

Rights Without Borders – realising human rights for all workers irrespective of citizenship



Students for Migrant Workers Rights

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1. Preface

This Report has been prepared by Students for Migrant Rights on behalf of the Campaign for Australian Ratification of the Migrant Workers Convention. It addresses one of the central issues of human rights in the 21st century: human rights for workers who are outside their country of nationality.

In our world in which workers are already being called on in increasing numbers to contribute to the global economy in far-away places it is essential to protect their human rights – to ensure that rights at work which have been painstakingly developed over a century and a half are not undermined because workers do not hold citizenship (either for migrant workers or for other workers in receiving countries).

This Report calls for Australian ratification of the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW). As far as is known there is no substantive barrier to ratification. Australia claims that it already substantially complies with the Convention; however this Report demonstrates that Australia can improve its own domestic record. Irrespective of that issue, Australian ratification will move forward the development of an international culture that accepts that migrant rights are human rights.

The aim of this report is to be used as a lobbying document to better inform decision-makers on the ICRMW and how it fits in to the Australian legislative context. Specifically, we hope to demonstrate that current legislation, both international and domestic, is insufficient to protect migrant worker rights; and also to provide a counter-point to the arguments most frequently made against the ratification of the ICRMW. In addition, this report can be used for public awareness and education campaigns for those who seek to know more about ICRMW and its compatibility with other international human rights treaties as well as the laws and policies relating to migrant workers in Australia.

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2. Executive Summary

Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

The ICRMW was adopted by UN General Assembly in 1990 in order to establish minimum standards for migrant workers and their families, irrespective of their migratory status. Although all human beings are born free and equal and everyone is entitled to rights to maintain their dignity, the promise seems hollow looking at the situations that migrant workers around the world face today and the situations of migrant workers in Australia are no exception.

The Campaign for Australian Ratification of the Migrant Workers Convention ('the Campaign') was initiated by the Australian government's rejection to a recommendation to ratify the ICRMW during the UN Universal Periodic Review in 2011. The Campaign has thence identified explanations for the Australian government's rejection through Freedom of Information requests as well as other channels. This Report mainly addresses the government's claim that the rights of migrant workers in Australia are already sufficiently protected by existing laws and policies.

Rights of Migrant Workers in Australia

In Australia, international treaties become relevant by being incorporated into domestic legislation. The first part of this Report looks at domestic circumstances and laws concerning migrant workers in Australia, paying attention to three groups of temporary workers: subclass 457 workers, Working Holiday Makers and international students. While this does not mean that these three groups are given exclusive protection by ICRMW within a broader group of migrants, the writers of this report have decided to focus on these three groups mainly for recent policy developments, among other reasons.¹ In each of these three groups, issues pertinent to their vulnerabilities and rights are analysed with an evaluation on relevant laws and policies the migrant workers may or may not be subject to. Firstly, the Report takes up subclass 457 workers and Migration Legislation Amendment (Worker Protection) Bill. The law's recent changes, including the power of investigation and enforcement, are analysed against empirical evidence on penalisation of illicit labour practices. In this light, the treatment of workers on the 457 scheme is also evaluated. Secondly, the 457 scheme and Enterprise Migration Agreements (EMA) are analysed, focusing on areas that are highly prone to rights violation in the context constituted by the conditions of the EMA. Lastly, the two most numerous groups of temporary migrants in Australia are examined: Working Holiday Makers (WHM) and international students. This Report reveals evidence where the requirement of WHM programs concerning conditions of employment-- such as 6 months maximum with one employer and 88-days of 'specified work' requirement for a second visa—create vulnerabilities that foster a societal 'culture' of rights violation, as seen in evidence of minimum wage violation, structure of subcontracting and exorbitant brokerage fees. Despite the marked increase in the

¹ Nevertheless, implications of ratifying ICRMW on other groups should be given due consideration in the future, especially undocumented workers, some permanent residents, and seasonal agricultural workers, just to name a few, and such limits are further elaborated in the Introduction of this report.

size of WHM in recent years, there has not been any measure for basic protection of their rights. Similarly, for international students, the limit of 40 working hours a fortnight creates a vulnerability that is not addressed by any government initiative. Both WHM and international students are placed in highly precarious casual work, without appropriate compensation for the risk, while they are constantly evaluated on their potentiality for being a 'risk' to Australian labour market and society by a number of government Reports and reviews. Above all, there has been little research done on the conditions of WHM and international students who work in Australia.

ICRMW in International Perspective

The second part of this Report looks at the ICRMW in comparison with other international treaties that Australia is already party to. In consideration of the International Covenant on Economic, Social and Cultural Rights (ICESCR), rights to non-discrimination; fair working conditions and remuneration; union and organisation; social security; education; cultural identity and family unity are explored. In comparison with the International Covenant on Civil and Political Rights (ICCPR), the applicability in unfair contract terms and labour trafficking and civil and political rights specific to migrant workers conditions are considered. For the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the analysis focuses on Article 11 of the CEDAW on women's right to work and discrimination in employment, in areas of sexual exploitation and the right to leave without fear. The section on the Convention on the Rights of the Child (CRC) focuses on children in detention; child's right to social security and healthcare as well as identity; and implications on the principle of the child's rights to unite with a family. Lastly, the UN Refugee Convention is studied to mark important differences as well as overlaps between the two groups (refugees and migrant workers). The conclusion of a comparative study in essence reiterates the opinions of the UN High Commissioner for Human Rights, Navi Pillay that "the Convention does not conjure up more rights or new rights for migrants...but it does give specific forms to these standards so that they are meaningful in the particular context of migration."²

Arguments for Ratification

Finally, the third part of this Report rebuts arguments against ratification of the ICRMW that are often incorrectly conceived or based on faulty information. Firstly, the ICRMW does not limit a state's ability to control its border or immigration. Also, the ICRMW does not condone irregular forms of migration but provides standards for basic rights for migrant workers in irregular situations that they are entitled to by virtue of being human. Overall, the goals of the Report are: a) to explain and compare the ICRMW and other international human rights treaties that Australia is party to, so that comparative protections offered by the ICRMW are explained; b) to collate information and resources available that illustrate specific vulnerabilities that migrant workers in Australia face; and c) offer counter arguments to critics of ratification based on the evidence presented. There has been no major research undertaken to complete this Report; rather, this Report utilises information already available to present an aggregate

² Address by Ms. Navi Pillay, High Commissioner for Human Rights, 14 December 2011, accessible at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11723&LangID=E>, last accessed on 15 Feb 2012.

of evidence that the current rights protection that Australia offers for migrant workers is not sufficient and that migrant workers in fact live with significant vulnerabilities.

3. Introduction

3.1 Migrant Workers in the 21st Century

The 21st century has been called the Age of Migration.³ Increasingly, countries everywhere are turning to migrant workers for the skilled labour essential for continued economic prosperity. Migrant workers are welcomed on a permanent or temporary basis within national borders for such purposes. Paradoxically, while calling on ever-increasing numbers to migrate to support economic development, the world (particularly the developed world), has been reluctant to positively affirm that such workers share equal human rights.

The reality for too many migrant workers around the world (including many in Australia) is that they lack the legal and social protections necessary to ensure their human rights are protected. In this Report we provide a review of the ICRMW and call for Australian ratification.

3.2 Overview of ICRMW and this Report

The ICRMW was adopted by UN General Assembly in order to “establish minimum standards that State parties should apply to migrant workers and members of their families, irrespective of their migratory status.”⁴ Considering that the rights of migrant workers are scattered in different human rights conventions and that their rights “have not been sufficiently recognized everywhere,”⁵ the Convention aims to foster respect for basic human rights of migrant workers and their families and to guarantee equality of treatment, and the same working conditions between migrants and nationals. The ICRMW together with Migration for Employment Convention 1949 and Migrant Workers Convention 1975 by the International Labour Organisation (ILO) forms the most comprehensive human rights document for migration workers to date. However of the 46 countries that have ratified or acceded to the ICRMW, all are countries of *origin* for migrant workers.⁶

The ICRMW consists of nine parts:

- Scope and definitions
- Non-discrimination with respect to rights
- Human rights of all migrants

³ Castles, S. and Miller, MJ. *The Age of Migration, International Population Movements in the Modern World*, Palgrave Macmillan, London, 1993.

⁴ Office Of High Commissioner For Human Rights. *The International Convention on Migrant Workers and its Committee*. Fact Sheet No 24, Rev 1. 2005
<http://www.ohchr.org/Documents/Publications/FactSheet24rev.1en.pdf>, last accessed on 20 February 2012.

⁵ Preamble of the ICRMW.

⁶ UN Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en, accessed on 4 June 2013.

- Other rights of migrants who are documented or in a regular situation
- Provisions applicable to particular categories of migrants
- The promotion of sound, equitable, humane and lawful conditions in connection with international migration
- Application of the Convention
- General provisions
- Final provisions

This Report outlines the provisions of the Convention and compares them with existing human rights treaties and domestic legislation in Australia which currently provide for the protection of rights for migrant workers, in order to respond to the proposition that they adequately provide for the fundamental rights of all persons in Australia, including migrant workers, and that they therefore negate the need to ratify the ICRMW.

3.3 Using this Report and its Limits

The aim of this report is to be used as a lobbying document to better inform decision-makers on the ICRMW and how it fits in to the Australian legislative context. In addition, this report can be used for public awareness and education campaigns for those who seek to know more about ICRMW and its compatibility with other international human rights treaties as well as the laws and policies relating to migrant workers in Australia. This report was inspired by a myth that migrant workers in Australia are sufficiently protected and thus there is no further need for rights protection mechanisms. Substantive portions of this report therefore seek to debunk this myth, as well as other misunderstandings on ICRMW. Overall, this report seeks to demonstrate that current legislation, both international and domestic, is insufficient to protect migrant worker rights in Australia; and also to provide a counter-point to the arguments most frequently made against the ratification of the ICRMW.

The report, however, is undermined by a number of factors. Perhaps the most significant limit of this report is its narrow scope, specifically that the domestic context only covers a selection that may not be representative of a broader group of migrant workers in Australia. The first section of the report mainly pays attention to temporary migrant workers in the Australian context, namely 457 workers, Working Holiday Makers and student visa holders (including post-study work permit holders), although the second report is inclusive of more broader migrant worker populations. There are many reasons attributable to this limited scope—first is the recent developments specific to the three groups that are worth noting, with respect to changes in laws, policies, size/numbers as well as demographics. The second reason is a practical one, namely the lack of expertise of the authors of this report, realistically speaking, to cover for all varieties of migrant workers in Australia. Nevertheless, implications of ratifying ICRMW on other groups should be given due consideration in the future, especially undocumented workers, some permanent residents, and seasonal agricultural workers, just to name a few.

4. The Case for Ratification

4.1 The Need for Action

In a recent speech Navi Pillay quoted from the Universal Declaration of Human Rights where she stated “all human beings are born free and equal in dignity and rights, and that *everyone* is entitled to all the rights and freedoms set forth therein, without distinction of any kind.” She said, however “looking at the situations of migrants in countries around the world today, the promise of this resolution sounds hollow.”⁷ One does not need to look far to find reasons for such comment. Horrid conditions in which migrant workers throughout the world work and live are well documented, published and circulated.

In Australia, we may be inclined to view these cases (as we do in many instances of human rights abuses) as instances which take place ‘elsewhere’ and therefore are not something that we need concern ourselves with. The temptation is there to simply point to the numerous pieces of domestic legislation put in place to protect labour rights, and ignore the fact that the reality is quite different. Indeed, at Australia’s last Universal Periodic Review in front of the UN Human Rights Council, Australia (responding to a recommendation put forward by a number of states) rejected the suggestion that we consider ratifying or acceding to the ICRMW as it “views existing protections in place for migrant workers as adequate.”⁸

However, the cases outlined in this section demonstrate that the protections in place are far from adequate. These, and the many others that have been documented, are all the more concerning when you consider the fact that they represent only the marginal percentage of instances which have been brought to light. The vast majority of migrant worker abuses remain unexposed, with no avenue for justice on the part of the worker.

Mohammed Nayeem, a metal fabricator working in Sydney, was forced to work between 50 and 70 hours a week at his job, while not being paid overtime. When Mr Nayeem asked his employer about his unpaid wages, his employer informed him that his performance was no longer ‘up to scratch’. He was then summarily fired and told that his visa would be cancelled. Despite being the one to terminate the employment contract, when Mr Nayeem’s former employer discovered he had found work elsewhere, he told Mr Nayeem and his former work colleagues that they could not resign without the employer’s permission. He also threatened to break Mr Nayeem’s legs and send him back to India.⁹

⁷ Address by Ms. Navi Pillay, High Commissioner for Human Rights, 14 December 2011, accessible at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11723&LangID=E>, last accessed on 15 Feb 2012.

⁸ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia – Addendum*, A/HRC/17/10/Add.1, 31 May 2011, http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/AU/A_HRC_17_10_Add.1_Australia_E.pdf, last accessed 27 May 2013.

⁹ Construction, Forestry, Mining and Energy Union. *A Better Life?: Stories for Exploited Guest Workers in Australia*, <http://www.cfmeunsw.asn.au/sites/default/files/downloads/posters/exploitedguestworkers09nsw0.pdf> last accessed on 25 Nov. 2013, p. 7.

Sam Kautai, a Cook Islander working for a roofing and guttering company, was made to work up to 12 hours a day and was paid only \$50 a month. Disturbingly, he was also savagely beaten by his employer. In one instance, his employer beat him with a claw hammer causing, among other injuries, blindness in one eye and partial deafness.¹⁰ In holding onto Mr Kautai's passport, as well as threatening to kill both him and his family, Mr Kautai's employer demonstrated that he was well aware of the basis of the power imbalance that existed between the two of them – Mr Kautai's status as a migrant.

In a case investigated by *The Age*, the newspaper found that a nursing agency was exploiting up to 30 Chinese nurses it had brought to Australia on 442 (or 'trainee') visas. The investigation discovered that the agency was sending "the nurses to work up to 50 hours a week – including on Christmas – in nursing homes and hospitals, while paying them a flat weekly rate of \$300."¹¹ The nurses claimed they worked double shifts without proper payment and had thousands of dollars in wages withheld, all under the guise of providing them with 'training', which the nurses stated never took place.

While in some of these cases justice was brought about and reparations were paid, in others, such as the case of the Chinese nurses, no such compensation was forthcoming. Additionally, as mentioned above, these cases likely represent only the tip of the iceberg, with most migrant worker abuses never coming to light. As a direct result of their vulnerability, these workers are highly unlikely (or unable) to utilise the protection mechanisms that Australia currently has in place.

Migrant workers are a highly vulnerable group, often working in industries which already have a high rate of exploitation present. A report by the Victorian Immigrant and Refugee Women's Coalition on hotel cleaners found that there were high instances of bullying and threats in the industry, but that "international students and other migrant workers are particularly vulnerable to intimidation. They are more likely to have their pay docked, be threatened with dismissal or lose shifts and hours if they refuse to stay back and work for free."¹² In the case of the nurses above, the threat of deportation was what kept complaints about their situation to a minimum.¹³ Distressingly, workers on 457 visas are twice more likely to die from work-related accidents than other Australians.¹⁴

Visa restrictions often cause vulnerabilities where workers are often forced into violating visa conditions. For example, a man identified as Thilan from Sri Lanka reported that his employers knew that he could work only 20 hours as an international student but regardless gave him more hours. To comply with this restriction, his hours at times had to be shifted to the following week to appear legal, which meant that

¹⁰ *Ibid* p. 11.

¹¹ McKenzie, N. 'Nurse agency faces claims', *The Age*. 31 January 2007. <http://www.theage.com.au/news/national/nurse-agency-faces-claims/2007/01/30/1169919337143.html> last accessed 25 May 2013.

¹² Victorian Immigrant and Refugee Women's Coalition, *Heartbreak Hotels: The Crisis Inside Melbourne's Luxury Hotels*, October 2010, <http://www.virwc.org.au/reports/HeartbreakHotelsReport.pdf>, last accessed on 6 January 2012.

¹³ McKenzie, N. 'Nightmare for nurses', *The Age*. 31 January 2007. <http://www.theage.com.au/news/investigations/nightmare-for-nurses/2007/01/30/1169919336319.html>. last accessed 25 May 2013.

¹⁴ *Supra* note 9, p. 13.

he was paid in the next pay cycle in accordance with the recorded shift. He says that he had no choice than to work more hours in fear of losing his job, and in some instances he was not paid for a few shifts he worked. He is just one of many cases of cleaners whose rights are violated and were recorded in a report by Victorian TAFE International and United Voice.¹⁵

For all the rhetoric on the part of the Australian Government that current protection mechanisms are sufficient to safeguard the rights of migrant workers, even their ministers do not seem to share their confidence in the system. When commenting on the case of the Chinese nurses, then immigration spokesperson Tony Burke drew parallels between their situation on the 442 visas with the common exploitation of 457 workers, stating that “the employee on the visa has no negotiating power, there is hopeless monitoring and enforcement and the rules mean that many of the rorts are legal. Wrong but legal.”¹⁶

These cases demonstrate the need for more to be done to protect the rights (and the lives) of migrant workers in Australia. For all the talk of sufficient protections being in place, the reality of the situation is that these workers are exploited precisely *because* of their vulnerability, and their exploiters confidence in getting away with it.

4.2 The symbolic value of ratifying the convention as a labour-receiving state

While the ICRMW was adopted in 1990, it was not until 2003 that it entered into force. Currently it has 46 party states, *all* of which are those that send their citizens to other countries for labour. Migrant communities around the world are saddened by this outlook, especially when, as mentioned above, the Convention does not create new rights for migrant workers or “oblige States to regularise the situation of irregular migrant workers. It does not reach above general international human rights standards which protect all human beings, but it does give specific form to these standards so that they are meaningful in the particular context of migration.”¹⁷

In this context, Australia’s ratification of the ICRMW would have much symbolic value. It would be the first labour-receiving country in the developed world to publically recognise that migrant workers too have human rights, which are an inalienable entitlement of every human being. It would also be one of the few labour-receiving countries to recognise unique vulnerabilities of migrant workers and their legitimate entitlement as rights-bearers. Accordingly, Australia would be in a position to influence and encourage other states to become party to the ICRMW in the UN human rights mechanisms and be a standard-bearer for improving the conditions of migrant workers worldwide.

¹⁵ Victorian TAFE International and United Voice, *Taken to the Cleaners: Experiences of international students working in the Australian retail cleaning industry*, Melbourne, 2012, p. 17.

¹⁶ Supra note 11.

¹⁷ Supra note 7.

5. Protection of the Rights of Migrant Workers and the Integrity of Australia's Labour Market

Vulnerability of migrant workers

The protection of migrant workers' rights and maintaining the integrity of the domestic labour market are interrelated concepts. The vulnerability of migrant workers makes it less likely that they will bring the cases of workplace abuse to legal remedies. To date, there has been only one convicted case for labour trafficking in Australia, but the Human Trafficking Working Group at the University of Queensland has demonstrated that labour trafficking is a problem that occurs throughout Australia. The working group published cases that "highlight and illustrate the vulnerability of foreign workers in Australia, though none of these instances resulted in trafficking-related charges." The Working Group continues, "this may be due to a number of reasons, including lack of evidence, failure to report cases to law enforcement agencies, and also the fact that many situations of labour exploitation do not contain all the elements of a trafficking in persons offence. Specifically, according to the Working Group, the employers who fail to comply with industry standards for their workers generally do not meet the criteria of Division 271 offences [that of a case of human trafficking]." ¹⁸

Significance in growing market for foreign labour

Moreover, with additional funding of \$10 million for the 457 visa program announced for 2011-2012, the Australian government has made clear its commitment to find genuine skilled workers to fill vacancies that cannot otherwise be filled by Australian domestic labour. ¹⁹ The initiative to strengthen the protection mechanism of the rights of migrant workers will be a fitting complement to the government's effort to reinforce its domestic market. As the OHCHR, as well as many experts, believe migrants whose rights are protected and who are able to live in dignity and security are better able to contribute to society than those who are marginalised and exploited. ²⁰

Introducing an explicit rights framework into domestic legislation based on the ICRMW will reinforce and complement punitive measures already adopted.

¹⁸ Human Trafficking Working Group, "Cases of Labour Trafficking in Australia" accessible on: <http://www.law.uq.edu.au/cases-of-labour-trafficking-in-australia> last accessed on 13 February 2012

¹⁹ <http://www.immi.gov.au/skilled/457-additional-funding.htm>

²⁰ Address by Ms. Navi Pillay, High Commissioner for Human Rights to the Graduate Institute of International and Development Studies, Geneva - 14 December 2011 <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11723&LangID=E> last accessed on 15 Feb 2012

6. Current Migrant Legislation/Regulations and Migrant Workers Rights

6.1 Visa Subclass 457 and Enterprise Migration Agreements

In 2011 the Australian Government introduced a new variation of the 457 visa subclass, known as Enterprise Migration Agreements (EMA). These agreements, negotiated between the government and senior management of large resource projects, enable such projects to bring in large numbers of overseas workers to fill workplace shortages of both skilled and semi-skilled workers.

EMAs are only available to projects worth more than \$2 billion dollars and with a workforce in excess of 1500 employees. The first EMA was granted to Gina Rinehart's Roy Hill mine in Western Australia and entitles the project to bring in up to 1715 foreign workers for three years to work on the construction phase of the project. As this inaugural EMA has yet to be instigated at the time of publication of this Report, the negative ramifications of such an enterprise are yet to be seen, but several possible issues with such an arrangement can be surmised.

Firstly, with such a large influx of workers being brought in, the likelihood of individual workers and their rights being 'lost' within the group is increased as the difficulty with regulating such a large workforce would be amplified. When coupled with the remote locations the majority of these projects will be located in, the circumstances are ideal for the possible exploitation of vulnerable workers.

Secondly, in the case of the Roy Hill EMA, a request for a concession on the English language skills for the workers involved had been requested. The project asked that the English requirement for its workers be lowered to 4.5 on the IELTS test. This raises issues such as the possibility of safety levels at the site being compromised if OH&S instructions are unable to be understood and a greater likelihood that the workers may be confused as to their rights in the workforce if instruction on these rights is delivered in English. The project has as of yet given no indication of how they plan to compensate for such risks to ensure their workers are protected.

Additionally, the project's apparent hesitance to employ Australian workers (there has been some indication that little or no effort has been made to advertise the majority of vacancies to the Australian workforce) raises the possibility that projects such as these are eager to employ foreign workers *due* to their vulnerability. Possible misunderstanding on the part of these workers regarding their rights at work and their increased dependence on their employers lends itself to situations where the workers could be paid less than their Australian counterparts and may not enjoy the same entitlements as their co-workers. While the Australian government has stated that they will ensure visa holders are aware of their rights "through a specific induction program"²¹ the sheer scale and scope of such projects are likely to mean that regulation of such programs will be difficult.

²¹ Bowen, C. 'First Enterprise Agreement approved', Joint media release with Chris Bowen MP - Minister for Immigration and Citizenship and Martin Ferguson AO MP - Minister for Resources and Energy, 25 May 2012, <http://www.chrisbowen.net/media-centre/media-releases.do?newsId=5963> last accessed on 25 Nov. 2013

While the outcome for workers under EMAs is yet to be seen, the large volume of workers that will be involved indicates that these types of agreements will lend themselves to a greater likelihood of exploitation for such workers. So far the Australian government appears to place a great deal of confidence in the holders of future EMAs respecting the rights of the workers under them. This is problematic, given the susceptibility to exploitation of workers under the 457 scheme. Ratification of the ICRMW would provide an additional avenue through which the rights of such workers could be protected and enforced. The articles in the ICRMW which stipulate both that migrant workers are to share equal treatment with nationals with respect to remuneration (Article 25) and that require states to ensure that information is provided to workers regarding their rights “in a language they are able to understand” (Article 33) could offer additional protection and incentive to the Australian government to properly monitor the situation on the ground with respect to the EMAs once they have been fully implemented. Additionally, the protections offered under Article 54, particularly to do with unfair dismissal, could go some way towards lessening the power imbalance seen between workers and employers in these situations or, at a minimum, give the workers an additional avenue through which to protect their rights. These additional protections could also lend themselves towards making the migrant workers less ‘desirable’ in the eyes of employers (or at least, make domestic workers as desirable as migrants) which could serve to strengthen the domestic labour force.

6.2 Visa Subclass 457 and Migration Legislation Amendment (Worker Protection) Bill

The Australian government adopted the *Migration Legislation Amendment (Worker Protection) Act 2008* (hereafter the Amendment Bill) in order to protect migrant workers particularly from exploitation. The Act has allowed expanded investigative power by the authorities and imposition of civil penalties on employers for non-compliance. However, according to one report, no one has ever been prosecuted under these laws despite more than 100 employers under the 457 subclass scheme being officially sanctioned in 2010-2011.²² Despite the government’s interest in maintaining the integrity of Australia’s labour market, there are continuing allegations against employers who attempt to exploit the vulnerability of migrant workers. A spokeswoman for the Department of Immigration and Citizenship (DIAC - now the Department for Immigration and Border Protection) said among the most "common reasons" for a sanction was failing to pay employees properly.²³ CFMEU NSW claims that underpaying migrant workers and hiring undocumented workers have become common practice in the construction industry.²⁴

There are a number of domestic legislations concerning the rights of workers and anti-discrimination at workplaces, including the Fair Work Act 2009, the Sex Discrimination Act 1984, the Age Discrimination

²² Wallace, Natasha (25 July 2011) “Employers avoid fines despite visa abuse sanctions” *Sydney Morning Herald* <http://www.smh.com.au/nsw/employers-avoid-fines-despite-visa-abuse-sanctions-20110725-1hx98.html> last accessed on 14 February 2012

²³ *Ibid*

²⁴ We use the term “undocumented” instead of “illegal” throughout the Report. Undocumented workers refer to those who engage in gainful employment without appropriate work permit.

Act 2004, and the Racial Discrimination Act 1975. Although these legislations provide general protection, they are not specific to the needs of migrant workers. The Amendment Bill was adopted in 2008 with a goal of strengthening the integrity of temporary labour migration. It is the goal of this section to analyse whether this bill provides sufficient protection of the rights of migrant workers.

It is said that the Amendment Bill seeks to serve four main purposes: providing better defined obligations of sponsors; improved information sharing across different levels of the government; extended investigative powers of the authorities; and penalties for non-compliance, including civil penalties.²⁵ It is said that the deteriorating integrity of the subclass 457 scheme, with a sudden growth of this scheme, especially in “lower” skilled occupations, is the rationale for the adoption of this policy.²⁶ As the subclass 457 scheme seeks to provide a relief for “genuine” temporary shortage in skilled-labour, policy makers have expressed their concerns on maintaining the 457 scheme up to its original purpose with minimal damage on the stability of domestic employment. The 457 scheme was never meant to replace Australian workers, but simply fill the positions that could not be filled by the domestic workforce temporarily. Stephen Castles states policy failure is when a policy does not achieve its stated objectives;²⁷ it is thus a meaningful to ask whether the 457 scheme achieves its stated objectives.

Scholars have long pointed out the danger of the employer-driven nature of the 457 scheme. A study by Tham and Campbell shows an assessment of the 457 visa scheme based on three themes, measuring whether 1) the scheme meets labour shortages; 2) equal and not less favourable treatment is maintained; and 3) the policy is effectively enforced.²⁸ Tham and Campbell rightly point out that if the 457 scheme seeks to serve its purpose, then genuineness of labour shortage is crucial, and the migrant workers cannot be given less favourable treatment. Otherwise, the employers will attempt to take advantage of less expensive foreign labour to replace its domestic workforce. Their study reveals an over-confidence in the employer’s statement of labour shortage, as reflected in the choosing of specified occupations eligible for the 457 scheme. Due to the lack of rigorous procedures to ensure the specified occupations match the shortage of skilled labour, the External Reference Group called the 457 scheme ‘a general labour supply visa’.²⁹

The Amendment Bill is perhaps an acknowledgement such conditions. Its four main measures seek to serve two purposes. First is better definition and increased responsibility of the employers for their sponsorship. By providing clearer definition, the sponsorship agreement and labour contract will have better justiciability in cases of abuses and exploitation. Second is enforcement by the authorities. Authorities seek to implement enforcement of greater effectiveness and efficiency by improving

²⁵ Bowen, Chris (2008) Migration Legislation Amendment (Worker Protection) Bill 2008; Second Reading Speech <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F2008-09-24%2F0007%22> , last accessed on 25 Nov. 2013

²⁶ *Ibid*

²⁷ Castles, S. Why migration policies fail’, *Ethnic and Racial Studies* V.27(2) March 2004 pp.205-227

²⁸ Tham, Joo-Cheong & Campbell, Ian, “Temporary Migrant Labour in Australia: The 457 Visa Scheme and Challenges for Labour Regulation” Center for Employment and Labour Relations Law,” Melbourne Law School, Working Paper No. 50, University of Melbourne, Melbourne, 2011.

²⁹ Visa Subclass 457 External Reference Group, Final Report to the Minister for Immigration and Citizenship, Commonwealth of Australia, Canberra, April 2008 (‘External Reference Group Report’)

information sharing across all levels of government, and expanded powers to monitor and investigate the sponsors and the imposition of “meaningful” penalties for employers in breach of their obligations.³⁰ The bill has allowed expanded investigative power by the authorities and imposition of civil penalties on employers in non-compliance. According to this bill, individual employers and companies can be fined up to \$6,600 and \$33,000 for abusing their workers. However, as mentioned above, no one has ever been persecuted under these laws despite the more than 100 employers who were sanctioned.³¹ Employers were more commonly given infringement notices or were barred from sponsoring more workers. Given these facts, it is worrisome that the government has halved its monitoring of sponsors, according to the report by the *Sydney Morning Herald*.³² Despite the government’s interest in maintaining the integrity of Australia’s labour market, there are continued allegations against employers who attempt to exploit the vulnerability of migrant workers.³³ CFMEU NSW claims that the underpaying of migrant workers and hiring of irregular workers has become a frequent sight in the construction industry; they have been pursuing a number of construction companies in Sydney for underpaying temporary workers.³⁴ It thus raises concerns that the construction workers had the highest jump in 457 visa holders with a 78% increase in 2010-2011 compared to the previous year.³⁵

In the words of Barbara Deegan’s 2008 *Visa Subclass 457 Integrity Review*, 457 visa holders regularly experience ‘substandard living conditions, illegal or unfair deductions from wages, and other similar forms of exploitation.’³⁶ This occurs largely because 457 visa holders can be removed from Australia if they are without work for 28 days and are therefore reliant upon their employer sponsor. Overall, what is missing in the Amendment Bill is recognition of migrant workers as rights-bearers. Although their vulnerability is recognised, and the danger of exploitation and lack of meaningful penalties thus far are acknowledged, migrant workers were not given rights or empowerment to mitigate the power imbalance between themselves and their employers. Instead of recognising the agency of the migrant workers, the state has taken an “enforcement” approach to settle the issues by state monitoring/investigation and penalty imposition. Considering the evidence, it is doubtful that the Amendment Bill fulfils its objective to strengthen the integrity of the 457 scheme.

³⁰ Supra note 25

³¹ Wallace, Natasha, “Employers avoid fines despite visa abuse sanctions” *Sydney Morning Herald*, 25 July 2011, <http://www.smh.com.au/nsw/employers-avoid-fines-despite-visa-abuse-sanctions-20110725-1hx98.html>, last accessed on 14 February 2012.

³² Sydney Morning Herald reports: “Along with a 52 per cent drop in the number of 457 sponsors “monitored” by the department, there has also been a 29 per cent drop in the number of sites visited by immigration since 2007-2008, according to a *Herald* analysis of the department’s figures.” *Ibid*.

³³ *Ibid*.

³⁴ Wallace, Natasha, “Illegal workers rife in construction industry, union claims” *Sydney Morning Herald*, 24 July 2011, <http://www.smh.com.au/nsw/illegal-workers-rife-in-construction-industry-union-claims-20110724-1hvgo.html>, last accessed on 15 February 2012.

³⁵ *Ibid*.

³⁶ Deegan, Barbara. *Visa Subclass 457 Integrity Review: Final Report*. Department of Immigration and Citizenship. October 2008

6.3 Temporary Visa Holders: International Students and Working Holiday Makers

According to DIAC, there were an estimated 1,680,160 persons with temporary visas in Australia as of 30 September 2012. Among them, most numerous were international students (342,370) and working holiday makers (145,660). Together with temporary skilled visa holders (subclass 457), skilled graduate visa holders (subclass 485) and New Zealand visa holders (subclass 444), workers on temporary visas in Australia were close to 7% of the entire Australian labour market, and more than 10% if including New Zealand visa holders.³⁷

Table 1 Temporary Visa Holders in Australia³⁸

International Student	342,370
Working Holiday Maker	145,660
Temporary Skilled (457s)	175,580
Bridging Visa	111,670
Skilled Graduates	39,170
Total	814,450
Australian Labour Market	11,511,900 (seasonally adjusted)

This section focuses on these top two most numerous groups among temporary visa holders in Australia, their work rights and implications of ratification of the ICRMW.

International Students

The ICRMW defines the term migrant worker as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national” (Article 2 paragraph 1) but excludes “students and trainees” in Article (3)(e). However, this Report interprets that the ICRMW, or its domestic interpretation, should apply to international students who are engaged in a remunerated activity outside the scope of their study, training and other forms of education. For example, if a student studies business and works in a restaurant part time, there is no reason why the student should be excluded from migrant worker rights protection mechanisms, provided that the work is not part of his/her education program. International students have taken an important role in the Australian labour market, and their role should be recognised in a form of labour rights. Furthermore, there are strong

³⁷ Sherrell, Henry (2013) Migrants Don’t Steal Jobs. *New Matilda*. 18 Jan 2013, <http://newmatilda.com/2013/01/18/migrants-dont-steal-jobs> last accessed on 16 May 2013.

³⁸ Australian Bureau of Statistics (2012) 6202.0 Labour Force, Australia, Sep 2012, published on 10 November 2012, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/84A51D28D3A3FD29CA257AAF0013F2A7?opendocument>, last accessed on 25 November 2013

links between international students and skilled migration, most explicitly in its post-study work visa (subclass 485), which will be elaborated later in this section.

As of March 2012, international students can work 40 hours a fortnight, a revision from the previous 20 hours per week provisions after a recommendation by the Knight Review to allow greater flexibility for students during their school terms. 20 hours per week provisions mean *de facto* that international students are engaged in part-time or casual employment rather than full-time, where employees usually work 38 hours a week. Working part-time or casually often means that employees are not entitled to the same benefits or workplace rights as the full-time employees. The Fair Work Ombudsman (FWO) explains that the casual employees' pay rate is "usually higher to make up for this", an observation far removed from the reality of many international students.³⁹ There are reports of employers abusing this provision to force international students to work for free hours in addition to the 40 hour fortnight, or to foster black market practices and pay cash.⁴⁰ The Knight Review explains that such provisions on the limit of working hours are necessary to recruit students with "genuine" interests to study in Australia, rather than to manipulate student visa programs to work in Australia. However, such claims cannot excuse the Australian government's neglect of their duty of care compromised by the *de facto* work place vulnerabilities that the limit of working hours imposes on international students.

International students' workplace vulnerabilities can be further aggravated by the base conditions of the industry. The FWO recognises that a large number of workers in the cleaning sectors are international students, and the unions vociferate that the cleaning industry is "in crisis".⁴¹ Sham contracting, unconventional working arrangements and other work place rights abuses have been found by the FWO – in fact, unions report that a FWO investigation into the cleaning industry in 2012 in Victoria found that 44 per cent of the audited employers to be in breach of workplace laws.⁴² Of the 380 international student cleaners in Victoria who participated in the survey by Victorian TAFE and United Voice, 35.5 per cent of them have reported to have worked additional hours without being paid, forty per cent suffered rude or abusive behaviour by a supervisor and many were not aware of their work place rights. Additionally, the report's analysis of online advertisements for cleaners found the phenomenon of underpayment very common.⁴³

Despite the exposé media reports, FWO investigations and union reports, there has been little research on the working experiences of international students in Australia. Instead, the government has continuously used the terms "security", "risks" and "migration risk levels" to assess international

³⁹ Fair Work Ombudsman. Is your job full-time, part-time or casual? (webpage) Accessed on 16 May 2013 at <http://www.fairwork.gov.au/employment/international-students/pages/is-your-job-full-time-part-time-or-casual.aspx>

⁴⁰ See, for example, the report by Victorian TAFE International and United Voice, *Taken to the cleaners: Experiences of international students working in the Australian retail cleaning industry*, Melbourne, 2012.

⁴¹ Fair Work Ombudsman, 'National Cleaning Services Campaign 2010-11: Report June 2011', Report by Fair Work Ombudsman's Targeted Campaigns Unit; Supra Note 40

⁴² Fair Work Ombudsman, 'Sham contracting and the misclassification of workers in the cleaning services, hair and beauty and call centre industries: Report on the preliminary outcomes of the Fair Work Ombudsman Sham Contracting Operational Intervention', November 2011; Supra Note 40

⁴³ Supra Note 40

students’ visa applications, despite allegations that the use of such terms has racial overtones and that it unfairly treats international students as security threats.⁴⁴ In contrast, measures to protect their workplace rights are ostentatiously lacking.⁴⁵



The Australian government allows international students to remain in Australia to “gain skilled work experience or improve their English language skills” after their studies on Skilled Graduate (subclass 485) visas.⁴⁶ The post-study work visa has had a conspicuous growth in recent years—there were 38,210 holders of 485 visas at the end of 2012, a 74 per cent increase from the previous year (Table 2). Post-study work visas now allow international students with bachelor, master and doctoral degrees up to four years of work without being tied to specific occupations or sectors after they graduate. The two-year visa is issued for students who complete bachelor or master’s degree by coursework; three-year for master’s degree by research; and four-year for a doctorate, which is a significant increase compared with the previous limit of 18 months.

The post-study work visa does not have a pathway to permanent residency and applicants are required to take employer-sponsored skilled migration (such as subclass 457) or professional and other skilled migration paths, which are processed according to priority processing by DIAC. In its submission to the Knight Review, Australian Confederation of Trade Unions (ACTU) credited the government for breaking “the nexus between study and permanent residency” in its changes to the General Skilled Migration stream. However, with the recent reforms what became possible is extended years of precarious residency in Australia. Imagine students who after 3-4 years of university education, acquire a 485 visa

⁴⁴ See, for example, the submission by Sydney University Postgraduate Representative Association (SUPRA) to Knight Review Team. SUPRA (2011) SUPRA Submission: Student Visa Review. Other submissions to the review team are available online: <http://www.immi.gov.au/students/knight/submissions-received.html>, last accessed on 16 May 2013.

⁴⁵ Commonwealth Parliamentary Library. ‘The other temporary skilled visa’ on *FlagPost: Information and research from Australia’s Commonwealth Parliamentary Library*. 21 March 2013, <http://parliamentflagpost.blogspot.com.au/2013/03/the-other-temporary-skilled-visa.html>, last accessed on 16 May 2013

⁴⁶ Department of Immigration and Citizenship (DIAC) ‘Temporary entrants and New Zealand citizens in Australia’. September 2012.

to work for two years, afterwards move on to an employer-sponsored visa to work in Australia. These individuals, then, after almost a decade of living, studying and working in Australia, are still subject to precarious legal conditions imposed by the temporary visa on which they have justified their stay in Australia. If, for example, they are cut back while on a subclass 457 visa from a company which has sponsored their visa, then their visa expires after one month of unsuccessful job seeking, regardless of their previous years of stay in Australia. Subclass 485, like subclass 457, is not eligible for any government social services including medical insurance. Such conditions have led Peter Mares to comment, “at what point do we say that someone has contributed enough or developed a sufficient attachment to this country that he or she should no longer be treated as an outsider?”⁴⁷ The Knight Review sought to boost the export of Australian tertiary education by increasing the enrolment of international students. Michael Knight stated simply the importance of post-study work visa as a marketing tool for “the ongoing viability of our universities in an increasingly competitive global market for students.”⁴⁸ Such trends are subject to criticism from economic rationalist arguments; and the rights-based analysis of conditions of international students and their post-work study period is yet to come.

⁴⁷ Mares, Peter. ‘Temporary migration is a permanent thing,’ *Inside Story*. 29 March 2013.

<http://inside.org.au/temporary-migration-is-a-permanent-thing/> Last accessed on 16 May 2013

⁴⁸ Knight, Michael, *Strategic Review of the Student Visa Program 2011 Report*, Australian Government. 2011

7. Rights of migrant workers are not sufficiently protected by the existing human rights treaties

The UN has identified nine core human rights treaties for their importance in the protection and promotion of human rights around the world.⁴⁹ Although many of the rights conferred by the ICRMW reflect those contained in other human rights instruments, the Convention's provisions are specific to the needs of migrant workers as, due to their vulnerable circumstances, their rights are not sufficiently protected by the other international conventions that Australia has ratified.

Although such protections may be derived from existing instruments, in many instances these protections do not impact on the experiences of migrant workers. For this reason, they are worth underscoring and require further expansion. These expansions create greater protection for migrant workers which policy-makers and law-enforcers unfamiliar with migrant issues may otherwise overlook. Each of the nine core human rights treaties by the UN is drafted by persons with relevant expertise and competence from around the world. Likewise, the issues specified in the ICRMW are rights deserving of protection and promotion as determined by a panel of recognised experts.

The other "thematic" human rights treaties by the UN, such as the CEDAW or the CRC, exist as conventions because of the recognition of the particular vulnerability of the groups at hand (women and children) and the subsequent need for more detailed protections of their unique circumstances. Australia ratified seven out of nine core human rights treaties; the ICRMW should be seen in this same light as the other seven.⁵⁰

The ICRMW recognizes in its preamble, that *because* of the *de facto* positions of vulnerability of migrant workers owing to "their absence from their State of origin" and that their rights have "not been sufficiently recognised everywhere", they "therefore require appropriate international protection". This implies that the rights of migrant workers may be protected in principle by existing human rights instruments, yet their rights are not being recognized due to their vulnerability. Particular circumstances relevant to migrant workers addressed by the Convention include protection from unfair contracts in relation to their stay and work permit; protection of important legal documents such as a

⁴⁹ The nine core human rights treaties are: International Convention on Elimination of All Forms of Racial Discrimination (ICERD), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention against Torture (CAT), Convention on the Rights of the Child (CRC), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), International Convention for the Protection of All Persons from Enforced Disappearance (CPEd), and Convention on the Rights of Persons with Disabilities (CRPD).

⁵⁰ Out of nine core human rights treaties by the UN, Australia has not signed ICRMW and the Convention for the Protection of All Persons from Enforced Disappearance.

passport; and rights of children regardless of the legal status of their parents. Australia's ratification of the ICRMW would further build on Australia's contribution to international human rights protection.

7.1 ICRMW and the International Covenant on Economic, Social and Cultural Rights (ICESCR)

The range of economic, social and cultural rights specified in the ICRMW do not differ significantly from those set out in the International Covenant on Economic, Social and Cultural Rights (ICESCR). As mentioned above, this argument is often put forward by States as to why ratification of the ICRMW is unnecessary – that the rights enshrined in this convention are already covered in one or more of the other core UN treaties. However, the ICRMW specifically attributes these ESC rights to migrant workers and expands on them. In doing so, it “formulates them in a way that aims at addressing specific vulnerabilities of ... migrants.”⁵¹ In Australia, as in many countries, the ICESCR is implemented via domestic remedies, however there continues to be discrepancies between migrant workers and the general population in the protection of the rights outlined in the ICESCR. For example, migrants usually experience housing and living conditions that are greatly inferior to that of the general population, despite the fact that the right to adequate living conditions for all (without discrimination) being already stipulated in the ICESCR. Outlined below are how the ICRMW lays out ESC rights within the migrant context and how the two conventions differ.

7.1.1 Right to non-discrimination

The principle of non-discrimination outlined in the ICRMW is broader than those set out in other human rights conventions.⁵² The classifications of ‘political or other opinion’, ‘ethnic origin’, ‘nationality, age, economic position’, or ‘marital status’⁵³ have been added to the non-discrimination clause of the ICRMW.

7.1.2 Right to fair working conditions and remuneration

The right to fair working conditions and remuneration, set out in Article 7 of the ICESCR, is also protected by Article 25 of the ICRMW. However, the ICRMW provision specifically states that migrant workers shall “enjoy treatment not less favourable than that which applies to nationals of the State” as, even though this right has been afforded to them since the entry into force of the ICESCR, migrants have long suffered from harsher working conditions than the citizens of the state in which they are employed. For this reason, the ICRMW sets out the areas in which migrant workers are often exploited, including, among others, the right to overtime, holidays with pay and minimal safety requirements. It also specifically stipulates that the holding of a private employment contract or the irregularity of the stay of the migrant worker in no way derogates these rights.

7.1.3 Union rights

Article 26 of the ICRMW deals with the migrant worker’s right to join trade unions, as outlined in Article 8 of the ICESCR. This article in the ICRMW does not include the right to strike, as it does in the ICESCR, but does stipulate the right of a migrant worker to “seek the aid and assistance of any trade union.”⁵⁴

⁵¹ Office of the High Commissioner for Human Rights, *Migrant Workers Rights in Europe*, United Nations Europe Regional Office, 2011, p. 21.

⁵² OHCHR, ‘The International Convention on Migrant Workers and Its Committee’, *Fact Sheet No. 24 (Rev. 1)*, United Nations, New York and Geneva, 2005, p. 5

⁵³ Article 1 (1) & 7, ICRMW 1990.

⁵⁴ Article 26 (1) (c), ICRMW 1990.

Article 40 deals with the right of a migrant worker to form a trade union, but this only applies to migrant workers and their families who are in a documented or regular situation.

7.1.4 Right to social security

Article 27 of the ICRMW deals with the right to social security. However, where the ICESCR recognises the right of everyone to social security,⁵⁵ the ICRMW grants migrants the right to social security in the sense that they must receive “the same treatment granted to nationals.”⁵⁶ In States where applicable national legislation prevents such an outcome, the ICRMW provides that the State should consider the possibility of refunding the contributions made by the migrant worker to the State which would have been used to fund the social security benefit in the case of a national worker, therefore ensuring that the migrant is not unduly handicapped by virtue of their non-national status.

7.1.5 Children’s right to education

The right of children to education is one of the most unassailable of the economic, social and cultural rights. Article 30 of the ICRMW further iterates this right, but goes one step further in stipulating that the children of migrant workers cannot be deprived of this right for the reason of the irregular situation of either the parents or the child in the State of employment. This right must be “equally accessible to all”, including the children of both regular and irregular migrant workers, and cannot be withheld by the State on the basis of the parent’s situation.⁵⁷

7.1.6 Protection of cultural identity

Article 31 of the ICRMW, which provides for the protection of the cultural identity of migrant workers, has a corresponding article in the ICESCR. However, whereas the Covenant provides for the right of everyone to have a cultural life,⁵⁸ the ICRMW further protects migrant workers from interference by State Parties that may seek to prevent or limit the means by which workers may maintain their cultural ties to their State of origin, and encourages the receiving State to actively assist and facilitate such ties.

7.1.7 Express extension of existing human rights to migrant workers

Article 43 explicitly sets out what the other international conventions tacitly stipulate – that migrant worker’s rights are human rights and that they are in fact entitled to the same rights as all others. It requires that migrant workers be afforded “equality of treatment with nationals of the State of employment” and, in recognition of the special issues that migrant workers face due to their vulnerable position in society, specifically mentions areas where migrant workers are consistently treated unequally. These include, but are not limited to, access to suitable housing and fair rental payments, access to vocational training and access to social and health services.

7.1.8 Family unity

Articles 44 and 45 of the ICRMW refer to the families of migrant workers. The ICRMW, like the ICESCR, recognises the family as the natural and fundamental unit of society and, as such, particular measures should be undertaken to ensure its unity. These articles place an emphasis on the reunification of

⁵⁵ Article 9, ICESCR 1976.

⁵⁶ Article 27, ICRMW 1990.

⁵⁷ Article 13 (a)(c), ICESCR 1976.

⁵⁸ Article 15 (1) (a), ICESCR 1976.

migrant workers with their spouse and dependent children. The ICRMW takes this slightly further than the ICESCR, in that it requires States to consider extending this treatment to additional family members. Article 45 essentially extends to the spouses of migrant workers the same rights offered to the migrant workers in a regular situation themselves, for example access to health, social services and cultural life. The ICRMW, in recognising the importance of the family unit, as well as the additional stress incurred on migrant families, also recognises the importance of assisting migrant spouses in these areas, and the positive affect this would have on the family as a whole.

7.2 ICRMW and the International Covenant on Civil and Political Rights (ICCPR)

The wording of the preamble of the ICCPR that equal and inalienable rights apply to “all members of the human family” suggests that migrant workers should be entitled equally to rely on its protections. Article 2 further emphasizes that “all individuals” within the state’s territorial jurisdiction are entitled to these rights. Migrant workers, therefore, being members of the human family and individuals within the jurisdiction of the receiving state, are entitled to all rights in the ICCPR.⁵⁹

The ICRMW incorporates all the substantive articles of the ICCPR except Article 21 (right to peaceful assembly), 25 (right to vote, restricted to citizens in ICCPR), 26 (equality before the law and equal protection of the law) and 27 (right to their own culture, religion and language). It also expands on some of these rights to relate them specifically to migrant workers’ unique circumstances, its basis being that (as previously mentioned) more specific and detailed recognition of rights will facilitate better implementation of the protection of the migrant workers’ rights.

7.2.1 Selected ICCPR Rights Which Have Been Expanded in the ICRMW

The ICRMW Articles 16 (right to liberty and security of person), 17 (humane and dignified treatment when deprived of liberty), 18 (equality before courts and tribunals; fair and public hearing), 20 (no imprisonment merely on grounds of being unable to fulfil contractual obligation), 22 (expulsion) and 26 (participation in trade unions) are some examples of expanded ICCPR rights in the ICRMW. These expansions codify into law explicit civil and political rights that are specific to the circumstances of the migrant workers.

Additionally, the ICRMW addresses civil and political issues that are more unique to the migrant experience. They include:

- communication in a language that can be understood by the migrant workers (Article 16, paragraph 5);
- the right to communicate with his/her consular authorities when detained (Article 16, paragraph 7);
- the right not to bear any costs arising from detention for certain purposes (Article 17, paragraph 8);
- equality with nationals before courts and tribunals (Article 18, paragraph 1);
- the right not to be deprived of residence or work permit solely on the ground of being unable to fulfil a contractual obligation (Article 20, paragraph 2); and
- rights and procedures when faced with the prospect of expulsion, which the ICCPR Article 13 addresses in less concrete terms (Article 22).

⁵⁹ Except for Article 25 on the right to vote and participate in public affairs, which has been explicitly restricted to citizens.

7.2.2 Unfair contract terms and labour trafficking

Migrant workers are especially prone to problems of unfair contract. The repeated emphasis in the ICRMW on ensuring information is provided in a language a migrant worker can understand is one approach to ensure that migrant workers have a fair contract and that they understand the terms of that contract. The inability to understand language can prevent migrants from knowing their rights. Debt bondage as a result of signing contracts in a language they do not understand is also a phenomenon not unheard of in the Asia-Pacific region. Unfair contracts often cause (if not force) migrant workers to violate the terms of their contract, which can lead to them becoming undocumented depending on the terms of the contract. ICRMW Article 20 further adds protection from contractual obligation. The article protects the migrant worker or his/her family from being imprisoned “merely on the ground of failure to fulfil a contractual obligation”. The article also prohibits deprivation of his/her residence or work permit or expulsion merely on the grounds of failure to fulfil a contractual obligation; however cases are exempt where fulfilment of that obligation constitutes a condition for such authorisation or permit.

Australia is not a ‘safe haven’ when it comes to fair contracts for migrant workers (see ‘The Need for Action’ above). There have been numerous alleged cases where migrant workers became the victims of labour trafficking when they were promised labour conditions very different to the reality. A report by Human Trafficking Working Group at the University of Queensland identifies 12 cases suspected of labour trafficking. The working group also lists 14 cases of trials related to slavery, sexual servitude and debt bondage.⁶⁰

7.2.3 Articles of the ICRMW that Deal With Migrant-Specific Civil and Political Rights

The ICRMW confers rights which deal with migrant-specific issues such as identity documents, remittances, education for migrant children, compensation, deportation and time allowed between jobs and after a contract ends. Some of these are more accurately covered by the analysis of economic, social and cultural rights (see ICESCR section above). Some important examples specific to the civil/political dimension are:

- Article 21 (prohibition of confiscation of important documents),
- Article 23 (right to protection and assistance from consular or diplomatic authorities),
- Article 32 (right to transfer earnings, savings and property upon termination of stay),
- Article 41 (right to participate in public affairs of State of origin, including elections),
- Article 42 (rights of representation in State of employment),
- Articles 46 and 48 (paying taxes),
- Article 51 (status after termination of contract and right to seek alternative employment),
- Article 54 (unfair dismissal) and
- Article 56 (expulsion).

⁶⁰ Human Trafficking Working Group, “Cases of Labour Trafficking in Australia” accessible on: <http://www.law.uq.edu.au/cases-of-labour-trafficking-in-australia> last accessed on 13 February 2012. For detailed case reports, go to: <http://www.law.uq.edu.au/human-trafficking-case-reports>, last accessed on 13 February 2012.

Employers often confiscate migrant workers' passports to ensure they do not run away. Migrant workers' access to law enforcement is then limited by the fear of going to the police without identity documents. The inability to speak the local language compounds this vulnerability.

The right to transfer earnings, savings and property in Article 32 read together with Articles 51 and 56 clarifies the legal status of migrant workers after termination of contract. In the absence of these provisions, migrant workers may be repatriated immediately without being able to settle outstanding financial affairs. Article 42 further grants migrant workers the right to represent themselves collectively to the State of employment which is critical in facilitating a dialogue to ensure that the state understands migrant worker needs. Article 54 gives a critical measure of protection to migrant workers against their employers who, very often, employ migrant workers precisely *because* they are more vulnerable than local workers. All these are common and important issues – but by no means an exhaustive list – faced by migrant workers all over the world.

7.2.4 Differentiation between categories of workers

In addition, the ICRMW makes distinctions among various groups of migrant workers, each group with a somewhat differentiated set of rights. It could thus be an extremely helpful document which would help states in their policy-making and law enforcement with reference to migrant workers.

7.2.5 Informing workers of their rights

There is also repeated emphasis throughout the ICRMW about the need to inform migrant workers about their various rights clearly. In other words, a right to information.

7.3 ICRMW and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

Australia ratified the CEDAW in July 1983. Although Australia is thus already required to uphold the rights outlined in the CEDAW in relation to women's work rights, ratification of the ICRMW would provide a framework within which these rights can be applied, and ensure that rights that have already been recognised as essential are properly extended to female migrant workers. Allowing for the recognition of women migrant worker rights (an already more vulnerable group⁶¹) would allow for appropriate protection of female migrant workers and their families.

Rights specified in the ICRMW overlap with those set out in the CEDAW. This is particularly the case with Article 11 of the CEDAW, which will be outlined in more detail below. In addition, there are elements of the ICRMW which clearly reference the significance of the CEDAW, including Article 1, Article 7 and Article 24. These will also be outlined in more detail to provide a clearer picture of the ways in which these two important conventions are linked around work rights.

7.3.1 Article 11 of the CEDAW

The right of women to work is outlined in detail within Article 11 of the CEDAW. Article 11 of the CEDAW is divided into three sections. The first section deals with the right to work without discrimination, more specifically, the right to work, equal employment opportunities and equal rights to protection of health and safety. It is important to extend this to include migrant women and their families who are just as represented as any other group who engages in work. The second section stipulates equality in treatment for women, so as not to be discriminated against on the grounds of marriage or maternity. More specifically, the CEDAW states that women have the right to adequate work provisions while pregnant, such as the allowance for maternity leave. The second section also covers the need for support services for women workers. The third section briefly covers legislation and the need for revision of these requirements if new relevant knowledge is obtained.

Taken together, Article 11 of the CEDAW, of which Australia is currently beholden, intersects with the needs of women in the context of migrant workers and their families. Critically, the ICRMW outlines the ways in which these rights can be adequately upheld and provides specific information that relates not just to women more generally but also women migrant workers and their families.

Article 1 of the ICRMW

Article 1 begins with, "the present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex."⁶² Thus, from the outset it is clear that work rights apply equally regardless of sex. It is important to reflect on the general thrust of the CEDAW, which echoes this same sentiment. With Australia already signatory to the CEDAW, it is important that Australia upholds this same notion to migrant workers.

⁶¹ The ICRMW outlines this extra vulnerability of migrant workers, in particular "Considering the situation of vulnerability in which migrant workers and members of their families frequently find themselves owing," Preamble, ICRMW 1990.

⁶² Article 1 (1), ICRMW 1990.

Article 7 of the ICRMW

Article 7 deals with non-discrimination, and links to the CEDAW when it references sex as one of the criteria set for non-discrimination. Again, relating this back to the CEDAW in which women's rights are to be respected, this same principle regarding non-discrimination based on sex can be found in the ICRMW and helps establish the case for non-discrimination towards migrant workers regardless of gender.

Article 24 of the ICRMW

This article states that, "every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law."⁶³ It is important to frame this statement of rights of women to be recognised before the law within the specific context of the CEDAW. Namely, countries signatory to the CEDAW, such as Australia, are bound to recognise women before the law in an equal way.

Taken together, it is clear that there are significant overlaps between the ICRMW and the CEDAW. Moreover, with Australia already signatory to the CEDAW and bound to it, signing of the ICRMW would seem an obvious progression in Australia's values. Indeed, given that the rights of women are already so clearly recognised in a broader context, it would seem within Australia's interest to extend that same recognition to women migrant workers and their families.

7.3.2 ICRMW, CEDAW and the Issues of Migrant Women

Overview

The feminisation of migrant labour and their disempowerment both at home and in their receiving countries via sex stereotyping and abuse dictates the need for a multi-faceted rights protection mechanism.⁶⁴ The protection from the CEDAW thus can greatly benefit from specific protection for migrant women that the ICRMW provides. Both the CEDAW and the ICRMW must be interpreted with reference to each other to ensure greater protection of women's rights. While the CEDAW lays out the rights of women extensively, it does not provide the necessary guidance needed by State Parties to ensure these rights are upheld for migrant women workers within their borders.

Regardless of whether the majority of migrant workers in Australia comprise of men or women, this does not eliminate the risk of gender discrimination in a manner that is particular to migrant women, or eliminate the protection and rights needed by female family members of migrant workers. There is the risk of sexual exploitation creating vulnerability in both women and children, where it has moved into the "political agenda of the Westernised, industrialised world."⁶⁵ Very few countries have ratified the

⁶³ Article 24, ICRMW 1990

⁶⁴ Stasiulis, D. K. & Baikan, A. B., *Negotiating Citizenship: migrant women in Canada and the global system*, Toronto, University of Toronto Press, 2005, p. 61.

⁶⁵ Demleitner, N. V., 'The Law at a Crossroads: The Construction of Migrant Women Trafficked into Prostitution,' in

ICRMW, despite links “between violence against migrant women workers and the failure of states to protect these women workers by monitoring minimum labour standards and ensuring access to adequate housing, education, and alternative employment opportunities.”⁶⁶

Scope of the ICRMW

Although the CEDAW upholds civil and political rights, in relation to eliminating discrimination against women⁶⁷, it has been noted that the ILO and UN Conventions “do not instruct state parties to devote particular attention to the type of employment in which women predominate.”⁶⁸ Ratification of the ICRMW is a way to close this protection gap, particularly where undocumented migrants are entitled to legal rights,⁶⁹ through the due processes explained in the ICRMW.⁷⁰

Right to leave without fear of dismissal

The CEDAW prohibits employers operating within ratifying states from dismissing female employees on the grounds of pregnancy, maternity leave or marital status.⁷¹

Sexual exploitation

There have been recorded instances where trafficked women to Australia were deceived about the fact that they were to work as sex workers, or they may know but were deceived about the conditions. Australian traffickers actively recruit women, who are provided false documents and who risk sexual violence and servitude,⁷² diminishing the right to be free of servitude (Article 11). The CEDAW's reach does not sufficiently explain in detail the scope of female migrant workers in this context to the extent that the ICRMW does.⁷³ Providing protection to trafficked women, as migrant workers, may not only

Kyle, D. & Koslowski, R. (Eds.), *Global Human Smuggling: Comparative Perspectives*, Maryland, Johns Hopkins University Press, 2001, pp. 257-270.

⁶⁶ True, J., ‘The Political Economy of Violence Against Women: A Feminist International Relations Perspective’ *Australian Feminist Law Journal*. Vol. 32(1), 2010, pgs. 39-60, p 52.

⁶⁷ United Nations General Assembly, *Convention on the Elimination of Discrimination Against Women (CEDAW)1979*.

⁶⁸ Cholewinski, R., ‘Protecting Migrant Workers in a Globalised World’, *Migration Information Source*, Washington DC, Migration Policy Institute, 2005. Accessed 21 February 2012 at <http://www.migrationinformation.org/Feature/display.cfm?id=293>.

⁶⁹ Yau, J., ‘Promise and Prospects of the UN's Convention on Migrant Workers,’ *Migration Information Source*, Washington DC, Migration Policy Institute, 2005. Accessed 21 February 2012 at <http://www.migrationinformation.org/Feature/display.cfm?id=288>.

⁷⁰ United Nations Educational, Scientific and Cultural Organization (UNESCO) *International Migrants Convention*. Accessed 21 February 2012 on <http://www.unesco.org/new/en/social-and-human-sciences/themes/social-transformations/international-migration/international-migration-convention/>.

⁷¹ CEDAW, Article 11(2)(a). It in fact states that special protection is to be provided to women in this situation: Article 11(2)(d).

⁷² Jeffreys, S., ‘Trafficking Denial: Language and Tactics,’ in Agrawal, A. (Ed.) *Migrant Women and Work*, New Delhi, Sage Publications, 2006, pp. 204-205.

⁷³ CEDAW, Article 6 only states that “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution in women” without specifying the exact measures.

help to reflect the actual numbers needed to ascertain the extent to which trafficking occurs, but also offer a more dignified process for undocumented women workers to claim their rights: as migrant workers, instead of sex workers⁷⁴ (Articles 8-35).

This may, in addition to other remedies, allow migrant women workers to claim compensation from the employer (Article 54), thus allaying in part the State burden of providing compensation and redress to migrant workers who experience exploitation. Ratification of the ICRMW will in fact assist the State in ensuring procedures – regarding legal assistance, interpreters and humanitarian standards – in dealing with migrant workers are taken into account to adhere to the standards set out in the CRC and the CEDAW.⁷⁵

⁷⁴ Bhabha, J. 'Trafficking, Smuggling and Human Rights'. *Migration Information Source*. Washington DC: Migration Policy Institute. 2005. Accessed 21 February 2012 at

<http://www.migrationinformation.org/Feature/display.cfm?id=294>

⁷⁵ United Nations Educational, Scientific and Cultural Organization (UNESCO) *International Migrants Convention*.

<http://www.unesco.org/new/en/social-and-human-sciences/themes/social-transformations/international-migration/international-migration-convention/> Accessed on 21 February 2012

7.4 ICRMW and the Convention on the Rights of the Child (CRC) and the Conditions of the Children of Migrant Workers

7.4.1 Scope

The ICRMW is applicable to all migrant workers and the members of their families (Article 1). This applies to both documented and undocumented family members (Article 5). The ICRMW also provides that migrant workers and their families have the duty to comply with the laws and regulations of their states of transit and states of employment (Article 34).

7.4.2 Detention of children

No migrant worker or member of his or her family will be subject to torture or cruel, inhuman or degrading treatment or punishment (Article 10)⁷⁶. Additionally, migrant workers and their families have the right to equality with nationals concerned before the courts and tribunals (Article 18) which includes the right to bail. These are important in relation to the detention of children, given that Australia currently faces international scrutiny for its detention of children, despite government policy that children will not be held in immigration detention centres.⁷⁷ No child should experience the continued risk of being held under government policy.⁷⁸ Unfortunately, it appears that this is still currently the practice.⁷⁹

The non-detention of children principles also extend to other family members in order to minimise the trauma caused to children as a consequence of being separated from their family members.⁸⁰ The right of the child to reside with the family is upheld in the CRC, but clearly, the ratification of the CRC in the case of child detention has been insufficient to eliminate the occurrences of this violation. It is important to note that the ICRMW specifically recognises that the family is the natural and fundamental group unit of society, and is entitled to protection by society and the state (Article 44).

7.4.3 Right to social security and healthcare

The right of migrant children to receive social security (Article 27) is specified in the CRC.⁸¹ The right to receive medical treatment (Article 28) is imperative to upholding the right to healthcare granted by the CRC.⁸² However, the much-needed specifics are located in the ICRMW, especially in the case of emergency medical care in order to combat child mortality. The specificity of Article 28 in the ICRMW is

⁷⁶ This right which states no child will be unlawfully or arbitrarily detained is also upheld in Article 37 of the Convention on the Rights of the Child (CRC).

⁷⁷ United Nations Children's Fund (UNICEF) (2011, 7 July) *Why Are Kids Still in Detention*. Retrieved 21 February 2012, from <http://www.unicef.org.au/Act/Speak-Out/Why-are-kids-still-in-detention.aspx>

⁷⁸ *ibid*

⁷⁹ *ibid*

⁸⁰ Article 19 of the CRC states that State Parties are responsible for protecting children from all physical and mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. Removal of the child from the family may equate to mental violence arriving from mental injury and neglect caused by the lack of parental care

⁸¹ Article 26 of the CRC.

⁸² Article 6 of the CRC upholds the right to life. Article 26 establishes the right to healthcare.

important to refine the meaning of the right to healthcare under the CRC for the children of migrant workers.

7.4.4 Right to identity

The ICRMW upholds the right to a name, registration of birth and to a nationality (Article 29). This is important in cases where parents may neglect or fear to register the birth of the child due to non-existence of legal documentation affirming the right of the parent concerned to reside in Australia. It should be noted that this does not necessitate that the child will be granted Australian citizenship in a manner that contrasts with Australian immigration law, which is also affirmed by the CRC.⁸³

7.4.5 Principle of family unity

The ability to uphold children's rights and the best interests of the child has been limited by migration control policies that are increasingly restrictive, including in matters pertaining to family reunification.⁸⁴ The ICRMW acknowledges the importance of family unity (Article 44) in ensuring the well-being of the child. The challenges faced by “children left behind” must be dealt with within the context of the ICRMW especially when the majority of these children have had a negative experience of migration.⁸⁵ Despite the improvement in economic performance experienced by the families of migrant workers receiving remittances, according to research the non-presence of a parent does not increase happiness experienced by the child.⁸⁶ Particularly where the mother was absent, children perceived that family relationships became unstable and deteriorated over a five-year period, experienced sadness and depression, and observed an increase of irresponsibility on the part of the father.⁸⁷

7.4.6 International migration

The ICRMW provides that State Parties shall consult and cooperate to promote sound, equitable and humane conditions in connection to the international migration of workers and their families (Article 64).

⁸³ Article 7 of the CRC upholds the child's right to be registered immediately after birth, to acquire a name and a nationality, and the right to know and be cared for by the parents in accordance with domestic law. Article 8 requires the state to provide assistance and protection where the child has been illegally deprived of his or her identity.

⁸⁴ UNICEF, ILO & OCHCR (2009, October) *Global Migration Group Fact-Sheet on the Impact of the Economic Crisis on Children's Rights*.

http://www.globalmigrationgroup.org/uploads/documents/UNICEF_Fact%20Sheet_1_final.pdf Last accessed on 10 November 2011

⁸⁵ Children with migrant parents working overseas responded with a resounding “no” that migration does not solve problems. They were also disturbed by representations of migrant workers as criminals to be pursued in destination countries: Global Migration Group & United Nations Children's Fund (UNICEF) (2012) *A view from the field: the impact of migration on children and youth left behind*.

http://www.globalmigrationgroup.org/uploads/news/2011-symposium/Views_from_the_field_Toll.pdf Last accessed on 21 February 2012

⁸⁶ In fact, it has been found that beyond economic benefits much of the impact experienced by families left behind has been negative: Cortina, J. Beyond the money: the impact of international migration on children's life satisfaction: evidence from Ecuador y Albania. *Migration and Youth: Harnessing Opportunities for Development*. [Conference] New York: Global Migration Group. 17-18 May, 2011.

http://www.globalmigrationgroup.org/uploads/news/2011-symposium/Life_satisfaction_Cortina.pdf Last accessed on 21 February 2012

⁸⁷ Arifin, E. N. *International migration in Southeast Asia*. (p. 303) Institute of Southeast Asian Studies. 2004. p.303

Proper services to provide information on policies, laws, regulations, and services to provide for social and cultural needs of migrant workers and their families (Article 65) are to provide regularity for the persons concerned (Article 69), with consideration of the principle of family unity laid out throughout the ICRMW, particularly in Article 44.

7.5 Refugees, Asylum Seekers and Migrant Workers: Differences as Stipulated in 1951 Refugees Convention and the ICRMW

7.5.1 Definitions

The ICRMW defines a migrant worker as:

“a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”. (Article 1)

In contrast, the Refugee Convention defines a refugee as a person who:

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside of the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”⁸⁸

7.5.2 Scope of the ICRMW

Article 3(d) of the ICRMW specifies that it does not apply to:

“refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned...”

Therefore, the definitions of the terms “migrant worker” and “refugee” are different and refugees are not included in the scope of the ICRMW. Also, the ICRMW protects the rights of migrant workers in Australia while fully respecting state sovereignty to control its borders and immigration policies (ICRMW Article 79). In this respect it is different from the 1951 Refugee Convention which prohibits the refoulement of refugees.

Migrant workers in Australia are those of foreign nationality engaged in remunerated activities. Asylum seekers, however, are not part of the exemptions as provided by the ICRMW Article 3, and can benefit from the protection the ICRMW provides. Nonetheless, their status as regular or irregular workers is decided by the domestic legislations of the State Parties and the ICRMW does not directly provide for legalisation of working rights of asylum seekers.

7.6 Additional rights conferred by the Convention

7.6.1 Right to transfer earnings abroad

Article 47 deals with the right of migrant workers to transfer their earnings, particularly those used to support their families, to their State of choice, and the requirement of States to assist with such

88 United Nations General Assembly, *Convention Relating to the Status of Refugees, 1951*, Article 1(A)(2), accessed on 23 February 2012 at <http://unhcr.org.au/unhcr/images/convention%20and%20protocol.pdf>.

transfers. This right would have an incredibly beneficial impact on all migrant workers. It is often cited as being one of the 'new' rights put forward by the ICRMW, but others have argued that it is simply an extension or 'addition' to rights already set out,⁸⁹ and it is of vital importance to the experience of migrant workers.

⁸⁹ OHCHR, "Migrant Workers Rights in Europe", United Nations Europe Regional Office, 2011, p. 11.

8. A Response to the counter-arguments

8.1 ICRMW does *not* limit state sovereignty to control immigration.

A common misunderstanding of the ICRMW is that it limits state's sovereignty to decide the immigration status of migrant workers. In fact, the ICRMW in Article 79 states: "Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention." In addition, Article 35 "protects" the right of States to decide on regularisations; Article 34 "protects" the laws and regulations of the States Parties, and the cultural identity of their inhabitants; Article 22 "protects" the right of States to decide to return irregular migrants on an individual basis.^{90 91}

In a recent speech, Navi Pillay lamented the excessive emphasis on border control as a means to deter irregular migration. She says, "research tells us that the majority of irregular migrants will have entered the country of destination legally and only subsequently will have fallen into an irregular situation. Some will have overstayed their permits having been unable to maintain a legal presence, while others will have lapsed into irregularity due to bureaucratic obstacles or will have been driven into irregularity trying to escape exploitation and abuse by their employers. Some irregular migrants will have protection needs that they have been either unable or unwilling to articulate to State authorities, or that have been dismissed in flawed asylum procedures."⁹² It should therefore be noted that maintaining adequate conditions for migrant workers *after* their entry is as (if not more) important as border control in regulating irregular migration. Ratification of the ICRMW will complement Australian border control and reduce the need to resort to high cost enforcement regimes.

8.2 ICRMW does *not* condone "illegal" or irregular forms of migration.

Some say that the ICRMW gives "too much" protection for irregular workers. This argument is based on a misunderstanding that fails to recognise that every human being has certain basic human rights that cannot be violated. Such human rights do not depend on citizenship or on residency status. The ICRMW does no more than reaffirm what other human rights treaties have already established in respect of irregular migrant workers. It protects both regular and irregular migrant workers and their families albeit to different extents. Part III of the Convention (Articles 8 to 35) applies to all migrant workers

⁹⁰ More detailed description of the extent to which the ICRMW can affect state sovereignty is elaborated in detail in OHCHR. *Migrant Workers Rights in Europe* United Nations OHCHR Europe Regional Office, 2011.

http://europe.ohchr.org/Documents/Publications/Migrant_Workers.pdf, last accessed on 14 Feb 2012.

⁹¹ OHCHR. *Migrant Workers Rights in Europe* United Nations OHCHR Europe Regional Office, 2011.

http://europe.ohchr.org/Documents/Publications/Migrant_Workers.pdf, last accessed on 14 Feb 2012.

⁹² Address by Ms. Navi Pillay, High Commissioner for Human Rights to the Graduate Institute of International and Development Studies, Geneva, 14 December 2011,

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11723&LangID=E>, last accessed on 15 Feb 2012.

whereas Part IV (Articles 36 to 56) provides additional rights to documented migrant workers and their families. The ICRMW clearly recognises that irregular or undocumented migrant workers, too, have fundamental human rights that cannot be violated. However, it should also be noted that most essential rights in Articles 8 to 35 are protected under other human rights treaties and ILO conventions No. 143 and No. 97, which Australia is party to.⁹³ As a matter of fact, the argument that giving rights to irregular workers encourages irregular forms of migration is *contrary* to well-known rights-verses-numbers trade-offs.⁹⁴ The argument is that there is an inversely proportional relationship between the scope of migrant workers' rights and their numbers. The degree of this inverse relationship ("tightness" of trade-off) may be debated among scholars; however, it is a general understanding that more rights protection often translates to more costs in terms of wages, which reduces the "competitiveness" of migrant workers' wages in the labour market and a subsequent greater competitiveness of the domestic workers.

Moreover, the ICRMW is dedicated to the reduction of irregular forms of migration. Its Preamble states "bearing in mind that the human problems involved in migration are even more serious in the case of irregular migration and convinced therefore that appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights." An OHCHR report states:

The Preamble proposes three cumulative elements that can contribute to reducing irregular movements of migrants: 1: Recognize their basic human rights to avoid unfair competition that irregular work facilitates. 2: Recognize "more" rights to regular migrant workers in order to encourage regular employment of migrants. 3: Sanction employers that resort to irregular migrant labour.

This in part explains why rights of all migrant workers and their families are recognized in Part III of the ICRMW. Article 68 affirms that: "States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation". In addition to this "clear and principled human rights approach to the problem of irregular migration", the ICRMW contains several elements specifically designed to combat irregular migration [in its Articles from 64 to 69].⁹⁵

Therefore, the ICRMW and the Australian government have a common goal of stopping and preventing clandestine and illegal activities that migrant workers may engage. It is of a view of the drafter of the ICRMW that protection of migrant rights is intimately related to discouraging such illegal activities. Ratification of the ICRMW will contribute to reducing irregular migration.

⁹³ Details of protection are provided in OHCHR. *Migrant Workers Rights in Europe* United Nations OHCHR Europe Regional Office, 2011. http://europe.ohchr.org/Documents/Publications/Migrant_Workers.pdf, last accessed on 14 Feb 2012.

⁹⁴ Ruhs, Martin and Martin, Phillip. 'Numbers v Rights: Trade-Offs and Guest Worker Programs,' *International Migration Review* 42(1). 2008

⁹⁵ *Ibid* p. 22

9. Conclusion

The history tells us that despite Australia's post-war immigration program to keep the country British and white, Australia is one of the most diverse countries in the world. The American 'Operation Gatekeeper' in 1994 was designed to strengthen control and enforcement along the US-Mexico border; it did not stop the Californian agricultural industry from hiring undocumented Mexican workers but resulted in a 20-fold increase in a number of people dying as a result of crossing the border in remote areas.⁹⁶ Germany's 'guestworker' program from 1955-1973 aimed to recruit temporary workers who would come without bringing families, but ultimately resulted in family reunification, permanent settlement and emergence of ethnic minorities. There are numerous instances that tell us mere control of numbers and strict enforcement without considering the socio-political background of migrant workers has almost always failed. Migrant workers are indeed humans and not labour commodities—their number cannot be controlled by force alone. Excessive force and enforcement without taking into consideration the humanness of migrant workers and their fundamental, inalienable human rights can, and always have, backfired.

Under-priced foreign labour is a tempting option for employers, and this can only undermine domestic labour force. "Labour shortage" is an ambiguous concept; is the labour short because the working conditions provide insufficient compensation? It is thus only through extensive consultation that involves multiple parties can such assessment be made properly. If the goal is to employ workers in areas of genuine labour shortage, then there is no reason migrant workers should be given less favourable treatment compared to domestic workers. Lesser wages, more vulnerable working conditions and lesser labour rights will only fuel the employers' temptation to hire a greater number of migrant workers and take advantage of their vulnerabilities.

At the end of 2009, there were more than 900,000 people in Australia on visitor and temporary visas. 457 scheme visa holders increased steadily from 16,550 in 1997-98⁹⁷ to 101,280 in 2008-2009.⁹⁸ Experts observe Australia's shift from permanent to temporary migration in its immigration policies, some calling the shift "permanent".⁹⁹ However, managing temporary migration is not easy indeed as successful temporary migration policies are rare around the world. It is imperative that Australia learns from the mistakes of other host countries whose temporary migration policies have failed. Scholars point to the lack of consideration of "human elements" and excessive focus on the benefits of

⁹⁶ Castles, S. 'Why migration policies fail', *Ethnic and Racial Studies* V.27(2) March 2004 pp.205-227, p. 205.

⁹⁷ Joint Standing Committee on Migration, Parliament of Australia, *Temporary Visas... Permanent Benefits: Ensuring the Effectiveness, Fairness and Integrity of the Temporary Business Visa Program*.

⁹⁸ DIAC. 'Subclass 457 Business (Long Stay), State/Territory Summary Report, Financial Year to 30 June 2009' Report Id: BR0008, 2009,

⁹⁹ For example, See: Tham, J-C & Campbell, I. "Temporary Migrant Labour in Australia: The 457 Visa Scheme and Challenges for Labour Regulation" Center for Employment and Labour Relations Law, Melbourne Law School. Working Paper No. 50 University of Melbourne, Melbourne:2011; Crock, M. *Immigration and Refugee Law in Australia*. Federation Press, 1998.; Hugo, G. 'Globalization and Changes in Australian International Migration' 23(2) *Journal of Population Research* 2006; Mares, P. 'The Permanent Shift to Temporary Migration,' 17 June 2009, *Inside Story* <http://inside.org.au/the-permanent-shift-to-temporary-migration/>

employers.¹⁰⁰ Migrant workers are not indeed commodities, and thus, any policies that treat migrant workers as if they are labour commodities are bound to fail.

¹⁰⁰ See, for example, Castles (2004) which provides a summary of arguments from different authors; also Ruhs, M. 'The Potential of Temporary Migration Programmes in Future International Migration Policy,' *International Labour Review* 7(14). 2006

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