

Supplementary Submission

on:

Strengthening economic relations between Australia and New Zealand

By David Faulkner, 15th of October 2012

This is a supplement to my original submission dated 5th October 2012.

In my original submission I provided evidence that the inequitable situation that New Zealanders in Australia are in was not agreed to by the New Zealand Government. I also argued that this inequality represents direct discrimination based upon nationality (as well as direct and indirect discrimination based upon national origin).

On Wednesday 10th of October 2012, former New Zealand foreign minister Phil Goff took a similar position in an interview with Bruce Hill on ABC Radio National's Pacific Beat program¹. The following are excerpts transcribed from this interview:

Former NZ minister says Australia discriminates against Kiwis

Hill: A former New Zealand foreign minister says he's prepared to fly to Australia to appeal directly to the Government for what he says is discrimination against New Zealanders. Opposition Labour Party Spokesman on Foreign Affairs, Phil Goff, and also a former Labour Leader, says Kiwis in Australia are being denied a path to citizenship – contrary to claims by the Australian Government of equal treatment.

Pacific Beat has asked Australian Immigration Minister Chris Bowen to speak about these concerns. A spokesman said he would be unavailable. A spokesman said that the claims are incorrect, that New Zealanders have to be permanent residents first before applying for citizenship. The statement says many Kiwis mistakenly believe that their right to live and work in Australia automatically qualifies them for citizenship, but their special category visa is still temporary. Phil Goff though, disagrees.

Goff: That's not correct. Alone among people living permanently in Australia, New Zealanders are denied the rights of permanent residency and the benefits that go with it. Look, you can't talk about having a single labour market, and aiming to achieve a single economic market between Australia and New Zealand, and then implement discrimination that contradicts that concept of everybody being treated in the same way.

Yet, you know, it's really about fairness. So, were approaching the centenary of the ANZAC tradition, yet New Zealanders are singled out as being the only group that can live permanently in Australia, that work hard, that pay their taxes, but are denied the same things that every other permanent resident of Australia can take for granted - in terms of a path to citizenship, in terms of, you know, you pay your taxes so that if things happen that aren't planned for, you become sick, you're made redundant, there is a safety net there. I don't think Kiwis think that's a fair go, and what's more, I don't think that Aussies think that that's a fair go, and this is about fairness.

Hill: Well, if the Australian Government says that this was all worked out as the result of an agreement with New Zealand, you were actually foreign minister at the time. Is it true that this was all done with New Zealand saying yes this is fine?

Goff: No - Absolutely not. The Australian Government of 2001 and the New Zealand Government agreed on two things: That people who were old age pensioners should get a pension paid for by both countries in proportion to

¹ See <http://www.abc.net.au/news/2012-10-10/an-nz-minister-says-kiwis-in-aus-discriminated-against/4306178?section=australianetworknews>

the time that they'd spent working in each country, and that people who had major disabilities would be entitled to receive a benefit. Anything outside of that was left to the country itself to determine what path it would take.

In New Zealand we continue to treat Australians living permanently in New Zealand with exactly the same rights as Kiwis. In Australia it was done differently.

Hill: Well, the Immigration Minister of Australia, Chris Bowen says that New Zealanders are possibly just – they mistakenly believe that this visa gives them the right to qualify for citizenship. That's just not true. But look at it from Australia's perspective – New Zealanders are given this right to work and live in Australia which other people don't have, so aren't New Zealanders, you know, still better off than others?

Goff: Well, in every other region of the world – take the European Union for example – were you have a single labour market you don't say to people you can come here and you can work here and you have to pay your taxes here, fair enough, but you're denied the benefits that go with the payment of that taxation.

[...]

Hill: Are you doing anything about this yourself politically in New Zealand as well?

Goff: Well, I've raised the matter with our Government, and I'm awaiting their reply, because I expect our Government to stand up for the rights of Kiwis in Australia, and to say that Kiwis in Australia should be treated in the same way as Aussies are treated in New Zealand – and I'll go there and make the case myself to people on both sides of the political fence - I don't think it's a party-political issue – just to say this is about a fair go, this is about an ANZAC tradition, this is about trying to achieve a single economic market between our two countries that are so similar, and nobody should be discriminated against on the basis of their nationality.

Concerning discrimination based on nationality, in the case of *Faulkner vs ACE Insurance Limited* [2011] NSWADT 36 at [121] the Tribunal concluded that, by refusing me insurance because I am a non-protected SCV holder, ACE Insurance breached the race discrimination provisions of the *Anti-Discrimination Act 1977 (NSW)*:

121. For the reasons and in view of the findings set out above, the Tribunal concludes that by refusing to supply insurance services under the AERP Policy to Mr Faulkner in August and September 2009, ACE engaged in discrimination on the ground of race, in the sense of nationality or citizenship, which was unlawful under s 19(a) of the ADA by operation of s 7(1)(c) of that Act.²

The issue will be further tested on the 17th of October 2012 in *Hannah Campbell vs State of Queensland*. The Queensland Government has adapted the federal restrictions for New Zealanders to its own policies, which include the denial of government-funded disability services to New Zealanders who arrived after the 26th of February 2001. This is despite the fact that Hannah's severe disability means that she is covered under the 2002 Social Security Agreement with New Zealand.

Similarly, the State of Victoria is being pursued for race discrimination based on New Zealand nationality and for breaching the *Charter of Human Rights and Responsibilities Act* by refusing student concessional travel to *all* SCV holders. Public Transport Victoria's position is that the SCV is a temporary visa and therefore no SCV are permanent residents. This is different again to the definition of 'permanent resident' under citizenship law – which excludes some SCV holders but not others based upon arbitrary periods of prior residence.

The fact of the matter is that the special category visa is not a temporary visa in the normal sense. It affords indefinite residence to a New Zealand national. However, the SCV contains one condition - it

² See <http://www.caselaw.nsw.gov.au/action/PJUDG?jgmid=150396>

is only valid whilst the holder is a New Zealand national. It is this nationality condition that classifies the SCV as a 'temporary visa' under the legal definition of this term in s. 30(2) of the Migration Act.

That is, there is a direct connection between New Zealand nationality and the classification of the SCV as a 'temporary visa' under the Act. Therefore, it can be argued that inequality based upon the SCV being a 'temporary visa' is also inequality that is based ultimately upon New Zealand nationality.

Finally, the recent revelation of statistical evidence from the 2011 Census in my original submission, as well as the mounting evidence that national origin discrimination pertaining to 'back door' migration motivated in part the 2001 changes, means that there are now avenues by which the 2001 changes can be contested as discrimination based on national origin via the federal courts - hardly a catalyst for closer relations between the two countries.

In continuing to discriminate against Kiwis (whilst pretending that the discrimination represents equal treatment agreed to by New Zealand no less!) the Australian Government is not only damaging international relations, but is also violating the notions of fairness and the spirit of ANZAC that go to the heart of the Australian psyche.

The solution is simple: introduce effective equality laws in line with Australia's international obligations, and treat everyone - including Kiwis - accordingly. Surely this should not be too much to ask of a country that claims to be the Land of the Fair Go.

The alternative appears entirely unattractive. If either Queensland or Victoria is successfully sued for race discrimination then it would be the logical next step to commence large-scale representative actions on a similar basis, as well as to challenge Australia's citizenship laws as racially discriminatory.

Housing NSW has provided the perfect vehicle to do so, as they have recently tied access to social and emergency housing to, in the case of New Zealanders, eligibility for Australian citizenship. This means that it will not even be necessary to go via the federal courts in order to argue that Australia's citizenship laws are discriminatory.

The NSW Anti-Discrimination Board has already accepted my complaint of race discrimination against Housing NSW.

2001 Amendments to Citizenship Eligibility

As with the current Citizenship Act, the *Australian Citizenship Act 1948 (Cth)* (the Old Citizenship Act) afforded the Minister discretion to determine whether SCV holders and non-citizens on Norfolk and Cocos Islands are considered permanent residents for the purpose of citizenship eligibility.

On the 16th of February 2001, the Minister, Philip Ruddock, exercised this discretion via a declaration under subsection 5A(2) of the Australian Citizenship Act 1948. The new legislative instrument (the Instrument) was entitled the *Australian Citizenship (Permanent Resident Status – New Zealand Citizens) Declaration 2001*³. The Instrument came into effect on the 26th of February 2001.

It appears obvious that the intent of the Instrument was to ensure that New Zealand nationals who do not meet the amended definition of 'Australian resident' in the Social Security Act cannot bypass

³ See Federal Register of Legislative Instruments F2006B00715

this exclusion via the acquisition of Australian citizenship. However, the then Minister for Immigration, Phillip Ruddock, later purported to Parliament that the intent of the 2001 changes to citizenship law was to implement the 2002 Social Security Treaty with New Zealand:

*"The new Instrument issued under the [Citizenship] Act, which gave effect to the requirement that New Zealand citizens entering Australia under those new arrangements are not treated as permanent residents for citizenship purposes, was required to support the new bilateral social security arrangements."*⁴

However, earlier that year the then Parliamentary Secretary to the Minister for Immigration, Andrew Robb, had clarified to the Hon. John Murphy MP that the Instrument was not required in order to implement the 2002 Treaty:

*"It is correct that on 26 February 2001 the social security arrangement announced jointly by the Governments of Australia and New Zealand did not contain any provision relating to New Zealand citizens' eligibility for Australian citizenship."*⁵

It is clear that these statements cannot both be true...

Notably, the Instrument left the rights of non-citizen migrants in the Australian territories of Norfolk Island and Cocos Islands intact. Such non-citizens are still regarded as permanent residents for the purpose of citizenship eligibility if they are: "not subject to any limitation as to time imposed by law"⁶.

New Zealand citizens residing within the Migration Zone are also not subject to any limitation as to time by law, but are now excluded from the definition of 'permanent resident' in the Citizenship Act nonetheless.

It will be most interesting to see whether the Minister decides to argue that Kiwis are merely receiving equal treatment because we are 'temporary' in front of a judge. Phil Goff claims that the real motives were very different indeed:

At the time the Australian Government called them part of a bilateral agreement with New Zealand that would put treatment of Kiwis in line with other migrants.

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 shit. 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.

Before the changes, Australia was pushing New Zealand to toughen immigration rules and pay more, but New Zealand refused on both counts.

Mr Goff said the spat over money and fears over "backdoor immigration" is what drove restrictions in 2001 and they now needed to be re-examined.⁷

⁴ Hansard – Ruddock, Reply to QUESTIONS ON NOTICE: Migration: Trans-Tasman: (Question No. 3604) 10-10-2006

⁵ Excerpt, correspondence from Parliamentary Secretary to the Minister for Immigration to the Member for Lowe dated 23rd of May 2006

⁶ See Schedule 1(5), Australian Citizenship (Permanent Resident Status) Legislative Instrument -Federal Register of Legislative Instruments F2007L02008

⁷ THE DOMINION POST SATURDAY, OCTOBER 6, 2012