

jobwatch
Employment Rights Legal Centre



**Submission to the Senate Education and Employment References Committee
on the Impact of Australia's Temporary Work Visa Programs on the
Australian Labour Market and on the Temporary Work Visa Holders**

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1 Table of Abbreviations

FW Act	<i>Fair Work Act 2009 (Cth)</i>
FWC	Fair Work Commission
FWO	Office of the Fair Work Ombudsman
JobWatch TIS	JobWatch Telephone Information Service

2 Introduction

Job Watch Inc (**JobWatch**) is pleased to make a submission to Senate Education and Employment References Committee regarding the impact of Australia's temporary work visa programs on the Australian labour market and on the temporary visa holders.

In this submission, JobWatch will focus on the following terms of reference:

- c) Whether temporary visa holders receive the same wages, conditions, safety and other entitlements as their counterparts or in accordance with law; and
- d) whether temporary work visa holders have access to the same benefits and entitlements available to Australian citizens and permanent residents, and whether any differences are justified and consistent with international conventions relating to migrant workers.

2.1 About JobWatch

JobWatch is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre receives State and Federal funding to do the following:

- Provide information and referrals to Victorian workers via a free and confidential telephone information service (**TIS**);
- Engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other organisations;
- Represent and advise disadvantaged workers; and
- Conduct law reform work with a view to promoting workplace justice and equity for all Victorian workers.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our TIS and to date we have collected approximately **170,000** records. JobWatch starts a new record for each new caller or for callers who have called before but who subsequently call about a new matter. Our extensive database allows us to report on our callers' experiences, including on what particular workplace problems they face and what remedies, if any, they may have available to them at any given time.

Currently, JobWatch's TIS is taking approximately **12,000** calls per year.

The comments in this submission are made both from the perspective of lawyers who routinely advise and represent clients in employment law matters and from that of callers to the JobWatch TIS. Case studies have been utilised to highlight particular issues where we have deemed it appropriate to do so. The case studies in this submission are those of actual but de-identified callers to JobWatch's TIS and/or its legal practice clients.

3 Background to the temporary migrant workers visa scheme (subclass 457) and its relationship to employment

3.1 Temporary migrant work visas

Temporary Work (skilled) (subclass 457) visas allow overseas workers to live and work for up to 4 years in Australia. The rationale of this visa subclass is to address skills shortages in Australia. In order to be eligible, overseas workers must be either sponsored by an Australian employer or covered by labour agreements between the Commonwealth and employers that allow employers to recruit overseas workers.

Approved employer sponsors are required to meet certain obligations designed to protect workers from exploitation and to ensure that the program is being used to meet genuine skills shortages. However, in JobWatch's experience, it is not uncommon for employers to act in breach of their obligations regarding employee protections.

For this reason, as will be discussed further below, JobWatch believes that it is absolutely necessary for employer visa sponsors to be more vigilantly monitored and for there to be greater penalties made available to better deter potential offenders.

3.2 The employment relationship

The relationship between employees and employers involves an inherent imbalance of power. This imbalance is a result of the employer's general ability to hire and dismiss employees and to determine employment conditions in circumstances where employees have a very limited ability to enforce statutory minimum entitlements and/or negotiate better conditions. Further, employers are, generally speaking, more economically well resourced than their employees.

Employee protections and entitlements in the FW Act (such as the National Employment Standards, Unfair Dismissal and General Protections divisions) recognise and aim to ameliorate the unequal nature of the employment relationship.

3.3 The impact of the temporary migrant workers visa schemes on the employment relationship

The temporary migrant workers scheme by its very nature exacerbates the inherent power imbalance that exists in the employment relationship. This is because the employee's residency status is tied to the ongoing sponsorship by the employer. It therefore adds a further level of domination that employers may and often do wield against employees. Further, the migrant workers who turn to JobWatch for assistance often have limited English language skills and little knowledge of their employment rights, which can further exacerbate their relative powerlessness.

4 Whether temporary visa holders receive the same wages, conditions, safety and other entitlements as their counterparts or in accordance with law

The extent of any exploitation and mistreatment of temporary work visa holders, such as sham contracting or debt bondage with exorbitant interest rate payments

JobWatch has found that temporary migrant visa schemes not only, by their very nature, have the potential to exacerbate the inherent power imbalance between employers and employees but do indeed have this effect. This is reflected through the way that temporary visa holders are treated by their employer sponsors.

The following case studies highlight JobWatch's concerns.

4.1 Case studies of exploitation of temporary migrant workers by employers

JobWatch regularly receives calls from workers on temporary work visas. These calls have increased significantly as temporary work visas have become more widely used. For example, a manual search of our database indicates that in 2005 only 2 people who called the TIS identified themselves as being on a 457 visa. In 2014, instead, 43 callers disclosed that they were 457 visa holders.

JobWatch's TIS database includes a large number of records which are principally about another problem, e.g. unfair dismissal, but which also involve migrant worker exploitation. Unfortunately, as we do not have 'visa issues' as a discrete problem description, it is not possible to retrieve the actual number of calls received by JobWatch relating to temporary work visas. Nevertheless, what is clear from our manual TIS database search is that the number of calls relating to temporary work visas is increasing. All of the following case studies relate to 457 visa holders.

4.1.1 Case Study 1 - Kamal

Kamal worked for his employer on a 457 visa. He then became ill and required several hospital admissions before he could get back to work. He was absent from work for less than 3 months in a 12 month period. After his last release from hospital, Kamal inquired as to his employment. His boss advised that his employment had been terminated. He explained that 457 visa sponsors are required to pay the employees and given that Kamal was on unpaid sick-leave the boss thought this was in breach of his sponsorship obligations. Kamal never received any written notification of his termination and is not sure when the termination took effect. Kamal is keen to take action, however, he is not sure how an unfair dismissal claim will impact on his visa status which remains uncertain. He wants to remain in Australia and be reinstated to his role.

4.1.2 Case Study 2 - Mindy

Mindy is chef on a 457 visa. Her employer did not make any superannuation payments on her behalf. When Mindy noticed this and raised it with her employer, the boss claimed not to have any funds and said that Mindy needed to pay the boss \$40 000 if she wanted to stay

in Australia. When Mindy didn't pay the boss and complained about not receiving her minimum entitlements, she was dismissed. Mindy has a young family and is afraid that she will not be able to properly provide for them.

4.1.3 Case Study 3 - Hassan

Hassan is a Nepalese migrant working full time for a trucking company. He experiences racial taunts whilst working. His employer has withheld his wage since Hassan complained that he did not get paid for his first 2 days on the job. He also believes he is getting underpaid in relation to a verbal employment agreement with his boss. Since then he has received threats from his employer regarding his immigration status. He believes his employer has treated him this way because of his visa status.

4.1.4 Case Study 4 - Teresa

Teresa is full-time chef who entered into a written employment agreement with a café on the condition of her 457 visa being approved. The café acted as Teresa's visa sponsor. Due to delay in her visa approval, her position was filled and contract terminated despite her ongoing sponsorship by the café. She has not received termination pay or payment in lieu of notice as stipulated in her contract.

4.1.5 Case Study 5 - Jamie

Jamie holds a 457 visa. His sponsorship arrangement is not clear, however, he found a job on the internet as a labourer. When he applied for the job he was told that it was an independent contractor position. Jamie relied on the boss' statement and applied for and was granted an ABN. He worked for a while under his ABN until his boss stopped providing work. He believes he is owed \$2500 under his contracting arrangement and has since discovered that his boss has been disqualified by ASIC some time ago and the boss' company no longer exists.

4.1.6 Case Study 6 - Zan

Zan is an Indian national and works in Australia under a 457 visa. His employer required Zan to pay \$12,000 before agreeing to sponsor him. The employer claims that this amount is to cover the cost of the visa to the employer. The employer seems not to have paid hundreds of dollars in superannuation. When Zan quizzed the employer regarding these issues his employment was terminated.

4.1.7 Case Study 7 - Pat

Pat arrived in Australia on a non-work visa. He proceeded to work illegally for his employer for three months after which he transitioned to a 457 visa. After a year and 3 months, Pat resigned. He has not been paid annual leave or overtime. Pat says that the employer exploits its workers and believes there is an arrangement between the employer and migration agents to swindle money from employees.

4.1.8 Case Study 8 - Justin

Justin is an accountant on a 457 visa and has a contract with his employer for 4 years. Justin's role ostensibly includes taking cash payments equivalent to superannuation and tax from other visa holders and himself and providing them to the employer. It also appears that his employer requires Justin to falsify documents thus enabling the employer to fraudulently obtain rebates from the government.

4.2 Trends arising out of the case studies

The above case studies show that the migrant workers covered by temporary working visa arrangements often experience employment issues with greater intensity by virtue of their precarious residency which they view as, and which in fact and law is, reliant on the retention of an employer sponsor.

The following trend areas have been identified:

- 4.2.1 Underpayment and/or non-payment of entitlements**
- 4.2.2 Unfair dismissal**
- 4.2.3 Discrimination**
- 4.2.4 Unreasonable requests of workers by employers**
- 4.2.5 Work in contravention of visa conditions**
- 4.2.6 Harassment of workers by employers**
- 4.2.7 Threats of deportation**
- 4.2.8 Employer requiring payment for sponsorship**

Temporary migrant workers will often experience a number of these issues simultaneously. However, as discussed further below, they may be hesitant to seek any form of legal recourse.

Additionally, JobWatch is concerned that, temporary visa workers who are dismissed only have 90 days to find a new sponsor or leave the country. This makes it very difficult, if not impossible, for a temporary visa worker to challenge their dismissal via e.g. an unfair dismissal or general protections claim.

Further, the remedy of reinstatement of employment is available in both unfair dismissal and general protections but is effectively meaningless unless the employer's sponsorship obligations can also be ordered to be reinstated.

5 Whether temporary visa holders have access to the same benefits and entitlements available to Australian citizens and permanent residents

The temporary nature of the migrant worker visa scheme means that 457 visa workers are highly vulnerable. Rogue employers take advantage of the fact that they are unlikely to speak up and enforce their rights for fear of being thrown out of the country. Hence, whilst at first glance it appears that 457 visa holders have the same legal protections as other permanent workers - because they are covered by our workplace laws - access to justice remains a

significant hurdle for employees on 457 visas.

In JobWatch's experience, the majority of temporary visa holders who contact the TIS are extremely reluctant to seek recourse under workplace laws for the apparent contravention by their employer of their employment rights. The prime reason behind this reluctance is their fear that if they make a complaint their employer will revoke their sponsorship. In some cases, employers have threatened the visa status of migrant workers to ensure these workers do not make a workplace complaint.

Because of this fear for their visa status, migrant workers suffer lower levels of access to the rights that they technically hold under law. As mentioned, migrant workers often have limited English language skills and knowledge of and access to the legal system which can make asserting their workplace rights even more difficult.

Additionally, migration law does not guarantee the residency status of a temporary migrant worker who is seeking to challenge their dismissal or make another workplace claim in the context of their employer's revocation of their sponsorship.

For these reasons, it is absolutely necessary for employer visa sponsors to be more vigilantly monitored and for greater penalties to be made available to better deter potential offenders.

6 Recommendations

In 2013, the Government's capacity to monitor and investigate compliance with the temporary work visa program was expanded by enabling Fair Work Inspectors to work with the Department of Immigration and Border Protection to ensure 457 visa holders are in their nominated occupation and being paid market salary rates. JobWatch endorses this change, but believes further improvements could be made. JobWatch recommends the following:

6.1 Recommendation 1: Automatic bridging visa

That temporary migrant workers who find themselves in a position of losing their employer's sponsorship because they have been dismissed, be entitled to an automatic bridging visa covering the period while they are challenging their dismissal (ie. in an unfair dismissal, general protections or discrimination claim). If employees have to leave the country because of the loss of their visa status, then this causes an additional injustice in that they can't practically enforce their rights.

6.2 Recommendation 2: Power to reinstate visa sponsorship obligations

That the FWC and/or the Federal Court of Australia and the Federal Circuit Court of Australia have the power to order reinstatement of the employer's visa sponsorship obligations because, without this power, the remedy of reinstatement which is available in unfair dismissal and general protections claims is rendered meaningless.

6.3 Recommendation 3: Better vigilance of temporary work visa arrangements

That a *specific taskforce* or other arrangement be set up between the Fair Work Ombudsman and the Department of Immigration and Border Protection to better protect the work and residency rights of temporary migrant visa workers.

6.4 Recommendation 4: Specific telephone hotline

That a confidential hotline be set up within the Fair Work Ombudsman or community legal centre to cater to the employment issues experienced by migrant workers.

6.5 Recommendation 5: Research and investigation

That more research be undertaken in order to determine the temporary work visa program's effect on local labour wages and conditions and the extent to which it addresses genuine skills shortages.

6.6 Recommendation 6: Increased penalties

That greater penalties to be made available to better deter potential offenders and accessories.

7 Conclusion

Ultimately, the exploitation of temporary visa holders undermines Australia's workplace relations system as a whole. By virtue of the availability of migrant workers who will (or are forced to) accept poor and/or unlawful conditions, employers are unlikely to employ anyone who will not accept such conditions, thereby decreasing fair employment opportunities for all Australians.

JobWatch recognises that the temporary migrant workers scheme can benefit the Australian economy and provide opportunities to migrant workers. Nevertheless, temporary visa holders must be protected from exploitation in the labour market if Australia is to have a truly fair workplace relations system. JobWatch is confident that the above recommendations will increase the fairness of this system.

JobWatch would welcome the opportunity to discuss any aspect of this submission further.

Ian Scott and Gabrielle Marchetti of JobWatch's Legal Practice can be contacted on (03) 9662 9458 with any queries.

Yours sincerely,



Per:
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