Temporary Migrant Labour and Unpaid Work in Australia

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Abstract

Increasing attention is being given to the exploitation of temporary migrant workers in Australia, especially in relation to wage underpayments and 'cash-back scams' where visa holders are coerced into returning a portion of their wage to their employer. However, very little focus has been given to the incidence of unpaid work performed by temporary migrants. This article examines how previous forms of regulation affecting visas for working holiday makers and international students actively encouraged the performance of unpaid work by allowing unpaid work to count towards either permanent residency or an extension of a visa holder's temporary stay. The article also assesses the current regulation of temporary migrant workers and the likelihood that it creates incentives for this cohort to perform unpaid work. We argue that this likelihood largely stems from the employer-driven nature of Australia's temporary and permanent migration program, and the ability for visa holders to achieve a favourable migration outcome through the performance of paid work, for which unpaid work is often a gateway.

I Introduction

Australia's migration program has been transformed in recent years through an increasing focus on providing temporary and permanent migration pathways linked to the performance of work.[1] The main temporary labour migration pathway (the Temporary Skill Shortage subclass 482 visa) and the main permanent labour migration pathways (the subclass 186 and subclass 189 visas) require the performance of work, with either employer sponsorship or work for an Australian employer given priority in the selection criteria for entry.[2] Other visas that are primarily for a non-

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[1] For an overview of recent changes, see Laurie Berg, *Migrant Rights at Work: Law's Precariousness at the Intersection of Immigration and Labour* (Routledge, 2015); Joo-Cheong Tham and Iain Campbell, 'Temporary Migrant Labour in Australia: The 457 Visa Scheme and Challenges for Labour Regulation' (Working Paper No 50, Centre for Employment and Labour Relations Law, The University of Melbourne, March 2011); Joanna Howe, 'The *Migration Legislation Amendment (Worker Protection) Act 2008*: Long Overdue Reform, but Have Migrant Workers Been Sold Short?' (2010) 23(4) *Australian Journal of Labour Law* 251.

[2] These various visa subclasses are created by the provisions in sch 2 of the *Migration Regulations 1994* (Cth).

work purpose, such as visas for international students (subclass 500 visa) and working holiday makers (subclass 417 visa and subclass 462 visa), allow the performance of work and provide ample scope to do so.[3] Increasingly, these visas are providing opportunities to transition to other visa categories which allow for a longer stay in Australia for the purpose of work. In short, 'work' has become fundamental to the purpose and orientation of the regulatory framework governing Australia's approach to migration.

It is timely, then, to consider whether this preoccupation with 'work' includes labour that is unremunerated. Unpaid work can take many different forms. Quite apart from labour performed within households or family businesses, a great deal of 'voluntary' work is done to benefit, for example, schools, charities, sporting clubs or churches.[4] But there has also been a significant increase in the incidence of unpaid 'work experience', undertaken with the intention of improving the employability of students or job-seekers. Such arrangements may involve 'placements' as part of education or training courses, or be offered to the long-term unemployed as part of 'active labour market' programs. They may be 'internships' or 'job trials' established by businesses to offer a taste of what work is like in a particular profession, or to test out applicants. Or they may simply be initiated by job-seekers themselves, in order to gain contacts or improve a resume. But, in whichever of these forms, unpaid work experience poses a challenge for regulators, especially in ensuring that it involves decent working conditions and does not have adverse economic or social consequences. Even when freely chosen, such arrangements have the potential to undermine both labour standards and social mobility.[5]

In Australia, the Office of the Fair Work Ombudsman ('FWO'), the agency responsible for enforcing the main labour statute, the *Fair Work Act 2009* (Cth) ('*Fair Work Act*'), has taken a strong interest in this issue. In 2013, the FWO released a research report on the nature and prevalence of unpaid work experience.[6] Since then, in accordance with the recommendations made in that report, it has worked with stakeholders to develop a new range of educative materials that help individuals and organisations understand the circumstances in which it is lawful or unlawful to work without pay to gain experience.[7] The legal position in this regard is outlined in the next section of the article. For now, it suffices to note that — again in accordance with the *2013 Report* — the FWO has been very active in pursuing employers for

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3 Ibid.

4 For a useful (if now somewhat outdated) overview of the legal issues posed by voluntary work, see Jill Murray, 'The Legal Regulation of Volunteer Work' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation*: *Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 696.

5 See Rosemary Owens and Andrew Stewart, 'Regulating for Decent Work Experience: Meeting the Challenge of the Rise of the Intern' (2016) 155(4) *International Labour Review* 679. As to the prevalence of such arrangements in Australia, see Damian Oliver et al, 'Unpaid Work Experience in Australia: Prevalence, Nature and Impact' (Department of Employment, Australian Government, December 2016).

6 Andrew Stewart and Rosemary Owens, 'Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia' (Report for the FWO, January 2013) ('*2013 Report*').

7 See FWO, *Unpaid Work* <www.fairwork.gov.au/pay/unpaid-work>.

what it regards as unlawful forms of exploitation.[8] This has included instituting a series of proceedings in which businesses have been fined for breaching the *Fair Work Act* by not paying, or underpaying, trainees or interns who were performing productive work.[9] It has also taken action against employers who insisted on treating an initial period of work as unpaid 'training', but who, in reality, have hired employees.[10]

It is generally accepted that periods of work experience can be a useful and important part of the transition from education to employment. But when poorly designed or misused, they may not merely 'fail to provide the first step towards decent and stable work', but 'trap young people in a vicious cycle of precarious employment and insecurity'.[11] This is a danger to which the International Labour Organization is alert. It has warned, for example, of the risk of internships becoming simply a 'disguised form of employment', without any of the benefits of real on-the-job training.[12] In general terms, it is young people who are most likely to be engaged in internships or other forms of work experience. But as the *2013 Report* for the FWO noted,

> migrant workers, especially international students and those on temporary working visas, are also especially vulnerable to unpaid work, because they often have the additional urgency of seeking to maximise the possibility of securing access to permanent residency.[13]

This article examines the way in which the treatment of unpaid work by Australia's migration law and policy has evolved in recent years. Until recently, the performance of unpaid work by temporary migrant workers, whether by international students or working holiday makers, was not just officially permitted, but actively encouraged. At a formal level, that has now largely changed. This is because of a growing understanding of the exploitative potential of unpaid work when it is enabled by migration regulation as the basis for securing a migration outcome for the visa holder. Despite this important recognition, these past regulatory practices permitting unpaid work have significance today, both in terms of creating a culture of tolerance for unpaid work among temporary migrants as a gateway to paid employment and contributing to embedding the dominant position of the employer in the design of Australia's regulation of temporary migration. In the final

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8 See, eg, FWO, 'Internships & Unpaid Work — Update' (Media Release, 12 August 2014) <https://www.fairwork.gov.au/about-us/news-and-media-releases/2014-media-releases/august-2014/20140812-interns-unpaid-work-update>.

9 See, eg, *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365 (12 December 2014); *Fair Work Ombudsman v Crocmedia Pty Ltd* [2015] FCCA 140 (29 January 2015); *Fair Work Ombudsman v Aldred* [2016] FCCA 220 (10 February 2016); *Fair Work Ombudsman v AIMG BQ Pty Ltd* [2016] FCCA 1024 (31 May 2016).

10 See, eg, *Workplace Ombudsman v Golden Maple Pty Ltd* (2009) 186 IR 211; *Fair Work Ombudsman v Bosen Pty Ltd* [2011] VMC 81 (21 April 2011).

11 Kari P Hadjivassiliou et al, 'Study on a Comprehensive Overview on Traineeship Arrangements in Member States: Final Synthesis Report' (Final Synthesis Report, European Union, 2012) 24. As to the characterisation of internships as a precarious form of work, see Guy Standing, *The Precariat: The New Dangerous Class* (Bloomsbury, revised ed, 2011) 16, 76–7; Ross Perlin, *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy* (Verso, revised ed, 2012) 36–41, 197–202.

12 International Labour Organization, *Internships: Head Start or Labour Trap?* (22 August 2012) <www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_187693/lang--en/index.htm>.

13 *2013 Report*, above n 6, xiii.

part of the article, we demonstrate that there still remain other unofficial inducements for temporary migrant workers to perform unpaid work. We highlight the problematic decision to introduce a new Temporary Skill Shortage visa that, rather disturbingly, establishes a requirement of 'work experience' in order to apply for the visa, without clarifying whether this be paid or unpaid. This recent reform also reflects the employer-driven nature of Australia's temporary and permanent migration program and the ability for visa holders to achieve a favourable migration outcome through the performance of work.

II Unpaid Work and Labour Standards

Some forms of labour regulation are framed to apply to both paid and unpaid work. The 'model' work health and safety statutes that now apply in most Australian jurisdictions, for example, create obligations that apply in relation to any worker engaged, influenced or directed by a person conducting a business or undertaking.[14] The term 'worker' is defined to mean a person carrying out work 'in any capacity', including as a 'trainee', a 'student gaining work experience', or a 'volunteer'.[15] The same definitions are used in the anti-bullying provisions in pt 6-4B of the *Fair Work Act*, though workers can only obtain relief if the business or undertaking in question is 'constitutionally covered'. Outside the federal public sector and the Territories, this requires the 'person' running the business to be a trading, financial or foreign corporation.[16] Some state and territory anti-discrimination laws are also drafted so as to prohibit conduct that affects unpaid workers.[17]

For the most part, however, labour standards are applicable only to those working as employees. This is the case, for example, in relation to most of the rights and protections created by the *Fair Work Act*, including the minimum conditions stipulated by the National Employment Standards, modern awards and national minimum wage orders.[18] In the absence of a statutory definition, whether a person

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[14] See, eg, the primary duty of care established by s 19(1) of the *Work Health and Safety Act 2011* (Cth), *Work Health and Safety Act 2011* (NSW), *Work Health and Safety Act 2011* (Qld), *Work Health and Safety Act 2012* (SA), *Work Health and Safety Act 2012* (Tas), *Work Health and Safety Act 2011* (ACT) and *Work Health and Safety (National Uniform Legislation) Act 2011* (NT). The term 'business or undertaking' is not defined, but s 5(1)(b) (definition of 'person conducting a business or undertaking') makes it clear that it need not be conducted for profit or gain.

[15] See, eg, ibid s 7(1)(f)–(h). See further Richard Johnstone and Michael Tooma, *Work Health & Safety Regulation in Australia: The Model Act* (Federation Press, 2012) 50–4. Note, however, that a group of volunteers working together for the same community purpose, but not employing anyone else, is not covered by the model Acts, since under s 5(7)–(8) of the *Work Health and Safety Act 2011* (Cth), this does not count as a business or undertaking: see, eg, *Re McDonald* (2016) 258 IR 99.

[16] *Fair Work Act* ss 789FC(1), 789FD(3). See, eg, *Re Cowie* [2016] FWC 7886 (21 November 2016) (umpire volunteering for Rowing Victoria Inc unable to seek an anti-bullying order, as the association was not a trading or financial corporation). In Queensland, workers excluded from the federal jurisdiction can now seek anti-bullying orders from the Queensland Industrial Relations Commission: see *Industrial Relations Act 2016* (Qld) ch 7 and the definition of 'employee' for this purpose in s 8(2)(b) (definition of 'employee').

[17] See *Anti-Discrimination Act 1991* (Qld) sch (definition of 'work'); *Equal Opportunity Act 1984* (SA) s 5(1) (definition of 'employment'); *Discrimination Act 1991* (ACT) s 2 and Dictionary (definition of 'employment').

[18] *Fair Work Act* pts 2-2, 2-3, 2-6. The same applies in relation to the coverage of enterprise agreements (pt 2-4) and protection against unfair dismissal (pt 3-2). To be covered by these provisions, an

is working as an 'employee' is determined by reference to the common law understanding of that term.[19] As the High Court of Australia made clear in *Ermogenous v Greek Orthodox Community of SA Inc*,[20] the common law requires two separate conditions to be satisfied. The first is that the person agree to perform work pursuant to a *contract*, the second that the contract be characterised as one of *employment* (as opposed to, for instance, a commercial contract for services).[21]

In practice, it is the first of these requirements that may be difficult for some unpaid workers to satisfy. The main problem here is not, as might be supposed, the need to show some form of consideration. It is now well established that an employment contract may be supported by a promise to 'remunerate' a worker other than by paying wages: for example, by providing board and lodging.[22] In principle, there is no reason why an agreement to provide training or work experience could not be good consideration for a promise to attend and perform work.[23] Rather, the problem is likely to be a lack of 'mutuality' of obligation,[24] or (more particularly) a lack of intention to create legal relations.

In relation to this last point, Gaudron, McHugh, Hayne and Callinan JJ noted in *Ermogenous* that the burden lies on the party seeking to establish the existence of a contract to adduce evidence of the necessary intention.[25] But their Honours also stressed the need to adopt an *objective* perspective in ascertaining that intention. It is not a question of searching for each party's 'uncommunicated subjective motives or intentions'.[26] Rather, it is a matter of considering what 'would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened'.[27] Where workers can be seen to be volunteering their services in support of a particular cause or organisation, it may be

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employee must also generally be working for a 'national system employer'. As a result of the mix of constitutional powers and state referrals used to support the *Fair Work Act*, all private sector (non-government) employers fall within this category. The exception is in Western Australia, where sole traders, partnerships and certain corporations are not covered: see Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6th ed, 2016) ch 6.

19 *C v Commonwealth* (2015) 234 FCR 81, 87 [34] (the Court); *Cai v Do Rozario* (2011) 215 IR 235 (Fair Work Australia).

20 (2002) 209 CLR 95 ('*Ermogenous*').

21 In *Ermogenous*, the High Court dealt with the first of these questions, finding that the worker concerned (an archbishop) was engaged under a contract. It remitted the question of whether that contract was one of employment to the South Australian Supreme Court, which subsequently found in the affirmative: *Greek Orthodox Community of SA Inc v Ermogenous* [2002] SASC 384 (26 November 2002). As to the tendency of some courts or tribunals to conflate or confuse the two requirements, see Murray, above n 4, 713.

22 See, eg, *Cudgegong Soaring Pty Ltd v Harris* (1996) 13 NSWCCR 92 (1 May 1996).

23 See, eg, *Edmonds v Lawson* [2000] QB 501, 514–15 [23]–[25].

24 See, eg, *Dietrich v Dare* (1980) 30 ALR 407, concerning a short job trial where the worker was under no obligation to present for work.

25 (2002) 209 CLR 95, 106 [26] (Gaudron, McHugh, Hayne and Callinan JJ). A stark (if somewhat contentious) example of this proposition is provided by the finding in *Prajapati v Narshima Tradings Pty Ltd* [2016] FCCA 2798 (2 November 2016). A woman who alleged she had been coerced by her husband into working at his brother's restaurant could not establish that she was an employee and, hence, entitled to wages, without leading evidence as to any dealings with the brother from which an intention to contract could be inferred.

26 *Ermogenous* (2002) 209 CLR 95, 106 [25] (Gaudron, McHugh, Hayne and Callinan JJ).

27 Ibid 105–6 [25] (Gaudron, McHugh, Hayne and Callinan JJ) (citations omitted). See also *Nield v Mathieson* [2014] FCAFC 74 (19 June 2014) 9 [42].

relatively easy to infer an absence of intention to contract, even if they receive an 'honorarium' or reimbursement for certain expenses.[28] But in the case of work experience that is undertaken for non-altruistic reasons, the matter can be more difficult to resolve. Over the years, different views have been taken of such arrangements.[29] There have certainly been instances in which courts or tribunals have found an absence of any intention to create legal relations.[30] But in other cases, employment contracts *have* been found to exist, especially in relation to arrangements of longer duration.[31]

There is one type of work experience that cannot be treated as involving an employment relationship, at least under the *Fair Work Act*. Sections 13, 15, 30C and 30M each provide that a person is not to be treated as an employee if they are 'on a vocational placement'. This is defined in s 12 to mean an unpaid placement undertaken as a requirement of an education or training course and authorised under a federal, state or territory law or administrative arrangement. The drafting of this exception is not as clear as it might be.[32] But it ensures, for instance, that the *Fair Work Act* will not apply to periods of unpaid work experience undertaken for the purpose of a university or TAFE course, or a statutorily recognised program of training required to enter a profession.[33] The *Social Security Act 1991* (Cth) also has provisions (such as ss 544B(8) and 631C) that exempt certain 'approved programmes' of work from the operation of the *Fair Work Act*. These may apply, for example, to the 'internships' arranged for jobseekers under the Turnbull Government's PaTH (Prepare-Trial-Hire) Programme, which commenced in April 2017.[34]

Of course, the very fact that such exceptions are considered necessary might be thought to strengthen the view that work experience arrangements not covered by the exceptions should be regarded as falling within the scope of the *Fair Work Act*, especially when regard is had to the objects of the statute. One possible approach then, as the *2013 Report* for the FWO argued, is to assume that if a person is performing productive work for an organisation, under an arrangement whereby they will either gain experience or be considered for an ongoing job, they are doing so under an employment contract — unless there is clear evidence to the contrary, or

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28 See, eg, *Andreevski v Western Institute Student Union Inc* (1994) 58 IR 195 (student magazine editor); *Teen Ranch Pty Ltd v Brown* (1995) 87 IR 308 (support worker at a church-run holiday camp for teenagers); *Grinholz v Football Federation Victoria Inc* [2016] FWC 7976 (4 November 2016) (junior soccer team coach).

29 For a survey of the pre-2013 case law, see *2013 Report*, above n 6, ch 6.

30 See, eg, *Pacesetter Homes Pty Ltd v Australian Builders Labourers Federated Union of Workers (WA Branch)* (1994) 57 IR 449; *Frattini v Mission Imports* [2000] SAIRComm 20 (16 May 2000).

31 See, eg, *Nominal Insurer v Cleanthous* [1987] NTSC 51 (11 August 1987); *Cossich v G Rossetto & Co Pty Ltd* [2001] SAIRC 37 (26 October 2001).

32 See *2013 Report*, above n 6, 75–82. See also Craig Cameron, 'The Vulnerable Worker? A Labor Law Challenge for WIL and Work Experience' (2013) 14(3) *Asia-Pacific Journal of Cooperative Education* 135, canvassing options for reform to the exception.

33 See, eg, *Upton v Geraldton Resource Centre* [2013] FWC 7827 (11 October 2013). Cf *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365 (12 December 2014) 28 [105], where the 'training course' that two Fijian workers were supposedly completing in Australia was not in any way 'authorised', it did not require a 'placement', and the workers were in any event paid for their work, albeit at below-award rates.

34 See Jobactive, *Young People Prepared for Trial and Hire*, Australian Government <https://jobactive.gov.au/path>; *Social Security Legislation Amendment (Youth Jobs Path: Prepare, Trial, Hire) Act 2017* (Cth), amending *Social Security Act 1991* (Cth).

the vocational placement exception applies.[35] This is effectively the stance that the FWO has come to adopt. It has made it clear that it will pursue any employer who appears to be 'systematically or strategically exploiting unpaid work experience as a form of free labour'.[36] In the cases referred to in the introduction,[37] the FWO has persuaded courts to find that unpaid or underpaid trainees or interns were employees entitled to award wages. While in three of those cases the existence of an employment contract was not contested, it is notable that the judges concerned endorsed the approach taken in the FWO's *2013 Report* and emphasised that '[p]rofiting from "volunteers" is not acceptable conduct'.[38]

III Visa Pathways and the Regulation of Unpaid Work

A *International Students*

International students, by virtue of their status as students, are a particular subset of migrants in Australia who are more likely than others to be exposed to the types of unpaid work that are the subject of this article. Similar to their local counterparts, international students often seek out employment opportunities related to their field of study in order to improve their employability. What is dissimilar, however, is the desire of many international students for a migration outcome, in the form of either another temporary visa with work rights or a permanent residency visa.[39] International students may enter Australia on a variety of different visas according to their enrolments and course of study. There are currently eight different visa subclasses for international students wishing to study in Australia.[40] In this section, two issues relating to the performance of unpaid work by international students are examined. The first involves the situation between 2005 and 2010 when there were incentives for international students enrolled in certain trades courses to complete a substantial amount of work experience in order to gain permanent residency. There was no requirement that this work experience be paid and, accordingly, during this period many international students worked without remuneration. It is important to understand the problematic nature of this historical approach to regulating the ability of international students to engage in unpaid work in the labour market. Policymakers and law enforcement officers face a continuing challenge in ensuring this set of temporary migrant workers, who have been identified as highly susceptible to

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35 *2013 Report*, above n 6, 148–9, 249–51.

36 FWO, above n 7.

37 See above n 9.

38 *Fair Work Ombudsman v Crocmedia Pty Ltd* [2015] FCCA 140 (29 January 2015) 14 [45]. See also: at 3–4 [7]–[9]; *Fair Work Ombudsman v Aldred* [2016] FCCA 220 (10 February 2016) 7–10 [23]; *Fair Work Ombudsman v AIMG BQ Pty Ltd* [2016] FCCA 1024 (31 May 2016) 19 [69]–[70], 33–4 [119]–[120].

39 See generally, Alexander Reilly, 'Protecting Vulnerable Migrant Workers: The Case of International Students' (2012) 25(3) *Australian Journal of Labour Law* 181.

40 These visa categories are largely for: English language intensive courses for overseas students ('ELICOS'); schools; vocational education and training ('VET'); higher education; postgraduate research and non-award: Department of Immigration and Border Protection, Australian Government, *Annual Report 2014–15* (Commonwealth of Australia, 2015) 69.

exploitation, does not engage in exploitative work.[41] The second issue examined is the nature of visa condition 8105, which restricts the amount of hours an international student can work during semester.[42] There are questions as to how the condition is enforced and whether it precludes the performance of unpaid work in excess of the fortnightly work hours requirement.

1 *Policy and Practice 2000–2010*

A key shift in Australia's immigration policy occurred at the turn of the 21st century with the explicit connection of migration outcomes to study in Australia. In 2000, the Migration Occupations in Demand List ('MODL') was created 'to help industry and states and territories to obtain the skilled migrants they need'.[43] This was followed by a key speech by the Federal Minister for Immigration and Multicultural Affairs in 2001, announcing that international students who were successful in key skill areas would be seen as 'ideal migrants' and the Government would pursue a policy of encouraging such students to migrate to Australia.[44] The main initiative outlined in this speech was the ability to make permanent residency visa applications without leaving Australia, in order to attract more international students to complete courses in areas of domestic skill shortage. Prior to this, all applications by international students for permanent residency had to be made offshore. The change officially established the education–migration nexus.

The effects of this strategic shift began to be felt in the mid-2000s. Certain trade occupations were listed on the MODL in order to encourage more permanent residency applications and alleviate skill shortages. Cooking, for example, was first listed on the MODL in May 2005, following an announcement of the need to add more trade occupations to the MODL in order to make the skilled migration program more attractive to applicants.[45] This produced a disproportionate number of international students enrolled in commercial cookery and also hairdressing courses, as it was calculated that completion of these two courses would offer a sure path to permanent residency.[46] The resulting 'international student crisis' is a story that is well known and it is not our intention to retell it here.[47] However, what has been

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41 Alexander Reilly et al, 'International Students and the Fair Work Ombudsman' (Report, FWO, March 2017); FWO, 'New Strategy to Raise International Students' Awareness of Workplace Rights' (Media Release, 25 September 2017); Open Letter from Natalie James (FWO), *Open Letter to International Students* (September 2017).

42 *Migration Regulations 1994* (Cth) sch 8; Department of Home Affairs, Australian Government, 'Student Visa Conditions' <https://www.homeaffairs.gov.au/trav/stud/more/visa-conditions/visa-conditions-students>.

43 Philip Ruddock, 'Minister Announces Innovative New "Contingency Reserve"' (Media Release, MPS 64/99, 29 April 1999).

44 Philip Ruddock, 'The Economic Impact of Immigration' (Speech delivered at the Economic Impact of Immigration Seminar, Canberra, 1 March 2001) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F48T36%22>.

45 Amanda Vanstone, '2005–06 Migration (Non-Humanitarian) Program' (Media Release, VPS 052/20045, 14 April 2005).

46 For numbers of how many international students were enrolled in commercial cookery and hairdressing courses, see the statistics cited in Bob Birrell, Ernest Healy and Bob Kinnaird, 'Cooks Galore and Hairdressers Aplenty' (2007) 15(1) *People and Place* 30, 30.

47 See, eg, Peter Mares, 'From Queue to Pool: Skilled Migration Gets a Makeover', *Inside Story* (online), 10 February 2010 <http://insidestory.org.au/from-queue-to-pool-skilled-migration-gets-a-makeover>;

largely absent in post-mortems of this period is the role that the regulatory framework around the education–work–migration nexus played in fostering the proliferation of unpaid work by international students.

It was the case (and, indeed, still is today) that before an international student in certain trades courses applied for permanent residency, they needed a skills assessment by the Trades Recognition Authority ('TRA'). In 2005, the TRA was a subset of the Federal Department of Employment, Education and Workplace Relations and was charged with assessing skills for a number of trade and associate professional occupations, as specified in instruments made under the *Migration Regulations 1994* (Cth).[48] At the start of 2005, the TRA announced that it was introducing a mandatory 900 hours of work experience component in order to pass the skills assessment, to come into effect on 1 July 2005.[49] This was introduced after feedback from employers and industry stakeholders that international student graduates of trade courses were not sufficiently employable.[50] The TRA did not require the 900 hours of work experience be paid: unpaid work sufficed. The 900 hours had to involve 'relevant and directly related work experience' and all claims of work experience needed to be accompanied by 'documentary evidence capable of verification'.[51]

The TRA's 2005 reform created a direct connection between the performance of unpaid work and a migration pathway to permanent residency. A TRA skills assessment showing 900 hours of unpaid work experience gave prospective migrants half the points required for a permanent residency visa. Two unintended consequences ensued. First, the new requirement led to fraudulent education providers selling a package of a vocational training course and sham work references to provide 'evidence' of the necessary hours of work experience.[52] In many cases, international students not only did not receive remuneration for this work, they paid

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Bob Birrell and Ernest Healy, 'The February 2010 Reforms and the International Student Industry' (2010) 18(1) *People and Place* 65; Bob Birrell and Bronwen Perry, 'Immigration Policy Change and the International Student Industry' (2009) 17(2) *People and Place* 64; Bruce Baird, 'Stronger, Simpler, Smarter ESOS: Supporting International Students: Review of the *Education Services for Overseas Students (ESOS) Act 2000*' (Final Report, Australian Education International, February 2010); Senate Education, Employment and Workplace Relations References Committee, Parliament of Australia, *Welfare of International Students* (2009); Michael Knight, *Strategic Review of the Student Visa Program 2011 Report* (Report, Australian Government, 30 June 2011) ('*Knight Review*').

48 As of December 2011, the TRA functions transferred to the Federal Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education.

49 TRA, '900 Hours Requirement FAQs Fact Sheet' (Fact Sheet, Australian Government, 2005) (copy on file with authors).

50 Ibid 14.

51 Ibid.

52 Elisabeth Wynhausen, 'We'll Say You Did the Hours', *The Australian* (Sydney), 26 July 2008; Nick O'Malley, 'So "Painful and Expensive" to Call Australia Home', *The Sydney Morning Herald* (online), 15 July 2009 <http://www.smh.com.au/national/so-painful-and-expensive-to-call-australia-home-20090714-dk5g.html>; Vanda Carson, 'Students Caught in Rorts for Residency', *The Daily Telegraph* (online), 13 August 2012 <http://www.dailytelegraph.com.au/students-caught-in-rorts-for-residency/news-story/41811d411256db7e95269869bafb3b7e>; Vanda Carson, 'Foreign Students Use Fake Work References from Indian Restaurant', *The Courier-Mail* (online), 20 February 2015 <http://www.couriermail.com.au/news/queensland/foreign-students-use-fake-work-references-from-indian-restaurant/news-story/5d1b3f7f4e9176b14537a1aa3011b52e>.

for the opportunity to work and, in some cases, they did no work at all.[53] These scams were uncovered by a series of investigations by the Commonwealth Department of Immigration, which, after 2008, began rejecting permanent residency applications on the basis that a 'bogus document' had been provided.[54] Although many international students appealed the rejection of their applications by the Migration Review Tribunal ('MRT'), it was difficult for these to be overturned. Courts emphasised that if an international student submitted a sham document to the TRA as evidence of completed work experience, then the resulting skills assessment could not be used to award points to meet relevant visa requirements.[55]

The second unintended consequence of the introduction by the TRA of the 900 work hours requirement in 2005 was that it required international students to find a job related to their course of study and created a strong incentive for them to accept unpaid work or severely underpaid work.[56] Given the large numbers of international students enrolled in hairdressing and cooking courses, this led to an oversupply of labour in these two industries, which greatly increased the likelihood that work secured in these industries would be unpaid.[57] The availability of international students and their strong desire to secure a migration outcome reduced the incentive for employers to hire paid staff in these occupations.

The TRA's 2005 directive allowing unpaid work experience to suffice for skills assessment purposes created a number of difficulties, of which the case of Mr Sunpreet Singh provides a useful illustration.[58] This case involved the review of a decision by the Minister's delegate to refuse to grant Mr Singh's permanent residency visa on the basis that his work reference was a bogus document. Mr Singh had completed an Advanced Diploma of Hospitality Management at Carrick Institute of Education between September 2006 and September 2008. He claimed to have undertaken work experience at the Copper Tiffin restaurant and received a favourable TRA skills assessment dated 27 June 2008.[59] Although the TRA had accepted his work and educational references and provided him with a skills assessment, the Minister's delegate wrote to Mr Singh asking for additional information regarding his work experience. Mr Singh provided a copy of the reference from Copper Tiffin that stated the applicant had completed over 900 hours of work experience and underwent training, both in an unpaid capacity. On 19 April

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53 Nick O'Malley, Heath Gilmore and Erik Jensen, 'Foreign Students Exploited as Slaves', *The Sydney Morning Herald* (online), 15 July 2009 <https://www.smh.com.au/national/foreign-students-exploited-as-slaves-20090714-dk52.html>. See also Birrell, Healy and Kinnaird, above n 46, 40.

54 Under the *Migration Act 1958* (Cth) s 103, it is an offence to provide a 'bogus document' (defined in s 5(1)).

55 See, eg, *Nanre v Minister for Immigration and Border Protection* (2015) 292 FLR 215; *SZQSD v Minister for Immigration* [2012] FMCA 433 (31 May 2012).

56 See Nick O'Malley, Heath Gilmore and Erik Jensen, 'Foreign Students "Slave Trade"', *The Sydney Morning Herald* (online), 15 July 2009 <http://www.smh.com.au/national/foreign-students-slave-trade-20090714-dk6d.html>.

57 See, eg, *1412564* [2015] MRTA 359 (6 March 2015) 3 [12]; *1407388* [2015] MRTA 336 (10 March 2015) 5 [23]. Both these cases involved applicants who were applying for the 485 visa and submitted that they had performed a period of unpaid work for restaurants in the hospitality industry, but never managed to secure paid work because they said it was extremely difficult to get a job in the industry.

58 *1210024* (Unreported, Migration Review Tribunal, Bruce MacCarthy, 13 October 2013).

59 Ibid [8].

2012, the Minister's delegate refused to accept this unpaid work experience as satisfying the work requirement needed to obtain a permanent residency visa, on the basis that there was a 'legal requirement' in NSW that 'people undertaking work experience must be paid'.[60] The nature and source of this requirement were not explained.[61] The Minister's delegate concluded that 'the reference from Copper Tiffin provided to TRA in support of the application for a skills assessment contained information of a false or misleading nature'.[62] During the applicant's appeal of this decision, the MRT conducted its own investigations as to the status of unpaid work experience, to which the Department of Immigration responded in the following manner:

> Using the benefit of hindsight and feedback from the MRT, our position is labour law breaches do not render a work reference false or misleading. Irrespective of this, it appears that applicants can in some circumstances conduct unpaid work experience legitimately.[63]

This admission by the Department confirmed that unpaid work experience was permitted as part of the TRA skills assessment regime, although the Department failed to address how this interacted with the supposed requirement under NSW law that work experience be paid. The Tribunal concluded that merely because Mr Singh's work for Copper Tiffin was unpaid did not mean his reference was false. It is quite remarkable that it took the applicant appealing the decision of the Minister's delegate to confirm the legality of unpaid work experience for the purposes of a TRA skills assessment, given that the completion of 900 work experience hours irrespective of remuneration had been official TRA policy since 2005.

The MRT then turned its attention to the question of whether Mr Singh had actually worked for Copper Tiffin for 900 hours on an unpaid basis or whether the reference itself was a sham. The Tribunal questioned Mr Singh at length and he was able to satisfy it of his 'sound knowledge of Indian cooking of the kind referred to in the work reference' and observed that '[h]is answers regarding the location of the restaurant in the way he travelled to and from that restaurant from both his place of study and his residence were given in a confident manner without hesitation'.[64] The Tribunal counterbalanced this against its own internet research, which was inconsistent with the applicant's testimony regarding the restaurant's opening hours and liquor licence, although it accepted that because the restaurant had since closed down it was unable to ascertain the truth of the matter. The Tribunal also referred to the numerous applications for TRA skills assessments by international students claiming to have worked for Copper Tiffin, but concluded that '[t]he mere fact that there have been many such references purporting to have been issued by Copper Tiffin management does not necessarily mean that the applicant's reference is not

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60 Ibid [10].

61 The NSW Industrial Relations Commission has, in the past, suggested that trainees in that State under the age of 18 cannot be expected to work without payment, since this would breach the *Industrial Relations (Child Employment) Act 2006* (NSW): *Child Employment Principles Case 2007* (2007) 163 IR 41, 111 [283]. But it is far from clear that this view is correct: see Andrew Stewart, 'Making the Working World Work Better for Kids' (Report, NSW Commission for Children and Young People, December 2008) 32. It would not, in any event, apply to adult trainees.

62 *1210024* (Unreported, Migration Review Tribunal, Bruce MacCarthy, 13 October 2013) [10].

63 Ibid [13].

64 Ibid [15].

genuine'.[65] This led the MRT to decide that Mr Singh did meet the criteria for a permanent residency visa as his work reference, despite referring to unpaid work, was not a bogus document.

Mr Singh's case reflects both the confusion within the Department of Immigration as to the legal status of unpaid work experience at the time, and the evidential difficulties facing international students who sought to rely on unpaid work experience to support their permanent residency visa applications. In Mr Singh's case, he was able to rely on family support, with his brother providing a statutory declaration attesting to his unpaid work experience at the restaurant and financial assistance to engage an immigration specialist to pursue his appeal.[66] Other international students in a similar situation may not be so fortunate.

Another case involving a work reference from Copper Tiffin also attests to the difficulties international students had in proving their completion of the 900 work hours requirement. In this case, the Minister's delegate asked for evidence additional to the work reference to prove the applicant's work experience at Copper Tiffin, but he was unable to provide it as the restaurant had closed down and he had been unable to contact the owner to get a new letter confirming his training period and the number of hours trained.[67] Although the completion of paid work is usually accompanied by payslips,[68] there is no requirement upon employers to complete these records for unpaid work if there is no employment relationship between the parties.[69] The Tribunal considered that the applicant's oral evidence pointed to his employment at Copper Tiffin, as he was a 'credible and candid witness' who provided detailed knowledge of the tasks and duties he performed and was frank in his evidence that '80 per cent of his role related to dishwashing with some cleaning and the remainder was assisting the chef in vegetable preparation'.[70] Nevertheless, it concluded that the reference was a bogus document and rejected his application for permanent residency. In judicial review proceedings, the Federal Circuit Court of Australia held there was jurisdictional error in the Tribunal's decision, since there was no explanation for this conclusion.[71] The applicant's evidence in this case also highlights the distinct possibility that the TRA's work experience requirement tended to result in more 'work' than 'training' or 'experience', with the performance of menial, repetitive and routine tasks as the norm, rather than the exception.

There was also a lack of clarity as to whether TRA's 900 work hours requirement, where it was completed on an unpaid basis, needed to comply with visa condition 8105.[72] This condition presently prevents international students from

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65 Ibid [17].

66 For example, his brother also provided financial support so that Singh could open his own fast food business: ibid [15].

67 *Singh v Minister for Immigration* [2015] FCCA 1939 (22 July 2015) 5 [16].

68 This is indeed a statutory requirement for national system employers, under s 536 of the *Fair Work Act*.

69 Another case that highlights the evidential challenges in establishing a period of unpaid work in support of a visa application is *1207637* [2015] MRTA 490 (27 March 2015) 6 [26]. See also *Ali v Minister for Immigration* [2015] FCCA 3204 (21 December 2015) 5–7 [24], citing Migration Review Tribunal Reasons, 7 November 2014 [105].

70 As quoted in *Singh v Minister for Immigration* [2015] FCCA 1939 (22 July 2015) 7–8 [26].

71 *Singh v Minister for Immigration* [2015] FCCA 1939 (22 July 2015) 8 [27].

72 Contained in *Migration Regulations 1994* (Cth) sch 8.

working over 40 hours per fortnight, although between 2005 and 2008 it required that international students work no more than 20 hours per week.[73] The TRA's own factsheet on the subject did not address this definitively, instead directing to the Department of Immigration questions regarding whether an applicant's visa arrangements allowed the meeting of the work experience requirement.[74] The case of *Bhatia v Minister for Immigration & Border Protection*[75] reflects the uncertainty over this issue, with the decisions of both the Minister's delegate and the MRT to refuse Mr Bhatia's permanent residency visa application being overturned on appeal by the Federal Circuit Court.

The case involved Mr Bhatia, an international student who was employed as a commis chef at a Crowne Plaza hotel for a minimum of 20 hours per week from April to September 2007. At this time he also worked on an unpaid basis as a casual chef at the Ascot Motor Inn for between 16 and 20 hours per week, with a view to completing his 900 work hours requirement as part of the TRA skills assessment process. At issue in this case was whether his unpaid work for the Ascot Motor Inn fell within the definition of work in the *Migration Regulations 1994* (Cth). Under reg 1.103, the meaning of 'work' is 'an activity which is usually remunerated'. If Mr Bhatia's unpaid work for the Ascot Motor Inn came within this definition, then the combination of his work for the Crowne Plaza hotel and the Ascot Motor Inn would render him in breach of condition 8105 in his international student visa, which limited his performance of work to 20 hours per week. At first instance, the MRT concluded that Mr Bhatia's employment with the Crowne Plaza could *not* be counted towards the points test for permanent residency, as during this period he was in breach of visa condition 8105. It took the view that working as a chef is an activity which is 'usually remunerated'. This determination led to the Minister's delegate and the MRT refusing to allocate points for Mr Bhatia's paid employment at the Crowne Plaza. They believed it to have been performed in breach of visa condition 8105 as it was done simultaneously with his unpaid work at the Ascot Motor Inn. This determination relied upon reg 2.27C, which stipulates that in order for 'a period of employment' to be counted for the points test, it must have been done in compliance with the terms of the visa. Thus, Mr Bhatia was unable to reach the 120 points threshold required for permanent residency as neither his unpaid work or paid work were counted by the Minister's delegate and MRT.

This decision was overturned on appeal. According to Judge Driver, the original decision meant that Mr Bhatia suffered

> a *double detriment* by relying upon his unpaid work at the Ascot Motor Inn. Not only was that work not counted because it was unpaid, but he was also taken (because of that work considered in combination with his paid employment) to have breached condition 8105 on his student visa and thus the whole of his paid employment over the period when his course of education was in session was not counted.[76]

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73 The substance and application of visa condition 8105 is examined more fully below.
74 TRA, above n 49.
75 [2015] FCCA 409 (20 March 2015) ('*Bhatia*').
76 Ibid 6–7 [18] (emphasis added).

The interpretation of unpaid work as being incapable of constituting employment was, as Judge Driver noted, pivotal to the MRT's reasoning.[77] In considering whether a particular activity constitutes work as defined by reg 1.103, his Honour said that regard must be had 'to the actual circumstances surrounding the activity', including the motivation of the parties.[78] The appeal decision found that while it can be generally accepted that the work of a chef is usually remunerated, the circumstances in which the work is undertaken may have a bearing upon whether it would be likely to be paid work in that specific circumstance. Judge Driver accepted Mr Bhatia's statutory declaration that his work at the Ascot Motor Inn was on a volunteer basis, with a view to meeting the TRA work experience requirement of 900 hours. His Honour used the administrative law remedies of certiorari to quash the MRT's decision, and mandamus to require the MRT to re-determine the application before it according to law.

This decision in *Bhatia*, like that in the other cases mentioned above, highlights the difficulty that international students had in relying on a period of unpaid work to meet the criteria for a permanent residency visa, despite it being permitted by the TRA's own policy at the time. The interpretation of visa condition 8105 and its application to international students continue to be live issues, with inadvertent or mistaken breaches of the condition resulting in visa cancellations.[79] In recent decisions, where the student was in minor breach of the provision by working a few additional hours each fortnight in breach of visa condition 8105,[80] or where dismissal was threatened if the student failed to work additional hours,[81] the MRT has ordered visa cancellation.

2 *Policy and Practice from 2010*

The TRA announced that it would no longer automatically accept unpaid work experience to be used for the 900 hours trade experience hours needed to obtain a skills assessment. Part F of the new Migration Assessment Policy defined 'employment' as 'a set of specialised, practical, theoretical and technical skills in a workplace, undertaken on behalf of a company, organisation or individual, including self-employment, for the primary purpose of remuneration and subject to relevant workplace laws'.[82] The policy confirmed that employment does not include institution-based workplace training[83] and that unpaid work could only be accepted as employment in limited circumstances.[84] The policy required that if unpaid work

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77 Ibid 8 [23].

78 Ibid 4 [10], citing *Xu v Minister for Immigration* [2007] FMCA 285 (26 March 2007) 10 [21] and *Tikoisuva v Minister for Immigration and Multicultural Affairs* [2001] FCA 1347 (20 September 2001) 4 [11].

79 See, eg, *Tsang v Minister for Immigration* [2015] FCCA 31 (30 January 2015); *Singh v Minister for Immigration* [2013] FCCA 1547 (9 October 2013); *Arora v Minister for Immigration* [2014] FCCA 2091 (9 September 2014). See also *1421269* [2015] MRTA 843 (3 June 2015), a case involving the mistaken breach by a spouse of an international student of visa condition 8104, which performs a similar function to condition 8105 in limiting work hours for spouses.

80 *Kaur v Minister for Immigration and Citizenship* (2012) 266 FLR 102.

81 *1414768* [2014] MRTA 2497 (14 October 2014).

82 TRA, *Migration Assessment Policy* (2008) pt F (Definitions).

83 Ibid [24.10.2].

84 Ibid [24.10.3].

was being used to support an international student's application for a TRA skills assessment, there needed to be evidence differentiating it from training requirements and explaining why the applicant was working in an unpaid capacity.[85]

This development, although significant, was ultimately overtaken by the reform of the regulatory framework for international student visas initiated by Senator Chris Evans as Minister for Immigration. The 900 work hours requirement was replaced by a substantially more comprehensive assessment of the employability of international graduates in trade or associate professional occupations. The TRA developed a Job Ready Program, which was just one of the reforms that responded to a constellation of issues arising from the aforementioned 'international students crisis'.[86] The *Migration Amendment Regulations (No 15) 2009* (Cth) required that certain visa applicants have their skills assessed after 1 January 2010 to apply for a visa. In effect, this required them to complete the Job Ready Program.

The Job Ready Program, which remains in place today, replaced the employer's attestation of the applicant's skills via a work reference confirming 900 hours of work, with a four-stage employment-based skills assessment program. The first stage of this process requires the applicant to complete a provisional skills assessment where evidence of 360 hours of 'any employment, work experience and/or vocational placement undertaken in an Australian workplace' must be provided.[87] The second stage requires the applicant to complete 12 months of full-time work under the supervision of a qualified Australian tradesperson working within the nominated occupation and who is formally registered with TRA. The third stage involves a job ready workplace assessment carried out by a TRA staff member after the applicant has conducted 863 hours of paid employment over a minimum of six months. The process culminates in the fourth stage, a job ready final assessment upon completion of 1725 hours of paid employment over a 12-month period. This has increased the applicant's fees for a skills assessment for the purpose of obtaining an independent skilled migration visa, from $300 prior to the introduction of the Job Ready Program, to between $2950 and $5250 at the time of writing. These fees reflect the significantly greater resources outlaid by the TRA in establishing and implementing this new skills assessment process.

In stage two, it is clear from the TRA's policy that the 1725 hours of work must not be on an unpaid basis, as pay slips must be provided to confirm the employer's payment of award wages for the applicant's work.[88] In its original iteration, stage one was silent on this question and, thus, allowed the possibility of unpaid work counting towards an applicant obtaining a provisional skills assessment. However, this has since been amended to make clear that only paid work

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85 Ibid [24.10.4].

86 See Chris Evans, 'Migration Program Gives Priority to Those with Skills Most Needed' (Media Release, 17 December 2008).

87 Department of Education and Training, Australian Government, 'Job Ready Program Participant Guidelines' (January 2015) 42.

88 Ibid 23.

can be counted.[89] This change reduces the incentive for international students to perform unpaid work.

It appears that the introduction of the 'paid employment' requirement in the Job Ready Program was not so much motivated by concerns over the exploitation of international students engaged in unpaid work. It was more about the mismatch between the skills claimed for the purposes of migration and the long-term occupational aspirations of these former international students, which meant that the permanent residency visa was not meeting its policy objective of alleviating domestic skill shortages. It was believed that a more robust skills assessment process, requiring a solid period of paid work in the applicant's nominated occupation, would be more likely to produce permanent migrants willing to work in that occupation. The Minister for Immigration stated that 'many of those' seeking to migrate to Australia strategically chose to do so using an occupation on the MODL, but with no intention of ever working in that occupation.[90] On another occasion, the Minister commented that '[the points test] did not solve the shortage … if we were bringing people who said they were cooks and hairdressers but were not prepared to work as cooks or hairdressers, we were not solving the problem'.[91] This concern was echoed by the national industry association, Restaurant and Catering Australia, which identified the failure of many international students graduating in cooking to enter the industry on an ongoing basis.[92] Nonetheless, despite the motivation for the Job Ready Program's introduction being less about addressing exploitative unpaid work arrangements, it is clear that the establishment of a more robust process has been largely positive. It has vastly reduced the number of international students applying for a TRA skills assessment and increased the integrity of the skills assessment program overall.[93]

The preceding analysis only refers to international students enrolled in trades courses and, therefore, requiring a skills assessment by the TRA in order to obtain permanent residency. However, there are many thematic similarities to international students enrolled in the non-VET sector. Informal work experience is increasingly seen as a de facto requirement to secure a job, for instance. As the International Labour Organization has stated, '[w]ork experience is highly valued by firms and so

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89 The TRA has amended its guidelines to make it clear that the 360 work hours requirement in stage one can only be satisfied by paid employment that complies with the *Fair Work Act* or through a vocational placement with a registered training organisation as part of an Australian qualification. This decision has been made 'due to the difficulties of differentiating between work experience, as observation, and work experience where applicants gain practical experience of the tasks and duties of their occupation, as required by the [Provisional Skills Assessment]': Emails from Deborah Verco (Department of Education and Training) to Joanna Howe, 20 April 2016, 5 April 2017 (copy on file with the authors).

90 Chris Evans, 'Changes to the 2008–09 Skilled Migration Program' (Ministerial Statement, 17 December 2008) 4.

91 Commonwealth, *Parliamentary Debates,* Senate, Legal and Constitutional Affairs Legislation Committee, 9 February 2010, 52.

92 Restaurant and Catering Australia, Submission No 50 to Joint Standing Committee on Migration, Parliament of Australia, *Inquiry into Eligibility Requirements and Monitoring, Enforcement and Reporting Arrangements for Temporary Business Visas*, 16 February 2007, 19.

93 See Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education and the Department of Immigration and Citizenship, Australian Government, 'Post Implementation Review of the Job Ready Program' (Policy document, July 2013) (copy on file with the authors).

the lack of such experience constitutes a major obstacle for first-time jobseekers.'[94] This is a situation that is exacerbated for international students who rely on informal work experience to secure employment, which is a key pathway to either a Temporary Work (Skilled) visa for four years (subclass 457 visa) or permanent residency through the Employer Nomination Scheme (subclass 186 visa). A report commissioned by the FWO has recently found that over 60% of the international students who completed a survey of their working arrangements had engaged in unpaid work for over one week, while over 30% had done so for between one and six months.[95] The frequency of unpaid work amongst international students was also confirmed by the *National Temporary Migrant Work Survey*, with 42% of respondents reporting that they had been asked to do a period of unpaid work as 'training'.[96] Clearly, the tying of migration outcomes to employer sponsorship has the potential to act as an additional incentive for international students to engage in unpaid work experience in order to secure a job.

A recent example is *Fair Work Ombudsman v Aldred*,[97] one of the cases in which the FWO took action over exploitative work experience arrangements. This case involved a communications business systematically using interns to perform work that would or could otherwise be performed by paid employees. Here the business advertised unpaid traineeship positions to which two employees were appointed as a 'graphic design intern' and a 'multi media intern'. One of the interns, who was recruited by the employer and eventually moved into an independent contracting arrangement, was an international student who negotiated with the employer to fraudulently alter her pay slips to better suit her visa aspirations.[98] Similarly, in *Fair Work Ombudsman v AIMG BQ Pty Ltd*[99] it was held to be unlawful for a media company to require an international student to complete an unpaid 'internship' of 180 hours of productive work over a period of four months before it started paying her wages. In this case, the international student's duties ranged from administration and office cleaning to event organising and magazine editing. As none of this work was a formal part of her tertiary studies, it needed to be remunerated in accordance with the *Fair Work Act*. Judge Altobelli stated that 'the Court will not countenance attempts to disguise employment relationships as unpaid internships and thus deny employees their required minimum entitlements'.[100] In yet another case involving international students and unpaid work, the FWO brought legal proceedings against a take-away outlet in regional Australia alleging unlawful use of an 'internship' program to exploit three international students from a private college in Korea.[101] In this case an 'Internship Agreement' between the students'

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94 International Labour Organization, 'Global Employment Trends for Youth 2013: A Generation at Risk' (2013) 64.

95 Reilly et al, above n 41, 45–6.

96 Laurie Berg and Bassina Farbenblum, 'Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey' (Report, November 2017) ('*National Temporary Migrant Work Survey*').

97 [2016] FCCA 220 (10 February 2016).

98 Ibid 7 [22].

99 [2016] FCCA 1024 (31 May 2016).

100 Ibid 34 [124].

101 *Fair Work Ombudsman v Kjoo Pty Ltd* [2017] FCCA 3160 (20 December 2017). See also FWO, 'Take-Away Food Outlet Allegedly Used "Internship" Program to Exploit Young Korean Workers' (Media Release, 4 June 2016).

college and the employer encouraged international students to travel to Australia for work experience. Each of the three students in this case were either not paid or substantially underpaid for the productive work completed during the internship.[102]

It seems unlikely that the pressures encouraging international students into unpaid work will subside. The tightened regulation of the education–migration nexus for students from a trades background will no doubt assist in reducing the incidence of unpaid work. But, on the whole, Australia's migration pathway for international students encourages them to find an employer willing to sponsor them for a subclass 457 visa or for permanent residency. As unpaid work is often perceived to be a gateway to paid work, these pathways create an opportunity for unscrupulous employers to exploit international students' desire for a migration outcome by requiring the completion of a substantial period of unpaid work prior to obtaining paid work. Further, with the continued growth of the international student visa program,[103] and the changing profile of source countries for international students,[104] it seems clear that many students embark on study in Australia with the hope of obtaining a migration outcome. Many of these students are coming from countries with very different quality of living and labour market standards and high wage differentials when compared with Australia. Therefore, it seems likely that many would be seeking an opportunity to work and remain in Australia.

B *Working Holiday Makers*

There is no doubt that there is an increased vulnerability for temporary migrants engaged in work in regional Australia, evinced through the establishment of a dedicated FWO Regional Services Team, which often works in conjunction with its Overseas Workers Team established in 2012. A key visa pathway that funnels temporary migrants into working in regional Australia is the Working Holiday Maker program. The program includes the Working Holiday (subclass 417) and Work and Holiday (subclass 462) visas.[105] It is intended to be a cultural exchange program, with the performance of work incidental to that central purpose. Indeed, the Department of Home Affairs states that '[w]ork in Australia must not be the main purpose of the visa holder's visit.'[106] Both the 417 and 462 visas allow work for the full 12 months of the visa, with the sole restriction on the work rights of a visa holder being that they

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102 *Fair Work Ombudsman v Kjoo Pty Ltd* [2017] FCCA 3160 (20 December 2017) 7–8 [27]–[34].

103 The student visa program is experiencing growth across all sectors. Total student visa grants in 2016–17 increased by 10.1% (343 035 grants) compared with the 2015–16 financial year, when 310 845 visas were granted: Department of Immigration and Border Protection, Australian Government, *Annual Report 2016–17* (Commonwealth of Australia, 2017) 254; Department of Immigration and Border Protection, Australian Government, *Annual Report 2015–16* (Commonwealth of Australia, 2016) 62.

104 China remained the largest citizenship country for student visa grants, followed by India, then Brazil, Nepal and South Korea. Of all student visas granted, 48.6% were granted to citizens of these five countries. Students from China made up 23.4% of student visa grants in 2016–17: Department of Immigration and Border Protection, Australian Government, *Student Visa and Temporary Graduate Visa Programme Bi-Annual Report* (30 June 2017) 34.

105 Department of Home Affairs, Australian Government, 'What is the Working Holiday Maker Program?' <https://www.homeaffairs.gov.au/lega/lega/form/immi-faqs/what-is-the-working-holiday-maker-program>.

106 Ibid.

cannot work for the same employer for more than six months.[107] On 1 November 2005, a 417 visa holder who had carried out 88 days of 'specified work' in regional Australia became eligible to apply for a second year extension on their visa.[108] 'Specified work' includes agriculture, mining and construction.[109] In 2013–14 approximately one-in-four 417 visa holders acquired a year's extension on their visa.[110]

In response to growing concerns surrounding the role of the 88-day work period as a driver of non-compliance with Australian workplace law, the Federal Government announced in May 2015 that unpaid work would no longer count towards enabling a second year extension on the Working Holiday visa. This decision was made by the then Assistant Minister for Immigration and Border Protection, Senator Cash, following the airing of an investigation by journalists into the working conditions of working holiday makers.[111] The decision was made on the basis that permitting unpaid work to be used in an application for an extension created 'a perverse incentive for visa holders to agree to less than acceptable conditions in order to secure another visa'.[112] Senator Cash informed the Australian Parliament during a Senate Estimates hearing:

> In relation to some of the integrity measures, Senator Carr, we also announced that, going forward, in terms of being able to apply for the second year on your working holiday visa, the department as an integrity measure will only now accept payslips. *Four Corners* suggested that documentation such as an employer reference was accepted by the department. Ensuring that the only document that will now be accepted by the department is a payslip is also a step in terms of the additional integrity measures we are putting in place.[113]

This reform attempted to grapple with a conundrum created by the previous policy: that although work paid at below-award rates would clearly breach workplace laws, the same work — if completely unremunerated — sufficed for a visa extension. An inquiry conducted by the FWO into the Working Holiday program found that prior to this reform, one-third of visa holders had used a period of unpaid work to gain a second year extension on their 417 visa.[114] This report also found that almost half of these visa holders would not have engaged in either paid or unpaid work if they had not needed to complete 88 days of specified work in

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107 *Migration Regulations 1994* (Cth) regs 417.611, 462.611 (by operation of mandatory visa condition 8547).

108 Ibid reg 417.211.

109 See further Department of Immigration and Border Protection, Australian Government, 'Working Holiday Maker Visa Programme Report' (31 December 2014) 4.

110 Ibid.

111 Commonwealth, *Parliamentary Debates,* Senate, Legal and Constitutional Affairs Legislation Committee, 26 May 2015, 103. See also Australian Broadcasting Corporation, 'Slaving Away: The Dirty Secrets behind Australia's Fresh Food', *Four Corners*, 4 May 2015 (Caro Meldrum Hana) <http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm>.

112 Michaelia Cash, Assistant Minister for Immigration, cited in Alex Harmon, 'Labour Hire Reform Required: The Shocking Truth', *Byte* (online), 6 May 2015 <www.thebyte.com.au/labour-hire-reform-required-the-shocking-truth>.

113 Commonwealth, *Parliamentary Debates,* Senate, Legal and Constitutional Affairs Legislation Committee, 26 May 2015, 103.

114 FWO, 'Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program' (Australian Government, October 2016) 29.

regional Australia.[115] This illustrates the role of migration-related incentives in influencing the work behaviour of visa holders.

Nonetheless, unpaid work is still allowed on the 417 visa. Michaelia Cash has stated that:

> In recognition of the many legitimate and worthwhile agencies that employ volunteer workers to deliver valuable community services, working holiday visa holders will still be able to perform volunteer work should they wish to do so. The work will simply not count towards eligibility for a second visa.[116]

Willing Workers on Organic Farms ('WWOOF'), an international organisation that operated in 70 countries and places 'volunteers'[117] on farms, has criticised this development, arguing that it will cripple many small- and medium-sized family farms who are heavily reliant upon unpaid workers.[118] WWOOF has proposed a 'volunteer pay slip' to assist the Department of Immigration in counting this work towards a second year extension on the visa.[119] This proposal seeks to create a way of proving a visa holder's period of work in a regional location for 88 days doing 'specified work', given that proof of unpaid work often presents an evidentiary challenge.[120] However, WWOOF's recommendation to develop paperwork protocols proving that the period of unpaid work was genuine does not address the core problem relating to the integrity of the Working Holiday visa program, which was the original motivation for Senator Cash's reform establishing the ineligibility of unpaid work. Further, although the 'WWOOFing' model is aimed to provide interested individuals with regional experience in biodynamics or organic farming, it does have the capacity to result in productive work that should be remunerated. WWOOF hosts pay an annual fee to be registered with the organisation, but there is no comprehensive auditing or monitoring program of standards, with WWOOF hosts only losing their registered status if an investigation occurs following a complaint by an individual. WWOOF Australia reported to the FWO that it was not aware of endemic exploitation or non-compliance with the *Fair Work Act* among its hosts. But given that it only has six staff in its Australian office and does not have an effective oversight system of hosts, it is unlikely that the organisation has the capacity to conclusively determine this.[121]

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115 Ibid.

116 Michaelia Cash, Assistant Minister for Immigration and Border Protection, 'Strengthening Integrity in Working Holiday Visa Programme' (Press Release, 1 May 2015).

117 While conventionally a 'volunteer' may be thought of as someone who is undertaking work on an altruistic basis for a non-profit organisation rather than a commercial operation, there is no clarity around this concept under Australian law: see Murray, above n 4.

118 Letter from WWOOF to Peter Dutton, 17 October 2015, 2 <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Additional_Documents>. The letter was provided at the public hearing in Melbourne, 20 November 2015, to the inquiry of the Senate Standing Committees on Education and Employment into The Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders.

119 WWOOF, 'Volunteering for Second Working Holiday Visa Extensions' (Issues Paper) (2015, copy on file with authors). See further Karla Arnall, 'Albany Flower Grower Says Changes to Working Holiday Visa System Will Spell the End of Business', *ABC News* (online), 13 May 2015 <http://www.abc.net.au/local/stories/2015/05/13/4235042.htm>.

120 See, eg, *1505583* (Migration) [2016] AATA 3041 (8 January 2016).

121 FWO, above n 114, 1.

In sum, despite its official purpose as a cultural exchange program, the Working Holiday Maker visa is increasingly being used for the purpose of work. This is reflected in the increasing number of source countries for visa applicants,[122] and the increasing liberalisation of work conditions under the visa.[123] It is also used as a gateway to other visas, allowing the visa holder to remain in Australia for a longer period of time. The decision to prevent unpaid work being counted towards a second year visa extension reflects concerns around the exploitation of Working Holiday visa holders in the labour market. These visa holders are more susceptible to completing a period of unpaid work than comparable local workers because of their desire to achieve a migration outcome. This exposes a key regulatory challenge that occurs when migration policies are used to incentivise temporary migrants into particular types of work. It becomes easier for employers to induce visa holders into unpaid work that goes beyond volunteering and involves productive work that should be remunerated under Australian law because of the likely existence of an employment relationship.

C *457 Visa Holders*

Unlike visas for international students and working holiday makers, the 457 visa, introduced in 1996, is a dedicated, temporary skilled migration pathway.[124] On its face, the regulatory framework for the 457 visa does not permit unpaid work. Holders of the 457 visa are required to be paid equivalent wages and conditions to local workers performing the same work in the same geographic locality.[125] They must also be remunerated above the Temporary Income Skilled Migration Threshold, which is currently set at $53 900.[126] Despite these requirements, it is not unknown for 457 visa holders to be engaged in unpaid work as part of their overall employment relationship with their employer–sponsor. Two aspects of the 457 visa's regulatory design make temporary migrant workers on the 457 visa more susceptible to unpaid work. First, the employer's dual role of employer and sponsor renders the visa holder more likely to acquiesce to an employer's request to perform additional unpaid work because their right to remain in Australia is tied to their employer's continuing sponsorship.[127] Second, the mixed migration motivations of 457 visa holders (similar to many

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[122] Notably, the top three source countries of working holiday makers applying for a second year on the Working Holiday Maker visa are the United Kingdom, Taiwan and South Korea: Department of Home Affairs, Australian Government, *Working Holiday Maker Visa Program Report* (Report, 31 December 2017) 7.

[123] For example, the most recent reform package to the Working Holiday visa allows visa holders to work for 12 months for the same employer in two different regions: Joint Explanatory Memorandum, Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016 (Cth), Treasury Laws Amendment (Working Holiday Maker Reform) Bill 2016 (Cth), Superannuation (Departing Australia Superannuation Payments Tax) Amendment Bill 2016 (Cth), Passenger Movement Charge Amendment Bill 2016 (Cth) 63.

[124] Howe, above n 1.

[125] *Migration Regulations 1994* (Cth) reg 2.72(10)(c).

[126] The threshold is a legislative instrument that provides the minimum amount of annual income to be paid to a subclass 457 visa holder: *Migration Regulations 1994* (Cth) reg 2.72(10)(cc).

[127] On the demand-driven nature of the 457 visa, see Joanna Howe, 'Contesting the Demand-Driven Orthodoxy: An Assessment of the Australian Regulation of Temporary Labour Migration' in Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Hart Publishing, 2016) 131.

temporary migrant workers) mean that despite their status as temporary workers, for many, their overriding and long-term desire is to secure permanent residency in Australia. This results in them being more willing to accept unpaid work in order to gain employer sponsorship for permanent residency.[128] Research into temporary migrant workers' behavioural traits supports this analysis, as it indicates visa holders are more likely to be compliant to employer requests around work.[129]

Two cases are illustrative of the capacity of the regulatory design of the 457 visa to produce a tendency for both unpaid and underpaid work. One case concerned Ms Virata, a worker from the Philippines who was employed by Comfort Inn Country Plaza Halls Gap on a 457 visa.[130] She worked for the hotel for a little over a year before the hotel terminated her employment via email, while she was in the Philippines. The Fair Work Commission made a finding of unfair dismissal and awarded her substantial compensation.[131] In its decision, the Commission noted the 'exploitative' nature of the employment relationship, given that Ms Virata and her de facto partner were required to split her salary between the two of them.[132] This provided a way for the employer to circumvent the Temporary Income Skilled Migration Threshold by nominally agreeing to pay the required amount for the primary 457 visa holder, but then in practice paying well below it because of the wage splitting between the primary visa holder and her partner. Ms Virata also alleged that she regularly worked 12 to 16 hours per day, despite being remunerated for a 40 hour work week,[133] and that she felt that she was forced 'to submit, obey and follow everything' if she wanted to keep her job.[134] This case exemplifies the tendency of 457 visa holders to perform unpaid work because of their additional reliance on their employer to sponsor them on the 457 visa.

The second case concerns a 457 visa holder who was sponsored for permanent residency by his employer. The employer required him to perform additional unskilled tasks and work considerable amounts of overtime, as a car driver for his friends and to work on his farm. He was directed not to record these extra hours and was not paid for these additional duties. The employee was dismissed after he made a complaint to his employer about this unpaid work. The Fair Work Commission made a finding of unfair dismissal and awarded the employee substantial damages, commenting on the vulnerable position of the employee:

> As a sponsored 457 visa worker, the Applicant was in a position where it is apparent that he was vulnerable to exploitation by virtue of his strong desire

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128 Barbara Deegan, 'Visa Subclass 457 Integrity Review' (Final Report, Department of Immigration and Citizenship, Australian Government, October 2008) 50–51 ('*Deegan Review*').

129 See, eg, Chris F Wright and Andreea Constantin, Submission No 23 to Education and Employment References Committee, Senate Standing Committees on Employment and Education, Parliament of Australia, *Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders*, 1 May 2015.

130 *Virata v NSW Motel Management Services Pty Ltd* [2015] FWC 7932 (24 November 2015).

131 Ibid.

132 Ibid 1 [4].

133 Ibid 1–2 [4]–[5].

134 Susie O'Brien, 'Worker on 457 Visa Alleges She Was "Enslaved", Paid $3 an Hour at Grampians Hotel', *Herald Sun* (online), 19 July 2015 <http://www.heraldsun.com.au/news/law-order/worker-on-457-visa-alleges-she-was-enslaved-paid-3-an-hour-at-grampians-hotel/news-story/7f69c522c5121a1bb060965d2b2c68b8>.

> to remain in Australia and the need to maintain sponsorship to do so. The apparent actions of the Respondent to exploit the Applicants vulnerability by compelling him to work unpaid overtime; as well as likely failing to pay his superannuation entitlements and making substantial deductions from his wages is disgraceful. To then terminate the Applicant's employment when he has taken a stand against these unreasonable actions is appalling.[135]

This case illustrates the possibility that a 457 visa holder will perform unpaid work for their sponsor in order to secure continuing sponsorship on the 457 visa and also to obtain permanent residency.

IV Employer-Driven Migration and Unpaid Work

Australia's regulatory approach to managing migration has undergone radical transformation from the 1990s to the present day. Although Australia was initially founded upon a culture of permanent migration, built upon ideas of nation-building and citizenship,[136] temporary labour migration has now become the norm, with an emphasis on labour migration predicated on an economic rationale, rather than family reunion and humanitarian needs.[137] The significance of this normative transformation is that Australia's migration regulation now incentivises visa holders to work. Each of the main visa categories reward visa holders who have worked in Australia and who have obtained employer sponsorship. The subclass 189 visa for permanent residency allows a period of paid employment to provide points for this visa, although unpaid work does not count in the calculation of the points test.[138] In addition, employer sponsorship is a direct route to permanent residency via the Employer Nomination Scheme (subclass 186 visa). Thus, both the main entry pathways to permanent residency reward applicants for a past period of paid employment in Australia or for establishing an employment relationship with an Australian employer. In the temporary program, the only temporary visa with a pathway to permanent residency and the temporary work visa with the longest term and capacity for renewal is the subclass 457 visa, which was replaced by the Temporary Skill Shortage subclass 482 visa in 2018, as discussed below.[139] This visa requires the performance of paid work sponsored by an employer. Other visa categories such as visas for working holiday makers, international students and graduates all afford an opportunity to work in Australia and often provide a path to a longer stay in Australia via another visa. With the advent of 'two-step' or even 'multi-step migration', a direct link between temporary migration through to permanent residency has been created

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135 *Farzday v Monochromatic Engineering Pty Ltd* [2015] FWC 7216 (20 October 2015) 11 [64].

136 Mary E Crock, 'Contract or Compact: Skilled Migration and the Dictates of Politics and Ideology' (2002) 16(1) *Georgetown Immigration Law Journal* 133.

137 The Department of Immigration's planning levels for 2016–17 for permanent migration to Australia reflect this shift, with two-thirds of the places (123 567) offered to skilled stream places and the remaining third (60 041) allocated to family stream, special eligibility stream and child places: Department of Immigration and Border Protection, *Annual Report 2016–17*, above n 103, 31.

138 Department of Home Affairs, Australian Government, 'Skilled Independent Visa (Subclass 189) (Points-tested) Stream' <https://www.homeaffairs.gov.au/trav/visa-1/189->.

139 Department of Home Affairs, Australian Government, 'Abolition and Replacement of the 457 Visa — Government Reforms to Employer Sponsored Skilled Migration Visas' (April 2017) <https://www.homeaffairs.gov.au/trav/work/457-abolition-replacement>.

for skilled occupations.[140] Increasingly visa holders are transitioning through a number of visa pathways in order to secure their ultimate goal of permanent residency.[141]

With migration outcomes increasingly linked to the performance of paid work, perhaps perversely this approach has the effect of encouraging visa holders to perform unpaid work. As this part will demonstrate, unpaid work is often perceived to be a gateway to paid work. Justice Einfeld recognised this in *Dib v Minister for Immigration and Multicultural Affairs*,[142] when stating that, 'the primary motive in *Kim* for performing the activity, as in *Braun*, was commercial — the gaining of work experience or the chance to demonstrate skills in the hope of obtaining paid employment'.[143] This point was also noted, more recently, in a case concerning an international student who worked in the kitchen for nine months on an unpaid basis for a Sydney waterfront seafood restaurant and transitioned to paid employment for the restaurant after that. The Tribunal noted that it would have been unlikely for the international student to have gained paid employment with the restaurant without a period of work experience.[144] The *Deegan Review* into the 457 visa also noted the strong motivation of many temporary visa holders for permanent residency and how this may induce them to accept all manner of work in order to secure employer sponsorship:

> The link between the sponsoring employer and access to permanent residency has been raised during consultations as a key driver for Subclass 457 visa holders to continue to work for a sponsor despite being subjected to underpayment of wages, substandard working and living conditions (including unsafe workplaces) and other breaches of the sponsor's obligations. *A visa holder may be so desperate to access a streamlined pathway to permanent residency, not otherwise available, that he or she will be compliant in such treatment.*[145]

This tendency for visa holders to be propelled into unpaid work in order to secure a migration outcome was noted in the Part III above. For both international students in trade occupations and working holiday makers, migration regulations were created which provided a direct pathway between the performance of unpaid work and the achievement of a migration outcome. Although recent reforms to both visa programs have decoupled the two, there is still scope within Australia's migration law to induce the performance of unpaid work by visa holders. This is primarily because of the deference Australia's migration law and policy gives to employers in determining the composition of Australia's migrant intake. The

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140 See, eg, Lesleyanne Hawthorne, 'How Valuable is "Two-Step Migration"? Labour Market Outcomes for International Student Migrants to Australia' (2010) 19(1) *Asian and Pacific Migration Journal* 5.

141 This is a phenomenon Birrell and Healy have called 'visa churn': Bob Birrell and Ernest Healy, 'Immigration Overshoot' (Research Report, Centre for Population and Urban Research, Monash University, November 2012) <http://tapri.org.au/wp-content/uploads/2016/02/birrell-and-healy-overshoot-2012.pdf>.

142 (1998) 82 FCR 489.

143 Ibid 495, referring to *Kim v Witton* (1995) 59 FCR 258 and *Braun v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 152.

144 *1207637* [2015] MRTA 490 (27 March 2015) 7 [32].

145 Barbara Deegan, 'Visa Subclass 457 Integrity Review: Integrity / Exploitation' (Issues Paper No 3, Department of Immigration and Citizenship, Australian Government, September 2008) 26 (emphasis added).

centrality of employer sponsorship in the 457 visa's design, and the move to employer sponsorship both as part of the TRA's Job Ready Program and as part of the central pathway to permanent residency (the Employer Nomination Scheme), mean there is still likely to be a strong incentive for visa holders to perform unpaid work.

This has become even more pronounced with the announcement in April 2017 of a new Temporary Skill Shortage ('TSS') subclass 482 visa, which requires applicants to have two years of relevant work experience in their nominated occupation.[146] This reform is likely to have the greatest impact on onshore applicants for the TSS visa, with international students and working holiday makers constituting two-thirds of onshore 457 visa recipients. This new work experience requirement is not limited to remunerated work and includes unpaid work experience that meets Australian workplace laws.[147] According to a government official the requirement is to be flexibly applied and can, for example, take into account the internship year for students studying a medical degree, or teaching and research experience gained by PhD students during the course of their studies.[148] It is likely this reform will place even more pressure on international students and working holiday makers to find work relating to an occupation eligible for sponsorship under the TSS visa during the course of their studies or holiday in Australia. In the absence of being able to find paid work, it is possible they will be induced into unpaid work. Unpaid work provides temporary migrants with an opportunity to demonstrate skills in the hope of obtaining paid employment in their nominated occupation. As Birrell has observed of the TSS reforms,

> it is very likely that immigration agents and some employers will respond to the desperation of overseas students seeking the 'relevant experience' by coming up with intern or other employment arrangements which purport to meet the requirement.[149]

Additionally, the focus of Australia's migration framework on employer sponsorship also constrains the choices of visa holders in the labour market. Their choice of whom to work for is inevitably constrained by the limited selection of employers willing to engage a temporary migrant worker or to undertake the additional obligation of employer sponsorship. Berg acknowledges the pivotal role of society and governments in perpetuating inequality or vulnerability, drawing upon Butler's work to show that precariousness is often created through dependence on another:[150]

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146 Department of Home Affairs, Australian Government, 'Temporary Skill Shortage Visa (Subclass 482)' <https://www.homeaffairs.gov.au/trav/visa-1/482->.

147 Email from Helen Innes (Department of Jobs and Small Business) to Joanna Howe, 15 May 2018 (copy on file with the authors).

148 Department of Home Affairs, Australian Government, 'Temporary Skill Shortage Visa: Skills, Qualifications, Employment Background,' (15 May 2018) <https://www.homeaffairs.gov.au/trav/visa-1/482-?modal=/visas/supporting/Pages/482/skills-qualifications-employment-background.aspx>.

149 Bob Birrell, 'The Coalition's 457 Visa Reset: Tougher than You Think' (Research Report, Australian Population Research Institute, August 2017) 12.

150 Berg, above n 1, 40–1.

> Precariousness implies living socially, that is, the fact that one's life is always in some sense in the hands of the other. It implies exposure both to those we know and to those we do not know; a dependency on people we know or know not at all.[151]

Thus, the regulatory design of Australia's temporary and permanent labour migration pathways preferences the needs and wishes of employers, rendering visa holders heavily reliant upon employer support to achieve their desired migration outcome. In this context, many visa holders who wish to secure a longer period of stay in Australia and/or permanent residency are more likely to choose unpaid work in the hope that it will secure the goodwill of an employer. This creates the possibility of exploitation. As long as employer sponsorship is the dominant entry pathway to Australia in both the temporary and permanent migration programs, visa holders will be more to likely remain in employment relationships marked by pronounced dependency. It is for these reasons that we suggest below a number of regulatory reforms, giving less preference to employers, to each of the three main visa categories requiring or permitting temporary migrant work in Australia.

One proposal is to reduce the hold of a particular employer over visa holders on temporary visas — such as the defunct 457 visa or the new TSS visa — that require the performance of work. The *Deegan Review* proposed that in determining eligibility for permanent residency, more weight should be given to the length of time a visa holder has worked for *any* Australian employer, rather than the willingness of one employer-sponsor.[152] Another set of proposals, advanced by Mares in his book *Not Quite Australian*, is to reduce the vulnerability of temporary migrant workers by reducing the time in which they are dependent on employer sponsorship. He proposes that any employer who wants to employ a 457 visa holder for more than two years should be required to sponsor that temporary migrant for permanent residence.[153] He also advocates that all temporary migrants who have lawfully worked and lived in Australia for a continuous period of eight years should receive an automatic right to apply for permanent residency without employer sponsorship.[154] Underlying each of Mares' proposals is a desire to ameliorate the precarious position of temporary migrant workers, which he argues is best addressed through providing visa holders with the opportunity to become permanent residents independent of an employer-sponsor.

For Working Holiday visa holders, there is a need for reforms to reduce their reliance on employers in order to gain a visa extension. One approach is to abolish the possibility of a visa extension altogether. Mares proposes reducing the potential for unscrupulous employers to entice migrant workers into exploitative (and often unpaid or severely underpaid) work in order to receive a migration outcome. He recommends that the option of a second year visa extension for Working Holiday visa holders be abolished because it 'creates a choke point that gives unconscionable power to employers in the workplace'.[155] The abolition of this option is also

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151 Judith Butler, *Frames of War: When is Life Grievable?* (Verso, 2009) 14.

152 *Deegan Review*, above n 128, 51. See also Berg, above n 1, 144.

153 Peter Mares, *Not Quite Australian: How Temporary Migration is Changing the Nation* (Text Publishing, 2016) 297.

154 Ibid 294.

155 Ibid 299.

canvassed in a report on the Australian horticulture industry, which found that the opportunity for a visa extension after the completion of an 88-day period of paid work is likely to result in exploitation.[156] This is a point supported by the FWO's 417 visa inquiry, which found this regulation has created a 'cultural mindset amongst many employers wherein the engagement of 417 visa holders is considered a licence to determine the status, conditions and remuneration levels of workers (regardless of duties or hours) without reference to Australian workplace laws'.[157] Nonetheless, abolition of the visa extension is unlikely to occur in the near future, given the horticulture industry's reliance on Working Holiday visas for low skilled labour during harvest.[158] However, consideration should also be given to proposals that: reduce the employer's power to sign off on a visa holder's completion of the 88-day period; provide Working Holiday visa holders with more information about paid work vacancies; and incentivise compliant employment practices. These would help reduce the incidence of exploitative unpaid work being used as a gateway to paid work that can count towards the visa extension.[159]

This article has shown how international students are particularly vulnerable to performing unpaid work in the hope of finding paid work that will allow them to stay in Australia. One way of reducing their vulnerability is to reconsider the viability of visa condition 8105, which restricts the work hours of international students. This visa condition frames the manner in which international students engage in the labour market during their studies, by restricting the hours in which international students can engage in paid work on the basis that the central purpose of the visa is for study. This makes it difficult for international students to find employers willing to employ them to work within this limitation. International students, therefore, have a much more limited labour market than that available to local students. Further, the ability of international students to complain about exploitation at work is constrained. Their reliance on paid work to cover tuition expenses and living costs can result in unscrupulous employers coercing international students to breach the work hours limit and using this as leverage to ensure compliance. Additionally, as the possibility of further stay is closely linked to employer sponsorship and previous work experience, this makes the need to secure paid work far more compelling. These factors can make it more likely that international students will accept exploitative work and be unwilling to draw attention to it or publicly access legal remedies to rectify it.

Mares suggests that the 40 hours fortnightly limit for international students be abolished because 'it gives employers too much leverage over student workers'.[160] In the current political climate this proposal seems unlikely to be politically pragmatic or achievable.[161] Nevertheless, his other recommendations,

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156 Joanna Howe et al, 'Sustainable Solutions: The Future of Labour Supply in the Australian Vegetable Industry' (Report, Horticulture Innovation Australia, 2017).

157 FWO, above n 114, 33.

158 Howe et al, above n 156; Haydn Valle, Niki Millist and David Galeano, 'Labour Force Survey' (Research Report, Department of Agriculture and Water Resources, Australian Government, 18 May 2017) 6.

159 These proposals are expanded further in Howe et al, above n 156, ch 5.

160 Mares, above n 153, 300.

161 Ibid 300.

coupled with Deegan's proposal and the analysis of an increasing number of other scholars critiquing Australia's temporary migration pathways that permit the performance of work,[162] suggest that there does need to be a reconsideration of the role of employer-sponsored work in producing the achievement of a migration outcome. As Howe has written in her critique of the demand-driven orthodoxy that underpins the 457 visa programme:

> This [suggestion of limits on employer demand] is not to diminish the importance of employer demand as one aspect of the regulatory framework for determining the composition of Australia's temporary migrant worker programme. However, the Australian government has both the capacity and obligation to ensure that employer requests for 457 visas are met with stronger scrutiny and accountability.[163]

The need for greater oversight of the way in which employers *access* temporary migrant labour should extend to the manner in which these workers are *treated* in the labour market. There should be less capacity for employers to use temporary and permanent residency as incentives to compel certain behavioural traits (such as compliance) and greater productivity (including the performance of unpaid work) from visa holders than would be acceptable in the local workforce.

V Conclusion

Unpaid work, when not undertaken out of an altruistic desire to benefit someone else or to further a particular cause, is problematic for a number of reasons. It may breach employment standards, such as those imposed by the *Fair Work Act*, to the extent that it is performed under what can be characterised as a contract of employment. The fact that the worker concerned may have 'chosen' to accept no money should not matter for this purpose, given that the legislation is meant to have a protective effect. If a worker cannot lawfully consent to be paid less than the minimum wage set for a particular job, why should it be lawful to agree to work for nothing? And the concern is simply heightened if the worker is vulnerable to being manipulated or coerced into accepting work without pay because they are desperate to break into a competitive job market, or to gain a right of permanent residence, or both.

In this article, we have considered the way the performance of unpaid work is regulated under various visa pathways and the evolution of this regulation over time. We have argued that this evolution has been informed by a growing awareness of the exploitative nature of visa regulations allowing unpaid work to count towards a migration outcome. As this article has shown, the vulnerability of many temporary migrant workers is exacerbated by regulatory practices in the past, which have led to the development of a culture of tolerance for unpaid work by temporary migrants within an employer-driven system. Even though the regulations pertaining to unpaid work have changed, the effects of this culture are ongoing and, thus, deeper and more pervasive than are often understood to be the case. The Australian Government

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[162] Berg, above n 1; Iain Campbell and Joo-Cheong Tham, 'Labour Market Deregulation and Temporary Migrant Labour Schemes: An Analysis of the 457 Visa Program' (2013) 26(3) *Australian Journal of Labour Law* 239; Joanna Howe, 'Is the Net Cast Too Wide? An Assessment of Whether the Regulatory Design of the 457 Visa Meets Australia's Skill Needs' (2013) 41(3) *Federal Law Review* 443.

[163] Howe, above n 127, 147.

must take responsibility for developing a migration law and policy framework that does not lead visa holders into unpaid work in order to secure the approval of an employer who will then acquiesce to signing off on an application for another temporary or permanent visa allowing further stay. Australia's regulatory framework still places too much weight on employers in determining the composition of Australia's migration intake. While there are undoubtedly labour market benefits to an employer-driven migration program,[164] the Australian Government has a responsibility to ensure that temporary and permanent labour migration visas do not increase visa holders' precarity in the labour market by creating the conditions in which exploitative, illegal and illegitimate forms of unpaid work are allowed to proliferate.

[164] See, eg, ibid.