CFMEU-AMWU SUBMISSION

RE REVIEW OF PERMANENT EMPLOYER-SPONSORED VISAS 2011

By email: Sponsored.Skilled@immi.gov.au

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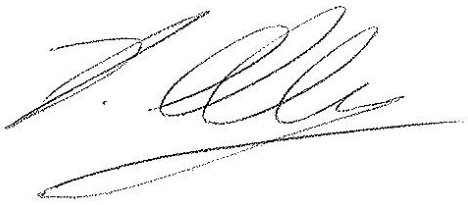
Dave Noonan
Assistant National Secretary
Construction, Forestry, Mining & Energy Union of Australia
PO BOX Q235
QVB Building Post Office
Sydney NSW 1230
02 8525 5850 telephone
02 8524 5851 facsimile
dnoonan@fed.cfmeu.asn.au



Dave Oliver
National secretary
Automotive, Food, Metals, Engineering and Kindred Industries Union known as the Australian Manufacturing Workers' Union
PO Box 12321 A'Beckett Street
Melbourne VIC 8006
(03) 9230 5888 telephone
(03) 9230 5887 facsimile
david.oliver@amwu.asn.au

Executive Summary

The CFMEU and AMWU reject the following underlying assumptions in the Paper.

- That expanding *employer-sponsored* permanent resident (PR) skilled migration is preferable to independent or non-sponsored PR skilled migration
- That Australia needs to expand semi-skilled migration generally; and
- That any expansion of semi-skilled migration should be via *employer-sponsored* visa categories such as ENS and RSMS.

Our strong view is that any Australian Government contemplating a migration policy change as significant as promoting the expansion of semi-skilled PR labour migration generally must first convince the Australian community of the need for such a change – and also convince Australian workers that their job security will be enhanced, not threatened, by such a move.

The CFMEU and AMWU support employer-sponsored PR visas for skilled positions, but only subject to changes and much tighter regulation than currently exists in the ENS/RSMS visa programs. The main changes recommended to both the ENS/RSMS are:

- Labour Market Testing (LMT) should be required for all positions employers propose to fill. Australian workers must have enforceable first rights to jobs in Australia.
- Genuinely tripartite Registered Employment Authorities (REAs) should be established, as provided for in the 2009 ALP platform, to provide a more rigorous and transparent process of labour market testing.
- Employers seeking approval as ENS/RSMS sponsors should undergo a more rigorous sponsorship approval process, involving at least examination of the sponsor's record of redundancies involving Australian workers, and of the sponsor's past and proposed training performance.
- ENS/RSMS sponsors as a minimum should be required to meet the training benchmarks required for the 457 visa program – including new benchmarks for construction employers that take account of the high proportion of 'independent contractors' in that sector.
- The payment of 'market salary rates' as defined in the 457 visa program.
- A Minimum Salary Level threshold should apply in both the ENS and RSMS visa programs, indexed annually. The minimum for the ENS ($49,330 currently for non-ICT occupations) should also apply to the RSMS visa. No visas should be approved below this threshold minimum.
- Monitoring of ENS/RSMS employers should be strengthened, to ensure worker protection. DIAC should provide the Fair Work Ombudsman (FWO) with the names and contact details of every ENS/RSMS sponsor and the names of the ENS/RSMS visa-holders employed by those sponsors

- Occupations eligible for ENS and RSMS visas should be confined to only those occupations in national shortage. There should be no open-ended eligibility, and is no justification for declaring almost every skilled occupation eligible for one or the other list.

- English language minimum standards: for both ENS and RSMS this should be IELTS 5, the 457 minimum, and there should be no 'exceptional circumstances'.

RSMS visa

- DIAC's power to cancel RSMS visas, for the reason that the visa-holder had not remained with the sponsoring employer for 2 years, must be removed.

- A new regional visa could be considered if the visa was tied not to a single employer but required the visa holder to live and work in a regional 'zone' which had multiple potential employers, and the visa holder was free to change employers. Such flexibility would thus remove the form of bonded labour currently present in the RSMS.

1. Introduction

The Construction, Forestry, Mining and Energy Union of Australia, (CFMEU) and the Australian Manufacturing Workers Union (AMWU) welcome the opportunity to make this joint submission on the DIAC Discussion Paper, *Review of the permanent Employer-sponsored visa categories – Employer Nomination Scheme, Regional Sponsored Migration Scheme, Labour Agreement, August 2011*.

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 AMWU also represents approximately 110,000 members working across major sectors of the Australian economy. AMWU members are primarily based in the manufacturing division in the sub-divisions of metal manufacturing, printing and graphic arts, food and vehicle building, repair and service. The AMWU also has significant membership in the mining, building and construction, aircraft and airline operations, laboratory, technical, supervisory and public sector employment. Our members work in unskilled, semi skilled, trade and professional occupations.

2. Discussion Paper and Review objectives

The Discussion Paper states (p6) that the 'primary objectives' of the review of the ENS/RSMS and Labour Agreement visa programs include:

- To 'ensure these programs continue to support ongoing employment and training opportunities for Australians and ensure migrants are not exploited'

This is the first of 7 'primary objectives' listed. But the Discussion Paper provides no evidence that the visa programs under review are meeting this fundamental objective at the present time, let alone under the many changes that are canvassed in the Paper.

As well, the Paper fails to acknowledge that several of the listed 'primary objectives' for the Review are in potential conflict with one another, and fails to address the question of how this conflict is to be resolved.

For example, another of the listed 'primary objectives' is to:

- make it easier for certain skilled temporary visa holders, such as people living and working in Australia on a Temporary Business (Long Stay) subclass 457 visa, to be sponsored for permanent residence after they have worked for the employer for several years and will continue to do so after the permanent residence visa is granted (p6)

But this objective is in potential conflict with the first objective cited above – for the simple reason that if the Government makes it 'easier' for temporary visa holders to be sponsored by their employer for PR visas, that alone can deny Australian workers that same job opportunity with that employer.

This is exactly what the ENS/RSMS visa programs do at present, because the sponsoring employer is able to fill the position with the foreign worker without any obligation to offer the job to Australian workers, ie without any Labour Market Testing (LMT).

The Discussion Paper does not even mention the fact that the ENS/RSMS visa programs do not require sponsoring employers to first offer the job to Australian workers – a crucial factor in job security concerns.

Nor does the Paper mention that the sponsoring employer has no obligation to inform the Department whether Australian workers have been made redundant in the position(s) that foreign workers are being nominated for ENS/RSMS visas.

Thirdly, the Discussion Paper is also misleading in its factual description of important aspects of the visas under review. At p13, the Paper says:

> ENS and RSMS visa holders are Australian permanent residents and *have the same employment and workplace rights as any other Australian permanent resident or citizen*. If their relationship with the employer deteriorates, they can seek redress through the Australian industrial relations system or find alternate employment. (Emphasis added)

But the Paper fails to mention that in relation to the RSMS visa, DIAC's own website states that:

- 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."

It is therefore simply not true that RSMS visa-holders 'have the same employment and workplace rights as any other Australian permanent resident or citizen' – because their PR visa may be cancelled if they leave their employer within 2 years of being granted the visa.

No other class of Australian permanent resident is subject to the threat of having their PR visa cancelled for this reason.

3. Overall comments

The CFMEU and AMWU reject several underlying assumptions, stated or unstated, in the Paper. These are:

- That expanding *employer-sponsored* PR skilled migration is preferable to independent or non-sponsored PR skilled migration
- That Australia needs to expand semi-skilled migration generally; and
- That any expansion of semi-skilled migration should be via *employer-sponsored* visa categories such as ENS and RSMS.

With regard to the first point, our views and the reasons for them have been put to the Government time and again over the last 4 years. The ACTU submission to this Review has detailed these arguments again, and we endorse these.

Our unions do not accept that Australia needs to expand semi-skilled migration generally. The Discussion Paper fails to make a case for this proposition at all. This shift would represent a major departure from the long-term direction of Australia's immigration program, which has been to increase the *skilled* component in the program overall.

Our strong view is that any Australian Government contemplating a migration policy change as significant as promoting the expansion of semi-skilled PR labour migration generally will need to first convince the Australian community of the need for such a change – and also convince Australian workers that their job security will be enhanced, not threatened, by such a move.

Our unions were prepared to accept semi-skilled *temporary* migration in particular and well-defined circumstances, notably in Enterprise Migration Agreements (EMAs) for resources construction projects – but only subject to the inclusion of strict safeguards, which the Australian Government has not yet implemented.

Our view is that semi-skilled *permanent* migration requires an equally cautious and prudent approach, that is best resolved on a case-by-case basis, and also subject to the strictest safeguards.

Our view is based on several considerations, including:

- That the long-term employment growth outlook for semi-skilled workers in Australia generally is relatively poor, with employment in these occupations universally projected to grow at much lower rates than skilled worker occupations.[1]

- That the Australian economy is undergoing major structural adjustment as a result of the resources boom and the stronger resources-driven Australian dollar – which will adversely affect semi-skilled jobs for Australian workers.

- That EMAs in the resources construction sector will lead to the presence in Australia of potentially very large numbers of semi-skilled construction workers on temporary visas - some possibly for relatively long periods if the resources boom Mark 2 turns out to run for several decades, as projected by some economists and commentators.

Despite this unfavourable outlook for semi-skilled Australian workers, the Government is virtually by stealth progressively expanding the avenues through which employers can recruit foreign workers to semi-skilled and even unskilled positions in the Australian job market. These include:

[1] For example, a 2009 Access Economics report for Skills Australia found that over the 15 years 2010-2025, projected employment growth in ANZSCO Major group Machinery Operators And Drivers was lower than for all occupations combined in 2 of the 3 scenarios considered (1.9% vs 2.1% pa growth, and 1.2% vs 1.5% pa). Source: Access Economics, *Economic modelling of skills demand*, October 2009, p40.

- Standard labour agreements in the 457 visa program, which allow employers access to foreign workers in semi-skilled occupations.
- The RSMS visa, which even now allows semi-skilled foreign workers to be recruited, and which has now been extended to Perth.
- Enterprise Migration Agreements (EMAs)
- Regional Migration Agreements or RMAs, under which (the Discussion Paper notes) 'conditional access to semi-skilled workers can be negotiated if there is a demonstrable need' (p21)
- The Pacific Islander Seasonal Worker Pilot program, initially limited to horticulture but recently expanded to the tourism sector.

Finally, we have very serious concerns about any proposed expansion of semi-skilled migration via *employer-sponsored* visa categories such as ENS and RSMS. As detailed below, this is a very high-risk option for semi-skilled migration that cannot be justified.

Employer-sponsored semi-skilled PR migration inevitably involves an unacceptably higher risk of exploitation of workers. This risk is increased significantly when there is an inadequate visa regulation framework, combined with inadequate regulation and monitoring of employers sponsoring such workers.

This is already the case now with skilled workers on 457 visas where DIAC's monitoring is woefully inadequate and unlikely to improve – and ENS/RSMS employers. The Government's decision in the 2011-12 Budget to not increase DIAC 457 compliance monitoring funding, while providing an additional $10 million to reduce 457 visa processing times for employers, clearly shows where its priorities lie.

Until DIAC has both the resources and the will to adequately monitor employers sponsoring vulnerable workers, our unions will never accept employer-sponsored semi-skilled PR migration.

4. Our position - summary

We are prepared to support employer-sponsored PR visas for skilled positions, but only subject to much tighter regulation than currently exists in the ENS/RSMS visa programs – detailed below.

We strongly oppose individual employer-sponsored PR visas for semi-skilled positions, for the reasons set out in Section 3 above.

Any employer-sponsored semi-skilled PR migration must only be through a very tightly regulated Labour Agreement route, on case by case basis.

The Labour Agreement route needs to be strengthened, to provide stronger protections to Australian workers and foreign workers. As unions have previously submitted in relation to Labour Agreements covering *temporary* foreign workers, the main areas for strengthening involve establishing a requirement for union consultation and negotiation; and broadening the range of matters on which consultation should occur.

5. Skilled positions – ENS & RSMS

The following changes should be made to both the ENS and the RSMS visa programs.

5.1 Labour Market Testing (LMT)

Labour Market Testing (LMT) should be required for all positions employers propose to fill with ENS/RSMS visa nominations.

LMT does not have to be a 'one size fits all' approach, and the same objective – ensuring Australian workers have first and enforceable rights to Australian jobs - can be achieved in various ways that are appropriate to the circumstances of the particular occupational labour market.

Employers can sponsor a foreign worker to fill any position under the ENS/RSMS visa programs without first having to offer the job to Australian workers, and to show that they were not able to find suitably qualified Australian workers.

This crucial feature of the ENS/RSMS programs is not even mentioned in the Discussion Paper.

Instead, the Paper states that one of the Strategic Objectives of the Review is to:

- make it easier for certain skilled temporary visa holders, such as people living and working in Australia on a Temporary Business (Long Stay) subclass 457 visa, to be sponsored for permanent residence after they have worked for the employer for several years and will continue to do so after the permanent residence visa is granted

The unstated assumptions behind this paragraph are that temporary foreign workers who occupy a job in Australia have superior rights to that job over Australian workers who might want to compete for that position – and that employers of these temporary foreign workers have the right to offer the job – and permanent residence visas – to these workers, without first considering Australian workers.

Our unions reject these assumptions. Australian workers must have enforceable first rights to all Australian jobs at the point of hiring and in redundancy situations.

Under current arrangements, the Government allows employers to recruit 457 visa workers without any LMT at the point of hiring; and to then sponsor that worker for a PR visa under ENS/RSMS without any LMT at that stage either.

This is permitted, regardless of how labour market circumstances may have changed. For example, at the time the employer wants to nominate for an ENS/RSMS visa for the foreign worker, there may be:

- increased unemployment among Australian workers in the occupation concerned; or
- a new batch of apprentice completers looking to move to other employers: or
- a new batch of young Australians looking for an apprenticeship start with an employer

But under current RSMS/ENS arrangements, the situation and claims of all these Australian workers are treated as secondary to the employer's right to sponsor the temporary foreign worker for a PR visa, and also to the temporary foreign worker's 'right' to retain that job.

This is not acceptable and regulations and procedures must change, to reflect and protect the right of Australian workers to these positions.

The inequity of the current arrangements is illustrated further, when temporary foreign workers on visas other than 457 visas are considered.

For example, the primary purpose of a Working Holiday visa (WHV) is 'to have an extended holiday supplemented by short-term employment' in Australia and the primary purpose of a student visa is to undertake education in Australia.

Yet under current ENS/RSMS visa rules, employers can employ WHVs and overseas student visa-holders and then sponsor them for PR visas for guaranteed, long-term full-time jobs without having to first offer the jobs to Australian workers.[2]

The Australian Government has previously said that LMT cannot be implemented in the 457 visa program because it would or may be a breach of Australia's international commitments or offers in international trade treaties or negotiations.

The union movement rejects this interpretation of Australia's international trade obligations and their alleged impact on LMT in the 457 visa program.

In any event, there can be no such argument against LMT in the ENS/RSMS visa programs, because these are permanent visa schemes and international trade commitments and offers relate solely to temporary movement of foreign persons.

LMT methods

As unions have previously proposed, there are several workable and effective and low-impact methods of LMT suitable for different circumstances. Specific occupations can be exempted from LMT entirely where there is objective independent evidence that a national shortage exists – and a list of these occupations drawn up and reviewed annually, as occurs in the UK. Stakeholders should be involved in these reviews.

For others, advertising the position nationally and locally at genuine market rates will be required.

5.2 Registered Employment Authorities (REAs)

The Government should replace the current 'Regional Certifying Bodies (RCBs) and introduce genuinely tripartite Registered Employment Authorities (REAs), as provided for in the 2009 ALP platform.

[2] In 2010-11, 2,537 former overseas student visa-holders were sponsored for RSMS/ENS visas, a 93% increase on the previous year (1,317) – Source: DIAC, *BR0097 Student visa program quarterly report 30 June 2011*, table 7.01.

These REAs should have a brief to provide a far more rigorous and transparent process of labour market testing to verify that RSMS visas are being used to fill genuine skill shortages that cannot be filled locally. The REA brief should extend to any area eligible for RSMS visas, including capital cities such as Perth.

At present there are over 50 RCBs. They are made up predominantly of state and territory local government departments, regional department boards, and local chambers of commerce. In very few instances is there any union representation.

The RCB model has proved problematic with criticisms raised during the Deegan 457 review process and since by the Skilled Migration Consultative Panel (SMCP). These concern the lack of labour market expertise and knowledge of RCB members, inconsistencies in decision-making, forum shopping, conflicts of interest (eg, regional population growth vs objective assessment of local needs), lack of transparency and lack of rigour.

In our view, the introduction of REAs with tripartite membership would be an important integrity measure and provide for a much more balanced consideration and view of labour market needs. Given that the SMCP supported the replacement of RCBs with REAs and explored possible models for REAs at some length back in 2009, there is no reason for further delay on this front.

5.3 ENS/RSMS sponsorship approval and sponsor obligations

Employers seeking approval as sponsors should undergo a more rigorous sponsorship approval process.

As a minimum, this should involve:

- mandatory examination of the sponsor's record of redundancies involving Australian workers, in general and in the particular classifications in which ENS/RSMS visas were nominated – and non-approval as a sponsor if redundancies have occurred in the latter occupations.
- a review of the sponsor's past and proposed training performance.

For ENS/RSMS sponsors who were previously 457 sponsors (responsible for around 75% of all ENS/RSMS visas), the time of ENS/RSMS sponsorship approval is a good time to review the employer's training record in the period since the 457 sponsorship was first approved. At present this is not done.

In relation to future training plans, there are good reasons to demand training commitments above the industry standard where the employer seeks ENS/RSMS sponsorship. This is because of the long-term employment commitment that these employers must make, to get visas approved.

ENS sponsors must commit that the nominated job will last at least 3 years, and RSMS must commit to a 2 year job. Employers who can make these sorts of commitments are better placed than most employers, and must surely be in a better position to employ and train apprentices. They should be required to do so, to at least the industry standard – where apprentices represent 15% of the trades workforce.

Sponsor obligations

Sponsorship obligations should be established for all ENS/RSMS sponsors – as in the 457 visa program - and should include the payment of 'market salary rates' as defined for the 457 visa program (see also 5.3 below).

At present ENS/RSMS sponsors have no sponsor obligations as laid down for 457 sponsors in Immigration Regulations.

Sponsor obligation not to recover certain costs

In the 457 visa program, the sponsor has a sponsorship obligation not to recover certain costs from the visa-holder.

Under the ENS and RSMS there is no corresponding sponsor obligation – but there should be, and the obligation should be clarified to specifically include the costs associated with obtaining ENS/RSMS visas.

In the 457 program, Regulation 2.87 of the *Migration Regulations 1994* requires approved sponsors not to recover, or seek to recover, certain costs from a primary or a secondary sponsored person. The costs relate specifically to the recruitment of the primary sponsored person and costs associated with becoming or being an approved sponsor or a former approved sponsor, including migration agent costs.

The CFMEU is aware of occasions where ENS or RSMS sponsoring employers have attempted to recover visa-related costs from the visa-holders by way of so-called Return of Service Obligations ("ROSOs").[3] These costs were suggested at $15,000 to $20,000 by one employer.

The AMWU advises that ROSO arrangements have also been imposed by sponsoring employers with subclass 457 workers which, as shown below, is unlawful under Immigration Regulations.

Under a ROSO arrangement in the RSMS visa context, the sponsor attempts to recoup from the visa-holder the direct costs to the employer of fees and charges involved in obtaining the visas for the primary applicant and any family members, additional fees for less than functional English, migration agents and consultants' costs.

If the employee serves out the period determined by the employer as the ROSO period, the employee has no further liability. But if the employee leaves before the end of the ROSO period, the employee must pay the employer a pro-rata amount calculated on the basis of time remaining to the end of the ROSO period.

[3] ROSOs typically arise in the Australian Defence Force and medical profession. ROSO arrangements often involve the Commonwealth, through the relevant government department, entering into a deed of agreement with a person to undertake specialized and highly skilled training. The person is then required to work for the Commonwealth for a certain period of time. The ROSOs in defence and medical professions generally are expressly allowed or recognised in legislation. In case of defence force, this is via the Defence (Personnel) Regulations 2002 and for the medical profession's rural bonded scholarship, this is via the *Health Insurance Act 1973.*

According to advice from DIAC, a ROSO contract offered to 457 visa workers under the subclass 457 program would be unlawful and unenforceable.

DIAC has also suggested that ROSO arrangements may be 'unreasonable' under s.326 of the *Fair Work Act 2009*, rendering the contract unenforceable.

We strongly support this finding and note that payments payable to the sponsoring employer do not answer the description of reasonableness in Regulation 2.12 of the Fair Work Regulations 2009. We strongly urge the Government to extend the employer obligation under Item 2.87 of the Migration Regulations to sponsoring employers under the ENS, RSMS and permanent employer sponsored Labour Agreement programs.

As for the permanent sponsored category of Labour Agreements, apart from complying with all relevant Australian standards and workplace legislation for wages and working conditions, all sponsor obligations are left to be specified in the Labour Agreement and can vary on a case by case basis.

Imposition of ROSO type of arrangements in RSMS or ENS and the permanent sponsorship category of Labour Agreement is of serious concern as this effectively creates a situation of bonded labour that can only increase the risk of exploitation.

5.3 Training benchmarks

The ENS/RSMS sponsorship approval criteria should (as a minimum) be at least those required for 457 sponsorship approval, and must include at least meeting the training benchmarks required for the 457 visa program – including new benchmarks for construction employers.

Currently ENS/RSMS sponsors are not required to meet any training benchmarks.

Prospective sponsors should meet one of the two standard training benchmarks for the 457 program, i.e. either 2% 'of payroll paid to a relevant industry training fund' or 1% of payroll spent on training for their Australian employees.

For would-be sponsors in the construction industry, the definition of 'payroll base' for training benchmark purposes should be expanded to include not just the payroll associated with direct employees of the sponsor but also payments made to 'independent contractors' by the sponsor.

Currently this payroll definition is limited to only 'direct employees' of the sponsor and excludes independent contractors engaged on a project. But this definition is not appropriate for construction due to the different structure of the workforce in this sector. For example:

- In the construction industry, only 54% of the total workforce is classified as employees compared to 84% in all other Australian industries (ABS FOES data 2009);
- 35% of the total workforce are classified as independent contractors by the ABS, compared to only 7% in all other Australian industries; and

- up to 46% of independent contractors in construction are likely to be sham contractors, i.e. effectively working as employees (Source: CFMEU *Report on Sham Contracting, Race to the Bottom*, March 2011).

This is consistent with the changed approach to training benchmarks in construction in relation to EMAs and the 457 visa program generally, as recommended by the ACTU Secretary Jeff Lawrence in his letter to Immigration Minister Bowen of 3 June 2011, concerning EMAs. This letter said that the total labour costs on the EMA project should be used to calculate construction training benchmarks.

As the ACTU Secretary's letter also pointed out, this would be consistent with State legislation raising training levies for the construction industry. These are usually levied on the total project cost (labour plus materials), in part to recognise the widespread use of contracting in the building and construction industry.

5.3 Market salary rates

Sponsorship obligations should include the payment of 'market salary rates' as defined for the 457 visa program.

Wage rates

Currently employers sponsoring 457 visa workers are required to pay 'the 457 market salary rate'. This is defined as the same terms and conditions of employment as are provided to an Australian undertaking equivalent work in the same workplace at the same location, as provided in the relevant industrial instrument applying to the 'equivalent Australian worker' (enterprise agreement, industrial award, award conditions with over award salary rates and common law contract).

Where there is no Australian performing equivalent work in the same workplace, the employer may demonstrate the market salary rate by reference to the applicable modern award or enterprise agreement. In absence of an award or enterprise agreement the employer is to provide the department with a range of evidence to substantiate the market salary rate.[4]

But employers sponsoring foreign workers on ENS/RSMS visas are not obliged to pay 'the market rate' as defined in the 457 visa program. Instead:

- in the ENS, the employer must 'comply with all relevant Australian standards and workplace legislation for wages and working conditions'; and meet the annual Minimum Salary Level of $49,330 or $67 556 for certain information technology positions

- in the RSMS, there is no Minimum Salary Level and the employer 'must make sure that all relevant workplace laws and award conditions are met'.

The DIAC Discussion Paper provides no data on wage rates at which ENS/RSMS visas have been approved. This is a serious shortcoming in the Paper.

[4] DIAC website, accessed 14 September 2011.

The ACTU therefore requested wages data from DIAC on behalf of affiliate unions. Although this wages data was not supplied in the form requested by the ACTU, the information provided shows that ENS/RSMS visas are being approved at relatively low wage rates, certainly when compared with 457 visas approved in the same broad occupations in the same period.

The data shows:

- In 2010-11, there were **5,372** ENS/RSMS visa grants to workers in trades occupations, 40% of which were to Automotive and Engineering Trades Workers.
- The average base salary across all trades in ENS/RSMS combined was **$48,105 pa**, with the ENS average only slightly higher than the RSMS ($48,461 vs $47,846).
- In 2010-11, the average base salary in ENS/RSMS for all trades ($48,105 pa) was **$20,095** lower than the average base salary for 457 visa grants approved for Technicians and trade workers ($68,200) – this is the closet occupational group for trades workers.[5]

These data suggest that a high proportion of ENS visas are approved at or below the notional Minimum Salary Level, and likewise that RSMS visas tend to be approved at relatively low salaries. The ACTU requested this data but it was not available for this submission.

Requiring payment of 'market rates' (as defined) in all employer-sponsored visas, both temporary and PR) will remove one opportunity to undercut Australian wages and conditions that currently exists in the ENS and RSMS visa programs.

Employers should welcome this change, because it also reduces the administrative complexity of dealing with different wage requirements in different visas.

5.4 Minimum salary threshold for ENS/RSMS

There should be an indexed Minimum Salary Level for both the ENS and RSMS visa programs. The minimum for the ENS ($49,330 currently for non-ICT occupations) should also apply to the RSMS visa.

The current ENS Minimum of $49,330 is the same as the current 457 Temporary Skilled Migration Income Threshold (or TSMIT). According to the DIAC website:

> The TSMIT is set at that level to ensure that all Subclass 457 visa holders have sufficient income to independently provide for themselves in Australia.
>
> The TSMIT helps to ensure that Subclass 457 visa holders do not impose undue costs on the Australian community or find themselves in circumstances which may put pressure on them to breach their visa

[5] The ENS/RSMS average base salary in 2010-11 was even well below the average 457 base salary in trades occupations in 2009-10 , the last year 457 data was presented on an ASCO Tradespersons basis ($48,105 vs $62,900)

conditions. This is particularly important given these workers do not have access to a range of government support available to Australian citizens and permanent residents.[6]

For the first 2 years after being granted ENS/RSMS PR visas, ENS/RSMS visa-holders and their families are in essentially the same position as 457 visa-holders, in that apart from Medicare, there is a 2-year waiting period for most social security benefits after the grant of the PR visas.[7]

No lower RSMS threshold

The 457 'reforms' implemented by the Labor Government in 2008 (including before and after the Deegan report) rejected the idea of a lower effective threshold salary for 457 visas in regional areas, and established the threshold salary for the 457 program as a whole – to apply in capital cities and regions.

The same principle should apply in the RSMS – there should be no lower threshold salary in RSMS relative to ENS and 457s.

The $49,330 ENS minimum base salary does specify a minimum number of hours per week (38 hours) but not a maximum number; and it does exclude overtime rates.

But the $49,330 annual base salary, equivalent to $946.83 per week ordinary time, is relatively low by Australian workforce standards. ABS data shows this rate is **22% ($264.57) below** the average weekly *ordinary time* cash earnings of all full-time non-managerial employees in Australia in May 2010 - $1,211.40, in all occupations combined, and:

- Well below average earnings in *every* major occupation group except Labourers.
- Below the corresponding average earnings rate for Technicians and trades workers ($1,137.40 per week) - and only slightly more than the average rate for Labourers ($900.90 per week) [8]

The current ENS Minimum Salary is therefore already low. Lowering the minimum even further, as canvassed in the Discussion Paper, would be an extremely high-risk move and the Government should firmly reject such proposals.

As the 2008 Deegan Report pointed out in relation to the 457 visa program, the risk of worker exploitation increases significantly at lower wage rates. Lower minimum wage thresholds for employer-sponsored PR visas in regional areas and RSMS-eligible cities (now including Perth) are an open invitation to employers to choose the foreign worker option over others - like training locals - because foreign workers are captive labour.

[6] DIAC website accessed 14 September 2011.

[7] There are some other exclusions from the waiting period, mostly family-related benefits, ie family tax benefit, child care benefit.

[8] ABS *Employee Earnings and Hours*, May 2010 Cat. 6306, Table 10. Note that 'cash earnings' in this survey includes salary sacrifice amounts, but these are relatively low in lower skilled occupations like Labourers.

A regional WA business leader let the cat out of the bag recently when he as much as admitted this. 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.[9]

DIAC's own data show that the RSMS visa is a high-risk visa.

- Of the 538 pre-decision site visits made in 2010-11 by DIAC officers to potential ENS/RSMS sponsors (nominating employers), 43% or 234 resulted in 'adverse referral outcomes', meaning the position nominated for the visa was 'not genuine', 'not verified' or the Department had 'serious concerns'.[10]

DIAC notes that the 538 employers site-visited are not necessarily representative of ENS/RSMS sponsors as a group because the selections...' are triggered by departmental officers who have some initial concerns.'

Nevertheless, in the absence of more representative data, the results of these pre-decision site visits are alarming. They clearly suggest, at the very least, the need for further research and investigation of selected high risk ENS/RSMS employers on a much more systematic basis.

5.6 Monitoring and enforcement

Two actions are needed, the first immediate and the second should be done once ENS/RSMS sponsorship obligations are in place, as recommended above.

First, DIAC should provide the Fair Work Ombudsman (FWO) with the names and contact details of every ENS/RSMS sponsor and the names of the ENS/RSMS visa-holders employed by those sponsors.

At present DIAC does not provide this information to the FWO, and DIAC itself does not conduct any systematic follow-up of ENS/RSMS employers.[11] It is therefore essential that the FWO have this information, if the FWO is to do its job of investigating compliance with the *Fair Work Act 2009* particularly in relation to migrant workers.

There is no doubt that ENS and particularly RSMS visa-holders in trades and sub-trades occupations are vulnerable workers, especially those from Third World countries. RSMS visa-holders are a

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

[10] Email DIAC to ACTU, 13 September 2011.

[11] DIAC email to ACTU, dated 9 September 2011.

particular concern due to the threat of PR visa cancellation that employers can exert, if the visa-holder does not stay with the employer for 2 years.

ENS and RSMS employers should therefore be high on the FWO list of high-risk employer categories for non-compliance with the FWA. But if the FWO does not know who these employers are, they cannot be systematically targeted for investigation.

Second, DIAC should be resourced to adequately monitor ENS/RSMS compliance with sponsorship obligations once these are in place.

5.7 Occupations eligible for ENS/RSMS

The Discussion Paper asks whether the list of occupations currently eligible for the ENS visa (the ENSOL or ENS Occupation List) should be merged with the 457-eligible list.

The Paper notes that some ENS-eligible occupations are not on the 457 list and vice versa, but does not provide information on what these occupations are – nor on what the implications of merging these 2 occupation lists might be.

We obtained information from DIAC which showed that some 127 occupations are on the 457 list but not on ENSOL, and 7 occupations are on ENSOL but not on the 457 list.

The 127 include the following 11 in ANZSCO 3 occupations Technicians and trades workers:

323213 Fitter-Welder
323411 Engineering Patternmaker
342312 Communications Operator
342411 Cabler (Data and Telecommunications)
342412 Telecommunications Cable Jointer
361114 Zookeeper
361199 Animal Attendants and Trainers nec
361211 Shearer
361311 Veterinary Nurse
393299 Clothing Trades Workers nec
399911 Diver
399916 Plastics Technician
399917 Wool Classer
399918 Fire Protection Equipment Technician

Our view is that both the ENSOL and the 457 list should be confined to only those occupations in national shortage. There is no basis for declaring almost every skilled occupation eligible for one or the other list.

In regard to RSMS, we believe that the ENS list should also apply to this scheme, and that the RSMS scheme should not be open-ended with respect to occupations eligible.

5.8 Minimum English language standards

The ENS currently has a minimum English requirement of IELTS 5 ('competent' English) in each of the 4 components – the same as the standard 457 visa minimum - while RSMS has 'functional' English defined as an average of IELTS 4.5 in each of the 4 components (speaking, writing, reading and listening).

- In both programs, the minimum English language standard can be waived if 'exceptional circumstances' apply.

Our view is that the minimum standard for both ENS and RSMS should be IELTS 5, and there should be no 'exceptional circumstances'. This is the position put by unions in relation to 457 workers under EMAs in the resources sector.

The same considerations apply, namely safety and the ability to understand and assert workplace rights.

In addition, labour mobility is enhanced by competent English language skills. This will be an increasingly important factor for the Australian labour force as structural adjustment proceeds.

6. RSMS –specific

6.1 Remove DIAC's power to cancel RSMS visas

As noted above, DIAC has power to cancel RSMS visas, for the reason that the visa-holder had not remained with the sponsoring employer for 2 years.

Our unions believe that this power must be removed.

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." (emphasis added)[12]

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

As the CFMEU submission on the 2011-12 Migration program said:

[12] DIAC website, Regional Sponsored Migration Scheme (Subclass 119/857) (accessed 13 September 2011) –

http://www.immi.gov.au/skilled/skilled-workers/rsms/obligations.htm

> 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 was 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. [13]

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, is repugnant in a modern society. 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.

This situation should concern all those who claim to espouse 'liberal' free market principles.

It should also concern all those who place a high priority on improving labour mobility, such as COAG and many 'liberal' economic commentators.[14]

Effectively the RSMS and the ENS visa programs (to the extent that also ties employees to the particular sponsoring employer) act as a brake on labour mobility, because they take skilled workers 'out of circulation' for the period they are bonded or tied to their sponsors.

6.2 A new Regional visa

If the RSMS visa was tied not to a single employer but required the visa holder to live and work in a regional 'zone' which had multiple potential employers, and the visa holder was free to change employers, this would remove the form of bonded labour inherent in the current scheme.

A lengthy stay in a designated region would hopefully encourage persons to put down substantial roots in the area, rather than rush off to a capital city at the earliest chance.

There would of course be the issue of what sanctions would apply if visa holders on this type of 'regional visa' left the designated regional area before their time was up. By allowing for movement between employers in a region, the extent of this issue could be minimised.

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[13] CFMEU Submission to DIAC on Migration Program 2011-12, dated 10 January 2011, p11.

[14] See Scott Murdoch," Labour mobility is 'key to the resources boom'", *The Australian*, September 10, 2011

http://www.theaustralian.com.au/business/economics/labour-mobility-is-key-to-the-resources-boom/story-e6frg926-1226133492985