

The Hon. Christian Porter MP
Attorney-General and Minister for Industrial Relations

By email christian.porter.mp@aph.gov.au

20 March 2020

Dear Attorney-General,

Requesting urgent employment and migration law policy response during COVID-19 pandemic

Community Legal Centres NSW is the peak for almost forty community legal centres across the state. Community legal centres are independent, community-based organisations that provide free legal advice and assistance to people and communities when they need it most. Our services are particularly targeted towards people experiencing disadvantage, especially financial disadvantage, and discrimination. Included in our membership are Redfern Legal Centre and Marrickville Legal Centre, centres that provide critical employment law services to members of the community experiencing disadvantage and discrimination in the workplace. These services are part of a consortium conducting a specialist employment service for migrant communities. Our correspondence has been informed by the expertise of these two centres, and contacts for both centres are included at the bottom of this letter.

The COVID19 crisis is significantly disrupting economic and labour markets and has caused great unrest for employers and employees. We are concerned that this crisis will have a disproportionately harsh impact on vulnerable employees, including casuals, migrant workers and low-income earners already living hand-to-mouth. Dismissal from their jobs will be disastrous for these workers and their families, with immediate and devastating consequences.

As a sector, we seek urgent action to implement temporary policy changes in the following areas:

1. Employment law recommendations:
 - Legislative clarification that ‘stand downs’ do not constitute termination and that such ‘stand downs’ do not break continuity of employment;
 - Access to welfare benefits while an employee is stood down; and
 - Extensions of time for Fair Work Commission applications.

2. Migration law recommendation:
 - Provide visa cancellation relief permitting workers who are stood down, terminated or made redundant, to access alternative employment.

Employment law

Issues

We anticipate a huge volume of employees seeking legal advice as to their rights and entitlements should their employment be affected by COVID-19. Specifically, and based on preliminary and anecdotal experience, we foresee employees requiring legal assistance in relation to:

- employees being 'stood down' or being placed on leave without pay;
- the effect of being stood down, or being placed on leave without pay, on an employee's continuity of service with an employer; and
- employees being dismissed from their employment but having insufficient time to file applications with the Fair Work Commission.

Each of these issues is likely to have powerful 'flow-on' effects for employers, employees and the efficiency of the administration of justice by federal courts and tribunals. For example:

- Employees, particularly casual employees, may be confused about whether or not being stood down constitutes termination of their employment.
- Employees who are stood down may be confused about whether or not they are entitled to access Centrelink payments during the period in which they remain stood down.
- Employees who are dismissed from their employment and unable to obtain legal advice within the required time may forgo their right to file applications relating to their dismissals with the Fair Work Commission.

It is our position that the problems identified will often require the taking of detailed instructions and the provision of considered legal advice. Free legal services, such as community legal centres, are already stretched and we fear that a rapid increase in demand, in the context of time limits for taking action, will mean denial of justice to many people.

Recommendations

To ease the burden of delivering employment law advice and assistance services to our clients, we propose the policy changes be made to clarify:

- That 'stand downs' do not constitute termination from employment, nor do such stand downs break continuity of employment. This clarification could potentially be achieved by way of amendment to sections 22, 386, 526 and 527 of the *Fair Work Act 2009* (Cth) and the broadening of the Fair Work Commission's powers to make orders along the lines of section 391(2) in these circumstances, or by the addition of a legislative note to those sections.
- That being stood down entitles an employee to access Centrelink payments during the period during which they remain stood down, potentially by way of immediate access to the proposed '[welfare wage](#)'.
- That the impact of the recent outbreak of COVID-19 upon employees and their immediate family (as defined in section 12 of the *Fair Work Act 2009* (Cth)) constitutes "exceptional circumstances" for the purposes of sections 366(2) and 394(3) of the *Fair Work Act 2009* (Cth), potentially by way of amendment to those sections or by the addition of a legislative note to those sections.

In our view, these sensible, practical policy changes will have an enormous impact on the clarity of advice we can provide to our clients, the speed in which we can communicate such advice, and the efficient administration of cases that will inevitably come before federal courts and tribunals.

Migration law:

Please note that we are also sending these migration law recommendations to the Hon. Alan Tudge MP and the Hon. Dan Tehan MP.

Issues

The COVID-19 outbreak is having disastrous impacts on Australia's workforce and economy. While temporary stand downs, terminations and redundancies affect every employee in a negative way, for migrant workers in Australia, such actions could lead to visa cancellation, making their circumstances particularly precarious.

Subclass 457 and 482 visa holders (Temporary Skills Shortage) are subject to visa conditions 8607 and 8107.

- Visa holders who are temporarily stood down are required to comply with visa conditions 8607 and are unable to access alternative employment for fear of breaking their visa conditions. The *Migration Regulations 1994* (Cth) – Schedule 8 state that condition 8607 requires a visa holder to only work in the occupation nominated on their granted visa. In plain terms, this means that a subclass 482 visa holder may only work in the nominated role for the nominated employer who sponsored them.
- If Temporary Skills Shortage visa holders are dismissed, in accordance with visa condition 8107, they have only 60 or 90 days to find alternate employment before their visas expire.

The enforcement of visa condition 8607 and the business response to the current pandemic means some subclass 457 and 482 visa holders will be unintentionally forced into poverty and destitution.

The Federal Government restrictions on crowds over 100 people and the call for Australian citizens to practice social distancing has had an immediate and drastic impact on some industries, particularly the hospitality industry. Australia's restaurants, cafés and bars rely significantly on migrant workers, including many subclass 457 and 482 visa holders.

Redfern Legal Centre has already provided advice to clients on subclass 457 and 482 sponsored visas in crisis due to COVID19. One client works as a chef for a catering company and was stood down without pay for one month due to a downturn in business. The company advised our client that it does not have enough funds to pay him annual leave at this time. Owing to condition 8607, the client cannot seek alternative employment for fear of jeopardising his Permanent Residency application. The client cannot return to his home country due to closed borders. He is destitute but willing to work in any role to survive, including as, for example, a supermarket casual, but cannot due to his visa conditions.

Many businesses are terminating staff instead of standing them down. The Business Council of Australia has made public comment about businesses 're-hiring' workers after the COVID-19 crisis has passed. Once a Temporary Skills Shortage visa holder is terminated, they only have 60 or 90 days to obtain another sponsored role, a challenge in these uncertain times.

These visa holders are crucial to filling the gaps in the labour market. When social gathering sanctions are lifted after the COVID-19 pandemic has passed, the Australian economy will rely on these workers to rebuild the economy.

Recommendations

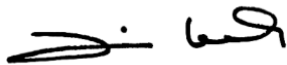
Recently the Australian Government announced international students are able to work beyond the 40 hours per fortnight cap (8105 visa condition) in response to the COVID-19 pandemic. At this time, the Hon. Alan Tudge MP [indicated](#) that the government would consider “providing flexibility with other temporary visas should the need arise.”

We ask that the Australian Government take urgent action by providing direction to Department of Home Affairs decision-makers to consider not cancelling Temporary Skills Shortage visas for breaches of visa conditions 8107 and 8607. We urge the Australian Government to provide visa cancellation relief so these workers may have access to alternative employment if stood down, terminated or made redundant.

It is in the Australian Government’s interest to support these experienced and highly skilled workers now so that they remain in Australia. The proposed visa cancellation relief will allow these visa holders to fill other gaps in the labour market, particularly in industries which will experience an increase in demand from a community in crisis, such as supermarkets and factories.

Thank you for taking the time to consider our position. If you would like to discuss this matter further, please contact Vasili Maroulis, Managing Principal Solicitor of Marrickville Legal Centre, on 0401 272434, or Redfern Legal Centre’s Employment Law Practice Solicitor, Sharmilla Bargon, on 0424 397221.

Yours sincerely,



Tim Leach

**Executive Director
Community Legal Centres NSW**