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Childcare and Early Childhood Learning
Productivity Commission
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Dear Commissioners,

Submission to the Productivity Commission's Inquiry into Childcare

Thank you for the opportunity to provide a submission to this inquiry. I am a Lecturer in the Law Faculty at the University of Technology, Sydney and have published extensively on immigration law and policy in Australia.

This submission relates to recent calls from stakeholders in the Australian community for dedicated visas for childcare workers, including live-in domestic workers or au pairs, and, more broadly, calls for the extension of childcare rebates to au pairs and nannies. These appeals are readily understandable in terms of their ability to enhance access to high quality childcare and to provide employment opportunities to carers currently living overseas. This submission urges the Productivity Commission to also take account of the impact that these measures may have on the industrial rights of those child care workers while holding temporary visas. Overseas workers in Australia are particularly vulnerable to unfair or unlawful work practices, given their lack of familiarity with local employment protections and institutional mechanisms for redress and sometimes weak English language skills. Young travellers seeking positions as au pairs are additionally disadvantaged by their youth and limited employment experience which can exacerbate the power differential in their employment relationships, as the Fair Work Ombudsman has recognised in the context of international students.¹

My research on the exploitative working conditions faced by some temporary migrant workers in Australia has highlighted how temporary immigration status itself can produce precarious work for some. Lessons learned from the experiences of migrant workers on a range of temporary visas are salient to the question of how to construct a visa to facilitate the entry of home-based childcare workers from overseas while also safeguarding visa-holders' labour rights. Workplace vulnerabilities can arise in different ways depending on the conditions of the specific temporary visa.

The 457 visa, for instance, includes a condition that visa-holders continue to be sponsored by their employer.² This condition may be breached 90 days after a visa-holder ceases work in the nominated position for their sponsor, whether employment is terminated by employer or employee.³ Upon breach of this condition the visa may be cancelled,⁴ which may then render the visa-holder an

¹ Michael Campbell, 'Perspectives on Working Conditions of Temporary Migrant Workers in Australia' (2010) 18(2) *People and Place* 51, 52.

² Condition 8107 provides that the visa-holder must work only for the sponsoring employer, in the occupation listed in the most recently approved nomination: see *Migration Regulations* sch 8, cl 8107 and sch 2, cl 457.611.

³ *Migration Regulations* reg 2.43(1)(l).

⁴ *Migration Regulations* reg 1.20E provides that the visa may be cancelled for breach of condition 8107 under *Migration Act* s 116(1)(b).

unlawful non-citizen liable to mandatory detention and immediate removal.⁵ All of this means that the employee tends to be reliant on their sponsor not only for their job but their continued lawful presence in Australia as well. This can create pronounced dependency for some visa-holders, as well as constraining their labour market mobility. Indeed, the deleterious impact of this visa condition was recognised last year through legislative reforms extending the period between cessation of work and breach of condition from 28 days to 90 days.⁶

Naturally, tying an au pair to their host family through a visa condition would serve the interests of families in secure, longer-term childcare. However, by severely impairing au pairs' ability to make alternative arrangements if they find their initial family placement unsuitable, such a visa condition is highly undesirable.

Scholarship and government policy have only very recently considered the vulnerabilities of international students as workers. Student visas can breed vulnerability by limiting visa-holders' work entitlements to forty hours per fortnight.⁷ This limited work entitlement is justified as assisting international students to meet the costs of their studies without over-committing to work which would jeopardise their studies. However, the line between compliant and non-compliant work is a particularly fine one for students who may overshoot their work cap by a small amount, or on isolated occasions, and may do so unintentionally or without realising it has happened.⁸ Such subtleties leave student visa-holders teetering on the edges of legality. This ever-present threat of detection and removal leaves students susceptible to employer exploitation, by using the student's potentially illegal work as a means to exert control over them or prevent them from reporting other violations of employment standards. Because of this, multiple stakeholders have called for this limitation on students' work rights to be removed.⁹

Apparently, au pair agencies recommend that au pairs work roughly twenty hours per week during their family placement. If the Commission were to recommend stronger regulation of the au pair industry, it may be desirable to formalise this hourly restriction. Still, it is argued here that any *visa* dedicated to domestic childcare not contain a *condition* which restricts hours of employment, since exploitative pressure by families on an au pair to exceed this limit would leave the au pair vulnerable to visa cancellation and sanction.

In short, the author recommends that any reforms to immigration regulation recommended by the Productivity Commission give consideration to the industrial effects on the visa-holders themselves.

Yours sincerely,

Dr Laurie Berg

⁵ Mandatory administrative detention for all persons reasonably suspected of being 'unlawful non-citizens' in Australia without a valid visa is provided in *Migration Act* s 189(1). Deportation and removal powers are set out in ss 198, 200-206.

⁶ *Migration Amendment (Temporary Sponsored Visas) Act 2013* (Cth).

⁷ Condition 8105 attaches to a variety of different visas available to international students.

⁸ Caselaw illustrates that an extremely marginal breach has led to visa cancellation: see, for example, *090314* [2010] MRTA 522 (the visa-holder breached condition 8105 in only one instance which involved a choice between covering an absent employee's shift or losing his job).

⁹ Senate Education, Employment and Workplace Relations Committee, Parliament of Australia, *Welfare of International Students* (2009) [3.87]ff.