CFMEU

NATIONAL

Second Submission

to the

Productivity Commission

Research Study into Geographic Labour Mobility

By email: labour.mobility@pc.gov.au

7 February 2014

Dave Noonan
Assistant National Secretary
Construction, Forestry, Mining & Energy Union
Level 9, 215-217 Clarence Street SYDNEY
P: +612 8524 5800 F: +612 8524 5801

1. Introduction

The Construction, Forestry, Mining and Energy Union (CFMEU) welcomes the opportunity to make a submission responding to the Draft report on this Research Study. The CFMEU consists of three Divisions, namely the Mining and Energy Division, the 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 across Australia.

The focus of this submission is the Draft report's finding and comments on temporary migration and geographic mobility.

2. The Draft Report's finding on temporary migration

There is one draft finding and various comments on the issue in the Draft report.

> DRAFT FINDING 11.1
>
> Geographic labour mobility has been an important mechanism for adjusting to the demographic, structural and technological forces shaping the Australian economy. It has been assisted by the considerable flexibility shown by employers and employees in overcoming the effects of impediments to mobility. **The increase in long-distance commuting and temporary immigration has been particularly important, and should not be impeded by excessive regulation**. PC report, p17, Draft recommendations and findings.
>
> *Selected other comments*
>
> Temporary migration has assisted in addressing skills shortages in hard-to-fill regions and occupations. In the health sector, the contribution of international migration is substantial. The mining industry contends that it would not have been able to respond to increased demand without temporary skilled migrants. On the other hand, unions have warned that increased use of temporary migrants can erode local investment in skills and education. *Temporary migration programs are subject to a range of checks and balances, such as capping, occupational restrictions and labour market testing. Governments should ensure the benefits of temporary migration are maximised by maintaining flexible arrangements and avoiding excessive regulatory burden.* PC report, p19, Overview (emphasis added).
>
> Temporary migration has been an important source of labour, particularly in hard-to-staff regions and occupations affected by skills shortages. The benefits of temporary migration should be maximised by maintaining flexible arrangements and avoiding excessive regulatory burden. (PC Report, p206)

3. CFMEU response

The report's description of Australia's temporary migration programs contains a number of factual errors. For example, in Table C.3 Temporary entrants in Australia, 30 September 2013 (sourced to the Department of Immigration DIAC):

- The table states that Bridging visa holders (112,000 in September 2013) have 'No' work rights. In fact, Bridging visa holders generally have the same work rights as provided in their last substantive visa, eg a former Overseas Student who moves on to a Bridging Visa has unrestricted work rights while on the BV, ie the same work rights as applied to the Overseas Student visa holder during vacation time outside of study term.

- The table states that Working Holiday maker visa holders (nearly 180,000 at 31 December 2013) 'can work for a maximum of six months with one employer' (footnote e). This is a misleading representation of the true extent of the work rights attached to these visas, which in practice are far more extensive than this – including in sectors eligible for work qualifying for a second year WHV, eg agriculture and construction.

    - WHV-holders as *an employee of a labour hire company or contractor* may work for more than 6 months (for the same entity), but may not provide services to the same 'end user' for more than 6 months – see Attachment A.

    - WHV-holders working as *'self-employed' or ABN workers* 'may provide services to the end user and others for longer than 6 months without breaching condition 8547' provided 'the end user is not their sole employer' - see Attachment A.

The Draft report also states (as shown above) that:

> *Temporary migration programs are subject to a range of checks and balances, such as capping, occupational restrictions and labour market testing. Governments should ensure the benefits of temporary migration are maximised by maintaining flexible arrangements and avoiding excessive regulatory burden.* PC report, p19, Overview (emphasis added).

The specific 'checks and balances' listed in this statement are not correct in relation to Australia's main temporary visa programs. As a result, the general claim regarding the 'checks and balances' overstates the true situation.

- There are no caps on the number of visas that can be granted in the 457 visa program or the Working Holiday 417 visa program (the 'Work and Holiday' visa subclass 462 does have caps on all countries except the USA, but the uncapped USA program supplies the vast majority of all 462 visa holders in Australia).

- There are no caps on any other *employer-sponsored* temporary visa programs, such as the 402 'Training and Research' visa.

- There are no caps on *overseas student visas* with work rights, nor on any of the various *post-study visas* which have unrestricted work rights of various durations (eg the 485 or 'Graduate Skilled' visa).

- There are very few '*occupational restrictions'* in the 457 'skilled' visa program which allows employers to sponsor temporary visa holders in nearly all 'skilled' occupations in the Australian economy, regardless of whether the occupations are in national or regional 'shortage'[1] – and regardless of whether qualified Australian workers are available to do the jobs.

- Even where occupational restrictions apply in the 457 visa program, the Department of Immigration lacks the expertise and processes (eg referral to appropriate government agency) to apply these restrictions competently.

    - For example, in July 2013 the Department approved 457 visas for nearly 20 Hungarian workers nominated as 'Mechanical Engineering Technicians'. In fact, none were qualified or had worked in this occupation previously, nor did they in Australia – where they were put to work as semi-skilled riggers on a Sydney construction site.

    - In June 2011, a 28-year old Irishman on a 457 visa was killed doing scaffolding work in WA, his 457 visa was granted for work as a 'Project administrator', then the largest single occupation in the 457 visa program with over 2,000 visa-holders in Australia.

- There are no *occupational restrictions* whatsoever on the type of work that can be done in Australia by WHVs, 485 visa holders, holders of Bridging Visas and most other temporary visas.

As to Labour Market Testing (LMT), there is no LMT 'obligation' in any significant temporary visa program except notionally for the 457 visa program (discussed below).

The fact is that employers can and do employ Working Holiday Visa holders, Overseas students and former Overseas Students (eg 485 visa holders) in preference to qualified and suitable Australian workers, with no legal obligation to undertake LMT – that is, to demonstrate that no Australian citizen or permanent resident was available to do the work before engaging the temporary visa holder.

As to LMT in the 457 visa program, the system of so-called LMT implemented from 23 November 2013 has been described by the CFMEU as nothing more than 'a cruel hoax' on Australian workers especially young people.

In the first place, the LMT 'obligation' will apply to only around 30% of all 457 visa nominations.[2]

Around 70% of the 70,000 applications for 457 visas expected over the next 12 months will be LMT-exempt on grounds of skill level of occupation (all skill level 1 and 2 occupations except nursing and engineering have been made LMT-exempt); or LMT-exempt due to claimed coverage by international trade agreements (as determined by the Assistant Minister for Immigration and Border Protection).

[1] Number of skilled occupations on the 457-eligible list is over 600, compared to less than 200 on the Skilled Occupational List for permanent skilled migration.

[2] CFMEU estimates confirmed by DIBP officials at Migration Program Consultations, Melbourne, 29 November 2013.

Even in the minority of cases where 457 LMT is required, the so-called 'regulatory burden' is virtually non-existent – as are the protections for Australian workers looking for work.

- Employers have no obligation even to advertise jobs for which they nominate foreign nationals for 457 visas – 'other recruitment efforts' (unspecified) will suffice, according to FAQs on the Department's website.[3]

- Job ads can be put on Facebook or buried on obscure company websites, for only a few minutes, then taken down. There is no minimum advertising time (the CFMEU proposed 28 days).

- The so-called 'job ads' can be 'placed' any time in the last 12 months. This means employers can use job ads placed in February 2013 to justify their bid for 457 visa workers in February 2014 – regardless of the number of Australian workers who become available or unemployed in that time.

- Employers have no obligation to keep any records of the number of Australian applicants, the number who got jobs and those who didn't, and the reasons why the Australian candidates missed out while temporary foreign workers did not. The Department simply 'encourages' them to do so.

- Employers simply have to 'declare' this information to the Immigration Department and that's the end of it. They have no obligation to prove they made good faith efforts to employ Australians first or keep records of any job interviews.

The facts above indicate that the 457 visa LMT 'obligation' can in no way be described as '*excessive regulatory burden'*.

It is more accurately characterised as ineffective and inadequate regulation that manifestly fails to achieve its legislative objective, namely to ensure that employers show that no suitably qualified and experienced Australian residents are available, before 457 visas are approved for foreign nationals.

The specific 'checks and balances' (which the Draft report describes) in the temporary migration programs in fact either do not exist or in practice provide very little protection for Australian workers, especially young people who are particularly affected by these programs.

A second criticism of the Draft report's treatment of temporary migration programs is that it gives undue weight to the claimed 'benefits' of these programs, and largely ignores the costs of the programs.

While the report acknowledges union concerns that 'increased use of temporary migrants can erode local investment in skills and education', a key concern is job losses – ie, that these programs (especially employer-sponsored visas) substitute temporary visa workers for Australian workers (especially young people), and drive down wages and conditions in general and in particular sectors.

This and other[4] costs of temporary migration do not appear to be considered in the report. The final report should attempt to weigh up the claimed benefits of these programs against their costs, including those described in the CFMEU's first submission.

[3] See http://www.immi.gov.au/faqs/Pages/Do-I-have-to-conduct-paid-advertising-to-meet-the-labour-market-testing-evidence-requirement-for-subclass-457.aspx

Additional regulation needed in temporary migration

In the 457 visa program, the CFMEU believes two key additions are needed to remedy the major deficiencies:

- Implementing a genuine Labour Market Testing (LMT) obligation which actually requires employers to show they were unable to find a suitably qualified and experienced Australian worker, before 457 visas are approved; and extending this beyond the 30% of the 457 program currently subject to the Clayton's LMT introduced by this government.

- Requiring employers of 457 visa tradespersons to train, or contribute to training, Australian apprentices. At 30 September 2013, there were 23,000 457 visa-holders in Skill Level 3 occupations (mainly trades) in Australia working for employers who had no obligation to train a single Australian apprentice. These employers should be training, or helping to train, around 5,700 Australian apprentices based on a good practice ratio of 25% apprentices: tradespersons.

In the Working Holiday visa program:

- Establishing annual caps on the number of WHVs to be granted, based on the projected labour market outlook for young Australians and minimising adverse impacts on them.

- Reviewing the work rights attached to WHVs, to ensure the program retains its primary purpose as a holiday program in which work is 'incidental'.

ENDS

[4] For example, tax revenue lost through WHV holders working as ABN workers for labour hire companies or others when they are actually employees and the employer evades PAYG tax (sham contracting).

ATTACHMENT A

EXTRACT FROM DIBP Procedures Advice Manual (PAM) - Schedule 8 – Overview of Condition 8547

- **2.2 Meaning of employer and employment**

For the purpose of condition 8547, the employer is the business for which the visa holder is working directly, that is, the end user. Consequently, a 417 holder may be employed by the same labour hire company or contractor for more than 6 months, but may not provide services to the same end user for more than 6 months. A 417 holder may be employed by a state or territory Department of Education or Health for more than 6 months, but may not provide services to the same school or health care facility for more than 6 months.

Visa holders cannot stay with any end user (in the same or a different position) beyond 6 months by using different employment agencies, business affiliates or sub-contracting arrangements.

Where two businesses are closely related (for example, parent company and subsidiary), they may be considered to be the same employer. Generally, separate businesses (for example, with different ABNs) may be considered different employers for the purpose of condition 8547.

For the purpose of condition 8547, workplace training is considered to constitute employment, rather than study or training.

Self employment

Self-employed visa holders may not solely provide services to the same end user for longer than 6 months as they would be considered to be in an employment relationship. If the end user is not their sole employer, the visa holder may provide services to the end user and others for longer than 6 months without breaching condition 8547.

If the visa holder's work is integrated into the end user's business as opposed to the visa holder being in business in their own right, the end user may be considered their employer (and therefore the visa holder is limited to 6 months employment).

A self-employed visa holder's work would be integrated into the end user's business if the visa holder created their own business specifically to provide services solely to that end user.

ENDS
7 February 2014