The permanent shift to temporary migration

Peter Mares

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A serious debate about this fundamental shift in policy, and its implications, has barely begun, writes Peter Mares

LAST MONTH the owners of a Melbourne restaurant specialising in the hawker style food of Penang were fined $180,000 for ripping off a Malaysian chef brought to Australia on a temporary work visa. The chef had been paid less than $10,000 for eighteen months' work at the Box Hill eatery. Magistrate Kate Hawkins described the underpayments as "staggering" and "beyond belief."

But they are all too believable. A trawl through newspaper archives and media releases from the Workplace Ombudsman reveal a string of similar cases involving temporary migrants. Aged care nursing assistants from the Philippines had large sums of money unlawfully deducted from their wages for rent, agency fees and airfares, and for training that was never provided. The Chinese employee of a packaging company was pressured back to work early after breaking his wrist in a workplace accident and then sacked after injuring his other arm. Construction workers in Western Australia were pressured into signing undated individual work agreements they’d had no chance to read. A Canberra chef was abducted by his boss after complaining to the immigration department about being overworked and underpaid, and would have been spirited out of the country had not the police pulled over the car speeding him towards Sydney airport.

In one of these cases a court was told how the employer had “gloated” that foreign workers “would sign anything because they were frightened of being sent back overseas.” In other words, temporary migrants are vulnerable because of their visa status. This vulnerability is not shared equally by all foreign workers – a physician from Texas may feel more able to tell a boss where to go than a welder from Guangzhou – but the pool of migrant labour in which unscrupulous employers can fish for vulnerable staff is now very large.

As of June 2008 there were around half a million temporary migrants with work rights in Australia – almost 5 per cent of the total labour force. The largest group, numbering around 320,000, is made up of international students, who are generally permitted to work up to twenty hours a week during term and full-time during semester breaks. The second group – around 130,000 people – consists of temporary 457 visa holders and their dependents (many of whom, as spouses, also have work rights). And the third group is made up of working holiday makers, who number around 90,000. All three groups have grown dramatically in recent years.

This is a transformational shift in Australian migration policy. Yet it is rarely discussed outside a limited circle of demographers and migration specialists. Media coverage of the issue has been largely confined to individual horror stories and political leaders rarely mention it in their public comments.

Of the three categories, the temporary 457 visa holders present some of the thorniest issues for government, especially in the midst of the economic slowdown. Initiated by the Keating government and introduced in 1996 by the Coalition, the 457 visa allows employers to sponsor skilled workers from overseas for between three months
and four years. Employers qualify as “sponsors” by demonstrating a “satisfactory record of training Australian workers” and by indicating how the overseas workers will benefit Australia – for example, by creating employment or expanding trade. The employer must pay wages at or above a minimum level determined by the Commonwealth.

What was initially intended as a way of plugging temporary skills gaps has become a permanent feature of the Australian labour market. Last financial year, for the first time, the number of visas issued to temporary foreign workers under the 457 scheme outstripped the number of visas granted to permanent skilled migrants. There is every possibility that this will happen again: although the permanent skilled intake is capped, the employer-driven 457 visa scheme is not.

The market for 457 visas was expected to rise and fall in line with economic needs, and indeed there has been a sharp fall in new applications since the onset of the global recession. But when growth returns to the economy numbers will rapidly go up again. Employers are likely to bring in temporary workers far more swiftly than the government lifts its annual quota for permanent migrants. This underlines another profound shift in Australia’s migration program: from government planning, control and target setting to a flexible system in which numbers fluctuate according to employer demand. In effect, the Commonwealth is surrendering to business a measure of control over migration flows.

The other important component of this structural change is that Australia is moving towards a “two step” migration program, in which permanent settlement is preceded by a period of temporary residence as either a migrant worker or an international student. This “try before you buy” system of migration can have advantages for both the migrant and the receiving country, but it also has a potential downside. If temporary migration does outstrip permanent migration in future, then there may be a mismatch between the settlement places available and the number of aspiring residents who will have already invested significantly – both financially and psychologically – in a life in Australia.

Initially the 457 visa was used almost exclusively to bring in professionals – IT specialists and medical staff, for example – but with time the range of temporary workers has broadened to include such trades as welding and baking and lower skilled workers including aged care assistants and meatworkers. The health sector remains the biggest employer of 457 visa holders, with medical professionals often employed by state governments, but manufacturing, construction, rental hiring and real estate and mining have now all overtaken the IT sector as major employers of temporary migrants, with accommodation and food services not far behind. The range of source countries has broadened too. Although more than one in five primary visa holders comes from the United Kingdom, the next biggest source countries are now the Philippines, India, China and South Africa.

This trend prompted the Australian to report breathlessly that “workers from India, China and the Philippines” were “flooding into Australia’s hospitals, factories and construction sites” and changing “the face” of the nation’s workplaces. In rather more sober tones, the Financial Review noted that Indian nationals dominate the ranks of IT workers entering Australia and quoted an industry representative saying it was “a sad reality that most 457 visa holders brought in from India were hired to undercut Australian labour costs.”

Blue collar unions have expressed similar concerns about temporary migrant workers, particularly with the fall in economic growth and the rise in unemployment. The national secretary of the CFMEU has called on the government to immediately halt 457 visas in the construction industry to “save Australian jobs.” In the mining sector the union has voiced concern that 457 visa holders are being kept on when Australian citizens have been retrenched. One prominent critic of the scheme has called for visa rules to be changed so that employers are forced to “give priority to retaining Australian workers over 457 migrants.”

There is a pattern here. The concern swirling around the 457 visa program is not about Irish nurses or English doctors pushing down wages and taking jobs in Australian hospitals; the focus is on workers from “developing countries” like China, India and the Philippines. Their “temporary” status is used to raise questions about the legitimacy of their presence in the Australian workforce. Ironically, the cumulative impact of media reports on abuses
in the 457 scheme – often written with a compassionate focus on the sorry fate of the individual being exploited – probably contributes to a general view that temporary workers disrupt the normal Australian order.

The problem is a structural one. Given the disparities in power between first world employers and third world workers, abuses of the 457 program are all too predictable. In 2007-08, 192 employers were sanctioned and 1353 were formally warned for breaching the rules of the 457 visa program – a sharp jump from the previous year, when 95 sanctions and 313 formal warnings were issued. It is debatable whether this means, as the Australian concluded, that abuses under the scheme are “multiplying” or whether it’s simply the more pro-active enforcement and monitoring regime introduced by the Rudd government identifying more cases. Either way, the figures remain small enough for the current immigration minister, Chris Evans, to say (just as his predecessors did) that “the vast majority of employers did the right thing.”

But in a government-commissioned review of the integrity of the 457 scheme, industrial relations commissioner Barbara Deegan disputed the view that departmental statistics provide any real indication of the scale of abuse. She concluded that cases of exploitation brought to official attention “are a very small part of the overall problem.”

Employer groups argue that there is no hard evidence of such exploitation. In response Deegan pointed to the “precariousness” situation of 457 visa holders, which makes such data very difficult to obtain. Temporary migrants are “reluctant to make any complaint which may put their employment at risk,” she wrote. Deegan was convinced that “concerns about exploitation are well-founded, particularly in relation to visa holders at the lower end of the salary scale” – that is, the tradespeople and other less qualified workers who make up around a fifth of all 457 visa holders.

So, at one level, the union concerns are accurate: the 457 scheme does risk undermining hard won conditions in Australian workplaces because temporary workers, particularly blue collar workers from non-English speaking backgrounds, are unable or unwilling to stand up for their rights. The question is, how do we respond to this problem? Should we end the scheme or change its operation?

Since it came to office the Rudd government has attempted to assuage union concerns about the 457 scheme by tinkering with the rules and implementing some of Deegan’s recommendations. The government has developed a new minimum salary scale, tightened up skills assessments and implemented tougher checks on employers’ past labour practices and on their future commitment to training local workers. It has also raised the bar for the English language proficiency of 457 migrants, partly on the assumption that workers with better English are more likely to understand their entitlements and complain when they are breached.

But many of Deegan’s more far-reaching recommendations have been overlooked – recommendations which might go further towards making the 457 scheme fairer and more ethical.

THE CONCEPT of an “ethical temporary migrant labour scheme” might sound like a contradiction in terms. Whether it is the Bracero program that brought Mexican farm workers to the United States in the 1940s and 50s, or the West German Gastarbeiter program of the 1960s and 70s, or the current employment of Filipina maids and Indonesian construction workers in Singapore, foreign workers have either been abused or they have outstayed their official welcome. More often than not, both of these things have occurred.

The American political philosopher Michael Walzer has argued that anything short of permanent migration is morally unacceptable. Temporary labour schemes are the ethical equivalent of a “family with live-in servants.” If the citizens of democratic societies want to bring in workers then they “must be prepared to enlarge their own membership: if they are unwilling to accept new members, they must find ways within the limits of the domestic labour market to get socially necessary work done.”

Walzer’s view accords little agency to migrants. They are “servants” rather than masters of their own destiny. In his elegant memoir Leave to Remain, the Lebanese-born engineer Abbas El-Zein describes his migration as an “implicit
contract" where the terms were economic rather than cultural: he had scientific skills that Australia wanted. Yet when he tells a dentist where he is from, the dentist’s immediate response is, “Lucky you.” El-Zein feels “summarily reduced to a dumb abstraction: a poor man from the Middle East lucky enough to find a better life in Australia.” He goes on: “Had I been an Australian living in Nepal or an Englishman living in the Caribbean, I would probably have been seen as an ‘adventurous’ man. The word ‘lucky’ would not have come up.”

El-Zein’s comments remind us that there are about one million Australians living and working abroad at any one time. These Aussie expats are migrant workers too. Are they just “live-in servants”? Walzer seems to assume that all foreign workers would prefer to become permanent residents of their host nation, yet the vast majority of Australians working overseas say that they intend to return to Australia sometime in the future.

The geographer Graeme Hugo points to an interesting contrast between Thai and Indonesian migrant workers in Peninsular Malaysia. The Thai–Malaysia border is porous, with Thai workers freely able to move between the two countries, which they do, in a pattern of circular migration, working in Malaysia but not settling there. Meanwhile, Indonesians seeking to work in Malaysia face greater restrictions, so if they manage to get in they tend to try to stay permanently. In other words, the structure of a migration program, and freedom of movement, can have a dramatic impact of the choices migrant workers make.

Of course Walzer’s comments point to the fundamental imbalance of power and the resulting inequities inherent in temporary migration between the first and third worlds. An obvious symptom of that inequality is the fact that migrant workers pay local taxes but do not enjoy the full benefits of government services in return.

Nevertheless, there is a strong case for pursuing the ideal of an ethical (or at least a much more ethical) temporary migrant labour scheme. Temporary worker schemes are a fact of life. They exist around the world, and they are not all equally bad. In fact Australia’s 457 system is far better than most. In Singapore, for example, “unskilled temporary migrant workers do not have the right to marry, or cohabit, with a Singapore citizen or Permanent Resident. Female non-resident workers have to undergo mandatory pregnancy tests every sixth months, with the threat of immediate deportation in the case of a positive test result.” Many labour migration schemes are restricted to single workers. Bangladeshi labourers or Sri Lankan maids working in the Gulf States generally travel alone and are often separated from family for years at a time. By contrast, 457 visa holders can bring members of their immediate family with them to Australia and their spouses are also allowed to work.

Despite the manifold problems with temporary labour schemes, workers continue to join them – especially workers from low wage countries with high levels of unemployment. As the saying goes, “there is only one thing worse that being exploited in a foreign country, and that is not being exploited at home.” Migrant workers are willing to trade off individual rights for economic gains. In fact, as Martin Ruhs writes, “given the large income inequalities between high and low income countries” migrant workers may be willing to do so “to an extent that is likely to be considered unacceptable in most liberal democracies.” To put it another way, temporary labour schemes increase migrant workers’ choices by “offering them the opportunity to legally earn higher wages abroad at the (potential) cost of restricting some of their rights.” We may find such tradeoffs unpleasant to contemplate, but calculations like these are made daily by millions of workers around the world.

In this context the attempt to develop well managed and carefully regulated temporary migration schemes becomes not only desirable but also essential, because it could result in real improvements in the lives of migrant workers. As Ruhs comments: “Labour migration policymaking is an inherently moral exercise that requires a discussion of values and ethics, not just facts.” The Swiss playwright Max Frisch made the same point more eloquently: Man hat Arbeitskräfte gerufen, und es kommen Menschen (“We called for labour power and we got human beings”).

As Philip Martin notes, a person is not a car: “A car crossing a border remains a car, with foreseeable economic and environmental impacts. People change their intentions, status and impacts, as when migrants intending to be temporary sojourners become permanent residents and then seek to change socio-political conditions in their new countries of residence – importing workers also means importing new languages, cultures and ideas, and the means
As Martin’s comment suggests, the ethics and values involved in human movement refer not only to the treatment of migrant workers. The rights and interests of the citizens in the receiving country also need to be considered. Will local workers be displaced from jobs? Will they be priced out of the housing or rental markets? Will their wages and conditions be undermined by temporary migrants willing to work longer hours for less pay?

Arguing for an approach that is both “realistic” and “idealistic,” Ruhs has developed some basic principles that should be employed if temporary migrant labour schemes are to be ethical. Following his lead we can evaluate key aspects of Australia’s 457 program by setting out three core principles.

**Principle 1: Temporary labour migration should not displace local workers or undermine their wages and conditions**

In Australia the key mechanism used to realise this principle has been “mandated minimum salary” levels. These minimum payments – set at award wage rates or above – are intended to provide a price signal to encourage employers to train and hire Australians first, given that recruiting overseas workers entails extra costs. But they have been an imperfect mechanism for protecting local jobs and conditions because the minimum salary level can fall well short of the prevailing wage. Take the example of a mine worker in outback Australia receiving the above-award wages and remote area living allowance needed to entice him or her to leave a major coastal city. In such a case, the mandated minimum salary for a temporary foreign worker from the Philippines would fall well below the prevailing wage.

The Rudd government has recognised this problem. In line with Barbara Deegan’s recommendations it has introduced a requirement that employers pay temporary foreign workers at “market rates” from September this year. In theory this should address a fundamental design flaw in the 457 scheme, though its practical implementation could prove problematic.

**Principle 2: Foreign workers should not be “permanently temporary”**

Temporary migration often involves a trade off between economic opportunity and civic rights. In return for a job at Australian rates of pay, workers from lower wage countries will accept that they do not enjoy the same rights as Australian citizens. But it is clearly undesirable for this situation to continue indefinitely, otherwise we create a class of residents who are “permanently temporary” – who live in Australia, pay Australian taxes and are subject to Australian laws but are excluded from the social security net and the democratic franchise.

The obvious policy response to this problem is to create pathways through which temporary workers can become permanent residents. Indeed, such a path already exists within the 457 scheme. But how wide is the path?

It is instructive to look at what happened to the people issued with 457 visas in the 2003–04 financial year, visas that would have all expired by June 2008. Almost half of those temporary migrants (17,840 people or 48 per cent) are now permanent residents of Australia. In other words, the 457 visa program has become, for many, the successful first step in a two-step migration program.

But there are pitfalls. Take the German doctor, Bernhard Moeller. He came to Australia on a 457 visa and moved with his family to Horsham in Western Victoria, helping to fill the gap in regional medical services. Happy with his new life, Dr Moeller applied to become a permanent resident, but was rejected because his thirteen year old son has Down Syndrome and is considered likely to be a future burden on the Australian taxpayer. After a public outcry, Senator Evans intervened to grant the visa. The point here is not that immigration department officials are mean and need a change of culture. The department was following the rules set down by parliament: rules that welcome a doctor with a Down Syndrome son as a temporary worker but not as a permanent migrant.

There are likely to be similar cases in future, and one hopes that a Vietnamese slanagerman or a Fijian nurse would...
receive the same groundswell of community support and benefit from the same ministerial intervention as the good doctor in Western Victoria.

Another structural flaw with two step migration is that it puts much greater power in the hands of employers because the vast majority of 457 visa holders need the active support of their boss if they are to gain permanent residency. This gives bosses huge leverage over temporary migrant workers who want to stay permanently in Australia, because those workers will not want to do anything that might endanger their sponsorship. As Commissioner Deegan noted, 457 visa holders who “have aspirations towards permanent residency” are particularly “vulnerable to exploitation as a consequence of their temporary status.”

Deegan’s response was to suggest that the pathway to permanency be broadened a little by giving “greater weight to the length of time” a temporary visa holder was worked in Australia and making it easier for them to apply as an independent migrant. Time worked in Australia would boost the applicant’s score in the immigration points test. They should also be allowed to apply for permanent residence onshore (that is without being forced to leave Australia first), according to Deegan. Neither of these recommendations has been taken up by government.

But the biggest problem in the two step migration regime is only just emerging. The fact that almost half the migrants issued 457 visa in 2003–04 are now permanent residents suggests that the pathway to permanency is reasonable wide and accessible. Unfortunately the immigration department could not tell me how many 457 visa holders from that year, or from any other year, had applied for permanent residency and been rejected.

Simple mathematics tells us that the number of rejections must rise. The number of 457 visas issued last year was almost triple the number issued in 2003–04, yet the size of the permanent migration program is now falling. In other words, in future years there will be more applicants for permanent residency and fewer places. Added to this will be the growing competition for those fewer places from the increasing numbers of international students graduating from Australian universities. These two groups already account for around 40 per cent of the permanent visas granted in the skilled migration scheme. As that proportion increases, competition for permanent settlement will intensify, increasing the extent to which temporary migrants are beholden to their employers for sponsorship and, as a result, vulnerable to exploitation.

If temporary migrants who are keen to stay in Australia fail to gain permanent resident status, what will they do? Many, presumably, will seek a second four-year visa. Of the 457 visas issued so far this year more than one in five has gone to existing 457 visa holders. After eight years in Australia, how many temporary migrants will seek a third visa? Or a fourth visa after twelve years? Will they become “permanently temporary,” residents without rights?

Senator Evans has recognised this emerging issue. He responded by giving greater emphasis to employer nominations within the permanent migration scheme in order to increase the number of places granted to people who are “already here on temporary visas.” The government is “encouraging employers to permanently sponsor those [temporary] workers in occupations whose skills cannot be met by local labour.”

But since making that change the minister has twice cut the number of permanent places on offer in the skilled migration program. The mathematical reality is that there will be many more applicants than settlement spots. Not only that, but Senator Evans has also trimmed the range of professions on the “critical skills list,” removing building and manufacturing trades “such as bricklayers, plumbers, welders, carpenters and metal fitters.” The list now consists almost entirely of health and medical, engineering and IT professions. Since applicants for permanent residency must either have a profession on the critical skills list or be sponsored by an employer, the combined effect of these changes will be to make it much harder for tradespeople and other lower skilled 457 workers to make an independent application for permanent residency. If they wish to settle permanently in Australia, these workers will be more reliant than ever before on sponsorship from their employer, making them vulnerable to pressure to perform unsafe work, accept low wages or suffer poor conditions without complaint.

Commissioner Deegan recognised this problem too, though her response was rather different. She recommends
that temporary workers be allowed a maximum stay of eight years. After that, those who fail to gain permanent residency must leave Australia.

To illustrate the kind of complexities that will emerge the longer migrant workers remain in Australia on a temporary basis, imagine for a moment the situation of a child of a 457 worker who comes here at age ten. At age eighteen, having spent almost half her life in Australia, she can only go to university if she pays the full fees of an overseas student. If she chooses to work, then she may no longer qualify as a dependent under the terms of her parent’s visa and risks losing her right to remain in Australia. She could attempt to secure a 457 visa in her own right, but without a tertiary qualification or trade skill that would prove difficult. In response to this type of scenario Deegan recommends granting employment rights to migrants’ dependent children from working age to the age of twenty-one. Again this recommendation has not been discussed publicly by the government.

**Principle 3: The rights of migrant workers must be protected**

In theory, 457 workers enjoy the same rights and conditions as Australians, but in practice the same protections are not guaranteed. Take unfair dismissal. Under the visa rules, a temporary migrant who is unemployed for more than twenty-eight days will be liable to have their 457 visa cancelled. So the sacked worker is likely to lose their right to remain in Australia long before an unfair dismissal case is ever resolved. Of course the sacked worker can look for a new job, but he or she will have only twenty-eight days to find an eligible employer who is willing to take on a sponsor’s obligations.

In practice, the immigration department has not enforced the twenty-eight day rule rigidly, but migrant workers would be unwise to rely on the department to bend its rules in their favour. And the minister has recently indicated he expects the twenty-eight day period to be fairly rigidly enforced as the job market tightens.

One of key sources of migrant vulnerability under temporary labour programs is the requirement that they can only work for a specified employer. If a residence visa is tied to a particular job with a particular boss, then migrant workers are less likely to protest against or expose exploitation. If migrant workers are to be protected, they must enjoy some level of mobility within the labour market: in other words, they must be able to withdraw their labour from one employer and seek out another who will treat them more fairly. Currently, a worker who wants to escape an abusive boss must find a new job before leaving the existing one, otherwise they risk losing their right to stay in Australia. This hardly amounts to mobility in any practical sense.

This is perhaps the single most important area where change could and should occur. One of Barbara Deegan’s recommendations was that visa holders be allowed up to ninety days to find a new sponsor. In his public responses to her report, Senator Evans has so far made no mention of this recommendation. Neither, as far as I can tell, has the Australian labour movement.

THE PUBLIC DEBATE about migration in Australia still lags well behind the dramatic changes in policy. Barbara Deegan’s report on the 457 visa scheme shows the complexity of the issues at stake but her most far-reaching proposals have received little public airing. Trade union leaders worry about the erosion of wages and conditions by “cheap” migrant labour while simultaneously professing concern for the welfare of the migrant workers themselves. But the concept of solidarity with those migrant workers seems to have fallen by the wayside. Instead of arguing for an expansion of migrant rights by supporting some of the more substantial reforms proposed by Commissioner Deegan, union leaders have campaigned for the scheme to be wound back or for a rule under which migrant workers are sacked before locals.

The rest of us still largely behave as if we lived in the twentieth century, when migrants came by sea and stayed for good. We endure periodic panics when boats carrying asylum seekers to our shores from Indonesia and we agonise about racism when Indian students are beaten up on their way home from work. But a serious debate about the fundamental shift from permanent to temporary migration and what it might mean for our collective sense of identity
and social cohesion is yet to begin. •

The figures for the current occupation and source-country breakdown of 457 visa holders used in this article were calculated from stock of primary visa holders currently in Australia as of 30 April 2009 as detailed in “Subclass 457 Business (Long Stay) Summary Report 2008–09 Financial Year to 30 April 2009” published by the Department of Immigration and Citizenship. The figure for 457 visas issued so far this year, one in five of which has gone to existing 457 visa holders, was provided by the department.

A February 2012 analysis of temporary migration by Peter Mares is available here.