

## THE VULNERABILITY OF SAFE HAVEN ENTERPRISE VISA HOLDERS: BALANCING WORK, PROTECTION AND FUTURE PROSPECTS

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*This article considers the policy settings of the Safe Haven Enterprise visa ('SHEV'). It considers the merits of linking renewal of the visa to particular work requirements, and argues that the current requirements place visa holders in a position of extreme vulnerability both in the Australian workforce and in relation to their general health and well-being. The article outlines possible avenues for reform of the visa, ultimately concluding that there is a strong case for its repeal.*

'I want to conclude my remarks, if I may, by referring to the establishment of the safe haven enterprise visas, which were introduced in the legislation that was passed in this place on the last sitting day of December 2014. In my view this is absolutely groundbreaking and fundamental. To remind my colleagues, and to inform those who are not aware of it, what it does is it rewards enterprise and enhances the strong regional needs, demands and desires of regional Australia with a new visa to be created called the safe haven enterprise visa. In essence, what this does is encourage somebody who is seeking protection in this country to work in regional or rural Australia with their family. It is a tremendous opportunity.'<sup>1</sup>

### I INTRODUCTION

In the 21<sup>st</sup> century, with the number of refugees increasing worldwide,<sup>2</sup> and nation states seemingly less willing to accept humanitarian migrants,<sup>3</sup> there has been a new conversation on the benefits of linking refugee protection needs with

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1 Commonwealth, *Parliamentary Debates*, Senate, 16 March 2015, 1454 (Christopher Back).

2 United Nations High Commissioner for Refugees, *Figures at a Glance* (19 June 2017) <<http://www.unhcr.org/en-au/figures-at-a-glance.html>>.

3 Andrew A Michta, 'Europe's Immigration Fatigue', *The American Interest* (online), 27 September 2016 <<https://www.the-american-interest.com/2016/09/27/europes-immigration-fatigue/>>; Joshua Cayetano, 'Syrian Refugee Crisis: Compassion Fatigue Is a Threat to America's National Interests', *Providence* (online), 20 June 2017 <<https://providencemag.com/2017/06/syrian-refugee-crisis-compassion-fatigue-threat-america-national-interests/>>; Ben Westcott, 'US to Resettle Fewest Refugees in a Decade under Trump's Cuts', *CNN Politics* (online), 28 September 2017 <<http://edition.cnn.com/2017/09/28/politics/trump-refugees-by-the-numbers/index.html>>.

labour mobility opportunities. In 2012, the United Nations High Commissioner for Refugees ('UNHCR') and the International Labour Organization ('ILO') held a joint workshop in Geneva to consider the relationship between work and protection.<sup>4</sup> The workshop acknowledged that labour migration and refugee protection are based on 'different rationales, but they can intersect'.<sup>5</sup> Labour market participation provides refugees with the opportunity to contribute to and integrate into the host country while increasing their skills, which in turn will facilitate access to durable solutions to their protection needs. The workshop noted that labour migration pathways are necessarily guided by international labour law, refugee law and human rights law. Therefore, it is imperative that refugees and asylum seekers have equal access to labour protections under state law,<sup>6</sup> and that those laws comply with the ILO Conventions.<sup>7</sup> If this is done, the economic contribution of humanitarian migrants may offer an alternative pathway to protection.<sup>8</sup>

In 2014, the government introduced a new visa, the Safe Haven Enterprise visa ('SHEV'), which in its title and in its terms, explicitly combines labour market and protection outcomes. Getting the policy settings right for the SHEV is not only important to ensure positive protection outcomes for SHEV holders, but also to maximise the chances of the SHEV being associated with positive economic outcomes.

This article considers the visa criteria in light of the position SHEV holders occupy in the Australian labour market and assesses whether the SHEV satisfies its twin objectives of offering humanitarian protection and leveraging an economic contribution from visa holders. Part II describes the origin of the SHEV. Part III examines the criteria for the visa. Part IV discusses the visa in light of changing approaches to refugee protection. Part V examines the

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4 United Nations High Commissioner for Refugees, *UNHCR-ILO Workshop on Labour Mobility for Refugees, Geneva 11–12 September 2012* <<http://www.unhcr.org/en-au/unhcr-ilo-workshop-on-labour-mobility-for-refugees-geneva-11-12-september.html>>.

5 United Nations High Commissioner for Refugees and International Labour Office, 'Labour Mobility for Refugees: Workshop in Geneva, 11–12 September 2012 – Summary Conclusions' (Report, October 2012) 1 <<http://www.unhcr.org/509a842e9.html>>.

6 *Ibid* 3.

7 *Convention (No 97) Concerning Migration for Employment (Revised 1949)*, opened for signature 1 July 1949, 120 UNTS 71 (entered into force 22 January 1952); *Recommendation (No 86) Concerning Migration for Employment (Revised 1949)*, International Labour Conference, 32<sup>nd</sup> sess, 22<sup>nd</sup> pt, Agenda Item 11 (1 July 1949); *Convention (No 143) Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*, opened for signature 4 June 1975, 1120 UNTS 323 (entered into force 9 December 1978); *Recommendation (No 151) Concerning Migrant Workers*, International Labour Conference, 60<sup>th</sup> sess, 31<sup>st</sup> pt, Agenda Item 5 (24 June 1975); International Labour Organization, *ILO Multilateral Framework on Labour Migration: Non-binding Principles and Guidelines for a Rights-Based Approach to Labour Migration* (International Labour Office, 2006). All instruments of the ILO are available at International Labour Organization, *Labour Migration* <<http://www.ilo.org/public/english/protection/migrant/areas/multilateral.htm>>.

8 Alexander Betts and Paul Collier, *Refuge: Transforming a Broken Refugee System* (Penguin, 2017); Elizabeth Collett, Paul Clewett and Susan Fratzke, 'No Way Out?: Making Additional Migration Channels Work for Refugees' (Report, Migration Policy Institute Europe, March 2016); European Union Agency for Fundamental Rights, 'Legal Entry Channels to the EU for Persons in Need of International Protection: A Toolbox' (FRA Focus Paper No 02/2015, March 2015); United Nations High Commissioner for Refugees and International Labour Office, 'Summary Conclusions', above n 5.

particular vulnerability of SHEV holders in the workplace. Part VI considers the visa options for SHEV holders who satisfy the work and study requirements of the visa. Part VII offers suggestions for reforming the visa to maximise its chances of success as a mechanism for humanitarian protection and as a labour market program.

This article reveals that under current policy settings, SHEV holders are not only vulnerable to exploitation in the workforce in their efforts to satisfy the visa pathway requirements, but that even if they do satisfy the requirements, their prospect of gaining a non-humanitarian visa is largely illusory. This will emerge as a difficult policy dilemma in 2019–20 when the first SHEVs expire. There is, therefore, a compelling case for reform.

## II ORIGIN OF THE SHEV

On 19 July 2013, Prime Minister Kevin Rudd announced that Australia had entered into a Regional Resettlement Arrangement with Papua New Guinea ('PNG') to detain and process asylum seekers attempting to reach Australia by boat.<sup>9</sup> A further agreement was signed with the Pacific Island nation of Nauru on 3 August 2013.<sup>10</sup> These arrangements were maintained by the Abbott Coalition Government when it took office on 18 September 2013. On 18 September 2013, the government introduced Operation Sovereign Borders, under which asylum seekers were intercepted at sea and either turned back to their country of departure, or transferred to Nauru and Manus Island for refugee processing.<sup>11</sup> Under this policy, according to government media releases, 29 asylum seeker boats have been turned back since December 2013.<sup>12</sup>

These arrangements clarified the extent of outstanding protection claims of 'unauthorised maritime arrivals' ('UMAs') in Australia.<sup>13</sup> At the end of 2014,

9 Prime Minister, Attorney-General and Minister for Immigration, 'Australia and Papua New Guinea Regional Settlement Arrangement' (Press Release, 19 July 2013) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F2611769%22>>.

10 Republic of Nauru and Commonwealth of Australia, 'Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues' (Memorandum of Understanding, 3 August 2013) <<http://dfat.gov.au/geo/nauru/pages/memorandum-of-understanding-between-the-republic-of-nauru-and-the-commonwealth-of-australia-relating-to-the-transfer-to-and.aspx>>.

11 Operation Sovereign Borders was established on 18 September 2013 to prevent asylum seekers from entering Australia by boat, and to deter future boats from attempting to reach Australia: see Department of Home Affairs (Cth) and Australian Border Force, *Operation Sovereign Borders* <<http://www.osb.border.gov.au/>>.

12 Janet Phillips, 'Boat Arrivals and Boat "Turnbacks" in Australia since 1976: A Quick Guide to the Statistics' (Research Paper Series 2016–17, Parliamentary Library, Parliament of Australia, 2017) 6.

13 Section 5AA of the *Migration Act 1958* (Cth) refers to asylum seekers attempting to reach Australia by boat as 'unauthorised maritime arrivals' ('UMAs'). The Coalition Government uses the term 'illegal maritime arrivals' ('IMAs') in all its communications and reports relating to this group of asylum seekers. Until 2013, IMA referred to 'irregular maritime arrival'. The Minister for Immigration and Border Protection, Scott Morrison, changed the designation of IMA to 'illegal maritime arrivals' in October 2013: Emma Griffiths, 'Immigration Minister Scott Morrison Defends Use of Term "Illegal Arrivals"',

there were approximately 30 000 UMAs in Australia who arrived between 2009 and 2013 with outstanding claims for protection. Collectively, these asylum seekers were known as the ‘legacy caseload’.<sup>14</sup> The “‘30 000” comprised approximately 21 364 people in the community on [Bridging Visa Es], approximately 8732 people in onshore immigration detention facilities and approximately 2739 being held under community detention arrangements’.<sup>15</sup> In addition, the caseload included ‘approximately 1550 asylum seekers on the mainland and on Christmas Island who arrived by boat after 19 July 2013’ and whom the Department agreed not to transfer to Nauru for off-shore processing.<sup>16</sup>

The Labor Government policy of releasing asylum seekers who had arrived by boat into the community on bridging visas was a significant shift from the previous policy of mandatory detention. Under section 189 of the *Migration Act 1958* (Cth), UMAs who arrive at an excised off-shore place, such as Christmas Island, must be placed in immigration detention. Under section 196, UMAs must remain in detention until they are removed or granted a visa. The Labor Government achieved removal from detention through granting Bridging Visa Es (subclass 050 and 051)<sup>17</sup> to UMAs.<sup>18</sup> This was the first time since the policy of mandatory detention was introduced in 1992 that asylum seekers had been released in large numbers.<sup>19</sup> Initially, the bridging visas included an entitlement to work. A ‘no work’ condition was added to bridging visas granted from August 2012.<sup>20</sup> The UMAs living in the community on bridging visas, some with work rights and some without, had their applications for asylum effectively frozen in 2012 under the Labor ‘no advantage test’,<sup>21</sup> and processing only recommenced once the Abbott Government successfully passed the *Migration and Maritime Powers (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) in December 2014.

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Plays Down PNG Police Incident’, *ABC News* (online), 21 October 2013

<<http://www.abc.net.au/news/2013-10-21/immigration-minister-scott-morrison-defends-use-of-illegals-term/5035552>>. This article adopts the statutory term ‘UMA’ to refer to asylum seekers arriving by boat.

- 14 The ‘legacy caseload’ is a term introduced by the government to refer to the approximately 30 000 asylum seekers who arrived in Australia by boat under the previous Labor Government: see Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2014, 10 545 (Scott Morrison).
- 15 Department of Parliamentary Services (Cth), *Bills Digest*, No 40 of 2014–15, 23 October 2014, 4, citing Department of Immigration and Citizenship, ‘Immigration Detention and Community Statistics Summary’ (Report, 31 August 2013) <<https://www.homeaffairs.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-aug2013.pdf>>. For updated data on the ‘legacy caseload’, see Department of Home Affairs (Cth), ‘IMA Legacy Caseload – Report on the Processing Status and Outcomes’ (April 2018) <<https://www.border.gov.au/ReportsandPublications/Documents/statistics/ima-legacy-caseload-april-2018.pdf>>.
- 16 Department of Parliamentary Services (Cth), above n 15, 4.
- 17 Department of Home Affairs (Cth), *Bridging Visa E – BVE (Subclass 050-051)* <<https://www.homeaffairs.gov.au/trav/visa-1/051->>.
- 18 Megan Clement, ‘Asylum Seeker Bridging Visas: Experts Respond’, *The Conversation* (online), 22 November 2012 <<https://theconversation.com/asylum-seeker-bridging-visas-experts-respond-10935>>.
- 19 Release of asylum seekers into the community was achieved through granting asylum seekers a Bridging Visa E, subclasses 050–051. See *Migration Regulations 1994* (Cth) sch 2 subclasses 050–051.
- 20 Chris Bowen, ‘No Advantage Onshore for Boat Arrivals’ (Media Release, 21 November 2012) 1.
- 21 *Ibid.*

In its 2014 amendments to the *Migration Act 1958* (Cth), the Abbott Government introduced a new protection visa scheme for UMAs. The SHEV emerged from negotiations between the government and the Palmer United Party in late 2014 as an alternative to a Temporary Protection Visa ('TPV'). The Government agreed to establish the visa in return for Palmer's support for the whole package of amendments in the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).<sup>22</sup> The Bill passed into law incorporating new and more onerous requirements for protection visas. UMAs were barred from making a valid application for any visa in Australia unless the Minister removed an exclusion from applying.<sup>23</sup> The right to seek merits review was weakened for those arriving after 12 August 2012, with review of decisions to be conducted by a new Immigration Assessment Authority in a 'fast track' process.<sup>24</sup> As part of these reforms, the Minister for Immigration and Border Protection, Scott Morrison, undertook to remove the work restriction condition on Bridging Visa E for asylum seekers.<sup>25</sup> Processing of asylum seekers in the 'legacy caseload' began in 2015. As of December 2017, 6020 UMAs had successfully applied for a SHEV visa through the non-fast track and fast track application processes, 1679 had been refused and 13 858 applications were yet to be finalised.<sup>26</sup>

### III SHEV CRITERIA

The SHEV offers protection for five years to asylum seekers who satisfy the definition of a refugee or a person otherwise requiring protection under section 36 of the *Migration Act 1958* (Cth). 'Refugee' is defined by sections 5H–5L of the Act.<sup>27</sup> Although SHEV holders can request to visit family overseas, this will only be granted if the applicant can demonstrate 'compassionate or compelling circumstances' that justify the travel.<sup>28</sup>

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22 Emma Griffiths, 'Government to Reintroduce Temporary Protection Visas in Deal with PUP to Ensure Senate Success', *ABC News* (online), 25 September 2014 <<http://www.abc.net.au/news/2014-09-25/government-to-reintroduce-temporary-protection-visas/5768084>>.

23 *Migration Act 1958* (Cth) s 46A(2).

24 *Migration Act 1958* (Cth) pt 7AA.

25 *Migration Regulations 1994* (Cth) sch 8 cl 8101. See Asylum Seeker Resource Centre, 'Changes to Refugee Law in Australia: What It Means for Asylum Seekers and Refugees' (Information Sheet, December 2014) 3 <[https://www.asrc.org.au/wp-content/uploads/2014/12/Migration-Bill-Impact-Info-Sheet\\_December-2014.pdf](https://www.asrc.org.au/wp-content/uploads/2014/12/Migration-Bill-Impact-Info-Sheet_December-2014.pdf)>.

26 Department of Home Affairs (Cth), 'IMA Legacy Caseload – Report on the Processing Status and Outcomes' (December 2017) 5 (Table 6 and Table 7) <<https://www.homeaffairs.gov.au/ReportsandPublications/Documents/statistics/ima-legacy-caseload-december-2017.pdf>>.

27 The definition mirrors the definition of a refugee in the *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('*Refugee Convention*') but gives more detail on the meaning of a 'well-founded fear of persecution' (s 5J) and 'membership of a particular social group' (ss 5K, 5L).

28 *Migration Regulations 1994* (Cth) sch 8 cl 8570.

If SHEV holders work or study in designated regional areas for three and a half out of the five years of the life of the visa, they are eligible to apply for a range of non-humanitarian visas as long as they satisfy the criteria for these visas.<sup>29</sup> To meet the work requirement, the work SHEV holders engage in must be ‘lawful’, ‘paid’ and on a full-time, part-time, temporary, casual or seasonal basis.<sup>30</sup> Any work done while receiving special benefit payments does not count towards meeting the work requirements of the SHEV.<sup>31</sup>

As of 27 October 2016, all states and territories had registered regional areas for the SHEV.<sup>32</sup> All areas of NSW are regional areas for the SHEV except for Sydney, Newcastle, the Central Coast and Wollongong. Tasmania joined the SHEV arrangements on 10 October 2015, with the whole state being designated as regional. The Australian Capital Territory, Queensland, South Australia, Victoria, Western Australia, and the Northern Territory joined the SHEV arrangements on 27 October 2016. The whole of South Australia and the Northern Territory are regional areas for the purpose of the SHEV, all of Queensland except for Brisbane and the Gold Coast, and all of Western Australia except Perth and some areas in the Pilbara and Goldfields/Esperance regions. All of Victoria besides Melbourne and some local council areas identified by postcode are designated as regional.

SHEV holders are also able to satisfy the three and a half year requirement through studying in a regional area.<sup>33</sup> SHEV holders can satisfy the study requirement through participation in study in primary or secondary school,<sup>34</sup> or in universities and vocational education institutions offering tertiary qualifications.<sup>35</sup> All universities outside of Sydney, Newcastle, Wollongong, Melbourne, Brisbane and Perth satisfy the definition of a regional university for the purposes of the SHEV.<sup>36</sup>

The option of studying at university is financially prohibitive for most SHEV holders. SHEV holders are only eligible for international student visas,<sup>37</sup> and are required to pay international student fees. The cost of a year of full-time study for a bachelor’s degree at an Australian university ranges from \$15 000–\$33 000.<sup>38</sup> Some universities have introduced fee waivers and small stipends to assist

29 *Migration Regulations 1994* (Cth) reg 2.05; Department of Home Affairs (Cth), *Safe Haven Enterprise Visa (Subclass 790)* <<https://www.border.gov.au/Trav/Visa-1/790->>.

30 Department of Home Affairs (Cth), *SHEV Pathway Requirements* <<https://www.border.gov.au/Trav/Visa-1/790-?modal=/visas/supporting/Pages/790/shev-pathway-requirements.aspx>>.

31 *Ibid.*

32 Department of Home Affairs (Cth), *Regional Australia Postcodes* <<https://www.border.gov.au/Refugeeandhumanitarian/Documents/regional-australia-postcodes.pdf>>.

33 Department of Home Affairs (Cth), *Safe Haven Enterprise Visa*, above n 29.

34 The study option is an important one for SHEV holders of school age. On 30 June 2016, there were 1637 IMA children of primary school age (5–11 years old) on Bridging Visa Es and 901 of secondary school age (18–25 years old).

35 Department of Home Affairs (Cth), *Safe Haven Enterprise Visa*, above n 29.

36 *Ibid.*

37 *Ibid.*

38 Australian Trade and Investment Commission, *Education Costs in Australia*, Study in Australia <<https://www.studyinaustralia.gov.au/global/australian-education/education-costs>>.

humanitarian visa holders, including SHEV holders, with their studies.<sup>39</sup> If SHEV holders take up these study opportunities, they receive no social security benefits while engaging in their university study.

Eligibility for a SHEV does not require an enforceable undertaking to work in regional Australia for the required time. SHEV holders can work or study as they see fit.<sup>40</sup> If SHEV holders fail to complete the three and a half year work or study requirement, they are still eligible to apply for a further humanitarian visa, but lose the opportunity to apply for a non-humanitarian visa.

To apply for a further TPV or SHEV, refugees must demonstrate that they continue to have a well-founded fear of persecution in all areas of their country of origin.<sup>41</sup> As conditions in countries of origin regularly change, and different migration officers may interpret eligibility for protection differently, SHEV holders can have no confidence that they will continue to be eligible for Australia's protection.<sup>42</sup> This leaves them in a condition of perpetual uncertainty. There is considerable literature on the impact of this uncertainty on refugees' mental health.<sup>43</sup>

The incentive for SHEV holders to remain in paid employment in order to make them eligible to apply for a non-humanitarian visa in the future is designed to channel visa holders into industries and locations in the Australian labour market with a shortage of workers. It establishes a social contract between the Australian state and refugees with future protection options related to the degree of participation in employment. It also complicates the employment relationship between SHEV holders and their employers, rendering SHEV holders more reliant on maintaining employment regardless of the pay and conditions. The implications of this relationship are explored further in Part V.

#### IV THE SHEV AND CHANGING APPROACHES TO REFUGEE PROTECTION

Having emerged from a political compromise, the SHEV was not subject to rigorous policy scrutiny. There is no indication in department deliberations that any thought was given to the type of work SHEV holders might engage in, how they might contribute to the economy, their prospects of finding work, and if they did find work, their potential vulnerability in the labour market. The Minister for

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39 See generally Refugee Council of Australia, *Scholarships for People Seeking Asylum and Refugees on Temporary Visas* (28 February 2018) <<https://www.refugeecouncil.org.au/ourwork/scholarships-people-seeking-asylum-refugees/>>.

40 *Migration Regulations 1994* (Cth) sch 2 cl 790.611.

41 *Migration Regulations 1994* (Cth) sch 2 cl 790.611.

42 There is a body of literature that questions whether the requirement for refugees to reapply for further protection complies with Australia's international obligations. See, eg, Emily Hay and Susan Kneebone, 'Refugee Status in Australia and the Cessation Provisions: *QAAH of 2004 v MIMIA*' (2006) 31 *Alternative Law Journal* 147.

43 See, eg, Shakeh Momartin et al, 'A Comparison of the Mental Health of Refugees with Temporary versus Permanent Protection Visas' (2006) 185 *Medical Journal of Australia* 357.

Immigration and Border Protection, Scott Morrison, did, however, consider the prospects of transitioning to an alternative visa at the conclusion of a SHEV:

Our experience on resettlement for people in this situation would mean that [the benchmarks of working or studying in these regional areas are] a very high bar to clear. Good luck to them if they choose to do that and if they achieve it. ... There is an opportunity here but I think it is a very limited opportunity and we will see how it works out.<sup>44</sup>

### A Linking Humanitarian Protection and Work

With the world experiencing the highest levels of displacement on record,<sup>45</sup> and with western countries increasingly reluctant to accept greater numbers of refugees,<sup>46</sup> and in many cases reducing their intakes,<sup>47</sup> international organisations and policymakers are looking for alternative pathways for refugee resettlement in places of safety, including the use of work programs in countries experiencing worker shortages in aspects of their labour market.<sup>48</sup>

Australian policy has reflected this trend. In 2004, the Minister for Immigration and Multicultural and Indigenous Affairs, Amanda Vanstone, announced that 9500 TPV holders could apply for mainstream migration visas to enable them to remain in Australia permanently.<sup>49</sup> The list of visas for which TPV holders could apply included a range of permanent and temporary economic and family stream visas.<sup>50</sup> Unlike the SHEV, the new visa pathways were introduced retrospectively, in recognition that TPV holders were making a significant contribution to the community.<sup>51</sup> As with a SHEV, applicants had to satisfy the requirements for the visa, although there was some softening of the

44 Scott Morrison, 'Reintroducing TPVs to Resolve Labor's Asylum Legacy Caseload, Cambodia' (Transcript of Press Conference, Canberra, 25 September 2014) 5  
<<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F3414551%22>>.

45 United Nations High Commissioner for Refugees, *Figures at a Glance*, above n 2.

46 The UNHCR annual global trends report highlights that the number of refugees and displaced persons increased from 16 to 17 million during 2016. The numbers of people returning to their home countries are low, and an ever-increasing proportion of refugees are located in developing countries: see generally United Nations High Commissioner for Refugees, 'Global Trends: Forced Displacement in 2016' (Report, 2017) <<http://www.unhcr.org/en-us/statistics/unhcrstats/5943e8a34/global-trends-forced-displacement-2016.html>>. See also Michta, above n 3; Cayetano, above n 3.

47 Westcott, above n 3.

48 Collett, Clewett and Fratzke, above n 8; European Union Agency for Fundamental Rights, above n 8; United Nations High Commissioner for Refugees and International Labour Office, 'Summary Conclusions', above n 5.

49 Amanda Vanstone, 'New Measures for TPV Holders' (Media Release, VPS 99/2004, 13 July 2004) <[http://pandora.nla.gov.au/pan/31543/20050430-0000/www.minister.immi.gov.au/media\\_releases/media04/v04099.htm](http://pandora.nla.gov.au/pan/31543/20050430-0000/www.minister.immi.gov.au/media_releases/media04/v04099.htm)>.

50 *Migration Amendment Regulations 2004 (No 6)* (Cth).

51 'This change was made in recognition that some current and former TPV and THV holders have made important contributions to the community during their time in Australia, particularly in rural and regional areas and some have particular skills that would otherwise qualify them for a migration visa': see Department of Immigration and Multicultural and Indigenous Affairs, *64d New Onshore Visa Options for Temporary Protection and Temporary Humanitarian Visa Holders* (24 August 2004) <[http://www.immi.gov.au/facts/64d\\_mte.htm](http://www.immi.gov.au/facts/64d_mte.htm)>.



requirements in recognition of the particular circumstances of TPV holders.<sup>52</sup> The scheme was not a great success, with a very small number of applications, and a high failure rate among those who did apply.<sup>53</sup>

In 2011, the Minister for Immigration and Citizenship, Chris Bowen, commissioned a report from a leading demographer, Professor Graeme Hugo, on the 'economic, social and civic contributions of humanitarian migrants'.<sup>54</sup> The declared purpose of the report was to outline the story of the contribution of humanitarian entrants to Australia, and to use the findings 'to inform government decision-making'.<sup>55</sup> The report paints a picture of people struggling at first to enter the labour market, but in the long term making a significant contribution to the Australian economy and society. The report highlights the high level of entrepreneurship among humanitarian migrants and a strong sense of loyalty to Australia across generations. The theme of entrepreneurship among humanitarian migrants has been developed further in research by Professor Jock Collins. Like Hugo, Collins highlights personal stories of achievement of humanitarian entrepreneurs and attributes this success at least in part to a courageous mindset related to their experiences as refugees.<sup>56</sup>

There is no direct link between the Hugo report and the creation of the SHEV visa. At the time of the report, and presently, Labor Party policy was to offer refugees permanent residency visas. The Minister simply hoped to leverage Hugo's work to garner greater acceptance of refugees in the broader community in support of existing policy. It is possible, however, that the report, and subsequent work highlighting the economic contribution of humanitarian migrants, influenced the negotiations between the government and the Palmer United Party in 2014.

The SHEV has the twin benefit of linking humanitarian migrants to the labour market, potentially channelling them into areas of need, and also offering the government a point of relief from the hard-line policy that denies humanitarian protection in Australia to UMAs. The SHEV offers a pathway to

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52 *Elibritt Karlsen*, 'Permanent Residency for Safe Haven Enterprise Visa Holders?' on Parliamentary Library, *FlagPost* (28 November 2014) <[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/FlagPost/2014/November/Safe\\_haven\\_Enterprise\\_visa](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2014/November/Safe_haven_Enterprise_visa)>.

53 *Ibid.*

54 Graeme Hugo, 'A Significant Contribution: The Economic, Social and Civic Contributions of First and Second Generation Humanitarian Entrants: Summary of Findings' (Summary of Findings, Department of Immigration and Citizenship (Cth), 2011) <[https://www.dss.gov.au/sites/default/files/documents/01\\_2014/economic-social-civic-contributions-booklet2011.pdf](https://www.dss.gov.au/sites/default/files/documents/01_2014/economic-social-civic-contributions-booklet2011.pdf)>.

55 *Ibid.* 8.

56 Jock Collins, Katherine Watson and Branka Krivokapic-Skoko, 'From Boats to Businesses: The Remarkable Journey of Hazara Refugee Entrepreneurs in Adelaide' (Full Report, Centre for Business and Social Innovation, University of Technology Sydney, 2017) 12–13, 19, 36–7, 144–5 <<https://www.uts.edu.au/sites/default/files/2017-10/From%20Boats%20to%20Businesses%20Full%20Report%20-%20Web.pdf>>; Jock Collins, 'Private Sector Initiatives in Refugee Employment and Entrepreneurship: Migration and Border Policy Project Working Paper' (Lowy Institute, December 2017) 8–12 <<https://www.lowyinstitute.org/publications/private-and-community-sector-initiatives-refugee-employment-and-entrepreneurship>>.

settlement that is broadly consistent with the government's philosophy on the relationship between welfare and work more generally. A comprehensive report on the welfare system commissioned by the Minister for Social Services in 2013, and released in 2015, concluded that there needed to be a much greater focus on employment in the welfare system.<sup>57</sup> This finding is reflected in the current federal government's mutual obligation requirements for welfare recipients.<sup>58</sup>

With the SHEV, refugees are provided with the possibility of ongoing protection on a non-humanitarian visa provided they engage in productive activity (work or study) for most of the five-year period of their visa. Ongoing protection in the Australian community is therefore linked to refugees' ability to engage in productive activity. This may cast refugees as potentially useful participants in the Australian economy, and not just victims of persecution. But, if SHEV holders are unable to complete the work-for-protection contract, it may also reinforce a perception of refugees as inadequate and undeserving.

Which of the economic narratives comes to dominate – the SHEV holder as economic contributor or as economic burden – will depend on the policy settings that are put in place around the visa. The policy settings can make it more or less likely that humanitarian migrants on SHEVs will be able to find and keep employment, have a positive experience of living in regional Australia, and have genuine prospects of satisfying the requirements for a permanent visa at the expiry of the SHEV. A failure of the SHEV scheme risks feeding the negative stereotype of refugees and asylum seekers and reinforcing what has been described as refugee 'compassion fatigue' in Europe.<sup>59</sup>

The success and failure of other temporary labour migration streams can inform policymakers on what does and does not work.<sup>60</sup> There is good evidence that the lack of proper regulation of the workplace rights of working holiday-makers and international students has led to significant exploitation in the workplace,<sup>61</sup> whereas the high level of regulation of Pacific seasonal workers has

57 Department of Social Services (Cth), 'A New System for Better Employment and Social Outcomes: Report of the Reference Group on Welfare Reform to the Minister for Social Services – Executive Summary' (February 2015) <[https://www.dss.gov.au/sites/default/files/documents/02\\_2015/dss001\\_14\\_exec\\_summary\\_access\\_2\\_final\\_0.pdf](https://www.dss.gov.au/sites/default/files/documents/02_2015/dss001_14_exec_summary_access_2_final_0.pdf)>.

58 Department of Human Services (Cth), *Mutual Obligation Requirements* (31 May 2018) <<https://www.humanservices.gov.au/individuals/enablers/mutual-obligation-requirements>>.

59 Claudia Cahalane, "'There's Compassion Fatigue': Why Refugee Charities Face a Funding Shortfall", *The Guardian* (online), 28 June 2017 <<https://www.theguardian.com/society/2017/jun/28/refugee-charities-at-risk-of-funding-fatigue>>; 'Compassion Fatigue: Most EU Countries Are Happy to Welcome Other Europeans', *The Economist* (online), 25 March 2017 <<https://www.economist.com/news/special-report/21719191-they-are-less-keen-refugees-outside-most-eu-countries-are-happy-welcome-other>>.

60 Joanna Howe and Alexander Reilly, 'Meeting Australia's Labour Needs: The Case for a Low-Skill Work Visa' (2015) 43 *Federal Law Review* 259; Jesse Doyle and Stephen Howes, 'Australia's Seasonal Worker Program: Demand-Side Constraints and Suggested Reforms' (Discussion Paper, World Bank Group, 2015) <<https://openknowledge.worldbank.org/handle/10986/21491>>.

61 Fair Work Ombudsman, 'Inquiry into Wages and Conditions of People Working under the 417 Working Holiday Visa Program' (Report, October 2016) <<https://www.fairwork.gov.au/ArticleDocuments/763/417-visa-inquiry-report.pdf.aspx>>; Alexander Reilly et al, 'International Students and the Fair Work Ombudsman' (Report, March 2017)

led to more positive experiences in the workplace, but a lower level of demand for their labour.<sup>62</sup> Getting the regulatory balance right is crucial for the success of all labour migration programs. The particular needs of SHEV holders as humanitarian migrants means that the policy setting and regulatory framework are critical to its success.

## B Work and Well-Being

Engagement in work is associated with well-being.<sup>63</sup> Employment leads to economic freedom and enhances human security. It is a source of self-expression and self-fulfilment.<sup>64</sup> Work provides people with a status and facilitates their healthy interaction with other people in the community.<sup>65</sup> Encouraging refugees to work is, therefore, to move them towards good health. In February 2014, Lisa Hartley and Caroline Fleay published research focusing on the impact on asylum seekers of the ‘no work’ condition in bridging visas.<sup>66</sup> Interviews with 29 men and women on bridging visas revealed that they all had a strong desire to work, and that not being able to work made them feel ‘socially isolated from the Australian community’.<sup>67</sup> The research concluded that the denial of work rights had a ‘dehumanising’ effect on asylum seekers.<sup>68</sup>

The SHEV not only comes with work rights but offers a positive incentive to work or study in regional areas. The positive incentive of eligibility to apply for a non-humanitarian visa is conditional on maintaining employment for the majority of the term of the visa. As discussed below, the power imbalance that already exists between employers and SHEV holders is exacerbated by the incentive to work, putting pressure on SHEV holders to hold down employment regardless of the pay and conditions of work. They are exposed to a heightened potential for exploitation in the workplace, which is counterproductive for both protection and economic outcomes.

The conditions of the SHEV are the inverse of the conditions of the bridging visa introduced by the Gillard Government in 2012 and abandoned by the Abbott Government in 2014. The same asylum seekers who were prevented from

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<<https://www.fairwork.gov.au/ArticleDocuments/1160/International-students-and-the-fair-work-ombudsman-report.pdf.aspx?Embed=Y>>.

- 62 Doyle and Howes, above n 60, 16–17. However, there are also reports of exploitation in the seasonal workers program: see, eg, Ben Doherty, ‘Hungry, Poor, Exploited: Alarm over Australia’s Import of Farm Workers’, *The Guardian* (online), 3 August 2017 <<https://www.theguardian.com/global-development/2017/aug/03/hungry-poor-exploited-alarm-over-australias-import-of-farm-workers>>.
- 63 Emma Crawford et al, ‘The Structural–Personal Interaction: Occupational Deprivation and Asylum-Seekers in Australia’ (2016) 23 *Journal of Occupational Science* 321, 327, 331.
- 64 Rosemary Owens, Joellen Riley and Jil Murray, *The Law of Work* (Oxford University Press, 2<sup>nd</sup> ed, 2011) 3.
- 65 Caroline Fleay, Lisa Hartley and Mary Anne Kenny, ‘Refugees and Asylum Seekers Living in the Australian Community: The Importance of Work Rights and Employment Support’ (2013) 48 *Australian Journal of Social Issues* 473, 474, 487–8.
- 66 Lisa Hartley and Caroline Fleay, ‘Policy as Punishment: Asylum Seekers in the Community without the Right to Work’ (Report, Centre For Human Rights Education, Curtin University, February 2014) <[http://www.nwhn.net.au/admin/file/content101/c6/CHRE\\_PolicyAsPunishmentAsylumSeekersInTheCommunityWithoutTheRightToWork\\_Feb\\_2014.pdf](http://www.nwhn.net.au/admin/file/content101/c6/CHRE_PolicyAsPunishmentAsylumSeekersInTheCommunityWithoutTheRightToWork_Feb_2014.pdf)>.
- 67 Ibid 1–2.
- 68 Ibid 10.

working on a bridging visa from 2012 to 2014 as a result of a ‘no work’ condition’ find themselves under pressure to find work and account for their time in and out of the workforce as SHEV holders. The stark contrast between the bridging visa with no work rights, and the role of work in the SHEV highlights the range of conflicting messages being sent to asylum seekers and refugees about how to conduct themselves in Australia and what ‘protection’ entails.

## V VULNERABILITY OF SHEV HOLDERS IN THE WORKPLACE

### A Vulnerability as Temporary Humanitarian Migrants

Temporary migrant workers are inherently vulnerable in the workplace due to their cultural and linguistic backgrounds, their insecure residency status, and their limited social and political power as non-citizens.<sup>69</sup> Among temporary migrant workers, refugees are particularly vulnerable for a number of reasons. Their pre-migration exposure to violence, instability and persecution can lead to a range of physical and mental health problems not faced by other workers.<sup>70</sup> As well as negative experiences in their country of origin, SHEV holders have all reached Australia after arduous journeys which ended with a highly dangerous and traumatic journey by sea, followed by a period of detention or release into the community on bridging visas while awaiting assessment of their claims.

Humanitarian migrants are more likely to have limited or disrupted education experiences as a result of discrimination or persecution in their countries of origin, or long periods in refugee camps with limited education opportunities.<sup>71</sup> Unlike most other migrant workers, humanitarian migrants have not travelled to Australia with employment pre-organised (such as 457 visa holders or seasonal workers), or with a contemplation of what work opportunities will be available to them (such as working holiday-makers or international students). They are likely to have limited or no knowledge of the Australian labour market, and to lack established networks or relevant work experience.<sup>72</sup>

In his study of the economic contribution of humanitarian migrants, Graeme Hugo found that proficiency in the English language was a clear indicator of workforce participation and levels of employment.<sup>73</sup> Of the 121 520

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69 See, eg, Laurie Berg and Bassina Farbenblum, ‘Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey’ (Report, November 2017) <<https://www.mwji.org/highlights/2017/11/14/report-released-wage-theft-in-australia-findings-of-the-national-temporary-migrant-work-survey>>; Laurie Berg, *Migrant Rights at Work: Law’s Precariousness at the Intersection of Immigration and Labour* (Routledge, 2015) 43–4; Peter Mares, *Not Quite Australian* (Text Publishing, 2016); Judy Fudge, ‘Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers’ (2013) 34 *Comparative Labor Law and Policy Journal* 95; Leah Vosko (ed), *Precarious Employment: Understanding Labour Market Insecurity in Canada* (McGill-Queen’s University Press, 2006).

70 See Hugo, above n 54, 23.

71 Ibid 22–3.

72 Ibid 23.

73 Ibid 23–4.

humanitarian migrants in the 2006 census who spoke English ‘not well’, 20 per cent were unemployed, and the workforce participation rate was 36.3 per cent (compared to a 4.9 per cent unemployment rate and 67.1 per cent workforce participation rate among Australian born people).<sup>74</sup> For those who spoke English ‘not at all’, unemployment was at 31.5 per cent and the participation rate was 12.1 per cent.<sup>75</sup> These figures are consistent with more recent employment figures. A Centre for Policy Development (‘CPD’) report in 2017 found that 18 months after arrival, 17 per cent of humanitarian migrants were in paid employment.<sup>76</sup> One significant finding of the CPD report was that many humanitarian migrants have a low level of education and skills on arrival, and typically look for low-skilled work, but that the availability of such work was shrinking in the Australian economy.<sup>77</sup>

The high rates of unemployment and low rates of participation of humanitarian migrants in the Australian economy suggest that the large proportion of SHEV holders who do not speak English well, or at all, will have great difficulty finding employment, and without government assistance are highly unlikely to hold down employment for three and a half years of the five year visa term.

The difficulty in satisfying the work requirement is exacerbated by the fact that SHEV holders are limited to working in designated regional areas. What is a regional area for the purpose of the SHEV is very broad, including capital cities such as Adelaide and Hobart. However, like other humanitarian arrivals, most potential SHEV holders are likely to be residents in major metropolitan centres, in particularly Sydney and Melbourne, where there are large ethnic communities, and where settlement services are concentrated.<sup>78</sup> If they have gained employment in these locations, they will have to leave this employment to satisfy the SHEV pathway work requirements. The time taken to relocate and find new employment necessarily uses up a portion of the one-and-a-half-year period in which SHEV holders are able to be unemployed while still satisfying the work requirements of the visa.

There is a clear risk that as a result of their multiple sites of vulnerability in the workplace, SHEV holders will be prepared to take on precarious work for low pay out of ignorance of their rights, or will accept poor pay and conditions in exchange for the evidence of employment they require to apply for a non-humanitarian visa at the conclusion of the SHEV.

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74 Ibid 24.

75 Ibid.

76 Centre for Policy Development, ‘Settling Better: Reforming Refugee Employment and Settlement Services’ (Report, February 2017) 5 <<https://cpd.org.au/wp-content/uploads/2017/02/Settling-Better-Report-20-February-2017.compressed.pdf>>.

77 Ibid 5, 9, 13–14.

78 Department of Social Services (Cth), ‘Humanitarian Settlement Program – Service Provider Locations’ <<https://www.dss.gov.au/our-responsibilities/settlement-services/programs-policy/settlement-services/settlement-services-locator>>. The ‘Contract Region Maps’ link reveals the extent to which services are concentrated in major urban centres.

## B Vulnerability as a Result of Working in Low-Skill, Short Term Jobs

The Centre for Policy Development ‘Settling Better’ report noted that ‘[o]nly 17 per cent of humanitarian migrants arrive in Australia with post school qualifications, yet it is anticipated that such qualifications will be required for 72 per cent of the new jobs created to 2020’.<sup>79</sup> The level of education and skills of SHEV holders is likely to reflect these findings, and so they will mostly seek low-skilled employment. The stated intention of the SHEV visa was to ‘encourage enterprise through earning and learning in regional areas’.<sup>80</sup> One of the reasons that the regions are lacking a workforce is the nature of the work available. Since at least the 1970s, young people have left regional areas in search of better employment opportunities elsewhere, leaving a skill shortage for regional employers.<sup>81</sup> The jobs available in regional industries to unskilled workers such as SHEV holders tend to be part-time, casual, and short-term.<sup>82</sup> SHEV holders in these locations face conditions of work, including physical climate, modes of work, facilities and culture, that may be completely foreign to them. Furthermore, there are no regulatory obligations on employers to provide induction and training to SHEV holders as there are, for example, in the seasonal worker program (‘SWP’).<sup>83</sup>

There are a growing number of reports of the extent of exploitation of migrant workers in low-skilled employment, which is indicative of the challenges faced by SHEV holders in the workplace.<sup>84</sup> Berg and Farbenblum’s 2017 report, ‘Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey’, revealed widespread underpayment of temporary visa holders, in particular working holiday-makers and international students across a wide range of industries and across all ethnic groups. SHEV holders are among the most vulnerable migrant workers due to their backgrounds of persecution, their financial status, and the incentive to work to be eligible for a visa extension regardless of pay and conditions of work. If SHEV holders work in short-term employment, they will face immediate pressure to find another contract without too much time elapsing. This constant cycle of applying for work increases the likelihood of SHEV holders encountering unscrupulous employers and adds to their fatigue in the negotiation of wages and conditions, all of which contributes to their vulnerability.

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79 Centre for Policy Development, above n 76, 14.

80 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2014, 10 546 (Scott Morrison).

81 U N Bhati, ‘An Analysis of Aggregate Labour Demand and Supply Relationships in Australian Agriculture’ (1978) 31 *Quarterly Review of Agricultural Economics* 106; Joanna Howe et al, ‘Sustainable Solutions: The Future of Labour Supply in the Australian Vegetable Industry’ (Report, University of Adelaide, 2017).

82 Howe et al, above n 81, 11.

83 Howe et al, above n 81.

84 See Berg and Farbenblum, above n 69; Mares, above n 69; Fudge, above n 69, 95–122.

### C Vulnerability of SHEV Holders Who Work While Studying

The vulnerability of international students in the workplace is well documented.<sup>85</sup> In addition to their inherent vulnerability as migrant workers, they are particularly vulnerable because of their relative youth, lack of work experience, and the need to balance work and study commitments.

In most respects, SHEV holders engaged in full-time study are more vulnerable than international students. Unlike SHEV holders, international students have had the opportunity to weigh the costs and benefits of studying in Australia, and have made a considered decision to undertake their studies despite the financial burden this entails. It is a condition of international student visas that students demonstrate they have the financial resources to support themselves during the course of their studies. Students must be able to cover their tuition fees, their return airfare, and to have access to \$20 290 for themselves, \$7100 for a spouse and \$3040 for any dependent child for general living expenses each year of their study.<sup>86</sup>

Unlike international students, SHEV holders did not arrive in Australia with the intention of studying, and therefore did not have to satisfy the financial requirements to study. Furthermore, the majority of SHEVs are from developing countries, and their backgrounds of persecution mean they are unlikely to have existing resources to support them in their studies. A World Bank study in 2016 found that poverty among Syrian refugees was extremely high.<sup>87</sup> There was a complex range of factors, but one that is particular to all refugees is the fact that they commonly have to abandon assets, property and capital to flee persecution.<sup>88</sup>

Like international students, SHEV holders who study full-time are not eligible for special benefit payments. This means that SHEV holders will almost certainly need to find significant paid employment to support themselves during their studies. If they were to work for the minimum wage of \$17.70 per hour, a wage level that is considerably higher than most international students report receiving,<sup>89</sup> they will need to work for 29.4 hours a week to reach the poverty line of \$520.51 for a single person requiring accommodation.<sup>90</sup> Given the barriers to employment faced by refugees in the early years of their residence in Australia, while on a temporary visa, it is very unlikely that a SHEV holders will be able to achieve anything like this level of employment while studying.

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85 See, eg, Berg, *Migrant Rights at Work*, above n 69, 51, 90, 96–101, 159; Alexander Reilly, ‘Protecting Vulnerable Migrant Workers: The Case of International Students’ (2012) 25 *Australian Journal of Labour Law* 181.

86 *Migration Regulations 1994* (Cth) sch 2 cl 500.214; Department of Home Affairs (Cth), *Student Visa Financial Capacity Requirements* <<https://www.border.gov.au/Trav/Stud/More/Student-Visa-Living-Costs-and-Evidence-of-Funds>>.

87 See, eg, Paolo Verme et al, *The Welfare of Syrian Refugees: Evidence from Lebanon and Jordan* (World Bank, 2016) xv–xvi, 83–7.

88 *Ibid.*

89 Reilly et al, above n 61, 36–7.

90 Melbourne Institute of Applied Economic and Social Research, ‘Poverty Lines: Australia – December Quarter 2015’ (Report, University of Melbourne, 22 April 2016) <<https://melbourneinstitute.unimelb.edu.au/assets/documents/poverty-lines/2015/Poverty-Lines-Australia-December-2015.pdf>>.

### D Vulnerability as a Result of the Need for Employment to Satisfy the SHEV Pathway Requirements

SHEV holders have a high level of investment in finding and keeping work so that they might be able to apply for a non-humanitarian visa at the end of the five-year period of the SHEV. This makes SHEV holders structurally more likely to accept poor pay and conditions of work from employers or labour hire companies. Indeed, SHEV holders may *initiate* discussions about low pay, being more concerned to maintain employment than to receive adequate pay and conditions for their work. This is similar to a phenomenon observed amongst many international students in the workforce. They willingly accept work at below-award wages because they are more interested in being employed than receiving fair remuneration for their work.<sup>91</sup>

The temporary nature of the SHEV visa provides an added barrier to SHEV holders finding employment as they can only guarantee employers a limited length of employment.<sup>92</sup> This limit becomes more and more pronounced as SHEV holders near the end of the visa term. SHEV holders are likely to be at their most vulnerable as they near the expiry date of their visas, both in terms of their prospects of finding work and in terms of their mental health, as they will be increasingly concerned about whether they will be able to apply successfully for a non-humanitarian visa, or remain eligible for further temporary protection.

The burden is on SHEV holders themselves to keep documentary evidence of employment and study. Form 1465 lists a range of documents that constitute evidence of work, including ‘copies of payslips, statement of service, employer contracts, employer references and an Australian bank statement covering the period of work’.<sup>93</sup> Evidence of study includes confirmation of enrolment, and evidence of satisfactory course completion. ‘Certified copies’ are required of these documents to be accepted as evidence of employment and study.<sup>94</sup> Once SHEV holders ‘believe they have met’ the SHEV pathway requirements, they need to lodge a Form 1465 with the accumulated evidence of employment. The burden falls on SHEV holders to prove their lawful employment.

The work requirement sets up a similar power imbalance between workers and their employers as is created by the requirement for Working Holiday Maker (‘WHM’) visa extension. WHMs must work for 88 days in designated regional areas in specified industries in the first year of their visa to be eligible for a one-year visa extension.<sup>95</sup> To satisfy the 88-day requirement, WHMs rely on

91 Stephen Clibborn, ‘Multiple Frames of Reference: Why International Students in Australia Tolerate Underpayment’ (2018) forthcoming *Economic and Industrial Democracy*; Reilly et al, above n 61, 37–40.

92 Greg Marston, ‘A Punitive Policy: Labour Force Participation of Refugees on Temporary Protection Visas’ (2004) 15 *Labour and Industry: A Journal of the Social and Economic Relations of Work* 65.

93 Department of Immigration and Border Protection (Cth), ‘Safe Haven Enterprise Visa (SHEV): Employment and Study Record’ (Form 1465, July 2016) 1 <<https://www.border.gov.au/Forms/Documents/1465.pdf>>.

94 Ibid.

95 See Alexander Reilly, ‘Low-Cost Labour or Cultural Exchange?: Reforming the Working Holiday Visa Programme’ (2015) 26 *Economic and Labour Relations Review* 474, 483.



employers to verify their employment. In relation to WHMs, the Administrative Appeals Tribunal held that an additional burden falls on workers to demonstrate that the full-time work was ‘remunerated in accordance with Australian legislation or awards’.<sup>96</sup> In its inquiry into the wages and conditions of people working under the Working Holiday visa program, the Fair Work Ombudsman found that more than a third of WHMs claimed to be paid less than the minimum wage, 14 per cent had to pay to secure regional work and six per cent had to pay an employer to sign off on their regional work requirement.<sup>97</sup> Howe, Stewart and Owens argue persuasively that linking migration outcomes to performance to work has a direct correlation to migrant worker vulnerability.<sup>98</sup>

SHEV holders are likely to be more desperate to satisfy the work requirement for the change to apply for a non-humanitarian visa than WHMs are to satisfy the work requirement for a visa extension. Whereas the downside of not fulfilling the 88-day requirement for WHMs is that they will have to return home a year early to a country which is politically stable and in which they have the full range of civil and political rights,<sup>99</sup> SHEV holders face the prospect of being returned to a country from which they fled persecution.

### E The Risk of Destitution

As discussed above, to be eligible to apply for a non-humanitarian visa at the conclusion of the SHEV, SHEV holders must have evidence of full-time, part-time or casual employment, or equivalent time in study. The common requirement is that SHEV holders must not receive special benefit payments. It is possible for SHEV holders to have a small amount of weekly employment to satisfy the criteria. But to do so, they may find themselves living in extreme poverty. There is, then, a clear risk that the twin requirements for paid work and avoidance of welfare assistance will send SHEV holders into a state of destitution.

The UNHCR has reported that many asylum seekers on bridging visas are currently living in a state of destitution, with inadequate housing and food supplies.<sup>100</sup> In the United Kingdom (‘UK’), where individual asylum seeker support is 51 per cent of the jobseeker’s allowance,<sup>101</sup> studies suggest that there

96 *Lin (Migration)* [2017] AATA 648 [6], [16].

97 Fair Work Ombudsman, above n 61, 4. See also Howe et al, above n 81.

98 Joanna Howe, Andrew Stewart and Rosemary Owens, ‘Temporary Migrant Labour and Unpaid Work in Australia’ (2018) 40 *Sydney Law Review* 183.

99 The political stability of some of the 19 countries with which Australia has working holiday agreements might be open to question, including Hong Kong Special Administrative Region of the People’s Republic of China and Taiwan.

100 United Nations High Commissioner for Refugee, ‘Asylum-Seekers on Bridging Visas in Australia: Protection Gaps’ (Consultation Report, 2013) <<http://www.unhcr.org/en-au/publications/legal/58117a937/asylum-seekers-on-bridging-visas-in-australia-protection-gaps.html>>; Peter Mares, ‘Refuge without Work: “This Is a Poison, a Poison for the Life of a Person”’ (2014) 45 *Griffith Review* 103.

101 Alexander Reilly, ‘Asylum Seekers in the Community: The Importance of Work for a Decent Life’ (2016) 22 *Australian Journal of Human Rights* 1, 9, citing Lisa Mayblin, ‘Asylum, Welfare and Work: Reflections on Research in Asylum and Refugee Studies’ (2014) 34 *International Journal of Sociology and Social Policy* 375, 379.

are large numbers of asylum seekers who are destitute despite receiving welfare.<sup>102</sup> Given the structural incentive not to receive any welfare, the condition of SHEV holders in Australia is likely to be worse than bridging visa holders, or asylum seekers in the UK.

## VI VISA OPTIONS AT THE CONCLUSION OF THE SHEV

If a SHEV holder satisfies the work and study requirements of the visa, they may apply for a range of permanent or temporary work or family visas for which they meet the criteria. Satisfying the work and study requirements of the SHEV does not provide any extra entitlement to apply for other visas. In fact, in a press conference discussing the visa, the Minister for Immigration and Border Protection, Scott Morrison, stated:

these benchmarks of working or studying in these regional areas are very high. Our experience on resettlement for people in this situation would mean that this is a very high bar to clear. Good luck to them if they choose to do that and if they achieve it. ... There is an opportunity here but I think it is a very limited opportunity and we will see how it works out.<sup>103</sup>

Given their disrupted education and work backgrounds, most SHEV holders will not have been eligible to apply for a non-humanitarian visa when they arrived in Australia seeking asylum. Therefore, in most cases a SHEV holder's eligibility for a non-humanitarian visa will be as a result of the work, study or relationships they formed during their time in Australia on a bridging visa and then on a SHEV. In discussing the visa options for SHEV holders, the focus will be on their prospects of using their work, study and living arrangements while on a SHEV to satisfy the criteria of the different visas.

### A Eligibility for a Visa under the Skilled/Economic Migration Stream

SHEV holders are eligible to apply for the following visas in the skilled/economic stream:

- Subclass 189 (Skilled–Independent);<sup>104</sup>
- Subclass 190 (Skilled–Nominated);<sup>105</sup>
- Subclass 476 (Skilled–Recognised Graduate);<sup>106</sup>

102 Leicester Refugee and Asylum Seekers Voluntary Sector Forum, 'Destitution in the Asylum System in Leicester' (Report, June 2009); Jennifer Allsopp, Nando Sigona and Jenny Phillimore, 'Poverty among Refugees and Asylum Seekers in the UK: An Evidence and Policy Review' (Institute for Research into Superdiversity Working Paper Series No 1, 2014) <<https://www.birmingham.ac.uk/Documents/college-social-sciences/social-policy/iris/2014/working-paper-series/IRiS-WP-1-2014.pdf>>.

103 Scott Morrison, above n 44.

104 Department of Home Affairs (Cth), *Skilled Independent Visa (Subclass 189) (Points-Tested) Stream* <<https://www.homeaffairs.gov.au/trav/visa-1/189->>.

105 Department of Home Affairs (Cth), *Skilled Nominated Visa (Subclass 190)* <<<https://www.homeaffairs.gov.au/trav/visa-1/190->>.

106 Department of Home Affairs (Cth), *Skilled – Recognised Graduate Visa (Subclass 476)* <<https://www.homeaffairs.gov.au/trav/visa-1/476->>.

- Subclass 489 (Skilled–Regional (Provisional));<sup>107</sup>
- Subclass 186 (Employer Nomination Scheme);<sup>108</sup>
- Subclass 187 (Regional Sponsored Migration Scheme); and<sup>109</sup>
- Subclass 457 (Temporary Work (Skilled)).<sup>110</sup>

SHEV holders must be a maximum of 45 years of age at the end of their SHEV to be eligible for any permanent or temporary visas in the economic stream.<sup>111</sup> Tracing this age requirement back to the time SHEV holders arrived in Australia, the *oldest* a SHEV holder could have been at the time of arrival was 38, having arrived in 2013 and been granted a SHEV in 2015 which expired in 2020.

To be eligible for a subclass 189, permanent skilled independent visa, applicants must have a relevant occupation on the medium and long-term strategic skills list ('MLTSSL').<sup>112</sup> The skill must have been subject to a skills assessment. Some SHEV holders may have high level skills on the list that they attained before arriving in Australia. If they do, their five years on a SHEV might be used productively to satisfy the further requirements of the visa, including attaining a level of competent English, and achieving the pass mark of 60 on the points test.

In relation to the points test, SHEV holders will receive between 15–30 points for being aged under 45. Maximum points are awarded for applicants between the ages of 25 and 32.<sup>113</sup> As discussed above, SHEV holders would have been in Australia for a minimum of seven years before applying for an independent skilled visa, so for maximum points would have to be less than 25 years of age on arrival.<sup>114</sup>

Ten to twenty points are awarded for a level of English language that is higher than competent.<sup>115</sup> Given that SHEV holders are from non-English speaking background countries,<sup>116</sup> and given that they have limited opportunities

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107 Department of Home Affairs (Cth), *Skilled Regional (Provisional) Visa (Subclass 489)* <<https://www.homeaffairs.gov.au/trav/visa-1/489->>.

108 Department of Home Affairs (Cth), *Employer Nomination Scheme (Subclass 186)* <<https://www.homeaffairs.gov.au/trav/visa-1/186->>.

109 Department of Home Affairs (Cth), *Regional Sponsored Migration Scheme Visa (Subclass 187)* <<https://www.homeaffairs.gov.au/trav/visa-1/187->>.

110 Department of Home Affairs (Cth), *Temporary Work (Skilled) Visa (Subclass 457)* <<https://www.homeaffairs.gov.au/trav/visa-1/457->>.

111 There are a small number of exemptions from this rule which are unlikely to apply to SHEV holders: see Department of Home Affairs (Cth), *Age, Skill and English Requirements and Exemptions* <<https://www.border.gov.au/Trav/Work/Work/Age-Skill-and-English-Language-Exemptions-Permanent-Employer-Sponsored-Programme#ae>>.

112 *Migration (IMMI 18/051: Specification of Occupations and Assessing Authorities) Instrument 2018* (Cth) s 7(1) item 1.

113 *Migration Regulations 1994* (Cth) reg 2.26AC, sch 6D pt 6D.1.

114 *Migration Regulations 1994* (Cth) reg 2.26AC, sch 6D pt 6D.1.

115 *Migration Regulations 1994* (Cth) reg 2.26AC, sch 6D pt 6D.2.

116 The main citizenships of IMAs are Iran, Sri Lanka, Afghanistan, Pakistan, Iraq, Vietnam and Bangladesh: Department of Immigration and Border Protection (Cth), 'IMA Legacy Caseload – Report on the Processing Status and Outcomes' (August 2017) 3

to learn English as a result of the work requirement on the SHEV, most SHEV holders will find it difficult to attain a level of English even at the lower end of this threshold. The one exception may be university scholarship holders who have to meet high standards of English to be accepted into university courses (as is discussed later in this section).

Points are also awarded for more than three years of skilled employment outside Australia in the last 10 years. No SHEV holders will satisfy this threshold given that the SHEV itself is five years and they will have been in Australia for a minimum of two years prior to obtaining a SHEV. Points are awarded for skilled employment in Australia for more than a year (5 points for one to two years and 10 points for three to four years).<sup>117</sup> In order to be able to use their pre-existing skills, SHEV holders will need to have the skills recognised by the relevant assessing authority and then find a job in their skilled occupation.<sup>118</sup> For the few SHEV holders who may have relevant skills, the time it takes to have their skills recognised means they are likely only to be eligible for five points at most. This assumes that they are able to find employment at all.

There are significant points awarded for obtaining a PhD (20 points), a bachelor's degree (15 points) or another qualification such as a diploma or trade qualification (10 points).<sup>119</sup> Studying in Australia itself carries 5 points,<sup>120</sup> and studying in a regional location, which includes all SHEV study locations, carries a further 5 points.<sup>121</sup>

The high level of points awarded for Australian study means that SHEV holders with pre-existing qualifications might be well advised to pursue further study over the course of the SHEV, rather than seeking skilled employment. A 30-year-old (30 points) SHEV holder completing a three-year bachelor's degree (15 points) at a regional (five points) Australian (5 points) education institution, would need to attain proficient English (10 points) during the course of their study to satisfy the 60 point threshold for the skilled independent visa. If the SHEV holder receives less points for age (25 points if aged 18–25, or 33–39, and 15 points if 40–44) then the SHEV holder may need to achieve superior English to reach the threshold.

A SHEV holder with no pre-existing skills may also be able to meet the eligibility requirements for a skilled independent visa (subclass 189) through studying a degree that qualifies them for a skilled occupation on the MLTSSL. For example, studying a bachelor's degree in nursing, social work, architecture, accounting or engineering in a regional university would gain them 25 points, age would add 15 to 30 points, and depending on their age, they may need proficient (10 points) or superior (20 points) English language.

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<<http://www.border.gov.au/ReportsandPublications/Documents/statistics/ima-legacy-caseload-august-2017.pdf>>.

117 *Migration Regulations 1994* (Cth) reg 2.26AC, sch 6D pt 6D.4.

118 Department of Home Affairs (Cth), *Skill Assessment and Assessing Authorities* <<https://www.border.gov.au/Trav/Work/Work/Skills-assessment-and-assessing-authorities>>.

119 *Migration Regulations 1994* (Cth) reg 2.26AC, sch 6D pt 6D.7.

120 *Migration Regulations 1994* (Cth) reg 2.26AC, sch 6D pt 6D.8.

121 *Migration Regulations 1994* (Cth) reg 2.26AC, sch 6D pt 6D.10.

The main barrier to obtaining a skilled independent visa through this pathway is having the resources to study at university. As discussed above, SHEV holders are considered international students, and thus liable to pay international student fees of between \$15 000 and \$30 000 per year. Scholarships in the university sector waiving student fees may offer the most viable path to independent economic migration for SHEV holders.

It is important to note that SHEV holders in full-time study lose their status resolution support service payments if they study full-time. This leaves many SHEV holders engaged in full-time study with no income at all and needing to engage in significant paid work to support their study. The policy of removing welfare support to students engaged in full-time study is ill-considered on many levels. First, it is unlikely to save money as students not studying are unlikely to find work and will require welfare support. Second, there are benefits both for refugees and for society in facilitating an education pathway. If refugees are ultimately removed from Australia, their education will improve their life chances, and if they remain in Australia, they will be much more likely to contribute to society and the economy.

The eligibility requirements in relation to English language and relevant skilled occupations are reduced for a range of other permanent skilled visas if SHEV holders can find private sector or government sponsors, through the skilled nominated visa (subclass 190), the skilled regional visa (subclass 489), the sponsored employer nomination scheme visa (subclass 186), or the regional sponsored migration scheme visa (subclass 187). However, there are still high thresholds on skills, experience and English language that are likely to make these visas prohibitive for SHEV holders.

A more realistic pathway for an economic visa following a SHEV is via a temporary skilled visa as the list of skilled occupations is more extensive. However, the current temporary skilled visa pathway, the subclass 457 visa, was replaced by a temporary skilled shortage ('TSS') visa in March 2018.<sup>122</sup> The TSS visa has two streams: a short-term (two-year) stream and a medium-term (four-year) stream.<sup>123</sup> Under the short-term stream, there is no pathway to permanent residency, with the capacity for only one onshore renewal, so that the maximum length of the visa is four years. This will not be attractive for refugees on a SHEV who are seeking permanent protection to avoid returning to their countries of origin from which they fled persecution. Eligibility for the medium-term stream requires an occupation on a new MLTSSL which is considerably narrower than the current consolidated sponsored occupation list for the 457 visa.<sup>124</sup> In addition, there is a new eligibility requirement of at least two years' work experience to be eligible for a medium-term TSS visa.<sup>125</sup>

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122 Department of Home Affairs (Cth), 'Fact Sheet One: Reforms to Australia's Temporary Employer Sponsored Skilled Visa Program – Commencement of the New Temporary Skill Shortage Visa' (2018) 1 <<https://www.homeaffairs.gov.au/WorkinginAustralia/Documents/commencement-of-tss-fact-sheet-1.pdf>>.

123 Ibid.

124 Ibid.

125 Ibid 2.

The requirement of two years' work experience to be eligible for a TSS visa is particularly difficult for SHEV holders. As discussed above, it is highly unlikely that SHEV holders currently have skills on the skilled occupation lists to make them eligible for a TSS visa. If they did, they would have been able to apply for a subclass 457 visa rather than the much more difficult pathway of seeking humanitarian protection. This means that SHEV holders will need to first attain a skilled occupation on the MLTSSL through a study pathway, then gain two years' work experience, and then find a willing employer sponsor (most likely their existing employer) to be eligible to apply for a medium-term TSS visa. Although this pathway is possible, the many hurdles and contingencies and the tight time frame mean the prospects of success are extremely low.<sup>126</sup>

Unless SHEV holders are eligible for employment in a skilled occupation on the MLTSSL immediately, it is difficult to see how they will manage to up-skill on the job and be in a position to apply for a TSS visa at the conclusion of the SHEV. The only hope of up-skilling is with the immediate support of an employer willing to train them in a skilled occupation and then sponsor them on a TSS visa at the conclusion of their SHEV. There is a danger, as discussed above, that unscrupulous employers may use the promise of up-skilling and sponsorship as leverage to require SHEV holders to undertake work below minimum levels of pay and conditions.

## B Eligibility for a Visa under the Family Migration Stream

SHEV holders can apply for a range of visas under the family stream, including:

- Subclass 143 (Contributory Parent),<sup>127</sup>
- Subclass 445 (Dependent Child),<sup>128</sup>
- Subclass 801 (Partner),<sup>129</sup>
- Subclass 802 (Child),<sup>130</sup>
- Subclass 804 (Aged Parent),<sup>131</sup>
- Subclass 820 (Partner),<sup>132</sup>

126 Bob Birrell reached the same conclusion in relation to the impact of the changes to the 457 visa on international students: see Bob Birrell, 'The Coalition's 457 Visa Reset: Tougher than You Think?' (Research Report, Australian Population Research Institute, August 2017) i–iii <<http://tapri.org.au/wp-content/uploads/2016/04/immigration-reset-7-August-2017-final.pdf>>.

127 Department of Home Affairs (Cth), *Contributory Parent Visa (Subclass 143)* <<https://www.homeaffairs.gov.au/trav/visa-1/143->>.

128 Department of Home Affairs (Cth), *Dependent Child Visa (Subclass 445)* <<https://www.homeaffairs.gov.au/trav/visa-1/445->>.

129 Department of Home Affairs (Cth), *Partner Visa (Subclasses 820 and 801)* <<https://www.homeaffairs.gov.au/trav/visa-1/801->>.

130 Department of Home Affairs (Cth), *Child Visa (Subclass 802)* <<https://www.homeaffairs.gov.au/trav/visa-1/802->>.

131 Department of Home Affairs (Cth), *Aged Parent Visa (Subclass 804)* <<https://www.homeaffairs.gov.au/trav/visa-1/804->>.

132 Department of Home Affairs (Cth), *Partner Visa (Subclasses 820 and 801)* <<https://www.homeaffairs.gov.au/trav/visa-1/801->>.

- Subclass 835 (Remaining Relative);<sup>133</sup>
- Subclass 836 (Carer);<sup>134</sup>
- Subclass 837 (Orphan Relative);<sup>135</sup>
- Subclass 838 (Aged Dependent Relative);<sup>136</sup>
- Subclass 858 (Distinguished Talent);<sup>137</sup>
- Subclass 864 (Contributory Aged Parent);<sup>138</sup> and
- Subclass 884 (Contributory Aged Parent (Temporary)).<sup>139</sup>

Given their circumstances, the more realistic option is a temporary partner visa (subclass 820).<sup>140</sup> The SHEV holder would need to be sponsored by their partner who is either a citizen or permanent resident of Australia. The relationship must have been ongoing for 12 months at the time of the application. The Australian sponsor can apply for a permanent partner visa at the same time, and eligibility for this visa is assessed about two years after the application for a temporary partner visa.<sup>141</sup>

One option for SHEV holders who are able to meet the work requirement for the visa to secure permanent residency is to spend their spare time searching for an Australian partner. They effectively have four years to find a partner so that they can satisfy the relationship criteria in their fifth year. Significantly, the Department states expressly that ‘time spent dating or in an online relationship does not count as being in a de facto relationship’.<sup>142</sup>

The opportunity to form an intimate relationship with Australian citizens or permanent residents is unpredictable, and not a pathway a SHEV holder can rely on for gaining a non-humanitarian visa.

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133 Department of Home Affairs (Cth), *Remaining Relative Visa (Subclass 835)* <<https://www.homeaffairs.gov.au/trav/visa-1/835->>.

134 Department of Home Affairs (Cth), *Carer Visa (Subclass 836)* <<https://www.homeaffairs.gov.au/trav/visa-1/836->>.

135 Department of Home Affairs (Cth), *Orphan Relative Visa (Subclass 837)* <<https://www.homeaffairs.gov.au/trav/visa-1/837->>.

136 Department of Home Affairs (Cth), *Aged Dependent Relative Visa (Subclass 838)* <<https://www.homeaffairs.gov.au/trav/visa-1/838->>.

137 Department of Home Affairs (Cth), *Distinguished Talent Visa (Subclass 858)* <<https://www.homeaffairs.gov.au/trav/visa-1/858->>.

138 Department of Home Affairs (Cth), *Contributory Aged Parent Visa (Subclass 864)* <<https://www.homeaffairs.gov.au/trav/visa-1/864->>.

139 Department of Home Affairs (Cth), *Contributory Aged Parent (Temporary) Visa (Subclass 884)* <<https://www.homeaffairs.gov.au/trav/visa-1/884->>.

140 *Migration Regulations 1994* (Cth) sch 2 cl 820.

141 Department of Home Affairs (Cth), *Partner Visa (Subclasses 820 and 801)* <<https://www.homeaffairs.gov.au/trav/visa-1/801->>.

142 Department of Home Affairs (Cth), *What a De Facto Relationship Is* <<http://www.border.gov.au/Trav/Visa-1/801-?modal=/Visas/supporting/Pages/partner/what-de-facto-relationship-is.aspx>>. De facto partner is defined in *Migration Act 1958* (Cth) s 5CB. See also *Migration Regulations 1994* (Cth) reg 1.09A.

### C Eligibility for Other Visas

The final category of visa for which SHEV holders are eligible to apply are international student visas, including:

- Subclass 402 (Training and Research);<sup>143</sup>
- Subclass 500 (Student),<sup>144</sup> and
- Subclass 590 (Student Guardian).<sup>145</sup>

The relevant criteria include:<sup>146</sup>

- being enrolled in a course of study that is registered on the Commonwealth Register of Institutions and Courses for Overseas Students ('CRICOS');
- English language competency; and
- meeting financial capacity requirements, including course fees and money for living costs.

To pursue this pathway, SHEV holders are likely to need to improve their English language skills through participation in a Commonwealth-funded Adult Migrant English Program ('AMEP'),<sup>147</sup> self-instruction, or enrolment in an English language course at their own expense. SHEV holders may need to complete an English Language Intensive Course for Overseas Students ('ELICOS') near the end of their SHEV at a cost of between \$250 and \$350 per week in order to improve their standard of English and to reduce the score required for entry into a course of study in Australia.<sup>148</sup>

In addition to the expense associated with improving their English language for the purpose of study, SHEV holders must have sufficient resources to cover one year of living expenses, currently \$20 290,<sup>149</sup> Overseas Student Health Cover from a registered provider at a cost of over \$500 per year,<sup>150</sup> and financial resources to cover tuition which are, on average \$30 000 across degrees at Australian Higher Education institutions.<sup>151</sup> SHEV holders are unlikely to meet

143 Department of Home Affairs (Cth), *Training and Research Visa (Subclass 402)*

<<https://www.homeaffairs.gov.au/trav/visa-1/402->>.

144 Department of Home Affairs (Cth), *Student Visa (Subclass 500)*

<<https://www.homeaffairs.gov.au/trav/visa-1/500->>.

145 Department of Home Affairs (Cth), *Student Guardian Visa (Subclass 590)*

<<https://www.homeaffairs.gov.au/trav/visa-1/590->>.

146 Department of Home Affairs (Cth), *Student Visa (Subclass 500)*

<<https://www.homeaffairs.gov.au/trav/visa-1/500->>; *Migration Regulations 1994* (Cth) sch 2 cl 500.

147 Department of Education and Training (Cth), *Eligible Temporary Visas for AMEP* (14 April 2016)

<<https://www.education.gov.au/eligible-temporary-visas-amep>>.

148 English Language Intensive Course for Overseas Students, *Cost of Study ELICOS Australia*

<<http://www.elicos.com/elicos-study-cost/>>.

149 Australian Trade and Investment Commission, above n 38.

150 The Department of Health website has a link to five providers. The minimum cover of basic health cover with any one provider is over \$500. See Department of Health (Cth), *Overseas Student Health Cover* (31 January 2018)

<<http://www.health.gov.au/internet/main/publishing.nsf/content/overseas+student+health+cover+faq-1>>.

151 Australian Universities, *Tuition Fees for International Students* (2018)

<<https://australianuniversities.click/tuition-fees-international-students/>>.



these financial requirements for an international student visa. It is important to note, moreover, that as long as asylum seekers meet the eligibility requirements for an international student visa, there is nothing to prevent them applying for such a visa.

At the conclusion of the student visa, the most obvious pathway to permanent residency is via a subclass 485 graduate visa, leading to a new temporary short stay visa, and then applying for permanent residency through the skilled visa stream. As discussed above, the two-year work experience requirement for the temporary short stay visas makes this pathway particularly challenging for SHEV holders.

## **VII REFORMING THE POLICY SETTINGS OF THE SHEV TO MAXIMISE SUCCESS**

The above analysis strongly suggests that SHEV holders are unlikely to satisfy the criteria for a non-humanitarian visa. Despite its promise, therefore, the SHEV does not provide the kind of alternative pathway international organisations are promoting to encourage states to engage in refugee protection. There are very few, and difficult, pathways to satisfy the criteria for skilled or family stream visas. The skilled stream visas require SHEV holders to achieve a high level of success in employment which, for many, entails attaining new skills and then finding work to gain experience in those skills, all within five years. Family stream visas require SHEV holders to form deep, long-lasting relationships with Australian citizens or permanent residents at a time when there are limited opportunities to form such relationships due to work and study commitments. All SHEV holders must satisfy the criteria of non-humanitarian visas at a time of great uncertainty about their future life, and while dealing with the trauma of their recent experiences of fleeing persecution in their country of origin. SHEV holders must achieve this high level of success in employment or relationships while adjusting to a new culture, and possibly attending to obligations to their extended family overseas or in Australia.

The poor prospects of success in attaining a non-humanitarian visa, in addition to the vulnerability of SHEV holders in the workforce, make a powerful case for reforming the visa conditions. The last section of this article outlines changes to the SHEV policy settings to enhance its effectiveness as a pathway to permanent protection for refugees in Australia.

### **A Reforming the Work Requirements**

The Hugo report on the economic contribution of humanitarian migrants<sup>152</sup> and the CPD ‘Settling Better’ report<sup>153</sup> suggest that SHEV holders, both as temporary migrants and as refugees, are likely to have very poor employment outcomes during the five years of the SHEV. The rationale for requiring three

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152 Hugo, above n 54, 24–5, 34.

153 Centre for Policy Development, above n 76, 13.

and a half years of work for the life of the visa is to encourage SHEV holders into work. However, given that the program is not tailored to meeting specific labour market needs, the economic benefit of this requirement is likely to be insignificant. In other words, for little or no economic benefit, SHEV holders are put at risk of destitution and exploitation in the workplace. This outcome benefits no-one.

The social and economic outcomes of the visa scheme are likely to be improved if the work requirements are lessened. It should be sufficient for SHEV holders to be *seeking work* or engaged in volunteer work to satisfy the condition of working three and a half years out five. Furthermore, while seeking work, or engaging in voluntary work or in part-time paid employment, SHEV holders should be able to claim the whole or a portion of the special benefit payment without compromising their eligibility to apply for a non-humanitarian visa at the end of the term of the SHEV. The new criteria would impose obligations similar to the obligations of unemployed Australians claiming the Newstart allowance. Claimants are required to enter a job plan which sets out a plan for seeking employment, and they must report every two weeks to a case worker on their progress in seeking work.<sup>154</sup> This kind of arrangement would serve the twin benefits of assisting SHEV holders in finding employment and institutionalising regular contact with a support person.

Relaxing the employment requirements avoids the significant risk discussed above that SHEV holders will be prepared to work for poor pay and conditions of work simply to satisfy the work criteria and thereby be at serious risk of living in a state of destitution. Without the pressure of finding work immediately, SHEV holders can work out a strategy for seeking appropriate employment commensurate with their education and skills. This way they are likely to make a more productive contribution to the Australian economy. Relaxing the employment requirements also recognises that there may be times when SHEV holders do not have the capacity to work or to seek work as a result of the trauma they experienced in their country of origin. Providing SHEV holders the opportunity to be out the workforce for up to one and a half years within the terms of the visa enables them to focus on their health needs without the pressure to find work.

Building on this modified work requirement, the government should actively assist SHEV holders to find work. There are apparent labour shortages in regional areas in low-skilled work in horticulture and related industries. The government has established a dedicated seasonal worker program to meet this need. This program should be extended to suitably qualified SHEV holders, with the government assisting with establishment costs such as accommodation and travel to regional areas. There are examples of successful movements of ethnic

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154 *Social Security Act 1991* (Cth) s 593. See also Department of Human Services (Cth), *What Your Commitments Are* (21 June 2018) <<https://www.humanservices.gov.au/individuals/services/centrelink/newstart-allowance/what-your-commitments-are#jobplan>>.

communities into regional areas that could be used as models for a coordinated approach to placing SHEV holders in appropriate employment.<sup>155</sup>

### **B Support for SHEVs Engaged in Study**

The government is to be applauded for extending the work condition in the SHEV to tertiary study. The study option is particularly appropriate for young SHEV holders who are still at school, have just finished school, or whose tertiary study in their countries of origin has been interrupted. As well as being an important investment in the future of SHEV holders, increasing the education and skills of SHEV holders enables them to contribute more productively either to the Australian economy or the economy of another country.

For the study option to be effective, however, SHEV holders need to be financially supported while engaging in full-time study. Without adequate financial support, SHEV holders either will not be able to take up study opportunities, or will take them up but seriously compromise their studies by engaging in long hours of paid work. The imperative to work to succeed in their studies increases their vulnerability in the workforce.

At the present time, a number of universities have implemented waivers of international student fees for SHEV holders who satisfy the entry requirements to study. Rather than leaving this to individual universities, the government should make available Commonwealth-supported places for SHEV holders.

### **C Support for SHEVs in Regional Locations**

The Commonwealth provides no extra resources to support SHEVs in their transition to work in regional areas. There is no support to assist them to find work, no dedicated trauma support and no support for them to find housing. Any additional support is left to the states and regional councils who host the SHEV holders. The Tasmanian government considers the SHEV to be an opportunity for economic growth in a state that is struggling economically. It has created a 'safe haven hub' for \$1.2 million 'to operate as a first point of contact for SHEV holders coming to Tasmania to live and work or study'.<sup>156</sup>

Such initiatives are vital for SHEVs to work in the regions. Refugees face a myriad of challenges in settling in Australia, including cost of living pressures, unemployment, and dislocation from support networks. Refugees often face additional challenges due to their particular service requirements, such as mental health and trauma support. The Commonwealth Department of Social Services recognises that for some refugees, there needs to be an initial period of time in larger cities where there are more extensive counselling and other services.<sup>157</sup>

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155 See, eg, David Radford, "Everyday Otherness" – Intercultural Refugee Encounters and Everyday Multiculturalism in a South Australian Rural Town' (2016) 42 *Journal of Ethnic and Migration* 2128.

156 Will Hodgman, 'Safe Haven Enterprise Visa Program Begins' (Media Release, 10 October 2015) <[http://www.premier.tas.gov.au/releases/safe\\_haven\\_enterprise\\_visa\\_program\\_begins](http://www.premier.tas.gov.au/releases/safe_haven_enterprise_visa_program_begins)>.

157 Department of Social Services (Cth), *Humanitarian Settlement in Regional Australia* (5 March 2018) <<https://www.dss.gov.au/settlement-and-multicultural-affairs/publications/humanitarian-settlement-in-regional-australia>>.

In response to the proposed introduction of the SHEV, the Queensland Council of Social Services published an issues paper outlining the challenges that SHEV holders would face in entering regional communities in Queensland, including high cost of living, high unemployment, as well as a shortage of services of particular importance to them such as English language classes.<sup>158</sup> A year earlier, Hugo, Tan and Feist identified a number of essential services that are required to facilitate migrant worker movements to regional areas, including quality education and health services, security, recreation opportunities, social support, and housing.<sup>159</sup>

There are examples of successful settlement of refugee groups in regional areas, but this has been the result of careful planning, with assistance provided to refugee communities to make a successful transition. One well publicised story of a successful regional resettlement is the story of the settlement of 160 Karen refugees from Burma in the Victorian town of Nhill from 2010.<sup>160</sup>

#### D Reforming the Visa Pathways for SHEV Holders

Finally, it is well documented that uncertainty about the future is detrimental to the mental health of humanitarian migrants. Under the current policy, no matter how diligently a SHEV holder might work or study, there is no certainty that they will be eligible for any non-humanitarian visa at the conclusion of the SHEV. This is highly unsatisfactory. There needs to be clearer pathways to non-humanitarian visas that will lead either immediately or over time to permanent residency.

In 2004, when TPV holders were provided a pathway to permanent protection, the language and work requirements were modified to assist TPV holders to apply for permanent residency.<sup>161</sup> Despite the modifications, the success rate remained very low. There were only 34 applications from a potential cohort of approximately 2000 applicants.<sup>162</sup>

The simplest way to modify the work requirements would be to make a direct correlation between meeting the work requirements of the SHEV and eligibility

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158 Queensland Council of Social Services, 'Developing a Framework for the Implementation in Queensland of the Australian Government's Regional Dispersal Policies for the Re-settlement of Refugees in Regional Australia' (Issues Paper, October 2014) <<https://www.qcoss.org.au/sites/default/files/Issues%20Paper%20regional%20dispersal%20of%20refugee%20settlers.pdf>>.

159 Graeme Hugo, Helen Tan and George Feist, 'Internal Migration and Regional Australia' (Policy Brief, Australian Population and Migration Research Centre, June 2013) 5–6 <[http://www.adelaide.edu.au/apmrc/pubs/policy-briefs/APMRC\\_Policy\\_Brief\\_Vol\\_1\\_6\\_2013.pdf](http://www.adelaide.edu.au/apmrc/pubs/policy-briefs/APMRC_Policy_Brief_Vol_1_6_2013.pdf)>.

160 AMES Research and Policy and Deloitte Access Economics, 'Small Towns, Big Returns: Economic and Social Impact of Karen Resettlement in Nhill: A Joint AMES and Deloitte Access Economics Report' (March 2015) <<https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economics-small-towns-big-returns-nhill-resettlement-270415.pdf>>. See also Department of Social Services (Cth), 'Snapshots from Oz: Key Features of Australian Settlement Policies, Programmes and Services Available for Humanitarian Entrants' (Report, May 2016) 36 <[https://www.dss.gov.au/sites/default/files/documents/05\\_2016/snapshots\\_from\\_oz\\_-\\_may\\_2016\\_-\\_print\\_version.pdf](https://www.dss.gov.au/sites/default/files/documents/05_2016/snapshots_from_oz_-_may_2016_-_print_version.pdf)>.

161 Karlsen, above n 52.

162 Ibid.

for a permanent protection visa. Unless the criteria for satisfying the work requirements for the SHEV are enough to be eligible for permanent protection, SHEV holders have to satisfy the criteria of the SHEV while also developing eligibility for another visa. A significant problem of these dual criteria is that they are often contradictory. The imperative to find work quickly to satisfy the work and study requirements may lead SHEV holders into low-skilled work that does not satisfy the criteria for any of the skilled stream visa pathways.

The complications around satisfying the separate visa criteria encourage strategic thinking and increase SHEV holders' reliance on external migration advice. This is likely to be detrimental to the health and well-being of SHEV holders and distort the choices they make in relation to work or study. They may not seek employment or study opportunities that best suit their level of education and skill, or their stage of life.

The complex ulterior motives SHEV holders may have for taking on particular employment adds to their vulnerability in the workforce. According to the rationale of the SHEV, the social contract needs to be much simpler. If SHEV holders satisfy the modified criteria of their visa, and remain in need of Australia's protection, they should be granted permanent visas that best match their skills. SHEV holders should be encouraged to continue on the employment or study path they have begun, and not be required to disrupt their lives once again through taking on new employment and the added burdens of learning a new workplace culture and possibly relocating. A simple pathway to a permanent visa also means employers can employ SHEVs with a greater degree of confidence that they will be in Australia and available for permanent employment at the conclusion of the SHEV. It reduces pressure on SHEV holders and supportive employers to manufacture conditions of employment that satisfy the requirements for a permanent visa.

## VIII CONCLUSION

The SHEV visa provides a novel pathway for refugees to achieve permanent residency in Australia and thereby to attain the humanitarian protection they require. Although success in the labour market should not be a prerequisite for protection, a focus on employment pathways for refugees offers the prospect of improved settlement outcomes. For these positive outcomes to be realised, the SHEV needs to offer a more certain and realistic pathway to attaining a non-humanitarian visa.

Under current policy settings, SHEV holders have to overcome unreasonable barriers to satisfy the work and study requirements to be eligible to apply for a non-humanitarian visa. If the failure rate is high, as it almost certainly will be under current policy settings, the government is left with a continuing problem on its hands. Failed SHEVs will apply for further SHEVs or TPVs as most of them will still be in need of protection. If a refugee successfully applies for a further SHEV, they will have been vulnerable workers in the labour market for

up to 10 years. Their prospects of satisfying the requirements of a non-humanitarian visa are unlikely to have improved during this time.

There is good reason for the government to assist SHEV holders to fulfil the work and study requirements of the visa and to provide pathways to permanent settlement. The government gets a good news story, in line with its focus on economic growth, in the midst of its hard-line asylum seeker policy. SHEV holders get the protection they require, and the well-being associated with productive work. The Australian nation has a positive story of refugee protection to enhance its reputation as a bona fide contributor to the world refugee crisis, as well as recent refugees contributing to the community and the economy. Of course, once eligibility for a further non-humanitarian visa is reduced to satisfying the criteria of the SHEV, there is no distinction between offering a permanent visa via the economic, family or humanitarian streams. In other words, satisfaction of the SHEV criteria, as modified, leads to a permanent visa and permanent protection.

Humanitarian migrants are a unique class of migrant. They are not in Australia out of choice, but have fled their countries of origin in search of protection. Although Australia is under no obligation under the Refugee Convention to provide permanent protection, it is common practice to offer such protection. It is highly unsettling to have a protracted period of temporary protection. While protection is temporary, asylum seekers cannot reunite with family, cannot put down roots in a country, and therefore cannot begin a new life. If Australia is committed to only providing temporary protection to asylum seekers at first instance, the SHEV is an opportunity to provide a clear and realistic pathway to permanent protection. The policy settings of the SHEV should be designed with this objective in mind.