



THE UNIVERSITY  
of ADELAIDE



Dr Joanna Howe

# The Impact of the China- Australia Free Trade Agreement on Australian job opportunities, wages and conditions

**Dr Joanna Howe**

Senior Lecturer, University of Adelaide  
Law School.

This report was commissioned by the Electrical Trades Union (ETU) and published through the University of Adelaide. The ETU had no editorial input into the researching and writing of the report.

The author is grateful to Associate Professor Alexander Reilly and Dr Christopher F Wright for their feedback on an earlier draft. All errors are the author's own.



# Dr Joanna Howe

Dr Joanna Howe is a Senior Lecturer of Law at the University of Adelaide and a consultant with Harmers Workplace Lawyers. She holds a Doctorate of Philosophy in Law from the University of Oxford where she studied as a Rhodes Scholar. Joanna has also worked as a consultant for the International Labour Organisation, the McKell Institute and for the Equal Opportunity for Women in the Workplace Agency. Joanna is the holder of a prestigious grant from the Oñati International Institute for the Sociology of Law in Spain to convene a workshop on temporary labour migration bringing together international experts in 2015. Joanna is also a chief-investigator on an Australian Research Council Discovery Grant, 'Work Experience: Labour Law at the Boundary of Work and Education'. Joanna is regularly invited to present evidence to the Senate Legal and Constitutional Affairs Committee and to advise government departments and reviews on Australia's temporary migration program. She is also the co-editor of the Work and Employment Column in the Australian Journal of Administrative Law and writes regularly for major media outlets. She is the author of two books - 'The Australian Standard of Employment Rights' (2009, Hardie Grant) and 'Rethinking Job Security' (2015-forthcoming, Ashgate Publishing) and numerous journal articles and book chapters. She is the recipient of the University of Adelaide Women's Research Excellence Award 2015.

## Contents

Introduction	2
<hr/>	
<b>Part One: Entry Pathways under the ChAFTA and the Application of Labour Market Testing</b>	<b>4</b>
Entry Pathway One: Chapter 10 – General Entry Provisions	4
Entry Pathway Two: Investment Facilitation Arrangements	7
Entry Pathway Three: Work and Holiday Visas	10
<hr/>	
<b>Part Two: Key Issues under the ChAFTA</b>	<b>12</b>
Issue #1: The role of Labour Market Testing in Australia's Temporary Labour Migration Program	12
Issue #2: Enforcement of Chinese Workers' Rights under Australian Labour Law	15

# Introduction

Significant controversy surrounds the impact of the China-Australia Free Trade Agreement (ChAFTA) in a number of areas.<sup>1</sup> This report focuses on two of these areas by examining the ChAFTA's provisions on labour mobility.

The first area of controversy is whether the ChAFTA will enable Chinese workers to replace local workers in the Australian labour market. This question hinges upon whether the Australian Government can impose labour market testing to determine whether a genuine skills shortage exists in the local labour market. Without labour market testing there is no regulatory mechanism to ensure that local job opportunities are protected.

The second area of controversy is whether the ChAFTA allows for, or will result in, Chinese workers receiving poorer wages and conditions than local workers in the Australian labour market.

This report is structured in two parts. Part One considers the three provisions in the ChAFTA that provide the opportunity for Chinese workers to access the Australian labour market. The labour mobility clauses in Chapter 10 and the two memorandums concerning large-scale infrastructure development projects and the annual entry of working holiday makers each facilitate this opportunity. This report identifies each of these entry pathways into the Australian labour market and examines how they will operate in practice.

Part One of the report makes a number of findings. Firstly, the report finds the ChAFTA greatly increases the access of Chinese workers to the Australian labour market. The report recommends the Australian Government use its enabling legislation to clarify that labour market testing will apply to certain categories of Chinese workers. In particular, there needs to be labour market testing in a manner that is consistent with Australia's 457 visa program, before employers can access Chinese workers who are 'contractual service suppliers' or 'installers and servicers'. Without labour market testing, there is no regulatory mechanism to prevent an employer from preferring a Chinese worker over a local worker for these two categories.

Secondly, the report also finds that there needs to be greater protection to ensure Chinese workers are not used as a way of undercutting local wages and conditions. This can be done by making it a requirement that Chinese workers be paid the applicable market salary rate and not merely the award rate for their occupational category. The market salary rate can be determined through taking into account the current major employing collective agreement registered by the Fair Work Commission in the sector

and/or region, ABS average salary rate data and the Department of Employment's Job Outlook data.

Thirdly, the report finds that the current regulatory framework for Investment Facilitation Arrangements (IFAs) requires reform in order to ensure it is a legislated framework that mandates labour market testing, market salary rates and the achievement of greater public accountability and transparency around IFAs.

Part Two of the report examines two key issues concerning the ChAFTA's impact on Australian labour standards.

The first issue pertains to the role and importance of labour market testing in determining the composition of Australia's migrant worker intake. This section finds that both the OECD and two independent Australian government reports published in the last two years suggest that it is necessary for countries to have a clear and concrete process for determining which occupations are eligible for temporary migration. It is essential, therefore, that the Australian Government relies on labour market testing to assess whether Chinese workers are filling genuine vacancies in the Australian labour market. The report recommends that Australia adopt a consistent approach to labour market testing so that workers entering Australia via a free trade agreement are subject to the same labour market testing requirements as under Australia's 457 visa program.

The second issue concerns whether temporary migrant workers from China can and/or will be paid less or treated differently to local workers performing equivalent jobs in the Australian labour market. Although it is true that Chinese workers will be required to be employed in accordance with Australia's employment laws and are entitled to Australian wages and conditions, it is equally true that where these workers are being exploited or being used to undercut local wages and conditions, it is highly unlikely this will be uncovered by authorities, due to the inadequacies of existing regulatory enforcement arrangements. This section explores the myriad reasons why this is so, including the significant wage differentials between China and Australia, the employer-driven nature of Australia's temporary migrant worker program and the limited resources of our enforcement inspectorate, the Fair Work Ombudsman. It is also highly unlikely that Chinese workers themselves will raise the alarm about underpayment of wages or exploitative treatment because of structural reasons inherent in temporary migrant worker programs, relating to the precarious position of migrant workers, especially those on temporary and employer-sponsored visa arrangements.

<sup>1</sup> For media articles identifying the main controversial aspects of the ChAFTA, see: Gabrielle Chan, 'Confused about the China Australia free trade deal: here's what you need to know', *The Guardian*, 3 September 2015; Paul Kelly, 'A poll fought over "Aussie jobs"', *The Australian*, 5 September 2015.





.....

Thus, this report finds that there are real concerns that the ChAFTA greatly increases the ability of Chinese workers to access the Australian labour market, without sufficient regard for the necessary regulatory framework to protect those workers from exploitation or to safeguard Australian job opportunities, wages and conditions.

.....

Although advocates of the ChAFTA will point to the text of the agreement that requires Chinese workers be employed according to Australian law, and government policy which currently stipulates labour market testing for labour agreements, neither of these are sufficient to ensure that the ChAFTA's operation in practice does not place downward pressure on Australian wages, conditions and labour standards.

Increasingly, there is an unquestioned economic philosophy that systems need to be less regulated by government and driven by the needs of employers, with market responsiveness, timeliness and flexibility as the drivers and indicators of success. Be that as it may, there is a strong case for government regulation to ensure that temporary labour migration is used to address genuine skill needs in the local labour market, without being used as a vehicle to unnecessarily increase labour supply and reduce local wages and conditions. Without clarification in the enabling legislation, the ChAFTA does not achieve the right balance between these two needs. Not only does the ChAFTA attempt to prevent the Australian government from regulating its temporary labour migration program with respect to Chinese workers to include some form of labour market testing, but it greatly increases the entry pathways for Chinese workers to enter the Australian labour market. Taken together, these two provisions make it extremely hard for the Australian Government to determine the scope and composition of its temporary migrant workforce, which is an important sovereign right and responsibility for any national government.

Thus, it is vital that the ChAFTA's implementation be accompanied by enabling legislation that stipulates the application of labour market testing and market salary rates to Chinese workers, greater public accountability and transparency around investment facilitation arrangements and a substantial increase in the enforcement capacity and powers of the Fair Work Ombudsman.

# Entry Pathways for Chinese Workers under the ChAFTA and the Application of Labour Market Testing

This Part explains and critically examines the three regulatory mechanisms under the ChAFTA which facilitate the entry of temporary Chinese workers. A central controversy around the ChAFTA is whether the Australian Government can require labour market testing for Chinese workers coming into Australia through these entry pathways.

## Entry Pathway #1: General Provisions Permitting Access

Chapter 10 of the China-Australia Free Trade Agreement regulates the movement of people between China and Australia.

Article 10.4 concerns temporary entry and provides two limitations on the ability of the government of either country to facilitate temporary movements between China and Australia.

Firstly, neither country is permitted to impose a cap on the number of temporary entrants from the other country.

Secondly, neither country is able to use labour market testing or any other similar regulatory mechanism to determine the composition of temporary entrants.

These are drafted as reciprocal obligations but they have a far greater effect on the Australian labour market as there will be many more Chinese workers that wish to work in Australia than Australian workers that wish to work in China. Although the reasons why an individual decides to move temporarily to work in another country are complex, differentials in wages and employment conditions function as a necessary condition for international migration to occur,<sup>2</sup> and this is especially so as between China and Australia given the huge wage disparity between the two countries.<sup>3</sup> The absence of a cap and labour market testing in Australia is likely to enable large numbers of Chinese workers to come to Australia,

whereas the low wages and poor working conditions in China mean it is highly unlikely that flows in the other direction will occur to the same extent.

Specifically, Article 10.4, paragraph 3 states:

In respect of the specific commitments on temporary entry in this Chapter, unless otherwise specified in Annex 10-A, neither Party shall:

- (a) impose or maintain any limitations on the total number of visas to be granted to natural persons of the other Party; or
- (b) require labour market testing, economic needs testing or other procedures of similar effect as a condition for temporary entry.<sup>1</sup>

A number of potential problems arise from Article 10.4, paragraph 3 in its present form deriving from its impact upon Australia's temporary labour migration program, the subclass 457 visa.

Firstly, it undermines Australia's ability to make its own immigration laws in the national interest. Although the stated objective of Australia's subclass 457 visa program is to meet skill shortages in the domestic labour market, Article 10.4, paragraph 3 of the ChAFTA prevents Australia from imposing a cap on the number of Chinese 457 visa holders. This means even if the Australian Government wished to constrain the number of 457 visa holders more generally because local unemployment was high or to reflect changing economic circumstances, it could not do so with respect

<sup>2</sup> Massey DS, Arango J, Hugo G, Kouaouci A, Pellegrino A, Taylor E J, *Worlds in Motion* - Understanding International Migration at the end of the Millenium, Oxford, Clarendon Press, 2008 , p 279.

<sup>3</sup> For statistics as to this wage disparity, see Part II of this report. See also: Sean Cooney, Sarah Biddulph and Ying Zhu, *Law and Fair Work in China* (Routledge 2013).

to Chinese citizens. So long as a Chinese applicant for a 457 visa met the general eligibility criteria for the visa, the Government could not reject the application. The absence of a cap means that Australian employers can engage unlimited numbers of Chinese citizens on 457 visas. Whilst it is true that Australia's current program settings for the 457 visa do not include an overall cap on the amount of 457 visas issued each year, this has not always been so. From 1 July 2013 until 14 February 2014, employer-sponsors were required to justify the number of workers to be sponsored for 457 visas as part of the sponsorship approval process, and a certain number of possible 457 sponsorships were approved. Once this 'nomination ceiling' was reached, an employer could not breach it without applying to have the cap increased to allow sponsoring of further employees. It is concerning that Article 10.4, paragraph 3 sets out to constrain present and future governments from using caps as a mechanism to determine the composition of Australia's temporary entrants.

Secondly, and of even greater significance, is the ban on labour market testing or any 'other procedure of similar effect'. This removes the ability of the Australian Government to ensure Chinese workers are only employed in Australia where there is no local worker available to do the job. This limits the Australian Government's achievement of a central purpose of the 457 visa program provided for in legislation, namely, 'to address genuine skill shortages in the Australian labour market'<sup>4</sup>.

The prohibition on labour market testing contained in the ChAFTA prevents present and future Australian Governments from using selection criteria that has the effect of determining whether there is an actual and legitimate labour market need for a Chinese worker to enter Australia or whether the alleged shortage can be filled locally. With respect to Chinese workers, this neuters the current safeguard in the *Migration Act 1958* (Cth) which requires an approved sponsor to undertake labour market testing to ensure that a 'a suitably qualified and experienced Australian citizen or Australian permanent resident is not readily available to fill the nominated position'.<sup>5</sup> In this way, the ChAFTA enables an employer to decide to replace an Australian worker with a Chinese worker on a 457 visa.

Thus, Article 10.4, paragraph 3 significantly expands the scope for Chinese citizens to access the Australian labour market through the 457 visa program and in contradiction with the central objective of the program as enshrined in legislation. Article 10.4, paragraph 3 renders Australia's labour market far more porous to Chinese workers than in its current form. Further, this provision purports to prevent the Australian Government from enacting legislation to rectify this.

### Which categories of Chinese workers will be exempt from labour market testing under Chapter 10 of the ChAFTA?

On 16 September 2015 the Turnbull Government introduced into the Australian Parliament its enabling legislation for the ChAFTA.<sup>6</sup> The Explanatory Memorandum for this legislation establishes that labour market testing will *not* apply to certain categories of Chinese workers.<sup>7</sup> This means that for these categories there will be no regulatory mechanism to ensure Chinese workers are not replacing local workers in the Australian labour market. These categories are provided for in Annex 10-A of the ChAFTA and it is to this we now turn.

#### (ii) Annex 10-A

Annex 10-A accords certain categories of Chinese citizens with rights to enter and work in Australia for a limited time period, and without labour market testing:

- > intra-corporate transferees and independent executives for up to four years
- > contractual service suppliers, for up to four years;
- > business visitors for up to 90 days (or six months in the case of service providers); and
- > installers and servicers of machinery and/or equipment for up to three months.

Annex 10-A is conspicuous for the breadth of access provided to Chinese citizens to enter the Australian labour market in a range of occupations and industries, for an extended period of time. Whilst it is entirely legitimate (and indeed consistent with Australia's 457 visa program) that some of these categories not be subject to labour market testing, for example, independent executives and intra-corporate transferees, or those in ASCO skill levels 1 and 2, for other categories, particularly those involving lower skilled occupations (ie. ASCO skill levels 3 and 4), it is vital that some form of labour market testing apply.

#### Intra-corporate transferees

Annex 10A, paragraphs 5 and 6 provide entry to 'Intra-corporate transferees of China' for a period of up to four years, with the capacity for further stay. A transferee must be:

- > an executive or a senior manager
- > a specialist with advanced, trade, technical or professional skills
- > a manager who primarily directs the enterprise or a department or subdivision of the enterprise

Therefore, this entry pathway is restricted to senior personnel within an enterprise or a staff member with a highly specialised skillset.

The rationale for providing an entry pathway for intra-company transfers is because these workers possess particular proprietary knowledge and experience of a Chinese business required to carry out its Australian operations. Because it is proprietary, this knowledge and experience cannot generally be sourced from the Australian labour market, however intra-corporate transfers are often undertaken to facilitate the transfer of proprietary knowledge and expertise to local staff. Facilitating efficient intra-corporate transfers is seen as an important aspect of enabling Chinese businesses to grow their Australian operations and to increase their returns on project and infrastructure investment.

It is reasonable that this category be exempt from labour market testing. Firstly, this is because the rationale for intra-corporate transfers means the particular knowledge and experience of the Chinese worker cannot be sourced from the local labour market. Secondly, the restrictions in the ChAFTA limit the operation of this category to senior personnel or a staff member with a highly specialised skillset.

<sup>4</sup> *Migration Act 1958* (Cth), section 140AA.

<sup>5</sup> *Migration Act 1958* (Cth), section 140GBA.

<sup>6</sup> *Customs Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015* (Cth).

<sup>7</sup> Explanatory Memorandum, *Customs Amendment (China-Australia Free Trade Agreement Implementation) Bill 2015*, Paragraph 160.



### Independent executives

Annex 10-A, paragraphs 7 and 8 provide entry for independent executives of China for a period of up to four years.

An independent executive is defined as an executive of a Chinese business who is responsible for establishing a branch or subsidiary of that business in Australia.

Similar to the arguments raised in the section on intra-corporate transfers, it is reasonable that independent executives of China be exempt from labour market testing as this category involves a senior executive with specific proprietary knowledge and experience of the business.

### Contractual service suppliers of China

Annex 10-A, paragraphs 9, 10 and 11 grant entry to contractual service suppliers of China for a period of up to four years, with the possibility of further stay.

A contractual service supplier is a Chinese citizen who has trade, technical or professional skills and experience.

This category is not limited to highly skilled workers. It includes many occupations for which labour market testing currently applies under Australian law. It is vital that labour market testing apply to this category otherwise it will be entirely possible for Chinese workers to replace Australian workers in fields as diverse as engineering, nursing and most trades.

Under these provisions, a business that has a contract with an Australian business to supply a service (for example, a hospital seeking to staff a particular ward) can bring its own workforce of Chinese staff under the contractual service supplier category and there will be no requirement that these jobs first be offered to local workers. This is why it is vital that the enabling legislation for the ChAFTA makes it clear that labour market testing will apply to the contractual service supplier category in a manner that is consistent with the 457 visa program.

### Installers and servicers of China

Unlike the three aforementioned categories of Chinese workers who will be permitted entry through the 457 visa program, installers and servicers of China will enter Australia via a Temporary Work (Short Stay) Activity Visa, which is a subclass 400 visa. This visa is intended for temporary workers who are doing short term, highly specialised, non-ongoing work.<sup>8</sup>

Annex 10-A, paragraph 13 provides the following description of this category:

*'A natural person of China is an installer or servicer of machinery and/or equipment where such installation and/or servicing by the supplying company is a condition of purchase of the said machinery or equipment. An installer or servicer must abide by Australian workplace standards and conditions and cannot perform services which are not related to the installation or servicing activity which is the subject of the contract.'*

There is no mandatory skills assessment for an installer or servicer from China and it is not limited to highly skilled Chinese workers. In fact, it is highly likely that under this provision, a low skilled or semi-skilled Chinese worker could enter Australia under the installer and servicer category.

Although the ChAFTA states that an installer or servicer must abide by Australian workplace standards and conditions and cannot perform services which are unrelated to the contract, it does provide

scope for a Chinese worker who is an installer or servicer to be used as a way of undercutting the wages and conditions of local workers. For example, if a particular sector is governed by a collective enterprise bargaining agreement which provides for a higher hourly rate than the award, it is perfectly legal for a Chinese business to employ a Chinese installer or servicer on the award rate rather than the wage which local workers would expect to receive under the enterprise agreement. This category of installers and servicers enables Chinese workers to effectively outprice local workers for certain jobs.

Given that the category of installers and servicers provides easy access to the Australian labour market for Chinese workers on lower wages and conditions than what local workers would expect, two important matters need to be established in the enabling legislation. Firstly, it is vital that labour market testing apply for this category. Secondly, this category must be subject to a requirement that market salary rates be paid in a manner that is consistent with the framework for the 457 visa.

### Despite having signed the ChAFTA, can Australia impose labour market testing on Chinese workers who are contractual service suppliers or installers and servicers?

Whilst the ChAFTA appears to greatly constrain the ability of the Australian Government to apply labour market testing with respect to Chinese workers, there is scope within Annex 10-A for the Government to mandate a requirement of labour market testing for all Chinese workers entering Australia under the contractual service supplier and installers and servicers categories.

The apparent ban on labour market testing in Article 10.4, paragraph 3 is expressly subject to the parameters specified in Annex 10-A. Paragraph 1, of Annex 10-A, states,

Australia requires a natural person of China seeking temporary entry to its territory under the provisions of Chapter 10 (Movement of Natural Persons) and this Annex to obtain appropriate immigration formalities prior to entry. *Grant of temporary entry in accordance with this Annex is contingent on meeting eligibility requirements* contained within Australia's migration laws and regulations, as applicable at the time for an application for grant of temporary entry. Eligibility requirements for grant of temporary entry in accordance with paragraphs 5 through 11 of this Annex include, but are not limited to employer nomination and occupation requirements.<sup>9</sup>

As Article 10.4 is subject to Annex 10-A, there is sufficient flexibility and scope within the latter to include labour market testing as indicated in the italicised phrase. If labour market testing is an eligibility requirement contained in Australia's migration laws and regulations, then this will necessarily apply to Chinese workers entering the Australian labour market through the entry channels of 'contractual service suppliers' and 'installers and servicers' provided in Annex 10-A.

Without local labour market testing Chinese workers can replace local workers without justification or consequence. Without a market salary rates requirement for both contractual service suppliers and installers and servicers, Chinese workers can undercut Australian wages and conditions by being paid the award wage rather than the industry norm which local workers would expect to receive under the relevant enterprise agreement.

<sup>8</sup> For more on this visa, see: <<https://www.border.gov.au/Trav/Visa-1/400->>.

<sup>9</sup> ChAFTA, Annex 10-A, Section A paragraph 1.



Therefore, it is critical that the Turnbull Coalition Government, via its enabling legislation for the ChAFTA, protect Australia's right to determine the composition of its migrant worker intake. The Government needs to clearly establish that Australia's interpretation of Annex 10-A is that labour market testing will apply to Chinese workers in a manner that is consistent with the general eligibility requirements of the 457 visa program.

Anything less, would mean that the Australian Government is effectively surrendering its autonomy over its migration laws and policies with respect to the composition of Australia's migrant worker intake with regards to Chinese workers. The importance of labour market testing is considered in Part II of this report, which develops the evidential basis for recommendation 4 below.

#### **Recommendation 1:**

This report recommends the Government clearly establish in its enabling legislation that labour market testing will apply to all Chinese workers coming into Australia as contractual service suppliers or as installers and servicers via Annex 10-A in the China-Australia Free Trade Agreement.

#### **Recommendation 2:**

This report recommends that the requirement of labour market testing in free trade agreements be consistent with the 457 visa program. This requirement of labour market testing for certain categories of temporary migrant workers should be enshrined in the Migration Act 1958 (Cth).

#### **Recommendation 3:**

This report recommends that contractual service suppliers and installers and services be subject to a market salary rates requirement as stipulated under the 457 visa program.

#### **Recommendation 4:**

This report recommends the Australian Government strengthen the application of labour market testing for the 457 visa, and consistent with the UK approach, adopt a model that is primarily predicated on independent labour market testing but which can be supplemented, where necessary, with employer-conducted labour market testing.

## **Entry Pathway #2: Investment Facilitation Arrangements**

Although not formally part of the ChAFTA, a Memorandum of Understanding between the two countries was agreed upon regarding the establishment of an Investment Facilitation Arrangement (IFA). The purpose of this memorandum is to encourage Chinese investment in Australia by permitting Chinese companies registered in Australia and undertaking large infrastructure development projects costing above A\$150 million to negotiate for increased labour flexibility on a specific, case-by-case basis with the Department of Immigration.

IFAs are intended to ensure guaranteed labour supply for the duration of infrastructure development projects and to manage the

commercial risk arising from a labour or skill shortage occurring during the project lifetime. This rationale of guaranteeing labour supply is important as concerns over labour or skills shortages can deter foreign investment.<sup>10</sup> Shortages can be fatal to large-scale projects, by increasing the construction phase of projects, resulting in increased costs and faltering confidence by investors.<sup>11</sup>

Although the Turnbull Coalition Government has stated that the framework for IFAs is comparable to the framework for enterprise migration agreements introduced by the Rudd and Gillard Labor Governments, there is one important area of distinction. The enterprise migration agreements model set the threshold at \$2bn. The EMA model was justified in large part because of the economic significance of the projects involved. In contrast, the \$150m threshold established by the ChAFTA is a significant discrepancy and likely to cover many more projects thus raising the possibility that this could be a major avenue for recruitment of migrant labour.

### **The process for making an IFA**

There are three steps before Chinese workers can be employed under an IFA.

#### **Step One:**

IFAs can only be negotiated for certain industries. The memorandum allows Chinese workers to be brought into Australia to work on the project, so long as the project is related to infrastructure development within the food and agribusiness, resources and energy, transport, telecommunications, power supply and generation, environment or tourism sectors.

To access an IFA, a project company must first apply to the China International Contractors Association (CHINCA). CHINCA will then write to the Department of Foreign Affairs and Trade. The Department of Foreign Affairs and Trade is then responsible for assessing whether the project company's application meets the memorandum's eligibility criteria. Within 20 days, the Department of Foreign Affairs and Trade is required to notify the Department of Immigration that the proposed project constitutes an eligible project under the terms of the memorandum.

#### **Step Two:**

This stage involves the Department of Immigration taking over the negotiation process for an IFA. Labour market testing is not required to enter into an IFA with a project company. In paragraph 6 of the memorandum, it clearly stipulates, 'there will be no requirement for labour market testing to enter into an IFA.'

At this stage, the Department of Immigration and the project company are permitted to negotiate 'concessions'. In this way, the IFA opens up new immigration possibilities as compared to Australia's official pathway for labour immigration, the 457 visa.

The 457 visa is aimed as a highly skilled work visa and is subject to a number of restrictions upon employer-sponsors, in particular:

- > occupations must be listed on the Consolidated Sponsored Occupations List (CSOL)<sup>12</sup>
- > visa holders must meet certain English language requirements<sup>13</sup>

<sup>10</sup> 'Why the era of giant commodity projects in Australia is over', *South China Morning Post*, 15 August 2015, <<http://www.scmp.com/business/commodities/article/1849643/why-era-giant-commodity-projects-australia-over>>

<sup>11</sup> For example, see: Business Council of Australia (2012), *Pipeline or Pipe Dream? Securing Australia's Investment Future*, Melbourne. See also, S Bahn, 'Workers on 457 Visas: Evidence from the West Australian Resources Sector' (2013) 39 *Australian Bulletin of Labor* 34, 35.

<sup>12</sup> <<https://www.border.gov.au/Trav/Work/Work/Skills-assessment-and-assessing-authorities/skilled-occupations-lists/CSOL>>.

<sup>13</sup> *Migration Regulations* 1994 (Cth), Specification of Tests, Scores, Period, Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas 2015 - IMMI 15/028.

- > visa holders' salaries must be above the Temporary Skilled Migration Income Threshold (TSMIT). The TSMIT is currently set at \$53,900.<sup>14</sup>

Whilst it is true that Chinese workers will need to be employed in compliance with Australian labour laws, the memorandum allows "concessions" to be made with regards to the required standards for the CSOL, English language ability and the TSMIT.

This means that the project company can negotiate via a private contract with the Department of Immigration to import Chinese workers to work on the project in lower skilled occupations, with lower level English-language ability and for a salary lower than the TSMIT.

### Key Issue: Can Chinese workers employed via an IFA undercut Australian wages and conditions?

The simple answer to this question is in the affirmative: there is no requirement in the memorandum that a Chinese worker employed via an IFA receives the same wages and conditions for their occupation as a local worker. The only stipulation in the memorandum is that the award rate be paid. Similarly, in the Project Agreements information booklet which is the policy document governing IFAs there is no market salary rates requirement. This means the ChAFTA could be used to create an IFA which undercuts local wages and conditions because although local workers may expect to be paid a higher rate for a certain occupation as provided for in the relevant enterprise agreement, a Chinese worker may be willing to work for the far lesser rate provided for in the award.

This effectively means that so long as the award rate is an acceptable concession on the TSMIT which has been negotiated in advance with the Department, then a Chinese worker employed via an IFA is simultaneously being employed in accordance with Australian law *and at the same time* undercutting local wages and conditions that are provided for in enterprise agreements. The risk of this occurring is high given that it provides Chinese employers with a relatively easy way to cut labour costs on infrastructure development projects.

It is also of concern that it is an Australian federal government department who is responsible for negotiating outcomes on labour with a Chinese company, who in many cases will be a Chinese State Owned Enterprise. This has the potential to make the wages and conditions that a Chinese worker will receive under an IFA a source of diplomatic dispute. It is entirely conceivable that situations may arise where it is an Australian government agency opposing a Chinese government agency's intentions in remunerating its staff.

This is why it would be preferable for all the parties involved to operate under a clear legislative framework governing IFAs with two key components. Firstly, this framework should provide a legislative requirement for labour market testing before Chinese workers can be employed under an IFA. Secondly, this framework should encompass a legislative requirement that Chinese workers receive the same wages and conditions as local workers for each occupational category specified in the IFA. The process for determining the applicable local wage and employment conditions for each occupation should take into account, but is not limited to the following:

- > The current major employing collective agreement registered by the Fair Work Commission in the sector and/or region;
- > ABS average salary rate data; and
- > The Department of Employment's Job Outlook data.

Cumulatively, these data sets will enable the Department of Immigration to identify what a local worker would expect to receive in terms of wages and conditions, to ensure Chinese workers on IFAs are not used a way of cutting labour costs.

In order to ensure continuing public support for investment facilitation arrangements, it is essential that these do not result in temporary migrant workers being employed on lower wages and conditions than comparable local workers. In an article in the Cambridge Journal of Economics, Michael Quinlan and Constance Lever-Tracy established that the existence of labour market regulations that ensured employers had to offer equal or better wages to migrant workers was critical to the acceptance of large scale migration from 1945 onwards:

The establishment of a pervasive network of legally enforceable sets of wages and conditions through the arbitration system after 1900, together with the growing organisational strength of unions, restricted the capacity of employers to use immigrants as a "super exploitable" category of labour. This formed the cornerstone of union acceptance of mass immigration after 1945 and of their growing tolerance towards non-European workers. It follows that a shift towards a more deregulated labour market which undermines union influence and the arbitration system, could foment divisions within the labour market and arouse strident union and working class hostility to further immigration.<sup>15</sup>

Similarly, respected Australian demographer, the late Professor Graeme Hugo, has previously criticised this type of approach, arguing, '[b]est practice should be to offer wages at the same (or better) levels than are offered to local workers. In this way, labour shortages reported by employers are more likely to be genuine'.<sup>16</sup> In this regard, the ChAFTA falls well short of a best practice approach to designing a temporary labour migration program to meet local skill shortages and safeguard local workers from displacement by temporary migrant labour, which necessarily will affect community acceptance of IFAs.

#### Recommendation 5:

This report recommends that Chinese workers receive the same wages and conditions as equivalent local workers for each occupational category specified in the investment facilitation arrangement. The process for determining the applicable local wage and employment conditions for each occupation should take into account, but is not limited to the following:

- > The current major employing collective agreement registered by the Fair Work Commission in the sector and/or region;
- > ABS average salary rate data; and
- > The Department of Employment's Job Outlook data.

<sup>14</sup> *Migration Regulations* 1994 (Cth), Specification of Income Threshold and Annual Earnings – IMMI 13/028.

<sup>15</sup> M Quinlan & C Lever-Tracy, 'From Labour Market Exclusion to Industrial Solidarity: Australian Trade Union Responses to Asian Workers, 1830-1988' (1990) 14 (2) *Cambridge Journal of Economics* 159, 160-161.

<sup>16</sup> Graeme Hugo, 'Best Practice in Temporary Labour Migration for Development: A Perspective from Asia and the Pacific' (2009) 47(5) *International Migration* 23, 59.



### Step three:

Once an IFA has been established between the Department and the project company, individual employers involved in the project can enter into a labour agreement with the Department of Immigration for Chinese workers to be engaged on the project. At this stage, the memorandum permits the imposition of a labour market testing requirement which employers can satisfy by demonstrating 'they have first tested the Australian labour market and not found sufficient suitable workers'.<sup>17</sup> It is important to note that this imposition of labour market testing is discretionary rather than mandatory under the ChAFTA. The memorandum states that a labour agreement will set out the number and type of jobs needed for the project and 'the sponsorship obligations associated with the labour agreement, including any requirements for labour market testing'. A footnote to the memorandum says that 'where labour market testing is required, employers may satisfy this requirement by demonstrating that they have first tested the Australian labour market and not found sufficient suitable workers.'

### Key issue: Does the memorandum allow the use of an IFA to facilitate Chinese workers replacing local workers in the Australian labour market?

Since signing the ChAFTA, the Australian Government has pointed to three policy documents, which attest to the inability of the IFA provisions being used to replace local workers with Chinese workers. In its view, these policy documents mean that the ChAFTA does not allow Chinese companies to bring in workers for major projects without first offering these jobs to Australian workers. Trade Minister Andrew Robb states unequivocally that to say otherwise is 'dead wrong'.<sup>18</sup>

The first of these documents is the 'China-Australia Free Trade Agreement Investment Facilitation Arrangement/Project Agreement Operation Flowchart'.<sup>19</sup> This document states that to enter into an IFA, 'robust labour market analysis' must be provided to the Department of Immigration. The flowchart also states that to enter into a labour agreement under an IFA, an employer must show 'there is demonstrated labour market need, Australians have been given the first opportunity through evidence of domestic recruitment activity (ie labour market testing) and there are no suitably qualified Australians.'

The second of these documents is the 'China-Australia FTA: Myths versus Realities' released on the website of the Department of Foreign Affairs and Trade on 17 July 2015.<sup>20</sup> This document states 'Under IFAs, Australian workers will continue to be given first opportunity. Consistent with existing practice, employers will not be permitted to bring in overseas skilled workers unless there is clear evidence of a genuine labour market need, as determined by the Department of Immigration and Border Protection.'

The third of these documents is the information booklet: 'Project Agreements – Information for Employers – Requesting a Labour Agreement'.<sup>21</sup> Of all three, this document provides the most comprehensive enunciation of what labour market testing will look like for Chinese companies seeking to use a labour agreement under an IFA. This document provides the following advice to employers:

You must provide a comprehensive written statement of the labour market need for the requested occupation(s), demonstrating ongoing shortages. This includes a project workforce profile illustrating the composition of the business' current and future anticipated workforce on the project, as well as evidence that you have made significant efforts to recruit workers from the Australian labour market within the previous

<sup>17</sup> MoU on Investment Facilitation Arrangements, paragraph 8, footnote 6.

<sup>18</sup> Minister Andrew Robb made this statement in response to an ABC Fact Check regarding the ChAFTA. A copy of his statement can be found here: <<http://www.abc.net.au/news/2015-08-13/andrew-robb-responds-to-fact-check/6694628>>.

<sup>19</sup> A copy of this document can be found here: <<https://www.border.gov.au/WorkinginAustralia/Documents/ifa-operation-flowchart.pdf>>. This flowchart was made publicly available in the following media release: Assistant Minister for Immigration and Border Protection, *Labor Caught Out Peddling Myths on IFAs*, media release, 24 July 2015.

<sup>20</sup> A copy of this document can be found here: <<http://dfat.gov.au/trade/agreements/chافتa/fact-sheets/Pages/chافتa-myths-versus-realities.aspx>>

<sup>21</sup> A copy of this document can be found here: <http://www.border.gov.au/WorkinginAustralia/Documents/project-agreement-employer.pdf#search=labour%20agreements>. This information booklet was published by the Department of Immigration in May 2015 but became the subject of a media release concerning its use with regards to the ChAFTA's IFA provisions: Assistant Minister for Immigration and Border Protection, Ms Michaela Cash and Parliamentary Secretary to the Minister for Trade and Investment, Mr Steven Ciobo, *Facts Expose Dishonesty of Union's Scare*, joint media release, 22 July 2015.



six months... Evidence of your domestic recruitment efforts should include details, for each requested occupation, of advertising undertaken within the past six months, including the period the job was advertised; the number of applicants who were hired; and reasons why other applicants were unsuccessful; or provide other compelling evidence of why no suitable Australian workers are available. The department will only enter into a project labour agreement where it has been satisfied that Australians have been provided first opportunity for jobs.<sup>22</sup>

Cumulatively, these three documents assert that it is current government policy for labour market testing to be applied to Chinese companies seeking to employ Chinese workers under an IFA.

Nonetheless, it is possible for both the Australian Government to argue that IFAs will not be used to replace local workers by pointing to these three documents outlining the application of labour market testing and for unions to argue that the ChAFTA will allow for the replacement of local workers because the actual text of the memorandum does not require labour market testing to be applied before Chinese workers can be brought in under an IFA.

Put simply, the ChAFTA does not require labour market testing to be applied to IFAs. The source of this requirement is in government policy which is subject to change according to the whim of the government and whose amendment is not contingent upon a piece of legislation passing through both houses of parliament. Government policy, as encapsulated in the flowchart, the myths versus realities fact sheet, and the project agreement information booklet, can be rewritten at any time by the government of the day.

Thus, there is scope for the IFA provisions in the memorandum to be used to replace local workers given there is no mandatory requirement of labour market testing. There is also a substantial incentive for this to occur as local wages and conditions can be undercut through the granting of concessional arrangements for Chinese workers employed under an IFA and because there is no requirement that workers on IFAs receive the same wages and conditions as equivalent local workers. Both these weaknesses of the IFA framework need to be rectified.

#### Recommendation 6:

This report recommends that the requirement for labour market testing for labour agreements signed under an investment facilitation arrangement become a legislated requirement through an amendment to the Migration Act 1958 (Cth).

#### Key Issue: Will IFAs be publicly accountable?

IFAs will have the status of private contracts between the Department of Immigration and a project company. Similarly, labour agreements which are negotiated under an IFA will also have the status of a private contract between an individual employer and the Department of Immigration. Both IFAs and labour agreements will have 'commercial-in-confidence' clauses which means they will not be on the public record. The rationale for establishing confidentiality around these agreements is to protect commercially sensitive material.

Nonetheless, there is a growing chorus recognizing that this rationale fails to achieve necessary standards of public accountability and transparency around IFAs and labour agreements. For example, the Business Council of Australia has recently advocated that IFAs and their terms pertaining to wages and conditions be listed on a public register.<sup>23</sup> In making this recommendation, the BCA is recognizing

the importance of continuing public support for IFAs and the strong case for developing far greater public accountability and transparency around IFAs than what is currently envisaged in the memorandum. Furthermore, it is unclear why the information pertaining to wages and conditions in IFAs is so commercially sensitive as to prevent its public release, when enterprise bargaining agreements are subject to full disclosure of the agreement on the website of the Fair Work Commission. If Australian employers have to comply with this principle of full disclosure, surely it is reasonable to require the same of Chinese employers seeking to operate within Australia.

#### Recommendation 7:

This report recommends that once an investment facilitation arrangement is in place it must be made publicly available by the Department of Immigration on its website. This should be accompanied by a public statement stipulating:

- > the concessions which are granted under the IFA with regards to wage levels, skills and English language ability
- > justification of why each concession has been granted and the circumstances surrounding the grant
- > how compliance with each concession will be monitored
- > the occupations which are covered by the IFA
- > the salary rates to be paid out to workers for each occupational category under the IFA
- > the proportion of overseas workers to be employed under the arrangement compared with local workers

#### Recommendation 8:

This report recommends that any labour agreements negotiated under the investment facilitation arrangement should be made publicly available by the Department of Immigration on its website. This should be accompanied by a public statement stipulating:

- > the concessions which are granted under the labour agreement with regards to wage levels, skills and English language ability
- > justification of why each concession has been granted and the circumstances surrounding the grant
- > how compliance with each concession will be monitored
- > the occupations which are covered by the labour agreement
- > the salary rates to be paid out to workers for each occupational category under the labour agreement
- > the proportion of overseas workers to be employed under the arrangement compared with local workers

### Entry Pathway #3: Work and Holiday Visas

Under the Memorandum of Understanding between Australia and China on a Work and Holiday Visa Arrangement, Australia has agreed to permit the annual entry of 5000 Chinese citizens on 'Work and Holiday' visas for a period of twelve months. These visa holders must be aged between 18-31, possess sufficient funds to support their year abroad and hold tertiary qualifications or have successfully completed two years of undergraduate study.

Work and Holiday visa holders will have unrestricted access to the Australian labour market. In the memorandum there is a provision that states visa holders are required to have regard 'to the principal purpose of their stay...which is a holiday, with work being incidental to the holiday' but this requirement is not currently enforced by

<sup>22</sup> Ibid p 8.

<sup>23</sup> Business Council of Australia, Submission to the Joint Standing Committee on the ChAFTA, August 2015, p 4.



the Department of Immigration. Even if the Department wished to enforce this requirement, it would be difficult to do so given that Work and Holiday visa holders have no constraints on their access to the labour market, other than that one employer cannot employ them for more than six months. This requirement is eliminated if a visa holder is working in a regional area. Given the high wage disparities between Australia and China, it is likely that many Chinese citizens will use this visa as a way into the Australian labour market and for a primary purpose of work, rather than a holiday or for cultural exchange purposes.<sup>24</sup> This will result in increased competition for low skilled and unskilled work in Australia and will lead to reduced entry-level jobs for young Australians. To date, most working holiday makers have resided in metropolitan areas where they compete with young Australians for jobs in a tight job market.<sup>25</sup> A key concern here is the vulnerability of Chinese Work and Holiday visa holders in the Australian labour market. A recent comprehensive analysis of the working holiday maker program identified the many characteristics of visa holders under this program which create this vulnerability and lead them to perform work that is inherently precarious. Associate Professor Alexander Reilly states:

Working Holiday Makers are young workers, mostly working in jobs in which they have no previous employment experience and in which they do not have adequate training. Many Working Holiday Makers will be employed in jobs requiring hard manual labour that they have not previously encountered. An increasing proportion comes from non-English-speaking backgrounds, which makes it difficult for them to understand safety requirements or to ascertain employment protections. They do not have secure residence status, and as non-citizens, they have limited social and political power.<sup>26</sup>

The vulnerability of working holiday makers in the Australian labour market has also been recognised by the courts as creating 'a particular class of employee who are potentially vulnerable to improper practices by their employer'.<sup>27</sup> Unlike under the 457 visa where it is a requirement that temporary migrant workers meet certain English language ability thresholds, under the Work and Holiday visa for Chinese workers, only a basic level of English is required. The poor language ability of many working holiday makers has increased their vulnerability in the Australian labour market. Research shows there is a necessary role for language assistance as the basis for successful migrant settlement and/or labour market integration.<sup>28</sup>

Working holiday makers have often experienced severe exploitation in the Australian labour market. How else to describe a job to dive through murky ponds and lakes for golf balls and receiving less than \$5 per hour,<sup>29</sup> or the kinds of exploitative treatment of workers at Baida

Poultry processing plants,<sup>30</sup> or those in fruit-picking jobs exposed by the ABC Four Corners program?<sup>31</sup> This anecdotal sample is supported by both academic and government examinations of the proliferation of exploitative work carried out by many working holiday makers.<sup>32</sup> The potential for exploitation of Chinese workers on a Work and Holiday visa is compounded by their use of a visa for a non-work purpose.<sup>33</sup> The presence of such a large and vulnerable migrant workforce, that is unregulated outside domestic labour law risks creating an underclass of workers who are invisible to the law. There is no way of knowing just how many, or where, Chinese Work and Holiday visa holders engage in employment. The fact of their employment may only become visible when circumstances of exploitation occasionally come to light. In its 1997 report, the Joint Standing Committee on Migration noted evidence that 'employers often pay less than award wages to Working Holiday Makers, putting pressure on locals to accept the same conditions to secure the relevant job'.<sup>34</sup>

As a matter of general principle, it is eminently reasonable that China should be part of Australia's Work and Holiday program. The permitted annual intake of 5000 places only represents a 2% increase on the staggering numbers already coming into Australia through the Work and Holiday visa or the Working Holiday visa. The primary issue here, is that this further expansion of the working holiday program is occurring at a time when a number of concerns have been raised about exploitation of working holiday makers in the Australian labour market. Viewed from this perspective, it is highly concerning that the memorandum facilitates the annual entry of a significant number of Chinese young people on the Work and Holiday visa without regard for the consequences for their wellbeing or for the Australian labour market. If, as it is likely to be, this visa is largely used for a work purpose, these young people will be extremely vulnerable to exploitation in the workplace and can also be used to increase competition for low skilled, entry level jobs which are essential for providing young Australians with a foothold in the labour market.

#### Recommendation 9:

This report recommends the Government review the Work and Holiday Visa and the Working Holiday Visa to ensure this visa scheme meets its central purpose of being for cultural exchange rather than as a general labour supply visa. In particular, this review should address the following:

- > The need to protect local job opportunities; and
- > The need to protect working holiday visa holders in the Australian labour market from exploitative arrangements.

<sup>24</sup> Arguably, this is the way the working holiday visa is already operating. For example, a government report in 2006 found that working holiday makers had become 'the single largest source of labour for seasonal producers' in some parts of the horticultural industry': Senate Standing Committee on Employment, Workplace Relations and Education, *Perspectives on the Future of the Harvest Workforce* (2006).

<sup>25</sup> Bob Birrell and Ernest Healy, 'Immigration Overshoot' (Research Report, Centre for Population and Urban Research, November 2012).

<sup>26</sup> See generally, Alexander Reilly, 'Low-Cost Labour or Cultural Exchange: Reforming the Working Holiday visa program, *Economic and Labour Relations Review* (2015). <<http://elr.sagepub.com/cgi/reprint/1035304615598160v1.pdf?jkey=akZczfzwHxIOtsC&keytype=>

<sup>27</sup> *Fair Work Ombudsman v Go Yo Trading Pty Limited & Anor* [2012] FMCA 865, [15].

<sup>28</sup> James Japp, *From White Australia to Woomera* (Cambridge University Press, 2002).

<sup>29</sup> Elise Worthington, 'Dutch golf-ball diving backpacker sues Queensland company for unpaid wages', ABC Radio, 20 July 2015; Marissa Calligeros, 'Dutch backpacker paid \$5 an hour to retrieve golf balls from lakes', *The Sydney Morning Herald*, 22 July 2015.

<sup>30</sup> Natalie James, 'The Fair Work Ombudsman's Inquiry into the labour procurement arrangements of Baida Group in New South Wales', 18 June 2015 <<http://www.fairwork.gov.au/about-us/news-and-media-releases/2015-media-releases/june-2015/20150618-baiaida-group-statement-of-findings>>.

<sup>31</sup> Four Corners, ABC, 'Slaving away: The Dirty Secrets Behind Australia's Fast Food', 4 May 2015.

<sup>32</sup> Joint Standing Committee on Migration (JSCM) (1997) *Working Holiday Makers: more than tourists*, August. Canberra: Australian Parliament House, 45; Tan Y, Richardson S, Lester L, et al. (2009) *National evaluation of Australia's Working Holiday Maker program*. National Institute of Labour Studies, Flinders University, Adelaide, SA, Australia, 27 February; Tan Y and Lester L (2012) *Labour market and economic impacts of international working holiday temporary migrants to Australia*. *Population, Space and Place* 18(3): 359-383.

<sup>33</sup> Joanna Howe and Alexander Reilly, 'Meeting Australia's Labour Needs: The Case for a Low Skill Work Visa' (2015) 43 (2) *Federal Law Review* 59.

<sup>34</sup> JSCM, 1997: 45.

# Key Issues under the ChAFTA

Two central points of contention regarding the ChAFTA's impact on workers concern the role and importance of labour market testing and whether Chinese workers can and/or will be paid less than their Australian counterparts. Using an evidence-based method, this part critically examines both issues.

## Issue #1: The role of Labour Market Testing in Australia's Temporary Labour Migration Program

### What is labour market testing?

Labour market testing means a business has to prove there are no local workers who can do a job before temporary visas are granted for migrant workers. The policy intent is to protect and privilege the employment opportunities of local workers.

There are a number of ways labour market testing can be conducted.<sup>35</sup> Australia's 457 visa program relies upon a model of *employer-conducted* labour market testing. This requires a local employer to advertise job vacancies in the local labour market and to provide evidence of failed recruitment efforts to the Department of Immigration when applying to sponsor a migrant worker for a 457 visa. Of course the onerousness of the requirement turns upon the stringency in which the Department enforces it. The Department's current policy regarding employer-conducted labour market testing is fairly weak, indicating that the posting of a single advertisement of a job vacancy on a business's website, any other website or on a social media platform such as Facebook will suffice.<sup>36</sup> Additionally, there is no minimum duration time for the advertisement or a requirement that advertising be paid.

Another model is *independent* labour market testing. This is where a body separate from employers establishes areas of skill shortage and/or labour shortage and compiles an occupational shortage list to determine which occupations are eligible for temporary labour migration. The occupational shortage list can operate at both

national and/or regional/sector levels. An example of the latter approach is the United Kingdom's Migration Advisory Committee. Established in 2007 the Migration Advisory Committee advises the Government as to the composition of the occupational shortage list, relying on a combination of both hard economic data and input from stakeholders.<sup>37</sup> For occupations not listed on the shortage list, the United Kingdom permits employers to access temporary migrant workers if the job offered to the overseas worker passes the 'resident labour market test'. This requires employers to advertise the job vacancy in specified forms of media for at least 28 calendar days,<sup>38</sup> with the advertisement specifying the job title, job description, location, salary, requisite qualifications, skills, experience, and closing date for applications.<sup>39</sup>

No method of labour market testing is fool proof. Each carries with it risks and challenges. There is a risk that employer-conducted labour market testing may simply be a tick-box exercise without sufficient pre-admission scrutiny. Furthermore, even within a more evidence-based approach mediated through an independent advisory body, there remains considerable room for employers to assert their 'need' for particular types of 'skilled' migrant labour. The latter brings a real challenge of accurately mapping and responding to employers' skills needs in a timely fashion.

### Why is labour market testing important?

On the one hand, it could be argued that Australia's present approach to labour market testing in the 457 visa program is 'tokenistic' and 'ineffective',<sup>40</sup> exempting too many occupations and too easy to evade if an employer so desired. Be that as it may, defective implementation of the labour market testing requirement is not enough to substantiate a case for repeal of this requirement

<sup>35</sup> For a list compiled by the OECD of how other countries approach the issue of labour market testing, see < [http://www.keepeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/recruiting-immigrant-workers-sweden-2011/characteristics-of-labour-market-tests-in-different-countries\\_9789264167216-13-en#page3](http://www.keepeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/recruiting-immigrant-workers-sweden-2011/characteristics-of-labour-market-tests-in-different-countries_9789264167216-13-en#page3)>.

<sup>36</sup> DIBP, Labour Market Testing in the Subclass 457 Visa Programme: Frequently Asked Questions, November 2013, *ibid*.

<sup>37</sup> A list of MAC publications is available at <[www.ukba.homeoffice.gov.uk/aboutus/workingwithus/indbodies/mac/](http://www.ukba.homeoffice.gov.uk/aboutus/workingwithus/indbodies/mac/)>. In particular, see: MAC, *Skilled Shortage Sensible: the recommended shortage occupation lists for the UK and Scotland* (2008).

<sup>38</sup> UK Visas & Immigration, *Tier 2 and 5 of the Points Based System Guidance for Sponsors*, para 28.16-28.42.

<sup>39</sup> *Ibid* 28.18.

<sup>40</sup> For an articulation of this position, see: Paul Kelly, 'China free trade deal: the political battle deepens', *The Australian*, 1 August 2015.



altogether. Without labour market testing there is no proper mechanism to ascertain that temporary migrant workers are not replacing the jobs of local workers. Firstly, this damages public confidence in the temporary migration system which is necessary for its continuing functioning. Public confidence in immigration policy is a fundamental precondition for permissive visa regulations – without this confidence, the Australian Government could come under pressure to abandon the ChAFTA or the special immigration arrangements that it facilitates.<sup>41</sup>

Secondly, and equally importantly, the absence of labour market testing allows employers to use overseas workers for an ulterior motive. Research shows that employer requests to access temporary migrant labour cannot be taken at face value and may produce a permanent demand (also called a ‘structural dependence’) upon temporary migrant labour.<sup>42</sup> In some cases a request may be made because there is a lack of local workers with the particular skill set required to perform the job, however other reasons for this shortage can exist: it may be caused by ‘labour-related shortages’ such as ‘skills gaps’, ‘labour shortages’ and ‘recruitment difficulties’.<sup>43</sup> For example, an employer may have a reluctance to invest in training for existing or prospective staff,<sup>44</sup> or a desire to move towards a deunionised workforce.<sup>45</sup> Additionally, for a small minority of employers, there could be a belief that, despite the requirement that 457 visa workers be employed on terms ‘no less

favourable’ than their Australian counterparts, it is easier to avoid paying award rates and conditions for temporary migrant workers who have been recognised as being in a vulnerable labour market position.<sup>46</sup> Given the possibility for employers to use the 457 visa scheme for a motive other than to meet a genuine skill shortage, it is necessary to further scrutinise employer attestation that a skill shortage exists. This is to ensure ‘the demand for migrant workers identified by employers is in fact a demand for workers who can be – and end up being – employed in compliance with existing employment laws and regulations’.<sup>47</sup>

According to respected demographer the late Graeme Hugo, independent confirmation of skills shortages is ‘the first fundamental step’ in the development of temporary migration schemes and cannot be outsourced to employers as they ‘will always have a “demand” for foreign workers if it results in a lowering of their costs’.<sup>48</sup> The simplistic notion that employers will only go to the trouble and expense of making a 457 visa application when they want to meet a skill shortage skims over a range of motives an employer may have for using the 457 visa. The absence of labour market testing allows employers to preference temporary migrant workers over local workers because of their perceived behavioural traits. A study of employers’ motivations for accessing 457 visa workers found that these were varied and were not always contingent upon whether a particular occupation was in shortage.<sup>49</sup>

<sup>41</sup> See, for example: Christopher F Wright, ‘How Do States Implement Liberal Immigration Policies? Control Signals and Skilled Immigration Reform in Australia’ (2014) 27(3) *Governance: An International Journal of Policy, Administration and Institutions* 397.

<sup>42</sup> See, for example: M Ruhs and B Anderson (eds), *Who Needs Migrant Workers? Labour Shortages, Immigration and Public Policy* (Oxford, Oxford University Press, 2010); A Geddes and S Scott, ‘UK Food Businesses’ Reliance on Low-Wage Migrant Labour: A Case of Choice or Constraint?’ in Ruhs and Anderson (2010); V Ottonelli and T Torres, ‘Inclusivist Egalitarian Liberalism and Temporary Migration: A Dilemma’ (2012) 20 *Journal of Political Philosophy* 202.

<sup>43</sup> Sue Richardson, *What is a Skills Shortage?* (National Centre for Vocational Education Research, 2007).

<sup>44</sup> See, eg, Australian Council of Trade Unions, Submission to the National Resources Sector Employment Taskforce, April 2010.

<sup>45</sup> For a fascinating insight into how employers can use subclass 457 visa workers to limit union power in their workplaces, see: Ken Phillips, ‘457 visas about union control’, *The Australian* (Sydney) 2 April 2013.

<sup>46</sup> This point as to the precarious labour market position of some subclass 457 visa workers is explored elsewhere in this part.

<sup>47</sup> Martin Ruhs, ‘The Potential of Temporary Migration Programmes in Future International Migration Policy’ (2006) 145 *International Labour Review* 7, 14.

<sup>48</sup> Hugo, above n 16, 59.

<sup>49</sup> C Wright and A Constantin, ‘An analysis of employers’ use of temporary skilled visas in Australia’, Submission to the Senate Education and Employment References Committee Inquiry into the impact of Australia’s temporary work visa programs on the Australian labour market and on the temporary work visa holders, 1 May 2015.



This study found that a significant minority of employers sought to acquire 457 visa-holders with certain behavioural traits due primarily to their dependence on their sponsoring employers, reflecting an ‘embedded preference’ for temporary migrant workers as a way of gaining a competitive advantage.<sup>50</sup> The study’s authors refer to an earlier investigation by Khoo et al into employer motivations for using the 457 visa program and noted that this found that over a third of employers used the scheme due to perceived behavioural traits of migrant workers, such as ‘higher commitment’ and ‘the existence of visa rules limiting workers’ mobility’ as reasons for using the scheme.<sup>51</sup> This is supported by scholarship which suggests employers prefer migrant workers because their labour costs less and is easier to dispose of,<sup>52</sup> and they are more likely to be ‘compliant, easy to discipline and cooperative’.<sup>53</sup>

### The importance of independent labour market testing

A number of independent reviews of Australia’s temporary migration scheme, and international organisations identify the importance of an independent labour market testing model, holding that without it, the entire integrity of the scheme comes into question. For example, the following bodies/reports advise of the importance of an independent labour market testing model:

1. The **Organisation for Economic and Cooperation and Development** advises countries to develop a means for mapping where there is a shortfall in domestic labour that needs to be filled through migration. The OECD recommends that identification of skill shortages by employers be independently confirmed to ensure their legitimacy:

Historically, requests by employers have not been considered a fully reliable guide in this regard, at least not without some verification by public authorities to ensure that the requests represent actual labour needs that cannot be filled from domestic sources’.<sup>55</sup>

2. The **Independent Review into the 457 Visa** led by Mr John Azarius, and commissioned by the Abbott Government in 2014 had, as its central recommendation, the development of an independent labour market testing model through the establishment of a tripartite ministerial advisory council.<sup>56</sup>

One of the council’s main tasks will be to make recommendations on the occupations that should be

included in the department’s 457 occupation list. To start with, the council will bring together evidence from all the government departments with labour market expertise: the Departments of Employment, Industry, Health, Education, and, of course, Immigration and Border Protection. After analysing the factual evidence, the council will take all stakeholders’ views into account and present options to the Minister.

This proposal has several advantages. It replaces two flawed requirements, the lack of responsiveness of the current occupations list and the inadequacy of labour market testing, with a system which is transparent to all stakeholders; which benefits from their full participation and buy-in; which responds quickly to the dynamic changes in the Australian labour market; which is based on factual evidence rather than poorly substantiated claims; which is objectively analysed by technical experts; and which considerably reduces government silos.<sup>57</sup>

3. The **Australian Senate Legal and Constitutional Affairs Committee** recommended the development of an independent labour market testing model for the 457 visa program. The committee’s final report stated:

In the committee’s view, the evidence to the inquiry has established that the 457 visa program should be serviced by a specific list or lists of in-demand skilled occupations for Australia and, where necessary, specific state or regional labour markets. As occurs with the Skilled Occupation List, the Australian Workforce and Productivity Agency should be tasked with and appropriately funded to compile and regularly review the content of the 457 visa program list.<sup>58</sup>

4. Similarly, **other academics such as Professor Graeme Hugo<sup>59</sup> and Dr Christopher F Wright<sup>60</sup>** have endorsed the need for independent labour market testing.<sup>61</sup>

### Conclusion

It is imperative that Australia has a regulatory mechanism to determine the composition of its migrant worker intake. Although labour market testing cannot be used in isolation, it is a vital regulatory technique to ascertain what skill shortages and labour shortages exist within the Australian economy. Labour market testing

<sup>50</sup> Ibid.

<sup>51</sup> S.E. Khoo, P McDonald, C Voigt-Graf and G Hugo, ‘A global labor market: Factors motivating the sponsorship and temporary migration of skilled workers to Australia’ 41 (2007) *International Migration Review*, 480.

<sup>52</sup> M. J. Piore, *Birds of Passage: Migrant Labor and Industrial Societies* (Cambridge University Press: 1979).

<sup>53</sup> Ruhs and Anderson (eds) *Who Needs Migrant Workers: Labour Shortages, Immigration and Public Policy* (Oxford, OUP 2010) 20.

<sup>54</sup> OECD, *International Migration Outlook: Sopemi 2009* (OECD Publishing, 2009) 133.

<sup>55</sup> Ibid 134.

<sup>56</sup> Although the Azarius report recommended the abolition of employer-conducted labour market testing, it was not opposed to labour market testing altogether. In fact, it was strongly supportive of the need for an independent labour market testing model. This is in contrast to the incorrect assertion in the submission of the Business Council of Australia to the JSCOT inquiry into the ChAFTA, where the BCA states, ‘The Business Council has consistently argued for the abolition of labour market testing because it is ineffective and inferior to other safeguards and unnecessarily adds to regulatory burden. Numerous reviews, including last year’s independent review of the integrity of temporary skilled migration (Azarius Review), have made these findings.’ Although the BCA may have been referring to employer-conducted labour market testing, it is inaccurate to identify the Azarius Review as against labour market testing altogether.

<sup>57</sup> J Azarius et al, *Robust New Foundations A Streamlined Transparent and Responsive System for the 457 Programme An Independent Review to the Integrity in the Subclass 457 Programme*, September 2014, 9.

<sup>58</sup> Senate Legal and Constitutional Affairs References Committee, ‘The Framework and Operation of Subclass 457 Visas, Enterprise Migration Agreements and Regional Migration Agreements’ (Final Report, 2013) 35.

<sup>59</sup> According to Hugo, this is ‘the first fundamental step’ in the development of temporary migration schemes and cannot be outsourced to employers as they ‘will always have a “demand” for foreign workers if it results in a lowering of their costs’: Graeme Hugo, ‘Best Practice in Temporary Labour Migration for Development: A Perspective from Asia and the Pacific’ (2009) 47(5) *International Migration* 23, 59.

<sup>60</sup> Wright and Constantin, ‘recommend the establishment of an independent mechanism to verify the existence of skills shortages before employers can use the 457 visa. We also support the use of a more precise list of occupations for sponsorship.’ C Wright and A Constantin, ‘An analysis of employers’ use of temporary skilled visas in Australia’, Submission to the Senate Education and Employment References Committee Inquiry into the impact of Australia’s temporary work visa programs on the Australian labour market and on the temporary work visa holders, 1 May 2015, p 3.

<sup>61</sup> The author has also recommended the introduction of independent labour market testing in two scholarly articles: Joanna Howe ‘Is the Net Cast Too Wide? An Assessment of Whether the Regulatory Design of the 457 Visa Meets Australia’s Skill Needs’ (2013) 41 *Federal Law Review* 443; J Howe, ‘Does Australia need an expert commission to assist with managing its labour migration program?’ (2014) 27 *Australian Journal of Labour Law*.



is necessary to ensure local workers are not replaced by temporary migrant workers. The OECD, two Australian government reports and the wealth of scholarship in this area suggests that labour market testing is important, and that independent labour market testing is a preferable model.

## ISSUE #2: Enforcement of Chinese Workers' Rights under Australian Labour Law

### Will Chinese workers receive the same wages and conditions as Australian workers performing equivalent jobs?

Under the ChAFTA Chinese workers have the same workplace rights and entitlements as Australian workers. For example, with regards to IFAs, the memorandum specifically states that all employers will 'be required to comply with applicable Australian laws, including minimum wage, workplace law, work safety law and relevant Australian licensing, regulation and certification standards.'

This has led many commentators to argue that this legal equality of entitlements and rights means there is no incentive for an employer to preference hiring Chinese workers over local workers.<sup>62</sup> Nonetheless, there is a substantial literature examining the phenomenon of temporary labour migration that clearly establishes the particular vulnerability of temporary migrant workers which renders these workers extremely vulnerable to exploitation despite a legal right to equality of remuneration, conditions, treatment and rights as local workers.<sup>63</sup> This is for a number of reasons.

Firstly, Chinese workers will be unlikely to complain about being paid below the Australian minimum wage or the relevant market salary rate because whatever they are earning here is still likely to be far more than what they would receive back in China. Many Chinese workers employed using the ChAFTA's provisions will be 'remittance workers' motivated by a desire to temporarily remain in Australia and to send a large amount of their wages back to China where its purchasing power is worth far more. This provides an even stronger disincentive for Chinese workers to bring to light the fact of their exploitation. Without inside informants, it is highly unlikely that Australian authorities will uncover it.

This is because Chinese workers will operate with a 'dual frame of reference' that computes the wages and conditions that can be earned in Australia compared with China.<sup>64</sup> Unlike Australia, China has no national minimum wage as each province sets its own rate. Table 1 and Table 2 identify that in Beijing the hourly minimum wage is 18.70 yuan (\$3.96 AUD) compared with \$17.29 AUD in Australia. Given that China has nowhere near the labour market protections or a strong (and enforced) minimum wage,<sup>65</sup> this may induce Chinese workers to accept conditions illegal under Australian law in

the knowledge that these conditions are far superior to those that would be experienced in China, a willingness that might be openly exploited by some employers.<sup>66</sup>

**Table 1: Minimum Wages (per month) in China and Australia**

China <sup>67</sup>		Australia <sup>68</sup>
Shenzhen	2,030 yuan / \$430 AUD	\$2847 AUD
Shanghai	2,020 yuan / \$428 AUD	
Guangdong	1,895 yuan / \$401 AUD	
Beijing	1,720 yuan / \$364 AUD	
Inner Mongolia	1,640 yuan / \$347 AUD	
Sichuan	1,500 yuan / \$318 AUD	
Hunan	1,390 yuan / \$294 AUD	
Hainan	1,270 yuan / \$260 AUD	

**Table 2: Minimum Wages (per hour) in China and Australia**

China <sup>69</sup>	Australia <sup>70</sup>
Beijing	\$17.29 AUD

Secondly, the ChAFTA provides for an employer-driven model of temporary labour migration. It hinges entirely upon a model of employer sponsorship. For both IFAs and general temporary labour migration provided for in Annex 10-A, a business has the dual relationship with a Chinese worker as their sponsor and employer. A Chinese worker's right to remain in Australia is wholly contingent upon the employer's continuing demand for their labour. Withdrawal of support from an employer-sponsor may mean cancellation of the visa. This threat, actual or perceived, may induce an IFA worker to accept any degree of substandard working conditions and creates a strong disincentive for these workers to voice concerns about their wages, conditions, treatment or rights for fear of being sent home. An independent review for the Department of Immigration into Australia's temporary labour migration scheme found that a model built upon employer-demand for migrant labour made migrant workers extremely vulnerable:

<sup>62</sup> For example, see: Jennifer Hewett, 'Labor reckless on free trade deal', *The Australian Financial Review*, 19 August 2015; Paul Kelly, 'China free trade deal: the political battle deepens', *The Australian*, 1 August 2015.

<sup>63</sup> For example, see: Brigid Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24(2) *Work, Employment and Society* 300.

<sup>64</sup> M. J. Piore, *Birds of Passage: Migrant Labor and Industrial Societies* (Cambridge University Press: 1979).

<sup>65</sup> For an excellent explanation of the difficulties of minimum wage enforcement in China and for a description of its labour laws more generally, see: Sean Cooney, Sarah Biddulph and Ying Zhu, *Law and Fair Work in China* (Routledge 2013).

<sup>66</sup> Ruhs and Anderson, *Who Needs Migrant Workers?* 29.

<sup>67</sup> Minimum wages differ across localities in China. Recent rises in minimum wage levels have been reported in the Chinese media. For example, see: < <http://www.scmp.com/news/china/money-wealth/article/1831933/fourteen-chinese-cities-provinces-raise-minimum-wage>>.

<sup>68</sup> Information about Australia's minimum wage can be found here: <<http://www.fairwork.gov.au/about-us/policies-and-guides/fact-sheets/minimum-workplace-entitlements/minimum-wages>>.

<sup>69</sup> Minimum wages differ across localities in China. Recent rises in minimum wage levels have been reported in the Chinese media. For example, see: < <http://www.scmp.com/news/china/money-wealth/article/1831933/fourteen-chinese-cities-provinces-raise-minimum-wage>>.

<sup>70</sup> Information about Australia's minimum wage can be found here: <<http://www.fairwork.gov.au/about-us/policies-and-guides/fact-sheets/minimum-workplace-entitlements/minimum-wages>>.

Despite the views of some employers and employer organisations, Subclass 457 visa holders are different from other employees in Australian workplaces. They are the only group of employees whose ability to remain in Australia is largely dependent upon their employment and to a large extent, their employer. It is for these reasons that visa holders are vulnerable and are open to exploitation.<sup>71</sup>

Thus, although a Chinese worker technically has a right to equal treatment and equal remuneration and conditions, the violation of this right is unlikely to be vocalised. The risk of losing one's residence and right to work in Australia including the expected income acts as a significant deterrent.

Thirdly, although it is true that Chinese workers will be required to be employed in accordance with our employment laws and are entitled to Australian wages and conditions, it is equally true that where these workers are being exploited or being used to undercut local wages and conditions, it is highly unlikely this will be uncovered by authorities. Often migrant workers are not even aware of their rights,<sup>72</sup> and there is no requirement to inform them in their own language of their representative registered organisation and of the role of the Fair Work Ombudsman. Of even greater concern is the fear some Chinese workers may have of retribution upon their return to China, if they voice concerns about exploitative treatment by a Chinese employer in Australia.<sup>73</sup>

Moreover, the body charged with weeding out exploitation of temporary migrant workers in the Australian labour market is not sufficiently resourced to uncover every instance of exploitation. Whilst the Fair Work Ombudsman has an important role in pursuing prosecutions of employers involved in exploiting temporary migrant workers,<sup>74</sup> its resources are limited and out of necessity the FWO adopts a strategy of pursuing high profile targets in order to maximise the impact of its investigative and prosecutorial work. Whilst these, and other enforcement initiatives of the FWO are appropriate, the regulatory capacity of the FWO is necessarily bounded by the huge challenge presented by Australia's geography and the significant number of temporary migrant workers. It seems unlikely that the FWO's current resourcing and powers is sufficient, a point which has been highlighted by recent media investigations into exploitation of temporary migrant workers.<sup>75</sup> The FWO currently has 300 inspectors divided into teams: compliance, early intervention, alternative dispute resolution and campaigns. Its inspectorate is required to serve up to 11.6 million workers,<sup>76</sup> over 10% of which are temporary migrants with work rights in the domestic economy.<sup>77</sup> The logistical challenges involved in enforcing the rights of Chinese temporary migrant workers, especially given the strong disincentive to complain to the FWO about mistreatment because of high wage differentials between China and Australia, creates a vulnerability that might be openly exploited by some employers.

**Table 3: Visa-holders with work rights**

Visa holders with work rights	Stock figures as at 31 December 2014
457 visa scheme	167 910
Seasonal Worker Program	2014
International student program	303 170
Temporary Graduate visa scheme	19 510
Working Holiday program	160 940
New Zealand citizens	623 440
Total	1 276 984

**Table 4: Australian Enforcement Operations<sup>78</sup>**

Enforcement Agency	Number of inspectors
Department of Immigration and Border Protection	40
Fair Work Ombudsman	300

**Table 5: Number of Workers Versus Number of Inspectors**

Number of visa holders with work rights	1.2 million
Number of workers in Australia	11.6 million
Number of Inspectors	340

Another reason Chinese workers will be unlikely to complain about exploitative treatment in the workplace is because Australia's visa arrangements deter temporary migrant workers from bringing instances of exploitation to the authorities. This is because the 457 visa contains particular conditions pertaining to work, which, if breached, may lead to a visa holder being fined, detained or deported under Australian immigration law. This provides scope for unscrupulous employers to coerce temporary migrant workers to breach their visa's work condition and to then threaten to report them to the Department of Immigration if they fail to comply with employer requests or if they voice concerns about exploitative treatment.<sup>79</sup> Additionally, for Chinese workers who are 457 visa holders, a primary cause for their reluctance to voice complaints about exploitative treatment is the close relationship between the Fair Work Ombudsman and the Department of Immigration and the fact that information sharing occurs between the two agencies

<sup>71</sup> Visa Subclass 457 Integrity Review, *Final Report* (Commonwealth of Australia, October 2008) 69.

<sup>72</sup> Olney S and Cholewinski R, *Migrant Workers and the Rights to Non-discrimination and Equality*, in Costello and Freedland (eds) *Migrants at work*, Oxford, Oxford University Press, 2014, p 277.

<sup>73</sup> For example, see: <https://www.hrw.org/world-report/2015/country-chapters/china-and-tibet>.

<sup>74</sup> For example, see: FWO, 'Litigation Policy' (Commonwealth of Australia: 3 December 2013, 4th edition).

<sup>75</sup> Two investigative television programmes were particularly powerful: 'Slaving Away: The Dirty Secrets behind Australia's Fresh Food', *Four Corners*, Australian Broadcasting Commission, 4 May 2015; '7-Eleven: The Price of Convenience', *Four Corners*, Australian Broadcasting Commission and Fairfax Media, 31 August 2015.

<sup>76</sup> Australian Bureau of Statistics, *Australian Labour Market Statistics, Cat.No.6105* (8 July 2014).

<sup>77</sup> For example in 2013-2014, visas were issued for 260 303 international students, 258 248 working holiday makers and 126 350 subclass 457 visa holders: DIAC, *Annual Report 2012-2013*, 2.

<sup>78</sup> The figures for this table are found in the Department of Immigration and Border Protection's annual report at p 71-72: <[http://www.border.gov.au/ReportsandPublications/Documents/annual-reports/DIBP\\_AR\\_2013-14.pdf](http://www.border.gov.au/ReportsandPublications/Documents/annual-reports/DIBP_AR_2013-14.pdf)>.

<sup>79</sup> For example, see: '7-Eleven: The Price of Convenience', *Four Corners*, Australian Broadcasting Commission and Fairfax Media, 31 August 2015.



with regards to 457 visa workers. Since 2012, the role of the FWO has been extended to monitor employer obligations in relation to 457 visa holders under the Migration Amendment (Temporary Sponsored Visas) Act 2013 (Cth), which conferred on the FWO the powers exercised by inspectors under the Migration Act 1958 (Cth).<sup>80</sup> Any breaches discovered by the FWO must be reported to the DIBP.<sup>81</sup> The vesting of these powers in the FWO immediately raises some concerns in terms of the enforcement of labour standards. This leads to a strong perception by 457 visa holders that if they complain to the FWO about their working conditions, then this information can be passed onto the DIBP which potentially could lead to their deportation. For example, a recent investigation by FWO inspectors and DIBP officials into visa fraud and worker exploitation led to the detention of 38 illegal workers, six of whom had been working in breach of their visa conditions.<sup>82</sup> This punitive action against temporary migrant workers found in exploitative work arrangements strongly deters them from informing authorities about their situation and inhibits their ability to trust that information they provide to the FWO will not be passed on to the DIBP. Additionally, as Professor Rosemary Owens points out, a fundamental tenet of international norms on labour inspection is that labour inspection and effective enforcement should be clearly distinct from each other and must not be compromised by the fact that there is

anything irregular about the status of migrant work: ‘the primary duty of labour inspectors is to protect workers and not to enforce immigration law’.<sup>83</sup> Furthermore, conferring migration inspectorate roles on labour inspectors, like what has effectively happened to FWO inspectors, may result in reduced resources available to the central objective of enforcing labour standards.<sup>84</sup>

Thus, whilst the ChAFTA requires Chinese workers to be paid according to Australian law, where this does not occur it is highly unlikely it will be detected. This renders Chinese workers vulnerable to exploitation in the labour market and may create ‘a reality of non-compliance’<sup>85</sup> with Australian labour law with respect to their employment.

Finally, it is important to briefly allude to growing concern about what is referred to as ‘China’s development model’, as this will necessarily have a bearing on the likelihood that Chinese workers will be paid and treated in accordance with Australian labour laws. In analysing opposition to the ChAFTA, Editor in Chief of *The Australian*, Paul Kelly makes the following observation ‘there is concern about China’s development model — bringing in large numbers of foreign workers for projects’.<sup>86</sup> A recent review of Chinese engagement in Africa provides a more expansive articulation of a Chinese development model hinging upon the importation of low cost Chinese labour to staff infrastructure projects. Although Australia’s labour laws are more comprehensive than those of many African

<sup>80</sup> Howe, J, Hardy, T and Cooney, S (2013), ‘Mandate, Discretion and Professionalism at an Employment Standards Enforcement Agency: An Antipodean Experience’ 35 *Law and Society* 1.

<sup>81</sup> For a description of the process of information sharing between the FWO and the DIBP, see: < <http://www.fairwork.gov.au/find-help-for/visa-holders-and-migrants#working-holiday-visa>>.

<sup>82</sup> P Dutton and M Cash (2015), ‘Illegal Workers Targeted Nationally’, media release, 28 May 2015.

<sup>83</sup> ILO (International Labour Organisation) (2006), Labour Inspection, Report of the Committee of Experts on the Application of Conventions and Recommendations, General Survey of the Reports Concerning the Labour Inspection Convention 1947 (No 81) (etc), International Labour Conference, 95th session, 2006. For more on this point, see Rosemary Owens, ‘Temporary Labour Migration: Is Effective Enforcement Possible?’ in *Temporary Labour Migration in the Global Era* edited by Howe and Owens.

<sup>84</sup> *Ibid.*

<sup>85</sup> This notion of ‘a reality of non-compliance’ draws upon argument of Joo-Cheong Tham. He states, ‘Insofar as migrant workers are displacing local workers because they constitute a cheaper and more flexible source of labour, such ‘attractiveness’ of migrant labour can be traced to the vulnerability of migrant workers and the structural risk of non-compliance they experience’: Joo-Cheong Tham, Submission to the Senate Education and Employment References Committee Inquiry into the impact of Australia’s temporary work visa programs on the Australian labour market and on the temporary work visa holders, 1 May 2015.

<sup>86</sup> Paul Kelly, ‘China free trade deal: the political battle deepens,’ *The Australian*, 1 August 2015.

countries and the role of unions and its labour inspectorate are more entrenched, there is concern that Chinese companies will seek to replicate its approach in Africa of importing large numbers of Chinese workers in Australia. For example, Hanauer and Morris, write:

Reliable numbers are difficult to come by, but the Chinese government estimated in early 2013 that 1 million Chinese nationals are living and working in Africa...The majority of them are laborers who come to work on a project managed by a large Chinese enterprise and who return to China after several years. These workers are often the focus of local ire because they are perceived as taking jobs that should go to local nationals or taking all of the management jobs and then abusing local laborers working under their authority.<sup>87</sup>

Further, a study of Zambia's Chinese State-owned copper mines, reached the conclusion that Chinese companies undercut local wages and conditions, had little regard for health and safety practices, did not know how to work cooperatively with local unions and were dismissive of local labour laws.<sup>88</sup> Another study of African perceptions regarding Chinese investment reached a similar conclusion. This found that the last decade of Chinese investment has been accompanied by China importing its own workforce to meet the personnel needs arising from this investment in breach of local labour standards.<sup>89</sup>

Although a thorough assessment of the African experience with accelerated Chinese investment since the turn of the millennium is beyond the scope of this report, it is important to be mindful of this experience when evaluating the likelihood of Chinese project companies using IFAs, or the provisions in Chapter 10 of the ChAFTA, to use Chinese workers to staff their investment projects in Australia.

#### Recommendation 10:

This report recommends the Australian Government substantially increase the enforcement capacity of the Fair Work Ombudsman, its powers under the *Fair Work Act 2009* (Cth) and its ability to impose penalties on employers who breach Australian employment law.

#### Recommendation 11:

This report recommends the increasing of civil and criminal penalties for employers found breaching Australian law with respect to the hiring and employment of temporary migrant workers.

#### Recommendation 12:

This report recommends that all temporary migrant workers, including Chinese workers entering the Australia labour market via the ChAFTA, be given an induction in their own language which details their workplace rights under Australian law and advises on support services available in the event of a breach of these rights or any other workplace issue.

#### Recommendation 13

The identities of migrant workers who report instances of exploitation to the Fair Work Ombudsman or to any other body should not be provided to the Department of Immigration and Border Protection.

<sup>87</sup> L Hanauer and L Morris, *Chinese Engagement in Africa: Drivers, Reactions and Implications for US Policy*, Rand Corporation Research Report. A copy of the report can be found here: <[http://www.rand.org/pubs/research\\_reports/RR521.html](http://www.rand.org/pubs/research_reports/RR521.html)>. See also David H Shinn and Joshua Eisenman, *China and Africa: A Century of Engagement* (Philadelphia: University of Pennsylvania Press, 2012.) 222.

<sup>88</sup> Human Rights Watch, 'You'll be fired if you refuse: Labor Abuses in Zambia's Chinese State-owned Copper Mines' (2011). A copy of this report can be found here: <<https://www.hrw.org/report/2011/11/04/youll-be-fired-if-you-refuse/labor-abuses-zambias-chinese-state-owned-copper-mines>>.

<sup>89</sup> Ethics Institute of South Africa, 'Africans Perception of Chinese Business in Africa: A Survey', August 2014, p 13. A copy of the report can be found here: <[http://www.ethicsa.org/phocadownloadpap/Research\\_Reports/AfricanPerceptionSurveyChineseBusinessWEBSITEVERSION.pdf](http://www.ethicsa.org/phocadownloadpap/Research_Reports/AfricanPerceptionSurveyChineseBusinessWEBSITEVERSION.pdf)>.

## For further enquiries

Adelaide Law School  
Ligertwood Building  
The University of Adelaide  
SA 5005 Australia

**Telephone:** +61 8 8313 5063

**Email:** [law.enquiry@adelaide.edu.au](mailto:law.enquiry@adelaide.edu.au)

 [law.adelaide.edu.au](http://law.adelaide.edu.au)

 [youtube.com/universityofadelaide](http://youtube.com/universityofadelaide)

**DISCLAIMER:** The information in this publication is current as at the date of printing and is subject to change. The University of Adelaide assumes no responsibility for the accuracy of information provided by third parties.

CRICOS 00123M © The University of Adelaide. Published September 2015