

Submission on ‘Migrant Intake into Australia’

By David Faulkner
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Introduction

This submission focusses on the following questions raised in the Productivity Commission’s May 2015 Issues Paper ‘Migrant Intake into Australia’:

1. What should be the extent and duration of any limits on access to social security and government services? Should those limits vary across visa streams or residency status? Are there any examples within the existing system, for example, the rights of New Zealand citizens residing in Australia, that could be used under a charging regime?
2. What exemptions would be required to comply with Australia’s current international obligations?

These questions cannot be considered in isolation, as Australia’s current international human rights obligations include those concerning the rights to non-discrimination and social security. This submission offers an answer to the first question above in terms of these same human rights obligations. In particular, a (hopefully compelling) case is made that the rights of New Zealand citizens should definitely *not* be used as a model given that their treatment is a classic example of state-sanctioned discrimination.

Finally, this submission raises the possibility that a charging regime for permanent visas may act as an even greater barrier to Australian citizenship for long-term resident New Zealand citizens than the current discriminatory regime unless real alternative pathways are put in place as per the Commission’s 2012 recommendations in ‘Strengthening Trans-Tasman Economic Relations: A Joint Study’.

Relevant International Human Rights Laws

- International Covenant on Civil and Political Rights (ICCPR)

ICCPR article 26 guarantees the right to equality before the law/freedom from discrimination. In *Gueye v. France*, the ICCPR Human Rights Committee decided that nationality was a prohibited ground of discrimination in terms of Article 26:

There has been a differentiation by reference to nationality acquired upon independence. In the Committee’s opinion, this falls within the reference to “other status” in the second sentence of article 26.¹

ICCPR General Comment No. 15 ‘The position of aliens under the Covenant’ states inter alia:

2. ... the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. ...

6. Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant.

- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)

Article 27 of the ICMW states:

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

¹ *Gueye v. France* (196/1985), ICCPR, A/44/40 (3 April 1989) at para. 9.4

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.

Australia has not ratified the ICMW, however, it has ratified the far broader *International Covenant on Economic, Social, and Cultural Rights* (ICESCR)

- **International Covenant on Economic, Social and Cultural Rights ('ICESCR')**

The right to social security, including social insurance, is to be enjoyed by 'everyone' under ICESCR art. 9. That is, by resident citizens and non-citizens alike.

Article 2(1) of the ICESCR requires Australia to take steps, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the Covenant by all appropriate means.

Article 2(3) provides an exemption for developing countries to determine to what extent they would guarantee ICESCR rights to non-nationals; however, Australia cannot claim developing country status, and therefore is not exempt from the obligation to make social security available to all residents on a non-discriminatory basis.

- **Convention on the Rights of the Child ('CRC')**

Similarly, Article 26 of the CRC requires that *all* children have the right to benefit from social security, including social insurance. Additionally, CRC Article 23 requires that the special care of a disabled child is to be provided free of charge whenever possible.

- **Convention on the Elimination of All Forms of Racial Discrimination ('CERD')**

The CERD prohibits "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

The term 'effect of' also ensures that indirect racial discrimination is prohibited.

Does being a non-citizen make discrimination OK?

South Africa has entrenched ICESCR human rights, including the right to social security, in its Constitution. In its 2004 report *'Comparative review of the position of non-citizen migrants in social security'* the South African Treasury examined how this right applied to resident non-citizens, including temporary residents. The conclusion was unequivocal:

The right of lawfully residing immigrants to social security does not infer that separate entitlements to benefit have to be created for this group. It simply means that lawful residents cannot be treated less favorably than national citizens who are otherwise in comparable circumstances. This is the consequence of applying the non-discrimination principle.²

The exclusion of non-citizen children – in particular children whose residence is lawful – also from social assistance, is not supported by the evidence from the countries investigated for purposes of this research, and appears to be in conflict with South Africa's international obligations and constitutional requirements.³

In *General Comment 19 (2009)* the ICESCR Committee clarified the obligations of signatories to the Covenant concerning the rights of non-nationals to social security and social insurance:

6. Non-nationals (including migrant workers, refugees, asylum-seekers and stateless persons)

36. Article 2, paragraph 2, prohibits discrimination on grounds of nationality and the Committee notes that the Covenant contains no express jurisdictional limitation. Where non-nationals, including migrant workers, have contributed to a social

² See s. 12, p. 70, Conclusion – Findings, *Comparative review of the position of non-citizen migrants in social security* M. Olivier; G.Vonk (eds.); report for the South African Treasury 2004

³ IBID at 71

security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country. A migrant worker's entitlement should also not be affected by a change in workplace.

37. Non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. Any restrictions, including a qualification period, must be proportionate and reasonable. All persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care.

38. Refugees, stateless persons and asylum-seekers, and other disadvantaged and marginalized individuals and groups, should enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support, consistent with international standards.

The ICESCR Committee's comments are unequivocal. Nationality-based social security restrictions that are unreasonable and/or disproportionate amount to unlawful discrimination – even for temporary residents. Reasonableness cannot be justified on the sole ground of immigration status.

The Committee for the Elimination of all forms of Racial Discrimination ('the CERD Committee') similarly clarified Australia's international obligations in *General Recommendation 30, Discrimination Against Non Citizens*:

3. Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law;

4. Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.

The CERD Committee made the following concluding observations in its periodic report on Australia on 14 April 2005 at [24]:

24. The Committee is concerned at reports according to which temporary protection visas granted to refugees who arrive without a valid visa do not make them eligible for many public services, do not imply any right to family reunion, and make their situation precarious. It is further reported that migrants are denied access to social security for a two-year period upon entry into Australia (art. 5).⁴

In its 2009 concluding observations on China at [27] the CERD Committee made unequivocally clear that indirect race discrimination as a result of nationality or immigration status is prohibited under the Convention:

27. The Committee expresses its concern about the definition of racial discrimination given in the Hong Kong SAR Race Discrimination Ordinance, which is not completely consistent with article 1 of the Convention as it does not clearly define indirect discrimination with regard to language, and it does not include immigration status and nationality among the prohibited grounds of discrimination. (art. 1 (1))

The Committee recommends that indirect discrimination with regard to language, immigration status and nationality be included among the prohibited grounds of discrimination in the Race Discrimination Ordinance. In this regard it recalls its General Recommendation No. 30.

Article 5 of the CERD expressly lists, inter alia, social security as a right protected by the Convention:

5(iv) The right to public health, medical care, social security and social services;

The United Nations High Commissioner for Human Rights is clear on the subject:

States must avoid different standards of treatment with regard to citizens and non-citizens that might lead to the unequal enjoyment of economic, social and cultural rights. Governments shall take progressive measures to the extent of their available resources to protect the rights of everyone—regardless of citizenship—to: social security; an adequate standard of living including adequate food, clothing, housing, and the continuous improvement of living conditions; the enjoyment of the highest attainable standard of physical and mental health; and education.

States must ensure that social services provide a minimum standard of living for non-citizens.⁵

⁴ CERD concluding observations - Australia, 14 April 2005, Paragraph 24

⁵ Excerpts from p. 25, 'The Rights of Non-Citizens', Office of the United Nations High Commissioner for Human Rights, 2006

As was the European Court of Human Rights in *Gaygusuz v. Austria*:

Summary

The verdict in *Gaygusuz versus Austria* established an important case law regarding the equal treatment of nationals and non-nationals. *Gaygusuz*, a Turkish national, had come to Austria in 1973 and worked for almost a decade with some gaps when he went back to Turkey. He later applied for emergency assistance in the form of advance pension according to the Unemployment Insurance Act on account of his failing health (his unemployment benefits had been exhausted). However, the application was rejected, citing his Turkish nationality. After going through the Upper Austrian Regional Labour Office, Constitutional Court and Administrative Court, he decided to submit his petition at the European Court of Human Rights. The Court unanimously found that the denial of social security benefit solely on the basis of a different nationality was a violation of Article 14 of the European Convention on Human Rights and Article 1 of Protocol 1 guaranteeing the right to enjoy possessions.⁶

In *Gaygusuz*, the Austrian Government submitted that the statutory provision in question was not discriminatory as the difference in treatment was based on the idea that the State has special responsibility for its own nationals and must take care of them and provide for their essential needs. The Court unanimously rejected this argument.

Unfortunately, this same failed argument is commonly used by Australian politicians to justify the discriminatory treatment of New Zealanders in Australia – including the Treasurer Joe Hockey in the following excerpt from a 2014 interview on New Zealand’s TV3:

Lisa Owen: But the ones who do choose to stay, since 2001, New Zealanders can’t collect welfare in Australia. Most of them can’t access student loans. They can’t vote. I’m wondering, does the Anzac spirit mean anything any more?

Joe Hockey: Oh, it means a lot. It means a lot. It’s just.... We’re...

Lisa Owen: So why not treat them the same way?

Joe Hockey: Because they are not Australian citizens.⁷

The same argument of nationality discrimination was also recently deployed by Federal MP Steve Ciobo in order to avoid government responsibility for homeless New Zealand youth in his electorate:

“The defining issue with New Zealand citizens is they are not Australian citizens.”

“There is absolutely nothing to prevent the New Zealand Government from providing welfare support for its citizens.”

“Australia does not provide Australian tax-funded support to citizens from other countries and there is no immediate plan to change that.”

Mr Ciobo said he did not believe Australians wanted taxpayers’ money to be used to fund citizens from other countries.⁸

Are the substantial restrictions on the rights of New Zealand citizens residing in Australia reasonable and proportionate?

Reasonableness

On the 26th of February 2001 the then Prime Minister John Howard published an attachment to the Joint Prime Ministerial Communique which stated, inter alia:

The changes to arrangements for accessing Australian benefits which Australia is announcing today are intended to address social security costs⁹

⁶ Regional judgment: Equal treatment of nations and non-nationals in Austria, United Nations Research Institute for Social Development (UNRISD), available at <http://www.unrisd.org/80256B3C005BF3C2/%28httpPages%29/24C5F8E698ED0435C1257D08005A0787?OpenDocument>

⁷ Lisa Owen interviews Australian Treasurer Joe Hockey, NZTV3, Sunday, 27 July 2014, 1:25 pm, available at <http://www.scoop.co.nz/stories/PO1407/S00430/owen-interviews-australian-treasurer-joe-hockey.htm>

⁸ ‘Youths as young as 12 living on the Gold Coast streets’, Laura Nelson Gold Coast Sun May 21, 2015, available at <http://www.goldcoastbulletin.com.au/news/gold-coast/youths-as-young-as-12-living-on-the-gold-coast-streets/story-fnj94idh-1227360355031>

⁹ New Australia/New Zealand Social Security Agreement And Associated Australian National Measures, Office of the Prime Minister of Australia, 26 February 2001

Also on the 26th of February 2001 Phillip Ruddock, the Minister for Immigration gave the following reasons for the introduction of New Zealand nationality-based restrictions:

"The new arrangements have been introduced with the express purpose of implementing the new social security agreement and apply to all New Zealand citizens, regardless of place of birth. It provides a more equitable base for the free-flow of people between each country."

Mr Ruddock described the changes, announced by the Prime Minister, John Howard, and the New Zealand Prime Minister, Helen Clark, as a major step towards bringing the situation of migrants from New Zealand more into line with the position of migrants from other countries.¹⁰

However, the current bilateral social security treaty with New Zealand (the Treaty) was not signed until April 2001, did not come into effect until July 2002, and strips rights from no-one. It is merely a cost sharing arrangement concerning the aged and veterans pensions. The scope of the Treaty is well defined and deals only with these pensions, as well as the severely disabled pension on humanitarian grounds.

The 2001 New Zealand Minister for Foreign Affairs, Phil Goff, entirely contradicts Ruddock's statement in the following excerpt from an article published in the Dominion Post on Saturday the 6th of October 2012:

Labour MP Phil Goff was foreign affairs minister at the time and said New Zealand was never a willing partner to the changes.

"That is all horse ???? It was never about treating New Zealanders fairly."

The changes arose because they thought New Zealand should pay more to support their expats in Australia, he said.

The Australian Government was also concerned that Pacific Islanders and Hong Kong Chinese were gaining New Zealand citizenship to sneak into Australia.

New Zealand refused to Australia's demands to pay more compensation and alter its immigration and citizenship policies. Australia retaliated by introducing the 2001 changes to social security and citizenship laws. We can now see the real reasons behind the 2001 changes – money and race.

Indeed, a number of commentators – including former New Zealand Immigration Minister Aussie Malcom and former Australian Minister for Citizenship and Multicultural Affairs Gary Hardgrave – have also expressed views that the 2001 changes were designed to deter Pacific Islanders.¹¹

In *'Unsophisticated and unsuited': Australian barriers to Pacific Islander immigration from New Zealand*, Hamer's interview with Aussie Malcom suggests that the 1973 easing of racially-based migration restrictions - which has subsequently resulted in the formation of substantial Pacific Islander diasporas in Australia - is one of the reasons behind the deteriorating circumstances of New Zealand citizens ever since:

"Malcolm recalled that his Australian ministerial counterparts would tell him, informally, that they had no problem with white New Zealanders settling in Australia, but that Māori and Polynesians represented a significant problem to them."¹²

Former Howard Government Minister Gary Hardgrave spoke just as candidly on Channel 9's A Current Affair programme on the reason for the 2001 changes in terms of Pacific Islanders:

The idea of not giving them access to these benefits was to say 'Hey, don't come.' They've still come anyway. I don't think it's the back door, it's actually the front door, it's the only door. I mean you just fly across. They get no support. They get absolutely no settlement services support, they don't get any English-language training, they don't get any skills on how to be part of our society. If you think the trickle of trouble we have got right now is an issue, open the floodgates up by giving everyone the dole, it will be a dam burst¹³.

10 Minister Welcomes Social Security and Immigration Changes, Media Release Minister for Immigration and Multicultural Affairs, MPS 020/2001, 26 February 2001

¹¹ See 'PM Admits Tradeoff on Aussie Welfare', New Zealand Herald, 11 December 2000, see also 'Second Class Kiwis', A Current Affair, 13 January 2014

¹² Paul Hamer, 'Unsophisticated and unsuited': Australian barriers to Pacific Islander immigration from New Zealand', Political Science 2014, p. 109. Available at <http://pnz.sagepub.com/content/66/2/93>

¹³ 'Second Class Kiwis', A Current Affair, 13 January 2014. Available at: <http://aca.ninemsn.com.au/article/8783207/second-class-kiwis>

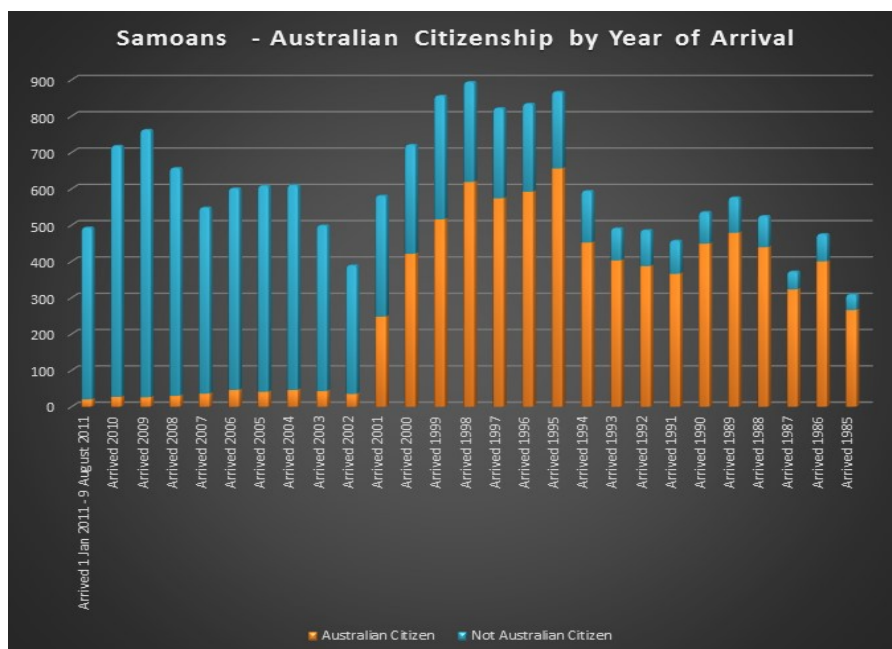
Proportionality

In February 2000 the Howard Government applied the 2 year waiting period for social security to New Zealanders. If Australia was merely worried about so-called government transfer shopping (i.e.: that social security benefits were an attractant) then this perhaps would constitute a legitimate reason and the introduction of such a stand-down period would similarly constitute a proportionate limitation. However, only a year later Australia introduced a blanket ban on both social security and citizenship access after New Zealand refused to pay more compensation and cede control of its borders.

There is nothing reasonable about a retaliatory nationality-based blanket ban to begin with, so it is impossible for it to additionally be considered proportionate in any way. In any case, the indefinite nature of the exclusion makes it inherently disproportionate to any possible legitimate aim.

Tellingly, the following excerpt from an internal New Zealand Government document reveals that the Clark Government was privately concerned that reciprocating the same 'nationality-based immigration filter' to Australian citizens "may raise human rights issues"¹⁴:

The effect of this blanket ban is clearly now racially discriminatory, as it predominantly affects New Zealand-born, Maori and Pasifika relative to people of other national/ethnic origins. This is highlighted by the following graph of 2011 Census data showing the near total decimation of a previously very high citizenship uptake by Samoans for those who arrived post-2001 (Samoans generally enter Australia as New Zealand citizens):



Census data reveals an identical pattern of racial exclusion for New Zealand-born, Maori, Cook Islanders, Niuean and Tokelauans – unsurprising given that fewer than 12,000 permanent visas have ever been issued to New Zealand-born settlers, and only a paltry 27 permanent visas to settlers born in Niue, Tokelau, and the Cook Islands since February 2001¹⁵. The overwhelming majority of New Zealanders use the SCV as the means to migrate to Australia. For example, in the financial year 2012-13, 26,557 or 98.3% of all New Zealand-born settled permanently in Australia via the SCV, but only a mere 8 arrived under the Skill Migration Program. No New Zealand-born settlers arrived under either the Family, Special Eligibility, or Humanitarian settler program streams¹⁶.

¹⁴ Phil Goff, Minister of Foreign Affairs, to Chair, Policy Committee, 8 November 2000, p 3. Archives New Zealand file AGBX W5190 16127 Box 310 FD 8/4/3 part 2 cited in Paul Hamer, draft Monash University PhD thesis - working title 'Māori in Australia: a history of inclusion and exclusion'.

¹⁵ Source: Department of Social Security's Settlement Reporting Facility

¹⁶ Source: DIBP Settler Arrival Data: Selected Countries of Birth by Migration Stream for the Financial Year 2012-13

In October 2013, McMillan & Hamer estimated that some 180,000 resident SCV holders were now affected by the changes¹⁷. In 2014 the DIBP estimated that 60% of New Zealand citizens had no pathway to a permanent visa¹⁸. Based on McMillan & Hamer's figures, the reality would be that some 92% of resident 'non-protected' New Zealand citizens currently do not hold a permanent visa. This sizeable gap between the DIBP's estimate of 40% eligibility for a permanent visa versus the reality of only an 8% uptake suggests that either their estimate is inaccurate or, more likely, the majority of those potentially eligible for a permanent visa do not bother to pursue the option. The author has no hard data on this, but, anecdotally, it appears that many New Zealanders are already deterred by the substantial current cost of a permanent visa. They understandably see the process and costs in terms of an application for citizenship – not the right to permanently reside, as New Zealanders already possess such a right.

If this is indeed the case, then any further substantial increases in the cost of obtaining a permanent visa would likely deter New Zealanders even more so than is currently the case. This would further exacerbate the already-evident racially discriminatory effect described previously. Additionally, such a discriminatory denial of access to citizenship also arguably unjustly excludes this group from the right to vote. This raises the issue of unlawfulness in terms of s. 7 & 24 of the Australian Constitution, as the High Court has twice held that 'the people' cannot be unreasonably excluded from the franchise (for a detailed dissection of this issue see *Are Aliens 'People of the Commonwealth of Australia'?*¹⁹).

Conclusion

As the blanket restrictions of the rights of New Zealand citizens residing in Australia are indefinite in nature and as they were instigated in retaliation for New Zealand's refusals to pay more compensation and curtail the entry into Australia of certain races then such restrictions can be seen as illegitimate and therefore discriminatory.

The Parliamentary Joint Committee on Human Rights raised similar concerns of non-compliance with these same international human rights treaties in terms of the National Disability Insurance Scheme - which compels New Zealand citizens affected by the 2001 changes to pay the NDIS levy but denies them eligibility for its disability services:

1.53 The committee considers that the exclusion of New Zealand citizens who are long-term residents in Australia and who are not protected SCV holders, permanent residents or Australian citizens, from access to the NDIS, raises issues of compatibility with the enjoyment of the right to social security and the right to non-discrimination in the enjoyment of that right, in particular as that exclusion affects New Zealand citizens who have been long-term residents of Australia.²⁰

The Joint Committee on Human Rights rejected the government's purported justifications of affordability and that the NDIS was not covered by the Treaty as meeting the bar of reasonableness and proportionality required by international human rights law.

More recently, in its Twenty-second Report of the 44th Parliament, the Parliamentary Joint Committee on Human Rights investigated Amendment 323 of the *Norfolk Island Legislation Amendment Bill 2015* – which extraordinarily denies social security eligibility to New Zealand citizens even if they hold a permanent visa:

1.273 Previously the committee in its Seventh Report of the 44th Parliament¹ raised concerns in relation to the exclusion of certain New Zealand citizens from access to benefits, such as the National Disability Insurance Scheme (NDIS), despite being required to contribute to the NDIS levy. In its concluding comments, the committee noted that 'under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR), noncitizens are entitled to the enjoyment of the human rights guaranteed by the covenants without discrimination.

...

¹⁷ See "Dr Kate McMillan & Paul Hamer: Kiwis in Australia deserve better", New Zealand Herald, 10 October 2013

¹⁸ See Parliamentary Joint Committee on Human Rights, 'Seventh Report of the 44th Parliament', Appendix 2, Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services to Senator Dean Smith, 19 March 2014, pp 7-8: Based on analysis of passenger card data, the DIBP estimated that only around 40 per cent of New Zealand citizens living in Australia would appear to have a permanent visa pathway available.

¹⁹ available at http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2543090

²⁰ See Parliamentary Joint Committee on Human Rights, 'Seventh Report of the 44th Parliament', p. 15 at [1.53]

1.280 The committee notes that the new subsection 7(2AA) would exclude New Zealand citizens who reside on Norfolk island and hold an Australian permanent visa from being considered an Australian resident under the Social Security Act 1991 (the Act). [...] No rationale is provided in the EM or statement of compatibility for this specific exclusion of Australian permanent residents who are New Zealand citizens. Accordingly, the measure appears to be directly discriminatory and therefore limits the right to equality and non-discrimination.

1.281 [...] To be capable of justifying a proposed limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome regarded as desirable or convenient. Additionally, a limitation must be rationally connected to, and a proportionate way to achieve, its legitimate objective in order to be justifiable in international human rights law.

As the illegitimate use of immigration status to effect discrimination is a violation of Australia's obligations under the ICCPR, ICESCR, CROC, and the CERD, the current systemic discrimination against New Zealanders in Australia should be viewed as a national disgrace. Such appalling treatment should never be promoted as an acceptable model for discriminating against other groups – non-citizens or otherwise.

In summary, discriminating against a particular group of immigrants in order to save costs or to deter certain racial subgroups is not a legitimate objective in terms of compliance with international human rights law. Australia should cease all such practices forthwith. The Productivity Commission should certainly not be recommending that these kind of rights violations become more entrenched or widespread.

As per some of the Commission's 2012 recommendations²¹, long term residents who are New Zealand citizens should be provided with a pathway to citizenship, or at the very least, given voting rights. The same should apply to any other minority groups in a similar position.

²¹ 'Strengthening Trans-Tasman Economic Relations: A Joint Study: Final Report', Productivity Commissions of Australia and New Zealand, 2012