive her right to statutory redundancy pay under the Employment Rights Act 1996 on expiry of the fixed term contract: FTER 2002, sch 2, paras 3(15) and 5.

<sup>643</sup> FTER 2002, reg 8.

limit for filing an unfair dismissal claim.<sup>644</sup> When his employment was terminated, the employer suggested that there was no available recourse to appeal the dismissal and ‘that he should direct his efforts to leaving Australia’.<sup>645</sup> The tribunal found that the claimant’s delay in filing the unfair dismissal application arose from his dependence on the advice provided by his former employer and (curiously) his union representative. However, the tribunal did not inquire into the reasons for the union’s failure to assist the claimant in this case.

In determining whether the dismissal was ‘harsh, unjust or unreasonable’ under unfair dismissal protections in Australia, Fair Work Australia (the current federal employment tribunal) has noted the special vulnerability of 457 visa holders upon the termination of their employment. In two recent cases, *Webster v Mercury Colleges Pty Ltd*<sup>646</sup> and *Paternella v Electroboard Solutions Pty Ltd*,<sup>647</sup> the summary dismissals of 457 visa holders were deemed to be ‘harsh’ by taking into account these workers’ precarious migrant statuses. In *Paternella*, the tribunal further highlighted the ‘extremely vulnerable position’ of the visa holder:

The dismissal was harsh because Mr Paternella was not given any warning that his employment was in jeopardy, limiting his opportunity to mitigate the loss of his job, and consequently his right to remain in Australia. The lack of warning also made the dismissal harsh because Mr Paternella had a limited time in which he could obtain employment with another employer prepared to sponsor him so that he could remain in Australia.<sup>648</sup>

This intersection between unfair dismissal protections and migrant status also illuminates the differential entitlements between workers under TMWPs and resident

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<sup>644</sup> *Antony Emurugat v Utilities Management Pty Ltd* [2008] AIRC 247.

<sup>645</sup> *ibid* [11].

<sup>646</sup> *Webster v Mercury Colleges Pty Limited* [2011] FWA 1807 (8 April 2011).

<sup>647</sup> *Paternella v Electroboard Solutions Pty Ltd* [2011] FWA 3323 (27 May 2011) (‘*Paternella*’).

<sup>648</sup> *ibid* [96].

workers to the range of remedies available under employment protections. A primary remedy under unfair dismissal regimes in Australia and the UK is reinstatement or re-employment. However in the case where a visa sponsorship is no longer in effect due to the termination of the migrant's employment, this remedy would not be available unless the migrant was able to obtain the appropriate legal permission to remain and work in the host state.

### ***Dismissals due to employer obligations under immigration laws***

For some migrants under a 457 visa or Tier 2 visa, they may encounter further obstacles in pursuing unfair dismissal claims where employers can justify that the dismissals were not unfair due to their obligations to comply with immigration laws and regulations. Such laws can prohibit employers from continuing the employment of migrants who do not have the requisite legal permission to work or who may be in breach of their visa conditions and other immigration rules. In the UK, case law distinguishes between dismissals based on the employer's mistaken assumption about the employee's right to work, and dismissals where the employee had no permission to work. In the former category, the employer's genuine but mistaken belief may be considered as 'some other substantial reason'<sup>649</sup> for justifying the dismissal under the Employment Rights Act 1996. The genuineness of the employer's mistake and the procedural steps taken appear to be important factors in assessing the fairness of the dismissal. In the latter category of cases (where the employee actually had no permission), the employer may rely on the 'statutory duty'

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<sup>649</sup> Under section 98(1)(b) of the Employment Rights Act 1996, the employer may rely on 'some other substantial reason of a kind such as to justify the dismissal'.

justification,<sup>650</sup> including where statutory procedures have not been followed. However, as Ryan points out, this justification cannot be assumed in all cases.<sup>651</sup>

In cases involving a genuine mistaken assumption on the part of the employer, compliance with the statutory dismissal procedures has been crucial to the outcome. The Court of Appeal in *Klusova v Hounslow LBC*<sup>652</sup> found that the visa holder was legally permitted to work pending the determination of the leave application and any appeals, subject to the conditions attached to the original work permit. Despite the genuineness of the employer's mistake, the 'some other substantial reason' justification required that the employer follow the statutory dismissal procedures, which did not occur in this case. Notably, Mummery LJ commented on the role of immigration bureaucracies in shaping the employer's mistake: 'The material before the court shows that the signals, which were sent out to the parties by the various offices in the Home Department dealing with Ms Klusova's legal status to work, caused misunderstanding'.<sup>653</sup>

In cases of where the migrant in fact lacked the legal authorisation to work in the UK, the employer may be able to rely on the 'statutory duty' justification. However, in *Kelly v University of Southampton*,<sup>654</sup> the EAT considered why the justification could not always be assumed: where the migrants' lack of permission to work is related to the employer's conduct or omission, where steps could be readily

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<sup>650</sup> Under section 98(2)(d) of the Employment Rights Act, the employer may justify the dismissal on the reason 'that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment'.

<sup>651</sup> Bernard Ryan, 'Can Immigration Control and Employment Law be Reconciled?' (Migrants at Work Conference, Oxford, June 2012).

<sup>652</sup> *Hounslow LBC v Klusova* [2007] EWCA Civ 1127.

<sup>653</sup> *ibid* [75] (Mummery J).

<sup>654</sup> *Kelly v University of Southampton* [2007] UKEAT 0295\_07\_112 [62]-[66].

taken to remedy the situation of irregularity, or where procedural breaches were involved. Yet, the EAT's approach (that all options should be explored before the dismissal) may, in practice, conflict with immigration law's strict imposition of duties on employers and employees who can be exposed to a range of civil and criminal liabilities.<sup>655</sup>

In Australia, dismissals which are 'forced on the employer' by external factors such as statutory obligations may still be considered as a termination at the initiative of the employer, and thus subject to unfair dismissal protection where other criteria are met.<sup>656</sup> Notwithstanding that compliance with statutory obligations such as immigration laws can be considered as termination at the initiative of the employer, there is still grounds for the employer to argue that the termination was not unfair in these circumstances. This was the outcome in *Chen v Allied Packaging Co Pty Limited*,<sup>657</sup> where the then Industrial Court of Australia concluded that the employer had a valid reason to dismiss the worker on the ground of his 'unlawful non-citizen' status under the Migration Act 1958 (Cth). In this case, the claimant had taken time off work due to injuries he sustained during the course of his work. The employer contacted DIAC for information regarding the claimant's entitlement to work in Australia. The reply from DIAC confirmed Chen's lack of entitlement and that the employer should not re-employ him unless he is able to provide evidence of his right to work. Chen's employment was subsequently terminated upon his return to work. Although Chen later applied to DIAC for permission to work that was

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<sup>655</sup> Ryan, 'Immigration Control & Employment Law' (n 651).

<sup>656</sup> *Fraser v Sydney Harbour Casino Pty Ltd* (1997) 70 IR. In this case, the employer was required by the *Casino Control Act 1992* (NSW) to dismiss the applicant after he lost a statutory license. The Full Bench of the NSW Industrial Relations Court held that this was still a termination at the initiative of the employer.

<sup>657</sup> *Chen v Allied Packaging Co Pty Limited* (1997) 73 IR 53 ('Chen').

granted after the dismissal, his application for re-employment was nevertheless rejected. Wilcox CJ found that:

...once Mr Doherty became aware of Mr Chen's status, any action by him (the employer) that facilitated Mr Chen's illegal employment would itself be unlawful; Mr Doherty would be an accomplice and would himself be exposed to prosecution. Whatever Mr Doherty's motive in contacting the Department, and however harsh the result may be as far as Mr Chen is concerned, there was a valid reason for his termination.<sup>658</sup>

The tribunal did not raise the issue of whether the contract of employment was regarded as illegal. Rather, its reasoning concerned whether the employer had a valid reason to dismiss the worker based on the statutory provisions of the Migration Act that prohibited the employment of non-citizens without the entitlement to work. Two subsequent cases involving migrant workers on short-term business visas (predecessor to 457 visas) were distinguished from *Chen* based on the fact that the claimants in these two cases had entitlement to work and their statuses had not become irregular during their employment with the respondents.<sup>659</sup>

The reasoning in *Chen* was applied in another unfair dismissal case before the (then) AIRC, *Emurugat v Utilities Management Pty Ltd*.<sup>660</sup> The case concerned the dismissal of a 457 visa holder where the employer argued that the applicant did not have the relevant skills, training, qualification, or experience to carry out the work for which the 457 visa was granted. The problem arose from the initial assessment by the employer's agents in Kenya that assessed the applicant as suitable for the nominated position of a Powerline Worker. Upon his employment, the employer

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<sup>658</sup> *ibid* [54] (Wilcox CJ).

<sup>659</sup> *Cunningham v Bensons Building Services Pty Ltd* [1998] SAIRC 26 (12 March 1998); *Su Hong v Rainbow (Australia) Pty Ltd* 134/97 M Print P6491 (10 November 1997). Both cases are cited in Robert Guthrie and Rebecca Taseff, 'Dismissal and Discrimination: Illegal Workers in England and Australia' (2008) 24 *IJCLLR* 31.

<sup>660</sup> *Antony Emurugat v Utilities Management Pty Ltd* [2008] AIRC 1114.

realised that he lacked the capacity to perform the duties of the position for which he had been recruited and for which his visa had been granted ‘whose conditions he was in breach of almost from the first moment of his working in Australia’.<sup>661</sup> The tribunal found that on the balance of probabilities the employer had a ‘sound, defensible or well-founded’ reason for terminating the applicant’s employment:

being his incapacity to be deployed as a Powerline Worker within the terms of his 457 visa and the fact that the continued employment of Mr Emurugat other than in accordance with the terms of his 457 visa was illegal under the provisions of the Migration Act 1958.<sup>662</sup>

Despite the fact that the situation arose entirely from the employer’s mistake in the first place, the AIRC highlighted the difficulties for the employer with respect to the continued breach of its obligations under the 457 visa and the Migration Act 1958 (Cth), which ‘would have jeopardised its capacity to continue to participate in the scheme’ and meant that it ‘faced the risk of prosecution’.<sup>663</sup> Furthermore, it pointed out that the applicant ‘would have endangered the safety of himself and others’ in the nominated role where he lacked the skills and qualifications.<sup>664</sup> The tribunal expressed some sympathy for the applicant in a situation whereby he was ‘in no way at fault’<sup>665</sup> and recommended that the employer ‘engaged in discussions’ with the applicant to find an alternative position considering the applicant had since obtained a partner visa to remain in Australia. Nevertheless, the case demonstrates a certain degree of reluctance on the part of employment tribunals to challenge

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<sup>661</sup> *ibid* [44].

<sup>662</sup> *ibid* [33].

<sup>663</sup> *ibid* [40].

<sup>664</sup> *ibid*.

<sup>665</sup> *ibid* [39].

employers' immigration obligations in situations where the dismissal would have otherwise be considered as unfair.

Yet employers cannot simply rely on the statutory justification where the dismissal of the 457 visa holder (resulting in the loss of her entitlement to work) occurred in tandem with the employer's decision to withdraw the sponsorship. In the case of *Mr L v The Employer*,<sup>666</sup> the issue before the (then) AIRC was whether it had jurisdiction to consider an unfair dismissal claim where the employer claimed that since the sponsorship of the 457 visa holder had been withdrawn, it was no longer lawful for the employer to continue employing the migrant. Senior Deputy President O'Callaghan held that:

I am unable to agree that the Employer has established that Mr L's application is lacking in jurisdiction on this basis. It appears to me that to the extent that the Employer argues that the termination of Mr L's employment was necessary because of the withdrawal of sponsorship arrangements, this position ignores the fact that the same entity made the decision to withdraw from the sponsorship. The combined decision to withdraw sponsorship and terminate Mr L's employment may conceivably have an element of harshness, unjustness or unreasonableness.<sup>667</sup>

In summary, the general position in the UK and Australia seems to be that employers' obligations under immigration laws such as those prohibiting the continued employment of migrants without the requisite permission to work or in breach of their visa conditions may be used to justify a dismissal that would otherwise be deemed as unfair. For migrants with highly precarious statuses, there is a further obstacle to pursuing unfair dismissal claims along with the enforcement of other employment protections: the operation of the illegality doctrine, which is explored in the next section.

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<sup>666</sup> *Mr L v the Employer* [2007] AIRC 457 (5 June 2007).

<sup>667</sup> *ibid* [22].

## **5.5 Access to Employment Protections**

On paper, the labour law regimes in Australia and the UK apply to migrants under TMWPs and resident workers alike. However, as discussed in the above analysis of unfair dismissal laws, employment protections can distinguish between categories of employees/workers such as those on temporary and fixed-term contracts in respect of their rights and entitlements. This section probes further into how precarious migrant statuses can obstruct the enforcement of a range of employment protections, which is a significant source of hyper-precarity in their work relations. The starting point is the common law doctrine of illegality that can render remedies arising out of a contract of employment unenforceable where immigration laws have been breached. I further analyse the application of this doctrine in statutory regimes of unlawful discrimination and workers' compensation for injured employees, which arguably do not depend on contractual claims. Finally, I examine the potential and limits of anti-discrimination laws for redressing migrant-specific vulnerabilities in terms of employment protections that arise from their precarious statuses.

### ***Illegality and the employment contract***

In the UK and Australia, the common law doctrine of illegality can apply to render a contract of employment void. This has foundational implications for labour law regimes, including employment protection legislation and collective agreements, since the rights and remedies are predicated on the existence of a valid contract of employment to be unenforceable. Illegality can encompass situations where the contract has been drawn up for an illegal purpose or in an illegal manner, performed in breach of the law, or prohibited by statute, expressly or by implication. 457 visa

holders and Tier 2 (General) visa holders can find themselves working in a variety of ‘illegal’ circumstances that contravene immigration laws and regulations, such as overstaying their visas, working after the withdrawal of their sponsorships, performing duties outside the scope of their nominated occupation, and/or breaching any of the conditions attached to their visas. Claims such as underpayments and unfair dismissals may therefore become unenforceable where the employment contract has been tainted by illegality.

In the UK, this principle has been invoked and applied in cases involving migrants sponsored on work permits. In *Rastegarnia v Richmond Design*,<sup>668</sup> the claimant had been granted a work permit for a specific job but changed his employment and started to work for the respondent without seeking permission from the Department of Employment. His unfair dismissal claim was rejected due to the illegality of his employment contract from the onset, under which he could not acquire any legal rights. In *Bamgbose v Royal Star and Garter Home*,<sup>669</sup> the claimant’s leave to remain in the UK had expired but he stayed on and worked for the respondent without the requisite authorisation for one year. His legal status was later regularised upon acquiring the necessary paperwork. His unfair dismissal claim was rejected by the EAT for failing to meet the statutory qualification threshold of two years of continuous employment. The claimant sought to include the period during which he was working in breach of immigration rules, but the EAT held that the contract was unenforceable during that specific period. Nevertheless, it rejected the employer’s argument that the employment contract was tainted by illegality

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<sup>668</sup> *Rastegarnia v Richmond Design* (unreported), cited in Astra Emir, *Selwyn's Law of Employment* (17 edn, OUP 2012) 90.

<sup>669</sup> *Bamgbose v Royal Star and Garter Home* [1996] EAT/841/95.

throughout its entirety. Rather, the contract was deemed as severable and enforceable from the date that his immigrant status was regularised.

In determining the question of illegality by reason of a statutory prohibition, the approach of Australian courts and tribunals has tended to decide cases on matters of statutory interpretation.<sup>670</sup> In the unfair dismissal cases analysed above, the reasoning and outcome have hinged on the question of whether there was a valid reason for the dismissal arising from the employers' need to comply with immigration obligations. Rather than rendering the employment contract invalid or void due to elements of illegality, employment tribunals in Australia have usually found that the termination was at the employer's initiative and that the tribunal had jurisdictional powers to consider the merits of the unfair dismissal claim, including the possible enforcement of remedies including reinstatement or re-employment. In the UK, Guthrie and Taseff have noted that in cases involving payment of wages and dismissal, the courts have tended to adopt the 'traditional' approach of not enforcing contracts that are tainted by illegality.<sup>671</sup>

### ***Illegality and statutory claims***

Although the doctrine of illegality is usually deployed against claims that arise out of the employment contract, there may be more leeway for the enforcement of statutory regimes that are not necessarily grounded in contract, such as unlawful discrimination and workers' compensation. These two areas of statutory employment protections have particular salience for migrant workers. Forms of discrimination, racism, and xenophobia against migrants at work can be commonplace in Australia

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<sup>670</sup> *Fitzgerald v F.J. Leonhardt Pty Ltd* (1997) 71 ALJR 653; *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd & Ors* (1978) 139 CLR 410.

<sup>671</sup> Guthrie and Taseff, 'Dismissal and Discrimination' (n 659).

and the UK. I return later to examine the limits of anti-discrimination laws in affording protections for workers who are subject to employers' mistreatment arising from their precarious legal statuses. For migrants under TMWPs who are injured at work, no-fault workers' compensation schemes such as those found in Australia (though not in the UK) can provide a safety net for these workers who may be more vulnerable to workplace health and safety risks compared to resident workers and may encounter more obstacles to sue the employer in light of their precarious legal status. I shall consider the operation of illegality with respect to claims under these two types of statutory worker protections in turn.

There has not been any reported case in Australia concerning unlawful discrimination claims brought by migrants with irregular status. In the UK, there have been a number of cases that illustrate the adverse effects of the illegality doctrine on discrimination claims brought by migrant workers with highly precarious statuses. In a recent case, *Hounga v Allen*,<sup>672</sup> the applicant (a Nigerian national) arrived in the UK to work as an au pair without a valid work permit. Her former employer obtained a tourist visa for her to enter the UK on false pretence, of which she was aware and partook in the arrangement. When the applicant was dismissed, she brought a case for unpaid wages and holiday pay, as well as for unfair dismissal and mistreatment based on racially discriminatory grounds. The Employment Tribunal and the EAT found that the claims arising from her contract of employment were tainted by illegality, but this did not preclude her statutory tort claim of racial discrimination. However, the Court of Appeal reached a different conclusion and held that the discrimination claim 'arose out of, or was clearly connected or

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<sup>672</sup> *Hounga v Allen & Anor* [2012] EWCA Civ 609.

inextricably bound up or linked with her own illegal conduct'.<sup>673</sup> Lord Justice Rimer concluded that 'if this court were to allow her to make that case and so relying upon her own illegal actions, it would be condoning her illegality'.<sup>674</sup>

The Court's determination of Hounga's culpability as an 'equal participant'<sup>675</sup> in the illegal conduct did not take into account her vulnerability to the employer's abuse arising from her employment status as a domestic worker and her highly precarious migrant status. Instead, the court drew on her reliance 'on the facts that she was an illegal immigrant' which constituted 'a direct link between the discriminatory treatment of which she complained and the circumstances in which she came to be, and was, employed by the (respondent)'.<sup>676</sup> Bogg and Novitz<sup>677</sup> have argued that the Court in *Hounga* should have followed a strict 'causal necessity' test laid down in *Hall v Woolstone Hall Leisure Ltd*, where there ought to be 'quite extreme circumstances before the test will exclude a tort claim'.<sup>678</sup> It was recognised in *Hall* that the plaintiff's claim upheld a fundamental right not be discriminated against on the ground of sex, and that the illegality doctrine ought not to apply so rigidly as to defeat the intended operation of protective anti-discrimination laws. At the time of writing, the UK Supreme Court unanimously allowed the claimant's appeal in *Hounga*. In the leading judgment, Lord Justice Wilson held that there was no 'inextricable link' between the discrimination complaint and the claimant's illegal

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<sup>673</sup> *ibid* [61] (Rimer LJ).

<sup>674</sup> *ibid*.

<sup>675</sup> *ibid* [60].

<sup>676</sup> *ibid* [61].

<sup>677</sup> Alan Bogg and Tonia Novitz, 'Race Discrimination and the doctrine of illegality' (2013) 129 LQR 12.

<sup>678</sup> *Hall v Woolstone Hall Leisure Ltd* [2000] EWCA Civ 170 [79] (Mance LJ).

conduct, and that the claimant's entry into the illegal contract 'provided... no more than the context' in which the discriminatory acts took place.<sup>679</sup>

In Australia, the issue of illegality in the context of migrant workers has mostly arisen in workers' compensation cases involving breaches of the Migration Act 1958 (Cth). Mandatory workers' compensation legislation in all Australian States and Territories jurisdictions require employers to insure against statutory and common law liability to compensate workers for work-related injury, illness, and disease. There is no comparable statutory scheme in the UK, so the analysis below is confined to Australian cases where the illegality doctrine has been raised to deny the workers' compensation claims of migrants who do not have the legal permission to work under the Migration Act.

In *WorkCover Corporation (San Remo Macaroni Co) v Liang Da Ping*,<sup>680</sup> the South Australian Supreme Court found that the respondent had no entitlement to workers' compensation for injuries sustained while he was an 'illegal entrant' without a valid working visa. In the lead judgment, King CJ asserted that insistence on performing the purported contract of service between the migrant and San Remo would have been an illegal act and the Migration Act 'discloses an intention of the legislature to prohibit such performance in the public interest'.<sup>681</sup> It was held that migrant was not engaged under a valid contract of service. Therefore he was not a 'worker' and his relationship with San Remo was not 'employment' under the statutory regime for claiming entitlement to compensation.

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<sup>679</sup> *Hounga v Allen & Another* [2014] UKSC 47 [40] (Wilson LJ).

<sup>680</sup> *WorkCover Corporation (San Remo Macaroni Co) v Liang Da Ping* [1994] SASC 4466.

<sup>681</sup> *ibid* [10].

Similarly, in *Australia Meat Holdings Pty Ltd vs Kazi*,<sup>682</sup> the Queensland Court of Appeal also rejected the respondent's claim to workers' compensation while performing work as an 'unlawful non-citizen' under the Migration Act. Davies and Williams JA construed the object of the relevant provision in the Migration Act to have an implied statutory prohibition with the effect of invalidating the contract: 'If it is in the national interest to prohibit unlawful non-citizens from performing work, it must also be in that interest... to prohibit any such person obtaining rights under a contract to perform work'.<sup>683</sup> In dissent, McMurdo J pointed out to the consequences of invalidating the contract, namely the 'apprehended impact upon the rights of innocent parties assessed against the policy of the Act'.<sup>684</sup>

The New South Wales Court of Appeal reached a different conclusion on the issue of illegality. In *Nonferral (NSW) Pty Ltd v Taufia*,<sup>685</sup> the Court found that the respondent was entitled to workers' compensation claim even though he was an 'illegal entrant' under the Migration Act at the time of his injury. There was no evidence in this case to suggest that the employer was aware of the respondent's legal status upon his employment. Cole JA and Stein JA (in the majority) examined the intention of the statutory prohibition (performing work without the written permission of the Secretary of DIAC) under the Act and concluded that its legislative object was to impose a penalty for non-compliance rather than to invalidate the contract. Both Justices also highlighted the consequences that would follow from finding of an implied statutory prohibition rendering the contract of service illegal,

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<sup>682</sup> *Australia Meat Holdings Pty Ltd v Kazi* [2003] QSC 225.

<sup>683</sup> *ibid* [23] (Davies and Williams JA).

<sup>684</sup> *ibid* [88] (McMurdo J).

<sup>685</sup> *Nonferral (NSW) Pty Ltd v Taufia* (1998) 43 NSWLR 312.

especially where it would ‘lead to an unjust, unreasonable, inconvenient or absurd result’.<sup>686</sup> As Stein JA puts it:

The contract could be rendered unenforceable even if the employer...had no knowledge of the respondent’s status as an illegal entrant. The employer would be unable to enforce the employee’s duties under the contract, e.g. the duty of confidentiality... On the other hand, an unscrupulous employer could deliberately recruit illegal immigrants in order to pay them less than award wages. An implied prohibition would mean that a worker could not sue for unpaid wages.<sup>687</sup>

Although Sheppard AJA reached the same outcome (dismissing the appeal) in *Taufia*, his reasoning was substantially different to the other Justices. He concluded that the respondent’s breach of the Migration Act rendered the contract of service invalid, but relied on a provision in the Workers Compensation Act 1987 (NSW) that entitled the Compensation Court to exercise its discretion to put aside an illegality in the contract of service. Sheppard AJA took into a number of factors in exercising this discretion, such as the very presence of the discretion which indicated that ‘the legislature foresaw that there might be cases where it would be appropriate to overlook an illegality’, the severity of the breach, whether there was disadvantage to any other person, the respondent’s circumstances, the lawful nature of the enterprise, the employer’s lack of awareness of the respondent’s immigration breach, and the amount of compensation that could be recovered.<sup>688</sup>

From the above cases, it can be seen that there is still considerable uncertainty regarding the illegality doctrine in claims arising from statutory regimes of worker protection such as unlawful discrimination and workers’ compensation. The outcomes of many of the above cases have denied migrant workers with irregular

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<sup>686</sup> *ibid* 319 (Stein JA).

<sup>687</sup> *ibid*.

<sup>688</sup> *ibid* 336 (Sheppard AJA).

statuses their entitlement to fundamental labour and human rights such as the right not to be discriminated on certain grounds and to the vital protection of their income and livelihood when they are injured at work (which can further lead to the failure of their migration projects). These protective statutory regimes are especially important for more vulnerable workers, such as migrants who might be subject to racial and/or nationality-based discrimination, migrants with poor language and communication abilities who are exposed to higher risks of workplace incidents, and migrants on employer sponsored visas who may be reluctant to raise safety issues. For migrants under TMWPs who fall into irregular statuses, the exclusion of these statutory protections can heighten the risk of hyper-precarity in and beyond the workplace.

### ***Migrant status as a ground of discrimination?***

Australia's federal Racial Discrimination Act 1975 (Cth) ('RDA') and the UK's Equality Act 2010 prohibit discrimination on the grounds of race, colour, descent, national or ethnic origin in areas such as employment, housing and social services, and the provision of goods and services among others. Notably, section 5 of Australia's RDA includes prohibited discrimination on the grounds of being an 'immigrant'. In some States and Territories legislation, the definition of 'race' includes the status of being, or having been, an immigrant.<sup>689</sup> All State and Territory laws have also included a 'characteristics extension' that broadens the scope of prohibited discrimination on the basis of an actual or perceived characteristic generally appertaining or imputed to people of a particular race.<sup>690</sup> There have not

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<sup>689</sup> Only the legislation in Northern Territory and Tasmania include immigrant status in their definition of 'race': Anti-Discrimination Act 1998 (Tas) s 3; Anti-Discrimination Act 1996 (NT) s 4(1).

<sup>690</sup> Equal Opportunity Act 2010 (Vic) s 7(2); Anti-Discrimination Act 1977 (NSW) s 7(2); Anti-Discrimination Act 1991 (Qld) s 8; Equal Opportunity Act 1984 (SA) s 51(c); Equal Opportunity Act

been any cases in which an Australian court or tribunal has sought to give meaning to the term ‘immigrant’ in this context of anti-discrimination laws or to determine whether migrant status falls within the ‘characteristics extension’ of race.

The case law in UK has dealt with the issue of whether ‘migrant status’ could be a characteristic or attribute related to the ground of race or nationality in the context of unlawful discrimination claims. The Equality Act 2010 defines ‘race’ to include colour, nationality, and ethnic or national origins.<sup>691</sup> There have been several cases in which claimants have sought to argue that their migrant status was an attribute linked to their race or nationality. In *Mehmet v Aduma*,<sup>692</sup> the EAT upheld a direct discrimination claim under the Race Relations Act 1976<sup>693</sup> by a Nigerian national who worked for the respondent on a student visa. The claimant was paid less than the national minimum wage and dismissed by the respondent after he insisted on applying for a National Insurance number. The EAT found no fault with the ET’s finding that the appropriate hypothetical comparator in this case, a British or British based person, would not have been underpaid as the claimant was and that the employer’s less favourable treatment of dissuading the claimant not to apply for a National Insurance number could constitute race discrimination. The EAT endorsed the reasoning of the tribunal at the first instance, which highlighted:

the relevance of the employee’s race was that he came from a country (Nigeria) which did not have automatic rights to work in the UK and so could be less favourably treated with impunity. It was not because the employer had any antagonism to people from Nigeria, but because of the opportunity which the employee’s race gave him to avoid employment legislation. This, the Tribunal found, was sufficient to constitute ‘racial grounds’ for the purposes

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1984 (WA) s 36(1); Anti-Discrimination Act 1998 (Tas) s 14(2); Anti-Discrimination Act 1996 (NT) s 20(2); Discrimination Act 1991 (ACT) s 7(2).

<sup>691</sup> Equality Act 2010, s 9 (1).

<sup>692</sup> *Mehmet v Aduma* [2007] UKEAT 0573\_06\_3005 EAT.

<sup>693</sup> The Race Relations Act 1976 was repealed by the Equality Act 2010.

of section 1(1)(a) of the Race Relations Act 1976. The Tribunal accordingly found that this situation ‘could’ constitute discrimination.<sup>694</sup>

However, in a recent appeal of two similar cases, *Taiwo v Olaigbe and another* and *Onu v Akwivu and others*,<sup>695</sup> the Court of Appeal held that the mistreatment of the claimants on account of their ‘immigration status’ could not constitute discrimination on the protected grounds of nationality within the meaning of the Race Relations Act 1976 or the Equality Act 2010. In both cases, the claimants were Nigerian nationals on domestic worker visas in the UK and had experienced underpayment, excessive working hours, threats and physical abuse by their employers, including the retention of their passports. The claimants argued that the reason for their mistreatment arose from each of their status as a ‘vulnerable migrant worker... who was reliant on the [employer] for her continued employment and residence in the UK’.<sup>696</sup> Along the lines of *Mehmet*, the claimants maintained that a hypothetical British domestic worker would not have been treated in the same way.

The Court of Appeal held that ‘discrimination on a particular ground will only be treated as discrimination on the grounds of a protected characteristic if that ground and the protected characteristic exactly correspond’.<sup>697</sup> In this case, the Court found that there was no ‘exact correspondence’ between the claimant’s migrant status and their nationality. In the leading judgment, Underhill LJ asserted:

... the ground on which the Respondents were held to have discriminated was, specifically, that the Claimants were migrant domestic workers, with the peculiar dependence on their employers that is a consequence of that status ...

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<sup>694</sup> *Mehmet v Aduma* (n 692) [9].

<sup>695</sup> *Onu v Akwivu & Anr, Taiwo v Olaigbe & Anr* [2014] EWCA Civ 279. Appeal from *Onu v Akwivu* [2013] ICR 1039 and *Taiwo v Olaigbe and another* [2013] ICR 770.

<sup>696</sup> *ibid* [5].

<sup>697</sup> *ibid* [49].

To say that their immigration status (in that sense) is “intimately associated” with their non-British nationality – or, as the Tribunal in *Onu* put it, that the two are “linked” – is to say no more than that only people with non-British nationality are migrant domestic workers. That is obviously so; but what matters is that not all non-British nationals working in the UK are migrant domestic workers or share an equivalent vulnerability. There are very many non-British nationals working in the UK whose conditions of leave to enter or remain permit them to work freely and entail none of the peculiar vulnerability of those whose right to work is in practice dependent on their current employer.<sup>698</sup>

Since the reason for the treatment complained of (that is, their immigration status) did not equate to a protected ground under the Act(s), the question of the correct comparator was thus not dealt with. The Court also swiftly rejected the claimants’ contentions that the mistreatment of migrant domestic workers was a provision, criterion or practice that could constitute indirect discrimination ‘since the relevant ground for direct discretion was absent’.<sup>699</sup>

It may be plausibly argued that the reasoning and outcome of the EAT and the Court of Appeal failed to appreciate the inalienable link between the source of the claimants’ mistreatment and their precarious migrant statuses (specifically, the dependence on their employer/sponsor for their right to work and reside in the UK) that would not have applied to persons of British nationality. The EAT adopted a rather constricted view of the effect of immigration controls on the claimant’s treatment by regarding it as merely a background factor to the claimants’ vulnerability. Meanwhile, the Court of Appeal’s approach was fixated on a narrow interpretation of the ‘equivalence’ principle between the ground of discrimination and the protected characteristic. Lord Justice Underhill’s reasoning that ‘not all non-British nationals working in the UK are migrant domestic workers or share an

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<sup>698</sup> *ibid* [50] (Underhill LJ).

<sup>699</sup> *ibid* [58].

equivalent vulnerability'<sup>700</sup> may have missed the salience of immigration law's construction of a variety of statuses accorded to groups of non-citizens with differentiated employment and residence rights and restrictions. These precarious legal statuses structure the particular vulnerabilities of migrants' hyper-dependence on the employer and their hyper-precarity where they are denied a range of employment rights and protections.

## **5.6 Private Intermediaries**

Private intermediaries have become key players in the flows and networks of international labour migration today. It is important to distinguish between the different forms, functions, and activities of intermediaries in the space of labour migration. Such intermediaries can also vary according to size, sectors, scale, and place of operation, as well as the degree of regulatory oversight. Differences in terminologies to describe the diverse intermediaries in Australia and the UK should be noted. Those that engage in the business of recruiting workers for direct employment by the client are commonly referred to as 'employment agents' in Australia and 'employment agencies' or 'recruitment agencies' in the UK. Agencies that hire workers or engage contractors to supply services to end-user clients in a triangular relationship are referred to as 'labour hire' or 'on-hire' agencies in Australia<sup>701</sup> and 'temporary agencies' or 'employment businesses' in the UK.<sup>702</sup> Some may be engaged in the recruitment and supply of labour to clients, along with

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<sup>700</sup> *ibid* [50] (Underhill LJ).

<sup>701</sup> Employment Agents Registration Act 1993 (SA); Employment Agents Act 1976 (WA); Private Employment Agents (Code of Conduct) Regulation 2005 (Qld).

<sup>702</sup> Conduct of Employment Agencies and Employment Businesses Regulations 2003; Agency Workers Regulations 2010.

other services such as training, human resources, payroll and administration, migration advice, transportation, and visa applications.

### ***Requirement of ‘direct employment’?***

Although the default sponsorship arrangement under both schemes is through a direct employment relationship, the regulatory frameworks have left open the possibility for labour hire arrangements or those resembling a contractor for service. Under the current 457 visa scheme, the business must be the direct employer of the nominated visa holder in order to be approved as a standard business sponsor.<sup>703</sup> If the business operates in Australia, the sponsored visa holder can also work directly for an associated entity of the business.<sup>704</sup> For businesses operating outside Australia, the visa holder must work directly for the sponsoring employer. There is a legislated list of nominated occupations exempted from this requirement where the visa holder may work for a business unrelated to the sponsor.<sup>705</sup> This exemption enables certain highly skilled migrants to work as independent contractors in specific occupations that require a degree of mobility between employers (such as chief executives, general managers, and medical professionals).<sup>706</sup>

The existence of a ‘direct’ employment relationship turns on whether the 457 visa holder is an employee at law,<sup>707</sup> drawing on a multifactor test that examines the

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<sup>703</sup> Migration Regulations 1994 (Cth) sch 2, cl 457.223(4)(ba).

<sup>704</sup> Associated entities’ are defined under the Corporations Act 2001 (Cth) s 50AAA where a list of criteria to be satisfied, such as whether the associate and principal are related bodies corporate, whether the principal controls the associate, etc.

<sup>705</sup> IMMI 10/030 (n 594).

<sup>706</sup> DIAC, *Procedural Advice Manual 3 (PAM3)* (1994-) [P Sch2.457.51] para 51.1.

<sup>707</sup> *C H A Agencies Pty Ltd v MIMIA* [2004] FMCA 279 [21].

totality of the relationship between the parties to determine if an employment relationship exists.<sup>708</sup> DIAC's PAM3 Guidance also lists several characteristics of a direct employment relationship, which include: engaging the employee in a contractual relationship, the ability to appoint or dismiss the employee, the provision of a work environment (including the place of work, tools, material, and equipment), setting work parameters (including allocating tasks to, supervising the work of, and assessing and determining the output of the employee), paying the employee a salary, complying with taxation obligations in relation to the employee, and providing conditions of service for the employee (including leave provisions, workplace health and safety responsibilities, other workplace relations obligations, superannuation, liabilities for the work conducted by the employee, and visa insurance).

While the above list is non-exhaustive, the PAM3 Guidance states that 'the sponsor must carry all these responsibilities in the relationship with their nominated employee'.<sup>709</sup> Yet, it also proposes circumstances where these required characteristics are not themselves 'indicative of the absence of a direct employer-employee relationship'.<sup>710</sup> It presents the example of a 457 visa holder sponsored by an accounting firm who may perform external audits of clients that require them to work on the clients' premises for a period of time. The PAM3 Guidance explains that this would not be considered as the supply of the worker's services where the firm 'retains control over all of the staff member's actions and work tasks and could recall

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<sup>708</sup> *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

<sup>709</sup> DIAC, *PAM3* (n 706) para 51.1.

<sup>710</sup> *ibid*, para 51.2.

the staff member to continue their work in the accounting firm's own premises at any time'.<sup>711</sup>

The PAM3 Guidance seeks to make a distinction between the above instance to situations where 'the sponsor shares, with another business, control of some or all of the aspects of a direct employer-employee relationship'.<sup>712</sup> An example of the latter is given: where the visa holder is employed and paid by an agency but works to the standard set out by the client company on tasks assigned by that company. The agency then renders an invoice to the client for the visa holder's work. The Guidance explains that this situation would be deemed as 'the supply of the services of a sponsored visa holder'.<sup>713</sup> The distinctions between these two examples provided by the Guidance are not so clear-cut, as the sharing of 'control' by the sponsoring employer and client appears to be present, to varying degrees, in both situations. Identifying the 'direct' employer may be even more difficult where the labour arrangements are purposely designed to circumvent legal obligations.

Prior to 2008, labour hire agencies were able to sponsor 457 visa holders on standard business sponsorships and supply their labour to unrelated end-user clients. There is no data available on the number or proportion of 457 visa holders who have been sponsored by labour hire agencies. The Deegan Review noted that labour hire agencies have been 'significant users' of the scheme since its inception, 'especially in the IT industry, but increasingly in other areas'.<sup>714</sup> The role of these labour market intermediaries was a visible component of the public controversy surrounding the

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<sup>711</sup> *ibid.*

<sup>712</sup> *ibid.*, para 51.3.

<sup>713</sup> *ibid.*

<sup>714</sup> Deegan, *Final Report* (n 293) 63.

scheme that led to legislative amendments in 2007 to curtail these agencies' access.<sup>715</sup>

Since then, a labour hire agency can only sponsor visa holders in a nominated position that is to be directly performed in the agency's own business operations. Should the agency wish to sponsor visa holders whose labour would be utilised by end-user clients, it must enter into an On-hire Labour Agreement negotiated with the Minister.<sup>716</sup> Instead of meeting the obligations that come with standard business sponsorships, the crucial requirement for parties to a Labour Agreement is compliance with its terms, which are intended to contain additional safeguards for 457 visa holders who are deemed to be more vulnerable (such as migrants in less skilled, less paid occupations) than those with standard nominations.<sup>717</sup> However, this worker-protective dimension has not always been borne out. In 2012, a Labour Agreement was terminated after DIAC found the sponsor had employed 457 visa holders on a casual basis, underpaid wages, and provided false and misleading information to DIAC.<sup>718</sup>

In the UK, there is no specific requirement for the Tier 2 (General) visa sponsor to be the migrant's direct employer and/or the paying body. The UKBA Tier 2 Sponsor Guidance explicitly recognises 'certain circumstances, for example in parts of the creative sector, where there is no direct employer/employee

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<sup>715</sup> Migration Amendment Regulations 2007 (No 11) (Cth).

<sup>716</sup> Migration Regulations 1994 (Cth) sch 2, cl 457.223(4)(ba).

<sup>717</sup> Deegan, *Final Report* (n 293) 43.

<sup>718</sup> Chris Bowen, Minister for Immigration and Citizenship, 'First ever termination of a labour agreement' (Canberra, 15 February 2012) <<http://www.minister.immi.gov.au/media/cb/2012/cb182584.htm>> accessed 30 April 2013.

relationship’.<sup>719</sup> The key requirement is that ‘the migrant must still have a sponsor who is able and willing to accept all of the responsibilities and duties associated with being their sponsor’.<sup>720</sup> The Guidance also notes the situation where a public funded body with the powers to intervene in the running or funding of the employing or paying body may still be the sponsor of the Tier 2 migrant. The Guidance provides the example where a local authority has certain powers of control over otherwise self-governing schools. The local authority can sponsor migrants employed as teachers in those schools, even though it is not actually the paying body or employer.<sup>721</sup>

At the same time, the Tier 2 visa scheme does not allow employment agencies or employment businesses to apply for a sponsor license if the migrant is supplied ‘to a third party as labour, regardless of any contractual arrangement between the parties involved’.<sup>722</sup> The Sponsor Guidance states that the sponsored migrants must not be contracted as agency workers or be contracted to undertake a routine role or provide an ongoing routine service for a third party.<sup>723</sup> The employment agency or business can only apply to be a sponsor for migrants who would be directly employed in connection with the running of the agency’s business.

There is a perplexing ambiguity to the Sponsor Guidance — on the one hand, it bars the sponsorship of Tier 2 migrants as agency workers, but on the other, it allows for the migrant to be working ‘on a contract basis’ for the sponsor and be

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<sup>719</sup> UKBA, *Tier 2 Sponsors' Guidance (04/14)* (n 471) 82.

<sup>720</sup> *ibid.*

<sup>721</sup> *ibid.*

<sup>722</sup> *ibid* 18.

<sup>723</sup> *ibid* 132.

‘supplied to one organisation by another organisation’.<sup>724</sup> The Guidance provides that where the sponsored migrant is ‘carrying out work for a third party’ on behalf of the sponsor, the migrant must be ‘contracted by’ the sponsor to provide/deliver a ‘time-bound’ service or project on the sponsor’s behalf.<sup>725</sup> It provides an example of this scenario:

Company A has a contract with a client - Company Z - to deliver an IT solution within an agreed timescale. A migrant who is sponsored by Company A to work on that project, may be sent to work for the duration of the contract at Company Z’s premises, but they remain employed by Company A throughout the period of the contract. As Company A is fully responsible for deciding their duties, functions, outputs or outcomes, Company A must be the migrant’s sponsor.<sup>726</sup>

There appear to be two main differences between the former and latter scenarios: first, a distinction between the ‘supply of the labour’ of the migrant and the ‘supply of a contract for service’ by the migrant on behalf of the sponsor; and second, the temporality of ‘routine’ and ‘ongoing’ work versus a time-bound project for the third party. However, these distinctions are not so clear-cut in the Guidance. Without any further clarification from relevant policy documents and case law, there remains substantial uncertainty around the permissible forms of intermediated arrangements entailing sponsorship, employment, and contractual provision of/for services under the Tier 2 visa scheme. This uncertainty can give rise to difficulties in identifying the sponsor and/or employer for the purpose of meeting obligations under immigration and employment laws.

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<sup>724</sup> *ibid* 131.

<sup>725</sup> *ibid* 132.

<sup>726</sup> *ibid* 131.

### *Intermediated migrant work relations*

For migrants with precarious statuses, arrangements involving certain types of labour intermediaries can increase uncertainty around their employment relationship with a specific sponsor which forms the basis for their legal authorisation to remain in the host state. In Australia, there have been cases of labour hire agencies ‘standing down’ 457 visa holders for lengthy periods without pay in between contracts with different end-user clients.<sup>727</sup> Migrants who are sponsored by labour agencies may experience frequent changes in their workplace, working conditions, and the nature of work performed. These changes can result in sponsored migrants breaching their visa conditions such as working outside the permitted scope of their nominated occupation.

Employers may seek to source migrant workers through labour intermediaries to avoid dealing with complex immigration rules, sponsorship duties, and the risk of prosecution for non-compliance. McKay’s research revealed that employers in the UK would source migrants through agencies to escape ‘the trouble of work permit arrangements’ and the obligation to check workers’ migrant status.<sup>728</sup> Since these employment agencies and businesses were usually not based at the physical workplace of migrant workers, they have not been major targets for the UKBA’s enforcement efforts. In Australia, the Deegan Review also noted that employers who were no longer approved sponsors due to former breaches of sponsorship obligations could continue to source migrant workers through labour hire agencies.<sup>729</sup>

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<sup>727</sup> Bob Kinnard, ‘Current Issues in the Skilled Temporary Subclass 457 Visa’ (2006) 14 *People and Place* 49.

<sup>728</sup> Sonia McKay, *Agency and migrant workers* (Institute of Employment Rights 2009).

<sup>729</sup> Deegan, *Final Report* (n 293) 64.

Furthermore, the use of offshore intermediaries can raise problems for the regulatory reach and implementation of the host state's laws.

There remain gaps in substantive legal protection for 457 visa holders on labour hire arrangements. In Australia, labour hire workers are often engaged on a 'casual' basis where they are paid at a slightly higher hourly rate (normally 20-25 per cent) in lieu of the range of entitlements associated with a full-time employment such as paid leave and sick leave. Casual workers also have no guarantee of ongoing work with the employer and can be engaged on an hourly, daily, or weekly basis.<sup>730</sup> Labour hire workers can also find themselves excluded in practice from provisions of the Fair Work Act due to the SER-centric legal tests attached to some statutory protections that are incompatible with complex triangular contractual relationships.<sup>731</sup>

While some industrial instruments in Australia contain provisions regarding labour hire employment, these workers are usually not covered by the enterprise agreements of the end-user client organisation. Therefore disparities in wages and working conditions can legally exist between labour hire workers and comparable direct employees in the same workplace. Unions have attempted to limit employers' usage of labour hire or to require that employers pay labour hire workers the same rates as directly employed employees through negotiating clauses in collective enterprise agreements. However, amendments under the WorkChoices legislation brought in a 'prohibited content' rule that meant that such clauses could not form part

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<sup>730</sup> 'Casual employee' is not defined in the Fair Work Act 2009 (Cth), although the Act provides for certain rights such as unpaid parental leave and unfair dismissal for 'long term casual' employees (defined as 'a casual employee... employed by the employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months'). Industrial courts and tribunals have developed various indicators of 'casual employment'.

<sup>731</sup> Independent Inquiry into Insecure Work in Australia, *Lives On Hold, Unlocking the Potential of Australia's Workforce* (2012) 34.

of federal collective agreements.<sup>732</sup> Conversely, the Fair Work Act 2009 adopted a ‘permitted content’ rule which covered clauses that fell within ‘matters pertaining to the employment relationship’. Fair Work Australia has applied this rule to permit clauses requiring consultation on engaging labour hire<sup>733</sup> and wage parity between labour hirers and direct employees under the collective agreement.<sup>734</sup> However, clauses that prohibit, restrict, or qualify the ability of an employer with respect to using contract or agency staff would not be considered as permitted content in a collective agreement.<sup>735</sup>

Although Tier 2 (General) visa holders cannot be engaged as ‘agency workers’ according to UKBA’s policy guidance, there remains room for sponsoring such migrants as self-employed contractors for service, rather than direct employees, as examined above. This would have the effect of excluding these migrants from the scope of statutory employment protections that are conferred only on those with the contractual status of ‘employees’ or ‘workers’. Bogg highlights the problem of ‘sham’ terms such as ‘substitution’ and ‘no mutuality’ clauses that are inserted into ‘comprehensive written contracts’ to disguise the reality of a personal employment relationship, especially where workers in a weak labour market position are offered such contracts on a take-it-or-leave-it basis.<sup>736</sup> Bogg and Novitz further indicate the problem for migrant workers where the ‘sham’ doctrine intersects with illegality. Where a migrant ‘knowingly’ colluded or acquiesced in contractual arrangements

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<sup>732</sup> Andrew Stewart and Joellen Riley, ‘Working Around Work Choices: Collective Bargaining and the Common Law’ (2007) 31 Melbourne University Law Review 903.

<sup>733</sup> *AMWU v Bitzer Australia Pty Ltd t/as Buffalo Trident* [2009] FWA 962.

<sup>734</sup> *LHMU application for a protected ballot order* [2009] FWA 920.

<sup>735</sup> *Australian Postal Corporation v CEPU* [2009] FWAFB 599.

<sup>736</sup> Alan L. Bogg, ‘Sham Self-Employment in the Supreme Court’ (2012) 41 ILJ 328.

with the employer to avoid legal obligations including immigration laws, the circumstances that can give rise to a ‘sham’ claim by the migrant may at the same time present the employer with an ‘illegality’ defence.<sup>737</sup>

### *Unethical practices of intermediaries*

A persistent problem in connection with migrants’ use of private employment agencies in the job-search and migratory process has been the practice of less scrupulous agencies charging migrants large sums of ‘recruitment’ and ‘administration’ fees to be paid upfront or deducted from their wages.<sup>738</sup> The ILO Private Employment Agencies Convention 1997 (No. 181) contains a wide prohibition against employment agencies ‘charging directly or indirectly, in whole or in part, any fees or costs to workers’.<sup>739</sup> However, the competent authority of the Member state may authorise exceptions to this provision ‘in respect of certain categories of workers, as well as specified types of services provided by private employment agencies’. These exceptions must be ‘in the interest of the workers concerned’ and made after consulting with the ‘most representative organisations of employers and workers’.<sup>740</sup>

Under the 457 visa scheme, sponsors are under an obligation not to recover or seek to recover from the primary visa holder or any family members ‘all or part of the costs’ that relate specifically to the recruitment of the visa holder or associated

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<sup>737</sup> Alan Bogg and Tonia Novitz, ‘Links between Individual Employment Law and Collective Labour Law: Their Implications for Migrant Workers’ (Migrants at Work Conference, Oxford, June 2012) 23.

<sup>738</sup> Fair Work Ombudsman v Kentwood Industries (No.2) [2010] FCA 1156.

<sup>739</sup> ILO Convention (No. 181) concerning Private Employment Agencies (adopted 19 June 1997; entered into force 10 May 2000) art 7(1).

<sup>740</sup> *ibid*, art 7(2).

with becoming or being an approved sponsor.<sup>741</sup> Furthermore, there are laws in some Australian States and Territories that directly prohibit or restrict the practices of private employment agencies in relation to charging workers job-search fees.<sup>742</sup> In the UK, employment agencies and employment businesses are legally prohibited from charging work-seekers fees for finding work, with the exception of certain occupations in the entertainment and modelling sectors.<sup>743</sup>

The Deegan Review noted a common misperception among 457 visa holders who did not know that certain fee-charging practices were unlawful in Australia since they heavily relied on the advice of their employment agencies.<sup>744</sup> Similarly, McKay's research found numerous cases of 'documented' and 'undocumented' migrants being charged upfront job-search fees, disguised as 'registration fees' and 'information and assistance fees', by employment and migration agencies before and after they entered the UK, commonly without knowing that such fees were illegal.<sup>745</sup> In a 2002 survey of 1,119 internationally recruited nurses in the UK, a third of the respondents reported that they had to pay the recruitment agency and/or employer agency fees.<sup>746</sup> The TUC's Commission on Vulnerable Employment pointed to cases

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<sup>741</sup> DIAC, *Temporary Work (Skilled) (subclass 457) Visa Booklet 9* (DIAC 2013) 18.

<sup>742</sup> The federal structure of Australian government means that the regulation of private employment agencies occurs at the State level. In Queensland, this prohibition is most comprehensive: see Private Employment Agents (Code of Conduct) Regulation 2005 (Qld) ss 18 and 19; Industrial Relations Act 1999 (Qld) s 408D (models and performers have a special exemption under this provision). All other States have various forms of restrictions on charging job seekers fees and/or deposits, for example, Fair Trading Act 1987 (NSW) ss 48 and 49; Agents Act 2003 (ACT) s 96; Employment Agents Act 1976 (WA) s 36.

<sup>743</sup> Conduct of Employment Agencies and Employment Businesses Regulations 2003, ss 6(1)(a) and 26(1).

<sup>744</sup> Deegan, *Final Report* (n 293) 62.

<sup>745</sup> Sonia McKay, 'The Relationship Between Status and Rights' in REMESO (ed), *Themes on Migration and Ethnic Studies* (2009) 7.

<sup>746</sup> Lynne Pearce, 'World of a difference' (2002) 16 *Nursing Standard* 14.

of large loans paid by migrants to agencies for ‘promises of non-existent jobs’, who thus found themselves in substantial debt upon arriving in the UK.<sup>747</sup> Since migrants can become hyper-dependent on their agencies for work and possibly visa sponsorship, they are less able to challenge exploitative practices.

Common practices by unscrupulous agencies in the labour migration ‘market’ have also included the provision of ill-informed and even misleading advice to employers regarding their sponsorship obligations. The Deegan Review noted that in some instances, migration agents allegedly sought to ‘sell’ the 457 visa scheme to employers as a way of obtaining a ‘bonded’ workforce.<sup>748</sup> Submissions to the Review gave examples of migration agents misinforming employers that the 457 visa is only a 12 month visa, that the employer can recover the costs of bringing a worker over to Australia from the visa holder’s wages, and that visa holders can be required to work for unlimited hours and only paid the relevant minimum salary level.<sup>749</sup>

The TUC has called for the ‘the monitoring and *regularisation* of agencies that deal with migrant workers’.<sup>750</sup> Rather than objecting to the operation of agencies per se, one of the main problems from the TUC’s perspective is the lack of regulatory oversight over the unlawful and unethical activities of unscrupulous agencies, especially those operating offshore where the host state’s enforcement powers and capabilities are legally and practically limited. The next subsection examines the extent to which the various and diverse intermediaries in the ‘labour migration space’ are regulated in Australia and the UK.

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<sup>747</sup> TUC Commission on Vulnerable Employment, *Hard Work, Hidden Lives: Full Report* (n 22) 196.

<sup>748</sup> Deegan, *Final Report* (n 293) 20.

<sup>749</sup> *ibid.*

<sup>750</sup> TUC, *Making a rights-based migration system work* (n 568) para 5.3.

### ***Regulation of labour market and migration intermediaries***

The licensing of employment agencies (engaging in a recruitment service) in Australia has been regulated at State-level (rather than federal level) since the turn of the 20<sup>th</sup> century.<sup>751</sup> Most States and Territories legislation have provisions that prohibit employment agencies from charging job seeker fees or engaging in misleading or deceptive conduct in specific legislation,<sup>752</sup> code of conduct regulation,<sup>753</sup> fair trading laws,<sup>754</sup> and/or industrial relations laws.<sup>755</sup> The regulatory difficulty arises where agencies conduct both recruitment and labour hire activities from one business, which has become increasingly common.<sup>756</sup> The New South Wales Department of Fair Trading has adopted a case-by-case approach to determine the dominance of the recruitment function among the activities of such a business, and the nature of its employment arrangement with the worker.<sup>757</sup>

In contrast to the regulation of employment agencies, there is a limited regulatory framework in Australia governing the activities of labour hire agencies that supply the service of workers to third-party labour-users (client businesses). There are an estimated 2,000 to 3,500 labour hire agencies hiring two to four per cent of the total workforce, which are concentrated in manufacturing, property and

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<sup>751</sup> Anthony O'Donnell and Richard Mitchell, 'The Regulation of Public and Private Employment Agencies in Australia: an Historical Perspective' (2001) 23 CLLPJ 7.

<sup>752</sup> Employment Agents Registration Act 1993 (SA); Employment Agents Act 1976 (WA).

<sup>753</sup> Private Employment Agents (Code of Conduct) Regulation 2005 (Qld).

<sup>754</sup> Fair Trade Regulations 2012 (NSW).

<sup>755</sup> Industrial Relations Act 1999 (Qld) s 408.

<sup>756</sup> O'Donnell and Mitchell, 'Regulation of Employment Agencies in Australia' (n 750) 31.

<sup>757</sup> New South Wales Department of Industrial Relations, *Labour Hire Task Force: Final Report* (2001) 49.

business services, and health and community services sectors.<sup>758</sup> However, as Campbell, Watson, and Buchanan point out, there may be an underestimation of the (growing) extent of agency work in Australia since the official statistics only include employees hired by agencies and not dependent contractors/self-employed agency workers.<sup>759</sup> There is no specific regulatory framework such as a registration and licensing scheme for labour hire agencies at the national level. Queensland and Western Australia have been the only states to have provisions in their industrial relations legislation that include labour hire agencies in the definition of ‘employer’.<sup>760</sup> The Recruitment and Consulting Services Association (RCSA), a peak body representing labour hire agencies in Australia, has a self-regulatory Code for Professional Conduct for agencies that voluntarily join as members.<sup>761</sup> The Australian Council of Trade Unions (ACTU) commissioned an Independent Enquiry into Insecure Work in Australia in 2012, which recommended a comprehensive national scheme for the registration, licensing, and regulation of labour hire agencies.<sup>762</sup>

Compared to Australia, the regulation of labour market intermediaries in the UK appears to be more developed. This may, in part, reflect the much larger market of employment agencies and businesses in the UK, which is the biggest in Europe and the third biggest worldwide. As of 2012, there are around 11,500 private

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<sup>758</sup> Independent Inquiry into Insecure Work in Australia, *Lives On Hold* (n 731) 33.

<sup>759</sup> Ian Campbell, Ian Watson and John Buchanan, ‘Temporary agency work in Australia’ in John Burgess and Julia Connell (eds), *International Perspectives on Temporary Agency Work* (Routledge 2004).

<sup>760</sup> Industrial Relations Act 1999 (Qld) s 6(2)(d); Industrial Relations Act 1979 (WA) s 7(1).

<sup>761</sup> RCSA, ‘Code for Professional Conduct’ <[http://www.rcsa.com.au/documents/RCSA%20Code/Code%20Reference%20Documents/Code\\_for\\_Professional\\_Conduct.pdf](http://www.rcsa.com.au/documents/RCSA%20Code/Code%20Reference%20Documents/Code_for_Professional_Conduct.pdf)> accessed 5 May 2013.

<sup>762</sup> Independent Inquiry into Insecure Work in Australia, *Lives On Hold* (n 731) 33-34.

employment agencies operating in the UK, with a workforce penetration rate of four to five per cent.<sup>763</sup> In certain sectors such as construction, social care, and services, temporary agency workers constitute a substantial proportion of the workforce.<sup>764</sup> The most robust regulatory regime concerning labour market intermediaries in the UK is the Gangmasters (Licensing) Act 2004 which introduced a Gangmasters Licensing Authority (GLA) to regulate the operation of temporary labour suppliers, or so-called ‘gangmasters’, in agriculture, forestry, horticulture, shellfish gathering, and food and drink processing sectors.

The GLA scheme covers all workers engaged by gangmasters in those sectors, irrespective of whether the worker works for the gangmaster, for another, or ‘on his own account’.<sup>765</sup> Significantly, a person is not excluded from being a ‘worker’ for the purposes of the Act ‘by reason of the fact that he has no right to be, or to work, in the United Kingdom’.<sup>766</sup> The GLA has largely been proactive in exercising its enforcement powers through surprise inspections and revocation of licenses.<sup>767</sup> However, the remit of the regime is only limited to the few specified sectors where Tier 2 migrants are unlikely to be found. There is evidence that gangmasters have diversified into other non-GLA sectors such as construction,

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<sup>763</sup> Ciett, *The Agency Work Industry around the World: Economic Report* (Ciett 2013).

<sup>764</sup> Robert MacKenzie, Chris Forde, Andrew Robinson, Hugh Cook, Brigitta Eriksson, Patrik Larsson and Anne Bergman, ‘Contingent work in the UK and Sweden: evidence from the construction industry’ (2010) 41 IRJ 603; Michelle Cornes, Jo Moriaty, Saidah Blendi-Mahota, Tim Chittleburgh, Shereen Hussein and Jill Manthorpe, *Working for the Agency: The Role and Significance of Temporary Employment Agencies in the Social Care Workforce* (Social Care Workplace Research Unit, KCL 2010).

<sup>765</sup> Gangmaster (Licensing) Act 2004, s 5 (6).

<sup>766</sup> *ibid*, s 26 (2).

<sup>767</sup> McKay, *Agency and migrant workers* (n 728) 54-55.

hospitality, and social care, and/or moved into these sectors completely to avoid GLA activities.<sup>768</sup>

Furthermore, there remains extensive under-reporting of migrant exploitation in GLA-regulated sectors. An Oxfam research paper pointed to the compounding problems arising from the requirement that the GLA inspect workers' immigrant status and share such information with the UKBA.<sup>769</sup> This may further discourage regular migrants who are uncertain of their migrant status and irregular migrants from reporting abuse, as well as drive irregular migrants into working for unlicensed gangmasters. In contrast, the Health and Safety Executive, the regulatory body for investigating and enforcing workplace health and safety legislation in the UK, has no such obligation to enquire into workers' immigrant status. Its Guidance Pack for inspectors states: 'Inspectors and visiting staff should not actively enquire about workers migrant status during visits or investigations, but should be aware of the possible indicators of illegal employment'.<sup>770</sup>

In terms of regulatory oversight of labour intermediaries in non-GLA sectors, the little-known Employment Agencies Act 1973 (EAA), its associated Conduct of Employment Agencies and Employment Businesses Regulations 2003, and the Employment Agency Standards Inspectorate (EASI) have generally suffered from a 'light-touch' legal framework and weak enforcement.<sup>771</sup> New provisions were introduced in the Employment Act 2008 to strengthen the EASI's inspection powers

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<sup>768</sup> Alex Balch, Paul Brindley, Andrew Geddes and Sam Scott, *Gangmasters Licensing Authority: Annual Review 2008* (2009) 15.

<sup>769</sup> Oxfam GB, *Turning the Tide: How to best protect workers employed by gangmasters, five years after Morecambe Bay* (Oxfam Briefing Paper, 2009) 16.

<sup>770</sup> Health and Safety Executive, *Topic Inspect Pack: Migrant Working* (2010) 1, 7.

<sup>771</sup> Michael Wynn, 'Regulating Rogues? Employment Agency Enforcement and Sections 15–18 of the Employment Act 2008' (2009) 38 ILJ 64.

and increasing penalties for offences. However, severe deficiencies in resources and funding for enforcement and little public awareness of the inspectorate continue to weaken its operational efficacy.<sup>772</sup>

Finally, the regimes regulating the provision of migration advice in Australia and the UK are largely based on statutory self-regulation. In order to provide fee-charging immigration advice and services, individuals and organisations must be registered with the relevant regulatory authorities. In Australia, migration advisers (including practising lawyers) must be registered with the Office of the Migration Agents Registration Authority (MARA). MARA has regulatory functions under the Migration Act 1958 (Cth) that include administering agent registration, monitoring agent conduct, and investigating complaints about, and taking appropriate action against, registered migration agents who breach MARA's Code of Conduct and/or act improperly.<sup>773</sup> Similarly, the UK's Office of the Immigration Services Commissioner (OISC) regulates immigration advisers through exercising supervision and discipline powers under the Immigration and Asylum Act 1999 and the Nationality, Immigration and Asylum Act 2002. Unlike MARA, legally qualified professionals regulated by approved professional bodies can also provide immigration advice without being admitted into the OISC regime. OISC also does not appear to have a Code of Conduct for its regulated advisers.

Overall, there are pronounced weaknesses, gaps, and ambiguities in both countries' frameworks for regulating migrant labour intermediaries. Without adequate regulatory protections, migrant workers sponsored under TMWPs who are engaged in intermediated labour arrangements can be at a greater risk of

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<sup>772</sup> Mick Wilkinson, Gary Craig and Aline Gaus, *Forced labour in the UK and the Gangmasters Licensing Authority* (2010).

<sup>773</sup> Migration Act 1958 (Cth) s 316.

experiencing hyper-precarity in their work relations. Their migrant statuses can become more precarious under these arrangements due to the difficulties of identifying the actual sponsor/employer for the purposes of compliance with the relevant legal obligations, and the risk of breaching their visa conditions arising from frequent changes in the user of their labour and the nature of the work performed. Furthermore, where migrants are dependent on intermediaries for information and advice, job search, and/or visa sponsorship, weak regulatory oversight of these intermediaries' activities can leave enormous scope for unscrupulous practices that heighten the risk of hyper-precarity in migrants' work relations.

### *A constructive role for regulated intermediaries?*

The above analysis has pointed to the problematic aspects of intermediated migrant work relations and migration projects under TMWPs which can increase the risks of hyper-dependence and hyper-precarity. At the same time, these intermediaries occupy a central role in the functioning of contemporary globalised, flexible labour markets. Private employment agencies, for example, have become key facilitators of migrants' access to employment in host states.<sup>774</sup> Despite the ILO's traditional antipathy towards private agencies, it recognised and even legitimatised their role in 'well-functioning' labour markets through the 1997 Private Employment Agency Convention (No. 181). A critical question arises as to whether the various intermediaries in the labour migration space can indeed play a constructive role in addressing the normative concerns of hyper-dependence and hyper-precarity arising from migrants' precarious statuses.

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<sup>774</sup> Robert MacKenzie and Chris Forde, 'The rhetoric of the 'good worker' versus the realities of employers' use and the experiences of migrant workers' (2009) 23 *Work, Employment and Society* 142; Linda McDowell, Adina Batnitzky and Sarah Dyer, 'Internationalization and the Spaces of Temporary Labour: The Global Assembly of a Local Workforce' (2008) 46 *BJIR* 750.

In principle, agencies can channel information and resources to facilitate migrants' change of employment during their stay in the host state. The ability for migrants to change end-users via a sponsoring labour hire or employment agency can lessen their dependence on a single end-user of their labour. If the contract for their services is terminated by the end-user, the agency (as the sponsor of the migrant's visa) can be a vital vehicle for finding migrants work with another client while continuing their sponsorship. In these circumstances, migrants' may experience a lesser degree of uncertainty in their legal statuses compared to a situation where a direct employer terminates the relationship and in turn entails the withdrawal of their visa sponsorship. Furthermore, specialised intermediaries can also possess more expertise and experience to comply with complex sponsorship duties compared to employers, which can alleviate the risks of the worker falling into precarious migration status arising from breaches of immigration rules. Fitzgerald has also pointed to the potential role of agencies in sending countries to assist migrants with accessing otherwise difficult-to-reach occupations and industries in specific labour markets abroad.<sup>775</sup>

In a study of Indian nationals on 457 visas, Velayutham found that the nature of operations of employment agencies can affect the vulnerability of migrant status for blue-collar workers admitted under these visas: 'Unlike workers in the IT sector, there was no easy access to large employment agencies or labour hire firms in Australia to place workers in alternative positions. The agents who initially recruited them were usually small, typically operated offshore'.<sup>776</sup> This observation suggests that a constructive role for employment agencies and labour hire firms could be to

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<sup>775</sup> Ian Fitzgerald, *Working in the UK: Polish migrant worker routes into employment in the north-east and north west construction and food processing sectors* (TUC 2007).

<sup>776</sup> Velayutham, 'Precarious experiences of Indians on 457 visas' (n 599) 357.

facilitate and support labour market transitions for temporary migrant workers so as to maintain their legal authorisation to remain in the host state.

A complex set of formal and informal ‘brokers’ that migrants interact with in the migratory process, alongside ‘traditional’ employment and labour hire agencies, are playing an increasingly pivotal role in mediating the relations between migrants and employers.<sup>777</sup> McKenzie and Forde analyse the different ethical agendas adopted by ‘new intermediaries’, such as social enterprises, ‘firm-as-intermediaries’, and single-person ‘agents’, towards migrant workers. They highlight the role of emerging non-for-profit social enterprises ‘whose activities are underpinned by a commitment to social justice for migrant workers’.<sup>778</sup> Their case study of one such enterprise in the UK illustrates how the activities of these new intermediaries extend beyond the migrants’ initial entry into the host state to facilitate subsequent opportunities for their labour market transition and mobility after admission. McKenzie and Forde also examined a case study of a large multinational employment agency that adopted ethical codes relating to migrant workers that were considered in the industry to be a ‘best practice’ example of corporate social responsibility. However, these codes were built around a ‘business case’ for diversity and its competitive strategy of a ‘high value-added’ approach to developing client relationships, rather than an imperative to promote the needs and interests of migrant workers.<sup>779</sup>

There is presently an underdeveloped role for those intermediaries with an ethical agenda of not only facilitating initial labour market access for migrants under the two TMWPs, but also meeting their post-admission needs and improving their

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<sup>777</sup> Chris Forde and Robert MacKenzie, ‘The Ethical Agendas of Employment Agencies Towards Migrant Workers in the UK: Deciphering the Codes’ (2010) 97 *Journal of Business Ethics* 31.

<sup>778</sup> *ibid* 32.

<sup>779</sup> *ibid* 35-36.

labour market experiences. Specifically, these intermediaries can help to provide migrants with a greater degree of security in their legal status under employer sponsored TMWPs as well as guaranteed wages, provision of information, and access to training in between jobs. Such measures have the potential to alleviate migrants' exposure to the risks of hyper-dependence and hyper-precarity associated with their precarious statuses.

### **5.7 Collective Rights in Migrant Work Relations**

The rights of workers to freely form and join trade unions of their own choosing and to organise and engage in collective bargaining without hindrance are widely recognised as fundamental labour and human rights. In Australia and the UK, migrant workers under TMWPs are entitled to the same trade union and collective bargaining rights as resident workers. However, migrants' ability to exercise these rights in practice as well as to seek union assistance in bringing claims against their employers can be impeded by the actual or perceived consequences of antagonising the employer: the termination of employment and withdrawal of the visa sponsorship that critically jeopardises their legal permission to remain in the host state. Migrants' precarious statuses under TMWPs can therefore obstruct a crucial mechanism of worker protection, which constitute a further source of hyper-precarity.

The Deegan Review noted that some 457 visa holders had signed employment contracts that purported to ban union membership, contact with unions, or engagement in union activities. Stakeholders of the Deegan Review also provided

instances of visa holders being dismissed by their sponsor after asking about union membership.<sup>780</sup> In the UK, Anderson observed that:

in some instances employers have taken advantage of immigrant status as a means of exercising control over work permit holders, including forbidding union membership. No claims can be made for the extent of such practices, but those on work permits may be conscious enough of this possibility to police themselves.<sup>781</sup>

Beyond the barriers posed by migrants' precarious statuses, the choices and strategies that unions assume in relation to organising temporary migrant workers as well as unions' wider policy positions on labour migration can influence the extent to which migrants may partake in trade union membership and activities. In Australia and the UK, trade unions have traditionally been depicted as 'labour protectionists' concerned with keeping migrants out of the labour market in order to protect the employment, wages, and conditions of resident workers.<sup>782</sup> Despite the ideological tradition of international labour solidarity, established local workforces have often displayed certain hostilities towards the entry of migrants into the labour market.<sup>783</sup> As Australia's historical experience highlighted, trade unions have had a longstanding wariness over the potential for temporary migrant labour to depress wage levels and working conditions and to weaken the bargaining position of organised labour in industrial disputes.

Contemporary trade union movements in both countries have increasingly adopted an inclusivist approach to representing and organising temporary migrant

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<sup>780</sup> Deegan, *Final Report* (n 293) 78.

<sup>781</sup> Anderson, 'Migration, immigration controls' (n 4) 310.

<sup>782</sup> Ryan, *Labour Migration and Employment Rights* (n 314) 7; Santina Bertone, Gerard Griffin and Roderick D. Iverson, 'Immigrant Workers and Australian Trade Unions: Participation and Attitudes' (1995) 29 *International Migration Review* 722.

<sup>783</sup> Stephen Castles and Godula Kosack, *Immigrant Workers and Class Structure in Western Europe* (OUP 1973).

workers, albeit with various challenges that are often associated with organising precarious workers. Migrants in workplaces, sectors, and regional locations with already low levels of unionisation, those engaged in contingent forms of employment such as agency work, and those with poor language skills pose considerable difficulties for union recruitment and organising.<sup>784</sup> Moreover, the labour markets contexts and regulatory environments in which unions operate can affect their industrial power and capacity to represent and organise migrants. Union membership and density in Australia and the UK have declined markedly over the past two decades, along with a corresponding weakening of trade union rights and collective bargaining rights in both countries' labour law and industrial relations framework.

Nevertheless, the ACTU and its affiliated members have, on the whole, been successful in raising public awareness of the exploitation of 457 visa holders, building partnerships with ethnic community groups and migrants' groups, and spearheading campaigns for legislative reforms to the scheme in 2008. Some commentators have argued that the traditional protectionist interests of trade unions underpinned their interest in preventing employer abuses of the scheme.<sup>785</sup> Yet Caspersz's interviews with trade union officials and 457 visa holders from the Filipino community suggest a mixed picture, not simply of historically held 'protectionist' attitudes towards temporary migrant workers, but also social justice and solidarity motivations to safeguard these workers from exploitation.<sup>786</sup>

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<sup>784</sup> McKay, *Trade unions and recent migration* (n 98).

<sup>785</sup> Judith Sloan, '457 visa feedback "code for lost votes"' *The Australian* (6 March 2013) <<http://www.theaustralian.com.au/opinion/columnists/visa-feedback-code-for-lost-votes/story-fnbkvnk7-1226591078345>> accessed 30 April 2013.

<sup>786</sup> Donella Caspersz, 'The Call to Arms: Organizing Temporary Migrant Workers in Australia' (International Industrial Relations Association World Congress, Sydney, 24-27 August 2009).

British trade unions have generally been supportive of a ‘Managed Migration’ agenda, recognising the ‘need for an objective system for determining whether people are allowed to enter the UK to work, in the interests of migrant workers and the wider community’.<sup>787</sup> At the same time, the TUC has emphasised that such a system ‘should ensure equal rights for people at work whether they are indigenous or migrant workers’.<sup>788</sup> The TUC has expressed concerns about aspects of the PBS that it saw as countering a rights-based approach to labour migration, including the nature of the Tier 2 visa that linked migrants’ status an existing employer or restricted sector.<sup>789</sup> In recent years, the TUC and affiliates have supported more liberal policy approaches to labour immigration.<sup>790</sup> This has emerged from an increasingly accepted view among the union movement that organising migrants can be a strategy of revitalisation in a period characterised by declining membership.<sup>791</sup> The TUC has shifted from having a separate national migrant worker strategy to including them under the umbrella of an overall vulnerable workers campaign.<sup>792</sup> Community and social movement unionism are also emerging within some parts of the British union

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<sup>787</sup> TUC, *Making a rights-based migration system work* (n 568).

<sup>788</sup> TUC, *The World according to Congree 2007: International Resolutions* (2007).

<sup>789</sup> TUC, *Making a rights-based migration system work* (n 568) para 4.2.

<sup>790</sup> Torben Krings, ‘A Race to the Bottom? Trade Unions, EU Enlargement and the Free Movement of Labour’ (2009) 15 *European Journal of Industrial Relations* 49.

<sup>791</sup> Phil James and Joanna Karmowska, ‘Unions and migrant workers: strategic challenges in Britain’ (2012) 18 *Transfer: European Review of Labour and Research* 201; Gamze Avci and Christopher McDonald, ‘Chipping Away at the Fortress: Unions, Immigration and the Transnational Labour Market’ (2000) 38 *International Migration* 191.

<sup>792</sup> TUC Commission on Vulnerable Employment, *Hard Work, Hidden Lives: Full Report* (n 22).

movement that have recognised the limits of traditional workplace organising strategies.<sup>793</sup>

## **5.8 Exclusion from Social Protections**

Under both TMWPs, visa holders are excluded from a range of social security protections, either as a condition of their visa and/or because they fall outside the coverage of social security regulations due to their residential status. The limited social protections for these migrants and their accompanying family members can heighten their reliance on the income from their employment with the sponsor, particularly in light of immigration restrictions that prevent them from undertaking work that is additional to their sponsored employment. For migrants in an inferior labour market position (such as those at the lower-end of the skills/wages spectrum), there may well be situations where they must accept substandard wages and working conditions in the absence of an income safety net.

In Australia, 457 visa holders are generally not entitled to access social security and public health benefits on the basis of their temporary residence status. Unemployment benefits under the Social Security Act 1991 (Cth) are only available to Australian citizens and permanent residents. Similarly, the Health Insurance Act 1973 (Cth) also limits entitlement to public funded Medicare benefits to Australian residents. Prior to legislative amendments in 2009, the sponsor was responsible for all public hospital medical expenses of primary and secondary 457 visa holders for the duration of their visas. While this may appear to be a worker-protective measure, the Deegan Review referred to cases where sponsors actively discouraged visa

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<sup>793</sup> Ian Fitzgerald and Jane Hardy, ‘Thinking Outside the Box?’ Trade Union Organizing Strategies and Polish Migrant Workers in the United Kingdom’ (2010) 48 BJIR 131.

holders from accessing medical care when required and from making workers compensation claims to avoid responsibility for medical expenses. In some cases, employers also illegally deducted medical insurance premiums from workers' wages.<sup>794</sup> Since 2009, a new visa condition (8501) requires all new 457 visa holders to maintain adequate health insurance arrangements for themselves and their dependents while in Australia.

457 visa holders also lack wage protection if their employers become insolvent or bankrupt. Workers with Australian citizenship or permanent residence status can access the General Employee Entitlements Redundancy Scheme (GEERS), or the Fair Entitlements Guarantee (FEG) (if the employer became bankrupt/insolvent on or after 5 December 2012). GEERS/FEG is a government 'safety net' scheme funded through the tax system and covers capped unpaid wages, annual and long service leave, capped payment in lieu of notice, and capped redundancy pay. It requires claimants to be 'entitled to reside permanently in Australia',<sup>795</sup> thus barring those with temporary residential status. For 457 visa holders, the only way to reclaim their entitlements upon the employer's insolvency or bankruptcy is through civil proceedings that often involve a substantial amount of time and expense.

The only form of income protection for 457 visa holders is superannuation. Employers have the same obligations to make contributions to a superannuation fund on behalf of the visa holder as they do for resident workers under with Superannuation Act 1992 (Cth). However, since the primary purpose of superannuation is to ensure sufficient post-retirement individual savings, these funds

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<sup>794</sup> Deegan, *Final Report* (n 293) 72-73.

<sup>795</sup> DEEWR, *General Employee Entitlements and Redundancy Scheme: Operational Arrangements* (2011) 7.

can only typically be accessed at the time of retirement, with strict regulations preventing early access to preserved benefits. Under certain conditions, 457 visa holders can take out their superannuation once they permanently depart Australia. However, superannuation benefits do little to address any immediate income insecurities experienced by these migrant workers and their dependents, especially if they lose their employment.

In the UK, limits on a Tier 2 (General) visa holder's access to public funds come from the 'no recourse to public funds' provision in the Immigration Rules<sup>796</sup> and the definition of 'a person subject to immigration control' in the Immigration and Asylum Act 1999.<sup>797</sup> Under the Immigration and Asylum Act, they are not allowed to claim a list of social security benefits under the Act: income-based jobseeker's allowance, state pension credit, attendance allowance, severe disablement allowance, carer's allowance, disability living allowance, income support, working families' tax credit, disabled person's tax credit, social fund payment, child benefit, housing benefit, or council tax benefit.<sup>798</sup> A similar list can be found in the Immigration Rules that exhaustively defines the term 'public funds'.<sup>799</sup>

Any other benefits that do not fall within the above lists are not considered as 'public funds'. The Home Office's Policy Guidance cites examples of such benefits, including: contribution-based jobseeker's allowance, guardian's allowance, incapacity benefit, contribution-based employment and support allowance, maternity allowance, retirement pension, statutory maternity pay, widow's benefit and

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<sup>796</sup> Immigration Rules, para 6.

<sup>797</sup> Immigration and Asylum Act 1999, s 115.

<sup>798</sup> *ibid*, s 115 (1).

<sup>799</sup> Immigration Rules, para 6.

bereavement benefit.<sup>800</sup> NHS treatment and access to emergency services also do not count as ‘public funds’ for the purposes of the Immigration Rules. Under NHS regulations, Tier 2 (General) visa holders and their dependents are generally exempted from charges for NHS hospital treatment.<sup>801</sup> However, where they are entitled to certain benefits, the visa condition of ‘no recourse to public funds’ can create a misperception among some migrants that they are not eligible for any form of public welfare and social security whatsoever.

Furthermore, Tier 2 (General) migrants must have in possession a minimum threshold of ‘maintenance funds’ to cover the cost of the initial part of their stay in the UK. Under this ‘means of subsistence’ requirement, visa applicants must prove that they have personal savings of at least £900 of available funds held in their bank accounts for a consecutive 90 day period ending no more than 31 days before the date of their application.<sup>802</sup> Along with the visa condition of ‘no recourse to public funds’, this requirement serves as another mechanism to prevent potential migrants and their dependents from seeking access to social welfare. The UKBA Policy Guidance clearly stipulates that visa applications that do not provide evidence of available funds to score the requisite 10 points for maintenance will be refused.<sup>803</sup>

There is another potentially adverse implication for migrants’ legal statuses flowing from immigration rules that restrict their access to social protections. The validity of their legal permission to reside in the host state can hinge on visa conditions that stipulate ‘no recourse to public funds’ for Tier 2 (General) visa

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<sup>800</sup> Home Office Border & Immigration Agency, *Guidance on Public funds (version 7)* (2012) 8.

<sup>801</sup> National Health Service (Charges to Overseas Visitors) Regulations 2011, reg 8.

<sup>802</sup> Immigration Rules, Appendix C.

<sup>803</sup> UKBA, *Tier 2 Policy Guidance* (n 470) 32.

holders or that 457 visa holders must take out their own health insurance. Non-compliance with such conditions may constitute a breach of immigration rules that renders their migrant statuses even more precarious, exposing them to the prospect of immigration enforcement measures. Therefore their hyper-precarity not only arises from their legal exclusion from a range of social security protections, but also the grave implications for their migrant status in the event they intentionally or inadvertently access or attempt to access such protections.

### **5.9 Conditional Routes to Permanent Residency**

Although there are pathways for 457 visa holders and Tier 2 (General) visa holders to acquire permanent residence status, the conditions attached to these routes can exacerbate some migrants' hyper-dependence on their sponsor/employer in order to secure such status. The main channel for 457 visa holders seeking permanent residency in Australia is through the ENS Visa 856 which relies on employer sponsorship. The alternative path is through the independent GSM category which does not require employer sponsorship but has more onerous application process and admission criteria. In 2011-2012, the ENS route was taken up by 60.4 per cent of 457 visa holders who applied for and received permanent residency status. A further 19.1 per cent obtained permanent residency via the Regional Sponsored Migration Scheme (which rely on sponsorship by rural employers). In contrast, only 10.8 per cent of applications granted to 457 visa holders came under the GSM category.<sup>804</sup>

Employers play a central role in the ENS application process, most significantly in deciding whether a 457 visa holder will remain long enough in Australia to meet the minimum length of employment requirement. This requires the

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<sup>804</sup> DIAC, *Subclass 457 State/Territory summary report, 2011-12* (DIAC 2011) table 1.27.

applicant to demonstrate that she has been employed continuously and actively performing the duties of the nominated occupation for at least two years immediately preceding the application, including at least the last 12 months with the nominating employer.<sup>805</sup> The employer's reference also has a critical bearing on the assessment process for the ENS route. It is estimated that around half of 457 visa holders end up becoming permanent residents, and most stay with the same employer in the same job.<sup>806</sup> Those 457 visa holders from developing countries of origin are more likely to pursue permanent residency.<sup>807</sup>

In the UK, Tier 2 (General) visa holders may apply for settled status, known as 'indefinite leave to remain' (IDL). Once IDL is obtained, there is no general restriction on the migrant's duration of permissible stay in the UK, right to work, or entitlements to public funds. Applicants for IDL must meet the requirements of the immigration rules applicable at the time of application. As of July 2014, the Tier 2 (General) visa holder must have lawfully resided in the UK for a continuous period of five years in an eligible immigration category, with the most recent period of leave being on a Tier 2 visa.<sup>808</sup> Since April 2012, a minimum gross annual income requirement of £35,000 or the appropriate rate for the occupation as specified in the

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<sup>805</sup> Migration Regulations 1994 (Cth) sch 2, cl 856.213(b)(ii)(B)-(C).

<sup>806</sup> Chris Bowen, Minister for Immigration and Citizenship, 'Key Note Address ' (2012 CPD Immigration Law Conference - Immigration Lawyers Association of Australasia, 12 March 2012) <<http://www.chrisbowen.net/media-centre/speeches.do?newsId=5640>> accessed 30 April 2012.

<sup>807</sup> Siew-Ean Khoo, Graeme Hugo and Peter McDonald, 'Which skilled temporary migrants become permanent residents and why?' (2008) 42 *International Migration Review* 193.

<sup>808</sup> Immigration Rules, pt 6A, paras 245AAA(a) and 245HF(c).

UKBA's Codes of Practice (whichever is higher) has been introduced for Tier 2 (General) migrants who apply for IDL from April 2016.<sup>809</sup>

The applicant for IDL is required to have been employed in the UK continuously throughout the five years under the terms of their CoS. An exception exists for any break in employment where the migrant applied for leave on another Tier 2 visa to work for a new employer, provided this occurred within 60 days of the end of their employment with the previous sponsor.<sup>810</sup> Where the Tier 2 migrant has switched between different immigration categories, only a small handful of categories (namely, a highly skilled migrant, innovator, investor, representative of an overseas business, any Tier 1 category except for post-study work) could be aggregated to meet the required continuous period.<sup>811</sup> Furthermore, the sponsor of the migrant's current CoS must certify in writing that they still require the migrant for the job in question and that the migrant is paid at or above the appropriate rate for the job as stated in UKBA's Codes of Practice.<sup>812</sup>

In order to qualify for IDL, Tier 2 (General) visa holders must also be residing in the UK for an 'unbroken period' with valid leave. This 'unbroken period' means that applicant for IDL cannot be absent from the UK for more than 180 days in any of the five consecutive 12-month periods prior to their application.<sup>813</sup> Any absence during the five years must be connected to the applicant's sponsored

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<sup>809</sup>Home Office, *Statement of Intent: Changes to Tier 1, Tier 2 and Tier 5 of the Points Based System; Overseas Domestic Workers; and Visitors* (2012) 7-8: with exemptions for PhD level and shortage occupation categories.

<sup>810</sup> Immigration Rules, pt 6A, para 245AAA(b).

<sup>811</sup> *ibid*, pt 6A, para 245HF(c).

<sup>812</sup> *ibid*, pt 6A, para 245HF(d)-(e).

<sup>813</sup> *ibid*, pt 6A, para 245AAA(a)(i).

employment in the UK or for serious or compelling reasons.<sup>814</sup> Reasons for absence must be provided, with evidence in the form of a letter from the employer detailing the purpose and period of absences in connection with the employment, including periods of annual leave.<sup>815</sup> Where the absence was due to a ‘serious or compelling reason’, the applicant must provide original supporting documents such as medical certificates.<sup>816</sup> Not only does the 180-day requirement further restrict migrants’ physical mobility, the need for them to provide a letter from their sponsor/employer to account for any absences can additionally heighten their dependence on the sponsor/employer in the process of applying for IDL.

For migrants who participate in TMWPs with goals of acquiring permanent residence status, the need for the sponsor/employer’s nomination and/or endorsement to make such an application can be a significant source of hyper-dependence. Under the 457 visa scheme, the main pathway for ‘upgrading’ their temporary status to permanent residency via the ENS can give rise to a perception among migrants that to do so, they must continue to work for and vie for support from the sponsoring employer. Under the UK scheme, an application by a Tier 2 (General) visa holder for IDL is premised on a minimum length of continued employment with as well as certification of support from the sponsor/employer.

These migrants can be less willing than those without aspirations for permanent residency to take any action that may antagonise the employer. Research on forced labour in the UK’s food industry found that numerous interviewees who were on employer sponsored work permits saw the system ‘as a necessary step

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<sup>814</sup> *ibid*, pt 6A, para 245HF(e).

<sup>815</sup> *ibid*, pt 6A, para 245AAA.

<sup>816</sup> *ibid*.

towards permanent residency and so, even if conditions were bad, they were generally accepted'.<sup>817</sup> Similarly, the Deegan Review found that some 457 visa holders 'may be more concerned with gaining permanent residency in Australia than ensuring that they receive appropriate wages and conditions in the short term'.<sup>818</sup> It may well be in the employer's interest to frustrate or delay the application for settlement so as to exercise greater control over the migrant. As the Deegan Review pointed out:

Where a visa holder has permanent residency as a goal that person may endure, without complaint, substandard living conditions, illegal or unfair deductions from wages, and other forms of exploitation in order not to jeopardise the goal of permanent residency.<sup>819</sup>

It further revealed that employers had promised 457 visa holders nomination for permanent residence but often failed to do so. In particular, 'employers of visa applicants at the lower end of the skills matrix prefer to retain those persons under temporary visas in order to increase the level of control over them'.<sup>820</sup>

A UKBA study in 2012 examined the employment characteristics of a relatively small sample of Tier 2 (General) visa holders who applied to and obtained IDL.<sup>821</sup> It found that within the sample, those in lower skilled (less than graduate-level) occupations were more likely to apply and obtain settlement soon after they became eligible. Certain occupations such as chefs, care workers, and nurses showed a greater propensity to settle. It also indicated that the salaries of the 'settlers' were generally lower than those of non-settlers. The current Coalition Government's

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<sup>817</sup> Scott, Craig and Geddes (n 24) 56.

<sup>818</sup> Deegan, *Final Report* (n 293) 33.

<sup>819</sup> *ibid* 49.

<sup>820</sup> *ibid* 50.

<sup>821</sup> Chris Jones and Mike Eaton, 'Analysis of Tier 2 General Migrants: Previous Salary and Occupations of those Eligible to Apply for Settlement' (UKBA Occasional Paper 100, 2012).

announcement of restricting the IDL rules in 2010-2011 might have influenced the decision-making of those who applied for settlement during that timeframe. While the study was situated in the context of the Government's objective of 'breaking the link between coming to work and staying permanently, and reserving settlement for those who make the biggest economic contribution',<sup>822</sup> the findings raise the possibility that these migrants in less-skilled and lower-paid occupations who are seeking permanent residency may be heavily dependent on their current employer/sponsor for continued employment and sponsorship in order to apply for IDL.

## **5.10 Employers' 'Policing' Obligations and Employer Sanctions**

### ***The employer as an immigration 'watchdog'***

The enforcement of immigration controls is increasingly expanding to involve a range of actors beyond the state and at diverse sites such as the workplace. Under both schemes, sponsors/employers have a wide range of reporting and record-keeping obligations to monitor migrants' compliance with immigration regulations. The employer/sponsor of a 457 visa holder must notify DIAC when certain events occur, including when: the sponsored migrant's employment ceases or is expected to cease; there is a change of work duties carried out; there is a change to the information provided to DIAC in the sponsorship application; the sponsor has paid the return travel costs in accordance with sponsorship obligations; and the sponsor becomes insolvent or the business legal entity ceases to exist.<sup>823</sup>

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<sup>822</sup> *ibid* 3.

<sup>823</sup> Migration Regulations 1994 (Cth) reg 2.84.

A Tier 2 licensed sponsor must keep proper records of its sponsored migrants, including contact details and photocopies of identity documentation. The sponsor must also report to the UKBA within 10 working days of the occurrence of certain events: where the migrant does not turn up for their first day at work (the sponsor must include the reason given by the migrant for their non-attendance); the migrant is absent from work for more than 10 working days without permission; the migrant's employment ends earlier than the date indicated on the CoS (including if the migrant resigns or is dismissed); the name and address of any known new employer; any significant changes in the migrant's circumstances (for example, change of job or salary from that stated on the CoS); any suspicion that the migrant is breaching conditions of leave; and any significant changes in the sponsor's business circumstances.<sup>824</sup>

These requirements can create the opportunity for some employers to exert additional control over their sponsored migrants through the threat of reporting to immigration authorities on issues such as their lateness or absenteeism without permission. The strongly worded UKBA Sponsors Guidance makes it clear that 'any information reported about migrants' non-attendance, non-compliance or disappearance will be used to take enforcement action against them'.<sup>825</sup> The possibility for employers to abuse their watchdog regulatory function may paradoxically undermine a rationale behind these sponsorship duties: 'that those who benefit most directly from immigration should play their part in making sure the

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<sup>824</sup> UKBA, *Tier 2 Sponsors' Guidance (04/14)* (n 471) 46-47.

<sup>825</sup> *ibid* 46.

system is not abused'.<sup>826</sup> The employer's 'duties' to monitor a migrant's immigration compliance and its power to report any 'irregularities' that may trigger enforcement actions against the migrant can be an additional source of hyper-dependence and hyper-precarity under both schemes.

### ***Employer sanctions***

The two TMWPs have in place a variety of employer sanctions that include civil and criminal penalties for violations of their sponsorship obligations and immigration laws generally. One may argue that the existence of these sanctions could help to deter employers from abusing migrants' vulnerabilities of hyper-dependence and hyper-precarity arising from their precarious statuses and prevent highly exploitative work relations (such as situations of HDP or HPD). However, it does not appear that these regimes of employer sanctions are framed and applied with a particular migrant worker-protective focus.

In terms of employer breaches of sponsorship obligations under the 457 visa scheme, DIAC may bar the employer from further sponsorships or application to be a sponsor until a specified date, cancel one or more of the employer's existing approvals as a sponsor, and/or apply civil penalties with a maximum penalty of AU\$6,600 for an individual and AU\$33,000 for a body corporate.<sup>827</sup> In the UK, the Tier 2 sponsor can be issued with a written warning, have their sponsorship rating downgraded, have the number of CoS they are able to issue reduced, or have their

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<sup>826</sup> Ian A MacDonald, 'Working, Business, Investment and Retirement in the UK' in Ian A MacDonald (ed), *MacDonald's Immigration Law and Practice*, vol 1 (8 edn, LexisNexis Butterworths 2010) 676.

<sup>827</sup> Migration Act 1958 (Cth) s 140Q.

licence suspended or revoked.<sup>828</sup> If an employer's sponsorship license is withdrawn, then any CoS issued under the license will be invalidated, with deleterious effects on the status of all visa holders sponsored under the license. A sponsored migrant who is deemed by the UKBA to have been complicit in the reason for the sponsor's license being withdrawn will be expected to leave the UK immediately. In all other cases, the sponsored migrant will have 60 calendar days starting from the date the UKBA's decision to curtail their leave is made before the migrant is required to leave the country or finding a new sponsor.<sup>829</sup>

Furthermore, specific civil and criminal sanctions can apply in situations where employers allow the 457 visa holder/ Tier 2 (General) visa holder to work in violation of the employment restrictions attached to their visas. In Australia, it is an offence for employers who knowingly or recklessly allow or continue to allow 'a lawful non-citizen to work in breach of a work-related condition'.<sup>830</sup> Contravention can attract civil penalties as well as criminal liability of two years imprisonment.<sup>831</sup> A statutory defence exists where the employer can establish that it took 'reasonable steps at reasonable times' to verify that the worker was not in breach of the work-related visa condition.<sup>832</sup> There is also an aggravated offence where employers knowingly or recklessly allow 'a lawful non-citizen to work in breach of a work-

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<sup>828</sup> UKBA, *Tier 2 Sponsors' Guidance (04/14)* (n 471) 53-54.

<sup>829</sup> UKBA, *Tier 2 Policy Guidance* (n 470) 52.

<sup>830</sup> Migration Act 1958 (Cth) s 245AC(1).

<sup>831</sup> *ibid*, s 245AC(3)-(4).

<sup>832</sup> *ibid*, s 245AC(2).

related condition' and the worker is being 'exploited',<sup>833</sup> with a hefty penalty of 5 years imprisonment.<sup>834</sup> In the UK, employers have certain responsibilities under the Immigration, Asylum and Nationality Act 2006 to prevent 'illegal working' of those with no right to work in the UK or those in breach of restrictions on their right to work. Employers who do not carry out the requisite document checks may be liable to civil penalties such as fines, and criminal offences apply for employers who abuse sponsorship arrangements.<sup>835</sup>

These sanctions seem to mainly reinforce immigration control measures that are aimed at discouraging the entry and employment of workers with irregular migrant statuses. A secondary aim may include protecting the local labour market from unfair competition associated with the exploitation of irregular migrants.<sup>836</sup> However, there is little consideration of the rights and interests of migrants in situations where employers' sanctions (such as the cancellation of sponsorship license) can adversely affect their legal statuses. More problematically, these sanctions are enforced not only by immigration authorities alone but also through the formal or informal 'cooperation' of labour inspectorates that could significantly compromise these inspectorates' worker-protective mandate.

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<sup>833</sup> *ibid*, s 245AH. Exploitation' in this provision is the same definition found in Criminal Code Act 1995 (Cth) s 271.1A, which refers to conduct that causes a person to enter into slavery or condition similar to slavery, servitude, forced labour, forced marriage or debt bondage.

<sup>834</sup> Migration Act 1958 (Cth) s 245AD.

<sup>835</sup> Immigration, Asylum and Nationality Act 2006, ss 15-22.

<sup>836</sup> Stephen Howell, *Report of the 2010 Review of the Migration Amendment (Employer Sanctions) Act 2007* (2010).

## 5.11 Conclusion

This chapter has highlighted various restrictions on migrants' rights and protections under the 457 visa and Tier 2 (General) visa schemes that arise from the intersection between their precarious migrant status and other labour market regulatory norms, which can be significant sources of their hyper-dependence, hyper-precarity, or a combination of both. The combination of the two vulnerabilities can give rise to highly exploitative situations of HDP and HPD. One such case involved an Indian cook on a 457 visa who was entirely dependent on his sponsoring employer for accommodation, food, and transportation. The employer forged his signature to obtain a visa and took away his passport and travel documents. The migrant was allegedly told that he would obtain permanent residency in four years' time and that his wages for the first year would be transferred to his family in India. He regularly worked 15 hours a day over periods as long as 40 consecutive days without a break. The employer was convicted for falsification of documents under immigration law and breaches of labour law, but the case fell short of prosecution for trafficking.<sup>837</sup> Although there are no reported cases of Tier 2 (General) visa holders in situations of severe exploitation, there has been evidence of forced labour cases involving migrants on domestic worker visas and under the seasonal agricultural workers schemes.<sup>838</sup> The final chapter of the thesis puts forward a number of proposals to tackle the concerns of the legally constructed hyper-dependence and hyper-precarity under contemporary TMWPs, based on enabling migrant workers' recourse to exit and voice in their work relations and migration projects.

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<sup>837</sup> *Fryer v Yoga Tandoori House Pty Ltd* [2008] FMCA 288; *R v Yogalingam Rasalingam* (unreported, District Court of New South Wales, 10-11 October 2007).

<sup>838</sup> Anderson and Rogaly, *Forced Labour and Migration to the UK* (n 616).

## **6. Combating Hyper-Dependence & Hyper-Precarity: Towards Exit and Voice**

### **6.1 Introduction**

In developing the notions of hyper-dependence and hyper-precarity throughout the thesis, I have sought to identify the most problematic features of contemporary labour migration regimes that shape these particular vulnerabilities in migrants' work relations. To bring the thesis to a full circle that started with the normative framework laid out in Chapter 2, this concluding chapter sets out some proposals for reform based on a positive paradigm of 'exit and voice' to respond to the two critical concerns. The chapter starts with recapping the main arguments that have been advanced in the thesis so far. I revisit the two potential constraints on the regulatory architecture of contemporary labour migration regimes: the protection of migrants' rights as enshrined in international instruments, and the legal regimes aimed at combating forms of unfree labour. Although these two normative discourses provide a baseline of protections for migrants, they do not essentially challenge states' underlying prerogative in constructing precarious legal statuses or adequately tackle the realities of migrants' work relations on a continuum of exploitation. In other words, these discourses neither capture nor address the normative wrongs inherent in the legally constructed hyper-dependence and hyper-precarity that are associated with migrants' precarious statuses.

In situating this thesis' contribution to the current debates on the ethics of TMWPs in liberal democratic states, I then turn to examine several notable proposals for normatively acceptable TMWPs that have been advanced by other scholars. Ruhs puts forward a case for 'new' and 'improved' TMWPs where migrants are granted a set of more targeted 'core' rights. He argues that restrictions on other rights could be

justified based on the costs and consequences of migrants' rights for host states which are 'part of a policy trade off between openness and rights that high-income countries are likely to make in practice'.<sup>839</sup> Also adopting a utilitarian approach to identifying 'core' rights that would make guest worker schemes more humane, Pevnick asserts that such schemes would not be pursued at all if migrants were granted a full range of rights. Carens provides a much stronger normative grounding for ascertaining the circumstances in which liberal democratic states may reasonably admit temporary migrant workers with certain rights restrictions, premised on a temporal understanding of their membership claims. In their criticism of a rights-based approach to TMWPs, Ottonelli and Torresi instead propose the need for accessible exit options to mitigate the risks of failed temporary migration projects.

Drawing on aspects of these contributions while addressing their gaps, the final part of this chapter puts forward my ideas for remedying the most problematic sources of hyper-dependence and hyper-precarity found in contemporary TMWPs, with specific recommendations for improving the current 457 visa and Tier 2 (General) visa schemes. In expanding the contours of exit and voice in migrants' work relations and their migration projects, these proposals do not simply represent aspirational idealism but strive for what is meaningfully possible to ameliorate the most acute structural vulnerabilities under these schemes. Here, I focus on reforming the current architecture of TMWPs, rather than advocating for their immediate elimination in favour of zero-migration or permanent settlement policies. Considering the strong push-pull factors driving global labour migration to high-income countries, the use of TMWPs is unlikely to cease in the near future. Rather than laying out a blueprint for an archetypal 'triple-win' TMWP, it is hoped that

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<sup>839</sup> Ruhs, *Price of Rights* (n 70) 173.

these ideas can direct the attention of policymakers in liberal states to the normative legitimacy and practical feasibility of protecting migrants against excessive domination by employers and against extreme precariousness in and beyond the workplace, without falling into the quandaries of contested trade-offs such as the ‘numbers versus rights’ proposition.

## **6.2 Summary of Key Arguments**

The critical notions of hyper-dependence and hyper-precarity have sought to capture the particular vulnerabilities in migrants’ work relations that are associated with their precarious legal statuses. Chapter 2 laid out the analytical and normative foundations for exploring how these two ‘hyper’ conditions are constituted, sanctioned, and institutionalised by the intersecting legal and regulatory norms, institutions, and processes under contemporary labour migration and labour market regimes in industrialised countries. TMWPs can entail de jure and de facto constraints on migrants’ labour mobility in the host state, which create and reinforce workers’ hyper-dependence on the sponsor/employer in ways that go beyond the immediate context of an employment relationship. Meanwhile, hyper-precarity refers to the multidimensional insecurities in migrants’ work relations and migration projects. Significant uncertainty and instability of their employment and residence authorisation in the host state can flow from temporary yet renewable sponsorship arrangements that are subject to the employer’s discretion. Furthermore, migrants’ precarious statuses can structure their exclusion, in law and in practice, from a range of employment and social rights and protections as well as institutions for collective representation and organisation.

Although hyper-dependence and hyper-precarity are distinct vulnerabilities in

migrants' work relations, the two can amalgamate in highly exploitative situations of HDP or HPD that constitute the 'worst of both worlds'. In these circumstances, migrants have little or no recourse to exit or voice in their work relations and broader migration projects. Where exit is not a viable option for some migrants, voice becomes all the more important for overcoming the exploitative labour situations that they may find themselves in. At the same time, the exercise of voice may be impeded by the operation of precarious migrant statuses that block exit, such as where migrants cannot resort to individual and/or collective grievance mechanisms due to the fear of antagonising the employer, which in turn may lead to the withdrawal of their visa sponsorship.

Chapter 2 further examined two potential normative constraints on the states' regulation of labour migration regimes. First, the international human rights regime has created a set of legal standards and measures to protect persons working and residing in states where they do not hold citizenship. However, the three main migrants' rights instruments are among the most poorly ratified international human rights instruments and have encountered enormous political resistance by many major host states. Importantly, the ICPRMW explicitly retains 'the right of each state Party to establish the criteria governing admission of migrants'.<sup>840</sup> It therefore does not challenge sovereign states' authority to design and enforce their own admission policies, including the wide prerogative to construct precarious legal statuses. Despite the espoused universality of the international human rights discourse, these instruments leave considerable scope for states to differentiate categories of rights restrictions based on migrants' employment and residence statuses.

The second normative constraint arises from supranational and national legal

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<sup>840</sup> ICPRMW, art 79.

and regulatory frameworks aimed at combating forms of unfree labour such as slavery, servitude, and forced labour. However, the difficulties of defining unfree labour in legal terms reveal the blurry boundaries between exploitation that is deemed as morally ‘appropriate’ and that deemed as ‘inappropriate’ in modern liberal societies. Work relations that are classified as slavery, servitude, and forced labour often share common characteristics of hyper-dependence and hyper-precarity with a wider continuum of exploitative labour relations that may not necessarily fall neatly within the legal categories of unfree labour. Furthermore, legislative responses have largely focused on criminalisation, particularly situating the offences in the context of anti-trafficking laws. Yet, the emphasis on criminal law intervention overlooks the underlying conditions, processes, and systems associated with labour market regulation and immigration controls that render migrants particularly vulnerable to exploitative work relations.

In addition to normative constraints on states’ regulation of labour migration, context-specific factors can circumscribe and mediate the ways in which regulatory goals translate into actual laws and policies. As explored in Chapter 3, each country’s past policies, as well as various political, economic, and social institutions such as labour market structures are part of a ‘regulatory crucible’ that shapes the goals, design, implementation, and outcomes of its labour migration regimes. There are certain parallels and variations in the ‘regulatory crucibles’ of the TMWPs between Australia and the UK. Despite the significant differences in the two countries’ immigration policy legacies, convergences in labour market regulatory goals and policies in recent decades — particularly in the pursuit of flexible and international competitive labour markets — have seen the liberalisation of the regulation of temporary migrant labour.

Chapter 4 critically analysed the admissions framework of the 457 visa and Tier 2 (General) visa schemes in light of their *raison d'être* of filling 'skills shortages' in the resident labour market. Both schemes reflect an employer-centred model of admission where employers' specific labour demands are key drivers of decisions pertaining to who to admit, how many migrants to admit, and the conditions of their admission. Yet, employers' 'need' for temporary migrant labour (especially their preference for a more flexible and compliant workforce) does not often take into account broader labour market needs and the interests of other labour market actors such as resident workers. Furthermore, the conditions of entry under the two schemes can affect the labour market profiles and bargaining power of the migrants admitted. In particular, the relaxation of admission criteria under the 457 visa scheme has led to employer sponsorships of a substantial group of migrants at the lower end of the skills/salary spectrum. With significantly less bargaining power in the labour market (compared to the original target group of highly skilled migrants), this group of less-skilled and less-paid migrants can be more exposed to the vulnerabilities of hyper-dependence and hyper-precarity arising from structural features of the scheme.

In Chapter 5, I examined the range of restrictions on migrants' rights and protections under the two TMWPs that may create or exacerbate the risks of hyper-dependence and hyper-precarity in their work relations and broader migration projects. Later on in this chapter, I shall revisit the most problematic aspects of these restrictions to propose specific reforms to the 457 visa and Tier 2 (General) visa schemes that may tackle the two critical normative concerns of the thesis.

### 6.3 Existing Proposals for Redesigning TMWPs

Advocates of contemporary TMWPs have argued that a properly designed scheme would enable the ‘more humane treatment’ of migrants compared to that of past guest worker programmes.<sup>841</sup> There have been several proposals of what such a scheme ought to look like. Ruhs argues for a combination of ‘realistic, feasible’ aspects of immigration policymaking with idealistic considerations.<sup>842</sup> In his view, all TMWPs restrict at least some rights of migrants as part of a policy trade-off based on ‘numbers versus rights/openness’ in high-income countries. For Ruhs, insisting on equal rights for migrants can lead to policies that admit less migrants than would be the case if some rights were restricted. His response to tolerating certain restrictions of rights in exchange for migrants’ access to the host state’s labour markets is premised on granting a set of ‘core’ rights for migrants under TMWPs.<sup>843</sup> His starting point is that migrants’ basic civil and political rights (except for the right to vote in national elections) must not be restricted under any labour migration programmes. Other rights can be restricted if those rights are shown, based on evidence, to create net costs for host states. He argues that there is a strong case for limiting restrictions to those already in practice in democratic high-income states, which include: the right to free choice of employment, select social rights, the right to family reunion, and the right to access permanent residence.

The ‘core’ and ‘non-core’ rights distinction is familiar terrain for labour lawyers. The ILO’s 1998 Declaration on the Fundamental Principles and Rights at Work (Declaration) represents a small set of ‘core’ labour standards around which

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<sup>841</sup> Ruhs, *Price of Rights* (n 70) 9.

<sup>842</sup> *ibid* 164.

<sup>843</sup> *ibid*.

the ILO has been restructured, and to which special priority and processes have been accorded. The 'core' labour rights have been deemed as: freedom of association and the right to collective bargaining, the elimination of forced labour, the abolition of child labour, and the elimination of discrimination in employment. This non-binding Declaration incorporated a follow-up procedure that in effect imposed reporting obligations on all Members states irrespective of whether they have ratified the conventions concerned. The ILO's core rights agenda has attracted substantial attention in labour law and human rights circles. The diverse perspectives that cut across this complex and multifaceted debate are beyond the scope of the present thesis. In summary, the two most prominent opposing 'camps' can be found in the robust exchange of arguments between Alston and Langille.

Alston maintains that the Declaration represents a regressive transformation of the international labour standards regime and offers a much less effective system than its established framework for protecting workers' rights.<sup>844</sup> He argues that the core rights agenda establishes a normative hierarchy of labour rights that relegates a wide range of well-defined ILO standards to secondary status. Furthermore, the Declaration undermines the ILO's well-developed regulatory mechanisms by replacing them with a new voluntarist and 'promotional' approach to enforcement.<sup>845</sup> Other scholars have also pointed to how the Declaration narrows the scope for ILO rule-making and rule-elaboration, where the development of any labour standards that are not immediately linked to the fundamental rights and principles agenda

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<sup>844</sup> Philip Alston, 'Core Labour Standards and the Transformation of the International Labour Rights Regime' (2004) 15 *European Journal of International Law* 457; Philip Alston, 'Facing up to the Complexities of the ILO's Core Labour Standards Agenda' (2005) 16 *European Journal of International Law* 467.

<sup>845</sup> Alston, 'Core Labour Standards and Transformation' (n 844).

would be deemed as ‘aspirational’ or lacking a ‘universalist’ character.<sup>846</sup>

On the other hand, Langille endorses the Declaration as superior to the ‘broken’ system of the traditional ILO convention regime.<sup>847</sup> For Langille, the main weapons of the ILO’s armoury have always been engagement, promotion, and persuasion, rather than enforcement. He rigorously defends the conceptual coherence and normative salience of the core rights agenda by drawing on a distinction between procedural and substantive dimensions of labour law. In his view, substantive standards (rather than rights) entail mechanisms that intervene in the employment contract by defining a ‘floor’ of outcomes imposed on parties. Procedural rights, such as the ILO’s core rights agenda, are enabling in their character by seeking to ‘protect rights to a fair bargaining process’.<sup>848</sup> Langille argues that the successful implementation of procedural labour law can lead to ‘better, but self-determined outcomes’.<sup>849</sup> He draws on a conception of Sen’s capabilities theory to characterise the role of fundamental labour rights to ‘unleash the power of individuals themselves to pursue their own freedoms’.<sup>850</sup>

However, Langille’s relegation of non-core ‘substantive’ dimensions of labour law to the level of standards (rather than rights) has attracted substantial criticism. Fudge maintains that ‘procedural rights need to be backed up by substantive commitments since a purely procedural understanding of core labor

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<sup>846</sup> Jill Murray, ‘Taking Social Rights Seriously: Is there a case for Institutional Reform of the ILO?’ in Colin Fenwick and Tania Novitz (eds), *Human Rights at Work* (Hart Publishing 2010).

<sup>847</sup> Brian Langille, ‘Core Labour Rights - The True Story (Reply to Alston)’ (2005) 16 *The European Journal of International Law* 410.

<sup>848</sup> *ibid* 428-429.

<sup>849</sup> *ibid*.

<sup>850</sup> *ibid* 434.

rights runs the risk of abuse of power in unequal bargaining situations'.<sup>851</sup> There are also contested claims over whether types of 'core' rights such as protection from discrimination are merely procedural in nature.<sup>852</sup> Furthermore, as Brown, Deakin, and Wilkinson argue, a fuller account of Sen's capabilities approach to economic and social rights moves beyond a traditional liberal demarcation that viewed only civil and political rights as market-enabling. They identify two types of social rights: 'claims to resources' such as unemployment payments and health insurance; and 'procedural or institutionalised interaction' such as collective bargaining provisions. In their view, social rights should be understood as 'part of the process of institutionalising capabilities', which help to convert personal, social, physical, and environmental characteristics into capabilities.<sup>853</sup> According to Deakin, social rights have the primary function of providing the 'conditions for substantive market access on the part of individuals' and combines both procedural and substantive norms in their form.<sup>854</sup>

Drawing from salient insights from the debate on 'core' versus 'non-core' labour rights, the case for granting a set of 'core' rights to migrants under TMWPs while restricting other rights requires a substantive normative foundation for identifying and justifying exactly what those rights are. The distinction of core/non-core migrants' rights runs the risk of falling into the trap, as Ruhs' approach does, of reinforcing the demarcation of civil and political rights from social and economic

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<sup>851</sup> Judy Fudge, 'The New Discourse of Labor Rights: From Social to Fundamental Rights?' (2007) 29 *CLLPJ* 29, 61.

<sup>852</sup> *ibid* 61.

<sup>853</sup> Jude Brown, Simon Deakin and Brian Wilkinson, 'Capabilities, Social Rights and European Market Integration' in Robert Salais and Rober Villeneuve (eds), *Europe and the Politics of Capabilities* (CUP 2004).

<sup>854</sup> Simon Deakin, 'Social Rights in a Globalised Economy' in Philip Alston (ed), *Labour Rights as Human Rights* (OUP 2005) 60.

rights in a hierarchy that prioritises the former species of ‘fundamental’ rights. It can be seen that the normative concerns of hyper-dependence and hyper-precarity in migrants’ work relations arise from a complex interplay of exclusions and restrictions across a range of social, economic, and civil rights under TMWPs, which include free choice of employment, entitlement to social benefits, right to family accompaniment, and access to permanent residence among others.

Moreover, any rationalisation for distinguishing between core and non-core rights granted to migrants would need to go beyond arguments based on the ‘price’ of rights, which are unlikely to convince those who believe in the intrinsic moral value of human rights. Langille attempts to defend the ILO’s Declaration by underscoring that its *raison d’être* is ‘to expand respect for labour rights’.<sup>855</sup> Nevertheless, his spotlighting of procedural/core rights over substantive/non-core rights creates the perception that the latter, with their ‘market-intervening’ nature, would have effect of increasing labour costs. Ruhs’ approach to promoting a set of core rights for migrants is more explicitly utilitarian than Langille’s position, as Ruhs argues that the rights granted to migrants are shaped by cost-benefit considerations that ‘critically depend on their impacts on the existing population in the host country’.<sup>856</sup>

One may further query the possibility of an objective measurement and assessment of the multifaceted ‘costs’ and ‘benefits’ of migrants’ rights and the actual effect of different types of rights and restrictions. Lessons can be taken from the mixed and contested claims in public policy discourse and scholarly works regarding the economic and fiscal ‘burden’ and ‘contribution’ of labour migration in

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<sup>855</sup> Langille, ‘Reply to Alston’ (n 847) 415.

<sup>856</sup> Ruhs, *Price of Rights* (n 70) 13.

industrialised countries. As noted in Chapter 2, empirical analyses of the ‘numbers versus rights’ proposition are incipient and have already been methodologically contested through the use of different datasets. Instances of labour migration policies that concurrently restrict migrants’ rights and the numbers of migrants admitted are not uncommon in numerous liberal states such as the UK in recent times. Ruhs’ empirical analysis has also been largely limited to examining migrants’ rights in laws and regulations (that is, ‘rights on paper’). Although he acknowledged that ‘in theory, migrants can be denied some rights that exist in law’,<sup>857</sup> Ruhs’ inquiry stops short at examining ‘rights in practice’. Notably, there has been insufficient attention in his inquiry to the role of precarious migrant statuses in undermining the enforcement of statutory rights in practice.

Pevnick also adopts a largely ‘pragmatic’ approach to identifying the rights and restrictions that ought to be in place under TMWPs. He advances a ‘core’ set of basic rights under an ethically acceptable guest worker scheme, which would allow migrants to work for different employers and protect their basic employment rights. In regards to rights that can be excluded or restricted, he submits that there would be ‘(a) no promise of future access to citizenship; (b) no access to membership services (such as social security); and (c) no access for their families’.<sup>858</sup> Pevnick argues that these restrictions are warranted since otherwise such programmes would not be pursued at all. However, a stronger normative defence for these restrictions is not evident in this account, with little connection to the idea of ‘associate ownership’ that he develops to justify citizens’ claims to self-determination of immigration laws and policies.

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<sup>857</sup> *ibid* 12.

<sup>858</sup> Pevnick, *Immigration and the Constraints of Justice* (n 115) 178

In other words, Ruhs' and Pevnick's ideas of an ethically acceptable TMWP are essentially premised on a utilitarian or consequentialist approach to migrants' rights. These arguments would have little appeal to those who underline the intrinsic value of rights as well as the liberal state's commitment to universality, inalienability, and indivisibility of human rights. Recognising that liberal democracies are morally constrained in distinguishing between citizens and non-citizens in the allocation of legal rights, Carens has provided a more substantive normative account that identifies the circumstances in which liberal states may legitimately admit migrants for employment on a temporary basis and may impose certain rights restrictions.

For Carens, the admission of temporary migrant workers with explicit restrictions on their right to stay in the host state would be morally permissible provided that these workers are actually present only for a short time. For persons admitted to work on a temporary visa 'who have no other moral claim to residence than their presence in the state',<sup>859</sup> it would be reasonable to expect that they leave the host state after a year or two when their visa expires. However, for Carens, 'it is not acceptable to keep people in a temporary status which is constantly renewed, so that they actually stay for a long time but remain in a vulnerable and restricted situation'.<sup>860</sup> He maintains that the longer the migrant's stay, the stronger her claim to membership of that society and the rights attached to membership such as permanent residency.

Rather than promoting the extension of a range of membership rights to temporary migrants, Ottonelli and Torresi call for the provision of substantial exit

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<sup>859</sup> Carens, 'Live-in Domestic' (n 25) 422.

<sup>860</sup> Joseph Carens, 'Who Belongs? Immigration, Democracy, and Citizenship' in Oliver Schmidtke and Saime Ozcurumez (eds), *Of States, Rights, and Social Closure* (Palgrave Macmillan 2007).

options at any stage of their migration projects. Viable exit measures can include: giving migrants the ability to change jobs and to return to their home state whenever they wish; enabling the transfer of social security payments to be used in their home state; allowing for frequent visits to and interactions with the home state.<sup>861</sup> However, Ottonelli and Torresi do not inquire into the institutional and regulatory factors such as the denial of certain rights that shape migrants' vulnerabilities to the risks of failed projects. They also do not address the predicament of migrants partaking in TMWPs with life-plans that involve seeking permanent residency and citizenship in the host state. Carens' proposition is useful for addressing the predicament of this cohort of 'temporary' long-term residents with precarious legal statuses. Their claims to full membership strengthens with the duration of their stay in the host state, which provides a normative basis for extending to them a full range of social, economic, political, and civil rights.

In summary, the above proposals attempt to grapple with a range of normative and practical issues arising from the design and implementation of TMWPs. Ruhs' and Pevnick's proposals of granting these migrants a set of 'core' rights while restricting other rights are largely premised on an instrumental or utilitarian view of migrants' rights arising from policy choices to maximise the benefits of labour migration for states' national interests. This position is manifested in an uncertain normative and empirical trade-off between the openness of admission policies and the rights afforded to migrants. In addressing the ethical quandaries of TMWPs for liberal democratic states, Carens accepts that a small handful of restrictions on social rights can be justified on the basis of the temporality of migrants' stay in the host state, with their claims to membership rights strengthening

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<sup>861</sup> Ottonelli and Torresi, 'Inclusivist Egalitarian Liberalism' (n 106) 220.

over time. Meanwhile, Ottonelli and Torresi call for the provision of exit options to alleviate temporary migrants' vulnerabilities to the risk of failed migration projects.

#### **6.4 My Proposals for Reform**

In my proposals for redesigning contemporary TMWPs, the concepts of hyper-dependence and hyper-precarity serve as the normative grounding for identifying and tackling the most problematic aspects of these schemes for migrants' work relations. I draw on some of the existing proposals discussed above, but the substantial contribution of my proposals pivots on a firm normative foundation that provides for the possibility of exit and voice in migrants' work relations and their migration projects at any time. Granting migrants under TMWPs the protection of a range of labour and social rights both in law and in practice is a crucial building block of this 'exit and voice' discourse. Although temporary restrictions on a narrow scope of rights may be justifiable under a normatively acceptable TMWP, my proposals do not represent an approach that seeks to distinguish between 'core' and 'non-core' rights. Instead, the exit and voice paradigm encompasses and cuts across both procedural and substantive, individual and collective aspects of temporary migrant workers' rights. It recognises the inseparability of these rights from a broader array of rights associated with their potential claims to fuller membership in the host state.

Expanding the contours for exit in migrants' work relations is essential for them to engage freely in the resident labour market as well as to facilitate their broader life plans emerging from their migration project. Recourse to exit mechanisms is not merely of a procedural nature, but has the substantive power to ameliorate hyper-dependence and hyper-precarity so as to leave exploitative labour relations and to plan for the future. As Chapter 2 pointed out, the possibility of

exiting an employment relationship and/or a failing migration project for some migrant workers and their families can be fraught with practical constraints such as needing to pay off large amounts of debt incurred prior to and throughout their migratory journeys. This makes recourse to voice all the more important, particularly with respect to collective voice mechanisms of representation and mobilisation that are able to ameliorate the weaker bargaining power of an individual worker who has little or no possibility for exit. Voice also has both procedural and substantive elements. Access to effective voice mechanisms can provide a bulwark against hyper-dependence and hyper-precarity through the collective empowerment and mobilisation of migrant workers under TMWPs alongside their counterparts with permanent residence and citizenship.

In developing the following proposals, I acknowledge the normative and/or pragmatic position that states do not need to and/or are unlikely to prioritise the interests of non-citizens when designing and implementing labour migration policies. At the crux of my concession to this position is the entitlement of host states to maintain citizens' privileged access to the resident labour market. A conventional view among policymakers is that unrestricted access to the labour market is 'a privilege limited to citizens and permanent residents of a country... Other people wishing to enter the country face the precondition that they have either no access or restricted access to the labour market'.<sup>862</sup> While accepting that the primary (espoused) rationale of TMWPs for host states will continue to be the 'need' for migrant labour to fill domestic skilled and unskilled labour shortages, my proposals aim to improve the current mechanisms for determining shortages under such schemes. However, my approach does not accept the 'trump card' of economic and

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<sup>862</sup> Memorandum to the Migration Amendment (Employer Sanctions) Act 2007 (Cth).

market imperatives over the protection of migrants' rights, but represents a meaningful effort to build a greater degree of consensus among the different positions and interests in the scholarly and policy debates on TMWPs.

In unpacking the need for redesigning current TMWPs to ameliorate hyper-dependence and hyper-precarity in migrants' work relations, the implications of these concerns for the resident workforce's interests should be taken into account. As Ruhs admits, migrant workers 'who can be employed under restricted rights will be preferred by employers to resident workers with full employment rights'.<sup>863</sup> The proposals in this chapter therefore have the potential of reconciling the interests of the resident and migrant workforces. Notably, the importance of expanding voice mechanisms to combat hyper-dependence and hyper-precarity has a strong collective dimension that could build and enhance the solidarity between resident workers and migrants under TMWPs.

### ***Detaching residence status from employer sponsorship***

Essential to migrants' exercise of exit is the elimination of legal constraints on migrants' labour mobility, which would minimise the risk of beholdings workers to a specific employer and employment relationship. Although TMWPs such as the 457 visa and Tier 2 (General) visa do not explicitly prevent migrants from changing employers, their legal authorisation to work and reside in the host state essentially hinges on a sponsorship arrangement with a specific employer or labour user. This tethering of their legal permission to work and reside in the host state to such a sponsorship has been identified throughout this thesis as a significant source of hyper-dependence and hyper-precarity. A normatively acceptable TMWP must

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<sup>863</sup> Ruhs, *Price of Rights* (n 70) 45.

therefore enable workers to quit their job and/or change employers without adverse consequences for their migrant statuses.

Ruhs argues that the portability of work permits/visas between different employers could be acceptably limited for a short initial period (such as six months), otherwise it would ‘substantially reduce the propensity of local employers to recruit migrant workers because the latter would be free to leave the employer who recruited them before at least part of that employer’s recruitment costs have been recovered’.<sup>864</sup> Carens proposes that a period of three months would be the maximum for limiting migrants’ freedom to change employers, so that any ‘recruitment costs’ may be recouped. Even with such a restriction, there ought to be an escape clause if the employer engages in abusive behaviour during this period.<sup>865</sup>

I would go further than the qualified conditions proposed by Ruhs and Carens. Without the freedom to exit any employment relationship at any time, a migrant can be vulnerable to situations of HDP and HPD and other severe forms of exploitation that ought not be accepted even for a ‘short initial period’. While Carens proposes an escape clause, he does not make it clear how this actually would operate in practice. Such a clause seems to be aimed at responding to highly exploitative labour situations when they occur, rather than preventing the very source of migrants’ vulnerabilities that stem from these immigration restrictions in the first place. A reasonable response to the practical need for employers to recuperate their recruitment costs would be to reduce the visa application and administration costs for employers and migrant workers (which could reduce any potential debt incurred by migrants). For example, the time and costs involved with the process of obtaining

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<sup>864</sup> *ibid* 175.

<sup>865</sup> Carens, ‘Live-in Domesticity’ (n 25) 433.

and maintaining a sponsorship license under the Tier 2 visa can be rather significant, particularly for small and medium sized businesses.

At the heart of my proposal for a normatively acceptable TMWP is that the migrant's legal authorisation to work and reside in the host state ought to be detached from an employment contract with a specific sponsor. Migrants could be issued with a transferrable work permit that is not tied to a specific employer sponsorship but enables them to change employers and to search for alternative employment throughout the duration of the permit. Such a proposal would be consistent with the economic and labour market considerations underpinning TMWPs. Some have argued that migrants who are not free to respond to wage signals in the labour market create inefficiencies in labour allocation and lower productivity growth.<sup>866</sup> Therefore, mechanisms that facilitate the mobility of workers within areas of skills shortages can be a more efficient and flexible response than tying them to a single employer for a period of time, especially since the shortage is only intended to be 'temporary'. Although it may be in the interest of individual employers to have increased powers of labour retention by controlling workers' mobility, this does not necessarily correspond to the wider interests of the labour market and economy.

Under such a proposal, labour market intermediaries and government labour departments can play a constructive role in channelling information and resources to match migrants with jobs and employers in identified areas of labour shortages before and upon their arrival and during their residence in the host state. New types of intermediaries such as the social enterprises identified by Forde and MacKenzie'

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<sup>866</sup> Eric Weinstein, 'Migration for the benefit of all: Towards a new paradigm for economic immigration' (2002) 141 *International Labour Review* 225.

study<sup>867</sup> can play a positive role in meeting the needs of migrant workers throughout their migration projects, such as facilitating post-admission labour market transitions under a redesigned TMWP where migrants' legal statuses are not tied to a specific employer sponsorship. A robust regulatory framework of registration and licensing, obligations and responsibilities, monitoring and enforcement similar to the GLA can help to reduce the scope for exploitative practices of less scrupulous intermediaries.

### ***Occupational and sectoral mobility and 'skills shortage'***

The primary rationale of TMWPs as policy instruments to address skill shortages in specific occupations and sectors of the labour market has been used to justify the in-built restrictions on migrants' free choice of employment under these schemes. Compared with legal constraints on migrants' freedom to change employers, these restrictions on labour mobility with respect to occupation and/or sector under TMWPs may be designed in a way that leaves workers with some recourse to exercise exit and voice. The main proposal here is that migrants' choice of employment could arguably be limited to a defined list of demonstrated shortage occupations and sectors in the resident labour market. Migrants' work permits would allow them to choose between and switch into any of the occupations on this list.

Carens distinguishes between highly skilled and unskilled TMWPs when assessing the restriction of migrants' mobility to a particular occupation and/or sector. In the case of highly skilled migrants, such a restriction would serve little purpose since these workers have little motivation to look for employment outside their specialised fields. Moreover, there is substantial competition to attract these migrants who are usually offered a wide range of rights on par with permanent

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<sup>867</sup> Forde and MacKenzie, 'The Ethical Agenda of Employment Agencies' (n 777).

residents and citizens. In relation to unskilled migrants, Carens argues that restricting migrants' occupational mobility essentially 'involves a deliberate element of exploitation' or 'unfairness'<sup>868</sup> since they must accept inferior wages and conditions to what they could command if they were free to compete in the whole labour market. In other words, such TMWPs seek out those workers 'who will do the job at below the market rate... because the conditions under which these temporary workers are admitted leave them with no effective alternative'.<sup>869</sup>

Both the 457 visa and Tier 2 (General) visa schemes are targeted at the admission of skilled migrants who are presumed to have a certain (high) degree of bargaining power in the labour market. Yet the admission criteria and processes can provide considerable leeway for employers to sponsor migrants in semi-skilled and lower-paid occupations as well as in occupations with perceived rather than actual 'shortage'. My proposal envisages a shift away from an 'employer say-so' admissions model towards a more evidence-based and independently-determined assessment of genuine labour market needs for migrant workers. As examined in Chapter 4, both 'skills' and 'shortage' are highly contested concepts in the regulatory design and implementation of TMWPs. Despite the function of labour market testing which requires employers to show that no suitably skilled resident worker is available to be employed in the position, the existence of unfilled vacancies does not per se 'indicate labour shortage that would justify the admission of migrant workers'.<sup>870</sup> Employers may claim that the 'need' for migrant workers exists if they are unable to find resident workers at prevailing wages and conditions and/or if they

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<sup>868</sup> Carens, 'Live-in Domestic' (n 25) 433.

<sup>869</sup> *ibid* 432.

<sup>870</sup> Ruhs, *Price of Rights* (n 70) 180.

are unwilling to invest in training and upskilling of the native workforce.

A more rigorous policy tool to identify genuine shortages would be the use of an independent expert panel to compile and regularly update a shortage occupation list, with the active input of a range of stakeholders, including migrants and their organisations. Rather than merely rely on employer attestation that ‘shortages’ exist, this approach would be able to take into account broader labour market and economic factors as well as the interests of diverse labour market actors. MAC in the UK represents a promising model in this direction, with an independent expert body undertaking regular analyses of skilled shortages and advising the Government on a range of appropriate policy responses that go beyond the recruitment of migrant labour. MAC draws on a combination of ‘top-down’ labour market information as well as ‘bottom-up’ evidence from employers, business groups, trade unions, and government departments. However, it is not apparent from MAC’s reports that these stakeholders include migrants and migrant organisations. If migrants’ interests are to be given much more standing under a normatively acceptable TMWP, then they should be given opportunities to participate in all aspects of policy development and implementation.

### ***Employment protections and collective organisation***

In liberal democratic states, employment protection laws generally apply to temporary migrants (with lawful residence status) and permanent residents and citizens alike. As Carens puts it, temporary migrants should enjoy the same rules and regulations pertaining to working conditions as citizens and permanent residents that ‘reflect a political community’s understanding of the minimum standards of

acceptable working conditions within its jurisdiction'.<sup>871</sup> Yet, as examined in Chapter 5, migrants' precarious statuses under TMWPs can often undermine these protections in practice, a critical source of hyper-precarity in their work relations. The effective protection of migrants' labour rights requires disentangling their migrant status from the enforcement of employment laws. As a starting point, a model of TMWP that does not tie the migrant's employment and residence authorisation to a mandated employer sponsorship would alleviate fears of reprisal if migrants sought to bring claims against their employers for violations of these rights.

The enforcement of immigration controls is also a crucial source of practical barriers to migrants' access to employment protections. The core worker-protective function of labour inspections can be severely undermined where inspectorates are expected to function as an arm of immigration authorities. Enforcing migrants' rights at work requires labour inspectorates to carry out their uncompromised mandate. Similar to Carens' argument, a 'legal firewall'<sup>872</sup> should be erected between the enforcement of immigration law and the protection of migrants' employment rights so as to enable migrants with precarious statuses to claim such rights. However, while states are escalating efforts to control migrants' mobility and residence in their territories, the structures and systems in place to monitor and enforce employment protections have generally headed down a deregulatory path.<sup>873</sup> I argue that a 'legal firewall' would only be effective where labour inspectorates are equipped with

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<sup>871</sup> Carens, 'Live-in Domestic' (n 25) 425.

<sup>872</sup> Joseph Carens, 'The Rights of Irregular Migrants' (2008) 22 *Ethics and International Affairs* 163, 167.

<sup>873</sup> Annette D. Bernhardt, Heather Boushey, Laura Dresser and Chris Tilly, *The Gloves-Off Economy: Workplace Standards at the Bottom of America's Labor Market* (Cornell University Press 2008).

formidable regulatory powers and resources to proactively investigate into diverse workplaces and sectors and have a wide range of enforcement tools at their disposal.

Furthermore, employment protections for workers engaged under TMWPs are situated within a broader web of contemporary labour market regulation that segments and differentiates between types of work relations. As highlighted in Chapter 5, the time-bound nature of migrants' legal permission to work and live in the host state under TMWPs can predispose these workers to temporary, fixed-term, and agency labour arrangements that receive lesser degrees of protection under SER-centric labour law regimes. To address this potential source of hyper-precarity, workers in these non-standard forms of employment relations ought to be able to enjoy equal entitlements to pay and working conditions under general employment protection laws as their full-time, permanent counterparts.

Crucially, trade unions can play an essential role in organising and representing migrants under TMWPs to expand their possibilities for exercising voice in the workplace, especially where their exit options are constrained. Migrants must be able to freely join trade unions of their own choosing, seek union assistance to enforce their rights, and collectively organise to improve their wages and conditions without the fear of jeopardising their legal status. This again points to the need for de-anchoring migrants' permission to enter and reside in the host state from a specific employer sponsorship. Moreover, unions can be a channel for overcoming workforce divisions by fostering solidarity between migrants and resident workers, more settled and new migrants, and different ethnic and racial groups. There can be an alignment of interests between migrant workers and resident workers in combating exploitative work relations that collective mobilisation and empowerment may help to achieve.

In the labour market contexts of Australia and the UK, where the deterioration of collective rights and institutions over the past three decades is unlikely to be reversed in the near future, trade unions need to be innovative in organising and mobilising their membership and workforce, especially in identifying opportunities for and meeting the challenges of organising the growing precarious workforce in globalised, flexible labour markets. Thinking outside the box of traditional strategies, alternative approaches to organising migrants such as building alliances in local communities and with civil society are emerging in the union movements of both countries. There is also potential for greater transnational organising efforts between trade unions in host states and home states, with the involvement of international union confederations. Yet, the failed attempt of the European Migrant Workers Union (initiated and funded by a German trade union) to become a transnational organisational structure for posted migrant workers in the construction sector reveals the political limits to cross-border solidarity between national labour movements.<sup>874</sup>

### ***Social protections***

Being able to access social rights and entitlements in the host state, ranging from unemployment benefits and pensions to public health, education, and housing services, can provide migrants under TMWPs and their family members with safeguards against hyper-dependence and hyper-precarity. However, restriction of migrants' access to a range of social protections is often defended on the basis of maximising the 'fiscal net contribution of migrants' and minimising the 'cost' to the

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<sup>874</sup> Ian Greer, Zinovijus Ciupijus and Nathan Lillie, 'The European Migrant Workers Union and the barriers to transnational industrial citizenship' (2013) 19 *European Journal of Industrial Relations* 5.

host state and its citizens in extending public services and welfare benefits to migrants.<sup>875</sup>

Beyond utilitarian justifications for this exclusion, Pevnick also argues that the contributions of citizens to build the state's institutions give them a special claim of 'associative ownership', including the right to elect whether or not to share the benefits of their collective accomplishments to non-members.<sup>876</sup> While he applies this reasoning in relation to excluding irregular migrants from accessing the host state's institutions, I would argue that his claim overlooks the special situation of migrants under TMWPs who have been granted the official consent of the polity to enter the host state. In contributing their paid and unpaid labour, paying taxes, and obeying the host state's laws, these migrants ought to have some degree of an associative ownership claim. The principle of inclusion in liberal states requires at least that if such persons are admitted as temporary members of the workforce and host society (working and living alongside permanent residents and citizens), they should not to be excluded from social membership benefits during their period of stay. At the minimum, the provision of 'universal' social benefits in host states such public health services and education should be available and accessible in law and in practice to migrants and their family members under TMWPs.

I am more persuaded by Carens' nuanced distinction between claims to different types of social protections that depend on the nature and purpose of such programmes. Based on principles of reciprocity, Carens maintains that temporary migrants should also be entitled to the same rights or to reimbursement for contributions to programmes that are tied to their workforce participation. Where

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<sup>875</sup> Ruhs, *Price of Rights* (n 70) 47.

<sup>876</sup> Pevnick, *Immigration and the Constraints of Justice* (n 115).

migrant workers and their families are prevented from receiving such benefits under applicable national laws, the ICPRMW encourages state to reimburse the ‘amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances’.<sup>877</sup> One feasible proposal could be that a proportion of income taxes and social security payments collected by the state from migrant workers and family members go into a special fund set up to finance their access to social benefits during their stay in the host state. To facilitate their exit from the migration project and to return home, bilateral agreements between host and home states to secure the portability of such funds would be vital protections for migrants and their families against the risks of destitution during their residence in the host state and upon their return home.

Temporary migrants’ claims to social programmes provided by the state for the benefit of citizens may be plausibly restricted where programmes are aimed at redistribution such as income support and social housing. Carens argues that such programmes ‘support needy members of the community and since the claim to full membership is something that is only gradually acquired, exclusion of recent arrivals does not seem unjust’.<sup>878</sup> However, migrants’ moral claims to these benefits ought to strengthen over the time of their residence in the host state. A reasonable qualification period (for example, 1-2 years) from when migrants first arrive in the host state to when they can make claims on non-contributory or means-tested welfare benefits may be acceptable. This would be consistent with the international standard on the right to social security as stipulated in General Comment 19 of ICESCR: ‘non nationals should be able to access non-contributory schemes for income support,

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<sup>877</sup> ICPRMW, art 27(2).

<sup>878</sup> Carens, ‘Live-in Domesticity’ (n 25) 430.

affordable access to health care and family support. Any restrictions, including a qualification period, must be proportionate and reasonable'.<sup>879</sup>

### ***Right to family accompaniment or reunification***

Under TMWPs, there are usually restrictions on family accompaniment or reunification. Besides explicit prohibitions, there may be requirements on the migrant to demonstrate a sufficient level of income and resources to provide for family members or a qualified entitlement to apply for family reunification after a period of residence in the host state. As Pevnick points out, limiting access for families under TMWPs would provide an incentive for circular migration and avoid, as far as possible, the permanent settlement of migrants.<sup>880</sup> As Carens has also recognised, families 'tend to generate social contacts' which 'leads people to sink roots into the community where they are living', and 'an authorised temporary migration may easily evolve into an irregular, permanent settlement'.<sup>881</sup> Families may also be seen to generate greater costs in the provision of social services than individuals.

I would argue that any restrictions on family reunion or accompaniment would need to take into account the normative weight of the right to family life as enshrined in a plethora of international, regional, and national human rights instruments. In the specific context of migrants, Article 44.2 of the ICPRMW stipulates that 'states Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses... and with their minor dependent unmarried children'. As Carens

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<sup>879</sup> CESCR, General Comment No. 19, The right to social security (Art 9) (adopted 23 November 2007) U.N. Doc. E/C.12/GC/19 (2008).

<sup>880</sup> Pevnick, *Immigration and the Constraints of Justice* (n 115).

<sup>881</sup> Carens, 'Live-in Domesticity' (n 25) 423.

notes, ‘Liberal democratic states find it difficult to justify overriding this right merely for the sake of narrow economic advantages’.<sup>882</sup> If such a restriction is to be imposed under a TMWP, then the period of restriction should be as minimal as possible, such as the initial few months of the migration project with the possibility for returning home for visits.

Under the proposed model, migrants’ right to family accompaniment or reunion would not be made conditional on a specific employer sponsorship that may deepen their hyper-dependence on the employer in respect of the legal statuses of their family members. Without the need to depend on a third party for the exercise of this right, the ability of migrants and their family members to plan for the future is also broadened. It would expand the possibilities for exit should they become trapped in abusive employment relationships and/or failing migration projects in the host state. Furthermore, to safeguard against the risk of experiencing hyper-precarity, family members need to be given the right to work in the resident labour market (with as few restrictions on their mobility as possible) and be entitled to the social rights that have been proposed above.

### ***Right to a secure residence status***

A pathway for migrants under TMWPs to independently acquire permanent residency and potentially citizenship would reduce the insecurity and uncertainty of their legal statuses. However, I recognise that granting most migrants an automatic and unconditional right to permanent residence is usually not a politically feasible option for policymakers in host states, save for the exceptional categories of highly skilled migrants that states want to attract in the ‘global race for talent’ (what

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<sup>882</sup> *ibid.*

Shachar refers to as ‘Olympic citizenship’).<sup>883</sup> I therefore suggest two proposals that may, at first glance, appear to be at opposite ends of the spectrum. However, both policy options are based on the principle that migrants under TMWPs should have clear and secure legal residence status throughout their migration projects.

The first option is that TMWPs should provide a route to permanent residency that is built into the conditions of admission from the very start. If the TMWP allows for the continual renewal of migrants’ visas and work permits, then they should be able to claim permanent residency after a stipulated minimum period of employment and residence in the host state. Importantly, this transition to permanent residence status should not require a specific employer’s continued sponsorship and/or support. There is then the challenge of drawing the line of *when* temporary migrants would acquire such a ‘right’ to permanent residence status in legal form. Here, I am drawn to Carens’ rationale that the longer the migrant’s residence in the host society, the stronger her claim to remain. He cites an EU Directive<sup>884</sup> granting permanent residence status to migrants legally residing in a member state for five years as a regulatory attempt ‘to implement the more indeterminate moral principle that the moral claim to remain grows over time, along with a recognition that some threshold must be established beyond which the right to stay is infeasible’.<sup>885</sup>

The other alternative is to make TMWPs truly temporary by explicitly restricting the renewal of work permits and visas. As Carens argues, the ‘admission

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<sup>883</sup> Ayelet Shachar, ‘Picking Winners: Olympic Citizenship and the Global Race for Talent’ (2011) 120 *Yale Law Journal* 2088.

<sup>884</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

<sup>885</sup> Carens, ‘Live-in Domestic’ (n 25) 419-420.

of workers on a temporary basis is morally permissible, but only if the duration of their stay is truly limited... democratic states cannot keep people indefinitely in a “temporary” status’.<sup>886</sup> During the migrant’s temporary stay in the host state, their legal status should not be compromised at the employer’s discretion over the renewal or termination of their sponsorships. If migrants under TMWPs cannot be provided with independent pathways to permanent residency that do not depend on employer sponsorship, then in my view, restricting the renewal of migrants’ work permits and visas would be a ‘second-best’ option.

The main argument here is the indefensibility of keeping migrants in a long-term situation of precarious legal statuses, which reinforce their hyper-dependence on the employer and hyper-precarity arising from the extreme uncertainty of their migration projects. One may also take into account that many migrants undertake ‘temporary migration projects’ with no intention of ever settling in the host state but to attain the requisite earnings and experience to advance long-term life plans upon returning home.<sup>887</sup> Nevertheless, as explored in Chapter 2, the longer this group of ‘temporary’ residents remain, the more likely they are to develop forms of emotional, psychological, social, cultural, and economic ties to their host society. In liberal democratic states such as Australia and the UK, there is a strong moral case for these migrants to be incorporated as full members of the host state on the basis of these ties that strengthen with the passage of time.

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<sup>886</sup> Joseph Carens, *The Ethics of Immigration* (OUP 2013) 113.

<sup>887</sup> Ottonelli and Torresi, ‘Inclusivist Egalitarian Liberalism’ (n 106).

### ***Rule-making, administration, and enforcement***

Finally, it is envisaged that a clear, informed, transparent, and accountable rule-making and administrative system underpinning TMWPs would help to cure some of the substantive and procedural defects that render migrants' statuses precarious. Complex, incoherent, and frequently tinkered immigration rules along with opaque and inefficient procedures can increase the likelihood of inadvertent breaches by employers and migrants. As Anderson puts it, 'the contradiction is therefore that in a bureaucratic and inevitably complex system of control, the state may perversely lose control over migration by creating greater numbers of overstayers, people working in breach of conditions, and illegal entrants'.<sup>888</sup> In McKay's interviews of non-EEA migrants working legally in the UK during the introduction of the points based system (from 2005 to 2008), several respondents (who were Filipino senior care workers) had become 'irregularised' by the changes to the work permit rules or were in an uncertain position as to their migrant status.<sup>889</sup>

Furthermore, crucial to helping migrants make informed and considered choices about their migration projects is the provision with reliable information regarding the TMWP itself, working and living conditions, employment laws and protections, and relevant immigration rules of the host state. In practice, migrants seek an array of information from employers, labour market intermediaries, and other sources in their networks including friends, families, and other migrants. Yet, the information given can often be deliberately or unintentionally inaccurate. Migrants can also become dependent on one or two sources of information such as their sponsoring employers or recruiters. As Ruhs argues, given the restrictions of

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<sup>888</sup> Anderson, 'Migration, immigration controls' (n 4) 311.

<sup>889</sup> Sonia McKay and Tessa Wright, 'Tightening immigration policies and labour market impacts' (2008) 14 *Transfer: European Review of Labour and Research* 653.

migrants' rights under TMWPs, policymakers in liberal states have a special obligation to provide 'the terms of the deal' in a way that is 'transparent, easily accessible, and made clear to workers before they join the program'.<sup>890</sup> I would add that there should be mechanisms for offering accurate and up-to-date information (in their own language), which migrants can access throughout their participation under the TMWPs. This would enable them to make more informed decisions regarding their migration projects and facilitate their exit and voice options.

### ***Specific suggestions for reforming the two TMWPs***

The above proposals seek to tackle the most problematic features common to the 457 visa and Tier 2 (General) visa schemes as identified in earlier chapters. The comparative inquiry throughout the thesis has also illustrated the variations between the two labour migration regimes that are shaped and mediated by their own regulatory crucibles of path-dependent policy legacies, economic, social, and political institutions, structures, and dynamics. Within liberal democratic states such as Australia and the UK, a range of actors and stakeholders also play a role in translating multiple and often competing regulatory goals and interests into actual laws, policies, and practices. The following subset of specific considerations for reforming the two schemes is attentive to the distinct national systems and contexts of labour migration.

Starting with the conditions of entry, a main controversy around the 'integrity' of the 457 visa scheme has been the liberalisation of its admission criteria and processes. A lack of mechanisms to assess employers' claims of skills shortages and the availability of concessional entry routes have led to an increasing admission

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<sup>890</sup> Ruhs, *Price of Rights* (n 70) 178.

of 457 visa holders on the lower end of the skills/wages spectrum. As the Deegan Review pointed out, this cohort of migrants were especially vulnerable to risks of exploitation arising from the structural features of a TMWP originally designed to recruit highly skilled and highly paid managers and professionals.<sup>891</sup> In comparison, the Tier 2 (General) visa scheme entails a more restrictive admission regime, with an annual numerical cap, higher skills threshold, and the requirement of labour market testing for occupations not covered by the SOL. Yet, the labour market test has not always been easy to implement in practice, not least due to employers' ingenuity in demonstrating that no resident workers could be found to fill a particular vacancy.<sup>892</sup>

Rather than a symbolic labour market test based on employer self-attestation, both schemes could adopt a more rigorous instrument in the form of a shortage occupation list developed by an independent expert body with stakeholder input, as detailed above. This is not to argue that the admissions criteria should be made more restrictive under either schemes or that any 'numbers versus rights' trade-off are implicated in this proposal. Rather, it underlines that a TMWP, which restricts migrants' labour mobility based on the justification of addressing skilled shortages, ought to have in place methodical, evidence-based, and objective means of ascertaining where genuine skilled shortages exist (which is after all the espoused aim of both schemes). Furthermore, with a much more rigorous mechanism of ascertaining skills shortages, the 457 visa scheme can remain uncapped. Restrictive quotas such as those under the Tier 2 (General) visas may perversely increase the dependence of migrants on their current sponsor/ employer given the difficulties of switching to another sponsor on a Tier 2 visa.

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<sup>891</sup> Deegan, *Final Report* (n 293) 27.

<sup>892</sup> Martin, *Temporary Worker Programs* (n 435).

This brings us to the proposal of de-anchoring migrants' legal status from an employer sponsorship. I have argued above that this would be a key feature of any normatively acceptable TMWP that would expand migrants' possibilities for exit and voice. It is plausible that the 457 visa scheme could be redesigned in a similar fashion to the permanent GSM programme which admits migrants after they have met specific criteria such as education, skills, and work experience in a shortage occupation, rather than require them to work for a specific sponsor. Similarly, the UK's former Tier 1 General visa (and its predecessor, the Highly Skilled Migration Programme) provided an independent basis for highly skilled migrants to work and reside in the UK without an employer sponsorship. However, since 2011, this route has been all but abolished as part of the government's policy to drastically reduce the size of non-EEA net migration.

If changing the employer sponsorship model underpinning both schemes is unattainable in the short term, then it is crucial that migrants who cease employment with their sponsors by reason of dismissal, resignation, or otherwise have an adequate period of time to remain in the host state to search for employment with a new sponsor, to enforce their legal rights, or to apply for an alternative visa route. Prior to 2013, the 457 visa scheme only provided a period of 28 consecutive days from the cessation of the migrants' employment with the sponsor. Beyond this timeframe, migrants were liable to have their visas cancelled. The Tier 2 (General) visa scheme has a slightly more 'generous' period of 60 days, but this is still arguably a very short timeframe to find a new sponsor. The most recent legislative reform to the 457 visa scheme has been the extension of this 28 day period to 90 days, which represents a positive step forward for expanding the possibility for migrants to exit exploitative work relations. For the new employer taking on a 457

visa holder who has left her previous sponsor, this extended period also provides a more reasonable timeframe in which to prepare the relevant sponsorship and nomination applications.

Another contentious aspect of the two TMWPs is the potential for intermediated labour arrangements to exacerbate hyper-precarity in migrant work relations where the actual sponsor/employer may not be readily identifiable for assuming various legal obligations. Despite the standard sponsorship requirement of a direct employment relationship, the 457 visa scheme (up until 2007) has allowed labour hire companies to recruit and sponsor migrant workers for placement in end-user client companies. The availability of Labour Agreements has left open the possibility for sponsors to continue these arrangements under the present scheme, subject to negotiations with DIAC and DEEWR. In comparison, employment agencies and businesses are not permitted to sponsor Tier 2 (General) visa holders as agency workers. However, the sponsor does not need to be the direct employer of the migrant. This ambiguity in the Policy Guidance leaves much room for complex, intermediated migrant work relations involving different sponsors, employers, and labour users.

What is clear from the analysis in Chapter 5 is that intermediated migrant work relations can generate two potential sources of hyper-precarity: the uncertainty of migrants' employment arrangements that may breach certain restrictions attached to their visas; and their exclusion from substantive employment rights and protections due to complex, triangular contractual engagements that may be contrived to sidestep legal obligations. I propose that labour hire or temporary agency arrangements should not be permitted under either scheme. The only exception may be where the migrant has demonstrably strong bargaining power as evidenced by a

high skill level and income threshold. Both schemes should have clear requirements of direct employment relationships (contracts of services) where the employer is responsible for compliance with all employment and immigration laws. These proposals do not conflict with the potentially constructive roles and functions of other intermediaries such as the social enterprises identified earlier that could facilitate migrants' post-admission labour market transitions under a model of TMWP that does not tether their legal residence status to an employer sponsorship.

Finally, while the two schemes offer migrants the possibility for obtaining permanent residence down the track, each critically and unduly relies on the sponsoring employer's nomination and support. As highlighted in Chapter 5, this 'conditional stepping stone' to more secure status can be a substantial source of hyper-dependence for those partaking in the 457 visa or Tier 2 (General) visa schemes with the goal of securing permanent residency. The 457 visa can be reformed so that these migrants' entitlement to permanent residency would be automatic after five years of lawful residence in Australia, without the need to go through the ENS that requires continued employment with a specific sponsor/employer for a minimum period of time. In the UK, application for IDL should also not require continuous employment over a five-year period and the sponsor's support stating that he still requires the migrant for the job in question. Due to the differences in the immigration politics of the two countries, reforming the 457 visa in this direction may be more feasible in the near future than the case of the Tier 2 (General) visa. While Australia's legacy of permanent settlement may still have certain influence on current labour and economic migration policies (notwithstanding the growth of temporary labour migration), the increasingly restrictive labour

migration controls in the UK have focused on breaking the link between temporary residence and permanent settlement for non-EEA migrants.<sup>893</sup>

## 6.6 Conclusion

Policymakers in liberal democratic states are often faced with the task of weighing up diverse and sometimes competing interests of employers, resident workers, and migrants workers within a regulatory crucible that shapes the legal and institutional architecture of TMWPs. Despite the ‘triple-win’ claims of international and national policymakers regarding contemporary TMWPs, migrant workers’ rights and interests have been given very little moral standing relative to the broad prerogative of host states in pursuing certain economic and political imperatives as well as the interests of employers in their demand for more flexible migrant labour. The above proposals for reform seek to emphasise the ‘aspirations and projects of the migrants themselves, as actors and purposive participants’<sup>894</sup> as well as the interests of resident and migrant workers alike in having decent employment terms and conditions.

In this chapter, I have argued that access to exit and voice at any stage of migrants’ work relations and their migration projects is critical for ameliorating the vulnerabilities of hyper-dependence and hyper-precarity associated with their precarious statuses, especially in averting the potential for highly exploitative situations of HDP/HPD. Any restriction on migrants’ labour mobility under TMWPs ought to be minimised as far as possible. Their legal permission to work and reside in the host state must be detached from an employer sponsorship, which would enable

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<sup>893</sup> Cameron, *Immigration speech* (n 31).

<sup>894</sup> Ottonelli and Torresi, ‘Inclusivist Egalitarian Liberalism’ (n 106) 208.

migrants to leave the employment relationship without deleterious effects on their legal status. It may be acceptable to have a few constraints on migrants' choice of occupation and sector for a short period of time to address the specific labour market shortages targeted by these schemes. However, what constitutes a 'shortage' should be subject to robust and regular review by an independent expert body like MAC with the input of a wide range of stakeholders. Furthermore, migrants under TMWPs should enjoy a comparable set of employment and social rights and protections as citizens and permanent residents, with the possible exception of a time-bound limitation on accessing redistributive social entitlements. Any kind of restrictions on family reunion should be minimised as much as possible. Ultimately, there must be a significant degree of security in migrants' legal status in the host state that does not depend on an employer/sponsor, whether their migration projects involve only a fixed-term stay or an eventual pathway to permanent residency.

Any proposals for reforming contemporary TMWPs need to be situated in policies, programmes, and public campaigns involving governments, employers, trade unions, community groups, and migrants themselves, which aim to tackle discrimination, xenophobia, and vilification of migrants in workplaces and host societies. Hostility towards migrants under TMWPs can often arise from public misperceptions that their admission per se can harm the local workforce and/or create problems of social integration. The media also plays an important role in how the public views these labour migration schemes and general immigration policies. Despite the tendency of mainstream media in many host states to reinforce public prejudice against migrants, sections of the Australian media were instrumental in raising public awareness of the exploitation of 457 visa holders.

In this thesis, the critical concepts of hyper-dependence and hyper-precarity have been developed to analyse the implications of migrants' precarious statuses for their work relations and migration projects, and to provide a platform for explicating a range of normative issues arising from the legal and regulatory architecture of contemporary TMWPs. Essentially, my inquiry has sought to cast a spotlight on migrant workers whose needs and interests have been marginalised in public and policy debates on labour migration, both in host states and intergovernmental forums. As Oberoi eloquently puts it: 'the individual migrant cuts a lonely and often invisible figure in this debate; his work is accepted but his presence rejected, her obligations emphasised but her rights denied'.<sup>895</sup> A positive change of direction in the current political discourses on immigration issues in Australia, the UK, and many other host states is necessary to enable migrants, their families, and communities the opportunity to meaningfully partake in the public debates and policy decisions that directly shape their working lives and migration projects.

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<sup>895</sup> Oberoi, 'Empowering migrants: human security, human rights and policy' (n 182) 229.

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