



Law Council  
OF AUSTRALIA

*Federal Litigation and  
Dispute Resolution Section*

23 March 2020

Committee Secretary  
Senate Select Committee on Temporary Migration  
PO Box 6100  
CANBERRA ACT 2600

By email: [temporarymigration.sen@aph.gov.au](mailto:temporarymigration.sen@aph.gov.au)

Dear Sir/Madam

### **Temporary Migration**

1. The Migration Law Committee (**the Committee**) of the Law Council of Australia's Federal Litigation and Dispute Resolution Section appreciates the opportunity to submit to the Select Committee on Temporary Migration (**the Select Committee**) inquiry into Temporary Migration (**the Inquiry**). The Committee also acknowledges its important and constructive ongoing dialogue with the Department of Home Affairs on policy and procedural issues relating to Australia's migration program.

### **Parliamentary Select Committee on Temporary Migration - Inquiry into Temporary Migration**

2. The Committee considers that the impact of temporary migration on Australia's Labour market varies substantially in the context of each particular visa program. Some programs use specific criteria to ensure the protection of the Australian labour market, such as employer-sponsored visa requirements for labour market testing, and skilled migration temporary visa categories requiring a state or territory government to nominate particular occupations which are in demand. Other visa categories where work rights are unrelated to the purpose of the visa will have a greater impact on the Australian labour market, where there are no such protections in the legislative scheme.
3. The Committee submits that an assessment of the effect of temporary migration on the Australian labour market must be undertaken with this in mind.
4. The Committee recommends that the Select Committee separately consider the following categories, by reference to the features of their particular legislative programs.

### **Employer Sponsored Temporary Migration Programs (Visas 482 and Regional 494)**

5. The existing framework for temporary employer-sponsored migration includes a 'skilled occupation list' which sets the parameters within which skilled applicants must apply. That list is limited to highly skilled occupations and is subject to regular review. It is open to the Government to change the list in response to adverse impacts on the Australian labour market or changing skills shortages.

6. The key safeguard to ensure the Australian labour market is not adversely impacted by employer sponsored temporary migration is the requirement for labour market testing to be completed. It must also be demonstrated that a temporary migrant will be receive equivalent payment and conditions to those available to an Australian worker. The criteria require applicants to be highly skilled with relevant qualifications and employment experience.
7. Employer-sponsored temporary migration also ensures the protection of the Australian labour market by way of sponsorship monitoring provisions. These provide the Government with oversight of temporary migrants' employment conditions to prevent exploitation of workers.

#### **Highly Skilled Work Visas (Visas 408 and 400)**

8. The existing framework for highly skilled work visas includes criteria for the Government to assess that the Australian labour market is not adversely impacted. This is a component of the assessment of the visa grant.
9. These temporary migration visa programs relate to highly specialised skill sets and are only granted where there is a proven need for the person's skills in the Australian workforce for a temporary period. The Committee submits that the highly specialised nature of the work facilitated by this category of temporary migration does not impact on the Australian labour market.

#### **Working Holiday Program (Visas 417 and 462)**

10. Working holiday visa arrangements undoubtedly facilitate young temporary migrant workers from specified countries competing with Australian workers for unskilled work. However, this category forms an important part of Australia's international trade agreements with many countries around the world and generally represents a relatively small proportion of temporary migrants in Australia with work rights. Further, these temporary migrant workers also play a vital role in meeting regional agricultural employment needs, given additional working holiday visa arrangements available after visa holders complete a specified period of regional work during their stay.

#### **Skilled Temporary Migration Programs (Regional 491)**

11. The new regional temporary migration program includes requirements for state and territory governments to nominate visa applicants where the state or territory has identified a particular skills requirement or shortage. This is an important safeguard in the criteria to ensure that there is a genuine need for the skilled worker in the relevant area, and for the state and territory governments to make an assessment of the impact on the Australian labour market in that region.
12. The program ensures that skilled migrants are settling in regional areas, in the hope that they will utilise their skills in the area. Unlike employer-sponsored programs, however, this program does not require temporary migrants to work in their particular skilled occupation as a temporary migrant. Therefore, this visa category has the potential to lead to exploitation of temporary migrants who are required to complete work in regional areas to gain Australian permanent residence. It may also displace Australian workers competing for unskilled work in those regions.

13. It is already apparent that there is a vast number of applicants seeking state or territory government sponsorship in occupations with little or no hope of providing employment in the given region. Accountant (General) is one such example. The Committee is informed that the majority of these individuals instead work as Uber drivers or casual workers in hospitality occupations. It is of concern that these applicants will have great difficulty in meeting the threshold earnings of \$53,900 per year for the minimum three years necessary to achieve permanent residency. The Committee has also received indications that some applicants may be prepared to, or are placed under pressure to, buy their job by advancing money to the employer to guarantee the \$53,900 minimum income.

#### **Temporary migrants with work rights unrelated to the purpose of the visa**

14. The Committee recommends that this cohort of the temporary migration program should be the main focus of the parliamentary inquiry as to the impact on the Australian Labour market. This category makes up the largest portion of long-term temporary migrants in Australia, as it includes persons in Australia on a student visa where the primary purpose is to study but work rights are attached. Work rights are generally 40 hours per fortnight despite the criteria for a student visa requiring that applicants have the financial means to meet course costs and living costs throughout their stay in Australia.
15. Employers who engage a student visa holder are not subject to monitoring and, unlike employer-sponsored migration programs, do not have to establish that they are meeting Australian minimum employment standards or that they have tested the Australian labour market before employing a temporary migrant.
16. It is the Committee's view that this category of temporary migrant is the most at risk of exploitation and, without any checks and balances in the legislative scheme, also the most likely to impact substantially on the Australian labour market.

#### **Seasonal Worker Program and Pacific Labour scheme.**

17. This program was introduced to alleviate seasonal labour shortages in regional areas, mainly by supplementing the workforce for fruit and vegetable picking and maintenance jobs. The program is essential for businesses in the regions as the available local workforce provides only a small proportion of the required workers. It is not uncommon for a larger farm to employ 150 mainly local workers on a permanent or near permanent basis and, in addition, to employ 1400 workers through the seasonal worker program.
18. The Committee understands that employers are generally pleased with the performance of these seasonal workers, particularly with regard to the care with which seasonal workers undertake their duties.
19. An approved employer will generally be a farming entity incorporated in Australia or a business partnership with a valid Australian Business Number. Labour hire entities may be approved as employers, provided they have been in operation for at least five years and have a record of compliance with workplace relations requirements.
20. There has been some bad publicity regarding the activities of some labour hire entities. This includes workers being forced to live in cramped accommodation and

with inadequate arrangements for the provision of food. Many locations in which seasonal workers are employed are isolated or with little access to public transport. Some farmers have taken the decision to never use a labour hire entity for this reason, taking the view that the workers are more productive if treated with respect.

21. Substandard living and working arrangements are rarely reported directly by seasonal workers, who may fear retribution from their employers (in most cases the labour hire business). Increasingly, the Australian Workers Union and the National Union of Workers have undertaken to raise concerns on behalf of seasonal workers.
22. The seasonal worker program is administered by the Department of Education, Skills and Employment (**the Department**). The Committee is not aware of any publicly available information regarding sanctions (if any) imposed by the Department upon employers. However, naming and shaming may not be effective because there is nothing to stop the owners of a labour hire business from closing it down and re-creating the same business under another name.
23. Investigation and action may be taken by the Fair Work Commission, but this may be restricted to pay and work conditions. Other matters, including accommodation standards and contractual arrangements—whereby an employer may reallocate a significant amount of the seasonal worker’s pay to cover airfares to and from Australia, accommodation and daily travel—fall outside the Fair Work Commission’s scope.

#### **Temporary Protection Visas (TPV and SHEV)**

24. While not specifically envisaged by the terms of reference, the Committee notes the importance of the situation faced by a large number of people in the Australian community who have been recognised as engaging Australia’s non-refoulement obligations, but who do not have any certainty about their future.
25. Consistent with the well-established policy of the Law Council, the Committee believes that the provision of temporary, rather than permanent, protection visas to persons who have been found to invoke Australia’s international protection obligations does not sufficiently respect the internationally recognised right to seek asylum.<sup>1</sup> International refugee law provides for refugee status to end in certain circumstances,<sup>2</sup> however each of these avenues follows from a focused assessment rather than occurring by default. Temporary protection is generally only permitted under international law as an exceptional measure, applied where the mass movement of asylum seekers makes initial, individualised refugee status assessments impracticable.<sup>3</sup> That is not the case

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<sup>1</sup> Law Council of Australia, *Asylum Seeker Policy* (2014), cl 7(a), <https://www.lawcouncil.asn.au/docs/b8ae4569-ae36-e711-93fb-005056be13b5/Policy-Statement-Asylum-Seeker-Policy.pdf>.

<sup>2</sup> Refugee status may be ended by cessation, cancellation or revocation. Cessation relates to situations where the circumstances under article 1C (1-6) of the 1951 *Convention relating to the Status of Refugees* are met and refugee protection is therefore no longer required. Cancellation may happen where a determination finds that refugee status should not have been granted in the first place. Revocation may occur in certain circumstances where a refugee subsequently engages in conduct within the scope of article 1F of the 1951 Convention. These outcomes are discussed in Sibylle Kapferer, ‘Cancellation of Refugee Status’ (UNHCR, Division of International Protection, *Legal and Protection Policy Research Series*, PPLA/2003/02, March 2003), at [3], [121] and [123] respectively.

<sup>3</sup> Andrew and Renata Kaldor Centre for International Refugee Law, ‘Temporary Protection Visas (TPVs) and Safe Haven Enterprise Visas (SHEVs)’, (Factsheet, UNSW, April 2019), 3, [https://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet\\_TPV\\_SHEV\\_Apr2019.pdf](https://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_TPV_SHEV_Apr2019.pdf).

in Australia, where temporary visas are granted following individual assessment, as a reflection of the way in which the individual arrived.

26. Additionally, in human terms, provision of permanent visas provides much better long-term outcomes for refugees, including in regard to settlement outcomes and social cohesion.<sup>4</sup> The Refugee Council of Australia states that the temporary protection visa policy has had an extremely damaging impact on refugees.<sup>5</sup> Psychological damage resulting from a lack of stability and security was well documented.<sup>6</sup> It also created a class of second-class residents, distinguished from those eligible for permanency due to their different mode of arrival.
27. The Committee calls on the Select Committee to recommend that permanent residency be made available to all current and future holders of temporary protection visas, and that the future use of temporary protection visas be discontinued.

### **Conclusion**

28. The Committee would be happy to provide further input or expertise on any of the matters raised in this submission, should that be of assistance.
29. Thank you again for the opportunity to comment. Please contact Ms Georgina Costello SC, Chair, Migration Law Committee, on (03) 9225 6139 or at [costello@vicbar.com.au](mailto:costello@vicbar.com.au) in the first instance if you require further information or clarification.

Yours sincerely

Margery Nicoll.

**Margery Nicoll**  
**Acting Chief Executive Officer**

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<sup>4</sup> See, for instance, Law Council of Australia, *The Justice Project* (Final Report, August 2018), Part 1, Asylum Seeker Chapter, pp 33-34, 41, <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Asylum%20Seekers%20%28Part%20%29.pdf>.

<sup>5</sup> Refugee Council of Australia, 'Australia's asylum policies' (Online, 28 December 2018), <https://www.refugeecouncil.org.au/asylum-policies/10/>.

<sup>6</sup> See, for instance, Senate Standing Committee on Legal and Constitutional Affairs, *Administration and operation of the Migration Act 1958* (report, 2 March 2006), 8.6 and following, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed%20inquiries/2004-07/migration/report/index](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2004-07/migration/report/index).