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Pathways to Illegality, or What Became of the International Students

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Introduction

This chapter maps the growth, collapse, and reformation of what is termed the ‘international education economy’ — representing an array of interests spanning states and institutions (most Australian universities, Technical and Further Education (TAFE) and Vocational Education and Training (VET) providers, education and migration advice industries) — and worth at its height around \$18.6 billion to the Australian economy.¹ More specifically, it seeks to document what has become of the particular representative group of international students who came into focus through mass self-organised protests in 2009 and 2010 — predominantly Indian and Chinese students working

1 Those who followed economic reporting on international education over the past five years cannot have failed to notice the significant variance in estimates regarding the precise value of this key ‘export industry’ to the Australian economy. This figure derives from reporting of Australian Education International (AEI), a branch of the Department of Education, Science and Training. See Australian Education International, ‘Research Snapshot: Export Income to Australia from Education Services 2010–2011’ (November 2011).

in Australia's service economy (cabs, convenience stores, contract cleaning, labour hire, sex work, etc.) and enrolled in vocational courses offered by private education providers.

Mapping the significant shifts in the Australian economy and migration policy that brought this cohort into existence, this chapter attempts to follow what has become of these several thousand temporary migrants, as migration laws and regulations were changed from 2009 onwards specifically to thwart their aspirations for permanent migration and a future in Australia, under the guise of re-establishing the 'integrity' of Australian international education.² While this chapter offers an overview of the different pathways traversed by former students, Chapter 2 provides a more detailed account of what occurred when students attempted to obtain permanency through the General Skilled Migration Program.

While it is impossible to offer a conclusive account of the different directions taken by former international students targeted by these changes, one thing is clear: the changes were neither designed for expelling former international students from Australia and back to their home countries, nor did they have this effect. Rather, the raft of changes have had the dual effect of refounding the international education economy on a more sustainable footing, favouring the market share of Australian universities, whilst simultaneously creating a sizable new class of permanently provisional or overtly illegal migrants.

International education economy: A background

International students have formed a numerically and politically significant component of Australia's migration program — and, in turn, the Australian populace — since 2001, when the Coalition Government under then Prime Minister John Howard made extensive changes to the *Migration Regulations 1994* ('the *Regulations*') to permit international students to apply for a range of permanent visas on

2 For an account and chronology of those changes up until 2009, see Bob Birrell and Bronwen Perry, 'Immigration Policy Change and the International Student Industry' (2009) 17 *People and Place* 64.

a concessional basis.³ Alongside the reshaping of the humanitarian program and his introduction of the Business (Long Stay) subclass 457 visa, the changes to the *Regulations* concerning overseas students are now considered to be amongst Howard's crowning immigration reforms.⁴

While under Howard international education was initially posited as a means of softening higher education funding cuts,⁵ increasingly the industry's profitability was derived from the VET sector. In May 2005, the occupations of cookery and hairdressing were added to the Migration Occupations in Demand List (MODL) in a move demographer Bob Birrell drily describes as 'a decisive moment in recent immigration history'.⁶

From 2005 to 2008, while overseas student commencements in universities remained largely stable, numbers in the VET sector (subclass 572) increased by 183 per cent.⁷ India and China were the two leading nationalities represented in these increased visa grants.⁸ In 1996, when the Howard Coalition Government took office, there were less than 100,000 overseas students enrolled in Australian schools

3 Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (The Federation Press, 2011) 298–328. The 'concessional' nature of the skilled visa subclasses for international students derived from the earlier introduction in 1999 of the 'Migration Occupations in Demand List' (MODL) reflecting occupations in skills shortage, and the attribution of additional qualifying 'points' to students having completed qualifications in areas linked to the MODL. In addition, students having completed relevant qualifications in their skilled occupation in Australia were exempted from the requirement, imposed on overseas applicants, of having completed relevant work experience in their field. See Bob Birrell and Ernest Healy, 'The February 2010 Reforms and the International Student Industry' (2010) 18 (1) *People and Place* 65.

4 Peter Mares, 'The Permanent Shift to Temporary Migration' in Perera et al. (eds), *Enter at Own Risk: Australia's Population Questions for the 21st Century* (Black Swan Press, 2010) 65, 65–91.

5 Jon Stratton, 'Preserving White Hegemony: Skilled Migration, "Asians" and Middle Class Assimilation' in Perera et al. (eds), *Enter at Own Risk: Australia's Population Questions for the 21st Century* (Black Swan Press, 2010) 38, 38.

6 Bob Birrell and Ernest Healy, above fn 3, 68.

7 Bob Birrell and Bronwen Perry, above fn 2, 66.

8 Department of Immigration and Citizenship, 'Student Visa Program Trends: 2003–04 to 2009–10' (2011). Available at: www.border.gov.au/ReportsandPublications/Documents/statistics/student-visa-program-trends-2009-10.pdf; Bob Birrell and Ernest Healy, above fn 3. According to AEI figures cited by Birrell and Perry, growth in the VET sector over 2005–08 was largely attributable to Indian visa applicants, who accounted for 44 per cent of new student commencements over the period. See Bob Birrell and Bronwen Perry, above fn 2, 66.

and universities; by 2009 there were 600,000.⁹ By 2011, at its peak, the international education economy cumulatively attracted \$18.6 billion in export income to Australia. This made international education the third most profitable export earner, after coal and iron ore. Though described as ‘*export income*’, the benefits of the international education economy flowed mostly to local business and communities:

In fact, the majority (52 per cent) of the \$15.7 billion revenue from international education in 2011 flowed to the host communities — the local shops and retail sector, accommodation providers, travel services and other community enterprises.¹⁰

In describing the growth of the international education industry from 2005 onwards, Monash University academic and famed economic nationalist¹¹ Bob Birrell narrates a process largely passive on the Australian side, driven entirely by the push of opportunistic agents and entrants from India fixing on the closer linkages between VET study and permanent migration outcomes. According to Birrell:

This confluence of events gave VET providers a new and potent marketing tool in order to attract students. They found a huge pool of potential clients in Asia, particularly in the Indian Punjab, who were interested in taking up the opportunity.

Birrell’s historical analysis is not only entirely mechanistic, but is obfuscatory in its categorical failure to address the multiple, active, and aggressive processes through which VET sector enrolments were courted and facilitated not only by providers but extensive Australian networks encompassing the (then) Department of Immigration and Citizenship (DIAC)¹² as well as Australian universities from 2005 onwards.

9 Australian Human Rights Commission, ‘Principles to Promote and Protect the Human Rights of International Students’ (October 2012).

10 International Education Advisory Council, ‘Australia: Educating Globally’ (February 2013). Available at: internationaleducation.gov.au/International-network/Australia/InternationalStrategy/theCouncilsReport/Documents/Australia%20-%20Educating.%20Globally%20FINAL%20REPORT.pdf.

11 *The Australian*, ‘The Top 50: Education: Bob Birrell’, 31 January 2012. Available at: www.theaustralian.com.au/top50/2012/bob-birrell/story-fnbttwrn-1226258657279.

12 Note that, on 18 September 2013, the former Department of Immigration and Citizenship was superseded by the Department of Immigration and Border Protection.

A major player in facilitating recruitment over this period was the multimillion-dollar Australian venture, IDP Education Pvt Ltd, and its international outcrops, specifically in India. IDP Education's company profile indicates that it is co-owned by 38 Australian universities, as well as Seek Ltd, a major online recruitment and training company.¹³ The company's Indian-based branch, IDP India, has for years coordinated road-show-like education fairs in major Indian capitals, showcasing representatives from Australian universities, TAFEs, VET providers, and schools, regarding prospects for work and study in Australia. IDP India has been and continues to be entirely unabashed in linking study pathways in Australia with more long-term migration outcomes, as exhibited in its online promotional material for the Australian Education Fair 2013, which announces 'visa rules relaxed' and highlights new post-study work visas available to students as of right after completion of a bachelor or higher degree course.¹⁴ In another example, the Australian High Commission in New Delhi in 2009 advertised that it 'worked closely' with a body by the name of Association of Australian Education Representatives in India (AAERI), whose purpose was to 'assure the integrity and credibility of agents who are recruiting students on behalf of Australian education and training institutions'.¹⁵ AAERI's material presents it as a quasi-official body of education agents and advisors based in India, operating with the imprimatur of the Australian Government and DIAC, under a purported 'code of ethics' that tellingly remains entirely silent on the provision of immigration advice and assistance by agents.¹⁶ In Australia, too, a highly profitable and entirely unregulated quasi-professional industry of 'education agents' sprung up, with loose and unarticulated links to colleges and universities, allowing them to offer students assistance with course admission and visa applications without cost, given their fees could be recuperated through agency agreements with education providers.¹⁷

13 IDP Education Pvt Ltd, *LinkedIn Company Profile*. Available at: www.linkedin.com/company/idp-education-pty-ltd.

14 IDP India, *Australian Education Fair 2013*. Available at: www.collegeadmission.in/Other%20Information/EducationalEvents/2013/IDP_Australian_Education_Fair_2013.shtml.

15 Association of Australian Education Representatives in India, *About AAERI*. Available at: www.aeri.in/home.html.

16 Association of Australian Education Representatives in India, *Code of Ethical Practices in Agents/Representatives Offices*. Available at: www.aeri.in/code_of_ethics.html.

17 International Student Legal Advice Clinic, 'Submission to the Senate Education, Employment and Workplace Relations Committee Inquiry into the Welfare of International Students' 8–13.

Through these means, many tens of thousands of students were corralled into courses, not only in the private VET sector, but the vocational education offshoots of major Australian universities, including the memorably named Ozford College (affiliated with Central Queensland University), and Melbourne Institute of Business and Technology (affiliated with Deakin University).¹⁸ The precise relationships between Australian universities and VET providers varied, taking diverse forms ranging from board membership to partial ownership, and investment. Even beyond the obvious cut derived by Australia's 38 major universities from investment in IDP Education as described above, it is clear that the university sector stood in direct relation to the developing international VET sector, despite later revisionist attempts by Birrell and others to elide this relation, particularly when the VET sector came to crisis from 2008 onwards.

From 2005 onwards, with the question of enrolment significantly eased through the various relationships and processes described above, potential entrants had only to worry about the remaining visa criteria — principally, access to funds sufficient for living expenses, course fees, and travel during the visa holder's intended stay in Australia.¹⁹ Aspiring students were able to meet these requirements variously through mortgaging ancestral property (in the case of Punjab, often representing the last of familial landholdings following the immiseration caused by the Green Revolution);²⁰ high-interest loans procured from agents and to be repaid by the student on arrival in Australia; or contractual arrangements with secondary visa holders (the primary applicant's 'husband' or 'wife') to demonstrate the required funds in exchange for being included in the visa application.

Driving take-up on the Indian side, specifically in Punjab, was mass poverty, particularly amongst smaller farmers shut out of the gains of the Green Revolution, and massive population growth, coupled

18 The Minister for Immigration published a highly useful legislative instrument (IMMI 13/027, 23 March 2013) that reveals the relationships between Australian universities and their vocational education 'partner'. The list of partner institutions includes some of Australia's leading private international colleges, including Ozford, Navitas, MIT, and Melbourne Institute of Business and Technology.

19 These requirements were imposed through the operation of Schedule 5A of the *Migration Regulations 1994* (Cth).

20 Chhabilendra Roul, *Bitter to Better Harvest: Post-Green Revolution Agricultural and Marketing Strategy for India* (Northern Book Centre, 2001) 33–50.

with an eviscerated education sector in India.²¹ Suffice it to say that VET sector students who were recruited and travelled to Australia from 2005 onwards tended to represent the poorest sectors of the populations of rural India and China, and who arrived in the context of overwhelming debt and obligation to make good on the investment of their families and communities.

Some 210,888 VET sector student visas were granted to overseas applicants between 2005 and 2012. A combination of punitive visa conditions (the requirement to service ever-increasing tuition fees while being limited to working only 20 hours per week), together with the racialisation of new entrants, ensured that students rapidly came to occupy a new underclass in the labour market — disproportionately represented in cabs, service stations, convenience stores, and as labour hire for roof insulation and construction work. At the same time, the profit-seeking growth in the VET sector meant that course content and learning was nominal only: students attended cookery classes in converted CBD office buildings only to find ovens fitted without gas connections.²² Documenting the seemingly unending growth in the international education economy in 2011, Ben Rosenzweig and Liz Thompson wrote:

The dynamics of these economies were persistently rendered opaque by two officially-sponsored fantasies: that these economies were essentially about 'education', with the desire for migration secondary or incidental; and secondarily that all of these genuine students did not to have to work for money.²³

21 David Feith, 'India's Higher Education Sector in the Twenty-First Century: A Growing Market and the Need for Greater International Engagement', paper presented at the 17th Biennial Conference of the Asian Studies Association of Australia, Melbourne (July 2008).

22 Examples of these practices abound. In a feature on SBS's *Insight* program that aired on 21 July 2009, most students studying at VET providers related similar examples. Harry Singh of Sydney, for instance, states: 'I didn't know anyone here and I didn't know about colleges. I was thinking colleges would be big like India colleges. But it's small, like a cabinet colleges. It's very small, like it's a house or it's offices, yeah. It's not like the colleges as compared to India ... Yeah, in the prospectus, in the booklet, it showed Harbour Bridge, Opera House, instead of a college building, yeah and some of the college prospectus shows, like, the gate of the fort and, like a Sydney college gate and all that. They show like this.' SBS *Insight*, *Transcript: At Risk* (21 July 2009). Available at: www.sbs.com.au/insight/episode/transcript/87/At-Risk.

23 Liz Thompson and Ben Rosenzweig, 'Public Policy Is Class War Pursued by Other Means: Struggle and Restructuring as International Education Economy' (2011) 3 *Interface* 39, 49.

It is entirely disingenuous to ask how many students arrived in Australia over this period for the ‘right reasons’, or as ‘genuine students’, as opposed to simply seeking a pathway to more permanent settlement in Australia. It is disingenuous chiefly because the overt linking of student visas with permanent migration outcomes from 2001 onwards was precisely what contributed to increased enrolment and ensured the growth of the international education sector. There was a clear intention by the government (if not an overt promise) that students could pursue permanent migration on completion of their studies in Australia. An entire private education industry — not to mention a greatly expanded Australian university and TAFE sector — grew up in the shadow of this explicit promise.

It was this historical and political grouping of temporary entrants, forged in a very particular moment in the growth of Australia’s international education economy, who could be seen on the streets of Melbourne holding signs that read, ‘We don’t just drive your cabs, we drive your economy’.

‘The expulsion’

Throughout 2007 and 2008, Melbourne’s CBD was brought to a standstill on several occasions by wildcat protests organised by the city’s cab drivers. Mostly international students and (representative of the VET sector’s makeup at the time) largely from the Indian subcontinent, the drivers protested the conditions of their labour and, most specifically, the unique and cruel forms of exploitation deriving from their tenuous legal status as international students. Disruptive as these protests were, they managed to gain little press and political traction. However, when largely the same people took to Flinders Street station in May 2009, organising under the banner of ‘international students’ and protesting the conditions of the international education economy as a whole, a furious public relations spectacle ensued between the governments of Australia and India to recover the tarnished image of the multi-billion dollar industry.²⁴

24 Benjamin Rosenzweig, ‘International Student Struggles, or, Causes of the Mediated Process of Reproduction’ (2010). Available at: hutnyk.wordpress.com/2010/08/18/ben-rosenzweig-theory-of-the-offensive-blog/; Liz Thompson and Ben Rosenzweig, above fn 23.

Analyses from that period tend to attribute a certain critical force to the 2009 protests in terms of the reforms to the international education sector that followed in the years after. In my view, this reading is both unduly optimistic and insufficiently attentive to the shifts underway as the protests took place. In 2006, former immigration minister Amanda Vanstone commissioned a far-reaching evaluation into the efficacy of the MODL and skilled migration outcomes, which was largely damning of the linking of VET sector education to permanent visa pathways.²⁵ Bob Birrell sat on the panel of that evaluation. When the Rudd Labor Government took power in late 2007, thousands of permanent visa applications were pending from former students seeking to parlay their study into a permanent visa outcome (as promised). By December 2008, then immigration minister Chris Evans issued students with a foreboding warning, indicating that skilled visa applications by VET students whose courses were not on a select critical skills list would not be afforded processing priority and would languish in the processing pipeline for years. A strategic decision was made to leave cooking and hairdressing (the field in which several tens of thousands of students had obtained their qualifications) off the critical skills list.²⁶ The movement towards culling the international education sector was well underway by the time international students began to organise in 2009. What the protests did provide, however, was the convenient imagery and trope of 'crisis' in the international education sector, which lent a sense of inexorability to the drastic measures that followed.

As a result of the protests, public discussion fixed on the spectre of the 'dodgy college' as the source of the resulting clamour in the international education economy. The 'dodgy college' and 'residency factory' did the work of casting the 'crisis' in international education as an aberration, an unintended consequence, a result of external corruption as opposed to the logical and necessary conclusion of the industry's profit-seeking imperatives. At the same time, and more importantly, projecting the problems of the international education economy onto the 'dodgy colleges' gave license to the later

25 Bob Birrell, Lesleyanne Hawthorne and Sue Richardson, 'Evaluation of General Skilled Migration Categories Report' (Department of Immigration and Multicultural Affairs, March 2006).

26 Bob Birrell and Bronwen Perry, above fn 2.

consequences that were visited onto the attendees of those colleges — VET sector visa holders — who, by presumption, came to represent an amorphous mass of ‘dodgy’ international students.

The year 2010 saw the unending proliferation of changes and measures taken to reinforce the ‘integrity’ of the international education economy — that is, to re-establish it on an equally profitable footing less beholden to the vagaries of student protest and international censure. A spate of audits were conducted into international colleges operating throughout Melbourne, which lasted until the auditing body itself fell under scrutiny for its internal processes.²⁷ Enhanced ‘integrity checking’ led to high rates of student visa cancellations, and a massive rise in the refusal of further student visa applications by Indian and Chinese nationals in particular.²⁸

In 2011, the introduction of the ‘genuine student’ and ‘genuine temporary entrant’ criteria for student visas operated as a *carte blanche* permitting the Department of Immigration to refuse further student visa applications based on an assessment of the applicant’s study history — i.e. whether they were previously enrolled in the international VET sector.²⁹ At the same time, ‘streamlined processing’ arrangements were introduced for students enrolled at universities, meaning student visas could be granted without English language or financial evidence if a student could show confirmation of enrolment in a bachelor or higher course when applying for the visa.³⁰

The cornerstone of the international education economy’s reformation was the overnight change to the MODL on 8 February 2010, which was replaced with a new Skilled Occupations List (SOL) divided into three schedules. The effect of the 8 February 2010 changes was to limit eligibility for general skilled migration to a select number

27 Victorian Registration and Qualifications Authority, ‘Outcomes of AUQA Higher Education Audit of VRQA’, 10 *VRQA Newsletter*. Available at: www.vrqa.vic.gov.au/enews/pages/Edition-10/article1.aspx.

28 Jaswinder Sidhu, ‘Discretionary Powers Target Indian Students, 49% Offshore Visa Applications Rejected’, *South Asia Times*, 17 December 2012. Available at: www.southasiatimes.com.au/news/?p=3235.

29 Bernard Lane, ‘Call to Rethink Student Visa Test’ *The Australian*, 1 March 2013. Available at: www.theaustralian.com.au/higher-education/call-to-rethink-student-visa-test/story-e6frgcjx-1226587879775.

30 Parliament of Australia, ‘Overseas students: Immigration policy changes 1997–2015’ (2016). Available at: www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1516/OverseasStudents.

of predominantly professional occupations on the pared-back SOL. The implications of these changes to the MODL are too extensive to list here, but for our purposes it is enough to say that for the 121,378 VET sector student visa holders in Australia at that time³¹ — a cohort who had paid thousands for an education never obtained and who had worked the most violent and precarious jobs imaginable in the Australian economy — any hope of a permanent migration outcome was all but destroyed.

Liz Thompson and Ben Rosenzweig described that moment as ‘the expulsion’, in the following terms:

The ALP federal government responded to the movements of guest consumers and to fractures in the smooth development of international education economies by sweeping a large part of these economies away and many of those on international student visas out of the country — all in one movement collapsing together economic restructuring, border control and repression. The state sought to disperse struggles and solve problems without having to acknowledge or confront anti-Indian xenophobia in particular or broader hostility to non-white non-citizens, largely by acting to dispense with a section of the (particularly private) international education industry, and with a section of the (particularly less wealthy and/or more likely to be troublesome) students ... The restructuring of these economies was thus configured as a reassertion of labour market management as well as a defence of the ‘integrity’ of the immigration and border control apparatuses of the Australian state — a performance of sovereignty proudly evoking that readiness for violence the possibility of which seeks to ritually re-found state and nation.³²

However, my contention is that talk of ‘expulsion’ of former international students has been both premature and misconceived. After all, the logic of the border is not exclusively to halt movement but rather to sort, redirect and modulate its forms in ways ultimately productive of new segments in the labour market — to funnel movement into value and, inasmuch, redraw the lines of the nation across social relations.³³

31 These statistics are taken from the closest recorded month to the changes: December 2009.

32 Liz Thompson and Ben Rosenzweig, above fn 23, 68.

33 Angela Mitropoulos, *From Precariousness to Risk Management and Beyond* (European Institute for Progressive Cultural Policies, 2011). Available at: eipcp.net/transversal/0811/mitropoulos/en.

Dispersal

Nicholas De Genova speaks of the spectre of migrant ‘illegality’ and the public spectacle of exclusion and expulsion as laying the symbolic groundwork for the subordinated inclusion of migrant workers into the national populace, in a manner that is particularly useful and apt to understanding the situation of VET sector students from 2010 onwards.³⁴ The constantly reiterated and enacted discourses of exclusion and expulsion, according to De Genova, lend migrant ‘illegality’ a semblance of fact, attributing it to some primordial or pre-existing quality of the migrants themselves, as opposed to the changing relations of the migrant to the state.

However, the result of performances of ‘illegality’ and exclusion is not necessarily to exclude or expel, but to set the scene for a particularly mediated form of inclusion:

And yet, the more that the Border Spectacle generates anti-immigrant controversy, the more that the veritable inclusion of those targeted for exclusion proceeds apace. The ‘inclusion’ of those deportable migrants, of course, is finally devoted to the subordination of their labour, which can be best accomplished only to the extent that their incorporation is permanently beleaguered with the kinds of exclusionary and commonly racist campaigns that ensure that this inclusion is itself, precisely, a form of subjugation. What is at stake, then, is a larger sociopolitical (and legal) process of inclusion through exclusion, labour importation (whether overt or covert) premised upon protracted deportability.³⁵

On one reading, the 2010 changes to the international education sector enacted a moment of exclusion that shifted the burden of ‘illegality’ of VET sector students from the state and onto themselves. And yet, the subordinated inclusion of former VET sector students proceeds apace. The 122,149 former VET sector students, and probably thousands more affected by the migration reforms of 2010 onwards, have dispersed so far as we can recognise in a number of disparate directions, depending on their cache of skills and social capital. Beyond the various pathways discussed below, Chapter 2 focuses on the permanent state of limbo

34 Nicholas De Genova, ‘Spectacles of Migrant “Illegality”: The Scene of Exclusion, the Obscene of Inclusion’ (2013) 36(7) *Ethnic and Racial Studies* 1180.

35 *Ibid.*, 1185–6.

experienced by students who applied for permanent residency through the General Skilled Migration Program, only to find their applications afforded the lowest level of priority according to the Department of Immigration's newly introduced directives.

Transitional arrangements

The changes to the general skilled migration rules on 8 February 2010 offered students an out in the form of transitional arrangements allowing persons who held a student visa on 8 February 2010 to apply for an 18-month Skilled (Graduate)(Temporary) Visa, based on the more extensive SOL that included several trade occupations.³⁶ The subclass 485 visa was introduced by the Coalition Government in 2007 as a 'concession' to the international education industry in exchange for tightening the English language requirements for skilled migration.³⁷

While it only offers students a further 18 months in Australia, nonetheless, the path to a subclass 485 visa has proven precarious.

In April 2011, the *Regulations* were amended to introduce a new 'Public Interest Criterion' (PIC) 4020, designed to disqualify applications containing fraudulent or misleading information, or bogus documents.³⁸ PIC 4020 has been applied in a notably harsh manner to further visa applications by former VET students, including subclass 485 applications. In a 2012 Migration Review Tribunal decision, the review applicant, a former subclass 572 visa holder and cookery student, had his subclass 485 application refused at the primary stage by application of PIC 4020, for having presented a bogus document.³⁹ The bogus document was alleged to be a work experience letter from his former employer, Tandoori Lounge. The allegation that the reference was bogus arose from a DIAC site visit in which another employee failed to recognise a photograph of the review applicant, which had been taken from an old passport used by the applicant to enter Australia.

36 Department of Immigration and Citizenship, *Visa Options: Transitional Arrangements*. Available at: www.immi.gov.au/skilled/generalskilled-migration/transitional/ (site discontinued).

37 Bob Birrell and Ernest Healy, above fn 3.

38 See Department of Immigration and Citizenship, *Public Interest Criterion 4020*. Available at: www.immi.gov.au/legislation/amendments/2011/110402/lc02042011-01.htm (site discontinued).

39 See MRTA 2732 (18 September 2012), specifically [21] to [24].

Many thousands of VET sector students have either taken the road to nowhere option offered by the subclass 485 visa after February 2010, or are grappling with obstacles on the way there.

Further student visas

Part of the refounding of the international education economy from 2010 onwards involved offering ‘streamlined processing’ of student visas for those enrolled in bachelor or higher courses.⁴⁰ While allowing universities their share of export income, these arrangements also allowed for the continuation of business as usual for former international colleges, either through new partnerships with universities — usually to offer English Language Intensive Courses for Overseas Students (ELICOS) or foundational courses⁴¹ — or (as is the case with VU Sydney) through rebranding as university adjuncts at significant cost.⁴²

Streamlined processing changes arose from a review of the student visa program conducted by former Justice Michael Knight,⁴³ which also recommended the introduction of automatic ‘post-study work visas’ of 18 months or more for students completing higher education courses.⁴⁴ The option of further study was made palatable for former students through the relative ease represented by streamlined processing, along with the possibility of automatic work rights.

Like the subclass 485 visa, the path to a further student visa has ultimately proven precarious. Amongst the Knight Review recommendations taken up with greatest speed,⁴⁵ in November 2011 new criteria were introduced to the assessment of student visa applications, under the name of the ‘genuine student’ and ‘genuine

40 Universities Australia, ‘Knight Review a Boon to Higher Education’ (Media Release, 22 September 2011). Available at: www.universitiesaustralia.edu.au/ArticleDocuments/406/1811%20Knight%20Review%20a%20boon%20to%20higher%20education.pdf.aspx.

41 In this respect, see the list of universities and ‘partner institutions’ set out in the legislative instrument of eligible providers for streamlined processing, above fn 17.

42 Victoria University Sydney is a joint venture of Victoria University and the private education provider Education Centre of Australia.

43 See Michael Knight, ‘Strategic Review of the Student Visa Program 2011’ (Report to the Australian Government, June 2011) Recommendation 3. Available at: www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/2011-knight-review.pdf.

44 See *ibid.*, Recommendation 4.

45 See *ibid.*, Recommendations 1–2.

temporary entrant' criteria. Ministerial Direction 53 guiding the application of those criteria specifically drew the decision-maker's attention to factors affecting former VET sector students, including 'circumstances in their home country' (i.e. poverty) and 'previous study history' (i.e. 'whether the applicant has undertaken a series of short, inexpensive courses').⁴⁶

The operation of the 'genuine temporary entrant' criterion in screening out applicants of particular nationalities was evident in the case of offshore student visa refusal rates in India. Over 2010 to 2011, the rate of approval for student visa applications from India fell from around 90.8 per cent to only 49.6 per cent, attributed largely to applicants' failure to meet 'genuine temporary entrant' requirements.⁴⁷ The effects were also felt onshore. In the 2010–11 and 2012–13 reporting periods, student visa refusals constituted the highest number of review applications lodged with the Migration Review Tribunal.⁴⁸ Several thousand former students now exist in legal limbo, sometimes waiting years for their cases to be constituted by the tribunal, holding bridging visas in the meantime with limited or no work rights.

Employer-sponsored options

Provided that they were able to find a willing employer, the Business (Long Stay) subclass 457 visa remained an available option for skilled former VET sector students. Until July 2013, the list of occupations for which an applicant could nominate under subclass 457 visa included a healthy number of trades, including, importantly, cook and hairdresser.⁴⁹ Until 1 July 2012, the English language requirements also remained favourable, requiring applicants to demonstrate a test score of five on each component of the International English

46 See Minister for Immigration and Citizenship, 'Direction No 53: Assessing the Genuine Temporary Entrant Criterion for Student Visa Applications'. Available at: immi-to-australia.com/pdf/imm4_6.pdf.

47 FactCheck, 'Christopher Pyne Exaggerates Labor's International Student "Failure"', *ABC*, 11 October 2013. Available at: www.abc.net.au/news/2013-10-04/pyne-international-student-failure/4994330.

48 Migration Review Tribunal and Refugee Review Tribunal, 'MRT–RRT Caseload Report 30 June 2011' (2011); Migration Review Tribunal and Refugee Review Tribunal, 'Annual Report 2012–2013' (2013).

49 See Legislative Instrument IMMI 09/125, 'Specification of Occupations (Subparagraphs 2.72(10)(a) and 2.72I(5)(b))' 26 October 2009.

Language Testing System (IELTS) test, and including exemptions to this requirement. In the immediate aftermath of the February 2010 changes, however, the greatest difficulty with the subclass 457 visa pathway for VET students was the requirement for sponsors to pay above the Temporary Skilled Migration Income Threshold (which in 2010 amounted to \$45,222 a year) and equivalent market salary rates. While for some trade occupations this base was well within market rates, for cooks and hairdressers it was significantly above award rates and was more than employers would have been willing to pay for graduates from the maligned international VET sector.⁵⁰

Perhaps symptomatic of this are allegations that former Singapore Oil CEO Eddie Kang extracted hundreds of thousands of dollars from several hundred former international students on the promise of securing sponsorship for subclass 457 visas.⁵¹ Specifically affected were numerous VET qualified cooks and hairdressers.⁵²

Migration/refugee review tribunals

Throughout the program years 2010–11 and 2012–13, student visa refusals and cancellations constituted by far the highest rate of lodgements in the Migration Review Tribunal.⁵³ During that period, the tribunal's online services indicated a wait period of around two years for a review hearing and decision for these cases.

Similarly, in 2010–11, China and India constituted by far the highest rate of lodgements in the Refugee Review Tribunal in relation to Protection Visa refusals. As set out above, these two national groups were also the highest represented in VET sector student visa grants from 2005 onwards,⁵⁴ and thus most liable to be impacted by the 2010 changes. During the 2010–11 financial year, 689 applications were lodged in the Refugee Review Tribunal by Chinese nationals, and

50 Bob Birrell and Ernest Healy, above fn 3, 79.

51 Steve Cannane, 'Sydney Businessman Eddie Kang Accused of Ripping Off Foreign Students Over 457 Visa Contracts', *ABC Lateline*, 15 October 2013. Available at: www.abc.net.au/news/2013-10-15/sydney-businessman-accused-in-alleged-visa-rort/5022152.

52 *Ibid.*

53 In the 2010–11 reporting year, student visa refusals and cancellations constituted 41 per cent of lodgements in the Migration Review Tribunal; in 2012–13 they constituted 35 per cent of lodgements. See Migration Review Tribunal and Refugee Review Tribunal, above fn 48.

54 See Department of Immigration and Citizenship, above fn 8.

435 by Indian nationals — which represented a 97 per cent rise in lodgements from India.⁵⁵ At the same time, the tribunal still had 477 visa applications on hand to decide from the previous year.⁵⁶

Former students may have more or less success in their review applications at the Migration Review Tribunal or Refugee Review Tribunal. In any case, it remains a provisional strategy for prolonging stay in Australia.

Illegality

Former VET sector students have found other options, particularly in the form of other employer- or partner-sponsored visas. The final and most obvious option is illegality, simply staying on in the country without any formal or legal status. Discussions of illegality and its consequences have not been prevalent in Australia, as compared with Europe and North America, whose geographic landscapes permit for mass undocumented entry.

What is salient in discussions of illegality is that there is nothing *irregular* about irregular migration and undocumented migrants forming an indispensable part of the labour market in both contexts.

Australia has not historically had the benefit of a sizable flow of flexible labour without status, with all the opportunities for exploitation that this implies. Former student visa holders are slowly shifting into the permanently illegal communities of regional Victoria, working alongside Samoan and Fijian former seasonal workers, and offshore entry protection visa applicants released into the community on bridging E visas.

What are the social implications of creating a permanently illegal class of residents, without the entitlements to education, welfare, medical care, and social recognition that legal status implies? What will these communities look like five or 10 years into the future, and what impact will their existence bring to the future direction of migration policy?

55 Ibid.

56 Ibid.

These questions, of course, cannot be answered in advance of people's movements and attempts at contestation. What I have sought to pose here is the question, not of the consequences of expulsion, but the forms of differential inclusion of those formerly holding VET sector visas — not as a long-past historical quandary, but a present social process in the unfolding.

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This text is taken from *Unintended Consequences: The impact of migration law and policy*, edited by Marianne Dickie, Dorota Gozdecka and Sudrishti Reich, published 2016 by ANU Press, The Australian National University, Canberra, Australia.

The papers published in this book arose from an inaugural conference on migration law and policy at ANU College of Law, held in October 2013. They are reprinted here with minor amendments.