



Does Australia need an expert commission to assist with managing its labour migration program?

Joanna Howe*

Labour migration policymaking involves many complexities and necessitates compromise between competing interests and objectives. In recent decades there has been a number of key shifts in Australia's labour migration settings. Of particular significance is the shift from supply driven to demand driven migration as employers have been given significant responsibility for determining the composition of Australia's labour migration intake. Drawing on two international case examples, I argue that an expert commission would better enable effective migration policymaking as it would provide oversight of requests from employers to access migrant labour and serve an important coordination function between Australia's temporary and permanent migration visa programs.

Introduction

There have been dramatic changes in Australia's approach to skilled migration in the last 20 years that have had, and continue to have, a profound impact on the economic, cultural and social future of the nation. Although Australia was initially founded upon a culture of permanent migration, built upon ideas of nation-building and citizenship,¹ temporary labour migration has now become the norm. In the past year, temporary immigrants (644,901) outnumbered permanent immigrants (128,973) on a ratio of around four to one.² Some 260,303 of these were international students, with working holiday makers (258,248) and subclass 457 visa holders (126,350)³ taking up the remaining places.⁴ Although only the latter visa class is for a dedicated work purpose, both international students and working holiday makers have work rights and a significant amount of unskilled and low skilled work is done by temporary migrants on these visas.⁵

Given the large numbers involved and the fact that temporary labour migration is usually a stepping-stone to permanent residency, the architectural foundations of temporary labour migration programs continue to have far-reaching implications for the configuration of national populations as well as the workings of labour markets. This is certainly true of Australia, where

* Lecturer, Law School, University of Adelaide.

1 M Crock, 'Contract or Compact: Skilled Migration and the Dictates of Politics and Ideology' (2001) 16 *Geo Immigr LJ* 133.

2 Department of Immigration and Citizenship, *Annual Report 2012-13*, Department of Immigration and Citizenship, p 2.

3 The 457 visa was introduced by the Howard Coalition government on 1 August 1996, through the insertion of a new Pt 457 in Sch 2 of the Migration Regulations (Amendment) 1996 No 76 (Cth).

4 Department of Immigration and Citizenship, above n 2, p 2.

5 This is explored in more detail in Part 3 of this article.

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the number of temporary labour migrants has quintupled since 1996.⁶ Temporary migration is now a vital source of permanent migrants with the majority of skilled migrants in the permanent visa stream having initially entered and worked in Australia as a temporary migrant. For example, in 2010–11, 41,710 permanent residency visas were for people who last held a 457 visa, with almost 9 in 10 granted a permanent employer sponsored visa.⁷

Decisions about both permanent and temporary labour migration are highly controversial. For receiving countries such as Australia, these controversies tend to converge around questions of how many migrants to receive, for what types of jobs and for what duration. The interaction between the presence of migrant workers in the labour market and the employment opportunities for domestic workers is particularly contentious. As Crock observes, these 'debates about immigration have profound cultural roots in Australia and can expose deeply-held fears and insecurities'.⁸

A model some countries have embraced to address this regulatory challenge is that of expert commissions to assist in migration policymaking.⁹ Expert commissions are independent statutory bodies charged with responsibility for engaging stakeholders, collecting and disseminating labour market data and advising government on decisions pertaining to labour migration programs. Expert commissions can provide advice as to whether migration is the most sensible way to fill a labour shortage and the profile of migrant workers most likely to flourish in the domestic labour market. A commission can also advise government on how to better match the supply of migrant workers with job vacancies, evaluate the employment implications of immigration reform proposals and assess how to balance the interests of workers, employers and the nation.¹⁰

This article considers whether Australia's labour migration program would benefit from the presence of an expert commission. This examination occurs despite the recent decision of the Federal government to abolish the Australian Workforce and Productivity Agency (AWPA), which had a significant role in advising the government on the permanent labour migration program. The first part of this article considers Australia's use of AWPA and the reasons prompting its abolition. The second part considers the potential role of expert commissions through a comparative analysis of the Austrian and British

6 There were 25,786 subclass 457 visa grants in 1996–97 compared with 125,070 in 2011–12: J Phillips and H Spinks, *Skilled Migration: Temporary and Permanent Flows to Australia*, Background Note, Department of Parliamentary Services, December 2012, p 40, Table 3; Department of Immigration and Citizenship, *Trends in Migration: Australia 2010–11*, Department of Immigration and Citizenship, February 2012, p 37.

7 Department of Immigration and Citizenship, *Population Flows: Immigration Aspects 2010–11 Edition*, Department of Immigration and Citizenship, 2012, p 66.

8 Crock, above n 1, at 137.

9 D Papademetriou et al, *Harnessing the Advantage of Immigration for a 21st Century Economy: A Standing Commission on Labor Markets, Economic Competitiveness and Immigration*, 2009, at <<http://www.migrationpolicy.org/research/harnessing-advantages-immigration-21st-century-economy-standing-commission-labor-markets>> (accessed 2 November 2014).

10 For more on the role and purpose of expert commissions in migration policymaking, see the special issue of the journal *Migration Letters* dedicated to this issue: P Martin and E Stark, 'Editorial: Expert Commissions and Migration Policy Making' (2014) 11 *Migration Letters* 1.

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systems. Both jurisdictions were chosen as comparators because they are attractive migrant worker destinations like Australia. Both Austria and Britain have introduced expert commissions into their migration policymaking framework in the past decade and, as I will explain, evidence from both jurisdictions suggests these commissions are working well. The final part explores the possible shape and rationale for an Australian expert commission advising on both the permanent and temporary labour migration programs. This section includes analysis of the recent recommendation from the independent review into the subclass 457 visa program for a tripartite ministerial advisory council providing expert advice to the government.¹¹

This article contends that Australia's skilled migration program should involve an expert commission. If properly established,¹² expert commissions can have a transformative effect on a country's labour migration program by collecting more substantial data to support policymaking, lifting the quality of public debate, increasing stakeholder engagement and providing government with an independent voice on labour migration policy matters. An expert commission also facilitates a more integrated approach to linking a country's labour migration program with workforce skills and development planning for local workers. This is because an expert commission is able to be responsive to changes in the economy and labour market so that recommendations can be made that both anticipate and react to these changes. The absence of an expert commission reduces the transparency and accountability of decision-making about labour migration programs and renders these more susceptible to political needs and regulatory capture by special interests.

Part 1: Australia's historical experience with expert commissions in the migration sphere

The subclass 457 visa program has never included input from an expert commission. Introduced on 1 August 1996, the subclass 457 visa saw the 'radical deregulation' of Australia's temporary entry regime, involving 'considerable self-regulation' by employers seeking to access temporary migrant labour.¹³ In its original form, the subclass 457 visa scheme was designed so that business could more easily access skilled labour, while balancing the need to safeguard employment opportunities for local workers. The subclass 457 visa was introduced via the Migration Regulations (Amendment) No 76 and sought to increase Australia's temporary skilled migrant worker intake with more flexible definitions of skills, streamlined processing of applications, waived labour market testing for certain key activities and a less onerous health assessment for visa applicants. Over time, the subclass 457 visa has been reformed and these requirements have

11 J Azarias 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, p 14.

12 I will return to this question in the final substantive section of the article where I consider the shape and structure for an expert commission in order for it to work effectively within the Australian migration policymaking framework.

13 B Kinniard, 'Current Issues in the Skilled Temporary Subclass 457 Visa' (2006) 14 *People and Place* 49 at 50.

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changed.¹⁴ Remaining constant, however, is the central role of the Department of Immigration and Border Protection in administering the program,¹⁵ and the absence of an expert commission in providing advice on temporary labour migration policymaking.¹⁶

In contrast, Australia's permanent labour migration program has involved input from an expert body, in particular in identifying the types of occupations for which permanent skilled migration is allowed. The Australian Workforce and Productivity Agency (AWPA) was established as an independent statutory body on 1 July 2012 by the Australian Workforce and Productivity Agency Act 2008 (Cth). Through this Act, Skills Australia was transformed into AWPA, a new organisation with new membership and some added functions.¹⁷ AWPA maintained the primary function of Skills Australia, providing expert advice to the Minister of Industry on Australia's current, emerging and future workforce development and workforce skills needs.¹⁸ AWPA's role was also expanded to provide advice on strategies to improve the productivity of the Australian workforce, the allocation of Commonwealth funding to address these issues and advice on the National Workforce Development Fund.¹⁹

Despite its broader role, the primary input of AWPA into Australia's permanent migration program was through advising the Department of Immigration with regards to the compilation and development of the Skilled Occupation List (SOL).²⁰ The SOL is a subset of the Specialised Occupations

14 For an overview, see: J Tham and I Campbell, *Temporary Migrant Labour in Australia: The 457 Visa Scheme and Challenges for Labour Regulation*, Working Paper No 50, Centre for Employment and Labour Relations Law, University of Melbourne, March 2011; I Campbell and J Tham, 'Labour Market Deregulation and Temporary Migrant Labour Schemes: An Analysis of the 457 Visa Program' (2013) 26 *AJLL* 239; J Howe, 'The Migration Amendment (Worker Protection) Act 2008: Long Overdue Reform, but Have Migrant Workers Been Sold Short?' (2010) 24 *AJLL* 13.

15 Upon introduction of the subclass 457 visa, the administering department was the Department of Immigration and Multicultural Affairs, which later changed its name to the Department of Immigration and Citizenship. This is now the Department of Immigration and Border Protection.

16 Despite the absence of an expert commission, the subclass 457 visa program does involve input from the Joint Council on Skilled Migration (JCSM) and, on occasion, from the ad-hoc appointment of an External Reference Group (ERG) or through the ad-hoc commissioning of an independent review. In the author's view, these are distinct from an expert commission which has ongoing function dedicated to labour market analysis, not just the provision of expert advice from key individuals like the JCSM or ad-hoc analysis of the program like the ERG or independent reviews. For more on the role of the JCSM see: J Tham, 'Law-Making and Temporary Migrant Labour Schemes: Accountability and the 457 visa Scheme' (2009) 17 *AJ Admin L* 18. For more on the ERG and the Deegan Review, see: J 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 *FL Rev* 443.

17 Australian Workplace Productivity Agency, *About Us*, at <www.awpa.gov.au/about-us/Pages/default.aspx> (accessed 2 November 2014).

18 L Doyle, 'Skills Australia Amendment (Australian Workforce and Productivity Agency) Bill 2012', *Parliamentary Library Bills Digest No 128, 2011–12*, 8 May 2012, p 6.

19 Australian Workforce and Productivity Agency Act 2008 (Cth) s 6.

20 The Skilled Occupations List (SOL) is a subset of the Specialised Occupations List (SpOL). This was developed as part of AWPA's first National Workforce Development Strategy (Australian Workforce Futures) and was updated on an annual basis. It was intended to identify those occupations where there was the greatest risk of market failure. The criteria for the SpOL are long lead time; high match; good data; and critical to the economy, see

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List (SpOL) which was compiled by AWPAs as part of its long-term workforce planning strategy, to identify those occupations where there was the greatest risk of market failure. AWPAs compiled occupation summary sheets for each occupation on the SpOL and, from that, would make a decision of which occupations to recommend for the SOL. The purpose of the SOL is to identify occupations where independent skilled migrants will assist in meeting the medium and long-term skill needs of the Australian economy.²¹ AWPAs was responsible for revising and updating its advice to the department on the SOL on an annual basis, through a formal submissions process involving stakeholder engagement by industry, unions, trade and professional associations.

AWPAs's SOL had a critical role in determining the composition of Australia's permanent skilled migration intake. It was used as the basis for independent points-tested visas, which are non-employer, sponsored visas. As at 31 October 2014 it included 191 occupations which were selected by AWPAs to ensure that independent skilled migration met the medium to long-term skill needs of the Australian economy.²² AWPAs's SOL replaced the previously existing, two subset lists, as both the Migration Occupations in Demand List and provisional Critical Skills List were revoked in February 2010. Since July 2010, a 'new and more targeted Skilled Occupation List' was created, which cut the number of eligible occupations by more than half and was put under AWPAs's purview upon its creation in 2012.²³ The decision to rely on AWPAs's advice for the skilled migration reoriented the program from being 'supply driven' contingent upon applications from individual skilled migrants to 'demand driven', as now an independent statutory body would advise the department on the needs and demands of Australian industry.²⁴ In addition to an occupation being demonstrably in undersupply in the economy, AWPAs developed three criteria to determine its recommendations for the composition of occupations on the SOL.²⁵ First, the skills took a long time to learn; second, there was evidence of high skills matching between the skill desired by the employer and the skill possessed by the overseas worker; and third, the costs

Australian Workforce and Productivity Agency, *Specialised Occupations List*, at <<http://www.awpa.gov.au/our-work/labour-market-information/specialised-occupations-list/Pages/default.aspx>> (accessed 2 November 2014). Some occupations in oversupply can be on the SpOL but as they are in oversupply this prevents them from being on the migration focused SOL. A good example is Primary School Teachers where there is currently an oversupply in Australia. Also excluded from the SOL are occupations which require the holder to be an Australian citizen (for example, a judge) or are very small and have a very limited range of employers — for example, some nuclear-related occupations where the only employer is the Australian Nuclear Science and Technology Organisation. In the latter case, AWPAs deemed employer-sponsored as the most appropriate route.

21 C Evans, *New Skilled Occupation List to Meet Australia's Economic Needs*, Media Release, 17 May 2010.

22 For a full copy of the list, see: Australian Workforce and Productivity Agency, *Skills Occupations List*, at <www.awpa.gov.au/our-work/labour-market-information/skilled-occupation-list> (accessed 2 November 2014).

23 Phillips and Spinks, above n 6, at 5.

24 C Evans, *Migration Reforms to Deliver Australia's Skills Needs*, Media Release, 8 February 2010.

25 Organisation for Economic Co-operation and Development, *International Migration Outlook: Sopemi 2011*, OECD Publishing, 2011, p 260.

of the skills being in short supply were high to the economy.²⁶

A key aspect of AWPAs operation was its transparent process for providing advice on the composition of the SOL and the public accountability of its recommendations. Unlike the addition and subtraction of occupations from the CSOL which is an opaque and vague process,²⁷ AWPAs made it clear that its methodology for determining whether an occupation was in shortage relied on a list of indicators prepared for AWPAs by the National Institute of Labour Studies.²⁸ In addition, AWPAs would make all submissions publicly available on its website and conduct focus groups with stakeholders for occupations which were borderline in terms of their inclusion on the SOL. On its website, AWPAs would 'flag' these occupations so as to provide notice that these occupations may be removed from the SOL in future, subject to labour market, education and migration data from stakeholders in relation to future oversupply issues. For example, in 2014 AWPAs conducted a special investigation into the occupation of 'accountant' because of its inclusion as a borderline occupation the previous year.²⁹ The final report recommended to the department that the occupation be included in the SOL but that the occupational limit on the number of permanent skilled independent migrant accountants be reduced by half per annum. In sum, AWPAs comprehensive and clear process for compiling the SOL has enabled the independent skilled migration program to more effectively identify domestic skill shortages.

Despite its expertise, AWPAs did not have a role in compiling the occupational shortage list for Australia's temporary labour migration program. The subclass 457 visas Consolidated Sponsored Occupations List (CSOL) was, during AWPAs existence, and still is, compiled by the Department of Immigration and Border Protection. The CSOL is approved by the Minister for Immigration following consultation between the Department for Immigration and Border Protection, the Treasury, the Department of Industry and the Department of Education, Employment and Workplace Relations.³⁰ Additionally, the Ministerial Advisory Council on Skilled Migration is able to recommend changes on any aspect of Australia's skilled migration program, and may provide input to the department regarding the content of the CSOL.³¹ The recent Senate inquiry into the subclass 457 visa concluded that the

26 In addition, the individual occupations also have to demonstrate they are in undersupply in the economy. In most cases the criteria lead to clear-cut decisions. While AWPAs accepted submissions about all occupations, focus groups were only used for occupations where the data was close. AWPAs developed its criteria using indicators based on a report by the National Institute of Labour Studies at Flinders University, see Australian Workforce and Productivity Agency, *Identifying Skills Shortages*, at <<http://www.awpa.gov.au/our-work/labour-market-information/Pages/Identifying-skills-shortages.aspx>> (accessed 2 November 2014).

27 J Howe, 'Accountability and Transparency under the Subclass 457 Visa Program: Is There Cause for Concern?' (2014) 21 *AJ Admin L* 139.

28 Australian Workforce and Productivity Agency, above n 26.

29 Australian Workforce and Productivity Agency, *Demand and Supply of Accountants at March 2014*, at <<http://www.awpa.gov.au/our-work/labour-market-information/skilled-occupation-list/Pages/accountants.aspx>> (accessed 2 November 2014).

30 Department of Immigration and Citizenship et al, *Submission to the Senate Inquiry on the Framework and Operation of Subclass 457 Visas, Enterprise Migration Agreements and Regional Migration Agreements*, June 2013, p 5.

31 *Ibid*, p 25.

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process for adding occupations to the CSOL was relatively opaque and unclear to stakeholders:

In broad terms, a relatively consistent message from submissions on the current listing process for the CSOL was that there is a lack of transparency as to the methodology by which occupations are added and removed.³²

The CSOL is extremely long, listing over 600 occupations, and the aforementioned process of updating the CSOL has been criticised for lacking accountability to the Parliament,³³ failing to rigorously and independently test the labour market,³⁴ and for relying too heavily on requests from employers for temporary migrant labour.³⁵ The recent independent review into the subclass 457 visa program has recommended that the CSOL be compiled in a more transparent manner,³⁶ a subject we will revisit in the final section of this article.

Upon the election of the Coalition government and its commitment to a 'Smaller Government Reform Agenda', AWPAs very existence has come under threat.³⁷ The government established the National Commission of Audit to review all Commonwealth expenditure. The commission's report advised the government to 'reduce the number of non-principal government bodies'.³⁸ Based on information provided by departments and through other research undertaken, the commission identified 696 non-principal bodies that existed at the Commonwealth level. The commission recommended that AWPAs be consolidated into the Department of Industry.³⁹ The government responded to this recommendation by devising the Australian Workforce and Productivity Agency Repeal Bill 2014 (Cth), abolishing AWPAs and integrating its functions into the Department of Industry.⁴⁰ The Explanatory Memorandum for the repeal Bill identifies a small amount of financial savings from AWPAs abolition and justifies this as 'part of the Government's commitment to streamline its advisory arrangements and to rationalise the number of portfolio bodies across government'.⁴¹

The Senate Economics Legislation Committee conducted an expedited inquiry into the repeal Bill, receiving nine submissions and three late submissions. The repeal Bill was supported by the Department of Industry which stated in its submission that AWPAs staff and functions would be subsumed internally without the requirement of an independent statutory

32 Ibid, p 26.

33 Howe, above n 27.

34 Howe, above n 16.

35 Senate Education, Employment and Workplace Relations Committee, *Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012*, Parliament of Australia, Canberra, March 2013, p 15.

36 Azarias et al, above n 11, p 14.

37 M Cormann, *Delivering A Smaller, More Rational Government*, Media Release, 13 May 2014; see also M Cormann, *Smaller and More Rational Government 2014–15*, Ministerial Paper, May 2014, p 5.

38 National Commission of Audit, *Towards Responsible Government: The Report of the National Commission of Audit, Phase Two*, March 2014, p xxvi, recommendation 14.

39 Ibid, p 137.

40 Australian Workforce Productivity Agency Repeal Bill 2014 (Cth) Sch 1.

41 Explanatory Memorandum, Australian Workforce Productivity Agency Repeal Bill 2014 (Cth), Parliament of Australia, 2013–14, p 2.

framework because AWPAs's functions were consistent with the ongoing work of the department.⁴² The department said there would be cost savings from AWPAs's abolition and argued that the new arrangements would allow AWPAs's core functions to be delivered more efficiently.⁴³ This is because the merger would enable stronger linkages between the skills and industry functions of the department, and improve accountability by instituting direct reporting lines through the Secretary of the Department.⁴⁴ The department expressly recognised that a priority in the integration of AWPAs into the government bureaucracy would be the ongoing development and maintenance of the SOL.⁴⁵ A joint submission by Professor Gavin Moodie and Dr Leesa Wheelahan did not support the repeal bill believing it would result in the loss of AWPAs's extensive expertise and resources on workforce data and because of the inability of a government department to offer 'independent advice on contentious issues' and promote 'new ideas stimulating fresh thinking and innovation'.⁴⁶ Their submission also noted that a key advantage of AWPAs was its open and consultative approach to stakeholder engagement, which was something they saw as traditionally not a strong point of Commonwealth departments.⁴⁷ Nonetheless, the committee endorsed the Bill as consistent with the government's deregulatory reform agenda and recommended AWPAs's abolition.⁴⁸ Both Houses passed the repeal Bill on 24 June 2014.⁴⁹

Somewhat obscured in the government's ideological commitment to smaller government is the role of expert commissions in facilitating migration policymaking. Irrespective of the merits of a smaller government approach, which is not the focus of this paper, it is an important question as to whether an independent, expert commission can play a useful and effective role in a country's temporary labour migration program. Australia's short-lived experience with relying on AWPAs to provide advice to the government on the composition of the SOL demonstrates the positive impact an independent, expert body can have on the transparency, accountability and robustness of the migration policymaking process. Other countries have certainly found expert commissions to be a useful tool,⁵⁰ and others are continuing to assess whether

42 Department of Industry, Submission to the Senate Economics Legislation Committee, *Australian Workforce and Productivity Agency Repeal Bill 2014 [Provisions]*, p 2.

43 Ibid.

44 Ibid.

45 Ibid.

46 G Moodie and L Wheelahan, Submission to the Senate Economics Legislation Committee, *Australian Workforce and Productivity Agency Repeal Bill 2014 [Provisions]*, p 2.

47 Ibid.

48 The Senate Economics Legislation Committee, *Australian Workforce and Productivity Agency Repeal Bill 2014 [Provisions]*, Commonwealth of Australia, June 2014.

49 Although the Australian Labor Party supported the repeal Bill, they did attempt to introduce, albeit unsuccessfully, an amendment recognising the ongoing need for critical independent research on Australia's skills needs. MP Sharon Bird proposed the amendment, 'whilst not declining to give the Bill a second reading the House notes that the Government has failed to guarantee that the critical independent research to Government and industry in relation to Australia's current, emerging and future skills and workforce development needs will continue to be carried out and made public': Commonwealth, *Parliamentary Debates*, House of Representatives, 17 June 2014, p 6 (S Bird).

50 See, eg, the United Kingdom and Austria. See Part 2 for more.

an independent expert commission may be a valuable addition to their regulatory framework.⁵¹ With AWPA now abolished, it seems likely that Australia has delayed addressing this question. We now turn to a comparative exploration of the use and viability of expert commissions to see if lessons can be learnt from experiences abroad.

Part 2: International case studies on the use of expert commissions

There is a diversity of regulatory approaches across jurisdictions as to whether expert commissions have a beneficial role in advising government on labour migration policy. Undertaking a comparative endeavour is not without its dangers — the unthinking and wholesale ‘transplantation’ of norms from other jurisdictions without proper consideration of political, social and constitutional constraints is, of course, an ill-considered option for reform.⁵² However, as Uwe Kischel argues, by limiting ourselves to our own jurisdictions, ‘[t]oo many institutions are intuitively taken for granted, and too many alternatives might never have been developed’.⁵³ It is the possibility of identifying *working alternatives* that this brief overview of the English and Austrian positions is undertaken.⁵⁴

2.1 Austria

Before examining the Austrian model of an expert commission, it is important to briefly allude to labour migration in Europe and the role of the European Union. Europe, with its ageing and shrinking population, is in increasing need of migrant labour and skills. It is within this context that Europe has developed a renewed interest in labour migration.⁵⁵

Labour migration in Europe can be sorted into three kinds. The first is labour migration within the European Union. The second is where a Third Country National wishes to migrate to a country within the European Union.⁵⁶ The third is where a Third Country National wishes to migrate to a country within Europe which is not part of the European Union. As Austria, which is the focus of this section, has been an EU member since the EU’s inception, only the first two kinds of labour migration apply to Austria.

The treaties of the European Union establish the ‘building blocks for legislation, and regulations, directives and recommendations [which]

51 See R Marshall, ‘The Case for a Foreign Worker Advisory Commission’ (2014) 11 *Migration Letters* 65.

52 O Kahn-Freud, ‘On Uses and Misuses of Comparative Law’ (1974) 37 *MLR* 1.

53 U Kischel, ‘Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law’ (1994) 46 *Adel L Rev* 213 at 215.

54 Zweigert and Kotz argue the vocation of the comparatist is to enrich the ‘supply of solutions’: K Zweigert and H Kotz, *An Introduction to Comparative Law*, 3rd ed, Clarendon Press, New York, 1998.

55 S McLoughlin and R Munz, *Temporary and Circular Migration: Opportunities and Challenges*, Working Paper No 35, European Policy Centre, March 2011, p 6.

56 A Third Country National is a person who is not a citizen of the European Union. See the List of Definitions in European Commission, *Study on the Situation of Third-Country Nationals Pending Return/Removal in the EU Member States and the Schengen Associated Countries* (HOME/2010/RFX/PR/1001).

implement the common goals of the EC throughout Member States'.⁵⁷ Article 45 of the *Treaty on the Functioning of the European Union* contains the basic right regarding freedom of movement for workers within the European Union.⁵⁸ A number of other directives promote temporary labour migration within the European Union by providing a right to residency if the individual is employed in that country,⁵⁹ a right to equal treatment for temporary migrant workers and citizens of the host state,⁶⁰ the recognition of professional qualifications obtained in another EU state,⁶¹ and rights for temporary migrant workers to be accompanied by family members.⁶²

Labour migration within the European Union and by third country nationals is highly controversial. Because of wide variations in wage levels across the European Union, some countries are more likely to be exporters of labour, while other countries are more likely to be importers. Workers from the former seek the reward of higher wages and better employment security elsewhere in the European Union. This has meant that some EU members have been reluctant to grant access to their labour markets because they fear an influx of migrants, which would undercut local labour market wages and conditions.⁶³ This creates political challenges as, despite the promotion of temporary labour migration by international economic agencies as improving economic prosperity,⁶⁴ temporary labour migration programs are 'unlikely to be popular with national electorates, so politicians may find themselves under pressure to restrict migration'.⁶⁵

This has been true of Austria, where labour migration is politically contentious. This is reflected in the diverging views of the social partners with the Chamber of Commerce, representing employers, advocating an expansion

57 L Lovingood, 'Off to Work We Go: Creating an Efficient Labour Force through European Union Employment Regulation of Third-Country Nationals' (2007-2008) 4 *SC J Int'l L & Bus* 91 at 93. See also Art 46 of the *Treaty on the Functioning of the European Union* which states that the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, at <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>> (accessed 2 November 2014).

58 *Treaty on the Functioning of the European Union*, above n 57.

59 *Directive 2004/38/EC of the European Parliament and of the Council on the Right of Citizens of the Union*, Art 7 at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:en:PDF>> (accessed 2 November 2014).

60 *Ibid*, Art 24.

61 *Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the Recognition of Professional Qualifications*, at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2005L0036:20110324:EN:PDF>> (accessed 2 November 2014).

62 See also *Directive 2004/38/EC*, above n 59.

63 A C L Davies, *EU Labour Law*, Edward Elgar, Cheltenham, 2012, p 72.

64 For example, the World Bank estimates that moving an additional 14 million workers from low income to high income countries would increase global income by \$350 billion: World Bank, *Global Economic Prospects 2006: Economic Implications of Remittances and Migration*, World Bank, Washington DC, 2005, p 31. The Global Commission on International Migration recommends 'carefully designed temporary migration programs as a means of addressing the economic needs of both countries of origin and destination': Global Commission on International Migration, *Migration in an Interconnected World: New Directions for Action*, Global Commission on International Migration, Geneva, 2005, p 16.

65 Davies, above n 63, p 71.

of the labour migration program, and the Chamber of Industry, representing workers, arguing that Austria should focus more on the training and investing in its domestic workforce.⁶⁶ Austria's labour migration model incorporates four types of skilled visas predicated upon points-based selection criteria for non-EU migrants. The four types are highly skilled persons, persons with scarce occupational skills, persons with other medium to higher skills and university graduate.⁶⁷ With its high economic growth and low unemployment rate, Austria is an attractive destination for both temporary and permanent migrants.

The regulatory framework for Austria's labour migration program is multi-layered.⁶⁸ There is an integration coordinator who oversees the program and is advised by an expert commission (*Expertertenrat*) which sets the agenda and priorities in seven integration policy areas.⁶⁹ The expert commission established a database for each of these indicators, to provide evidence-based advice to the integration coordinator.⁷⁰ The expert commission is also charged with engaging stakeholders and bringing together political actors and institutions.⁷¹ The Austrian regulatory framework also includes a labour market monitor and a skills monitor which identify Austria's skill needs that need to be met by labour migration and those that can be met through the local workforce. According to Biffl, the presence of these monitors is 'the major strength' of the Austrian model as they provide a rigorous and clear framework for assessing the relationship between the local and migrant labour force.⁷² Relying on the advice of the integration coordinator, Austria's Minister of Labor, in consultation with the Minister of Economics, releases an annual occupational shortage list. Although the compilation of this list is in one sense 'political', in that government departments are ultimately responsible for its production, it is compiled in a rigorous, evidence-based fashion. The involvement of the integration commissioner [Q: coordinator?], the expert commission and the labour market and skills monitors provide recommendations for the occupational shortage list based on their economic modelling and by estimating the number of skilled domestic workers available.⁷³ Austria also has a migration advisory board that includes

66 G Biffl, 'Independent Migration Commissions in Europe: The Case of Austria' (2014) 11 *Migration Letters* 43 at 46.

67 Ibid, p 48.

68 Although this paragraph provides a brief introduction to the Austrian system, see further G Biffl, *Migration and Labour Integration in Austria, SOPEMI Report on Labour Migration Austria 2012–13*, 2013; see also *Report of the Austrian SOPEMI Correspondent to the OECD, Monograph Series Migration and Globalization*, Danube University, Krems, 2013.

69 These are language and education, labour, rights and values, health and social affairs, cross-cultural dialogue, sports and leisure, housing and regional integration: see *Expertertenrat* 2012 cited in Biffl, above n 66, at 47.

70 Statistics Austria, *Migration & Integration. Zahlen. Daten. Indikatoren*, Statistics Austria & Ministry of the Interior, Vienna, 2013.

71 Biffl, above n 66, at 47.

72 Ibid, at 50.

73 P Martin and E Stark, 'Editorial: Expert Commissions and Migration Policy' (2014) 11 *Migration Letters* 3.

representatives of the various ministries, the social partners, the provinces, NGOs, cities and communities.⁷⁴

The regulation of Austria's labour migration program appears to be fairly comprehensive. There exists a transparent process for identifying how skill shortages are determined and this is explicitly related to the data collected from the labour market and skills monitors. A distinct apparatus is established to ensure shared decision-making as the Austrian model is inclusive of stakeholder voices through both the expert commission and the migration advisory board. The integration coordinator incorporates both the economic data and the submissions of these parties in advising the government ministries. It is in this context that the ministries compile an occupational shortage list. Biffl has observed that the development of this complex interplay of different actors and a more coordinated and transparent approach to managing Austria's temporary and permanent labour migration program has elevated the quality of public debate so that it is more informed.⁷⁵ Martin and Stark also argue that Austria's 'inclusive labour migration policy' approach is one that could be emulated by other receiving countries.⁷⁶

2.2 United Kingdom

The role of both permanent and temporary migrant labour is highly contentious in the United Kingdom. Fuelling this was the accession of central and east European states into the European Union in 2004, which led to higher than expected numbers of EU migrant workers entering the United Kingdom.⁷⁷ The UK Government at the time did not elect to exercise its entitlement to impose transitional restrictions on the entry and work rights of migrants from the newly acceding states because of a view that the United Kingdom had a shortage in low skilled workers across the economy.⁷⁸

It was in this context of increasing political disagreement and public concern over the role of migrant labour in the domestic economy that the United Kingdom considered the idea of an expert commission to assist with migration policymaking.⁷⁹ The government announced in July 2006 that it would consult on establishing a non-statutory and advisory non-departmental public body that would advise the government on where migration can fill skills gaps within the economy. A consultation paper was launched on 29 November 2006, seeking the views of stakeholders, customers and the general public about the establishment of the Migration Advisory Committee, and what role such a committee should have. The intention to set up the committee was first announced in March 2007, after the consultation had shown

⁷⁴ Biffl, above n 66, at 51.

⁷⁵ Ibid, p 47.

⁷⁶ Martin and Stark, above n 73.

⁷⁷ 'Nearly 600,000 new EU migrants', *BBC News*, 22 August 2006.

⁷⁸ The eight countries whose citizens could have been subjected to transitional controls on access to the labour market were the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia. Two other countries acceded to EU membership at the same time — Cyprus and Malta — but the terms of their accession required the immediate opening of their employment rights to their citizens from the day of joining on 1 May 2004.

⁷⁹ D Flynn, 'The Politics of Immigration in Hard Times' in *Labour Migration in Hard Times: Reforming Labour Market Regulation?*, Institute of Employment Rights, The Russell Press, London, 2013.

overwhelming support for having a new independent committee, with 89% of respondents in favour.⁸⁰ The MAC met for the first time on 7 December 2007, shortly before the introduction by the government of a new five-tier, points-based system for assessing immigration applications.

The Migration Advisory Committee (MAC) was established as a non-statutory, non-time limited non-departmental public body funded by the Home Office.⁸¹ It is comprised of a chair and four other committee members who are appointed as individuals to provide independent and evidence-based advice to the government on migration issues. Committee members are selected on the basis of their expertise in economics. The MAC's modus operandi is to receive questions from the government, which it seeks to respond to in a timely fashion, usually within 3 to 6 months. The MAC's response is in the form of a public report that identifies the questions posed by the government, the economic analysis and its recommendations.⁸² There has been no shortage of remits from the government for the MAC to consider and advise on. Excluding publications that call for evidence or state an intention to consult, the committee has produced 10 reports since August 2010, several of them of considerable length and complexity.⁸³ Although supported by a secretariat within the Home Office, the MAC is operationally independent and is not influenced by Home Office officials or the Minister. The secretariat takes direction only from the MAC on the deployment of resources delegated to it by the Home Office.⁸⁴

Like Austria's points-based model for skilled migration outside the European Union, the UK's system is composed of five tiers and is also predicated upon a points-based method. The introduction of the five-tier model involved the rationalisation of more than 80 entry channels for migrant workers which had existed prior to 2008.⁸⁵ Tier 1 is for investors, entrepreneurs and exceptionally talented migrants; Tier 2 is for skilled workers with a job offer; Tier 3 is for low-skilled migrant workers outside the European Union and is currently closed; Tier 4 is for foreign students and Tier 5 includes temporary migrants with a non-work related purpose. The MAC's primary role is to provide advice on Tier 2 admissions, which includes three sub-channels.⁸⁶ These are for intra-company transfers, temporary migrants to fill jobs in shortage occupations and temporary migrants requested by employers following a demonstrated unsuccessful effort to recruit domestic workers.

With regards to Tier 2, one of the MAC's central tasks is to provide

80 Migration Advisory Committee and Home Office, *Migration Advisory Committee: Triennial Review*, 2014, p 4.

81 The Home Office is a Department of the UK government concerned with immigration, counter-terrorism, police, drugs policy, and related science and research.

82 A list of MAC publications is available at *Migration Advisory Committee*, at <www.ukba.homeoffice.gov.uk/aboutus/workingwithus/indbodies/mac/> (accessed 2 November 2014).

83 These are available on the MAC's website; *ibid*.

84 Migration Advisory Committee and Home Office, *ibid*, n 80.

85 P Martin and M Ruhs, 'Independent Commissions and Labour Migration: The British MAC' (2014) 11 *Migration Letters* 23 at 27.

86 Migration Advisory Committee, *Analysis of Tier 1, Tier 2 and Dependents under the Points-Based System*, 2009.

recommendations on the composition of an occupational shortage list. For the past 5 years since its inception, the MAC has provided these recommendations to government on an annual basis, using a combination of both hard economic data and input from stakeholders. With regards to the former, 12 top-down labour market indicators are relied upon to determine if a particular occupation should be deemed as being in shortage. Each indicator has to reach a certain threshold in order for the occupation to be in shortage. This data is publicly released by the MAC and the formulae involved are also available for external scrutiny. This is supplemented by evidence through an annual submissions process from employers, unions and others as to which occupations are in shortage. This combination of both objective and subjective factors (or what Ruhs terms 'top down' and 'bottom up' data) enables the MAC to develop a set of recommendations for government as to which occupations are deemed to be in shortage. MAC does not always recommend that an entire occupation be added to the occupational shortage list. Martin and Ruhs provide the example that while there may be no general occupational shortage in secondary school teachers, there may be a shortage in secondary school mathematics teachers.⁸⁷

Just because an occupation is in shortage does not automatically prompt the MAC to call for migrant labour in the occupation in question. MAC seeks to differentiate between skill shortages that are best met by temporary migration and those that could be met by increased training of domestic workers. MAC can request a formal review of the training system that trains British workers for that occupation in question.⁸⁸ This facilitates a more nuanced identification of where resources for training purposes need to be placed to enable more strategic reliance on the migrant worker program and improve the employment prospects of local workers.⁸⁹

A number of aspects of the UK's reliance on an expert commission have enabled it to achieve more effective migration policymaking. From the perspective of stakeholders, the MAC's independence from the Home Office has given its recommendations more credibility and integrity as its work is freed from government intervention and political considerations.⁹⁰ Even though the secretariat for the MAC is located within a government department, this is not seen to compromise the committee's independence as reporting lines are not to the department but to the committee.⁹¹ A key aspect of the MAC's effective operation is its transparency and accountability to the public. The MAC's website clearly identifies its methodology in determining which occupations are in shortage and both lists and justifies its recommendation to government. According to stakeholders, this means that:

⁸⁷ Martin and Ruhs, above n 85, at 29.

⁸⁸ P Martin and M Ruhs, *Independent Commissions and Labor Migration*, Paper presented to the Expert Commissions and Migration Policy Making Conference, University of California, 18–19 April 2013, p 7.

⁸⁹ This is particularly important in occupations where apprenticeships and training pathways have shrunk. See further M Ruhs and B Anderson, *Who Needs Migrant Workers? Labor Shortages, Immigration and Public Policy*, Oxford University Press, Oxford, 2010.

⁹⁰ Migration Advisory Committee and Home Office, above n 80, p 8.

⁹¹ Ibid.

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The Committee [is] unafraid to offer advice that Ministers might not always find politically convenient. The openness which characterises the MAC's approach to its fact-finding and reporting is credited [as] not just with helping Ministers make sound decisions but with improving the understanding of the issues, and hence the quality of debate, more widely.⁹²

Martin and Ruhs concur with this analysis, arguing that after 6 years in operation, the MAC has 'earned a reputation for careful analysis of the data an evidence on which it bases its recommendations, which has strengthened its credibility with the government and the public'.⁹³ Testament to its strong reputation and its highly regarded contribution to migration policymaking is that the MAC survived the Cameron Coalition government's 'Red Tape Challenge', which sought to rationalise the public service and review the number of public bodies.⁹⁴ Despite the MAC being established by the previous Labour government, the newly elected conservative government's Minister of State for Immigration strongly recommended that the MAC be retained, indicating its success in achieving a non-political, credible advisory role.⁹⁵

The MAC also plays a valuable role in considering the broader consequences of labour migration and does not always advocate for an increase in migration levels to address labour shortages. This nuanced response to the question of how best to meet a domestic skill shortage has assisted in producing more informed migration policymaking. As has been noted, debates around migration levels are 'often emotional, and not always based on a dispassionate review of fact and data'.⁹⁶ It is to be expected that local workers are protective of their labour market opportunities, wages and conditions and that some workers perceive labour migration as a threat. In this context, the MAC is able neutrally and objectively to interrogate issues. For example, in recent years UK employers have alleged an acute skills shortage in the aged care public sector.⁹⁷ However, when the MAC interrogated employer requests for an increase in migration levels to address this shortage, it found that this would lead to the suppression of wages in the industry. The MAC also found that increased training of local workers also would not address the shortage of aged care workers in the public sector, because the cumulative effect of the onerous education requirements and the depressed wage levels in the industry were a disincentive for local workers to perform this work. Instead, the MAC recommended that only the highest skilled aged care workers be added to the occupational shortage list to avoid 'institutionalising low pay in the care sector' and concluded that:

Budgets need to be larger, or at least better targeted towards those parts of the sector suffering from labour shortage, so that those workers can be paid more.⁹⁸

⁹² Ibid, p 5.

⁹³ Martin and Ruhs, above n 85, at 29.

⁹⁴ See further Cabinet Office, *Red Tape Challenge*, at <<http://www.redtapechallenge.cabinetoffice.gov.uk>> (accessed 2 November 2014).

⁹⁵ Migration Advisory Committee and Home Office, above n 80, at 4.

⁹⁶ Ibid 4.

⁹⁷ Martin and Ruhs, above n 85.

⁹⁸ Migration Advisory Committee, *First Review of Recommended Shortage Occupation Lists for the UK and Scotland*, 2009, p 96.

Overall, the recent regulatory approaches in Austria and the United Kingdom suggest that some governments are turning to more transparent, coordinated and publicly accountable decision-making processes to address controversial migration policy questions. While both countries' older migration programs have tended to be more complex and with decision-making occurring internally within government departments and without public justification, the most recent reforms indicate significant coordination efforts by governments. This is clearly distinct to the approach of the current Abbott Coalition government, which has recently subsumed AWP into a government department. The following part considers whether an alternative approach should be adopted.

Part 3: What would an expert commission look like within Australia's migration program?

The case for an Australian expert commission can be advanced by reference to a series of rationales. These are discussed in turn below.

3.1 To address the complexity of Australia's labour migration program

The sophisticated regulatory design of Australia's labour migration program is quite remarkable. On this basis alone, an expert commission could assist in providing evidence-based recommendations on how both the temporary and permanent programs could be better managed and respond to changes in the economy in a timely and more coordinated fashion. To understand the large numbers involved in both permanent and temporary labour migration, and to fully appreciate the complexity of these programs, it is important briefly to describe the various entry channels for migrant workers in Australia.

Within the temporary labour migration program, a number of visa pathways exist. The subclass 457 visa allows sponsorship of migrant workers for up to 4 years when Australian workers are not available to do the job, based on a skilled occupation list and labour market testing for certain occupations. In 2012–13 there were 126,350 subclass 457 visas approved by the Department of Immigration and Border Protection.⁹⁹ A number of visas for a non-work related purpose exist but are important to the overall picture because a significant amount of low and semi-skilled work is performed under these visa types. First, working holiday visas (visa subclasses 417 and 462) allow temporary migrants from 29 countries of between 18 and 30 years of age to work while they holiday in Australia for up to a year.¹⁰⁰ Working holiday visas provide work entitlements for the full 12 months of the visa, but only 6 months' work with any one employer.¹⁰¹ In November 2005, the law was changed to make it possible for working holiday visa holders to apply for a

⁹⁹ Department of Immigration and Citizenship, above n 2, p 2.

¹⁰⁰ See Department of Immigration and Citizenship, *Working Holiday Maker Visa Program Report*, Commonwealth Government, 31 December 2011, p 3. The most recent addition to the list of countries with work and holiday arrangements is Argentina, with whom an agreement was finalised in February 2012.

¹⁰¹ Migration Regulations 1994 (Cth) regs 417.611, 462.611. See also, Department of Immigration and Citizenship, *WHM Visa Program Report*, 30 June 2013, p 4.

second working holiday visa if they have worked for 3 months in 'specified work' in mining, construction and agriculture in regional Australia.¹⁰² Despite this visa being for a non-work related purpose, the department has acknowledged the work motive of working holiday makers. It reports that the recent increase in working holiday makers 'largely appears to be associated with the wider global economic situation in 2011–12 as labour market opportunities in some partner countries remain uncertain'.¹⁰³ Numbers in the program have risen from less than 20,000 in the early 1980s to a total of 258,248 in 2012–13.¹⁰⁴ Second, international students are permitted to work part-time during the course of their studies.¹⁰⁵ Since 2008, the opportunity to work has been automatically included in student visas, whereas previously students had to apply to be able to work. In 2013, international students became eligible for Graduate (Temporary) Visa Subclass 485 to provide new opportunities to live and work in Australia after the completion of their course of study. The rationale for the liberalisation of work rights for international students is to give Australia a competitive advantage over its major competitors for international students, the United States, Canada and the United Kingdom, where work rights either do not exist or are not as generous.¹⁰⁶ On 30 June 2013, there were 304,251 international student visa holders in Australia with the right to work up to 40 hours a fortnight during the course of their studies in any job in any industry in Australia.

A further complexity is that, although Australia's primary temporary labour migration program is aimed at skilled labour, the Pacific seasonal worker scheme (visa subclass 416) enables the entry of low-skilled migrant workers. The justification for this scheme is multifaceted, including economic benefit to the Australian and Pacific island nation economies, and benefits to the horticultural industry and the migrant workers.¹⁰⁷ The scheme builds on the particular trade and development relationship Australia has with the Pacific island nations.¹⁰⁸ The Australian horticultural industry advocated strongly for the scheme, claiming that prior to its inception 'up to \$700 million of fresh

102 Department of Immigration and Citizenship, *Working Holiday Maker Visa Program Report*, 30 June 2013, p 4.

103 Ibid, p 7.

104 Ibid. Furthermore, the numbers in the working holiday maker program in 2012–13 were their highest ever, and represented a 15.8% increase on the previous year.

105 See generally A Reilly, 'Protecting Vulnerable Workers: The Case of International Students' (2012) 25 *AJLL* 181.

106 See generally, for Canada, Citizenship and Immigration Canada, *Work Off Campus*, at <<http://www.cic.gc.ca/english/study/work-offcampus.asp>> (accessed 2 November 2014.); for the United States, A Labi, 'Britain's New Visa Policy Tightens Rules for Students and Universities' *Chronicle of Higher Education*, 2011; and for the United Kingdom, Department of Immigration and Border Protection, *Visas, Immigration and Refugees: Students — Higher Education Sector: Temporary Visa (Subclass 573) — Assessment Level 1* at <<http://www.immi.gov.au/Visas/Pages/573.aspx>> (accessed 2 November 2014).

107 See generally N Maclellan and P Mares, *Remittances and Labour Mobility in the Pacific: A Working Paper on Seasonal Work Programs in Australia for Pacific Islanders*, Institute for Social Research, Swinburne University of Technology, 2006, at <<http://researchbank.swinburne.edu.au/vital/access/manager/Repository/swin:5609>> (accessed 2 November 2014); A Reilly, 'Ethics of Seasonal Labour Migration' (2011) 20 *GLR* 127.

108 B Ripoll, 'Australia's Relationship with Pacific Island Nations with Focus on the Financial Relationship', Coin Reform Seminar, Canberra, 18 September 2012, at <<http://mini>

produce [was] left to rot because of a lack of reliable workers'.¹⁰⁹ Unlike the preceding three visa subclasses discussed above, there has been a slow take up of places in the Pacific seasonal worker scheme. An evaluation study of the Pacific seasonal worker pilot scheme in 2012 drew a direct connection between the slow uptake of places in the scheme and the increasing availability of self-funded working holiday visa holders and international students.¹¹⁰

Although temporary labour migration is increasingly being utilised, Australia's permanent labour migration program is also highly significant, both in terms of the number of workers and the complexity of its design. Australia's migration program consists of 190,000 places, with 128,550 of these allocated for skilled migrants.¹¹¹ Four main categories exist under the skilled component of the Australian migration program. First, general skilled migration is for skilled workers who do not have an employer sponsoring them. Migrants are selected on the basis of their nominated occupation, age, skills qualifications, English language ability and employability. As outlined in the first section of this article, migrants seeking to enter Australia under this stream are required to have their occupation listed on the Skilled Occupation List. This list was formerly compiled by AWPB but is now to be compiled internally by the department. The second stream is for employer nomination which is for workers who have an employer willing to sponsor them. Increasingly, subclass 457 visa holders are applying for permanent residency via this stream as these migrant workers already have a relationship with an Australian employer. For example, in 2010–11, 41,710 permanent residency visas were for people who last held a 457 visa, with almost 9 in 10 granted a permanent employer sponsored visa.¹¹² Two minor subsets of the skilled migration program are 'business skills migration', which encourages successful business people to settle in Australia and develop new business opportunities and 'distinguished talent' which is a small category for eminent individuals with special or unique talents of benefit to Australia.¹¹³

In recent years, Australia's permanent migration program has been repositioned to focus on skilled migration and, increasingly, in favour of employer nomination. This shift to a demand-driven model was the result of a review of permanent skilled migration undertaken by the Rudd government

sters.treasury.gov.au/DisplayDocs.aspx?doc=speeches/2012/009.htm&pageID=005&min=
=bfr&Year=&DocType=> (accessed 2 November 2014). See also MacLellan and Mares,
above n 107.

109 D Kerr, *Seasonal Worker Pilot Scheme Is More Proof of Australia's New Pacific Focus*, Media Release, 20 August 2008.

110 Department of Employment, Education and Workplace Relations, *Final Evaluation of the Pacific Seasonal Worker Pilot Scheme*, September 2011, pp 22–25, at <http://docs.employment.gov.au/system/files/doc/other/pswps_-_final_evaluation_report.pdf> (accessed 2 November 2014).

111 Department of Immigration and Border Protection, *Fact Sheet 20: Migration Programme Planning Levels*, at <<https://www.immi.gov.au/media/fact-sheets/20planning.htm>> (accessed 2 November 2014).

112 Department of Immigration and Citizenship, above n 7, p 66.

113 Department of Immigration and Citizenship, *Overview of Skilled Migration to Australia*, Fact sheet 24, Department of Immigration and Citizenship, Canberra, 2010, at <http://www.immi.gov.au/media/fact-sheets/24overview_skilled.htm> (accessed 2 November 2014).

for 2008–09 in the wake of the economic challenges resulting from the global financial crisis.¹¹⁴ The review identified the need for a shift in focus away from ‘supply-driven’ independent skilled migration towards ‘demand-driven’ outcomes, in the form of employer and government-sponsored skilled migration.¹¹⁵ The intention is to enable the program to better target the skills needed in the economy and ensure that skilled migrants are employed in industries that have the highest need. The government has recently announced another review of the skilled migration program and, in its Discussion Paper, it has indicated that this demand-driven approach is to continue as a foundational principle of the program.¹¹⁶

This picture reveals an Australian labour migration program with eight primary entry channels. Although two of these channels involve temporary visas for a non-work related purpose, both international students and working holiday makers perform a significant amount of low and semi-skilled work in Australia. Their contribution in the labour market needs to be accounted for, especially in light of recent reforms to both visas which allow working holiday makers to stay on an additional year if they elect to perform work in a regional location, and the new subclass 485 which allows international students to remain and work in Australia for another 2 years upon completion of their studies. It would make a lot of sense to have an expert commission providing evidence-based advice to government on how these different entry channels are optimally managed. While it is true that, like in Austria and the United Kingdom, where the expert commission is more involved in some of the entry channels over others, it is still useful to have an expert commission with oversight over the entire labour migration program.

In Australia’s case, an expert commission is particularly necessary given three significant evolutionary shifts in our migration program. First, the evolution of the program from being supply driven to demand driven necessitates an independent body that can verify that requests from employers to access migrant labour are in the national interest. As will be explored below, employers’ self-interest and the national interest do not always conflate. Second, the shift from a focus on permanent migration to temporary labour migration reflects a significant policy reform in response to changing international realities, most notably the increased movement of people around the world for economic purposes. This shift would be more effectively managed through an independent body solely charged with managing the different temporary entry channels (for example, the subclass 457 visa, international student visa and the working holiday maker visa), as well as ensuring that it is in the national interest for a temporary migrant worker to transition to permanent residency. Third, the shift from family reunion and economic purposes as the central reasons for migration to Australia to a focus on meeting domestic skill needs provides a clear rationale for an expert commission. Although previously the Department for Immigration could

114 C Evans, *Migration Program Gives Priority to Those with Skills Most Needed*, Media Release, 17 December 2008.

115 Ibid.

116 Department of Immigration and Citizenship, *Strengthening the Integrity of the Subclass 457 Program*, Discussion Paper, December 2012, p 8.

manage migration policy, the increasing focus on skilled migration means that the research and advice from other departments such as the Treasury, the Department of Employment and the Department of Industry is also critical. An expert commission could provide a useful conduit in coordinating the research efforts of these departments and a transparent and accountable process for migration policymaking across these different government bodies. Therefore, in Australia, as legislation and administrative practice have introduced ever-increasing complexity around migrant selection and admission, the presence of a commission would enable the development of expertise and experience to feed into government decision-making.

3.2 To devise a credible occupational shortage list

I have argued elsewhere that there are significant deficiencies in the ability of Australia's temporary labour migration program to identify and address domestic skill shortages.¹¹⁷ This is because the subclass 457 visa is based on an undemanding employer attestation scheme coupled with a fairly lukewarm labour market testing requirement for certain occupations. The latter was introduced via the Migration Amendment (Temporary Sponsored Visas) Act 2013 (Cth); however, this has been implemented in a weak fashion by the department. Section 140GB refers to any redundancies or labour market research conducted in the preceding 4 months prior to the making of a 457 visa application but the department's guidelines allow the submission of evidence from the preceding 12 months.¹¹⁸ This dilutes the labour market testing requirement as any evidence of unsuccessful recruitment efforts in the preceding 12 months will suffice for the making of a 457 visa application. This is a significantly longer time period from which employers can access data in support of their application. Furthermore, the department's guidelines also suggest 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 also suffice. There is no minimum duration time for the advertisement nor a requirement that advertising be paid. These insubstantial labour market testing requirements are supplemented by an additional obligation that a migrant worker's occupation be listed on the Consolidated Sponsored Occupations List (CSOL).¹¹⁹ However, the CSOL is not a genuine occupational shortage list, but is compiled internally by the department and includes over 600 occupations.¹²⁰

While it is true that Australia's permanent migration program has relied upon a more transparent and accountable process for compiling its occupational shortage list,¹²¹ as the first section of this article has explained, the abolition of AWPA means that it is likely that this will change.

A primary argument for the establishment of an expert commission in

¹¹⁷ See Howe, above n 16; J Howe, 'Enterprise Migration Agreements under the Subclass 457 Visa: Much Ado about Nothing?' (2014) 27 *AJLL* 86 at 95–6; Howe, above n 27.

¹¹⁸ Department of Immigration and Border Protection, *Labour Market Testing in the Subclass 457 Visa Programme: Frequently Asked Questions*, November 2013 (copy on file with author).

¹¹⁹ Migration Regulations 1994 (Cth) regs 1.20G(2), 1.20H(1).

¹²⁰ See further Howe, above n 16.

¹²¹ The official title of this list is the Skilled Occupation List (SOL). For more on this list, see Part 1.

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Australia is the opportunity this would provide to develop rigorous, transparent and credible occupational shortage lists for both the permanent and temporary labour migration programs. Chaloff notes that there is an increasing trend amongst OECD countries to rely upon tripartite or external expert bodies to input into the compilation of shortage lists,¹²² and states the following rationale for their presence:

Shortage lists . . . communicate to the public that a migration system is selective and focused on specific skills. Lists provide a focus for professional bodies, employers and unions to debate which occupations should be on or off the list, and may serve as a signal to employers by encouraging them to think of recruiting migrants if the occupation is on the list. Shortage lists may also signal to employers and government where training is required to address a shortage of domestic workers.¹²³

Although employers often contend that they are better placed than an expert commission to select migrant workers to meet their needs, it is doubtful whether employers act in the national interest in instances when this is opposed to their own interest. An employer-demand model, which is an apt description of both Australia's temporary and permanent labour migration programs, is not ideal as employers are profit-maximising entities in a competitive market. They serve a different function to governments and/or an expert commission. Given the possibility for employers to use labour migration 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'.¹²⁴ The presence of an expert commission to identify labour shortages is consistent with OECD advice that independent labour market testing is preferable for mapping domestic labour shortages because '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'.¹²⁵

It is important to note that an Australian expert commission would not make final decisions about the composition of the occupational shortage list. This is a political responsibility best left to elected officials with accountability to the Parliament and to the electorate through a cycle of regular elections. Nonetheless, as both the Austrian and English case studies demonstrate, the presence of an expert commission can aid the integrity of the compilation process by relying upon both hard economic data and engagement with stakeholders to develop a view as to whether a particular occupation is in shortage *and* whether this shortage is best addressed through migration. An Australian expert commission could make recommendations which

122 J Chaloff, 'Evidence-Based Regulation of Labour Migration in OECD Countries: Setting Quotas, Selection Criteria and Shortage Lists' (2014) 11 *Migration Letters* 11 at 12.

123 Ibid, p 20.

124 M Ruhs, 'The Potential of Temporary Migration Programmes in Future International Migration Policy' (2006) 145 *International Labour Review* 7 at 14.

125 OECD, *International Migration Outlook: Sopemi 2009*, OECD Publishing, 2009, p 134.

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Parliament could modify, reject or allow to take effect. This would provide greater public confidence in the process as an expert commission could develop agreed-upon definitions and measures (like the MAC does in the United Kingdom) which would force those that disagreed with the presence of an occupation on the shortage list to make their case with objective evidence rather than assertion.

3.3 To inform government decision-making and elevate the quality of public debate

Recent experience attests to the controversial nature of Australia's migration program. The parliamentary and public debate over the subclass 457 visa in 2013 proved highly inflammatory with Scott Morrison, the Coalition's spokesperson on immigration (as he then was),¹²⁶ arguing that:

Labor's attack on skilled migration through the measures introduced to choke the 457 skilled migrant programme with union red tape was economic vandalism. But it's not just the measures that Labor forced through the Parliament, it was their rhetoric. Labor's rhetoric on the 457 changes was blunt, unsophisticated and anti-migrant; crudely blaming migrants for taking away Aussie jobs.¹²⁷

A central part of the Coalition's argument against the proposed Labor reforms to the subclass 457 visa was that Labor's rhetoric about the reform was racially charged and reflected an anti-immigration position. During the debate in the House of Representatives, Liberal MP Don Randall criticised the reforms as being 'the most racist piece of legislation that has come to the House since I have been a member . . . It is not only xenophobic in its nature but it also highly jingoistic in its interpretation of our attitude towards foreign workers'.¹²⁸

While it is not inherently racist or xenophobic to argue for limitations on the numbers of temporary and permanent labour migrants who are permitted entry into Australia, often these debates are accompanied by a significant amount of misinformation, fear-mongering and mistrust of migrant workers. In critiquing the 2013 debate over the subclass 457 visa, Joo Cheong Tham has appropriately captured the false conflict created by some politicians (and others) between local and migrant workers:

The question of justice for temporary migrant workers should also be joined to the question of justice for Australian workers. But not in the way the [Labor] government has done so. Its statements about 'putting Aussie workers first' by 'putting foreign workers at the back of the queue' threatens to turn the specific — and — real conflict in relation to accessing employment to a broader — but false — conflict between the rights and interests of Australian workers versus foreign

¹²⁶ MP Scott Morrison is currently the Minister for Immigration and Border Protection in the Abbott Coalition government.

¹²⁷ S Morrison, 'Immigration that Creates Jobs', Speech delivered to the AMMA, Brisbane, 8 August 2013.

¹²⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 19 June 2013, p 6269 (Don Randall).

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workers. This poses a false trade-off that does fuel xenophobia — why wouldn't Australian workers be hostile to foreign workers if they perceive them as a threat to their working conditions?¹²⁹

Experience from both Austria and the United Kingdom attests to the ability of an expert commission to lift the quality of public debate and promote informed government decision-making. This is because a more transparent and rigorous process for selecting occupations to be on a shortage list has the benefit of increasing public confidence that only occupations which are in shortage are eligible for labour migration. An expert commission can also assist in communicating to the public the shared prosperity and economic gains that ensue from labour migration, leading to greater public acceptance of the use of labour migration to address domestic shortfalls.

Another benefit of an expert commission is that it has the potential to reduce the opportunity for regulatory capture by special interests. The Austrian approach exemplifies this through its use of dedicated channels by which the social partners (namely, the Chamber of Industry and the Chamber of Labour) can provide input into the decision-making process by the expert commission. In contrast, when decisions are made in a non-transparent fashion and internally within government departments, there can be confusion as to whether these decisions were made on a sound basis or because of lobbying by a particular group. The recent addition of flight attendants to the CSOL by the department is one such example.¹³⁰ The addition of this occupation to the occupational shortage list for the subclass 457 visa occurred after the head of the department met with the CEO of Qantas who was lobbying for the reform.¹³¹ Although adding flight attendants to the CSOL was opposed by unions who were not consulted on this change, a week after the meeting occurred, the CSOL was amended.¹³² No public justification was provided by the department for this change. While this decision may have been evidentially sound and based on data revealing a labour shortage in domestic flight attendants, this remains unproven because of the lack of accountability and transparency that characterises decision-making in the labour migration program.¹³³ Robert Baldwin and John Houghton identify a particular challenge of subordinate legislation (which tends to be extensively relied upon as part of Australia's labour migration program) as being that 'special groups and interests may exercise influence in lobbying, and representation may be weighted towards the interest of a pressure group or department'.¹³⁴

Although there is a danger that an expert commission might be subject to

129 J Tham, Submission No 22 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Migration Amendment (Temporary Sponsored Visas) Bill 2013*, 21 June 2013, p 26.

130 See further Howe, above n 27.

131 Commonwealth, *Questions Taken on Notice, Supplementary Budget Estimates Hearing: 15 October 2012*, Immigration and Citizenship Portfolio, answer to question by Senator Xenophon (SE12/0336).

132 Commonwealth *Questions Taken on Notice, Budget Estimates Hearing: 21–22 May 2012*, Immigration and Citizenship Portfolio, answer to question by Senator Xenophon (BE12/0211).

133 This has been explored elsewhere, see S Cooney, 'The Codification of Migration Policy: Excess Rules? — Part II' (1994) 1 *AJ Admin L* 181; Tham, above n 16, at 20.

134 R Baldwin and J Houghton, "'Circular Arguments': The Status and Legitimacy of Administrative Rules' (1986) *Pub Law* 239 at 267.

the same weakness of capture by special interest groups, the Austrian and English experiences suggest that this can be overcome through creating an expert commission with a highly professional, evidence-based culture. Marshall suggests that 'independence is strengthened through selecting highly respected professional members who serve for long, staggered terms that do not coincide with those of any administration, and ensuring a high level of visibility, transparency, and professionalism in the commission's deliberations'.¹³⁵ This can be contrasted to an internal departmental approach where closed executive processes can exacerbate problems associated with capture by certain stakeholders at the expense of others.¹³⁶

A tripartite structure can also act as a safeguard against regulatory capture by special interests. The report, 'Robust New Foundations', by the Independent Review into the Subclass 457 Visa Programme, recommends that a tripartite ministerial advisory council be established 'to provide stakeholders from divergent viewpoints the opportunity to collaborate and develop workable options for government'.¹³⁷ Although only scant detail about this tripartite structure was provided in the report,¹³⁸ the importance of tripartitism was emphasised by the report's authors because of the need for integrity and credibility to be overarching principles of the subclass 457 visa program.¹³⁹ In the report's view, the status quo is insufficiently rigorous and transparent for maintaining public confidence that temporary migrant workers are only being deployed in occupations experiencing a skill shortage:

During our consultations it became clear that there are programme settings which have been constructed and implemented without a transparent and evidence-based approach. There are two policy issues that we consider to be core questions in the existing 457 programme, as they directly address one of the two objectives. These are: proving that the position cannot be filled by a local worker and determining the skilled occupations that are used for the programme. It is our considered view that these issues are not well served by the current policy approaches and can be improved by adopting a more robust evidence-based approach.¹⁴⁰

¹³⁵ Marshall, above n 51, at 76.

¹³⁶ See further H Punder, 'Democratic Legitimation of Delegated Legislation — A Comparative View on the American, British and German Law' (2009) 58 *International Comparative Law Quarterly* 353 at 375.

¹³⁷ Azarias, above n 11, at 49. This recommendation for an expert body to advise on the composition of an occupational shortage list was advanced by the author in her submission to the panel: see J Howe, *Submission to the Independent Review of Integrity in the Subclass 457 Visa Programme*, 30 April 2014, and see also in a recent scholarly article: Howe, above n 16.

¹³⁸ Azarias, above n 11, at 49. The report states that the council would include 'representation from key stakeholders such as peak councils, industry and trade unions' but does not explore how representatives would be chosen or the proportion of representatives from each of the stakeholder groups. Joo-Cheong Tham has also previously made the point that it would be valuable to include representatives of migrant workers in decision-making around labour migration programs to ensure their interests are protected: Tham, above n 16.

¹³⁹ Azarias, above n 11, at 44.

¹⁴⁰ *Ibid.*, at 44. It seems unlikely that the government will adopt this recommendation for a tripartite ministerial advisory council despite this being described as one of two 'core solutions' in the report which were established as necessary pre-conditions for the other recommendations contained in the report: Azarias, above n 11, at 14. The government's response to the report indicates that a number of its more deregulatory proposals are to be adopted, in particular, the recommendations to streamline the processing of visa applications

Does Australia need an expert commission? 25

Although a ministerial advisory council for the subclass 457 visa program is a step in the right direction, this article advances a more comprehensive solution, arguing that a tripartite expert commission be formed to advise government on both Australia's permanent and temporary skilled migration program. The explicit inclusion of stakeholders in the decision-making process, and the focus on both permanent and temporary entry channels, would allow greater coordination between the two and ensure that migration policy is made in a more transparent and coherent manner.

Conclusion

In this article, I have argued that Australian migration policymaking would be improved by the presence of an expert commission. This argument is informed by contemporary practice, in which migration policy is a highly complex space where unaccountable decision-making and poor public transparency is rife. While an expert commission is not a panacea for resolving difficult political contests around the question of how many migrants to admit, and the fears of domestic workers of being displaced in the labour market or that wages and conditions will deteriorate over time, this article has argued that an expert commission would produce more informed public debate and sounder governmental decision-making. Although AWP was more limited in scope than the type of expert commission advanced in this article, the recent abolition of AWP and the subsuming of its role into the department is a retrograde step.

Given the importance of labour migration to the economy, social fabric and labour market, Australia needs clear and bounded principles to encourage greater certainty in migration policymaking. The experience from Austria and the United Kingdom attests to the useful role an expert commission can play in this regard. In recent years, Australian migration policymaking has been characterised by significant and persistent change. An Australian expert commission would facilitate greater legitimacy and acceptance of the labour migration program, as well as the opportunity for increased transparency and the potential for meaningful consultation.

to reward low risk applicants and refocus monitoring activities on high risk applicants, to increase the sponsorship approval period for start-up businesses, to reduce the English language testing requirements for 457 visa applicants and to freeze the Temporary Skilled Migration Income Threshold at its current level and to review its role in 2 years: I McFarlane, *Reforming Skilled Migration to Improve Australia's Competitiveness*, Media Release, 14 October 2014.