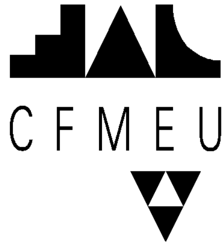

CFMEU SUBMISSION TO REVIEW OF EMPLOYER SANCTIONS LEGISLATION 2010

By email: employercompliance@aph.gov.au

To: The Reviewer

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9 July 2010

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Executive summary

The CFMEU submits that:

- Illegal work as defined in the Act and Discussion Paper is a significant and growing problem. The size of the illegal worker population in 2010 is almost certainly much larger than the estimates of 30,000 to 76,000 persons provided in the Review's Discussion Paper.
- Based on our experience, the CFMEU believes that the problem of illegal workers in the construction industry in 2010 is worse than in 2007 when the Employer Sanctions Act was introduced.
- DIAC should commission independent research to provide estimates of the size of the illegal worker population and its characteristics, and publish updated estimates each year.
- The current legislation is not effective and needs to be strengthened by providing a mix of criminal and civil sanctions.
- Criminal offences should remain in the Act and all criminal offences should be strict liability requiring only proof of the physical elements of the offence. These could sit alongside civil penalty provisions dealing with the same conduct.
- Alternatively, if strict liability is not accepted, the current test of 'knows of, or is reckless as to whether' the person is entitled to work should be removed. We propose adding ***constructive*** knowledge to actual knowledge ie 'knows or ought reasonably to have known' that the illegal worker was not entitled to work.
- There should also be a strict liability civil penalties regime. This should provide a wide range of penalties, ranging from lower level fines up to significant penalties that act as a real deterrent even for well-resourced corporations.
- The CFMEU supports a new civil penalty provision along the following lines:

  Any person who derives a benefit from work of any kind performed by a person who is or was an unlawful non-citizen (UNC) or otherwise not entitled to perform such work (ie, non-resident working in breach of visa conditions) shall be taken to have contravened this provision.
- Unions should be granted standing to bring civil penalty proceedings, as with the Fair Work Act.
- The legislation should provide for a statutory defence for employers/others against the strict liability offences, as proposed by the 1999 RIWA and as applies in similar legislation in the UK.
- In industries with a known high risk of employing illegal workers, all employers and other entities engaging or referring labour should have a legal obligation to check the work rights of all workers (existing and prospective). This should include an obligation to use VEVO (DIAC's Visa Entitlement Verification Online system), as per the clause now included in CFMEU EBAs in NSW.

1. Introduction

The Construction, Forestry, Mining and Energy Union of Australia, (CFMEU) welcomes the opportunity to make a submission to this review of the *Migration Amendment (Employer Sanctions) Act* 2007 (the Act).

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 vast majority of whom work in the construction sector.

The CFMEU has long been a strong supporter of permanent legal migration. There is great diversity in our membership reflecting the workforce composition in the industries we represent.

The CFMEU supports strong and effective laws to combat illegal work. We have long argued for these laws to be enacted and vigorously enforced. We supported the recommendations of the 1999 Review of Illegal Work (RIWA), particularly the strict liability approach recommended by that report.

When the 2007 legislation was introduced without the strict liability provisions, the CFMEU formally expressed its concern and disappointment. Our prediction that few employers would face criminal sanctions under the Act has proved correct.

2. Why illegal work is a serious problem

The Discussion Paper (p5) lists 7 reasons why illegal work by non-residents 'is seen as a problem for the Australian community'.

Top of the list is rightly that 'illegal workers take jobs away from Australian citizens, permanent residents or temporary residents with the right to work'.

However, missing from the list are two important reasons why illegal work is abhorrent and against Australia's national interests.

<u>First,</u> illegal work not only takes away jobs. Illegal work threatens workplace safety and the wages and working conditions of Australian workers and temporary residents working lawfully in Australia. Illegal workers are vulnerable workers with no bargaining power and no power to resist unlawful demands by employers.

The more illegal work takes place in an industry or occupation, the more overall wages and conditions (including safety) in those sectors will be reduced relative to other sectors.

One predictable result is that Australian workers will be less attracted to work in sectors with relatively high levels of illegal work, because standards will be relatively lower and more precarious.

<u>Second</u>, illegal work threatens not only public confidence in the immigration program. It also threatens public confidence in the bipartisan goal of building closer economic relations between

Australia and Asia. As DIAC's own figures show, most (but not all) of the illegal migrants detected by DIAC compliance work are from Asian countries. [1]

Failure to prevent illegal work by a mainly Asian workforce is not conducive to developing positive community attitudes towards Asian people and indeed our nation's important place in Asia.

This is doubly important, given that foreign nationals admitted to Australia on visas specifically for the purpose of tourism and education make up a significant part of the illegal workforce.

2.1 Regulating work by temporary residents

Most illegal workers work in lower-skilled occupations. It is useful to restate what successive Australian governments have done to regulate access by foreign nationals to the Australian labour market.

In regard to skilled labour, the Australian government strictly regulates access of foreign skilled workers to the Australian labour market. It does this through the 457 visa regime for temporary skilled workers.

As stated by the Minister for Immigration and Citizenship:

> 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.[2]

This position is consistent with Australia's binding international commitments regarding the movement of skilled foreign labour into Australia, under the 1995 World Trade Organisation General Agreement of Trade in Services (WTO GATS).

Under this agreement, Australia committed to allow skilled foreign workers to access the Australian labour market only under employer sponsorship and only after local 'labour market testing', ie the employer being required to show that there were no qualified Australian workers available who could do the work. The exceptions are mainly for persons entering as intra-company transfers.

- The important principle embodied in this is that Australian residents who are skilled workers have superior rights to skilled work within Australia, relative to non-resident workers.

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[1] In 2009-10 (to 31 March 2010), 76% of all illegal workers located by DIAC were from 8 Asian countries, dominated by Malaysia and China (Source: *DIAC, Immigration compliance - at a glance (2009-10 as at 31 March 2010)*).

[2] Senator Chris Evans, Minister for Immigration and Citizenship, 'Employers must put locals first', media release, 2 March 2010. See also 'Overseas workers to supplement not replace local work force', 29 July 2009.

In relation to lower skilled workers, the Australian government has set even higher standards for the temporary admission of foreign nationals. 'Lower-skilled' here means sub-trades occupations ASCO 5-7.

Temporary 457 visas for foreign workers in these occupations can only be approved through a 'labour agreement'.[3] This is a formal agreement between the Commonwealth government and the employer or industry body sponsoring the foreign workers, after consultation with relevant industrial stakeholders, including peak bodies, professional associations and unions.

These 457 visa labour agreements for lower skilled workers require a higher standard of proof that there are no Australian workers available to do the work.

In relation to temporary unskilled workers, the government enforces a higher standard than for skilled or semi-skilled workers. This applies to both the evidence required to demonstrate that there is a genuine shortage of Australian workers and the level of regulation of the visa regime under which unskilled workers are admitted. This is meant to apply in the Pacific Islander Seasonal Worker pilot program.

- In the period 2000-2009, employment in unskilled jobs (Labourers etc) Australia-wide grew at less than half the rate in all occupations (10% vs 23% - ABS customised Labour Force Survey data). This is a further reason why access must be tightly regulated.

2.2 Less-regulated temporary work visas

While the Australian government at least tries to regulate access to the Australian labour market in this way through its employer-sponsored visa regimes (as do nearly all OECD countries), it has taken a different view to some other temporary visas with work rights attached and which impact on the semi-skilled and unskilled labour market.

The main examples of these visas are the Working Holiday visa (WHM or subclass 417) and visas for overseas students and overseas student graduates from Australian universities and colleges (eg the Graduate skilled visa, subclass 485).

The CFMEU has consistently argued that these uncapped and largely unregulated temporary visas with work rights have had serious adverse impacts in the Australian labour market, particularly for young people and those competing in lower-skilled job markets.[4]

We have proposed that the work rights associated with these visas should be reviewed; and that there should be independent assessments of the actual labour market impacts of these visas, including the negative impacts on young Australians, before any consideration is given to increasing

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[3] Senator Chris Evans, Minister for Immigration and Citizenship, 'New process for temporary business visa labour agreements', media release, 20 February 2008.

[4] The CFMEU made submissions along these lines to several inquiries into international students in 2009, include a Senate inquiry into the welfare of international students and the Baird inquiry.

the work rights attached to these visas (eg, by increasing the number of hours overseas students are permitted to work each week during term, currently 20 hours).

The following examples illustrate our concerns about the negative impact of these uncapped temporary work visas:

- Between June 2008 and June 2009, the number of persons aged 15-24 year old in jobs Australia-wide fell by 101,000 (ABS Labour Force Survey data). Yet during the same time, the number of overseas student and WHMs on these temporary visas with work rights grew by 82,400 or 20%, from 406,500 to 488,800[5] - creating intense competition in the youth labour market.

- In some trade courses where overseas students are concentrated (eg cooking), the numbers graduating have grown so large they are swamping the young Australians competing for scarce openings.

    - In 2007-08, around 23,000 overseas student graduates obtained formal recognition of their trade qualifications from Trades Recognition Australia (TRA).[6] Probably around 15,000 to 20,000 of these would have qualified as cooks, *nearly 10 times* the annual output of cooks from the Australian apprenticeship system (around 2,300 in 2007-08).

- The main goal of many of these temporary visa holders is a PR visa, and some are prepared to work for substandard wages and conditions to secure one. One study reported overseas students working for as little as $4 an hour to make up their mandatory 900 hours of 'work experience' required for their 'trade qualification', and some students even paying their employer to get this work, and working for nothing.[7]

Our point is that illegal work in Australia takes place in an environment where the impacts of legal work undertaken by non-citizens is poorly regulated and already having serious adverse impacts.

3. Threats to work illegally

One measure of the effectiveness of the current Act is the extent to which it deters illegal work. The Act has failed badly in this area. The Act has so conspicuously failed to tackle the problem of illegal workers in NSW construction that the CFMEU has been obliged to address the issue through Enterprise Bargaining Agreements (EBAs) – see Attachment 2.

Another indicator of the weakness of current laws came recently in the form of threats by some overseas students to stay in Australia as illegals, if they did not get their way and receive permanent residence (PR) visas.

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[5] Source for this published data is DIAC, *Immigration Update 2008-09*.
http://www.immi.gov.au/media/publications/statistics/immigration-update/update-jun09.pdf

[6] DEEWR Submission to Senate Inquiry into the welfare of international students, 2009.

[7] See B.Birrell, E.Healy and B.Kinnaird, 'Cooks galore and hairdressers aplenty', *People and Place*, Vol 15, no 1, 2007; pp30-44; and 'The cooking-immigration nexus', *People and Place*, Vol 17, no 1, 2009; pp63-75.

The CFMEU addressed this issue in its recent submission to the Senate Inquiry into the Visa Capping Bill. The relevant extract is reproduced below.

The point is that if the Employer Sanctions Act was effective in stamping out illegal work, it is less likely that this threat would be made. If those tempted to make such a threat saw regular media reports of employers being successfully prosecuted for hiring persons with no entitlement to work in Australia, there would be more hesitation before issuing the threat.

The lax regulation of overseas students work limits has probably also contributed (Attachment 1).

The CFMEU submission to the recent Senate inquiry said:

> The CFMEU also notes that some submissions to the Inquiry have argued that the provisions of the Bill applying 'cap and cease' to existing visa applicants should not be passed, because 'the majority' of these persons who are already in Australia will ignore the new laws and stay on as 'illegal immigrants'.
>
> Thus as one submission put it:
>
>> 2) The other definite problem Australia will face is of illegal immigrants. Where the lodged applications will be cancelled, majority of the applicants will not be returning to their country and will stay illegally in Australia. Australia would then become like one of the European countries or America having illegal immigrants. To avoid this problem you should not cancel the applications that have been lodged but should not take any further applications that have not yet been lodged. This will both benefit Australia and the applicants.[8]
>
> The threat to stay in Australia and to work as illegal immigrants should be explicitly and strongly rejected by the Committee. Australian migration laws and policy should not be made in response to threats, as a matter of principle.
>
> Illegal immigration threatens the wages and working conditions of Australian workers, and also temporary residents working lawfully in the Australian labour market.
>
> As well, it disadvantages employers doing the right thing and complying with industrial laws and agreements. Illegal workers are vulnerable workers with no bargaining power. Employers of illegal workers can undercut their competitors and gain an unfair competitive advantage.
>
> The CFMEU notes that the Minster has recently commissioned a review of the adequacy of penalties provided under the Migration Amendment (Employer Sanctions) Act 2007 for employers and labour hire firms using or engaging illegal workers. Threats such as those

[8] Submission No 12 to Committee Inquiry into *Migration Amendment (Visa Capping) Bill 2010*, dated 29 June 2010 (sic), Name withheld.

quoted above underline the importance of this review and should be brought to its attention.[9]

4.The size of the problem

Illegal work as defined in the Act and Discussion Paper is a significant and growing problem. The size of the illegal worker population in 2010 is almost certainly much larger than the estimates of 30,000 to 76,000 persons provided in the Paper – see Attachment 1.

Based on our experience, the CFMEU believes that the problem of illegal workers in the construction industry in 2010 is worse than in 2007 when the Employer Sanctions Act was introduced.

Our assessment is based on the number of incidents involving illegal workers that have come to our attention on construction sites, particularly in NSW; the numbers of workers involved; and the apparently increasing number of visa situations that illegal workers are in (for example, in 2009 we encountered persons without a valid visa at all, persons apparently unknown to DIAC at all, and persons working in breach of visa conditions on visitor visas and overseas student visas).

5.Conclusions and recommendations

1. Illegal work as defined in the Act and Discussion Paper is a significant and growing problem. The size of the illegal worker population in 2010 is almost certainly much larger than the estimates of 30,000 to 76,000 persons provided in the Paper – see Attachment 1.

- Based on our experience, the CFMEU believes that the problem of illegal workers in the construction industry in 2010 is worse than in 2007 when the Employer Sanctions Act was introduced.

2. DIAC should commission independent research to provide estimates of the size of the illegal worker population and its characteristics (including industries where employed), and publish updated estimates each year.

3. Effective employer sanctions laws are essential for an effective solution to the illegal worker problem, and to prevent the problem from growing into the scale of problem in the UK and US.

Effective employer sanctions laws

4. The current legislation is not effective and needs to be strengthened by providing a mix of criminal and civil sanctions.

[9] CFMEU Submission (No 208) to Committee Inquiry into *Migration Amendment (Visa Capping) Bill 2010*, dated 17 June 2010.
http://www.aph.gov.au/Senate/committee/legcon_ctte/migration_amendment_visa_capping/submissions.htm

5.1 Criminal sanctions

5. Criminal offences should remain in the Act and all criminal offences should be strict liability requiring only proof of the physical elements of the offence. This should apply to the most serious, repeated and/or deliberate breaches and also the lesser infringements. These could sit alongside civil penalty provisions dealing with the same conduct – see below. {Criminal penalties can co-exist with civil penalties – see for example s 552 of FWA and following}.

6. Alternatively, if strict liability is not accepted, the current test of 'knows of, or is reckless as to whether' the person is entitled to work should be removed. We propose adding ***constructive*** knowledge to actual knowledge ie 'knows or ought reasonably to have known' that the illegal worker was not entitled to work.

7. The 'aggravated offences' provision in the current legislation is strongly supported and those offences listed should remain, ie slavery, forced labour and sexual servitude.

8. Penalties for criminal offences: in relation to custodial terms, the existing penalties are supported (currently maximum 5 years for aggravated and 2 years otherwise). In relation to fines for the aggravated offences (currently maximum $33,000 for individuals and $165,000 for companies), the CFMEU supports uncapped maximum fines for companies.

- For non-aggravated offences, the CFMEU believes the maximum fines should be increased from their current levels of $13,200 for individuals and up to $66,000 for companies.

5.2 Civil penalties

9. There should also be a strict liability civil penalties regime. This should provide a wide range of penalties, ranging from lower level fines up to significant penalties that act as a real deterrent even for well-resourced corporations.

   - Engaging or referring for employment multiple illegal workers should be recognised as a more serious breach than one involving an individual illegal worker, and the scale of penalties should reflect this.

   - Penalties should include immigration-related penalties, such as cancellation of sponsor status (where the sponsor is currently a 457 sponsor) and a bar on being a 457 sponsor for a lengthy period of time after the breach (irrespective of whether the employer is a sponsor or not at the time of the breach).

   - More serious penalties should apply where the employer/entity found to have been engaging or allowing illegal labour is:

     a) currently approved by DIAC as sponsor of temporary or permanent visa workers (eg subclass 457, other 400 series visas, employer-sponsored PR visas). These employers are privileged and expected to maintain higher standards than non-approved employers.

     b) further exploiting the illegal worker through underpayment of wages and/or the use of 'sham contracting', ie where an employer tries to disguise an employment relationship

as an independent contracting relationship. Conduct associated with sham contracting (eg misrepresentation) can attract penalties of up to $33,000 per contravention under the FW Act.

- Unions should be granted standing to bring civil penalty proceedings, as they are under the Fair Work Act.

10. The CFMEU supports a new civil penalty provision along the following lines:

    Any person who derives a benefit from work of any kind performed by a person who is or was an unlawful non-citizen (UNC) or otherwise not entitled to perform such work (ie, non-resident working in breach of visa conditions):

    a) In a business or entity owned or controlled by that person;

    b) In connexion with a business controlled or operated by that person;

    c) at or under the direction of that person –

    shall be taken to have contravened this provision.

11. The civil penalty system above could capture the principal contractor in the construction industry responsible for a site where illegal workers are engaged by subcontractors. However, the CFMEU supports including a legislative provision specifically identifying the principal contractor in the construction industry as having obligations and liability for the engagement of illegal workers by subcontractors.

    - This is consistent with other workplace legislation imposing a statutory responsibility on principal contractors, notably for occupational health and safety, for example in the Queensland *Workplace Health and Safety Act* 1995 and in other jurisdictions – see Attachment 3.

12. There should also be provisions that allow individuals involved in corporate decision-making to be penalised as well as the corporate entity eg see s 550 of FWA (involvement in contravention treated in same way as actual contravention). The courts also have powers to make other appropriate orders in civil penalty cases under the Fair Work Act [see for eg s 545 – Orders that may be made by a particular court] and an equivalent power might be useful here e.g. orders that a compliance programme be undertaken, costs, compensation, injunctions or perhaps even disqualification from directorships. [10]

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[10] Disqualification from being a director has also been canvassed by the Treasury as a penalty option for fraudulent Phoenix activity, ie giving 'a Court or the Australian Securities and Investment Commission (ASIC) a discretion to disqualify a person from being a director if the relevant company has been wound up and the conduct of the person, as a director of that company, makes them unfit to be concerned in the management of a company'. (Source: The Treasury, *Action against fraudulent Phoenix activity, Proposals Paper*, November 2009.) The CFMEU supported disqualification in its response to this Proposals Paper.

5.3 Employer defence against strict liability offences

13. The legislation should provide for a statutory defence for employers/others against the strict liability offences, as recommended by the 1999 RIWA and as applies in similar legislation in the UK. As in the UK system, this defence could be established by evidence that the employer/entity had checked specific documents and/or used the DIAC VEVO system at the point of hiring; checked to ensure their continuing entitlement to work; and maintained records for a specified period.

    - Maintaining these records is similar to the 457 sponsor obligations to keep records of their compliance with sponsorship obligations, in a reproducible form or format and to provide these records and information to DIAC in a manner and in a timeframe requested by them.

5.4 Obligation to check work rights

14. In industries with a known high risk of employing illegal workers, all employers and other entities engaging or referring labour should have a legal obligation to check the work rights of all workers (existing and prospective). This should include an obligation to use VEVO (DIAC's Visa Entitlement Verification Online system), as per the clause now included in CFMEU EBAs in NSW, which has been certified – Attachment 2.

    VEVO will capture only persons with a visa or passport, but not certain categories of Australian citizens. DIAC's current advice to employers and labour suppliers on the Employer Sanctions laws states that each of the following is proof of a person's entitlement to work in Australia:

    • an Australian passport

    • an Australian citizenship certificate

    • a certificate of evidence of Australian citizenship

    • a valid visa with permission to work (checked through VEVO or Faxback)

    • a full Australian birth certificate for a person born before 20 August 1986

    • a full Australian birth certificate for a person born on or after 20 August 1986, showing that at least one parent was born in Australia.

    It is not unreasonable that employers and others in construction and other high risk industries should have this obligation.

15. The same obligation to check the work rights of all workers (as proposed for construction, above) could also be applied to other sectors which are government priorities, eg the resources sector.

16. VEVO: An employer or other entity wishing to use VEVO to check the work entitlements of prospective employees currently requires the consent of the prospective employee to do so. Consent should not be required; and any employer/other entity engaging a worker after the

worker refused consent to check their work entitlement on VEVO should lose any right to the available statutory defences.

5.5 'Naming and shaming' employers

17. 'Naming and shaming' employers and labour suppliers found to have employed illegal workers would assist in changing behaviour and creating more effective deterrence, and should be adopted.

    - This strategy should be legislated for, to prevent the strategy being constrained or overturned on 'privacy' grounds.
    - DIAC should be legally obliged to 'name and shame' on its website offending employers/labour suppliers after a threshold leve has been reached, eg more than one Illegal Worker Warning Notice (IWWN) or Infringement Notice. There should be no DIAC discretion in this matter.

5.6 Complementary incentives to encourage employer compliance

Sponsorship eligibility (DIAC-related)

18. DIAC should require all employers seeking approval as sponsors for employer-sponsored visas (eg the subclass 457 visa) to commit to the use of VEVO as a condition of being approved; and to demonstrate that they are using VEVO during the period that they have approved sponsorship status.

Government procurement

19. Employers and others employing/referring illegal workers should be ineligible to tender for Australian government contract work for a prescribed period which could vary according to the seriousness of the offence or breach. This should apply in construction and all other sectors.

20. All organisations tendering for government contract work should have an obligation to use VEVO. This also should apply in construction and all other sectors.

21. The Commonwealth government should negotiate with the States/Territories to secure similar provisions in their government procurement arrangements.

Construction industry code of practice

22. The obligation to comply with Australian immigration laws including especially the ESL should be written into the construction industry code, the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry (August 2009).

    The relevant section is 6.1, Legal obligations relating to employment, under "Workplace relations and Occupational Health Safety and Rehabilitation components". The Code states:

    All parties must comply with the provisions of applicable:

• awards and workplace arrangements which have been certified, registered or otherwise approved under the relevant industrial relations legislation; and

• legislative requirements.”

The *Migration Amendment (Employer Sanctions) Act* 2007 (and its successor) could be specifically listed in the Guidelines above, ie:

• legislative requirements, including those prohibiting the engagement of illegal workers under the *Migration Amendment (Employer Sanctions) Act* 2007 and its successors.”

Attachment 1 Estimates of illegal workers

The Discussion Paper says that DIAC estimates the illegal worker population to be in the range of 30,000 to 76,000 non-citizens 'at any given time', or just under 0.7% of Australia's working population (p5).

The Paper states that this estimate includes both:

- Unlawful non-citizens (UNCs) undertaking work in Australia;
- Lawful non-citizens (visa holders) working in breach of a visa condition which prohibits or limits the work they can do – but EXCLUDING overseas students working in breach of their allowable hours (20 hours/week during study term, unrestricted hours in vacation time).

The paper does not explain the method by which these estimates were derived. The CFMEU contacted the Review Secretariat seeking more information on these estimates, and was put in touch with the Departmental officer who produced them. This officer advised that there was a DIAC Paper which set out how these estimates were derived, and tried to explain the complex methodology over the phone.

The CFMEU requested a copy of this paper, but the paper was not cleared for release by the Immigration Minister's office by the time the CFMEU made its submission.

Problems with the DIAC estimates

There are several:

- The method by which these estimates were derived has not been disclosed and therefore cannot be properly assessed.
- The estimate does not provide a breakdown by UNCs and others, in particular the numbers working in breach of their visa conditions, by visa class or subclass.
    - This information is central to an effective targeting strategy, among other things.
- The estimate excludes overseas students who comprise the largest group of temporary visa holders with work rights, and possibly the largest single group working in breach of their work rights – see below.
- The claim in the Discussion Paper that the estimates related to 'any given time' is not accurate. They relate specifically to June 2009, according to telephone conversations with DIAC.
- Most importantly, because the Paper does not provide another estimate for a time before 2009, it is not possible to establish whether the number of illegal workers has declined since 2007 when the Employer Sanctions laws were introduced, in absolute or relative terms.

- This Is one important indicator of whether the Employer Sanctions legislation has been effective, but this assessment cannot be made on the limited data presented.

- It is not clear if the DIAC estimates have taken into account unpaid work, which (as the Discussion Paper notes) comes within the definition in Subsection 245AG of the Migration Act, which defines 'work' as 'any work, whether for reward or otherwise' (Paper, p4).
  - This in turn raises the issue of so-called unpaid 'voluntary work' performed by persons holding visitor visas which has been authorised by DIAC.
  - This includes work for statutory bodies and government departments in the area of environmental protection, plus work on rural properties and in regional areas.
  - There is a lack of public information and transparency about this so-called authorised unpaid work, even though the scale could be quite large. More information needs to be released, as a minimum.

Overseas students

Those in this group working excess hours have been excluded from DIAC estimates of illegal workers.

There are apparently no official estimates of the number of overseas students working excess hours, or the total amount of work done by them. In fact, there is no up-to-date official estimate of the proportion of overseas students undertaking *lawful* work, or the amount and value of that work (the last AEI survey was in 2004) – let alone its impacts (positive and negative) in the domestic labour market.

Based on submissions and evidence presented to two official inquiries in 2009[11], it is commonplace for international students to work in excess of the 20 hours/week limit during term.

According to one estimate (based on a non-representative small sample), some 70% of international students work.[12] If that figure applied to the total stock of international students in Australia in June 2009 (386,500), then just over 270,000 overseas students would be working.

- If only 5% to 10% were working excess hours, between 13,500 to 27,000 overseas students would have been working in breach of their visa conditions in June 2009.

[11] The Senate Committee of Inquiry into the welfare of international students, and the Baird inquiry into the ESOS Act.

[12] Nyland, C, Forbes-Mewett, H, Marginson, S, Ramia, G, Sawir, E and Smith, S 2009, Journal of Education and Work, vol. 22, no. 1, Feb, pp. 3-4. See also Bob Birrell & T Fred Smith, *Export earnings from the overseas student industry: how much?* Australian Universities Review, vol. 52, no. 1, 2010, pp 4-9, especially discussion reviewing ABS estimates of student earnings in Australia.

This is not a trivial number, and nor would the labour market impacts be trivial. The proportion of international students taking vocational courses would certainly be very high, because 'work experience' is required to be granted the qualification needed for a PR visa application.

CFMEU comments

The CFMEU believes that estimates for the number of persons working illegally should be prepared and presented for separate categories and each major visa class or subclass, ie

- Overstayers
- Visitor/tourist visas – any work
- Working Holiday Makers – working more than 6 months with one employer.
- Overseas students – working excess hours
- Temporary business short stay visas, etc

Given the huge growth in these temporary visas since 1999, it is reasonable to expect that the number of persons working illegally has also risen. Even if only 2% of persons on visitor/tourist visas worked illegally, for example, and that remained constant, then the total number working illegally would increase as the total numbers increased.

A proportion of persons granted an onshore 457 visa have previously held a visitor or tourist visa. Some may have been working unlawfully for their sponsoring employer before being granted the 457 visa, but it is not known if DIAC checks this.

- Some 13% of persons granted an onshore 457 visa in trades occupations the 6 months to 31 December 2009 previously held a visitor or tourist visa, or a 456 business short stay visa (DIAC unpublished data) – but the numbers were relatively small in this period (120 out of 940).

US research

US research indicates that in 2005, illegal workers comprised around 4.9% of total employment in all industries combined, but between 12% of construction industry employment[13] - or around 2.45 times the proportion of illegal workers as all industries combined.

Assuming this ratio applied in Australia, and that 0.7% of total employed persons were illegal workers, then illegal workers would comprise around 1.71% of total construction industry employment (2.45 x 0.7%). This equates to around **16,900** illegal workers in a total construction workforce in Australia of some 985,000 persons (ABS data, May 2009).

While we do not claim this is the actual number of illegals in Australian construction, it provides a guide to the potential size of the problem.

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[13] The Pew Hispanic Centre, *Size and characteristics of the Unauthorised Migrant Population in the United States, Estimates Based on the March 2005 Current Population Survey*, March 2006, p14. http://pewhispanic.org/files/reports/61.pdf

Attachment 2 CFMEU EBA clause on illegal workers

The following clause is being inserted into EBAs negotiated by the CFMEU NSW Branch:

37. IMMIGRATION COMPLIANCE

The Company recognises its obligations in respect of compliance with the Australian Immigration laws.

Existing and prospective Employees will be required to complete the Authority contained in Appendix J of this Agreement to obtain from Department of Immigration and Citizenship (DIAC) details of immigration status. No person will be allowed to undertake any work for the Company unless it is verified he / she has the right to work.

Copies of this authority will be available on request to the Secretary of the Union or nominee.

This provision will be strictly complied with by the Company.

For Appendix J – see next page.

Authority to obtain details of work rights status from DIAC

EMPLOYEE DETAILS
(As specified in passport or other identity document)

Family Name:

____

Given Name(s):

____

Other Name(s) used (e.g. maiden name):

Date of Birth: _____ / _____ / _____

Nationality:
____

Passport Number:
____

Visa Number:
____

Visa Expiry Date: _____ / _____ / _____

I authorise the Department of Immigration and Citizenship (DIAC) to release the details of my work rights status (that is, my entitlement to work legally in Australia) to the named employer / labour supplier and a representative of a principal contractor and authorised trade union officer on request.

I understand that these details are held by DIAC on departmental files and computer systems. I also understand that the employer / labour supplier will use this information for the purposes of establishing my legal entitlement to work in Australia, and for no other purpose. I also understand that I allow release of my work rights for a period of three months from the date below.

Employee Signature:

____

Date: _____ / _____ / _____

EMPLOYER / LABOUR SUPPLIER DETAILS

Business Name:
____

____

____

Business Street Address:
____

____

____

____

Type of Business:
____

____

Name of Contact Person:

____

Telephone:
____

Fax:
____
___

Note that the employee's work rights status will be sent directly to the fax number given above. Please ensure that this number is correct

THE COMPLETED FORM SHOULD BE FAXED TO 1800 505 550

IF ALL DETAILS MATCH WITH OUR RECORDS, THE EMPLOYEE'S WORK RIGHTS STATUS WILL BE FAXED TO YOU WITHIN ONE WORKING DAY.

Attachment 3 – OHS Legislation extracts

QLD WORKPLACE HEALTH AND SAFETY ACT 1995 - SECT 31

31 Obligations of principal contractors

(1) A principal contractor has an obligation to ensure the workplace health and safety of persons arising from--

(a) a hazard at the workplace for which no other person owes a workplace health and safety obligation; and
(b) anything that has been provided for the general use of persons at the workplace.

(2) Without limiting the principal contractor's obligation under subsection (1), the principal contractor must--

(a) coordinate, supervise and oversee construction work in a way that prevents or minimises risks to the health and safety of persons at or near the workplace during the work; and
(b) consult with each of the following persons who are involved in the construction work in relation to identifying hazards associated with the construction work and assessing risks that may result because of the hazards--
(c) notify another person of any matter of which the principal contractor is aware, or should reasonably be aware, that may affect the capacity of that person to comply with the person's obligations under this Act; and
(d) provide safeguards and take safety measures prescribed under a regulation made for principal contractors.

(3) In addition, the principal contractor has the obligation mentioned in subsection (4) if the principal contractor reasonably believes, or should reasonably believe, that a person at the workplace is not discharging the person's workplace health and safety obligation.

(4) The principal contractor must--

(a) direct the person to comply with the person's workplace health and safety obligation; and
(b) if the person fails to comply with the direction--ensure the person stops work until the person complies with the obligation.

WORKPLACE HEALTH AND SAFETY ACT 1995 - SECT 34C

34C Obligation of person in control of relevant workplace area

(1) The person in control of a relevant workplace area has an obligation to ensure the relevant workplace area is safe and without risk to health.

(2) This section does not apply to a relevant workplace area to the extent that the relevant workplace area is also the domestic premises of the person in control of the relevant workplace area.

WORKPLACE HEALTH AND SAFETY ACT 1995 - SECT 13

13 Who is the principal contractor for construction work

(1) The principal contractor for construction work, other than prescribed construction work, is the person appointed by the client as the principal contractor for the construction work under section 184A.

(2) If the client does not appoint a principal contractor for the construction work, the client is taken to be the principal contractor for the construction work.

(3) The principal contractor for prescribed construction work is the person who is in control of the prescribed construction work.

Note--
For construction work for which there is no client and that is not prescribed construction work, there is no principal contractor.

(4) In this section--

prescribed construction work means construction work that--

(a) is for a structure that is a class 1a building or an associated class 10a building; and
(b) has an estimated final price of more than $80000.

WORKPLACE HEALTH AND SAFETY ACT 1995 - SECT 30C

30C Obligations of project managers

A project manager has an obligation to ensure construction work is planned and managed in a way that prevents or minimises risks to the health and safety of--

(a) all persons undertaking the construction work; and
(b) persons at or near the workplace during the construction work.

WORKPLACE HEALTH AND SAFETY ACT 1995 - SECT 12B

12B Who is the project manager for construction work

(1) The project manager for construction work is the person engaged by the client to carry out the planning and management of the construction work.

(2) Subsection (1) does not apply if--

(a) the construction work is for a structure that is a class 1a building or an associated class 10a building; or

(b) the construction work is not a prescribed activity, and the estimated final price for the construction work is $80000 or less.

ACT WORK SAFETY ACT 2008 - SECT 22

Duty—person in control of premises

(1) This section applies to a person in control of premises.

Note ***Person in control*** —see s 13.

(2) The person has a duty to ensure work safety in relation to the premises by managing risk.

Note ***Managing risk*** —see s 14.

(3) Without limiting subsection (2), the person's duty includes—

(a) maintaining the premises in a way that is consistent with work safety; and

(b) providing safe entry to, and exit from, the premises.

ACT WORK SAFETY ACT 2008 - SECT 13

Meaning of person in control

For this Act, a "person in control" is—

(a) for premises—anyone who has control of the premises, including anyone with authority to make decisions about the management of the premises; or

(b) for plant or a system—anyone who has control of the plant or system or the operation of the plant or system, including anyone with authority to make decisions about the plant or system or the operation of the plant or system; or

(c) for the design, manufacture, import or supply of plant or a system—anyone who has control of the design, manufacture, import or supply of the plant or system, including anyone with authority to make decisions about the design, manufacture, import or supply; or

(d) anyone else prescribed by regulation.

Note More than 1 person may be a person in control for a duty under this Act (see s 16).

NSW OCCUPATIONAL HEALTH AND SAFETY ACT 2000

10 Duties of controllers of work premises, plant or substances

(1) A person who has control of premises used by people as a place of work must ensure that the premises are safe and without risks to health.

(2) A person who has control of any plant or substance used by people at work must ensure that the plant or substance is safe and without risks to health when properly used.

(3) The duties of a person under this section:

(a) do not apply to premises, plant or substances used only by employees of the person, and

(b) do not apply to premises occupied only as a private dwelling or to plant or substances used in any such premises, and

(c) extend to the means of access to or exit from a place of work, and

(d) apply only if the premises, plant or substances are controlled in the course of a trade, business or other undertaking (whether for profit or not) of the person.

(4) In this section, a person who has control of premises, plant or substances includes:

(a) a person who has only limited control of the premises, plant or substances (in which case any duty under this section applies only to the matters over which the person has control), and

(b) a person who has, under any contract or lease, an obligation to maintain or repair the premises, plant or substances (in which case any duty under this section applies only to the matters covered by the contract or lease).

26 Offences by corporations—liability of directors and managers

(1) If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the director or person satisfies the court that:

(a) he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or

(b) he or she, being in such a position, used all due diligence to prevent the contravention by the corporation.

(2) A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the corporation has been proceeded against or been convicted under that provision.

(3) Nothing in subsection (1) prejudices or affects any liability imposed by a provision of this Act or the regulations on any corporation by which an offence against the provision is actually committed.

(4) In the case of a corporation that is a local council, a member of the council (in his or her capacity as such a member) is not to be regarded as a director or person concerned in the management of the council for the purposes of this section.

NT WORKPLACE HEALTH AND SAFETY ACT - SECT 56

Duties in regard to workplace

56. Duties in regard to workplace

(1) An employer has a duty to take all reasonably practicable measures to ensure that the workplace, and the means of entering and leaving it, are safe.

(2) The duty extends, to the extent that may be appropriate in the circumstances, to:

(a) an owner or occupier of the workplace; and

(b) a person who designs, constructs, manufactures, imports, installs or supplies a workplace or any part or component of a workplace.

(3) An employer or other person who fails to comply with a duty under this section is guilty of an offence.

Maximum penalty: 1 000 penalty units or imprisonment for 2 years.

SA OCCUPATIONAL HEALTH, SAFETY AND WELFARE ACT 1986
23 Duties of occupiers
Working Date: ***28 August 2006***

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23 Duties of occupiers

The occupier of a workplace must ensure so far as is reasonably practicable—

(a) that the workplace is maintained in a safe condition; and
(b) that the means of access to and egress from the workplace are safe.
(a) for a first offence—Division 2 fine;
(b) for a subsequent offence—Division 1 fine.

TAS WORKPLACE HEALTH AND SAFETY ACT 1995 - SECT 15

15. Persons in control of workplaces, &c.

(1) A person who has control of any premises, plant, substance or temporary public stand to which subsection (2) applies must ensure so far as is reasonably practicable that the premises and the means of access to or egress from the premises, or the plant, substance or temporary public stand are safe and without risk to health and safety.

Penalty:

In the case of –

(a) a body corporate, a fine not exceeding 1 500 penalty units; and

(b) a natural person, a fine not exceeding 500 penalty units.

(2) This subsection applies to –

(a) premises which have been made available to persons, other than employees of the person in control of the premises, as a workplace or the means of access to or egress from those premises; and

(b) any plant, substance or temporary public stand which has been provided for the use or operation of persons at a workplace, other than employees of the person in control of that plant, substance or temporary public stand.

(3) A person who has control of any workplace or temporary public stand must so far as is reasonably practicable –

(a) ensure that visitors to the workplace or temporary public stand are aware of the health and safety requirements relevant to the visitors and that they comply with those requirements; and

(b) remove a visitor who fails to comply with any health and safety requirements relevant to visitors to the workplace or temporary public stand.

Penalty:

In the case of –

(a) a body corporate, a fine not exceeding 1 500 penalty units; or

(b) a natural person, a fine not exceeding 500 penalty units.

VIC Occupational Health and Safety Act 2004 - SECT 26

Duties of persons who manage or control workplaces

26. Duties of persons who manage or control workplaces

(1) A person who (whether as an owner or otherwise) has, to any extent, the management or control of a workplace must ensure so far as is reasonably practicable that the workplace and the means of entering and leaving it are safe and without risks to health.

Penalty: 1800 penalty units for a natural person; 9000 penalty units for a body corporate.

(2) The duties of a person under subsection (1) apply only in relation to matters over which the person has management or control.

WA OCCUPATIONAL SAFETY AND HEALTH ACT 1984 - SECT 22

22 . Duties of persons who have control of workplaces

(1) A person that has, to any extent, control of —

(a) a workplace where persons who are not employees of that person work or are likely to be in the course of their work; or

(b) the means of access to and egress from a workplace,

shall take such measures as are practicable to ensure that the workplace, or the means of access to or egress from the workplace, as the case may be, are such that persons who are at the workplace or use the means of access to and egress from the workplace are not exposed to hazards.

(2) Where a person has, by virtue of a contract or lease, an obligation of any extent in relation to the maintenance or repair of a workplace or the means of access to and egress from the workplace, the person shall be treated for the purposes of subsection (1) as being a person that has control of that workplace or that means of access or egress.

(3) A reference in this section to a person having control of any workplace or means of access to or egress from a workplace is a reference to a person having control of that workplace or that means of access or egress in connection with the carrying on by that person of a trade, business or undertaking (whether for profit or not).

[(4)-(6) deleted]

(7) This section does not apply to a person whose duties are set out in section 20.

[Section 22 inserted by No. 30 of 1995 s. 16; amended by No. 51 of 2004 s. 23, 80 and 103.]

OCCUPATIONAL SAFETY AND HEALTH ACT 1984 - SECT 23D

23D . Contract work arrangements

(1) This section applies where a person (the ***principal***) in the course of trade or business engages a contractor (the ***contractor***) to carry out work for the principal.

(2) Where this section applies, sections 19 and 19A have effect —

(a) as if the principal were the employer of —

(i) the contractor; and

(ii) any person employed or engaged by the contractor to carry out or assist in carrying out the work concerned,

in relation to matters over which the principal has the capacity to exercise control; and

(b) as if —

(i) the contractor; and

(ii) any person referred to in paragraph (a)(ii),

were employees of the principal in relation to matters over which the principal has the capacity to exercise control.

(3) Where this section applies, the further duties referred to in subsection (4) apply and sections 20A, 23H and 23J have effect —

(a) as if the principal were the employer of —

(i) the contractor; and

(ii) any person employed or engaged by the contractor to carry out or assist in carrying out the work concerned;

and

(b) as if —

(i) the contractor; and

(ii) any person referred to in paragraph (a)(ii),

were employees of the principal.

(4) The further duties mentioned in subsection (3) are —

(a) the duties of an employee under section 20; and

(b) the duties of an employer under sections 23G(2) and 23I(3).

(5) An agreement or arrangement is void for the purposes of this section if it purports to give control to —

(a) a contractor; or

(b) a person referred to in subsection (2)(a)(ii),

of any matter that —

(c) comes within section 19 or 23G(2); and

(d) is a matter over which the principal has the capacity to exercise control,

but this subsection does not prevent the making of a written agreement as mentioned in section 23G(3).

(6) A purported waiver by a contractor of a right that arises directly or indirectly under this section is void.

(7) Nothing in this section derogates from —

(a) the duties of the principal to the contractor; or

(b) the duties of the contractor to any person employed or engaged by the contractor.

[Section 23D inserted by No. 51 of 2004 s. 8; amended by No. 36 of 2009 s. 5.]

(3) An offence against subsection (1) is an indictable offence.