CFMEU SUBMISSION RE DISCUSSION PAPER ON CONSOLIDATION OF COMMONWEALTH ANTI-DISCRIMINATION LAWS

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1. Introduction

The Construction, Forestry, Mining and Energy Union of Australia, (CFMEU) welcomes the opportunity to make this submission to this important Review. The CFMEU consists of three Divisions namely the Mining and Energy Division, Forestry and Furnishing Products Division and the Construction and General Division. We are the major union in these industries and represent approximately 110,000 members.

2. Focus of submission

The CFMEU supports the consolidation of Commonwealth anti-discrimination laws and the rationale and principles outlined in the Discussion Paper, described as follows:

> The Government is conscious that anti-discrimination law has become too complex and it is important that people are able to easily understand their rights and obligations. In considering options for reform, the Government will keep the following principles in mind:
>
> - a reduction in complexity and inconsistency in regulation to make it easier for individuals and businesses to understand their rights and obligations under the legislation
> - no reduction in existing protections in federal anti-discrimination legislation
> - ensuring simple, cost-effective mechanisms for resolving complaints of discrimination, and
> - clarifying and enhancing protections where appropriate.
>
> The Government has committed to introducing new protections against sexual orientation and gender identity discrimination as part of this process. (AGD website)

The CFMEU welcomes this initiative and commends the Government for it.

Our union has a very firm commitment to strong anti-discrimination laws that meet the challenges of our changing society. A review of the present legislative regime and a consolidation of these laws into a single instrument are important steps to achieving that objective.

The specific focus of this CFMEU submission is the issue of discrimination in employment on the basis of visa status or residency status, ie permanent resident versus temporary resident status.

This issue is not addressed in the Discussion Paper on the consolidation of Commonwealth anti-discrimination laws.

3. CFMEU position

The CFMEU position is that neither Commonwealth nor State anti-discrimination laws should make unlawful certain discrimination in employment on the basis of visa status or residency status.

In particular, it should not be unlawful for an employer to discriminate in favour of Australian permanent residents over temporary visa holders (temporary residents) in redundancy or recruitment situations, or for training or promotion.

This means that in redundancy situations, it should be not be unlawful in terms of anti-discrimination laws) for employers to give preference to retaining in employment workers who are Australian residents over all temporary visa holders, with the single exception of New Zealand citizens in Australia on temporary visas.[1]

Likewise in recruitment/hiring situations, it should be not be unlawful in terms of anti-discrimination laws) for employers to give preference to hiring workers who are Australian residents over all temporary visa holders, with the single exception of New Zealand citizens in Australia on temporary visas.

Similarly, in respect of promotion or training opportunities provided for employees or other workers, it should be not be unlawful in terms of anti-discrimination laws for employers to give preference to workers who are Australian residents over all temporary visa holders, with the single exception of New Zealand citizens in Australia on temporary visas.

Current Commonwealth anti-discrimination laws

At the very least, there is a need to clarify whether Commonwealth anti-discrimination laws currently prohibit discrimination on the basis of visa status or residency status.

Our understanding is that the Commonwealth Racial Discrimination Act 1975 [RDA] may currently cover discrimination based on immigrant, visa or residency status, but this is uncertain.

The relevant section is s.9 of the *Race Discrimination Act 1975* (RD Act) which reads as follows:

> **9 Racial discrimination to be unlawful**
>
> (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on **race, colour, descent or national or ethnic origin** which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life. (emphasis added)

'Visa or residency status' is not expressly mentioned and our understanding is that 'visa or residency status' is not captured by 'race, colour or national or ethnic origin'.

On this basis, Commonwealth anti-discrimination laws currently do not prohibit discrimination on the basis of visa status or residency status.

In relation to 'national origin' in s 9 of the RD Act, the cases including D*e Silva* and *Macabenta*[2] draw a distinction between discrimination on the basis of *nationality* (which to some extent can be chosen

[1] NZ citizens have unrestricted work and residency rights in Australia, under the terms of the 1983 Australia-New Zealand Closer Economic Relations (CER) Trade Agreement and previous arrangements. This should be referenced in the consolidated anti-discrimination legislation.

[2] De Silva v Minister for Immigration (1998) 89 FCR 502; Macabenta v Minister of State for Immigration and Multicultural Affairs (1998) 90 FCR 202.

and is not necessarily fixed for all time) and *national origin* which is inherited and does not change. The current Act covers the latter but not the former.

That distinction supports the view that discrimination on the basis of *visa or residency status* is not captured by the current laws, because *visa or residency status* can similarly be changed or chosen.

On the other hand, we note that Australian Human Rights Commission website page titled "Work out your rights" implies that the RD Act does in fact cover this area since it states that *race* includes:

> colour, descent, national or ethnic origin, **immigrant status** and racial hatred (emphasis added)

In April 2010 the CFMEU met with Mr Graeme Innes AM, the Federal Disability and Race Discrimination Commissioner. His preliminary view was that discrimination based on visa or residency status conceivably fell within the definition of 'race' discrimination under the Commonwealth Act, if not directly then at least indirectly.

4. Reasons for our position

The CFMEU believes that Commonwealth anti-discrimination laws should recognise and be consistent with the principle that Australian resident workers (ie permanent residents and Australian citizens) have the primary right to Australian jobs.

The main considerations are:

- There has been a huge growth in the number of temporary visa-holders in Australia who are working, both lawfully and unlawfully – and numbers are likely to grow further in the future.

- Some employers (in their hiring and redundancy decisions) are prepared to discriminate against Australian resident workers in favour of temporary visa-holders, because the latter are seen by employers as more compliant and more willing to accept substandard wages and working conditions.

- The work rights attaching to temporary visas vary by visa subclass, but in all cases (except for New Zealand citizens) they are less than the work rights of Australian permanent residents which are unrestricted.

- The primary purpose of most temporary visas is usually not to perform work in Australia, but to undertake some other activity (eg study or a holiday) and work is a secondary or 'incidental' purpose and generally subject to specified restrictions.

- Even where the primary purpose of the temporary visa is to perform work in Australia (eg, as with the subclass 457 visa or Temporary Business Skilled visa), the Commonwealth Government has clearly stated that the intention is that these visas should only be granted when there are no suitably qualified Australian workers available to do the work – ie, that in hiring situations, employers should give preference to Australian workers over potential 457 visa workers.

  A very clear statement of this underlying principle was provided by the then Immigration Minister in 2010:

> The Rudd Government does not support any employer who seeks to use the temporary skilled migration program as a substitute for local labour.
>
> Temporary overseas workers on subclass 457 visas are only to be employed if skilled labour cannot be sourced locally.
>
> The Rudd Government recognises the need for industry to access skilled overseas labour where there are demonstrated skills shortages but it is important that the program complements domestic recruitment and is not used to replace local workers.
>
> Our priority is to provide training and job opportunities for Australians.
>
> A range of measures introduced by the Rudd Government in consultation with industry and unions last year ensures that temporary skilled overseas workers on subclass 457 visas are not employed ahead of local workers or used to undermine Australian wages and conditions. [3]

- It follows that in redundancy situations when there are both suitably qualified Australian workers available to do the work as well as 457 visa-holders in the same classifications, employers should give preference to retaining the Australian workers and the 457 visa-holders should go first.

- It is therefore unexceptional that Australian resident workers should have more rights to employment in Australia than temporary visa-holders.

Some comments follow on several of these issues.

Number of temporary visa-holders and likely growth

Since the introduction of the RD Act in 1975, there has been a huge growth in the number of temporary visa-holders in Australia, some with work rights and others with no work rights as determined under the *Migration Act 1958* and associated Regulations.[4]

In 2012, there are around one million persons in Australia on temporary visas with some work rights (DIAC data) plus several hundred thousand more persons on temporary visas with no work rights, some 50,000 of whom may be working unlawfully at any one time. [5]

- This represents close to 10% of the total Australian workforce, and an even higher proportion in some industries.

This growth in the size of a temporary migrant workforce (working legally or unlawfully) was not envisaged in 1975.

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[3] Senator Chris Evans, Minister for Immigration and Citizenship, 'Employers must put locals first', media release 2 March 2010.

[4] The Immigration Minister already 'discriminates' between various classes of temporary visas by attaching different work conditions to each visa subclass, including the condition of 'no work permitted' .

[5] Report of Review of Employer Sanctions Act 2007 (July 2011), by Stephen Howells (the Howells Review).

The sheer size of this workforce, together with their vulnerability to employer exploitation, and the willingness of some to accept substandard wages and conditions (often to secure a permanent visa) pose real issues in today's labour market where some employers are only too keen to exploit this situation.

Categories of temporary visa-holders or temporary residents

It is useful to distinguish 3 categories:

1. NZ citizens here on a temporary visa
2. 457 visa holders
3. Other temporary visa holders, eg Overseas student visa holders, Working Holiday Makers (WHVs or visa subclass 417).

New Zealand citizens are the only temporary visa-holders who enjoy the exact same residency and work rights as Australian permanent residents. These New Zealand citizens have unrestricted work rights and unrestricted rights to reside (stay) in Australia.

Some limited categories of 457 visa-holders can enter and work in Australia, without the need for 'labour market testing' or establishing that there are no Australian resident workers who can do the work, under international trade agreements; and these foreign nationals must be accorded 'national treatment'. The 1995 World Trade Organisation General Agreement on Trade in Services (WTO GATS) specifies these categories as intra-company transfers of executives or 'specialists' (persons with trade, technical or professional skills) of foreign (not domestic) firms in specified services industries who also meet other designated criteria such as 2 years employment with the foreign firm.[6]

Temporary visas (other than 457 visas) are not affected by the specific and limited international trade-related obligations implemented via the 457 visa, described in the preceding paragraph.

The size of the temporary visa-holder population in Australia is likely to grow, for several reasons. The growth in international trade in services is the main factor, since provision of these services (eg education and tourism) requires the presence in Australia of large and growing numbers of temporary visa-holders.

As well, successive Australian governments have given increased priority to employer-sponsored temporary skilled visa programs over permanent visas for independent (non-sponsored) migrants.

The CFMEU has a proud history of fighting for the workplace interests of all our members and for justice in our society, including the fair treatment of all vulnerable workers in the industries we

[6] Australia currently has no legally binding international trade obligation to waive 'labour market testing' and provide 'national treatment' for 457 visa-holders in general, only these specific categories of 'intra-company transfers' listed; plus 'Thai chefs', under the Thailand- Australia Free Trade Agreement (TAFTA).

cover. Temporary migrant workers in Australia including those on 457 visas have been a most vulnerable and exploited group of workers, especially those from developing countries.

Our union has played a leading role in fighting for and securing many more workplace rights and protections for the 80,000 temporary 457 visa workers in Australia, and other temporary migrant workers.[7] Without our efforts and those of others in the Australian union movement, these 457 migrant workers would not have today the benefits of the *Migration Legislation Amendment (Worker Protection) Act 2008*. This Act provides for the right to be paid the same as an Australian worker in the same workplace, and protection against employer threats of immediate deportation if 457 visa workers stand up for their workplace rights, among others.

Employer preference for temporary visa-holders over Australian workers

The reason why some employers have this preference were well-documented in the Deegan Review of the 457 visa program.[8]

Deegan found that many 457 visa workers (especially from developing countries) were more compliant and more willing to accept substandard wages and working conditions – especially when their ultimate goal was a permanent residence visa for Australia and they were banking on their employer sponsoring them for this visa.

In addition:

- a KPMG survey in August 2009 found that 75% of employers surveyed said they would retrench Australian workers before their 457 visa workers.[9]
- The CFMEU and other unions have provided Ministers with many specific examples of employers retrenching their Australian workers and retaining 457 visa workers – in some cases, even replacing the redundant Australian workers with 457 visa workers.

The CFMEU is also aware of numerous examples of overseas students on temporary visas:

- Working for low wages (eg $4/hour) and in some cases for no pay at all, in order to clock up the hours of 'work' or 'work experience' needed to obtain the qualification necessary for PR.
- Actually paying the employer for the job and working for no pay, for the same reason, ie to acquire the documentation needed to support the claim to a qualification and/or PR visa.

[7] For example, the CFMEU is currently undertaking a major project to raise reduce the risk of labour trafficking in our industries and to advocate for victims of labour trafficking; and the CFMEU's 2011 major report on sham contracting (*Race to the Bottom*, March 2011) drew attention to temporary migrant workers as a high-risk group for sham contracting exploitation, and recommended ways to combat the practice.

[8] Commissioner Barbara Deegan, *Report of the Visa Subclass 457 Integrity Review*, November 2008, DIAC.

[9] KPMG, 'Effects of the financial crisis on skilled migration under the 457 visa program', August 2009.

- Engaged in sham contracting arrangements, working with an ABN as an independent contractor when in fact and in law they were employees[10].

In the case of foreign nationals on WHVs (Working Holiday visas), current government policy is itself directly providing incentives to employers to employ WHVs ahead of young Australian workers. WHVs can qualify for a 'second year' WH visa by performing 3-months work in designated industries (eg agriculture, construction and mining) in regional areas – including by working as an 'independent contractor' or by performing 'unpaid' work in these industries!

The DIAC website was boasting in August 2011 that:

> "Working Holiday visa holders who conduct construction work in eligible regional areas of Australia following disasters can count the work as specified work. This work may be paid or ***unpaid work***." (emphasis added)

There are around 120,000 WHVs currently in Australia, and around 25,000 second year Working Holiday visas are granted each year, entitling the visa-holder to stay and work in Australia for a further year (DIAC data).

These practices all provide multiple incentives for employers to give preference to temporary visa workers over Australian workers – and the regulatory authorities are overwhelmed by the sheer scale of the temporary migrant workforce and the myriad abuses.

Purpose of temporary visas and work rights

New Zealand citizens are the only temporary visa-holders who enjoy the exact same residency and work rights as Australian permanent residents. These New Zealand citizens have unrestricted work rights and unrestricted rights to reside (stay) in Australia.

All other temporary visa-holders have restrictions on the amount of time they can lawfully stay in Australia and the amount or type of work they are permitted to undertake in Australia.

For example, two of the main temporary visas are those for overseas students (various visa subclasses) and Working Holiday Makers (WHV or visa subclass 417).

In both cases, the primary purpose of the visa is 'study' and 'holiday' in Australia respectively.

The work rights attached to the visa reflect this purpose. In the case of student visas, visa-holders are permitted to work for no more than 40 hours per fortnight during term[11] but unrestricted hours outside of term.

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[10] Examples of the first two abuses were reported by VET instructors of international students in Birrell, Healy and Kinnaird, 'Cooks galore and hairdressers aplenty', *People and Place*, Vol 15, no 1, 2007, pp30-44; and 'The cooking-immigration nexus', *People and Place*, Vol.17, no.1, 2009, pp63-75. For sham contracting, see above, this section.

[11] Previously the restriction was 20 hours per week during term. The change to 40 hours per fortnight was announced in 2011 following the Knight Review.

In the case of WHVs, work is lawful for the entire duration of the visa but the maximum period of stay with one employer is limited to 6 months.

Our argument is that where the 'primary purpose' of these temporary visas is something other than work, eg study or holiday and work rights have been restricted accordingly, it is unexceptional to treat such persons differently (in anti-discrimination law terms) to Australian permanent residents who enjoy unrestricted work rights and who need work to earn a living and to support their family, in many cases.

It is equally unexceptional and logically consistent to permit employers to discriminate in favour of of Australian residents with unrestricted work rights, over such temporary visa-holders, in hiring and redundancy situations, among others.

In relation to recruitment, we also note that under the *Public Service Act 1999*, Australian citizens and permanent residents can be treated preferentially in terms of recruitment to the Australian Public Service.

Our present submission asks no more (in relation to recruitment) than that Australian citizens and permanent residents in private sector employment should have a corresponding right to preferential treatment as that which the Commonwealth has legislated in its own employment area.

ENDS