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Australian Ratification of the Migrant Worker Conventions – Responses to Concerns Raised by the Australian Government[1]

I. Introduction

Three complementary universal instruments comprise the international legal framework for protection of migrants' human rights, including labour rights. These are:

- *The United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*;
- *The International Labour Organization Migrant Workers (Supplementary Provisions) Convention 1975 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*; and
- *The International Labour Organization Migration for Employment Convention (Revised) 1949.*

The UN Convention, ILO C-143 and ILO C-97, provide a comprehensive, rights-based, normative framework covering the process of migration and protection of migrants' labour rights.

The Australian Government has publicly stated nine reasons for its failure to ratify the UN Convention to date. It can be assumed that the Government would apply similar arguments to ILO C-97 and C-143. This paper identifies these reasons and presents responses.

II. Background: The Migrant Worker Conventions

Three complementary universal instruments comprise the international legal framework for protection of migrants' human rights, including labour rights.[2] The *International Convention*

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[1] This paper was written for the Human Rights Council of Australia by Sanushka Mudaliar with assistance from Laurie Berg, Michael Curtotti, Patrick Earle, Sohoon Lee, Andrew Naylor, Chris Sidoti and the members of Students for Migrant Rights (University of Sydney). We would also like to acknowledge the assistance of Kurt Kraues. For further information contact Sanushka Mudaliar, campaigns@hrca.org.au

[2] The Human Rights Council of Australia would like to acknowledge our use of the *Guide on Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* prepared by the International Steering Committee for the Campaign for Ratification of the Migrants Rights Convention; June 2012. Available from migrantsrights.org

on the Protection of the Rights of All Migrant Workers and Members of Their Families ("the UN Convention") articulates a human rights perspective on questions and concerns that arise in relation to the employment of migrant workers. It applies the rights contained within the International Bill of Rights to the specific situation of migrant workers and members of their families.[3] The UN Convention defines a "migrant worker" as:

> *a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.*

The UN Convention recognises that migrant workers, both temporary and permanent, are as deserving of recognition of their human rights as Australian citizens. Its implementation would formalise Australia's commitment to prevent the abuse and exploitation of migrant workers and would link Australia to the international framework protecting migrant workers. The UN Convention also requires States Parties to take steps to eliminate the illegal movement of workers and prevent the employment of workers without permission to work.

The UN Convention does not create new rights for migrants. It contains rights that Australia has already ratified and which apply to all people in Australia. As explained by the UN High Commissioner for Human Rights, Navi Pillay, the UN Convention "gives form to [the standards in the International Bill of Rights] so that they are meaningful in the context of migration."[4]

The UN Convention does not interfere with State sovereignty over the issuing of visas or entry of non-citizens. Article 79 of the UN Convention states:

> *Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families.*

Drafting of the UN Convention began with principles contained in two ILO Conventions. ILO *Migrant Workers (Supplementary Provisions) Convention 1975 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers* (C-143) requires signatories to adopt all necessary means to suppress clandestine movement of migrants, and illegal employment of migrants, in collaboration with other members. ILO C-143 also mandates equal treatment with nationals for migrant workers working legally.

[3] The International Bill of Rights consists of the *Universal Declaration of Human Rights*, the *International Covenant on Political and Civil Rights 1966*; and the *International Covenant on Economic, Social and Cultural Rights 1966*; as well as the optional protocols to the two covenants. Australia accepted the International Bill of Rights, including by ratifying the two covenants.

[4] Address by Ms. Navi Pillay, High Commissioner for Human Rights to the Graduate Institute of International and Development Studies, Geneva - 14 December 2011(Accessible at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11723&LangID=E last accessed on 15 Feb 2012)

ILO *Migration for Employment Convention (Revised) 1949* (C-97) covers the conditions under which migrant workers are employed. It specifies the need for migrant workers to have access to accurate information, and applies the principle of treatment 'no less favourable' than that afforded to nationals. ILO C-97 also contains provisions that allow for discrimination between non-citizens and citizens in certain areas. For example, with respect to social security, limitations can be prescribed concerning benefits that are wholly paid out of public funds.

This paper refers collectively to these three conventions as "the Migrant Worker Conventions."

III. Responses to the Government's Reasons for Failing to Ratify the UN Convention

1) **The human rights of migrants and temporary entrants to Australia are protected under international law, including the human rights treaties to which Australia is already a party.[5]**

Response: Australia has already accepted the International Bill of Rights, therefore implicitly recognising the rights contained in the UN Convention. However, ratification of the UN Convention itself is necessary. Countries of the United Nations agreed to create a specific convention for migrant workers precisely because the rights of this vulnerable group were not adequately protected by States as part of their existing human rights obligations.

The argument that ratification is unnecessary because the rights of migrant workers are already protected under the human rights treaties to which Australia is a party is inherently flawed. If the rights of migrant workers in Australia are already adequately protected there should be no reason *not* to ratify the UN Convention. Ratifying the Migrant Worker Conventions would send a clear signal to employers that Australia is committed to upholding human rights of all workers.

There are nine core United Nations human rights treaties. Each of these treaties establishes a committee of experts to monitor the implementation of the treaty provisions by its States Parties. Migrant workers have been specifically identified, along with children, women, and people with disabilities, as vulnerable groups requiring a specific core human rights treaty.

[5] Letter from the Hon. Nicola Roxon, MP Attorney-General and Minister for Emergency Management to Mr Chris Sidoti, Executive Director - The Human Rights Council of Australia, 16th April 2012. Ref number: AG-MC12/02240

These groups were identified because their rights were not adequately protected by general measures designed to protect the rights of all people. Australia has already ratified the conventions pertaining to children, women, and people with disabilities.

By accepting the International Bill of Rights, Australia has already recognised that migrant workers are rights-holders of the rights contained in the UN Convention. Failing to ratify the Migrant Worker Conventions is inconsistent with Australia's commitment to provide equal terms of work for all workers, and represents a decision by Australia to demote the human rights of migrants. Failure to ratify allows Australian employers to access to a labour force subject to poorer conditions than local workers, and without the equal protection of their human rights.

2) **Migrant workers are already protected by domestic legislation including the *Migration Legislation Amendment (Worker Protection) Act 2008*, the *Fair Work Act 2009*, the *Sex Discrimination Act 1984*, the *Age Discrimination Act 2004* and the *Racial Discrimination Act 1975*.**[6]

Response: Simply granting migrant workers the same rights as local workers neglects the special vulnerabilities experienced by migrant workers. This is why the Migrant Worker Conventions were created. Certain aspects of Australian migration legislation and policy impede the ability of migrant workers to enjoy the protection of worker protection and anti-discrimination legislation.

The importance of non-discrimination has already been recognised by the Australian Government. The *Migration Legislation Amendment (Worker Protection) Act 2008* legislates that migrant workers should be treated no less favourably than a permanent resident or citizen worker with regards to the terms or conditions of employment. The *Fair Work Act 2009*, the *Sex Discrimination Act 1984*, the *Age Discrimination Act 2004* and the *Racial Discrimination Act 1975* apply to all workers in Australia, including migrant workers. The Australian Human Rights Commission, the Fair Work Ombudsman and Fair Work Australia are also empowered to consider issues affecting all workers in Australia. This provides in principle protection to migrant workers.

However, simply granting the same rights as local workers does not address the special vulnerabilities experienced by migrant workers that led to the creation of the Migrant Worker Conventions. In some areas, the operation of Australian migration legislation and policy

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[6] *Ibid* letter from Nicola Roxon MP to Mr Chris Sidoti; Letter from Senator the Hon Bob Carr to Anna Burke MP, 10th May 2012; Letter from the Hon Chris Bowen MP, Minister for Immigration and Citizenship to Mr Andrew Naylor, Chair – The Human Rights Council of Australia, 9th August 2012.

prevents the fulfillment of migrant workers' rights under worker protection and anti-discrimination legislation. The difficulties that migrant workers face in enforcing their rights creates the potential for a second-tier or underclass of workers to exist alongside local workers. This situation can depress wages and working conditions for local workers.[7]

For example:

a) The *Migration Act 1958* s280(5)(b) and (c) allows a person nominating or sponsoring a visa applicant to provide immigration assistance.[8] This means that employers can provide immigration advice to migrant workers as part of the process of negotiating employment terms and conditions. As a result, some migrant workers do not receive independent advice as to their rights at any time prior to and during employment in Australia. Employers have been known to misrepresent rights and entitlements, for example, by suggesting that a worker should not take holidays or by threatening to cancel his/her visa if the worker does not agree to substandard conditions.[9] Some migrant workers are also willing to accept sub-standard wages and working conditions in return for the ability to stay and work in this country, or out of fear that a complaint would lead to removal from Australia. All workers in Australia, including migrant workers, have a right to be heard and to have a voice in the community.

b) s116 of the *Migration Act 1958* empowers DIAC to cancel a visa if the circumstances which permitted the granting of the visa no longer exist. DIAC's policy is that once the Department is informed of a termination, the migrant worker receives a notice indicating that they have 28 days to apply for another visa or leave the country. Similarly, employees who wish to leave their current employer (and are entitled to change employers) must acquire a new visa within 28 days of receiving notification. It is not widely advertised that this time can be extended under certain circumstances, including if the worker is currently applying for new positions. If a migrant worker brings a claim of unfair dismissal under the *Fair Work Act 2009,* there is no standard process through which workers with claims of genuine merit can be granted a bridging visa to pursue their claim or the opportunity to seek another job in Australia if the claim is upheld.[10] The perception that visa holders have only a few weeks to obtain a new visa or have no alternative but to leave the country clearly acts as a disincentive

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[7] International Labour Conference, 92nd Session, 2004, Report VI, *Towards a Fair Deal for Migrant Workers in the Global Economy* (Geneva: International Labour Office, 2004) p. 32, para. 109 cited in R. Cholewinski, "Protection of the Human Rights of Migrant Workers and Members of their Families under the UN Migrant Workers Convention as a Tool to Enhance Development in the Country of Employment" available from the Committee on Migrant Workers http://www2.ohchr.org/english/bodies/cmw/mwdiscussion.htm

[8] The *Migration Act 1958* S280(1) prevents a person who is not a registered migration agent from giving immigration assistance. Subsections 5(B) and 5(C) exempt a person nominating or sponsoring a visa applicant from this offence.

[9] This information was provided by Migration Alliance, http://migrationalliance.com.au/

[10] Further information is available in the Migration Alliance Law Reform Task Force submission to Fair Work Act Review. This submission was jointly supported by the Transport Workers Union and canvassed with the Australian Workers Union; Construction, Forestry and Mining Union, Maritime Union, Aviation Union Federation, and United Voice. It is available at http://www.deewr.gov.au/WorkplaceRelations/Policies/FairWorkActReview/Papers/Pages/default.aspx

for migrant workers to speak out against substandard conditions in the work place or to file a complaint against an employer. It has been commonly reported that some employers take advantage of this situation.

A specific concern related to the resources sector and the newly announced Enterprise Migration Agreements, is that the DIAC website states that it is a condition of a visa issued under a Labour Agreement that "The employee must not: stop working for the employer who nominated them (that is, become unemployed or change employer)."[11] No such suppression clause would ever be applied to a local worker.

Ratifying the Migrant Worker Conventions would require the Australian Government to review and amend the *Migration Act 1958* so that it operates in a way that facilities the enforcement of Australian anti-discrimination legislation and the principle of "no less favourable treatment." This will involve implementing measures to inform migrant workers of their rights, ensuring access to recourse, and providing protections for migrant workers who raise a complaint against an employer. It would also involve implementing stronger and more effective enforcement mechanisms.

In recent years the Australian Government has taken steps that bring Australia into closer compliance with the Migrant Worker Conventions. The *Migration Legislation Amendment (Worker Protection) Act 2008* created new obligations for employer sponsors, as well as higher penalties, sanctions and bars. The *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012* introduces an intentionally broad and non-exhaustive definition of coercive conduct that includes psychological oppression, taking advantage of a person's vulnerabilities, non-physical conduct, and "subtle means by which offenders obtain a victim's compliance."

However, without the complete implementation of the over-arching international human rights framework contained within these Conventions, these domestic legislative amendments will not be sufficient to protect worker rights in Australia. DIAC had anticipated that the 2008 *Worker Protection* amendment would increase compliance, and therefore changed its enforcement practices.[12] From 2008-2009 to 2011-2012, the number of sponsors monitored by DIAC decreased by 67%, and the number of sponsors visited by DIAC decreased by 38%.

[11] Immi.gov.au/Visas, Immigration and Refugees/Employer Sponsored Workers/Labour Agreements/Employee Obligations http://www.immi.gov.au/skilled/skilled-workers/la/obligations-employee.htm (accessed 20th August 2012).
[12] N. Wallace "Employers avoid fines despite visa abuse sanctions" *Sydney Morning Herald* http://www.smh.com.au/nsw/employers-avoid-fines-despite-visa-abuse-sanctions-20110725-1hx98.html, 25th July 2011 (last accessed on 14 February 2012)

In 2011-2012, DIAC monitored approximately 7.5% of the approximately 185000 employer sponsors and uncovered breaches in almost 40% of the sites visited.[13] The 423 breaches uncovered through monitoring 1398 employer sponsors represents the lowest possible number of breaches that occurred in Australia in the past year.[14] It took more than two years from the implementation of new penalties for employer sponsors for the first employer to face the Federal Magistrates Court.[15] Enhanced monitoring and enforcement of employer sponsors would be required under the Migrant Worker Conventions.

Given the alarmingly high numbers in which employers are breaching their sponsorship obligations, it is clear that these pieces of domestic legislation alone cannot be relied upon to maintain the integrity of Australian labour standards and prevent employers from viewing migrant workers as a cheap and exploitable alternative to local workers. Ratifying the Migrant Worker Conventions would diminish the power imbalance between employers and migrant workers, and foster a culture based on human rights and respect for the inherent dignity of all workers. The Migrant Worker Conventions provide a common, authoritative, normative, and internationally agreed framework to guide legislative changes as well as future policy and practice. **Australia is already substantially in compliance with the articles of these Conventions**. By making an international commitment, and closing any remaining legislative gaps, the Government can change the culture in which migrant workers are employed in Australia.

3) **The UN Convention is incompatible with domestic migration policies, and would "require significant changes in Australia's visa regime for non-citizens with work rights, and their families."** [16]

Response: Australia is in a strong position to ratify the UN Convention. There is no publicly available information to suggest that a comprehensive review of domestic legislation with reference to the obligations under the UN Convention has been completed. There is also no publicly available analysis of the implications of any necessary changes.

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[13] From 2011-2012 DIAC employed 38 officers (up from 27) to monitor approximately 18500 employer sponsors. DIAC commenced monitoring on 1398 employer sponsors and conducted 1081 site visits. This resulted in 423 formal warnings, administrative sanctions or infringement notices. DIAC Annual Report 2010-2011; Migration Blog, DIAC, http://migrationblog.immi.gov.au/category/sponsor-monitoring/ (last accessed 1st August 2012); Letter from the Hon. Chris Bowen, Minister for Immigration and Citizenship to Mr Andrew Naylor, Chair of the Human Rights Council of Australia, 9th August 2012.

[14] The 2010 Howells Review of Employer Sanctions p23, para 37. Available at: http://www.immi.gov.au/media/publications/compliance/review-employer-sanctions/ This conclusion was drawn in reference to the total number of irregular workers identified through monitoring visits by DIAC. The same reasoning can be applied to the number of breaches of employer sanctions identified from monitoring visits.

[15] The judgment was reached on the 28th of June 2012.

[16] Australia – Universal Periodic Review January 2011, International Obligations – Treaties, at FOI-15 of documents released under a Freedom of Information Request to the Attorney-General's Department on 26th June 2012; available at: http://www.ag.gov.au/Freedomofinformation/Pages/Freedomofinformationdisclosurelog.aspx

There is no publicly available information documenting the changes to domestic migration policies that would be required in order to ratify the UN Convention or the implications of these changes. There are no publicly available documents that indicate that the Government has conducted a detailed analysis of the differences between domestic migration policy and the rights articulated in the UN Convention. Australia's existing protections for migrant workers place us in a strong position to ratify the UN Convention without making significant changes to our migration or industrial relations laws. If the Government is to rely on this argument, then the specific ways in which the UN Convention is incompatible with existing laws or policies needs to be publicly released and the implications of changing these policies subject to public discussion.

4) **"At times the Convention does not distinguish between those who are working lawfully and those working unlawfully."[17]**

Response: The part of the UN Convention that covers undocumented workers reiterates basic human rights that Australia has already accepted apply to all people. It explains how these rights apply in the context of migration. For example, this section covers the right to life, freedom from torture and unlawful interference with privacy. The rest of the UN Convention grants more extensive rights to documented workers in order to encourage regular migration.

The UN Convention distinguishes between "documented/regular" workers and "non-documented/irregular" workers. The definition of these terms in the UN Convention differs from the way these terms are used in the Australian context. Article 5 states:

> *For the purposes of the present Convention, migrant workers and members of their families:*
> *(a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party;*
> *(b) Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article.*

In the Australian context, article 5(b) only applies to people who are working "unlawfully," that is, have entered Australia on a valid visa and are working in breach of their visa conditions either because their visa restricts access to the labour market, does not entitle them

[17] *op cit.* note 16

to work, and/or they have over-stayed their visa term.[18] The 2010 Howells Review of the *Migration Amendment (Employer Sanctions) Act 2007* found **no evidence that any person was in Australia without permission for their initial entry**.

The preamble to the UN Convention states that undocumented (or unlawful) workers:

> *are frequently employed under less favourable conditions of work than other workers and that certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition.*

The UN Convention requires States Parties to implement measures to eliminate the employment of undocumented workers, prevent the dissemination of misleading information related to immigration, and impose effective sanctions against employers.[19] This is consistent with, and would lend weight to, recent legislative reforms proposed by the Government.[20]

The UN Convention does not reward or encourage Article 5(b) workers. Only Parts I, II and III of the UN Convention cover Article 5(b) workers. Part IV grants more extensive rights to Article 5(a) workers and their families as an incentive not to engage in Article 5(b) work. Parts I and II cover scope, definitions and non-discrimination with respect to rights. Part III explains the way in which principles that are consistent with respect for the fundamental human dignity of every human being apply in the context of migration. It upholds basic human rights that Australia has already accepted apply to all people through our ratification of the International Bill of Rights. For example, it covers the right to life, freedom from torture and unlawful interference with privacy.[21] It also states that the employment of these workers would be:

> *discouraged if the fundamental human rights of all migrant workers are more widely recognized and, moreover, that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the States concerned.*

The Government has demonstrated its commitment to preventing Article 5(b) work with the

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[18] The 2010 Howells Review of Employer Sanctions, conducted for the Department of Immigration and Citizenship, found no evidence that any person was in Australia without permission for their initial entry. p13 and 24 Available at: http://www.immi.gov.au/media/publications/compliance/review-employer-sanctions/

[19] UN Convention Article 68

[20] *Migration Amendment (Reform of Employer Sanctions) Bill 2012* and the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012.*

[21] Another example is Article 27: *1. With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm. 2. Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances.* As a matter of interpretation, this article does not create a right to social security for all migrant workers.

recent release of an exposure draft of the *Migration Amendment (Reform of Employer Sanctions) Bill 2012*. The new definition of coercion in the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Bill 2012* is also designed to prevent and punish those who employ workers in a manner consistent with Article 5(b). It is therefore unclear why the Government objects to ratifying the UN Convention on these grounds.

Failing to protect the basic rights of all workers aids unscrupulous employers who benefit from exploiting vulnerable migrant workers. It allows employers to escape the cost of upholding Australian labour standards by employing these workers instead of local workers. Ratification of the Migrant Worker Conventions would require Australia to implement domestic procedures to prevent this practice and eliminate demand for these workers. As noted above, stronger penalties alone are not a sufficient deterrent. The operation of the *Migration Act 1958* must be consistent with the implementation of anti-discrimination and worker protection legislation, and the power imbalance between employers and migrant workers must be addressed. This can be achieved by ratifying and enforcing the UN Convention, as well as by creating a culture that protects the human rights of all people. To do so would bring Australia's commitment to migrant worker in line with its commitment to the other vulnerable groups identified by the United Nations: women, children, and people with disabilities.

Finally, ratification of the UN Convention does not create new international obligations related to refugee policy. Article 3 of the UN Convention states:

> *The present Convention shall not apply to: d) Refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned*

Australia is not affected by the problem of cross-border movements of people who work without any identity papers or other forms of documentation that affects developed countries that share land borders with other countries.

5) No like-minded parties have ratified the UN Convention.[22]

Response: The reasons why these countries have not ratified are not relevant to the Australian context. Australia's approach to human rights has historically differed from other Western developed nations so this should not pose an obstacle to ratification. Furthermore, ratification of the UN Convention would be of benefit to our regional

[22] Attorney-General's Department – Human Rights Branch, Brief for meeting with Claire Mallinson – National Director of Amnesty International Australia, 27th February 2009, FOI-4 and FOI-15 of documents released under a Freedom of Information Request to the Attorney-General's Department on 26th June 2012; available at: http://www.ag.gov.au/Freedomofinformation/Pages/Freedomofinformationdisclosurelog.aspx

relationships and could foster partnerships to effectively achieve the measures recommended in the UN Convention.

No information is publicly available on the consultations between the Australian Government and these 'like-minded' countries that have chosen not to ratify. In January 2009, Australia submitted a *Request for Information on the UN Migrant Workers Convention* as part of the Intergovernmental Consultations on Migration, Asylum and Refugees. The content of the response was exempted from material provided by the Attorney-General's Department to the Human Rights Council of Australia under a Freedom of Information request.[23] There should be no issue with placing these reasons on the public record if they are relevant to Australia.[24]

The inference of this reason against ratification is that 'like-minded' refers to other Western developed nations such as the USA, Canada, and countries of the European Union. The USA has long differed from much of the world in not recognising economic, social and cultural rights and is one of only two countries that has not ratified the Convention on the Rights of the Child. The countries of the European Union are restricted by regional agreements – and Australia has very different positions from the European Union on a range of issues, most notably trade and trade protection.

This has been labelled the Asian century – and increasingly Australia's key relationships are in this region. The UN Convention has been ratified by important allies and regional friends and neighbours with whom Australia is seeking to build more cooperation around issues of migration and movement of people. These include the Philippines, Indonesia, Bangladesh and Sri Lanka.

6) **With its limited number of signatories the Convention has not been accepted as an international standard.[25] &**
7) **The UN Convention needs to be updated, but it cannot at present.[26]**

Response: Australia's ratification of UN Conventions has never been based on the number of signatories. The number of recent signatories and ratifications demonstrates that the UN Convention is an accepted international standard in its current form and

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[23] The response to this FOI request was released on the 26th June 2012. See note 23
[24] The names of contributing countries can be deleted to protect confidential inter-governmental communications.

[25] Ministers' Office Brief – Office of the Attorney-General, Migrant Workers Convention FOI-1, released under a Freedom of Information Request to the Attorney-General's Department on 26th June 2012.
[26] Verbal statement by the Hon Chris Bowen MP, Minister for Immigration and Citizenship at the NSW Labor Conference, July 14-15.

Australia's role in regional direction setting will only be strengthened through ratification.

In the history of the United Nations, Australia has never used the number of signatories as a benchmark against which to assess whether a United Nations human rights treaty is an international standard. Australia participated in the drafting all of the core UN human rights treaties, including the UN Convention.

Australian also signed all six of the core human rights treaties to which we are a party before they entered into force. The UN Convention currently has 34 signatories and 46 parties, or a total of 80 signatories or parties. Australia signed the *International Covenant on Civil and Political Rights* in 1972 when it had only 43 signatories or parties. Australia signed the *International Covenant on the Elimination of All Forms of Racial Discrimination* in 1966 when it had only 33 signatories or parties, and signed the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* when it had only 36 other signatories or parties.

Recent ratifications demonstrate that the UN Convention is held to be an international standard. In the last five years, seventeen countries have signed or ratified the UN Convention.[27]

8) **The Australian Government is unable to express reservations on portions of the Convention.[28]**

Response: Reservations can be made provided that they are compatible with the object and purpose of the UN Convention

Reservations can be made under Article 91 of the UN Convention. However a reservation cannot be used to exclude an entire part of the Convention or a particular category of migrant worker. Reservations must also be compatible with the object and purpose of the UN Convention. The only specific part of the UN Convention that the Government has publicly expressed concern about is the coverage of undocumented workers. As discussed above, this should not stand in the way of ratification and is not a valid reason to express a reservation.

[27] Dated from the beginning of 2007.
[28] *Op cit.* note 26, Statement from the Hon Chris Bowen.

9) **"Becoming a party to the Convention would require Australia to treat migrant workers and their family members more favourably than other migrants in visa application processes"[29]**

Response: The UN Convention does not create special rights for any people or any group of migrants.

It is unclear what the Government means by this statement. The UN Convention defines a "migrant worker" as:

> *a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.*

It protects the rights of all workers and ensures that all workers are treated equally and fairly. The UN Convention merely articulates how rights that Australia has already ratified, and is obliged to protect for all people in this country, apply in the context of migration. It does not create special rights for any people or for any group of migrants. As noted above, the UN Convention does not interfere with State sovereignty over the issuing of visas or entry of non-citizens. If the Government is to rely on this argument, then it must release a detailed analysis of the differences between domestic migration policy and the rights articulated in the UN Convention and explain how the UN Convention would require Australia to preference migrant workers and their families.[30]

[29] *Op cit.* note 16, Australia – Universal Periodic Review January 2011.

[30] The UN Convention does not apply to civil servants of other states; investors; refugee and stateless persons; students and trainees; seafarers; and workers in offshore installations. International students are entitled to work a set number of hours per fortnight under the terms of their visas. The HRCA's interpretation is that the exclusion of 'students and trainees' was designed to ensure that people taking part in a training program do not have to receive the same terms as employees. However, the UN Convention *does* apply to international students who undertake paid work unrelated to their course of study in order to support themselves. The HRCA is seeking clarification from the UN Committee for Migrant Workers on this point.