



Unions NSW Submission

Productivity Commission Workplace Relations Framework

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1. Unions NSW

2. Unions NSW welcomes the opportunity to make a submission to the Australian Law Reform Commission's (ALRC) Inquiry into Traditional Rights and Freedoms.
3. Unions NSW is the peak body for trade unions and union members in NSW and has been fighting for the rights of working people in Australia since 1871. It has over 65 affiliated unions and Trades and Labour Councils representing approximately 600,000 workers across the State. Affiliated unions cover the spectrum of the workforce and in both the public and private sectors. Unions NSW is a not-for-profit organisation funded by its affiliates.

4. Migrant Workers

5. Unions NSW strongly supports Australia's migration and refugee resettlement programs and welcomes temporary visitors (including overseas students) who also need to work to support themselves while pursuing their studies or holidaying in Australia.
6. UnionsNSW also supports employers' capacity to apply to 'import' particular skills where it can be properly demonstrated that the required skills are not available in the Australian labour market.
7. However, the introduction of various subclasses of visa has slowly changed the nature of Australia's migration program. While permanent settlement remains a (welcome) part of our expanding workforce and citizenry, there is an increasing trend to issue temporary visas (and visas of longer duration) which appear to be turning 'temporary visitors' to Australia into a 'reserve army' of vulnerable and low paid workers, who lack the most rudimentary human right and rights of citizenship taken for granted in this country since Federation.
8. This submission is concerned chiefly with the visa classes that permit temporary work in Australia which include the following:

- a. 417 Working Holiday Visa
 - b. 420 Entertainment Visa
 - c. 421 Sport Visa
 - d. 423 Media and Film Staff Visa
 - e. 426 Domestic Workers (Diplomatic/consular) Visa
 - f. 427 Domestic Workers (Overseas Executive) Visa
 - g. Student visa
 - h. 457 Temporary Work (Long Stay)
9. All these visas (with some variations) restrict the right of the visiting workers to leave the employ of the sponsoring employer¹. In many circumstances, employers are required to hold the visas of the 'sponsored' worker (this includes workers employed in accordance with 457 visas).
10. While it is desirable that entry for a temporary period to engage in work for a specific employer, such as that permitted by holders of 457 visas, not be extended to permit persons to access all areas of Australia's labour market (since the visas are aimed at skills not able to be sourced in Australia), it is not in accordance with basic norms of human rights that any employee be 'tied' often for long periods, to one employer, with no capacity to even exercise the option of 'exit' as a means of relieving an otherwise intolerable situation.
11. Restrictions on the rights of some visa holders to leave the employ of their sponsoring employer reinforce the reductions in basic human rights of these types of employment categories.

12. Visa and Personal Documentation

13. In the case of Domestic workers (sponsored/employed by embassies and Consulates in Australia and visiting business Executives), the problems associated with being 'tied' to one employer are particularly acute. These workers are often women, and may be prevented by language difficulties and unlawful restrictions on their movements from being able to access

¹ This does not apply to overseas students who are permitted to work up to 20 hours a week whilst in Australia

not only basic workplace rights, but protection from unlawful treatment including assault. It is common for their passports and similar documentation to be held by the employer, rendering any capacity to either complain or leave a potentially abusive employment situation, moot.

14. However these disabilities also apply to visiting workers employed pursuant other visa categories, which are also driven by the nature of employers being 'tied' to their employer with limited options of 'exit' which allow them to remain in Australia. Further for some employees, their sponsoring employer has compulsorily acquired their visa and passport, preventing them from leaving their employment or the country.

Recommendation One

No sponsoring employer should be permitted to hold the passports and/or visas or any other residency documentation of their employees. Assurance of compliance with the terms of temporary working and other visas should rest with the properly constituted authorities and not the sponsoring employer/business. All temporary residency documentation and domiciliary papers should remain the property of the temporary resident him or herself, and any demand for its surrender except by an officer of Commonwealth authorised to do so, should be strictly prohibited.

Recommendation Two

A financial penalty should apply to employers who compulsorily acquire the passports, visas or personal documentation of their sponsored employees. Information about this penalty regime should be widely publicised and circulated, and upon entry to Australia all such workers should be provided with information concerning this right.

15. Sub-contracting arrangements

16. Some of the worst abuses occur as a result of the establishment of 'pyramid' or sub-contracting arrangements which obscure final responsibility for the rights and conditions of

such workers. In turn the ability for these workers to seek recourse for any ensuing underpayment or mistreatment in the workforce become a complex task which many temporary workers may choose not pursue as a result.

17. It is the view of Unions NSW that such employment arrangements are particularly unsuitable in relation to vulnerable workers.

Recommendation Three

The head contractors/final customers of supply chains employing workers on temporary work visas should be held legally accountable for illegal and abusive treatment of workers in the supply chains of which they are the final customer/client.

18. International Students

19. Restrictions on the number of hours able to be worked by overseas students has appeared to open up students to exploitation and coercion towards engaging in illegal arrangements by breaking the work restrictions imposed by their visa. This has most recently been exposed through the widespread practice of 7/11 franchises who insist on international students working more than their legally restricted 20 hours a week. It appears 7/11 and other employers are then able to threaten students with deportation and cessation of studies if they complain of employment abuse.
20. It is the view of Unions NSW that while restrictions on the hours of work of overseas students appear reasonable on its face, these restrictions are used by some employers as a means to coerce students into working additional hours for below award wages. Further, no such restrictions apply to permanent residents who are studying.

Recommendation Four

The purposes of the overseas student program would be better realised if the restrictions on paid employment applying to international students while studying were removed. Sanctions for failing to complete the nominated course in the time frame permitted by the terms of the study visa would be the preferred form of control over the terms and conditions of these types of visas.

21. The trend towards a growing army of temporary and residentially insecure workers raises serious questions about the nature of citizenship in this country and raises the spectre of growing dependence of Australian business (and the society as a whole) on a class of labour which has no citizenship rights, including most importantly, freedom of movement and the franchise, as well as other fundamental rights such as collective bargaining rights, freedom to complain about arbitrary and oppressive conditions and the right to a safe workplace.
22. Unions NSW acknowledges recent abuses of migrant workers which have been highly publicised by media reports and trade unions and argues such behaviour is becoming systemic and threatens to undermine the democratic norms that underpin Australia's polity in general, and its labour market regulatory regime in particular.

23. Internships

24. Unions NSW is concerned by the potential negative impacts of unpaid internships, including
- a. Unpaid internships replacing and undercutting the paid workforce;
 - b. Restricting young people's entry into particular industries and sectors to only those who can afford to work for free;
 - c. Exploitation of interns who are performing what is effectively defined as paid work;
 - d. Limited access to recourse for unpaid interns who wish to seek unpaid wages for work performed.
25. In recent years, internships and even volunteer work have become a necessary gateway to paid work in certain industries and sectors. This requirement has locked large numbers of

young people out of jobs in these areas as they cannot afford to work for free. Further, many young people undertaking exploitative unpaid internships in these industries and sectors are often reluctant to leave their internship or speak out about the exploitation as they fear damage to their future career prospects.

26. It is on this basis that Unions NSW disagrees with the Productivity Commissions assertion that interns' experience of exploitation is mitigated by the fact there is no wage binding the intern to 'employment'. While there are no wages being paid, interns may continue to feel 'tied' to the internship as it is the only gateway to employment. A fact which Unions NSW believes many employers are aware of and seek to exploit.

27. Unions NSW agrees with the Productivity Commission that there is a lack of clarity surrounding the line between lawful and unlawful internships and as such believes there is room for Fair Work Australia to play a greater role in regulating unpaid internships and providing appropriate mechanisms for young people seeking recourse against exploitative internships.

28. The vague definitions of unlawful internships provided by the Fair Work Act provide employers with an opportunity to exploit unpaid interns.

29. Unions NSW is concerned that much of the Fair Work Ombudsman's response to unpaid internships has been reliant on anecdotal evidence and qualitative research. There is a need for thorough quantitative data on the issue of internships in order for appropriate policy decisions to be made.

Recommendation Five

Further research into the prevalence and nature of internships be undertaken, with a focus on quantitative data.

30. Unions NSW understands lawful internships to be those that provide a genuine work experience opportunity where the intern benefits by gaining skills and knowledge. In these instances, employers should not engage interns in place of paid workers or as a means of

gaining unpaid labour. Unions NSW has produced a *Code of Practice* for internships which should be used as a guide in determining if an intern is gaining a positive learning experience out of an internship. This code has been attached to this submission as Appendix A.

Access to Arbitration

31. The *Fair Work Act 2009* ('the Act') restricts access to arbitration of workplace disputes except in very limited circumstances.
32. However for the most part, including where matters arise under the NES, a Modern Award, an Agreement or other written agreement, the Fair Work Commission (the Commission) may only deal with disputes to the extent that the industrial instrument under which the dispute arose provides terms for the settlement of disputes by the Commission. In addition, the Commission may only arbitrate where the parties to the dispute have agreed.
33. The only exception to the provision of arbitration by mutual agreement (consent arbitration), is where an industrial instrument expressly permits the exercise of FWCs arbitral powers upon the application of one of the parties to the Agreement.
34. This type of provision is typically only available in Collective Agreements where the industrial parties have agreed to its inclusion. It is clear that the ability to agree to such a provision reflects a balance of industrial forces which acts to protect the parties to the Agreement from both arbitrary acts which breach the Agreement as well as from inadvertent matters arising during the life of the Agreement that were not contemplated during the making of the Agreement, but which could, if not corrected, alter the terms of the Agreement during its life.
35. New situations and issues arise constantly during the life of any industrial instrument, as business needs and employee needs change and develop over its life. Access to unilateral arbitration ensures these matters can be dealt with in an impartial manner. In industrial arrangements where workers do not have access to arbitration, Unions NSW is concerned employers seek to treat any agreement made between themselves and their employees as

an 'arrangement' whose terms and stipulations may be interpreted in ways which favour the exercise of their own views.

36. The current restrictions on access to arbitration impact the less organised and most vulnerable members of the workforce in a disproportionate manner, namely employees who do not have access to arbitration in their Agreements, and Award reliant workers who are not covered by an Agreement. The restricted access to arbitration as such acts to entrench and exacerbate existing labour market inequalities.

37. Unions NSW believes a fair and productive approach would be the provision to unilateral arbitration to all workers.

Recommendation Six

All employees should be provided with explicit access to unilateral arbitration over matters which arise during the term of any Award or Agreement, regardless of whether or not the parties were able to agree to this provisions during the making of the Award or Agreement.

38. Access to unilateral arbitration in disputes that arise during the term of an Agreement (or an Award) protects both parties, but particularly in our submission, those employees who are most subject to arbitrary and unilateral treatment at work.

39. Expanding access to unilateral arbitration requires legislative change to the *Fair Work Act*. As outlined above, the *Act* currently restricts access to arbitration to situations where both parties have agreed that the Fair Work Commission may arbitrate². As such, it is not currently possible to expand access to arbitration through the Award review process.

² *Fair Work Act 2009* (Cth) s. 739(4)

APPENDIX A

Unpaid Work Code of Practice Unions NSW

The Code of Practice outlined below should apply to lawful unpaid work, including:

- Work placements;
- Internships;
- School work experience;
- Work for the dole.

In the Code of Practice, lawful unpaid work opportunities are collectively referred to as internships. The code of practice should also apply to volunteers. In the case of volunteer work, 'learning outcomes' may not apply.

Organisational capacity and planning

Before advertising for an internship or volunteer work, organisations must consider their capacity to provide an intern/volunteer with a positive learning experience. This will involve initial planning on what the day-to-day activities of the internship would look like and what type of work the intern would be exposed to. The organisation should be confident that an intern will benefit more than the organisation from the internship.

A planning checklist for an organisation should include:

- There is an employee who can supervise the intern and organise activities;
- There are a range of learning activities and meaningful tasks that the intern can take part in;
- The intern is not being used to complete what would otherwise be considered paid work;
- There is a clear list of learning outcomes that the internship should achieve;
- An employee will be assigned to discuss and debrief workplace activities and ensure that learning outcomes are being achieved;
- The intern will benefit more from the internship than the organisation.

Induction

When an intern begins their internship it is important that they are properly 'inducted' into the workplace. This induction might look similar to that of a paid employee. The induction should include:

- Introduction to work colleagues/team. This should also include who the intern's direct report is and who their point of contact is;
- Any relevant safety inductions. This should include information about emergency exits, and who the first aid officers and fire wardens are;
- An overview of their rights and obligations under WHS legislation (including bullying and harassment);

- An overview of what learning outcomes they should expect to achieve;
- Information about how to claim re-imbursements or allowances, if applicable;
- An explanation of the dispute resolution process. This should include how and to who the intern can make complaints and the process undertaken to ensure they are resolved;
- Information on any other relevant staff policies or procedures.

Dignity and respect

As with all workers, interns should be treated with dignity and respect in the workplace.

For many young people, an internship may be their first experience of paid work or a professional working environment. Organisations must take this into consideration when introducing an intern into their workplace and take extra care to ensure they feel included and respected in their workplace.

All anti-bullying laws and the rights and regulations that accompany them apply to all interns.

Interns should not be used to replace paid workers in the workplace. They should also not be required to perform work of a productive nature. Interns may be asked to perform work; however this should always be in order to develop learning outcomes and should not be used by employers as 'unpaid labour'. As a rule, internship work should always be meaningful.

Clear learning outcomes

Organisations should prioritise the learning opportunities and outcomes of interns. In preparing for an intern, the organisation should consider what learning outcomes they are able to offer an intern. Learning outcomes should be discussed with the intern when they begin. The intern and the organisation should be able to agree on all the proposed outcomes and assess whether they are achievable. The intern should be given the opportunity to add their own learning outcomes.

During the internship the intern and the employee responsible for the intern should have a discussion about the outcomes. They should assess whether the outcomes are being achieved, and if they aren't, how this can be resolved. At this stage there should also be the opportunity to include more learning outcomes.

Learning outcomes may include:

- Learning how to apply academic learning and knowledge into the work environment;
- Learning what technical skills and knowledge are required to work in a certain industry or profession;
- Developing interpersonal and communication skills in a workplace environment;
- Learning skills that are very specific to a certain industry, profession or workplace (for example, how to use a particular computer program).

Support in the workplace

Organisations should appoint an employee in the workplace who will act as a 'mentor' or 'point person' for the intern. The role of this employee should be to:

- Be a first point of contact for the intern;
- Help plan activities for the intern;
- Act as a support in the workplace for any questions the intern may have;
- Discuss learning outcomes with the intern and how they can be achieved;
- Assist the intern with any workplace grievance they may have;
- Conduct debrief activities with the intern.