

Multiculturalism and temporary migration: where does justice fit?

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Temporary migration is proving to be profoundly important for Australia. Seven years ago, a leading demographer considered the shift from permanent to temporary migration as probably the 'greatest change' made to Australian immigration in the last decade.² That this change was far from transitory is captured by the sense that there has been a 'permanent shift to temporary migration'.³ Indeed, the importance of temporary migration goes beyond its implications for Australia's migration program; it also impacts upon the labour market, with temporary migrant workers estimated to make up 10% of labour market participants.⁴

An important threshold was crossed in the mid-1990s when the intake of temporary migrants - those with a limited ability to stay - exceeded that of permanent migrants.⁵ Nearly twenty years later, it is fair to say that this country is only *beginning* to fully grasp the significance and implications of temporary migration. A particular set of issues – arguably the most important – concerns questions of justice. What does justice mean in relation to

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² Graeme Hugo, 'Globalization and Changes in Australian International Migration' (2006) 23(2) *Journal of Population Research* 107, 110.

³ Peter Mares, 'The Permanent Shift to Temporary Migration', *Inside Story* (online), 17 June 2009 <<http://inside.org.au/the-permanent-shift-to-temporary-migration/>>.

⁴ Mark Cully, 'Migrant Labour Supply: its Dimensions and Character' (Paper presented at the Australian Labour Market Research Workshop, University of Sydney, 15-16 February 2010); Henry Sherrell, 'Migrants Don't Steal Jobs', *New Matilda* (online), 18 January 2013 <<http://newmatilda.com/2013/01/18/migrants-dont-steal-jobs>>. These estimates are based on the total number of temporary visa holders granted work rights.

⁵ In Australia, the key groups of temporary migrants are: international students; workers on Subclass 457 Temporary Work (Skilled) visas ('457 visa workers') (previously named Business (Long Stay) visas); those on Working Holiday (and Work and Holiday) visas; and those on skilled graduate visas. Another group sometimes included in the discussion of temporary migrants in Australia are New Zealand citizens resident in Australia. Strictly speaking, these New Zealanders are not temporary migrants in the sense referred to above as they have the legal right to remain indefinitely. Technically, however, they are on a temporary visa (the Special Category Visa), a visa status that has important implications for their entitlement to social security benefits (see Department of Immigration and Citizenship, *Fact Sheet 17 - New Zealanders in Australia* (October 2012) <<http://www.immi.gov.au/media/fact-sheets/17nz.htm>>).

temporary migrants in Australia? What is the morally correct way to approach the question of temporary migration?

This paper explores this question and does so through the lens of multiculturalism. In taking this approach, the paper unapologetically treats the Australian version of multiculturalism as being informed by an understanding of justice - Australian multiculturalism embodies a view of how to justly treat people of different cultural and ethnic backgrounds, especially those who have migrated.⁶

Australian multiculturalism is, however, a contested concept,⁷ with vigorous debate as to its content and substance.⁸ To acknowledge that Australian multiculturalism embodies a notion of justice is not to imply – or prescribe – any *specific* understanding of justice.⁹ Moreover, Australian multiculturalism is more than a view of justice. It is a polymorphous concept with crucial distinctions to be made between multiculturalism as a description of social reality; multiculturalism as government policy;¹⁰ and multiculturalism as a social ideal, whether as an ethos¹¹ or as a statement of national identity.¹²

This paper does not seek to resolve these debates. On the contrary, the various interpretations of multiculturalism lie at its heart, with the paper

⁶ Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford University Press, 2nd ed, 2002) ch 8; Tim Soutphommasane, *Don't Go Back to Where You Came From: Why Multiculturalism Works* (NewSouth Publishing, 2012) vi-viii.

⁷ Tim Soutphommasane, *Don't Go Back to Where You Came From: Why Multiculturalism Works* (NewSouth Publishing, 2012) xi-xiii.

⁸ See Ghassan Hage, 'Multiculturalism and White Paranoia in Australia' (2002) 3(3-4) *Journal of International Migration and Integration* 417, 427-429.

⁹ In particular, it is not to imply that Australian multiculturalism necessarily embodies the policy of social justice as promulgated under the Hawke and Keating ALP governments. A policy of social inclusion seems to have replaced this emphasis on social justice.

Multiculturalism, however, has a marginal place in the policy of social inclusion: Martina Boese and Melissa Phillips, 'Multiculturalism and Social Inclusion in Australia' (2011) 32(2) *Journal of Intercultural Studies* 189.

¹⁰ James Jupp, *From White Australia to Woomera: The Story of Australian Immigration* (Cambridge University Press, 2nd ed, 2007) ch 5; Tim Soutphommasane, above n7, ch 2.

¹¹ Ghassan Hage, 'What Should 'Championing Multiculturalism' Mean Today?' (Keynote address delivered at the National Ethnic and Multicultural Broadcasters' Council's National Conference, Launceston, 26 November 2011).

¹² See Laksiri Jayasuriya, 'Multiculturalism' in Brian Galligan and Winsome Roberts (eds), *Oxford Companion to Australian Politics* (Oxford University Press, online version, 2012).

drawing out how particular interpretations of multiculturalism have different implications in relation to justice for temporary migrants.

The paper will suggest that that there are four dominant views of justice present in Australian debates over temporary migrants, namely:

- Justice is irrelevant;
- Justice based on priority for citizens;
- Justice based on choice; and
- Justice based on fairness.

Justice is irrelevant

The view that justice is not relevant in relation to temporary migrants has different sources. We can begin with former Prime Minister John Howard who famously (or notoriously) declared that:

We will decide who comes to this country and the circumstances in which they come.¹³

This proclamation is deeply infused with the idea of state sovereignty, a principle well recognised in international law.¹⁴ In its strongest form, this view implies that matters of migration are solely for a State to determine *at its discretion* – questions of justice are irrelevant to such a prerogative.

Then there is the perspective that views temporary migrants in terms of the benefits they will bring to Australia - 457 visa workers are seen as a supply of labour to deal with skill shortages and international students are seen as a source of export revenue.

This perspective is clearly reflected in Principle 3 of 'People of Australia: Australia's Multicultural Policy':

The Australian Government welcomes the economic, trade and investment *benefits* which arise from our successful multicultural nation.¹⁵

It is similarly evident in the goal of productive diversity.¹⁶ This goal is not a principle of justice but rather a strategy to harness the *value* of cultural and ethnic diversity.¹⁷

¹³ Prime Minister John Howard, '2001 Election Policy Speech' (Speech delivered in Sydney, NSW, 28 October 2001) <<http://australianpolitics.com/2001/10/28/john-howard-election-policy-speech.html>>.

¹⁴ As the ILO has noted, '(t)he principle of state sovereignty over immigration means that States essentially decide who enters their territory, who stays, who can work and who should leave, within the framework of internationally recognized norms': International Labour Office, *International Labour Migration: A Rights-Based Approach* (2010) 164.

¹⁵ Commonwealth Government, *The People of Australia: Australia's Multicultural Policy* (2011) 5 (emphasis added) <http://www.immi.gov.au/media/publications/multicultural/pdf_doc/people-of-australia-multicultural-policy-booklet.pdf>.

¹⁶ See Commonwealth Government, *Multicultural Australia: United in Diversity: Updating the 1999 New Agenda for Multicultural Australia: Strategic Directions for 2003-2006* (2003) 8-9 <http://www.immi.gov.au/media/publications/settle/_pdf/united_diversity.pdf>.

¹⁷ Santina Bertone and Mary Leahy, 'Multiculturalism as a Conservative Ideology: Impacts on Workforce Diversity' (2003) 41(1) *Asia Pacific Journal of Human Resources* 101, 107.

The flip-side of the perspective that views temporary migration in terms of its benefits to Australia would be one that sees such migration through the prism of its negative impact on this country. Concerns that temporary migration might adversely impact upon social cohesion¹⁸ seem to evince such a tendency. These concerns appear to assume that temporary migrants are outside of the 'social'; an assumption that comes naturally from understandings of the Australian nation that are based solely on citizenship.

I do not want to be misunderstood. I am not suggesting perspectives based on sovereignty, or those based on the benefits or detriments brought by temporary migration to Australia, are necessarily wrong. What I am arguing is that these are not perspectives based on justice for temporary migrants; they are not grounded in considerations of equity for such persons. While these perspectives are not irrelevant in determining temporary migration policy, they imply that justice is irrelevant for temporary migrants.

One way to drive home this point is to compare Principle 3 of the 'People of Australia: Australia's Multicultural Policy' mentioned earlier – which is not a principle of justice – with Principle 2 which is clearly based on considerations of justice. The latter principle provides that:

The Australian Government is committed to a *just*, inclusive and socially cohesive society where everyone can participate in the opportunities that Australia offers . . .¹⁹

Another interpretation of multiculturalism also suggests that justice is irrelevant for temporary migrants. This is the interpretation that states that multiculturalism is essentially concerned with citizens. It follows that temporary migrants – by definition non-citizens – fall outside the scope of multiculturalism and its view of justice. A 'citizenship-centred multiculturalism',

¹⁸ See Andrew Markus, *Mapping Social Cohesion 2012: The Scanlon Foundation Surveys National Report* (ACJC, 2012).

¹⁹ Commonwealth Government, above n15, 5 (emphasis added).

as advocated by former Immigration Minister Chris Bowen,²⁰ easily lends itself to such an interpretation.

The view that justice is irrelevant to temporary migrants does not necessarily mean that their treatment is invariably unjust; the just treatment of temporary migrants might be seen as crucial for advancing the interests of Australia.

Take, for example, the statutory requirement that 457 visa workers are to have working conditions no less favourable than local workers in the same workplace. Two goals underpin this requirement. One is based on justice for temporary migrant workers - preventing the exploitation of 457 visa workers. The other is a goal based on justice for local workers but not necessarily for temporary migrant workers - preventing 457 visa workers undermining the working conditions of local workers. The latter goal alone could justify the 'no less favourable' requirement, resulting in a situation where 457 visa workers were treated justly but as an incidental consequence of protecting the interests of local workers.

However plausible the perspectives based on sovereignty, the interests of Australia and a citizenship-based multiculturalism, the view that temporary migrants are not entitled to *any* consideration of justice would make many of us uncomfortable. Many of us would object to temporary migrants being 'reduced to units of production in the mining industry or export dollars for the education sector'.²¹ At the very least, most – if not all – of us would consider temporary migrants as fellow human beings entitled to justice. But if so, what would such an entitlement entail? This leads to consideration of the other key views of justice for temporary migrants.

²⁰ Immigration Minister Chris Bowen, 'The Genius of Australian Multiculturalism' (Speech delivered at the Sydney Institute, 16 February 2012).

²¹ Peter Mares, 'Temporary Migration and its Implications for Australia' (Speech delivered at the Senate Occasional Lecture Series, Commonwealth Parliament, 23 September 2011) 30.

Justice based on priority for citizens

The second view does not discount obligations of justice to temporary migrants. But it insists that - whatever their claims of justice - they are trumped by the claims of justice of the citizens. According to this line of reasoning, the primary obligation of a nation-state is to its citizens; the interests and entitlements of non-citizens, including temporary migrants, have defer to this. This view can be referred to as the priority thesis.

The priority thesis is vividly reflected in the heated controversies over 'foreign workers stealing Aussie jobs'. There is, of course, much that is problematic about these controversies. For one, the rhetoric of 'cheap foreign labour' - which is often invoked - is problematic at best, dangerous at worst. It is problematic as it implies that the 'cheapness' of 457 workers is due to their 'foreignness'. The risk of such workers being poorly paid, however, depends on a range of factors including their migrant status, labour market conditions, employer practices and the adequacy of regulation - a facile equation of 'cheapness' with 'foreignness' fails to come to grips with such complexity. The prism of 'cheap foreign labour' is also dangerous because it portrays foreign workers as a threat to Australian workers, allowing various prejudices to be refracted, including some bordering on racism.

The slogan 'foreign workers stealing Aussie jobs' also posits a bilateral relationship where foreign workers are taking something (stealing) owned by Australian workers. This, of course, is far from the realities in capitalist labour markets. No worker owns a job like property; employers offer jobs with particular working conditions in a process underpinned by the profit motive (and governed by regulation).

That said, there is an important claim of justice underlying complaints over 'foreign workers stealing Aussie jobs'. Put simply, the claim is that Australians should have preference over temporary migrants in accessing employment. This is an expression of the priority thesis.

Many of us may have sympathy with this view. But how far should the priority thesis extend? What about giving effect to the priority thesis through differential treatment of local and temporary migrant workers in the workplace? It is this which has been urged by the Construction Forestry Mining and Engineering Union (CFMEU). In recent submissions, the union has advocated exemptions from anti-discrimination laws in the areas of recruitment and redundancies for employers that give preference to Australian workers (citizens and permanent residents) over temporary migrant workers.²²

Some may dismiss this as a predictable response from a redneck union with little regard for the interests of migrant workers. This would be profoundly simplistic and unfair. The CFMEU has a proud history of activism in protecting 457 visa workers from exploitation; indeed, it is amongst the most active groups on this issue. Even more admirably, such campaigning has been accompanied by concerted efforts to grapple with the significance of temporary migrant workers. These submissions are an example of this process of thoughtful engagement.²³

Importantly, the flaws in the CFMEU's position do not lie with the logic of its analysis. Its logic is clear and seemingly compelling. If the priority thesis is accepted in relation to preference for employment, why shouldn't it extend to the areas relevant to accessing employment, in particular, recruitment and termination of employment? Indeed, the CFMEU's submissions push the thesis beyond these areas by recommending exemptions from anti-discrimination laws in relation to training and promotion.

There are nevertheless serious difficulties with the CFMEU's position. If adopted, unintended consequences are likely to ensue in the form of arbitrary

²² CFMEU, Submission No 203 to the Attorney General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws*, 1 February 2012; CFMEU, Submission No 382 to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Exposure Draft of Human Rights and Anti-Discrimination Bill 2012*, 21 December 2012.

²³ See Construction and General Division, CFMEU, *Jobs for Aussie Workers, Protection for Migrant Labour* <<http://www.cfmeu.asn.au/campaigns/national/jobs-for-aussie-workers-protection-for-migrant-labour>>.

employer decisions and the exploitation of temporary migrant workers. The crucial point here is that the union's recommendations result in employers having the power to discriminate against temporary migrant workers in favour of local workers. This risks arbitrariness because the decisions of employers are not subject to the same stringent requirements of due process that apply to governmental decisions. It is one thing to design immigration admission criteria administered by government departments to give effect to the priority thesis, but another to give effect to this thesis through private sector actors like employers.

Adoption of the CFMEU's position will also exacerbate the risk of temporary migrant workers being exploited. Employment security, including protection in the event of redundancies, is not only crucial for protecting the employment of workers but also their other working conditions. The ability of an employer to arbitrarily terminate the employment of workers gives rise to the power to arbitrarily alter their other working conditions – a threat of termination of employment can easily be used to secure acceptance of inferior working conditions. These recommendations of the CFMEU do not live up to their proclaimed position of '(j)obs for Aussie workers, protection for migrant labour'²⁴ – they may secure jobs for Aussie workers but they lessen protection for migrant labour.

The problem of unintended consequences is not, however, the main difficulty with the CFMEU's position. Its central flaw is this: the priority thesis seems to be treated as the exclusive principle for determining policy on temporary migrant workers. If so, this appears to negate any considerations of justice for temporary migrant workers. Such a view of justice based on priority for citizens (and permanent residents) is clearly *not* an understanding of justice for temporary migrants.

²⁴ See Construction and General Division, CFMEU, *Jobs for Aussie Workers, Protection for Migrant Labour* <<http://www.cfmeu.asn.au/campaigns/national/jobs-for-aussie-workers-protection-for-migrant-labour>>.

Are we then left with an unenviable choice: to accept the priority thesis, and effectively deny justice to temporary migrants, or reject it completely? Fortunately, we are not faced with such a binary choice. As I will discuss in relation to justice based on fairness, we can subscribe to the priority thesis (within limits) and still insist upon justice for temporary migrants.

Justice based on choice

According to this view, the act of choosing to migrate on the part of temporary migrants renders the arrangements to which they are subject in the receiving country just. Such a view is consistent with a worldview emphasising 'global markets' - global labour markets with 457 visa workers as sellers of their labour power; global education markets with international students as purchasers of education services.

For some, a corollary of justice based on choice is that temporary migrants can 'take it or leave it'. Temporary migrants are free to choose to migrate to Australia. But if they do so, they should accept Australia as it is and, should this prove unsatisfactory, they can choose to leave Australia and go somewhere else.

Justice based on choice would place emphasis on temporary migrants making informed decisions about whether or not to migrate, an emphasis that probably means better provision of information by the Australian government to such migrants.²⁵ Such a view would also be emphatically opposed to forced migration like labour trafficking. Otherwise, it would be compatible with temporary migrants being subject to a wide and varied range of arrangements; temporary migrant workers could experience working conditions superior, inferior or identical to those enjoyed by local workers provided their working conditions result from employment contracts that were freely made.²⁶

This view of justice based on choice clearly has strong appeal in a society like ours that celebrates choice (perhaps overly so). We can also see the cogency of such a view when it comes to temporary migrants on Working Holiday

²⁵ See, for example, Access and Equity Panel, Department of Immigration and Citizenship, *Access & Equity for a Multicultural Australia: Inquiry into the Responsiveness of Australian Government Services to Australia's Culturally and Linguistically Diverse Population* (2012) recommendation 20.

²⁶ For a discussion of the implications of the choices made by temporary migrant workers upon their rights, see Valeria Ottonelli and Tiziana Torresi, 'Inclusivist Egalitarian Liberalism and Temporary Migration: A Dilemma' (2010) 20(2) *Journal of Political Philosophy* 202.

visas. Such persons come to Australia for the principal purpose of a holiday and choose Australia out of a broad menu of holiday destinations. In this sense, the position of migrants on Working Holiday visas is analogous to those on tourist visas.

However, the role of choice and its implications for justice needs to be carefully understood. First, the freedom of temporary migrants to come and to leave Australia is enjoyed to different degrees. Those on Working Holiday visas tend to be in Australia for a relatively brief period of time, periods that often do not allow for deep connections to be formed with this country. This is, however, not the case with international students and 457 visa workers. Their stay is temporary in the sense of being limited in time, but it is far from transient with these migrants being resident in Australia for several years. Attachment to this country inevitably grows during this stay, imposing social – and sometimes financial - costs when these migrants decide to leave the country.

Second, choosing to come to Australia is not the same as choosing to accept its status quo; it does not mean supine acceptance of whatever treatment is meted out. This point can be illustrated in relation to migrants – whether temporary or permanent – who choose to come to this country because of ‘Australian liberal democratic values’.²⁷ Such a choice is not equivalent to choosing *not* to change Australia and its diverse ways of life. On the contrary, liberal democratic values are principles that organise – and encourage – engagement, debate and disagreement in the political process. A full-blooded commitment to these values will often mean an obligation to robustly participate in Australian politics, including debating – and shaping - the direction of this country.

Third, choice as a principle of justice should be kept in perspective – especially when it comes to temporary migrant work (whether by long-term temporary migrants or those here for brief stints).

²⁷ Immigration Minister Chris Bowen, ‘Arthur Calwell Memorial Lecture’ (Speech delivered in Melbourne, 3 April 2012) <<http://www.minister.immi.gov.au/media/cb/2012/cb185365.htm>>.

Let me approach it this way. As is well known, a central reason for the Liberal Party's loss in the 2007 federal elections was community opposition to the Howard Government's *WorkChoices* industrial laws (the title of the legislation making abundantly clear its key justification). Particular concerns surrounded the 'take it or leave it' statutory individual contracts, or Australian Workplace Agreements. Here there were two main grounds for concern. First, the labour market was considered by many in Australian society as not providing a level playing field between workers and employers. Many would subscribe to the view of Justice Higgins expressed more than a century ago in the *Harvester* decision of the 'usual, but unequal, contest, the "higgling of the market" for labour, with the pressure for bread on one side, and the pressure for profit on the other'.²⁸ In this context, choice in the nominal sense of 'take it or leave it' is not seen as a genuine choice.

The second ground of opposition is arguably more important for our present purposes. It argues that choice is not decisive in terms of justice at the workplace. Even if genuinely chosen, employment contracts can be unjust. In other words, such contracts can still be unfair. This core concern with fairness explains why the industrial laws introduced by the ALP government to replace the *WorkChoices* legislation is entitled the *Fair Work Act*.

The debate over *WorkChoices* demonstrates that, for many in Australian society, justice at work is not simply a question of choice but also of fairness. This view which extends to all workers, including temporary migrant workers, nicely leads to consideration of the final view of justice for temporary migrant workers – justice based on fairness.

²⁸ *Ex parte H V McKay* (1907) CAR 1, 3.

*Justice based on fairness*²⁹

Justice based on fairness clearly informs Australian multiculturalism. As the former Immigration Minister Chris Bowen has noted, multiculturalism in this country is connected to principles of 'equality and a fair go for all'.³⁰ These principles are powerfully evident in Principle 4 of the 'People of Australia: Australia's Multicultural Policy', which states that:

The Australian Government will promote understanding and acceptance *while responding to expressions of intolerance and discrimination with strength, and where necessary, with the force of law.*³¹

This principle illustrates how the understanding of fairness in Australian multiculturalism is concerned with prohibiting discrimination based on race, culture, religion and ethnicity. Australian multiculturalism is, however, not just directed at the ensuring absence of discrimination or treating all Australians – whether a migrant or not - in the same way.

A profound insight of Australian multiculturalism is that a 'fair go' does not always mean identical treatment, because of the clear differences in the circumstances of those who are Australian-born and those who have migrated (e.g. familiarity with Australian culture and practices; English fluency). Given these differences, fairness for Australian migrants will sometimes require efforts on the part of the government and other sectors of society that are directed to the needs of these migrants, for example in ensuring that the

²⁹ For some, this title will remind them of John Rawls' famous theory of justice as fairness (see John Rawls, *A Theory of Justice* (Belknap Press, 1971); John Rawls, *Political Liberalism* (Columbia University Press, 1993); John Rawls and Erin Kelly (ed), *Justice as Fairness: A Restatement* (Harvard University Press, 2001)). The following analysis is, however, *not* based on Rawls' theory but rather understandings of fairness in Australian multiculturalism. For divergent views of the implications of Rawls' theory for migration admission policies, see Joseph Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49(2) *The Review of Politics* 251; Donald Galloway, 'Liberalism, Globalism, and Immigration' (1993) 18 *Queen's Law Journal* 266.

³⁰ Commonwealth Government, above n15, *Message* (emphasis added). See also Commonwealth Government, above n16, 6.

³¹ Commonwealth Government, above n15, 5 (emphasis added).

provision of government services is responsive to these needs.³² Such differential treatment does not mean that the principles of fairness are different for Australian migrants. They remain the same; varied circumstances, however, call for varied application.

Acknowledging the role of justice as fairness in Australian multiculturalism is one thing; it is another to treat this principle as extending to temporary migrants. A 'citizenship-centred' multiculturalism would stand against such an extension, seeing multiculturalism as only applying to citizens.

Yet, this is not the only available interpretation; it does not even seem to be the dominant interpretation. The scope of multiculturalism – as commonly understood – would seem to extend not only to citizens but also to permanent residents. Underlying conventional understandings of multiculturalism is not a nation restricted to citizens but rather an enlarged nation of citizens and (certain) denizens, a vision where permanent residents are considered part of the 'People of Australia'.

If we accept this broader – more typical - interpretation of multiculturalism, we are necessarily dispensing with Australian citizenship as limiting the scope of multiculturalism; its scope is being delineated by attachment to Australia. But if so, shouldn't multiculturalism extend to temporary migrants who have been in this country for a substantial period of time, many who subsequently become permanent residents and citizens? Shouldn't they also be considered part of the 'People of Australia'?

Two other perspectives on multiculturalism would lend support to the thrust of this argument. Multiculturalism as immigration policy would suggest that such policy should include not only permanent migrants but also temporary migrants. Multiculturalism as a liberal democratic creed would disavow distinctions made on migrant status and would embrace all persons (including

³² See Commonwealth Government, above n15, 8 (emphasis added).

temporary migrants).³³ As emphasised by former Immigration Minister Chris Bowen:

Multiculturalism is about inviting *every* individual member of society to be everything they can be, and supporting each new arrival in overcoming whatever obstacles they face as they adjust to a new country and society and allowing them to flourish as individuals. It is a matter of liberalism.³⁴

There is then a strong case for extending the understanding of fairness in Australian multiculturalism to temporary migrants.

What would such a view mean for temporary migrants?

It does not mean that choice is irrelevant in determining questions of justice for temporary migrants. Justice based on fairness is not opposed to justice based on choice. On the contrary, the former includes the latter. Choice is necessary for fairness. But it is not sufficient. Situations can still be unfair even if freely chosen by temporary migrants.

What about the relationship between justice based on fairness and justice based on priority for citizens? Let me make further remarks illustrating their relationship by touching upon two areas - the political process and the workplace.

Justice based on fairness includes a view of political justice. This view implies that temporary migrants are entitled to equal enjoyment of political freedoms, in recognition of their status as human beings. Key political freedoms, in particular those of political expression and association, are human rights – individuals possess these rights by virtue of their status as human beings, not because they are citizens of a country. This is made abundantly clear by the

³³ Stephen Castles, 'Multicultural Citizenship' (Research Paper No 16, Parliamentary Library, Parliament of Australia, 1995-1996).

³⁴ Immigration Minister Chris Bowen, above n20 (emphasis added).

key international conventions on human rights.³⁵ Equal enjoyment of political freedoms is also based on the principle that those regularly subject to the laws of a country should be able to participate in the political process.³⁶ The priority thesis has little (moral) relevance when it comes to the enjoyment of political freedoms.

The political freedoms of temporary migrants are not simply granted in the abstract; they are directed at enabling temporary migrants to engage in the political processes of this country, in particular, to hold Australian governments and legislatures accountable for the laws that impact upon them. This will invariably mean criticisms of Australian laws and policies on temporary migration *by temporary migrants*. Such criticisms should not be viewed as illegitimate, or worse as shameful ingratitude on the part of temporary migrants. On the contrary, they should be welcomed as part of the commitment to justice for temporary migrants.

What this discussion also suggests is that Australian governments and legislatures should be accountable to temporary migrants; their obligation to be accountable encompasses both citizens and denizens.

Of course, Australian governments and legislatures are not accountable to temporary migrants in the same way as they are to citizens and permanent residents. The priority thesis has cogency in relation to the right to vote³⁷ which should extend only to citizens and arguably to permanent residents.³⁸ But – and this is a crucial point – denying temporary migrants a right to vote is

³⁵ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) arts 19, 20; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 19, 22 (“UNDHR”).

³⁶ See Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1983) ch 2; Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford University Press, 2nd ed, 2002) 359.

³⁷ See UNDHR art 21(1).

³⁸ Peter Mares and Brian Costar, ‘The Voting Rights of Non-Resident Citizens and Non-Citizen Residents’ in Joo-Cheong Tham, Brian Costar and Graeme Orr (eds), *Electoral Democracy: Australian Prospects* (Melbourne University Press, 2011) ch 1.

not the same as denying their entitlement to public accountability. They are not electoral constituents but they are still moral constituents.³⁹

Justice based on fairness for temporary migrants also embodies a view of justice at work. A key premise of this view is that, once temporary migrants are participating in the labour market, they should be treated like any other worker with equal enjoyment of workplace rights. This premise reflects the status of temporary migrants, firstly, as *human beings*. As human beings, temporary migrant workers should enjoy the bundle of rights recognised as human rights.⁴⁰

The principle of equal enjoyment of workplace rights also reflects the status of temporary migrant workers as *workers*. As workers, they enjoy the status of industrial citizens⁴¹ and therefore, should be able to access the rights attached to such a status. According to this line of reasoning, they should at the very least enjoy the *minimum rights and entitlements* that are available to local workers.⁴²

These are not radical notions. Indeed, they are implicit in the *Fair Work Act* which covers employees, regardless of their migrant status. They are explicit in concerns regarding the exploitation of temporary migrant workers – especially when they result from the distinct vulnerabilities that arise from the migrant worker's temporary status.⁴³ They are also reflected in the best

³⁹ See Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Belknap Press, 1996) 145-151.

⁴⁰ ILO Multilateral Framework on Labour Migration Principle 8 states '[t]he human rights of all migrant workers, regardless of their status, should be promoted and protected'. For the enumeration of such rights, see *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) pt III.

⁴¹ See generally Ron McCallum, 'Industrial Citizenship' in Joe Isaac and Russell D Lansbury (eds), *Labour Market Deregulation: Rewriting the Rules: Essays in honour of Keith Hancock* (Federation Press, 2005); Ron McCallum, 'Justice at Work: Industrial Citizenship and the Corporatisation of Australian Labour Law' (2006) 48(2) *Journal of Industrial Relations* 131.

⁴² According to the ILO, a 'fundamental notion' of existing international law as applies to migrant workers and their families is that '[u]niversal human rights and core labour rights apply to all migrants, regardless of their status': International Labour Office, above n14,216.

⁴³ See Barbara Deegan, *Visa Subclass 457 Integrity Review: Final Report* (2008). For an argument for equal rights at work in order to prevent exploitation of guest workers, see Daniel Attas, 'The Case of Guest Workers: Exploitation, Citizenship and Economic Rights' (2000) 6(1) *Res Publica* 73. See also Joseph Carens, 'Live-in Domestic, Seasonal Workers, and

traditions of the trade union movement – solidarity calls for unity amongst all workers, not just those holding Australian passports.

These notions do not, however, have same force *before* temporary migrants are admitted to the Australian labour market. At this point, the question of workplace rights is of little relevance given that these migrants are not yet in the workplace. Here the priority thesis has force in terms of preference for employment and it can justify stringent labour market testing (as I have supported in relation to Labour Agreements under the 457 visa scheme).⁴⁴

So much more can be said about justice based on fairness for temporary migrants: What implications does it have for their access to social security and social services? What implications does it have for their access to public health insurance? What does it imply in terms of their entitlement to permanent residence? These are questions best left for another day (another paper).

Others Hard to Locate on the Map of Democracy' (2008) 16(4) *Journal of Political Philosophy* 419, 432.

⁴⁴ Joo-Cheong Tham, Submission No 1 to the Senate Standing Committees on Education, Employment and Workplace Relations, Parliament of Australia, *Inquiry into the Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012 [Provisions]*, 11 September 2012.

Concluding thoughts

It should be clear by now which view of justice I prefer – justice based on fairness. There are several reasons for my view: justice based on fairness is a view of justice; it integrates and accommodates the important considerations of choice and priority for citizens (and permanent residents); and it is consistent with key interpretations of Australian multiculturalism.

Not only do a variety of reasons exist but they are also, in my view, compelling.

After all, wouldn't it be terribly 'un-Australian' to deny fairness to temporary migrants?