Senate Education and Employment Committee

Inquiry into the impact of Australia's temporary work visa program on the Australian labour market and on the temporary work visa holders

Sydney, NSW

ACTU response to written questions on notice from Senator Lines

1. *The committee has heard evidence from Dr Joanna Howe regarding an independent tripartite body to advise government on labour migration. Dr Howe gave the UK model (the Migration Advisory Committee) as an example of such a body.*

   a) *What is ACTU's position on the UK model and the basis on which it was established?*

   b) *Would ACTU support a similar model being established in Australia?*

ACTU response

(a) The evidence and advice available to the ACTU is that the UK Migration Advisory Committee (MAC) has done a good job since it was established. The MAC has responsibility for providing independent, evidence-based advice to the Government on migration issues and has produced a number of well-reasoned reports into which sectors of the economy are experiencing skill and labour shortages and whether migration should be used to fill shortages.

It should be noted, however, that the MAC itself is not a tripartite body. Instead, its membership comprises a chair, five other independent economists, and several government representatives. There are no representatives from unions, employers, or any other community groups for that matter. That said, unions in the UK have confirmed to us that the MAC has engaged proactively with unions, as it has with others, in developing their advice.

(b) There may be a role for a body similar to MAC, but in our view there also needs to be a body that is properly tripartite, not only a body of expert economists, and it should have a role to provide policy advice to the Minister, not only to provide economic and labour market analysis.

In this respect, the ACTU has consistently supported an ongoing legislated role for a tripartite Ministerial Advisory Council for Skilled Migration (MACSM) to provide independent oversight and advice in relation to all elements of the program.

The MACSM was first established under the Labor Government in 2012 and we were disappointed to see it languish for more than 18 months under the current government without a single meeting.

As the Committee would be aware, the MACSM has recently been reconstituted. Part of its role will be a review of the Consolidated Skilled Occupation List, which appears to be akin to the type of work the MAC does in the UK.

The ACTU is a member of the reconstituted MACSM, but there is no longer a cross-representative of unions on it as we believe there should be under a genuinely tripartite body. Dr Howe made the observation in her evidence to the Inquiry that 7 of the 8 members of the new MACSM hold the same overall view of the skilled migration program whereas the previous MACSM had a more equal balance of views.

The discussion of the merits of a MAC-type body to provide independent, labour market analysis really points to the mistake the current Government made in abolishing the independent, tripartite national skills body, the Australian Workforce Productivity Agency (AWPA). AWPA had a tripartite board structure supported by a secretariat wide with a wide range of economic, labour market and policy expertise. Among other things, AWPA was responsible for advice on the Skilled Occupations List (SOL) which is used for the permanent skilled migration program.

2. *The committee has heard evidence from the AMIEU in Sydney recommending joint employment legislation as a means to prevent phoenixing.*

   a) *Is ACTU familiar with the operation of joint legislation in Sweden, Canada, the US, or elsewhere?*

   b) *Does ACTU consider that joint employment legislation would be effective in helping prevent phoenixing, and if so, why?*

   c) *Would ACTU support the introduction of joint employment legislation in Australia?*

ACTU response

The ACTU supports the introduction of joint employment legislation to address the joint employment nature of arrangements between host employer, labour hire provider and worker. Our position, endorsed by the 2015 ACTU Congress, is that the Fair Work Act should be amended to recognise that both labour hire operator and host employer have a role in observing workers' rights and entitlements.

Of course, there will be matters of detail that will require further consideration, including the precise definition of "joint employment" and the mechanism or trigger for determining when it exists. We note that joint employment legislation has operated in other countries such as the US and Canada for some time and a body of supporting case law has developed alongside those legislative provisions.[1]

Joint employment legislation could assist in dealing with phoenixing. For example, in circumstances where a labour hire company went into liquidation but was a joint employer with the host company, the workers could still have recourse to the host for any unmet entitlements. If nothing else, the very prospect of this scenario occurring could also help in encouraging host employers to be more discerning in their choice of labour hire contractors.

Joint employment legislation should be part of a broader suite of measures to address the variety of illegal and immoral practices of some labour hire providers, such as phoenixing. As we have outlined to the Committee in response to earlier questions of notice, a rigorous licensing system for labour hire providers is one such measure. This should include threshold capital requirements, a requirement to pay a bond, and requirements for a minimum period of operation before labour hire providers can be licensed and employ temporary overseas workers. These measures will help create more effective barriers to entry to those labour hire providers that are prone to mistreat their workers, disappear when action is taken against them and then re-emerge at a later date under a new name. [2]

In addition to joint employment legislation, unions also support bargaining at the industry level or through and within a supply chain. These options reflect better the modern organisation of industries operating on the basis of joint production and joint employment, rather than bargaining always being restricted only to the single workplace. Our position is that workers have the right to organise and negotiate their terms and conditions of employment at the level which achieves the best outcomes for them, which allows them to bargain with the actual decision-maker for their enterprise, and which is efficient and delivers consistency in outcomes.

Joint employment legislation could also help address the problem of not being able to bargain effectively to cover all workers at a worksite. As the AMIEU referred to in their evidence to the Committee in Sydney, the joint employment legislation in the US has ensured

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[1] **See for example National Labor Relations Board v Browning-Ferris Industries of Pennsylvania Inc [1982] USCA3 1083):** *"In "joint employer" situations no finding of a lack of arm's length transaction or unity of control or ownership is required, as in "single employer" cases. As this Circuit has maintained since 1942, "[i]t is rather a matter of determining which of two, or whether both, respondents control, in the capacity of employer, the labor relations of a given group of workers." NLRB v. Condenser Corp. of America, supra, 128 F.2d at 72 (citations omitted). The basis of the finding is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. Walter B. Cooke, 262 NLRB No. 74 (1982) (slip op. at 31). Thus, the "joint employer" concept recognizes that the business entities involved are in fact separate but that they share or co-determine those matters governing the essential terms and conditions of employment. C.R. Adams Trucking, Inc., 262 NLRB No. 67 (June 30, 1982) (slip op. at 5); Ref-Chem Co. v. NLRB, [1969] USCA5 1338; 418 F.2d 127, 129 (5th Cir. 1969); NLRB v. Greyhound Corp., [1966] USCA5 871; 368 F.2d 778, 780 (5th Cir. 1966)."*

[2] For example, the FWO reported that during the course of their inquiry into the operation of the Baiada Group and associated labour hire contractors, four of the six principal contractors and 17 other sub-contractors ceased trading.

that if you have a site agreement every worker is governed and protected by that site agreement. The alternative to that is the situation that currently prevails in the meat industry (described by the AMIEU in their evidence in Brisbane) where labour hire workers on the award are paid at rates 20-30% below the enterprise agreement rates that apply to meatworkers who are directly employed by the meat companies.

Unions also support other measures to ensure principal and host employers cannot avoid legal or moral responsibility for the people performing work for them, including:

a) making principal or host employers responsible for keeping employment records for all of the workers performing work for them (whether directly employed or not);

b) making principal or host employers responsible for unfair dismissal in relation to all of the workers performing work for them (whether directly employed or not).

The problems caused by the absence of any joint employment arrangements under Australian law was demonstrated again in a recent Fair Work Commission case where a security guard, Alan Edge, was unable to pursue an unfair dismissal claim against the company, Titanium, that he understood to be his employer. This was despite the fact he wore Titanium uniforms, undertook all his work at Titanium's direction, and was issued his separation certificate by Titanium. Up to three different entities were involved, each asserting they were not the employer of Mr Edge in a situation SDP O'Callaghan described as 'dubious' and 'borderline farcical'.[3]

In summary then, the ACTU supports joint employment legislation. While joint employment legislation is not solely or specifically designed to prevent phoenixing, and there are other ways to address phoenixing, it could still play a role in reducing both the impact and incidence of this practice. As we said in our question on notice in relation to labour hire licensing, there is no one single answer to reducing and removing the scourge of rogue labour hire contractors. Joint employment may not be the whole answer but it would be a welcome step.

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[3] *Alan Edge v Titanium Security Australia Pty Ltd [2015], FWC 5279, 5 August 2015).*