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Submission

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Review: A Migration System for
Australia's Future

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Executive summary

The migration system has a vital role to play in addressing the challenges and opportunities that Australia faces in the coming decades. However, the system currently is not aligned with other labour market policies tasked with addressing skills and workforce needs and is poorly equipped to ensure that migrants are protected.

The migration system is preoccupied with short-term economic efficiency objectives. Policymakers have aimed to maximise the fiscal benefits – by attracting high income earners, on one hand, and by reducing migrants' access to welfare and subsidised public services, on the other – and address individual employers' immediate workforce needs. Despite the success of these reforms in improving the 'efficiency' of Australia's migration system, they have largely disregarded the importance of 'equity' and 'voice', which are equally important labour market policy goals.

Visa schemes that restrict temporary migrants' social rights and access to representation, and that empower employers in ways that heighten migrant workers' vulnerability to mistreatment, exemplify the fundamental inequities between temporary visa holders and Australian permanent residents and citizens. Despite net economic benefits delivered by Australia's skilled migration policies, there has been widespread underpayment and mistreatment of temporary migrant workers, which have resulted directly from the design of migration policies.

This submission outlines four principles that should guide any reform to temporary visas with work rights, which are reflected in its recommendations (see p. 4):

- Migrants on temporary visas must have guaranteed pathways to permanent residency and citizenship and be provided with adequate social and economic support.
- Migrants must have the ability to move freely between employers to minimise the potential for employers mistreating them and to ensure the migration system contributes to a dynamic labour market.
- The skills and workforce needs that the migration system is designed to address must be independently verified and coordinated with other labour market policies aimed at addressing skills needs, e.g., education and training and industrial relations.
- Institutional protection mechanisms must be strengthened considerably to ensure migrants' rights and minimum employment standards are enforced.

Recommendations

Our recommendations focus primarily on reform of the Temporary Skill Shortage visa as a key component of Australia's migration system explicitly tasked with addressing skills needs. We provide various options for potential reform including what an industry sponsorship model might look like. Our main recommendation is the creation of a Temporary Skilled Mobility visa scheme modelled on Australia's existing permanent skilled migration program. This is the most effective way the migration program can address Australia's short-term skills and workforce needs in a manner complementary to other labour market policies while ensuring that migrants' rights are protected.

We emphasise the importance of addressing problems with the current migration system in the creation of any new visa scheme. To ensure this, we recommend the proposed Temporary Skilled Mobility visa meet the following preconditions:

- Residency status – visa holders should have a clear and defined pathway to permanent residency and access to social security, subsidised public services, and post-arrival support.
- Mobility – visa holders should have the freedom to move between employers.
- Skill thresholds – before a particular occupation is eligible for points attainment or employer / State government nomination under a new visa scheme, Jobs and Skills Australia should assess the utilisation and adequacy of other mechanisms aimed at addressing workforce needs, such as structured training programs, active labour market programs and industrial relations arrangements that determine job quality and thereby the attractiveness of these occupations.
- Institutional protections – deficiencies with institutional protection must be addressed as a precondition for visa reform.

We recommend these preconditions – providing support for temporary migrants and a guaranteed pathway to permanent residency, enabling worker mobility, independently verifying skills and workforce needs, and addressing deficiencies with institutional protection – form the guiding principles for any reforms to the wider migration system, including to any existing or new temporary visas.

1. Introduction

We welcome the opportunity to make a submission to the Department of Home Affairs' review – *A Migration System for Australia's Future*. The migration system has a vital role to play in addressing the challenges and opportunities that Australia faces in the coming decades. However, there are two major problems with the current migration system. First, the migration system currently is not aligned with other labour market policies tasked with addressing skills and workforce needs. Second, the migration system is poorly equipped to ensure migrants are protected from underpayment and other mistreatment at work, and that employers do not gain an unfair advantage from employing them. To address these problems, a wider set of complementary reforms to government policy are needed to make them more responsive to workforce needs, and to ensure minimum employment standards are effectively enforced.

Migration reform is also essential, particularly of Australia's system of temporary migration. Temporary visas inadequately protect migrants in the workplace. Policy changes since the mid-1990s have resulted in this system increasingly resembling a 'guest-worker' regime,¹ where temporary migrants' rights are restricted, their capacity to bargain for decent working conditions is curtailed and their agency to pursue opportunities available to citizens and permanent residents is diminished. These arrangements have distorted the labour market.

The ability of temporary migrants in Australia to seek redress if they are underpaid or otherwise mistreated is limited by visa rules that place considerable power in the hands of employers. Like the guest-workers of post-war Western Europe, temporary migrants in Australia "constitute a disenfranchised class".² Visa rules that allow for differential treatment of temporary migrants compared to other workers in Australia present a fundamental injustice that needs to be rectified. If this is not addressed, Australia may suffer a fate like other countries with guest-worker schemes where, in many cases, these programs were shut down because the policies designed to deliver short-term economic benefits inevitably produced unintended economic and social fragmentation and public hostility.³

We outline four principles that should guide any reform to temporary visas:

1. Migrants on temporary visas must have guaranteed pathways to permanent residency and citizenship and be provided with adequate social and economic support.
2. Migrants must have the ability to move freely between employers to minimise the potential for employers mistreating them and to ensure the migration system contributes to a dynamic labour market.
3. The skills and workforce needs that the migration system is designed to address must be independently verified and coordinated with other labour market policies aimed at addressing skills needs, e.g., education and training and industrial relations.
4. Institutional protection mechanisms must be strengthened considerably to ensure migrants' rights and minimum employment standards are enforced.

Our recommendations focus primarily on reform of the Temporary Skill Shortage visa as a key component of Australia's migration system explicitly tasked with addressing skills needs. We provide various options for potential reform, including what an industry sponsorship model might look like, before recommending the creation of a Temporary Skilled Mobility visa as the most effective way of addressing Australia's skills and workforce needs while ensuring that migrants' rights are protected. The principles we outline for reform of temporary skilled migration should be applied to reforms of other temporary visas with work rights.

¹ Wright, C.F. and Clibborn, S. 2020. A guest-worker state? The declining power and agency of migrant labour in Australia, *Economic and Labour Relations Review*, 31(1): 34–58.

² Walzer, M. 1983. *Spheres of Justice: A Defense of Pluralism and Equality*. New York: Basic Books.

³ Castles, S. 2006. Guestworkers in Europe: A resurrection? *International Migration Review*, 40(4): 741-766.

2. Problems with the migration system

Our joint and individual research has focused extensively on problems with the current migration system, which are due mainly to the operation of temporary visas. For example, in an historical analysis of the bargaining power and agency conferred on migrant workers, we found migrant workers arriving in Australia in the period from 1973 to 1996 had high levels of bargaining power and agency. However, since 1996, migrant workers' power and agency has been incrementally curtailed to the extent that their rights are restricted, their capacity to bargain for decent working conditions with their employers is truncated, and their agency to pursue opportunities available to citizens and permanent residents is diminished.⁴ Our analysis assessed four criteria identified within the international research as important determinants of migrant workers' power and agency:⁵

- Residency status
- Mobility
- Skills
- Institutional protections

Residency status

The almost exclusive focus on permanent visas from 1973 to 1996, accompanied by an effective system of labour standards enforcement, meant that migrant workers enjoyed the same social and employment rights and entitlements as Australian citizens. With the creation and expansion of temporary visa schemes after 1996, temporary migrants initially had the opportunity to apply for permanent residency with a reasonable expectation that this would be granted so long as they fulfilled standard eligibility requirements. However, more recent policy changes, such as the creation of the Temporary Skill Shortage (TSS) visa short-term stream, have removed this opportunity for some visa holders.

The erosion of the temporary-permanent migration pathway has created significant vulnerability for temporary migrants on the long and uncertain journey to permanent residency.⁶ Between 2013 and 2018, the number of people who had been on temporary visas for eight or more years increased threefold.⁷ Temporary migrants in Australia are denied or have restricted or conditional access to many of the rights and protections that citizens are entitled to, such as protection of income in the event of workplace injury, recovery of unpaid entitlements when their employer goes into administration, and subsidised health care, education and unemployment benefits. There are also high costs associated with obtaining temporary visas.⁸ As studies in other countries have found, the denial of such protections to migrant workers with temporary residency can weaken their bargaining power and agency relative to those with permanent residency.⁹

⁴ Wright, C.F. and Clibborn, S. 2020. A guest-worker state? The declining power and agency of migrant labour in Australia, *Economic and Labour Relations Review*, 31(1): 34–58.

⁵ Bauder, H. 2006. *Labor Movement: How Migration Regulates Labor Markets*. Oxford: Oxford University Press; Dauvergne, C. 2016. *The New Politics of Immigration and the End of Settler Societies*. Cambridge: Cambridge University Press.

⁶ Robertson, S. and Runganaikaloo, A. 2014. Lives in limbo: migration experiences in Australia's education–migration nexus. *Ethnicities* 14(2): 208–226.

⁷ Sherrell, H. 2019. Migration–permanent and temporary visa trends. Briefing Book: Key Issues for the 46th Parliament. Canberra: Parliament of Australia, pp. 128–131.

⁸ Wright, C.F., Groutsis, D. and Kaabel, A. 2022. Regulating migrant worker temporariness in Australia: the role of immigration, employment and post-arrival support policies. *Journal of Ethnic and Migration Studies*, 48(16): 3947–3964.

⁹ Bauder, H. 2006. *Labor Movement: How Migration Regulates Labor Markets*. Oxford, NY: Oxford University Press; Dauvergne, C. 2016. *The New Politics of Immigration and the End of Settler Societies*. Cambridge: Cambridge University Press.

Mobility

A feature of permanent migration in Australia is the right of visa holders, like citizens, to move freely between employers. From 1973 to 1996, when the migration system was built almost exclusively upon the principle of permanent residency, migrant workers could leave their employer if they were being mistreated, if they could receive better wages and conditions or if they could utilise their skills more effectively with another employer.

By contrast, under temporary visas that have been created or expanded since 1996, migrant workers' mobility is restricted or conditional. Workers on the TSS and Pacific Australia Labour Mobility (PALM) stream (formerly Seasonal Worker Program (SWP)) have their residency rights tied to their employer sponsor; if the employment relationship with their sponsor ceases, they have a short timeframe to find another sponsor or face deportation. While international student and working holiday maker (WHM) visa holders are free to move between employers, those workers can become dependent on their employers due to a risk of employers reporting technical breaches for exceeding working hour limits in the case of international students, and withholding documentation required for WHM applicants to gain visa extensions.

In support of international scholarship suggesting that constraining migrants' mobility can diminish their power and agency,¹⁰ Australian studies have identified such constraints as an important factor contributing to temporary migrant workers' vulnerability to underpayment and other forms of mistreatment.¹¹

Skills

Like other groups of workers, migrant workers' skills and qualifications can influence their bargaining power with employers to negotiate good wages and conditions and their agency to move between employers. High-skilled migrants with scarce qualifications and experience tend to have stronger bargaining power and agency than lower skilled migrants who can be replaced more easily and may therefore be more tolerant of poor working conditions.¹² These findings are reflected in our analysis of the skill thresholds in Australia's migration system.¹³

From 1973 to 1996, Australia's migrant system focused on skilled migration. This meant that foreign nationals seeking work visas were required to possess tertiary qualifications and skills in high demand. This did not preclude migrants from working in lower skilled occupations, which was an outcome for migrants facing challenges getting their skills recognised upon arrival. But it meant they had the required qualifications and experience to gain employment in high-skilled work once skill recognition was achieved.

Since 1996, the qualifications threshold for permanent skilled visas has remained high. This was initially the case for the temporary skilled visa, but reforms after 2001 expanded eligibility of this scheme to large numbers of intermediate-skilled occupations not requiring university-level qualifications. Cases involving underpayment of temporary skilled visa holders disproportionately involve workers in such occupations, such as cooks and builders' labourers.¹⁴

¹⁰ Zou, M. 2015. The legal construction of hyper-dependence and hyper-precarity in migrant work relations. *International Journal of Comparative Labour Law and Industrial Relations*, 31(2): 141–162.

¹¹ For example, Howe, J., Clibborn, S., Reilly, A., van den Broek, D. and Wright, C.F. 2019. *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry*. Adelaide, SA, Australia: University of Adelaide.

¹² Anderson, B. 2010. Migration, immigration controls and the fashioning of precarious workers. *Work, Employment and Society* 24(2): 300–317; Dauvergne, C. 2016. *The New Politics of Immigration and the End of Settler Societies*. Cambridge: Cambridge University Press.

¹³ Wright, C.F. and Clibborn, S. 2020. A guest-worker state? The declining power and agency of migrant labour in Australia, *Economic and Labour Relations Review*, 31(1): 34–58.

¹⁴ Boucher, A. 2019. Measuring migrant worker rights violations in practice: the example of temporary skilled visas in Australia. *Journal of Industrial Relations*, 61(2): 277–301.

The expansion of international student visas and changes to the WHM visa have encouraged large numbers of temporary migrants into low-skilled work in the hospitality, retail, and horticulture industries. Perceptions by these workers that they are easily replaceable, which is a consequence of the low barriers to entry for these occupations, is a factor contributing to widescale underpayment of temporary migrant workers in these industries.¹⁵

Institutional protection

Labour market regulation is an important factor determining migrant workers' bargaining power and agency. Previous scholarship has highlighted the role of trade unions and government inspectorates in institutionalising protections by establishing and enforcing decent labour standards.¹⁶ The absence of such institutional protections can allow employers to pay migrant workers below these standards to gain a competitive advantage.¹⁷

From 1973 to 1996, institutional protections for migrant workers were strong. The conciliation and arbitration and award systems provided relatively standardised wages and conditions for workers. An effective labour standards enforcement regime supported by strong unions helped to ensure that workers received the wages and conditions they were entitled to under the relevant industry or occupational awards,¹⁸ including migrant workers.¹⁹ The permanent migration program buttressed strong institutional protections for migrant workers who had the same workplace rights and entitlements as Australian citizens.

This scenario has changed after 1996. Prior to COVID, visa intakes increased to unprecedented levels. Many migrants work in jobs with weak enforcement of labour standards. This is the case not only among temporary migrants but also undocumented workers who form a large proportion of the horticulture workforce in certain regions.²⁰ While temporary migrants have de jure access to the minimum standards set in the relevant awards, there are considerable challenges to enforcing such standards. Temporary visa holders are concentrated in industries and organisations with low levels of union representation.²¹ This has been affected by declining levels of union membership and industrial relations policy changes that weakened unions' role in regulating labour standards.²² Temporary migrants account for a disproportionate amount of the Fair Work Ombudsman's (FWO's) activities, yet the FWO has insufficient resources and faces structural challenges to enforce labour standards in the parts of the labour market where temporary migrants are concentrated.²³ Consequently, while institutional protections for migrant workers were strong prior to 1996, since then they have weakened considerably.

¹⁵ Clibborn, S. 2021. Multiple frames of reference: Why international student workers in Australia tolerate underpayment, *Economic and Industrial Democracy*, 42(2): 336–354.

¹⁶ Hardy, T. and Howe, J. 2009. Partners in enforcement? The new balance between government and trade union enforcement of employment standards in Australia, *Australian Journal of Labour Law*, 22(3): 306–336.

¹⁷ Zou, M. 2015. The legal construction of hyper-dependence and hyper-precarity in migrant work relations. *International Journal of Comparative Labour Law and Industrial Relations*, 31(2): 141–162.

¹⁸ Goodwin, M. and Maconachie, G. 2007 Unpaid entitlement recovery in the federal industrial relations system: strategy and outcomes 1952–95. *Journal of Industrial Relations* 49(4): 523–544.

¹⁹ Quinlan, M. and Lever-Tracy, C. 1990. From labour market exclusion to industrial solidarity: Australian trade union responses to Asian workers, 1830–1988. *Cambridge Journal of Economics*, 14(2): 159–181.

²⁰ Howe, J., Clibborn, S., Reilly, A., van den Broek, D. and Wright, C.F. 2019. *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry*. Adelaide: University of Adelaide.

²¹ Clibborn, S. 2021. Multiple frames of reference: Why international student workers in Australia tolerate underpayment, *Economic and Industrial Democracy*, 42(2): 336–354.

²² Cooper, R. and Ellem, B. 2008. The neoliberal state, trade unions and collective bargaining in Australia. *British Journal of Industrial Relations* 46(3): 532–554.

²³ Clibborn, S. 2015. Why undocumented immigrant workers should have workplace rights, *Economic and Labour Relations Review*, 26(3): 465–473; Clibborn, S. and Wright, C.F. 2018. Employer theft of temporary migrant workers' wages in Australia: why has the state failed to act? *Economics and Labour Relations Review*, 29(2): 207–227.

3. Migration policy principles and the need for complementary reforms

Many of the policy changes described above that have contributed to the current problems with the migration system are due to a preoccupation with short-term economic efficiency objectives. Policymakers have aimed to maximise the fiscal benefits – by attracting high income earners, on one hand, and by reducing migrants' access to welfare and subsidised public services, on the other – and address individual employers' immediate workforce needs. Despite the success of these reforms in improving the 'efficiency' of Australia's migration system, they have largely disregarded the importance of 'equity' and 'voice', which are equally important labour market policy goals.²⁴

Visa schemes that restrict temporary migrants' social rights and access to representation and that empower employers in ways that heighten these workers' vulnerability to mistreatment exemplify the fundamental inequities between temporary visa holders and Australian permanent residents and citizens. Despite net economic benefits delivered by Australia's skilled migration policies, the design of migration policies has directly contributed to widespread underpayment and mistreatment of temporary migrant workers.²⁵

The visa system currently in place is largely the product of a top-down approach to policymaking by government partly in response to business lobbying, as detailed academic analysis has demonstrated.²⁶ For many years, workforce representatives, such as trade unions, were largely excluded from the policymaking process. This resulted in distorted migration policies that overlooked the importance of social equity and worker representation or 'voice' as policy goals. Ensuring that visa schemes are equitable and provide migrants with access to voice, as well as ensuring they are efficient, must be primary goals of the migration system.

These principles should also be reflected in the structures that govern policymaking. The most effective labour market policy models internationally in terms of addressing immediate and longer terms workforce needs – e.g., those operating in Denmark and Germany – are developed jointly by employer associations and trade unions.²⁷ These organisations represent the most important labour market stakeholders, namely employers and workers, which are better placed than government to identify the skills and workforce needs of the sectors they represent and to jointly develop solutions to address these needs. Governments in these countries play an important role but they facilitative rather than directive.

Given that a primary objective of the migration system is to address Australia's skills and workforce needs, the logic of these international models should apply here. The advent of Jobs and Skills Australia may help in this regard, since it will allow for the generation of data that can form the basis of constructive joint discussions between employer associations and unions focused on diagnosing and resolving labour market needs. This use of an evidence base to enable constructive negotiation between employers and unions is a critical element of the Danish system, for example, because it minimises disagreement over 'the facts'.²⁸

²⁴ Befort, S. F. and Budd, J. W. 2009. *Invisible Hands, Invisible Objectives: Bringing Workplace Law and Public Policy into Focus*. Stanford: Stanford University Press.

²⁵ Clibborn, S. and Wright, C.F. 2022. The Efficiencies and Inequities of Australia's Temporary Labour Migration Regime. *Australian Economic Review*, 55(2): 254-262.

²⁶ Wright, C.F. 2015. Why do states adopt liberal immigration policies? The policymaking dynamics of skilled visa reform in Australia. *Journal of Ethnic and Migration Studies*, 41(2): 306-328.

²⁷ Heyes, J., 2007. Training, social dialogue and collective bargaining in Western Europe. *Economic and Industrial Democracy*, 28(2): 239-258.

²⁸ Andersen, S.K., Wright, C.F. and Lansbury, R.D. 2022. Defining the problem of low wage growth in Australia and Denmark: From the actors' perspectives. *European Journal of Industrial Relations*, <https://doi.org/10.1177/09596801221132424>.

Ensuring that policymaking is governed in a way that enables oversight from key labour market stakeholders – especially employer associations and unions – should be an important focus of reform to Australia’s migration system. Two other goals are essential. First, migration policies must be designed in a manner that complements domestic labour market policies. Second, migrants must be protected, and employers must not gain an unfair advantage by employing them. Each of these goals will now be discussed.

Ensuring the migration system complements domestic labour market policies

The migration system has been disproportionately attuned to addressing employers’ immediate workforce needs and insufficiently attentive to ensuring that employers do not gain an unfair advantage in utilising migrant labour. Barriers to temporary migrant workers’ mobility, access to government support, collective representation and permanent residency have made them vulnerable to underpayment and mistreatment. This has encouraged unscrupulous employers to address their workforce needs by mistreating temporary migrant workers rather than investing in training and improving job quality.²⁹

Addressing Australia’s skills and workforce needs is a key goal of the migration system. But migration is not the only policy area with this goal. Other policies also vital for addressing skills and workforce needs include industrial relations policies that affect job quality and the supply of and demand for labour, education and training policies tasked with providing the workforce with necessary skills, and social policies aimed at encouraging inactive workers into the labour market.³⁰

These different policy areas are weakly coordinated, that is, they do not work together effectively to address skills and workforce needs. Problems with the TSS visa exemplify this. The TSS visa is designed to address individual employers’ recruitment difficulties, which may be the result of an employer offering uncompetitive wage rates and unattractive working conditions, rather than skill shortages that are experienced by all employers in the same industry. Furthermore, the design of the TSS visa does not take sufficient regard of industrial relations measures such as job quality, which can affect the responsiveness of labour market supply (i.e., prospective workers) to demand (i.e., employers who need those workers).

Current skills policies are designed to efficiently meet the short-term needs of individual employers. However, they are ill-equipped for addressing the labour market’s longer-term needs. These policies are the consequence of government reforms implemented since the 1990s that have prioritised flexible skills supply through ‘marketised’ training policies, a ‘demand-driven’ migration system and industrial relations arrangements that have undermined workforce development and retention. Despite giving employers several different policy avenues for addressing their recruitment challenges, these arrangements have eroded the labour market’s capacity to address longer-term workforce needs.³¹ This has made industries vulnerable to the disruptive effects of COVID and supply chain crises when certain avenues of skills supply, notable via the migration system, have been less available.

According to the Committee for Economic Development of Australia, temporary skilled visa schemes – the TSS visa and the 457 visa that preceded it – have helped “to fill important skills gaps, with safeguards to prevent the displacement of Australian workers and undermining of

²⁹ See Wright, C.F. 2022. *Bargaining for Skills: Strengthening Coordination of Immigration, Training and Industrial Relations in the Vocational Trades*. Sydney: University of Sydney.

³⁰ Oliver, D. and Wright, C.F. 2016 *Australia’s shifting skills ecosystem: Contemporary challenges in education, training and immigration*. In: Hancock, K. and Lansbury, R., eds, *Industrial Relations Reform: Looking to the Future*. Sydney: Federation Press, pp. 163-186.

³¹ Toner, P. 2018. *How Economics Explains Failure of the Publicly Funded Privately Delivered Training Market*. Melbourne: University of Melbourne.

pay and conditions”.³² Another study found “almost no evidence that outcomes for those born in Australia have been harmed by migration. If anything, there is some evidence that migration has a small positive association with outcomes for the Australian-born”.³³

However, there is reason to believe that temporary visa policies that restrict migrant workers’ mobility and access to government support, collective representation, and permanent residency, which increases their reliance upon maintaining the relationship with their employer, has encouraged some employers to favour the migration system to address their workforce needs rather than investing in training and improving job quality.

The operation of employer-sponsored visas is of particular concern. Single-employer sponsorship underpins the design of the TSS visa. The scheme allows an employer to sponsor a migrant worker to work in a managerial, professional or trades occupation, but only for that employer. If the employment relationship is terminated, the worker has 60 days to find another employer sponsor before they lose their residency rights. This arrangement benefits employers who can use TSS visas to address their skills needs with minimal risk that the sponsored worker will leave. This gives employers a degree of control over temporary skilled migrants that they do not have over other workers.³⁴ By contrast, there are often risks for an employer training non-sponsored workers if the worker leaves before the employer can recover the costs of their training investment. It is important to note that visa sponsorship involves considerable costs for employers. Tying sponsored workers to their employer to ensure the employer can recoup sponsorship costs has been cited to justify the single-employer sponsorship model that limits the ability of workers to leave their employer.³⁵ However, this arrangement can make TSS visa holders more vulnerable to underpayment and mistreatment.³⁶

Furthermore, the single-employer sponsorship model can also result in employers developing preferences for temporary skilled visa holders over other groups of workers. An analysis of the reasons for why employers sponsor temporary skilled visas found that while many did so to address shortfalls of suitably qualified workers, in accordance with the scheme’s objective, large proportions of employers in industries reliant on skilled trades workers used the scheme to recruit workers perceived as having certain ‘behavioural traits’. These ‘behavioural traits’ related to the perceptions of employer sponsors that temporary skilled visa holders had better attitudes, stronger work ethics, and were more loyal and harder working than other groups of workers. The single-employer sponsored nature of the temporary skilled visa scheme was identified as a reason for these perceptions.³⁷

Addressing skill shortages is the main objective of the TSS visa. However, the design of the scheme allows employers to sponsor temporary skilled migrants to address their recruitment difficulties, which may not necessarily be skill shortages. Some labour economists define skill shortages as market-wide shortages of workers at the prevailing wage rate that cannot be

³² Committee for Economic Development of Australia. 2019. *Effects of Temporary Migration: Shaping Australia’s Society and Economy*. Melbourne: Committee for Economic Development of Australia, p. 12.

³³ Breunig, R., Deutscher, N., and To, H.T. 2017. The relationship between immigration to Australia and the labour market outcomes of Australian-born workers. *Economic Record*, 93(301): 255-276.

³⁴ Wright, C.F., Groutsis, D. and Van Den Broek, D. 2017. Employer-sponsored temporary labour migration schemes in Australia, Canada and Sweden: Enhancing efficiency, compromising fairness? *Journal of Ethnic and Migration Studies*, 43(11): 1854-1872.

³⁵ Ruhs, M. 2013. *The Price of Rights: Regulating International Labor Migration*. Princeton: Princeton University Press.

³⁶ Boucher, A. 2019. Measuring migrant worker rights violations in practice: The example of temporary skilled visas in Australia. *Journal of Industrial Relations*, 61(2): 277-301; Coates, B., Sherrell, H., and Mackey, W. 2022. *Fixing Temporary Skilled Migration: A Better Deal for Australia*. Melbourne: Grattan Institute.

³⁷ Wright, C.F. and Constantin, A. 2021. Why recruit temporary sponsored skilled migrants? A human capital theory analysis of employer motivations in Australia. *Australian Journal of Management*, 46(1): 151-173.

addressed by raising wages or improving job quality.³⁸ According to a recent report by the Productivity Commission, “skill shortages should be identified where employers have difficulties in hiring *in the context of wage increases over time* rather than ‘at current levels’. Skill shortages are also subject to employer preferences” (emphasis in original).³⁹

By contrast, recruitment difficulties are when an individual employer struggles to attract workers because of circumstances within their control, for instance, by offering uncompetitive wages and conditions associated with poor job quality.⁴⁰ Only 1% of surveyed employer sponsors of temporary skilled visa holders indicated they would increase wages to address their workforce needs, which suggests that they used the scheme to address recruitment difficulties rather than skill shortages. Even in situations where skill shortages did exist, low employer disinclination to raise wages in response indicates these were unlikely to have been pronounced shortages.⁴¹

The migration system plays an important role in addressing short-term workforce needs, namely unanticipated shortages that cannot be addressed due to the inevitable lag in the training pipeline. However, governments have focused too much on maximising the efficiency of the migration system for employers. This has been achieved through regulations that restrict temporary migrant workers’ mobility and access to representation, which make temporary migrants vulnerable to underpayment and mistreatment.⁴² These regulations have resulted in some employers developing embedded preferences for using temporary visa schemes to address their workforce needs rather than investing in training and improving job quality to attract and retain workers. These problems highlight the need to ensure the migration system complements industrial relations and training policies, rather than undermining them.

Recruiting workers perceived as having superior loyalty, work ethic and attitudes compared to other workers may be legitimate for employers when making decisions regarding new personnel. However, these objectives are inconsistent with the explicit focus of TSS visa regulations for addressing shortages of suitably qualified workers and could lead other workers to be displaced. As such, while TSS visas may be beneficial in the short term for governments and employers seeking to source skills efficiently, if these schemes are not regulated properly, they can have potentially adverse long-term implications for skills investment, for career development, and for employers seeking to transition to more productive business strategies.⁴³

Strengthening *coordination* between industrial relations, education and training, and migration policies should be a precondition of reform of the migration system. This would help to ensure that skills and workforce needs are addressed more reliably. International research demonstrates coordination is necessary to ensure that skills are developed and utilised in a sustainable manner.⁴⁴

³⁸ Healy, J., Mavromaras, K. and Sloane, P.J. 2015. Adjusting to skill shortages in Australian SMEs. *Applied Economics*, 47(24): 2470-2487; Junankar, P.N. 2009. Was there a Skills Shortage in Australia? Bonn: Institute for the Study of Labor.

³⁹ Productivity Commission. 2022. 5-year Productivity Inquiry: A more productive labour market – Interim Report. Canberra: Commonwealth of Australia, p. 14.

⁴⁰ Richardson, S. 2009. What is a skill shortage? *Australian Bulletin of Labour*, 35(1): 326-354.

⁴¹ Wright, C.F. and Constantin, A. 2021. Why recruit temporary sponsored skilled migrants? A human capital theory analysis of employer motivations in Australia. *Australian Journal of Management*, 46(1): 151-173.

⁴² Clibborn, S. and Wright, C.F. 2022. The efficiencies and inequities of Australia’s temporary labour migration regime. *Australian Economic Review*, 55(2): 254-262; Coates, B., Sherrell, H., and Mackey, W. 2022, *Fixing Temporary Skilled Migration: A Better Deal for Australia*. Melbourne: Grattan Institute.

⁴³ Wright, C.F., Knox, A. and Constantin, A. 2021. Using or abusing? Scrutinising employer demand for temporary sponsored skilled migrants in the Australian hospitality industry. *Economic and Industrial Democracy*, 42(4): 937-959.

⁴⁴ Haipeter, T. and Lehndorff, S., 2009. *Collective Bargaining on Employment*. Geneva: International Labour Organization.

Ensuring migrant workers are protected

It is clear from the weight of government, academic, media and union reports from recent years that employer non-compliance with minimum employment standards is a widespread problem in Australia. Like other developed nations, the problem disproportionately impacts temporary migrant workers in low-paid industries like hospitality, retail, and horticulture.⁴⁵

Our own research highlights this. For example, one analysis found that international student visa holders working in hospitality and retail were generally confined to low-wage, underpaid jobs as they had little practical access to legally paid jobs. This study found that 100% of the 1,433 international university students surveyed working part-time as waiters and shop assistants were paid under award minima. Many international students interviewed for the study were aware of the National Minimum Wage, and knew they were being underpaid, but none were aware of their rights under the applicable award including to minimum wages, overtime, and penalty rates.⁴⁶

For most of the 20th century, Australian unions held a central role in setting and enforcing minimum standards through the conciliation and arbitration system. Under that system, unions enjoyed legal status as parties to awards, while high union density and relatively free right to enter workplaces provided them with knowledge of employer non-compliance and opportunity to address it.⁴⁷ This also deterred employers from breaching employment standards given the risk of detection. Unions now have relatively little role as enforcers of employment standards. This has resulted partly from union membership decline but is also due to their active sidelining by governments through changes to industrial relations policy.⁴⁸ The FWO, tasked with primary responsibility for enforcing employment standards, has never been sufficiently resourced to replace the roles that unions once played in enforcing minimum standards.⁴⁹

Workers in large organisations and certain industries have greater access to collective protections. However, those working in smaller businesses and industries with low union density, such as agriculture and hospitality, are much more susceptible to employer non-compliance. This is particularly so in industries characterised by complex supply chains, intermediaries and fragmented business models, such as franchise operations, in which commercial pressures can produce conditions of non-compliance and obscure responsibility over employment standards.⁵⁰ Migration reform therefore must be accompanied by industrial relations reform to ensure that minimum employment standards are properly enforced.

Institutional protections of employment rights must serve temporary migrant workers better. As the FWO has never been adequately resourced to fulfil the primary employment law enforcement function that the state once shared effectively with unions, Australia's labour enforcement function must be adequately funded. The FWO's budget needs to be significantly increased. A strong state labour enforcement agency is an important part of increasing chances of catching non-compliant employers, of encouraging voluntary compliance by increasing employer perceptions of being caught, and of adequately protecting temporary

⁴⁵ Fair Work Ombudsman. 2019. Fair Work Ombudsman and Registered Organisations Commission Entity Annual Report 2018-2019, <https://www.fairwork.gov.au/ArticleDocuments/710/fworoce-annual-report-2018-19-final.pdf.aspx>.

⁴⁶ Clibborn, S. 2021. Multiple frames of reference: Why international student workers in Australia tolerate underpayment, *Economic and Industrial Democracy*, 42(2): 336–354.

⁴⁷ ⁴⁷ Hardy, T. and Howe, J. 2009. Partners in Enforcement? The New Balance Between Government and Trade Union Enforcement of Employment Standards in Australia, *Australian Journal of Labour Law*, 22(3): 306-336.

⁴⁸ Cooper, R. and Ellem, B. 2008. The neoliberal state, trade unions and collective bargaining in Australia. *British Journal of Industrial Relations* 46(3): 532–554.

⁴⁹ Hardy, T. and Howe, J. 2015. Chain reaction: a strategic approach to addressing employment noncompliance in complex supply chains. *Journal of Industrial Relations*, 57(4): 563–584.

⁵⁰ Johnstone R, McCrystal S, Nossar I, et al. 2012. *Beyond Employment: The Legal Regulation of Work Relationships*. Sydney: Federation Press.

migrant workers. Enforcement of employment laws for temporary migrant workers ideally involves more than just the state labour enforcement agency. While significantly increasing the FWO's budget is important, there are numerous non-state actors who the Australian government could better support to be part of the enforcement solution. This involves both their funding and removal of barriers to their effective operation. Unions, community legal centres, other community-based migrant representative groups, and temporary migrant workers themselves should all be given a more prominent role in this regard.⁵¹

Amending legislation to confirm that employment laws apply equally to all employees regardless of visa status and establishing an institutional 'firewall' between the FWO and the Department of Home Affairs is another necessary reform. In 2015, a gap was identified at the intersection of Australia's migration and employment laws relating to undocumented migrant workers that has serious implications for employees, employers, and policy.⁵² Australia is host to a large and growing population of migrants working without authorisation, either working in breach of visa conditions or working without any visa authorisation. These undocumented workers are particularly vulnerable to exploitation in the form of wage theft. Yet, they are potentially not entitled to protection under Australia's employment laws. In addition to the implications for workers, there are broader policy concerns arising from the current system of regulation that effectively rewards employers of undocumented workers who are equally in breach of migration law. In its 2019 report, the Migrant Workers Taskforce recommended that this loophole be closed.⁵³ Left uncorrected, current regulation may in fact be placing downward pressure on employment standards in some sectors and increasing undocumented migrant work. This must be addressed.

A range of additional reforms to employment regulation would also reduce migrant workers' vulnerability to underpayment and other mistreatment. Amendments to the definition of casual employment in the Fair Work Act, introduced by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth), helped employers to classify employees as casual.⁵⁴ Two decisions of the High Court in 2021 helped employers to classify workers as independent contractors.⁵⁵ These increase the risk of misclassification of permanent employees as casual, and of employees as independent contractors, denying rights to protections such as unfair dismissal (both casual employees and independent contractors) and Modern Award minimum standards (independent contractors). Commonwealth legislation should introduce definitions that reflect the realities of working relationships rather than the current emphasis on express terms in contracts often prepared by employers.

To summarise, the migration system and related policy areas are focused disproportionately on maximising 'efficiency', particularly addressing individual employers' short-term workforce needs and reducing welfare expenditure. These policies are insufficiently focused on 'equity' and 'voice' by not adequately ensuring fairness and representation for migrant workers so that employers cannot get a competitive advantage by employing them. It is essential that the migration system achieves a balance between these goals of 'efficiency', 'equity' and 'voice', since all three are equally important goals to guarantee sustainable outcomes in any policy

⁵¹ See Clibborn, S. 2019. Submission to the Attorney-General's Department in response to the September 2019 Discussion Paper titled: Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance. <https://www.ag.gov.au/Consultations/Documents/industrial-relations-consultation-strengthening-penalties-for-non-compliance/submissions/dr-stephen-clibborn-submission.pdf>

⁵² Clibborn, S. 2015. Why undocumented immigrant workers should have workplace rights, *Economic and Labour Relations Review*, 26(3): 465–473.

⁵³ Australian Government. (2016). Report of the Migrant Workers Taskforce, Recommendation 3.

⁵⁴ Stewart, A., McCrystal, S., Riley Munton, J., Hardy, T. and Orifici, A. 2021. The (omni)bus that broke down: Changes to casual employment and the remnants of the Coalition's industrial relations agenda, *Australian Journal of Labour Law*, 34(3): 132-169.

⁵⁵ Riley Munton, J. 2022. Boundary disputes: Employment v independent contracting in the High Court, *Australian Journal of Labour Law*, 35(1): 79-84.

area relating to the labour market,⁵⁶ including migration.⁵⁷ In addition to the reforms of the migration system that we propose in the next section, the following reforms are necessary:

- Reform the education and training and industrial relations system to improve the quality and reliability of the training system. This would help to strengthen workforce attraction and retention by ensuring that wage levels and working conditions are competitive and compensate workers fairly, safeguarding workers' job security, and providing better opportunities for workers to acquire the skills and experience necessary to develop careers. These are necessary measures for improving the responsiveness of labour market policy to skills and workforce needs.
- Strengthen the coordination of industrial relations, education and training, and migration policies to ensure they function together more coherently to address workforce needs. Employer associations and trade unions both have a critical role to play in the coordination of these policy areas.
- Strengthen the wage law enforcement regime by increasing the funding to the FWO and facilitating greater co-enforcement by unions, community legal centres, other community-based migrant representative groups, and temporary migrant workers themselves.
- Create a firewall whereby the FWO (responsible for wage law enforcement) would be prevented from providing any information about migration status of underpaid individuals to the Department of Home Affairs (responsible for migration law enforcement). This arrangement, if well publicised, would increase trust between temporary migrant workers and the FWO, removing a barrier to reporting non-compliant employers. A clear arrangement such as a firewall would address the problems of uncertainty and complexity with the current 'Assurance Protocol' that appears to have contributed to few workers utilising it.
- Introduce definitions of employees, casual employees and independent contractors that reflect the reality of work relationships and reduce the risk of misclassification of workers, including migrant workers.

⁵⁶ Befort, S. F. and Budd. J. W. 2009. *Invisible Hands, Invisible Objectives: Bringing Workplace Law and Public Policy into Focus*. Stanford: Stanford University Press.

⁵⁷ Clibborn, S. and Wright, C.F. 2022. The Efficiencies and Inequities of Australia's Temporary Labour Migration Regime. *Australian Economic Review*, 55(2): 254-262.

4. Reforming the TSS visa and other temporary visas

In this section we outline different options for reforming the Temporary Skill Shortage visa and other temporary visas with work rights. Our main focus is the TSS given its main objective is to address skill shortages and because of the consistent scrutiny that this visa, and the 457 visa before it, has received. However, given problems of migrant worker mistreatment have been more pronounced under other temporary visa schemes – such as the international student visa and the WHM visa – we also propose a wider suite of reforms to the temporary visa system.

Reforming the TSS visa

The TSS visa is designed to address skill shortages. However, the single-employer sponsored nature of the scheme does not allow this goal to be fulfilled adequately. As noted above, the manner of the TSS visa's regulation is more attuned to addressing an individual employer's recruitment difficulties that may be caused by that employer offering uncompetitive wages and conditions, rather than skill shortages experienced by all employers within the same labour market. Furthermore, the restrictions on TSS visa holders' mobility between employers do not allow a sponsored worker to move easily to another employer to utilise their skills more productively. Given that no other group of workers is subject to these types of restrictions on their mobility within the labour market, this feature of the TSS visa also highlights a fundamental inequity in the design of single-employer sponsorship models. This design feature can allow employers to recruit workers over whom they can exert more control compared to workers who are not subject to employer sponsorship. This can provide an incentive for an employer to recruit workers on TSS visas, which diminishes the incentives for them to provide better job quality to improve workforce attraction and retention. Single-employer sponsorship can thus create structural preferences for migrant labour that undermine other mechanisms of workforce development, which can distort the labour market.

In this section we present two alternative models to single-employer sponsorship: industry sponsorship and mobility visas. While we present these as alternatives to the current design of the TSS, their features could potentially be applied to other temporary visas with work rights.

Industry sponsored visas

Several previous reports have proposed replacing single-employer sponsorship model that currently applies to the TSS and other temporary visas with an industry sponsorship model.⁵⁸ The Australian Government's Jobs and Skills Summit Outcomes Document also flagged examining the potential for industry sponsorship of skilled migrants.⁵⁹

Australia has previously had two models that are potentially instructive for designing an industry sponsorship system. The first is Labour Agreements as they operated until the mid-1990s, which were signed jointly between the Department of Immigration and relevant employer associations and trade unions. While Labour Agreements still exist, unions are no longer formally party to them. The version of Labour Agreements that existed until the mid-1990s allowed employers, in agreement with unions, to address identified shortages via largescale sponsorship of skilled migrants.

⁵⁸ For example, Wright, C.F. 2022. *Bargaining for Skills: Strengthening Coordination of Immigration, Training and Industrial Relations in the Vocational Trades*. Sydney: University of Sydney.

⁵⁹ Treasury. 2022. *Jobs and Skills Summit: Outcomes Document*. Canberra: Australian Government, <https://treasury.gov.au/sites/default/files/inline-files/Jobs-and-Skills-Summit-Outcomes-Document.pdf>

The second is the Enterprise Migration Agreements (EMA) model developed by the Gillard government in 2012. The uptake of EMAs when the system was in operation was very limited. This was partly due to political factors and the sharp downturn in mining investment after 2012 which coincided with the launch of EMAs. It is likely that mining firms no longer needed EMAs because their demand for labour was declining, as reflected in the declining rates of 457 sponsorship in the Western Australian mining and construction sectors after 2012. The design of the scheme was otherwise sound, and analogous to successful industry-wide mechanisms for addressing skills needs in Denmark, Germany and other European countries.

The EMA model was built around specific contours of mining construction. EMAs allowed subcontracting employers to engage migrant workers on temporary visas via the project owners or principal contractors, but only if they could demonstrate a shortage of resident skilled workers and only if attempts to recruit workers locally had proved unsuccessful. Project owners and subcontracting employers were required to make defined investments in training directed towards shortage occupations with the aim of reducing reliance on migrant workers.⁶⁰

While the features of mining construction are unique, the EMA's basic design of allowing sponsorship from a peak organisation which retains ultimate responsibility for the worker could be adapted for other industries. For example, in other industries sponsorship could be done by an industry association, instead of a principal contractor, and individual employers, instead of subcontractors, could then engage workers with agreement from the association.

A design flaw of EMAs was that unions were not involved in the sponsorship process. While union membership has sharply declined in recent years, unions nevertheless remain by far the largest representative organisations of the workforce in every industry or occupation that they cover. They are therefore legitimate stakeholders in any area of labour market policy, especially ones directly related to the employment relationship. Unions should be joint sponsors since they are better positioned and have less conflict of interest than employer associations for ensuring individual employers comply with their legal obligations to their workers.

The EMA model could thus be adapted to an industry sponsorship model under which the relevant employer associations and unions would be joint sponsors. Employer associations should have responsibility for allocating workers to individual employers to ensure the visa addresses skill shortages from the employer perspective. Since workers are best positioned to know how their skills can be most effectively utilised, they should have freedom to move between employers so long as their work relates to their area of sponsorship. And unions should have responsibility for ensuring that individual employers are compliant and that workers have representation to ensure the visa does not undermine employment and training standards. Worker mobility would further reduce the risks of mistreatment and underpayment and address skill shortages more effectively.

Mobility visas

Mobility visas are a potential alternative to industry sponsorship, particularly for addressing problems of temporary migrant workers being mistreated. Finland's residency permits, which enable workers to have mobility within their professional field, is one example of how such a system might operate. Under the Finnish system, if a worker is mistreated by their employer, they can leave the employment relationship and gain an "extended permit or a certificate of expanded right to work due to exploitation by employer, [they] can work in any field of [their] choice. In other words, [they] will have an unrestricted right to work".⁶¹ This effectively

⁶⁰ Wright, C.F. 2012. Enterprise Migration Agreements strike the right balance in a tricky policy area. *The Conversation*, 29 May, <https://theconversation.com/enterprise-migration-agreements-strike-the-right-balance-in-a-tricky-policy-area-7288>.

⁶¹ Finnish Immigration Service. 2022. Residence permit or certificate due to exploitation by employer, <https://migri.fi/en/residence-permit-or-certificate-due-to-exploitation-by-employer>.

gives the worker mobility for 12 months before they need to find another sponsor. The scheme strikes a balance between meeting labour market needs while allowing visa holders the ability to obtain more competitive wages and working conditions with another employer in their professional field.

Another option is to model mobility visas on Australia's existing permanent skilled migration program. Since the 1970s the different visa schemes under the permanent program have contributed to Australia's skills base while delivering fair outcomes for visa holders. In stark contrast to the temporary visa schemes, there have been relatively few reported cases of mistreatment of permanent skilled migrants since their inception.⁶² The main visas in the permanent skilled migration program – Employer Nomination Scheme (subclass 186) visa, the Skilled Independent (subclass 189) visa and Skilled Nominated (subclass 190) visa – or a scheme that combines elements of different permanent skilled visas, could form the basis of a design of a new temporary skilled visa.

For example, the entry criteria for a new 'Temporary Skilled Employer Nomination Visa' could be modelled on the Employer Nomination Scheme (subclass 186) visa. This would require applicants to meet the following existing criteria, with the possibility of varying some criteria to widen the number of eligible applicants:

- Be qualified to work in an eligible skilled occupation
- Have 3+ years relevant work experience
- Have nomination from an Australian employer, but with no obligation that the visa holder maintain employment with that employer; this would give the employer the first opportunity to employ the visa holder but the visa holder's ability to seek employment elsewhere would give the employer an incentive to provide competitive wages and conditions and to not mistreat the visa holder
- Be aged under 45 years
- Have competent English language

Similarly, the entry criteria for a new 'Temporary Skilled Independent visa' could be modelled on the Skilled Independent (subclass 189) visa. This would be based on a points test, with the possibility of have a slightly lower points qualification threshold than the subclass 189 visa, to widen the number of eligible applicants. As with the subclass 189 visa, points could be awarded for the following existing criteria:

- Age (25-33 year olds given most points; no points for those 45+ years) (15-30 points)
- English language skills (for 'proficient' and 'superior' English; no points for 'competent' English but would be a minimum precondition) (10-20 points)
- Skilled employment experience (for 3+ years; max points for 8+ years) – in a nominated skilled occupation for 20+ hours/week (5-15 points)
- Australian employment experience (for 1+ years; max points for 8+ years) (5-20 points)
- Educational qualifications (Diploma / skilled trade qualification (minimum precondition) or higher) (10-20 points)
- Specialist education qualification (Master's or higher in a STEM field) from Australian institution (10 points)
- Australian study requirement (5 points)
- Professional year in Australia (5 points)
- Credentialed community language (5 points)
- Study in regional Australia (5 points)
- Partner skills (10 points)

⁶² Wright, C.F. and Clibborn, S. 2020. A guest-worker state? The declining power and agency of migrant labour in Australia, *Economic and Labour Relations Review*, 31(1): 34–58.

Finally, the entry criteria for a new 'Temporary Skilled Nominated visa' could be modelled on the Skilled Nominated (subclass 190) visa. This would be based on sponsorship from a state government and a points test, with the possibility of having a slightly lower points qualification threshold than the subclass 190 visa to widen the number of eligible applicants. As with the subclass 190 visa, applicants would have to meet several core requirements and satisfy the points test based on the existing criteria below:

Core requirements:

- Be qualified to work in an eligible skilled occupation
- Commit to living in a nominating state for a minimum period (e.g., 2 years)
- Have an employment contract (a precondition for the 190 visa in some states)
- Satisfy the points test (below)

Points given for:

- Age (25-33 year olds given most points; no points for those 45+ years) (15-30 points)
- English language skills (for 'proficient' and 'superior' English; no points for 'competent' English but this is a minimum precondition) (10-20 points)
- Skilled employment experience (for 3+ years; max points for 8+ years) – in a nominated skilled occupation for 20+ hours/week (5-15 points)
- Australian employment experience (for 1+ years; max points for 8+ years) (5-20 points)
- Educational qualifications (Diploma / skilled trade qualification (minimum precondition) or higher) (10-20 points)
- Specialist education qualification (Master's or higher in STEM field) from Australian institution (10 points)
- Australian study requirement (5 points)
- Professional year in Australia (5 points)
- Credentialed community language (5 points)
- Study in regional Australia (5 points)
- Partner skills (10 points)
- Invited to apply by a nominating State or Territory government agency (5 points)

Another option is to have a single Temporary Skilled Mobility visa using a points test that combines elements of these existing schemes. For example, in 2016 the Productivity Commission recommended a job offer from an employer – or potentially nomination from a state government – in an area of identified shortage, qualifications, age and English language ability as among several criteria be used to determine the points awarded to applicants under a single permanent skilled visa.⁶³ A single Temporary Skilled Mobility visa could be designed along similar lines.

It is important that problems with the current migration regime to be addressed in the creation of any new visa scheme. Following the criteria outlined above, the proposed Temporary Skilled Mobility visa should meet the following preconditions:

- Mobility – visa holders should have the freedom to move between employers. Even if nomination from an employer or a state government or a job offer is a precondition or a qualification criterion for such a visa, there should be no obligation that the visa holder maintain employment with that employer. This would give the nominating employer the first opportunity to employ the visa holder but the visa holder's ability to move to alternative employment would give the employer an incentive to provide competitive wages and conditions and to not mistreat the visa holder.

⁶³ Productivity Commission. 2016. Migrant Intake into Australia: Inquiry Report, Australian Government: Canberra, pp. 459-462.

- Institutional protections – currently weak institutional protections contribute to problems of temporary visa holders being mistreated. These deficiencies with institutional protection must be addressed as a precondition for visa reform. This should be accompanied by an induction process administered by the FWO involving union participation to ensure that visa holders have awareness of their rights.
- Residency status – visa holders should have a clear and defined pathway to permanent residency (e.g., after three years). Current restrictions on temporary migrants’ access to social security, subsidised public services and post-arrival support should be loosened.
- Skill thresholds – If skill shortages are used as a criterion for visa qualification, these should be independently verified by Jobs and Skills Australia with joint oversight from relevant employer associations and trade unions. Before an occupation is eligible for points attainment or employer / state government nomination, Jobs and Skills Australia should assess the utilisation and adequacy of other mechanisms aimed at addressing workforce needs, such as structured training programs, active labour market programs and industrial relations arrangements that determine job quality and thereby the attractiveness of occupations.

Table 1 outlines how incorporating these measures into a proposed Temporary Skilled Mobility visa could address the deficiencies of existing temporary visa schemes.

Table 1 Designing a Temporary Skilled Mobility visa to address the deficiencies of existing temporary visa schemes

	TSS	PALM	Student	WHM (88-day)	Proposed Temporary Skilled Mobility visa
Permanent residency	Some – pathway to permanency but only for some visa holders	No	No	No	Yes – if path to permanency and if restrictions on government economic support are loosened
Mobility	No	No	Officially yes –but dependency on employers if breach of visa work hour limitations	Officially yes –but dependency on employers for evidence of work towards 88 days	Yes – if workers are free to move between employers
Skill thresholds/ labour market assessment	Some – skill thresholds but no effective labour market assessment	No	No	No	Yes – if there is independent assessment of labour market needs
Institutional protections	Some – but FWO responsible for investigating both wage and migration law compliance	Some –audits for wage law compliance, union induction	No	No	Yes – if current problems with institution protections are addressed and if union induction is introduced

Broader reforms of the migration system

Given that temporary migrants in Australia are more likely than citizens and permanent residents to suffer underpayment of wages and other mistreatment by employers, we propose several other policy reforms to address this. As noted above, Australia's migration regime exposes temporary migrants to wage theft and other forms of mistreatment at work due to current restrictions on mobility, residency status, skill thresholds and institutional protection. Therefore, we recommend that these four factors form the guiding principles of reform to the temporary migration system, as outlined below:

- Reforms should recognise the benefits to social inclusion of permanent migration and certainty created by a clear temporary-permanent migration pathway. This should apply to all temporary visa classes with work rights, not only the TSS visa. Residency and citizenship are key determinants of whether migrant workers are likely to be treated fairly or unfairly by their employers. Temporary residency necessarily restricts the agency of migrant workers because it limits their capacity to find alternative employment if they are being mistreated and may entail limited access to public benefits that can increase their financial dependence on their employer. By contrast, permanent residency and citizenship greatly enhance migrants' ability to access their employment and social rights and to exit from exploitative employment relationships without fear that this could lead to deportation. Current restrictions on temporary migrants' access to social security, subsidised public services, and post-arrival support needs reconsideration. These restrictions serve to socially marginalise many people who wish to contribute to and build a life in Australia and compound their potential vulnerability to mistreatment in the workplace.⁶⁴
- Reforms should ensure that temporary migrant workers maintain or are granted mobility between employers so they can exit from exploitative arrangements currently facilitated by their dependence upon employers created by some visa arrangements. This should extend beyond the TSS to include the PALM and other visa schemes that produce a controlled and immobile migrant workforce. Such arrangements ignore "the profound inequality of non-citizen workers – who depend on employers in order to even enter or remain in the labour market".⁶⁵ Such conditions typically grant employers a significant degree of power over migrant workers, which can result in these workers being exploited.
- The labour market needs that the migration system is tasked with addressing should be independently verified by Jobs and Skills Australia with joint oversight of relevant employer associations and trade unions. This body should be tasked with assessing existing supply and demand within the Australian labour market and regional labour markets and the appropriate roles for domestic institutions – such as the education training and industrial relations systems – and the migration system in addressing skills and workforce needs. Using employer demand as a proxy for determining labour market needs can serve to distort the labour market in the long-term, by encouraging employers to develop structural preferences for migrant labour in ways that can erode opportunities for the local workforce. As Professor Martin Ruhs from the European University Institute argues, skilled migration policies must be designed with reference to a broader range of policy principles other than simply "employer interests".⁶⁶ As well as independently verifying employer claims that migration is

⁶⁴ Wright, C.F., Groutsis, D. and Kaabel, A. 2022. Regulating migrant worker temporariness in Australia: the role of immigration, employment and post-arrival support policies. *Journal of Ethnic and Migration Studies*, 48(16): 3947-3964.

⁶⁵ Dauvergne, C. and Marsden, S. 2014. Beyond numbers versus rights: Shifting the parameters of debate on temporary labour migration. *Journal of International Migration and Integration*, 15(3): 528.

⁶⁶ Ruhs, M. 2013. *The Price of Rights: Regulating International Labor Migration*. Princeton: Princeton University Press.

needed to fill skill shortages, Australian governments must focus more attention on policy alternatives for utilising the existing and potential domestic supplies of skilled labour, such as structured training programs, active labour market programs and requirements by employers in low-wage industries to improve job quality and thereby the attractiveness of work in these industries.

- Institutional protections of employment rights must serve temporary migrant workers better. Australia's labour enforcement function must be adequately funded. The FWO's budget needs to be significantly increased. A strong state labour enforcement agency is an important part of catching non-compliant employers, of encouraging voluntary compliance by increasing employer perceptions of being caught, and of adequately protecting temporary migrant workers. Enforcement of employment laws for temporary migrant workers ideally involves more than just the state labour enforcement agency. While significantly increasing the FWO's budget is important, there are numerous non-state actors who the Australian government could better support to be part of the enforcement solution. This involves both their funding and removal of barriers to their effective operation. Unions, community legal centres, other community-based migrant representative groups, and temporary migrant workers themselves should all be given a more prominent role in this regard.⁶⁷

⁶⁷ Clibborn, S. 2019. Submission to the Attorney-General's Department in response to the September 2019 Discussion Paper titled: Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance. <https://www.ag.gov.au/Consultations/Documents/industrial-relations-consultation-strengthening-penalties-for-non-compliance/submissions/dr-stephen-clibborn-submission.pdf>

5. Conclusions and summary of recommendations

The migration system has a vital role to play in addressing the challenges and opportunities that Australia faces in the coming decades. However, the system currently is not aligned with other labour market policies tasked with addressing skills and workforce needs and is poorly equipped with ensuring that migrants are protected.

The migration system is preoccupied with short-term economic efficiency objectives. Policymakers have aimed to maximise the fiscal benefits – by attracting high income earners, on one hand, and by reducing migrants' access to the welfare and subsidised public services, on the other – and to address individual employers' immediate workforce needs. Despite the success of these reforms in improving the 'efficiency' of Australia's migration system, they have largely disregarded the importance of 'equity' and 'voice', which are equally important labour market policy goals.

Visa schemes that restrict temporary migrants' social rights and access to representation, and that empower employers in ways that heighten these workers' vulnerability to mistreatment, exemplify the fundamental inequities between temporary visa holders and Australian permanent residents and citizens. Despite net economic benefits delivered by Australia's skilled migration policies, the design of migration policies has directly contributed to widespread underpayment and mistreatment of temporary migrant workers.

Our recommendations focus primarily on reform of the Temporary Skill Shortage visa as a key component of Australia's migration system explicitly tasked with addressing skills needs. We have provided various options for potential reform, including what an industry sponsorship model might look like. Our main recommendation is the creation of a Temporary Skilled Mobility visa scheme modelled on Australia's existing permanent skilled migration program. This is the most effective way the migration program can address Australia's short-term skills and workforce needs in a manner complementary to other labour market policies while ensuring that migrants' rights are protected.

We emphasise the importance of addressing problems with the current migration schemes in the creation of any new visa scheme. To ensure this, the proposed Temporary Skilled Mobility visa should meet the following preconditions:

- Residency status – visa holders should have a clear and defined pathway to permanent residency and access to social security, subsidised public services, and post-arrival support.
- Mobility – visa holders should have the freedom to move between employers.
- Skill thresholds – before a particular occupation is eligible for points attainment or employer / state government nomination under a new visa scheme, Jobs and Skills Australia should assess the utilisation and adequacy of other mechanisms aimed at addressing workforce needs, such as structured training programs, active labour market programs and industrial relations arrangements that determine job quality and thereby the attractiveness of occupations.
- Institutional protections – deficiencies with institutional protection must be addressed as a precondition for visa reform.

We recommend these preconditions – providing support for temporary migrants and a guaranteed pathway to permanent residency, enabling worker mobility, independently verifying skills and workforce needs, and addressing deficiencies with institutional protection – form the guiding principles for any reforms to the wider migration system, including to any existing or new temporary visas.