CFMEU SUBMISSION TO SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Inquiry re: Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements

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May 2013

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Executive summary

The key recommendations of the CFMEU submission are:

Labour market testing (LMT)

- Effective labour market testing (LMT) should be legislated including a right of appeal for Australian workers assessed by employers as not suitable for the positions.

Redundancy preference

- Employers should have a 457 sponsor obligation to give preference to retaining the Australian workers and the 457 visa-holders in the same occupations should go first.
- As well, a new 457 visa condition should be included which clearly and explicitly states that one of the conditions attaching to the 457 visa is that the visa-holder has secondary rights relative to Australian resident workers in the same classifications in redundancy situations.

457 training obligations

- The current 457 training benchmarks are completely ineffective in securing sponsor training of Australian workers in the specific occupations for which 457 visas are granted.
- In the skilled trades occupations, the primary objective of 457 training requirements should be to increase training through trade apprenticeships and graduate cadetships in the specific occupations allegedly in short supply, ie the occupations of 457 visa workers approved on the basis that no qualified Australian workers are available;

Enhanced rights and protections for 457 visa workers

- The *Fair Entitlements Guarantee Act 2012* (FEGS) needs to be amended to provide that the holder of a subclass 457 visa is eligible for an advance and assistance under the Act.

The Commonwealth should, in relation to workers compensation benefits:

- Amend its own Comcare legislation so that injured subclass 457 visa holders are able to retain benefits when they leave Australia and return home.
- Seek agreement of States/Territories to ensure Workers' compensation legislation is amended so that injured subclass 457 visa holders are able to retain benefits when they leave Australia and return home.
- DIAC should be directed to give a much higher priority to processing PR visa applications from 457 primary visa holders; and to adopt the same or similar performance target for processing these visas as it has established for 457 visa applications, ie 10 days.
- The DIAC discretionary power to cancel RSMS 'permanent residency' visas (used by 457 visa workers) - on the ground that the RSMS visa-holder did not "remain employed in the nominated position in the regional area for at least two years" - should be removed.

1. Introduction

The Construction, Forestry, Mining and Energy Union, (CFMEU) welcomes the opportunity to make this submission to this important Inquiry. 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.

The CFMEU takes pride in its migrant membership and welcomes migrants to our industry. Our union and has a proud history of fighting for the workplace rights of all our members including the fair treatment of vulnerable migrant workers in the industries we cover.

The CFMEU's position is encapsulated in this June 2012 Resolution on Immigration & Temporary Overseas Workers from our Construction and General Divisional Executive:

> We reaffirm our historical stance against all forms of racism and sectarianism.
>
> We support appropriate skilled migration to this Country, in particular through permanent migration schemes which do not bind workers to individual employers.
>
> The union makes no apology for advocating the principle that employers should be compelled to offer jobs to Australian citizens and residents, and to demonstrate that no qualified Australian workers are available before seeking temporary overseas workers.[1]

1.1 The primary rights of Australian workers to Australian jobs

There has been much hysterical commentary about the Prime Minister's recent statement that the Government wanted to "put Aussie workers first" for Australian jobs in the 457 visa program.

The fact is that this fundamental principle underpins the 457 visa program, is ostensibly endorsed by all major Australian political parties and is strongly supported by the Australian community.

A clear statement of this principle was provided by the then Immigration Minister in the Labor Government 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.[2]

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[1] CFMEU Construction and General Division, *Resolution on Immigration & Temporary Overseas Workers*, Divisional Executive Meeting 14-15 June, 2012.
http://www.cfmeu.asn.au/sites/default/files/downloads/nat/reports/resolution-guest-labour.pdf

This reflects the ALP National Platform which explicitly recognises 'the primary right of Australian workers to Australian jobs'. Para 66 in Chapter 2 of the Platform commits to " ...a skilled migration program that -

- has the necessary tests and checks, and resources to ensure the integrity of the system and recognise the primary right of Australian workers to Australian jobs
- is underpinned by rigorous safeguards to ensure that employers have made all possible efforts to fill positions locally in order to protect the primary rights of Australian workers to Australian jobs and ensure that migrants are not filling the jobs that Australians could be undertaking."

The Coalition also claims to support this principle. Opposition Leader Mr Abbott said in April 2012 regarding 457 visas:

> Provided they are paid the same wages and provided there aren't Australians who could readily fill particular jobs, businesses should be able to bring in the workers they need to keep growing and to create more local jobs.[3] (emphasis added)

The Australian community strongly supports this principle in opinion polls. For example:

- A November 2012 opinion survey commissioned by the CFMEU found that **80%** of Australians agreed that mining companies should have to prove that they have thoroughly searched for Australian workers before being permitted to import temporary foreign workers. This rose to **89%** in March 2013 when the survey was repeated. [4]

Our own focus group research shows the strength of this belief in the Australian community, and that it applies not just to mining companies but across the board, to all industries

The fundamental principle that temporary foreign workers should be admitted only when Australian are not available is one recognised and supported by Ross Garnaut in his 1989 landmark report:

> There will continue to be pressure from China and the Republic of Korea for Australia to accept temporary entry for labourers and skilled workers on, for example, joint venture developments. *Australia's approach has been to welcome migrants on a non-discriminatory basis but to refuse entry to guest workers unless they possess an important skill that is not available in Australia. This approach*

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

[3] Tony Abbott, Landmark Speech entitled '*The Coalition's Plan For More Secure Borders',* 27 April 2012.

[4] See CFMEU Media Releases, '89% of Australians believe mining companies should search for Aussie workers before using 457 visas' 14 April 2013 - http://www.cfmeu.net.au/news/89-of-australians-believe-mining-companies-should-search-for-aussie-workers-before-using-457-vi ; and '4 in 5 say mining companies should employ locals first', 11 December 2012. http://www.cfmeu.asn.au/news/4-in-5-say-mining-companies-should-employ-locals-first

> *has deep roots in Australian labour and immigration policy. In a country receiving migrants from diverse sources, it is important to the maintenance of national coherence and identity. It is defensible in principle and should be maintained*.[5] (emphasis added)

The CFMEU considers that Garnaut's reasoning and recommendations are even more relevant nearly 25 years on in 2013, and for the coming decades.

This is because Australia's future economic prosperity will depend even more on the sustainable growth of our international education and tourism industries, and other international services. These all require the presence in Australia of a growing number of temporary residents.

Growth in all these sectors will be threatened, if the Australian community does not have confidence that our temporary skilled visa policies are adequately protecting the primary rights of Australian workers to skilled jobs in Australia.

The 457 visa program is not doing this under current policy settings.

Finally, for those troubled by the principle that Australian workers have primary rights to Australian jobs, it is worth noting that:

- Australian law requires that only Australian citizens can stand for and be employed as members of the Commonwealth Parliament; and 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.

The preferential treatment of Australian citizens and permanent residents in the 457 visa program broadly reflects that which the Commonwealth has legislated in its own employment area.

2. Focus of submission

The ACTU submission to this Inquiry covers many issues of concern to our union. The following highlights our main priorities only, given this Inquiry must report in a very short time frame.

These are:

Labour Market Testing, preference for Australian workers over 457s in redundancy situations , 457 sponsor training obligations, and enhanced rights and protections for 457 visa workers.

3. Labour Market Testing (LMT)

> Term of Reference (b) their [ie 457 visas'] accessibility and the criteria against which applications are assessed, including whether stringent labour market testing can or should be applied to the application process;

CFMEU Recommendation:

[5] Ross Garnaut, *Australia and the Northeast Asian Ascendancy*, 1989, pp293-4

Effective labour market testing (LMT) should be legislated including a right of appeal for Australian workers assessed by employers as not suitable for the positions.

3.1 Why LMT is imperative

LMT is needed to ensure that the 457 visa program achieves its stated purpose, ie that employers are granted access to 457 visas for temporary foreign workers only when there is are no qualified Australian workers available to do the work.

The current mechanisms in the deregulated 457 visa program intended to achieve this objective (as an alternative to LMT) have been an abject failure – see below.

LMT is imperative to ensure the integrity of the 457 visa program now, and will become even more necessary in Australia over the next decades.

- The 457 visa program with no LMT was designed for an environment of acute, persistent and widespread skilled labour shortages predicted with the second phase of the resources boom. It is not suited to a changed environment of the resources investment boom slowing, softening labour demand generally and increased global uncertainty.

- The costs to employers of accessing temporary foreign workers on 457 visas are declining, relative to the costs of engaging Australian resident workers. This trend will continue.

    - This is partly a consequence of globalisation which makes it increasingly cheaper and easier for employers to recruit labour offshore.

    - But it is also because employers now have access a vast and growing pool of foreign nationals already in Australia on temporary visas of various kinds, many desperate for even discounted Australian wages on a 457 visa and the ultimate prize of a permanent residence (PR) visa.

The latest available DIAC data shows that there were **1.7 million** temporary visa holders in Australia at 31 December 2012, [6] Between June 2000 and June 2012, this temporary visa holder population increased by 93% - around 8% per annum in recent years.

Many of these 1.7 million non-residents want 457 visas because the visa provides them access to long term jobs in Australia, and many 457 visa workers want the permanent residence (PR) visa that the 457 visa pathway leads to. Currently more than 50% of 457s convert to PR visas.

Employers can therefore access - at very low or no cost - 457 visa workers without any need to go offshore to find 'overseas workers'.

With no legal obligation to even offer the jobs to Australian workers – let alone employ them - this situation provides very strong incentives for many employers to prefer 457 visa workers over Australian resident workers.

[6] DIAC, *Temporary entrants and New Zealand citizens in Australia as at 31 December 2012*.

In most cases, employers gain captive and compliant 457 labour for at least 2 years, the minimum period with the 457 sponsor required for the worker to become eligible for an employer-sponsored PR visa. [7]

3.2 The extent of 457 visa rorting

The fundamental abuse or rort of the 457 visa program is when the Australian government authorises an employer to employ a foreign national on a 457 visa when a qualified Australian citizen or permanent resident is available and willing to do the work.

This breaches the first of 'the fundamental tenets of the subclass 457 visa', that DIAC states as:

> a. to enable businesses to sponsor a skilled overseas worker if they cannot find an appropriately skilled Australian citizen or permanent resident to fill a skilled position; [8]

Other abuses breach the second 'fundamental tenet' of the 457 visa:

> b. to ensure that the working conditions of sponsored visa holders are no less favourable than those provided to Australians, and that overseas workers are not exploited.

The CFMEU will provide to the Committee on a confidential basis and upon request, numerous examples of the exploitation of 457 visa workers.

As to the first abuse, the evidence suggests it is widespread but it is simply not possible to quantify exactly how many 457 visas have been granted when qualified Australian workers were available.

This is because:

- Despite the rhetoric about the scheme's purpose, it is currently <u>not</u> unlawful for employers to employ 457 visa workers when qualified Australian citizens or permanent residents are available and willing to do the work.
- DIAC does not collect any data on the extent to which qualified Australian workers are denied jobs filled by 457 visa workers - nor does any other agency. In fact, such information is of no interest to DIAC – because it is perfectly acceptable under existing 457 Regulations.
- Qualified Australian workers will not even be aware of many jobs employers fill with 457 workers, due to the complete absence of any obligation to even advertise the positions.

[7] Employer-sponsored PR visas (ENS, RSMS) require 2 years with the same employer, as from 1 July 2012. Note that this is the qualifying period for *eligibility* to be sponsored, not a *guarantee* that the employer will sponsor the 457 visa worker for PR once this time has elapsed. As well, DIAC visa processing times for RSMS applications are 6-9 months, further extending the period of bonded labour for 457 workers.

[8] *Strengthening the Integrity of the subclass 457 visa program*, DIAC Discussion Paper for MACSM dated 14 December 2012, p2 (now publicly released under FOI).

- Many 457 jobs are never advertised, because a large and growing proportion of 457 visas are being granted to foreign nationals already onshore in Australia – many already working for their 457 sponsors on other temporary visas, eg Working Holiday Visas and others – see below.

This flawed policy accords a higher priority to employer convenience and the interests of other temporary visa holders than to the so-called 'fundamental tenet' of the 457 visa program listed above.

Macro level evidence

Various data indicate that this is a major program-wide problem, not just an issue at the margins. Recent trends in the 457 visa program have increasingly diverged from many other indicators of the Australian labour market. The 457 visa program has gone in completely the opposite direction to the general labour market.

For example:

- The apparent relationship between 457 visa applications lodged and the ANZ Bank Job Ads series has collapsed. DIAC previously trumpeted this close relationship – that the two moved in lockstep - as evidence that the 457 program was truly responsive to changes in labour demand.

- But over the past 12 months or so, 457 visa applications have gone in completely the opposite direction, continuing to rise during 2012 (and up 40% in the first 4 months of FY 2013 to end-October 2012) - while the number of Job Ads in the ANZ series has *fallen* for 10 consecutive months and in December 2012 was 20% *below* February 2012 levels.

A similar picture of 457 worker growth outstripping general employment growth emerges at an industry and occupation level. In the 12 months to February 2013:

- While Australian construction industry employment grew by only 1.1%,[9] the number of 457 visa holders working in the industry actually increased by 25% (or 2,020 workers) to 14,080 (DIAC data).

- The total number of 457 visa workers in trades occupations (Skill Level 3) Australia-wide grew from 13,260 to **19,880** – an increase of 6,620 or **50%**. But ABS data shows that nationally total employment of tradespersons actually declined over the same period – total persons employed as 'Technicians and Tradespersons' fell by 1,200 or 0.1%.[10]

These divergent macro trends suggest that large numbers of foreign nationals are being granted 457 visas for work as skilled tradespersons and others, when more skilled Australian workers are available.

[9] ABS Labour Force Survey detailed quarterly, February 2013 (trend basis).

[10] ABS Labour Force Survey, detailed quarterly February 2013 (original data).

3.3 Onshore 457 visa grants

The 457 visa program has turned into one where 457 visas are increasingly being granted to persons located ***onshore,*** ie already in Australia.

Table 1 shows that in the 12 months to 31 August 2012:

- 43% of all 457 primary visas granted were granted to persons located onshore who held other temporary visas, ie to foreign nationals already in Australia (30,032 out of 70,630).
- Of this 30, 032 granted 457 visas onshore, some 23,500 held visas with some work rights but at least 4,800 held visas with no work rights.

Table 1 457 primary visas granted ONSHORE (a) in the 12 months to 31 August 2 by last substantive visa held

Visa subclass	Last Substantive Visa Held Visa title	No	% of ALL 457 grants
417	Working Holiday	8,958	12.7
457	Business (Long stay)	7,417	10.5
572	VET (OS student)	3,658	5.2
573	Higher education (OS student)	2,564	3.6
977	Electronic Travel Authority (Business)	1,129	1.6
651	eVisitor	994	1.4
676	Tourist	951	1.3
976	Electronic Travel Authority (Visitor)	930	1.3
485	Skilled - Graduate	856	1.2
456	Business (Short stay)	754	1.1
Others		1,821	2.6
Total		**30,032**	**42.5**
Subtotal	*Visas with work rights (b)*	***23,453***	***33.2***
Subtotal	*Visas with no work rights (c)*	***4,758***	***6.7***
Others	*Work rights not known*	***1,821***	***2.6***
Subtotal		***6,579***	***9.3***
Total 457 visa grants 12 months to 31 Aug 2012 (d)		**70,630**	**100.0**

Source: DIAC published and unpublished data.

(a) Client located onshore when visa granted.

(b) Visa subclasses 417, 457, 572, 573, and 485.

(c) Visa subclasses 977, 651, 676, 976,and 456.

(d) Onshore plus offshore 457 primary visa grants.

The proportion of all 457 visas granted to 'clients located onshore' has been rising and is now the majority – from 43% in February 2012 to 51% in February 2013 (unpublished DIAC data).

Many of persons granted 457 visas onshore are already in the labour market and working for their sponsor at the time the sponsor lodges the 457 visa nomination, or when the 457 visa is granted – some lawfully, others unlawfully.

- Exactly how many are already working for their 457 sponsor is not known. DIAC does not publish this data – the department does not even collect it.

In the absence of any legal obligation on employers to LMT and employ qualified Australian workers first, this is an open invitation to employers to bypass Australian workers and give jobs to 457 visa workers.

457 visas granted onshore to temporary visa holders with no work rights

The fact that 9% of all 457 primary visas (nearly 6,600) were granted to persons in Australia with no work rights raises the most serious concerns about the integrity of the visa program.

The concern is that these visa holders were working unlawfully for their sponsor before or at the time that DIAC actually granted their 457 visa.

In March 2012 DIAC told the CFMEU:

> "The Department cannot say for complete certainty that Subclass 457 visas have not been granted to people who have worked without authority."[11]

In other words, the Department cannot assure that:

- it is <u>not</u> approving 457 visas for sponsors who are or have been unlawfully employing non-citizens in breach of the *Employer Sanctions Act*; and

- it is <u>not</u> granting 457 visas to foreign nationals who are or have been working in breach of their visa work conditions.

This is an extraordinary admission in a visa program that is meant to protect the primary right of skilled Australian workers to skilled jobs in Australia.

Not only is there no effective mechanism to ensure that 457 visas are only granted when no qualified Australian workers are available. In 7%- 9% of the 457 visa program, the Department is not able to guarantee that it is not granting 457 visas to non-citizens with no work rights but working unlawfully; and not rewarding sponsors who employ illegal workers!

DIAC advised that in 2011-12, it made only '110 pre-grant visits' to sponsors in relation to the 457 visa program, which might have detected employers engaging foreign nationals unlawfully. This represents less than 2% of the 6,600 457 visas granted to persons with no work rights.

[11] DIAC email to CFMEU dated 18 March 2013.

Note that persons on temporary visas *with* work rights (and granted 457 visas onshore) may also be working unlawfully at the time of 457 visa grant. But again, DIAC is not able to say with confidence that all these visa holders – and their employers – have complied with the *Employer Sanctions Act*.

It is also to be noted that in total, 66% of all 457 primary visas granted in the year to 31 August 2012 (46,581 out of 70,630) went to persons who had previously held a substantive temporary visa (unpublished DIAC data).

- Up to two-thirds of all 457 visas may be being granted to persons who have already worked for their sponsoring employer and have established a relationship with the sponsor.
- Of these, 16,549 were located offshore at the time of 457 visa grant, including some 13,400 persons who had previously held a temporary visa with *no work rights*.

Under current DIAC systems, there is no way of knowing how many of these 13,400 (representing 19% of the entire 457 program) may also have been employed unlawfully while in Australia before being granted their 457 visas.

3.4 Arguments against LMT

There are essentially 3 arguments against LMT in the 457 visa program, as advanced by DIAC and some employers:

1. LMT is unnecessary because "The 457 sponsorship requirements ensure that if a suitably qualified and experienced Australian is readily available to work where needed, employers will look to them first."
2. LMT is too costly and too onerous on employers – too much 'red tape'
3. Australia's 'international trade obligations' prevent the re-introduction of LMT.

None of these arguments stand up to scrutiny.

3.4.1 457s are 'more expensive' than Australian workers

DIAC has frequently made this claim including before Senate Estimates Committee hearings. Most recently it posted the following on the DIAC website following the Immigration Minister's 26 February 2013 announcement of program changes:

> **What incentives are there to encourage employers to employ Australians first?**
>
> The 457 sponsorship requirements ensure that if a suitably qualified and experienced Australian is readily available to work where needed, employers will look to them first.
>
> If a suitably qualified Australian worker is readily available and acceptable, they are the more preferable option <u>because it is comparatively less expensive to source a local worker</u>.
>
> There are significant costs to the employer when sponsoring a 457 worker. These costs include:
>
> - paying sponsorship and nomination fees
> - costs of recruitment

- providing equal terms and conditions including paying market rates
- maintaining a financial commitment to training levels
- being liable for the cost of return travel to the person's country of origin.

When these costs are factored in, it is more expensive to employ an overseas worker than a local worker of the same skills and experience. [12] (emphasis added)

The Department's claim - that "it is more expensive to employ an overseas worker than a local worker of the same skills and experience" - is patently untrue, for ALL or even most 457 visa workers.

The following table shows the items which the Dept says amount to 'significant costs to the employer' of 457 visa workers – along with the true situation.

457 sponsor 'Cost' Item	**CFMEU Comment – the reality**
Paying sponsorship and nomination fees	Practically no cost. Only $420 sponsor application fee plus $85 visa nomination fee for each 457 worker. Cheaper than the average Australian car rego!
Recruitment costs	Practically nothing - for the 43% of 457 visa workers already in Australia on other temporary visas workers, many already employed by the sponsor. Possibly some extra costs for offshore recruitment, but not for big corporations. Tax expense anyway.
Providing equal terms and conditions including paying market rates	No 'extra' cost and easily rorted. Chances of being found out minimal – see 'Sponsor obligations' below.
Maintaining a financial commitment to training levels	No 'extra' cost at all. 457 training benchmarks simply require expenditure of 2% of total payroll on training at time of sponsorship approval – no additional training spend, and easily rorted anyway. Good employers spend more than 2% on training.
Sponsor monitoring obligations	No or negligible 'extra' cost. Chance of sponsor being monitored very low – only 4% site-visited in 2011-12.

[12] DIAC, *Employer Sponsored Workers - Strengthening the integrity of the 457 program,* DIAC website http://www.immi.gov.au/skilled/strengthening-integrity-457-program.htm#i

Being liable for the cost of return travel to the person's country of origin	Employers don't incur this cost for over 50% of 457s – because they convert to permanent residence visas and stay in Australia! Tax write-off for the other employers.

On top of this, what the Department does not say is that the *Worker Protection Act 2008* actually removed some costs from sponsors. From September 2009, the cost of private health insurance was shifted away from 457 employers and on to the 457 visa workers themselves.

That can be a big cost item – between $1,900 to $4,650 per year for a 457 visa holder with family cover in 2013, even more for top cover.[13]

Finally, the Department ignores the cost advantage of 457 visa workers to sponsors – namely, that 457s are captive and compliant labour with no bargaining power so long as they are kept on 457 temporary visas.

3.4.2 LMT is too onerous – too much 'red tape'

DIAC's website said:

> In the past, by the time an employer approached the Government to sponsor a skilled worker from overseas, they had already tested the local labour market thoroughly. However, they were still forced to go through the prescribed process which usually involved extra costs and delays for the employer.[14]

As shown above, with 43% of 457 visas going to persons already in Australia, many already working for their 457 sponsor, this implied claim that 457s are recruited from 'overseas' is now quite misleading.

The fact is that an obligation to recruit Australian workers first is more essential now. Without the now necessary 'burden' of LMT, the primary objective of the 457 scheme will not be achieved, particularly in situations where the would-be 457 visa worker is already employed by the sponsor on another visa.

There is also no reason why employers need to go through the LMT process twice. Once the requirements of a legally required LMT process are set out, employers concerned about genuine shortages will have advance notice of the process to follow to comply with 457 LMT.

[13] See 457 insurance premiums compared on website here - http://www.457visacompared.com.au/457-visa-health-insurance/

[14] DIAC website, op cit.

3.4.3 Australia's international trade 'obligations' mean no 457 LMT

DIAC's website said in 2013:

> **Why is the government not reintroducing Labour Market Testing?**
>
> The 457 program is an important part of how Australia meets a number of our international trade obligations. These obligations mean we can't limit access to our economy of people who wish to do business with us. Part of doing business with us often involves sourcing skilled labour from other countries. Australia must remain open for business people and service providers and the reforms to the 457 program will not adversely impact these obligations.[15]

The CFMEU rejects claims that Australia's international trade commitments and/or offers impose limitations on the extent to which the Australian Government can make changes to the general 457 visa program – including re-introducing LMT.

Australia's binding international trade commitments do not relate to the 457 visa program generally – they relate only to specific types of international movements to Australia of specific categories of foreign nationals, as specified in those treaties.

The Australian Government has chosen to implement its international commitments regarding trade in services via the 'Movement of Natural Persons', through the 457 visa program. But this does not mean that the 457 visa program in general must therefore reflect the concessional arrangements that apply in the limited circumstances covered by the international trade agreements.

In other words, the international trade commitments 'tail' does not - and should not - wag the 457 visa program 'dog'.

The main relevant and binding international trade commitment is the 1995 World Trade Organisation General Agreement on Trade in Services (WTO GATS) – the Uruguay Round.

Under WTO GATS, Australia agreed that some limited categories of personnel can enter and work in Australia, without the need for 'labour market testing' (LMT) or establishing that there are no Australian resident workers who can do the work; and that these foreign nationals must be accorded 'national treatment'.

The 1995 WTO GATS specifies these very limited categories as *intra-company transfers* of 'executives, senior managers, independent executives and service sellers'.

- These currently are the <u>only</u> categories where Australia has a binding international obligation to admit 457 visa-holders free of LMT under the WTO GATS concessional arrangements[16].

[15] DIAC website, op cit (since removed).

[16] Some Free Trade Agreements (FTAs) also include limited concessions without LMT, eg for Thai chefs.

- The personnel concerned must also meet other specified criteria such as 2 years employment with the foreign firm.
- The personnel concerned must be employed by foreign (not domestic Australian)[17] firms in specified services industries.

But the 1995 WTO GATS provided that the temporary entry of foreign 'specialists' (ie, persons with trade, technical and professional skills) [18] would be subject to LMT – ie, employers had to show there were no qualified Australians available to do the work.

In 2005 Australia made a *non-binding* offer[19], as part of its Mode 4 offer for the Doha Round of WTO GATS trade negotiations. This 2005 Doha offer is (apparently) still current in 2013 and made additional concessions regarding the entry and temporary stay of skilled persons, again within the confines of the types of trade in services covered by the offer. These included "the removal of labour market testing for specialists" – ie persons with trade, technical and professional skills – and for 'contractual service suppliers'.

It has been argued that Australia's current Doha offer can or should not be withdrawn or amended; and that to do so would be an act of 'bad faith' in its trade negotiations.

The CFMEU rejects these arguments. As previously stated, the first part of this claim involves the international trade 'tail' wagging the 457 program 'dog', to an absurd degree.

Our view concerning 'bad faith' is that the larger issue is that of bad faith with the broader Australian community. Most Australians would be appalled to learn that any Australian Government was offering to give up for all time its right to impose LMT in the 457 visa program in its entirety, or in significant parts of the program, without public debate..

[17] Productivity Commission 2010, *Report on Bilateral and Regional Trade Agreements or BRTAs*, p176.

[18] 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 those specific categories of 'intra-company transfers' listed; plus examples such as 'Thai chefs', under the Thailand- Australia Free Trade Agreement (TAFTA).

[19] The front page of the 2005 Australian Doha offer states: "Australia reserves the right to withdraw, modify, or reduce this offer in whole or part, at any time prior to the conclusion of the negotiations".

3.5 Proposed LMT

The CFMEU submits that effective LMT could be legislated via firstly amendments to the *Migration Act 1958* and/or to the Migration Regulations 1994; and secondly, a complementary amendment to the *Fair Work Act 2009*.

The key points of the CFMEU proposal are that:

- The LMT obligation applies to all 457 visa nominations, with exceptions made for nominations where:

    (i) the base market salary rate is $250,000 per annum (the market salary exemption as from 1 July 2013);or

    (ii) labour market testing is expressly excluded under any binding international treaties or trade agreements in force as at 3 May 2013 to which Australia is signatory.

- LMT requires advertising the position(s) nationally (not just within a small local area), providing information to the Minister/Department on number of applications received from Australian workers, and the reasons why Australian applicants were considered by the sponsor to not be suitable to fill the position/s; and

- notifying all unsuccessful candidates/applicants who were Australian citizens or Australian permanent residents of the reasons why the applicant/candidate was considered by the sponsor to not be suitable to fill the position/s.

This last requirement – notifying all unsuccessful Australian applicants – is essential for an effective LMT system. Without this requirement, unsuccessful Australian applicants will be unaware that they have missed out on the job and the reasons why.

Equipped with this notification, unsuccessful Australian applicants will then have access to a new proposed provision of the *Fair Work Act 2009* which would create a new 'workplace right' for Australian citizens/permanent residents; and prohibit 'adverse action' being taken against them on the basis that they are an Australian citizen or Australian permanent resident.

The provision would provide a means for applicants who are Australian citizens or Australian permanent residents and notified under the proposed new requirement to respond to an employer's assessment that they are not suitable to fill the position(s).

Providing this new means under the established arrangements of the *Fair Work Act 2009* is a preferred alternative to creation of a new body or position with similar (but not identical) objectives, as two separate reports have recommended: the 2008 Deegan Report and (according to media reports) a 2012 ALP Caucus Sub-committee report on the Resources sector.

The former recommended establishment of a 457 'Integrity Co-ordinator' within DIAC, while the latter recommended a Resource Sector Jobs Ombudsman position be established 'to overview the effective operation of the Jobs Board and handle complaints in relation to recruitment and related issues in the resources sector'.

4.Redundancy preference

The need for these provisions is clear from employer preference for captive and compliant 457 workers.

- a KPMG survey in August 2009 found that 75% of employers surveyed said they would retrench Australian workers before their 457 visa workers.[20]

In the event of redundancies, preference should be given to Australian workers over 457 visa workers. Additionally there should be a right to appeal decisions about redundancies.

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 have a 457 sponsor obligation to give preference to retaining the Australian workers and the 457 visa-holders should go first.

As well, a new 457 visa condition should be included which clearly and explicitly states that one of the conditions attaching to the 457 visa is that the visa-holder has secondary rights relative to Australian resident workers in redundancy situations.

Currently it is not unlawful in terms of Commonwealth anti-discrimination laws for employers to give preference to retaining in employment workers who are Australian residents over all temporary visa holders, including 457 visa workers.

The situation with respect to State/Territory anti-discrimination laws is less clear. According to correspondence to the CFMEU from the then Minister for Immigration in September 2009, "requiring subclass 457 visa workers to be made redundant ahead of Australian workers may potentially breach some State anti-discrimination laws" – though none were identified.

It is therefore desirable to put the matter beyond doubt. This is best done by way of Commonwealth Immigration Regulations, viz., the proposed new 457 sponsor obligation combined with the associated new 457 visa condition.

5. 457 training obligations

The current 457 training benchmarks are completely ineffective in securing sponsor training of Australian workers in the specific occupations for which 457 visas are granted.

This is evident in relation to the skilled trades. At end-March 2013, there were over 20,000 457 visa workers in Australia in trade occupations (ANZSCO Skill Level 3). But the employers of these 457 trades workers do not have any obligation at present to train a single Australian apprentice.

The actual number of Australian apprentices being trained by the employers of these 457 trades workers is not known. DIAC does not even collect this vital data. This is despite a Joint Union proposal in April 2011 to conduct a special project to gather this data.

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

- These 457 sponsors should be training at least 5,000 Australian apprentices – a 25% ratio.

Recently the Joint Unions submitted that the objectives of 457 training requirements should be:

- to increase training through trade apprenticeships and graduate cadetships in the specific occupations allegedly in short supply, ie the occupations of 457 visa workers approved on the basis that no qualified Australian workers are available;
- to ensure that the 457 sponsor approval criteria are sufficiently robust to screen out would-be sponsors who do not meet best practice Australian standards for apprenticeship/cadetships training.
- To increase the cost of accessing 457 visa workers relative to the cost of training Australian workers especially young people in entry-level positions. This is a legitimate objective for Australian government policy.

Measures to achieve these objectives have been proposed to the Migration Advisory Council on Skilled Migration (MACSM). The CFMEU would be happy to expand on these to the Committee.

6. Enhanced rights and protections for 457 visa workers

Our union has played a leading role in fighting for and securing improved workplace rights and protections for 457 visa workers and other temporary migrant workers in Australia.

There are 4 main areas where stronger rights and protections are still needed.

6.1 Eligibility for FEGS assistance

First, the *Fair Entitlements Guarantee Act 2012* (FEGS) needs to be amended to provide that the holder of a subclass 457 visa is eligible for an advance and assistance under the Act.

FEGS provides Commonwealth financial assistance to employees in circumstances where their sponsoring employer becomes insolvent or bankrupt and is unable to fully pay workers their employment entitlements for work done. Entitlements include annual leave, long service leave, payment in lieu of notice, redundancy pay or wages.

Currently this Act limits eligibility for assistance to Australian citizens and permanent residents, and New Zealand citizens who are holders of a 'special category' visa.

The Act therefore *excludes* 457 visa holders (and all other temporary visa holders) from eligibility for Commonwealth financial assistance when their sponsoring employer becomes insolvent or bankrupt and is unable to fully pay these workers their employment entitlements.

Paragraph 10(1)(g) of the *Fair Entitlements Guarantee Act 2012* currently states, as one of the conditions of eligibility for an advance under the Act:

g) when the employment ended, the person was an Australian citizen or, under the *Migration Act 1958,* the holder of a permanent visa or a special category visa;

Paragraph 10(1)(g) of the *Fair Entitlements Guarantee Act 2012* should be amended to provide that the holder of a subclass 457 visa is eligible for an advance and assistance under the Act.

Justification

Extending FEGS eligibility to 457 visa holders (and holders of other employer-sponsored temporary visas) is justified on equity grounds, to remove unfair discrimination in Commonwealth legislation against these visa workers.

The CFMEU's preferred position is that *all* holders of temporary visas with work rights should be eligible for FEGS assistance, if they meet all other criteria for the scheme, ie not just holders of 457s and other employer-sponsored visas. If workers have done the work, their entitlements must be paid.

However, 457 visa workers (and non-resident workers on other employer-sponsored visas) are in a different category to *non-sponsored* temporary visa holders with work rights, such as Working Holiday Makers (417 visas), Overseas Students and Skilled graduates (485 visas).

In the case of 457 visa workers, their employer has been 'approved' as a 457 sponsor by the Commonwealth government agency (DIAC) under Commonwealth laws (*the Migration Act 1958*). The same applies to other employer-sponsored visas.

Many 457 visa holders work for long periods[21] in Australia with the same employer, some of whom become insolvent[22]. While Australian and New Zealand citizens receive FEGS assistance, 457 visa workers in the same workplace receive nothing. They lose their unpaid entitlements for work already done.

The reason given for excluding 457 visa workers from FEGS eligibility does not stand up to scrutiny. The Explanatory Memorandum to the FEGS Bill describes it as follows:

> The Bill establishes an assistance scheme, which is intended to operate as a safety net for eligible persons. *In this way it is analogous to social security legislation, and care has been taken to maintain some consistency with conditions of eligibility in analogous social security legislation*. (emphasis added)

But employment entitlements, deriving from work already performed for an insolvent employer, are in reality not very 'analogous to social security' benefits which generally derive from characteristics of persons (eg attaining pension age), not from work done for a particular employer.

[21] The maximum duration of a single 457 visa is 4 years but some 457 visa holders are granted extensions and work for more than 4 years.

[22] The number of 457 sponsors who become insolvent and the number of 457 visa workers affected by loss of employment entitlements are unknown. DIAC does not disclose, and may not even collect, this data.

In any case, the FEGS Act extends eligibility to NZ citizens on special category visas who are not generally eligible for Australian social security benefits. Hence the criterion is only 'some' consistency with social security legislation (not total consistency).

Extending FEGS to 457 visa holders and holders of other employer-sponsored temporary visas can therefore with no damage to the principle underlying the scheme.

The additional cost to FEGS is not likely to be significant and benefits are likely. Eligibility for FEGS may encourage more rigorous criteria for approval of employers as sponsors for 457 and other employer-sponsored temporary visas, and closer scrutiny by DIAC of sponsorship applications.

6.2 Workers compensation entitlements

Currently injured 457 visa holders lose their entitlement to workers compensation benefits upon leaving the country.

The Commonwealth should:

- Amend its own Comcare legislation so that injured subclass 457 visa holders are able to retain benefits when they leave Australia and return home.
- Seek agreement of States/Territories to ensure Workers' compensation legislation is amended so that injured subclass 457 visa holders are able to retain benefits when they leave Australia and return home.

Some arrangement for a special lump sum payment to departing injured workers may be needed, where ongoing entitlement to the workers compensation benefits is usually dependent on the injured worker visiting Australian-based medical and/or rehabilitation practitioners.

6.3 DIAC processing priority for 457 visa holders applying for permanent residency visas

There are currently unacceptably long delays in the time taken by DIAC to process PR visa applications from 457 visa workers.

For example, 6-9 months (or even longer) is apparently not unusual for the time taken by DIAC to process applications for employer-sponsored PR visas such as the ENS or RSMS visas. By contrast, the Department's current performance target for processing 457 visa applications is only 10 days!

The CFMEU recommends that DIAC be directed to give a much higher priority to processing PR visa applications from 457 primary visa holders; and to adopt the same or similar performance target for processing these visas as it has established for 457 visa applications, ie 10 days.

The reason is simple. The longer the PR visa processing time, the longer the 457 visa workers are maintained in a precarious state of captive labour by their employers.

It is offensive to prolong the period of bonded labour that 457 visas entail, by unnecessarily protracted PR visa processing times for these visas.

6.4 Remove worker mobility restrictions on RSMS visas

This falls under term of reference “Any related matters”.

The RSMS visa, or the Regional Sponsored Migration Scheme visa, is an employer-sponsored permanent residence (PR) visa that is frequently the pathway to PR visas for 457 visa workers.

Around 80% of all RSMS (and ENS) visas are granted to former 457 visa workers. For this reason, the RSMS visa is important for this Inquiry.

The RSMS visa is notionally a PR visa but this “permanent residence” visa can be cancelled by DIAC in certain circumstances. The DIAC website on RSMS says, under the heading ‘Employee’s Obligations’:

- The visa-holder must “remain employed in the nominated position in the regional area for at least two years”.
- “The visa may be cancelled if the employee does not comply with these obligations to complete the two year contract with the employer.”

DIAC has on occasions exercised its discretion and cancelled (at the behest of employers) these so-called PR visas granted under RSMS. This is grossly offensive and the DIAC power to cancel RSMS visas on the above grounds must be removed.

It is unacceptable that a single employer can effectively determine whether a worker can continue to hold a PR visa in Australia. This arrangement continues the state of labour bonded to the employer that is such an objectionable feature of the original 457 temporary visa program.

It places excessive powers in the hands of employers and completely distorts the bargaining relationship between employers and workers. It guarantees – under duress - compliance with employer-determined wages and conditions for the duration of the bonded period.

It is irrelevant that DIAC claims it has only exercised this power to cancel RSMS visas a few times.

The more relevant consideration is that the RSMS visa-holder knows that this power exists, and that his/her PR visa may be cancelled if their employer chooses to notify DIAC that the employment relationship has been terminated, for any reason before the 2 years is up.

Bonding RSMS visa-holders to their employers in this way, often after several years effectively locked in as a 457 visa worker, should be rejected. It means that in practice some workers may be tied to the same employer for 5 years or more – say 3 years on a 457 visa plus 2 more on the RSMS visa.

A regional WA business leader let the cat out of the bag when promoting employer-sponsored visas. The Busselton Chamber of Commerce CEO Mr Ray McMillan was reported thus in an August 2011 story:

> However, Mr McMillan said local businesses that needed to fill skilled positions should consider sponsored migration visas.

> These would require the worker to stay in the region or position for at least two years, he said.
>
> "Many businesses think migration is too long a process, but what it does is allow employers to secure an employee for a number of years, as a result of the application," Mr McMillan said.[23]

This leaves no doubt that employers are attracted to sponsored visas because they 'secure' captive labour.

ENDS

[23] Stephanie Vanichek, 'Cautious approach to work visa change', *Busselton Dunsborough Times*, 12 August 2011.