ACTU Submission

Senate Inquiry into the Customs Amendment (CHAFTA Implementation) Bill 2015 and the Customs Tariff Amendment (CHAFTA Implementation) Bill 2015

23 October 2015

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Introduction

The ACTU welcomes the opportunity to make a submission to this Senate Inquiry into the *Customs Amendment (CHAFTA Implementation) Bill 2015* and the *Customs Tariff Amendment (CHAFTA Implementation) Bill 2015* ('the CHAFTA enabling legislation').

The ACTU is the peak body for Australian unions, made up of 46 affiliated unions. We represent almost 2 million working Australians and their families.

As the Committee is aware, this is the third related parliamentary Inquiry into CHAFTA since the agreement was signed on 17 June 2015. The ACTU has made submissions to the two previous inquiries and we continue to rely on those submissions, which are on the public record.

Unions have concerns with a number of aspects of CHAFTA, such as the inclusion of ISDS provisions, but in this submission we focus on the labour mobility provisions in CHAFTA and what they mean for both Australian workers and workers from overseas.

As the process of parliamentary inquiry into CHAFTA reaches its conclusion, it is vital that the implications of the agreement are laid out in a clear and unambiguous fashion so the community knows exactly what the Australian Government has signed onto.

Despite a great deal of obfuscation from the Government on this issue, it is beyond doubt that CHAFTA removes labour market testing for a whole range of occupations, such as nurses, engineers, electricians, plumbers, carpenters, bricklayers, tilers, mechanics, and chefs. This means Australian and Chinese companies can employ unlimited numbers of Chinese nationals in these and many others occupations without any obligation to provide evidence of genuine efforts to first recruit Australian workers to fill those positions.

Unions cannot support an agreement that removes this basic protection in support of Australian jobs.

We note agreement has now been reached between the Government and Opposition on amendments to migration regulations and policy guidelines to address defects in CHAFTA. We support elements of this agreement, as far as it goes, and in this submission we propose further necessary improvements to strengthen those amendments in support of Australian jobs. However, as Labor has acknowledged, there are limitations on what can be done if CHAFTA itself remains untouched. Unless CHAFTA is renegotiated, amendments to the Migration Act or Regulations cannot reverse the express prohibition on labour market testing in the text of CHAFTA.

In the submission that follows, we first provide the Committee with some context for this debate. This includes an overview of our position on skilled migration and proud record of representing and standing up for the interests of migrant workers. It includes our position on the importance of labour market testing

We take the Committee through the key provisions of CHAFTA that give rise to our genuine and well-founded concerns about the lack of protection in it for Australian jobs. We then consider the recent report from JSCOT, and assess the proposed amendments from the Labor Opposition and the subsequent agreement that has been reached with the Government.

The ACTU supports and endorses the submissions of our affiliated unions.

Key points and recommendations

Australian unions are not anti-trade. The benefits of free trade agreements are often oversold and the drawbacks downplayed, but nonetheless we recognise the value of lower tariffs, increased exports and freer access to overseas markets for Australian businesses. We welcome the opportunities for workers that come from participating in the 21st century global economy.

We can believe in all these benefits of free trade agreements, and at the same time have a rock solid commitment to ensuring that other provisions of free trade agreements do not jeopardise Australian jobs.

In relation to free trade agreements and labour market testing our position is clear. We have no objection to overseas workers from any country being employed in Australia, provided there is genuine, verifiable evidence through labour market testing that the employer has not been able to find a suitable, qualified Australian to do the job. However, we cannot support this fundamental obligation on employers to support Australian jobs first, simply being waived as part of the cost of pushing through free trade agreements.

Our view is that the Australian Government should not be entering into any free trade agreements that trade away the right of the Australian Government – and the Australian community - to require that rigorous labour market testing occurs.

Unfortunately, the evidence from the terms of CHAFTA itself and the supporting MOU is that the Australian Government has struck a free trade agreement with China that does just this i.e. for most, if not all, occupations, there will be no obligation on an employer to conduct labour market testing before taking on a Chinese national to ensure there was no Australian who could do the job. Hundreds of occupations across nursing, engineering, and the trades, that are currently covered by labour market testing will no longer be covered as a result of CHAFTA.

There are three key provisions that give rise to these concerns. Together, these provisions either state explicitly that there will be no labour market testing, or, at the very least, fail to provide any reassurance or certainty that labour market testing will apply.

1. Article 10.4 of CHAFTA which states that neither party shall require labour market testing as a condition of temporary entry. This general prohibition on labour market testing applies to all temporary skilled workers entering under the 457 visa program, despite the Government attempting to suggest the exemption applies only to a much narrower range of specialist workers and executives.

2. Paragraph 7 of the MOU to the agreement that states there will be no requirement for labour market testing for parties to enter into an Investment Facilitation Agreement (IFA) for projects worth $150 million or more, provided a Chinese company has a stake in the project of 15% or more.

3. Paragraph 8 of the MOU that refers to the possibility of labour market testing for labour agreements that fall under an IFA but fails to include any mandatory requirement for this to occur.

Our position has been confirmed by a number of independent fact checks [1] and has not been seriously challenged by the Government.

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[1] The Conversation, "Could the China-Australia FTA lock out Australian workers", 22 June 2015; ABC Fact Check, "Does the China Free Trade Agreement threaten Australian jobs", 13 August 2015.

Instead the Government has relied on bald assertions that labour market testing will apply, despite what the agreement says, and for much of the time has resorted to the lazy and obnoxious argument that those who question the agreement are racists.

Unions will stand by their record of representing and standing up for the interests of workers any time – whether they be Australian citizens, permanent residents, or temporary migrant workers.

The matters identified above are serious deficiencies with the China Australia Free Trade Agreement. The ACTU continues to hold the view that the only way to rectify these deficiencies fully and restore labour market testing is to renegotiate the relevant provisions of CHAFTA.

In the absence of CHAFTA being renegotiated, the proposal by Labor to introduce amendments to the Migration Act was an improvement that would provide a greater degree of support for Australian jobs and training opportunities, and for the rights of temporary migrant workers. We believe the Labor proposal, and the subsequent agreement on these matters reached with the Government, can be strengthened by various further amendments outlined in this submission. These include:

- A requirement for an online 'Project Jobs Board' to be established for each IFA to advertise all project positions. Use of the Project Jobs Board would be part of the labour market testing requirements under IFAs.

- A provision for the Minister to impose a further condition on IFA projects for 'a minimum number of apprentices and trainees be employed (or graduate employment places be provided).

- Increasing the TSMIT in line with Average Weekly Earnings (currently approx. $77 000). This would make it more effective in reducing incentives to overlook local workers (while still not overcoming the fact labour market testing is removed).

- A requirement for a public register of work agreements to include the full text of the agreement or, at the very least, details on the location of the agreement, the occupations which are covered, any concessions which has been granted and why, the salary rates, and the number and proportion of overseas workers to be employed.

ACTU position on the skilled migration program and the movement of temporary overseas workers under free trade agreements

Free trade agreements that deal with the movement of temporary overseas workers into Australia are important issues for Australian unions and our members.

Quite simply, this is because the fundamental issues at stake are about support for Australian jobs, support for Australian training opportunities, and support for fair treatment and decent wages and conditions for all workers. These are core issues for unions.

That is why unions will continue to campaign and advocate strongly in debates over the labour mobility provisions in free trade agreements.

As part of these debates, unions are routinely accused of being xenophobic, of playing the 'race card'. In the debate over the China Australia Free Trade Agreement, too often this appeared to have been the fall-back response from a Government that is unable or unwilling to explain the impact and implications of the agreement it has signed Australia up to.

In standing up for the interests of workers, unions will not allow the migration or free trade debate to be hijacked in any racist or xenophobic direction.

Australian unions are long-standing supporters of a strong, diverse, and non-discriminatory skilled migration program. We embrace all the benefits migration has brought to Australia's social, cultural and economic life. Unions are particularly proud of the fact that thousands of our members across the country are migrants or come from migrant backgrounds. Indeed, union officials too have similarly diverse backgrounds.

Our clear preference is that the migration program operates occurs primarily through permanent migration where workers enter Australia independently. This gives migrants a greater stake in Australia's long-term future and it removes many of the 'bonded labour' type problems that can arise with temporary migration where a worker is dependent on their employer for their sponsorship and ongoing prospects of staying in Australia.

We accept there is a role for some level of temporary migration to meet critical short-term skill needs but there needs to be a proper, rigorous process for managing this.

There are three key priorities in how we approach the temporary work visa program, and any related provisions in free trade agreements that deal with the movement of temporary overseas workers into Australia.

One, is that the priority must always be on maximising jobs and training opportunities for Australians – that is, citizens and permanent residents, regardless of their background or country of origin. Whether it is young Australians looking for their first job or older Australians looking to get back into the workforce or change careers, they deserve an assurance that they will have first access to Australian jobs. A rigorous system of labour market testing is critical in this respect and this should not be undermined by labour mobility provisions in free trade agreements.

Two, that when overseas workers are required on a temporary basis to fill genuine shortages that cannot be filled locally, those workers must be treated well, be safe in their workplace, receive Australian wages and conditions at genuine 'market rates', and be able to join and be represented by a union, just as all Australian workers can.

And three, this is also about ensuring that employers are not let off the hook; making sure employers cannot just take the easy option of using temporary overseas workers without first testing the local labour market and investing in training to develop the skills of Australian workers – and ensuring employers who do do the right thing are not undercut by those employers who exploit and abuse temporary visa workers.

Unions have a long and proud record of representing and standing up for the interests of temporary migrant workers. Regardless of the visa type, unions are there to provide whatever support we can for migrant workers who are being underpaid, made to work in unsafe conditions, or are mistreated or exploited in some other way. In many cases, it has been unions who have uncovered and reported cases of exploitation, bringing these cases to wider public attention, while also securing a remedy for the workers involved.

Our position on these matters is set out in more detail in our submission to the current Senate Inquiry into the temporary work visa program.[2]

[2] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa (see ACTU submission no. 48.)

The importance of labour market testing

As noted above, one of the fundamental principles underpinning the skilled migration program must be that Australian workers – citizens and permanent residents – have the first right and opportunity to access Australian jobs.

If public statements on the subject are taken at face value, there appears to be universal support for this principle across the party political spectrum, and from unions, employers and community groups.

If that principle is accepted, then it follows, in our submission, that there needs to be a mechanism, a process, to ensure that this is actually occurring in practice. A requirement for labour market testing provides such a mechanism, ensuring there is independent assessment and verification of whether employers wishing to employ overseas workers have first made all reasonable efforts to find a suitably qualified Australian for the position and were not able to find one.

In our submission, a legal requirement for labour market testing to occur is a logical extension of the principle that the priority should always be to employ Australians first. Without genuine labour market testing, it is entirely unclear how the Government and the community, not to mention affected workers, can be assured that Australian workers are in fact being given priority.

Rigorous labour market testing is more important than ever now with unemployment remaining stubbornly at or above 6% for over a year - the highest levels in more than a decade. Close to 800 000 Australians are currently unemployed and looking for work. Of particular concern is youth unemployment, which is more than double that, just below 13% in the latest monthly ABS figures. This equates to more than 270 000 young people out of work.[3]

Over the past 12 months or more there have been a string of announcements of major job losses across the country and skill shortages are at 'historic lows' according to the Government's own departmental advice. There are generally large fields of applicants for skilled jobs and employers continue to recruit skilled workers with little difficulty.[4]

If we look just at the two main broad occupational groups where the majority of 457 visa workers are used – ANZSCO level 2 Professionals and ANZSCO level 3 Technicians and Trades Workers – there are currently more than 350 000 Australians in those occupations who are either unemployed or underemployed.

For example, there are currently 32 020 trades and technician workers in Australia on 457 visas, yet there are 63 300 Australian trades and technician workers out of work and a further 88 000 looking for more work than they currently have. Similarly, there are currently 46 010 professionals employed on 457 visas while at the same time there are currently 62 600 professionals unemployed and further 149 600 who are under-employed. [5]

Whether it is young people looking for their first job or older workers looking get back into the workforce or change careers, they deserve an assurance that they will have priority access to local jobs before they can use temporary workers from overseas. That is why the labour market testing requirements currently in place under the 457 visa program are so important to ensure that employers have a legal obligation to employ Australians first.

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[3] ABS Labour Force, 6202.0

[4] Department of Employment, Skill Shortages Australia 2014

[5] ABS Labour Force Detailed, Quarterly, cat 6291.0.55.003, table 18 and 19; Subclass 457 quarterly report, quarter ending at 31 March 2015, Department of Immigration and Border Protection, Australian Government.

Unions therefore welcomed and strongly supported the passage of legislation in the previous Parliament that introduced new provisions for labour market testing through the *Migration Amendment (Temporary Sponsored Visa) Act 2013*.

While the system introduced does have its limitations, and in our submission to the current temporary work visa inquiry we outline particular aspects of labour market testing that could be improved or made more effective, it does mean that employers seeking to use 457 visa workers now have a legal obligation, at least for those occupations which are subject to labour market testing, to look locally first and demonstrate to the satisfaction of the Minister that they have sought to employ Australian workers and no suitably qualified and experienced Australian is readily available to fill the position. This requires employers to provide evidence of their recruitment attempts, such as job ads and participation in job and career expos, and detail the results of such recruitment efforts.

In relation to labour market testing and free trade agreements, unions have advocated consistently since its introduction in 2013 that labour market testing should be applied to all positions under the temporary 457 visa program. We do not support existing exemptions from labour market testing on the basis of international trade obligations, or on the basis of skill level or occupation.

Our position is that the Australian Government should not be entering into any free trade agreements that trade away the right of the Australian Government – and the Australian community - to require that rigorous labour market testing occurs. This is our position regardless of which country the free trade agreement is with.

Analysis of key provisions of CHAFTA

Commitments in the text of the agreement

Under the terms of CHAFTA, a general prohibition on labour market testing applies to positions being filled by Chinese nationals under the standard 457 visa program – or any other temporary visa types for that matter. This means an employer will not have to provide any evidence of their efforts to first employ an Australian worker to fill those positions. The text of the agreement leaves no room for ambiguity on this point, as is clear from chapter 10, article 10.4 (3) which states:

*3. In respect of the specific commitments on temporary entry in this Chapter, unless otherwise specified in Annex 10-A, **neither Party shall:***

(a) *impose or maintain any limitations on the total number of visas to be granted to natural persons of the other Party; or*

(b) ***require labour market testing**, economic needs testing or other procedures of similar effect **as a condition for temporary entry**.*

Significantly, the text of the agreement shows the relevant "specific commitments" made by Australia to not undertake labour market testing extend beyond high-level occupations such as 'independent executives' and 'intra-corporate transferees', and apply to the broad category of 'contractual service suppliers of China' coming to Australia for up to four years, as well as installers and servicers under short-term 400 visas. This is confirmed by Mr Robb's own Department, DFAT, in their information note to the JSCOT inquiry on the specific commitments under chapter 10, [6] and is set out again clearly in the Explanatory Memorandum to the Customs Amendment Bill. [7]

Under chapter 10, clause 10 in Annex 10-A to the agreement, a contractual service supplier is defined as:

> *"...a natural person of China who has trade, technical or professional skills and experience and who is assessed as having the necessary qualifications, skills and work experience accepted as meeting Australia's standards for their nominated occupation and is:*
>
> > *(a) an employee of an enterprise of China that has concluded a contract for the supply of a service within Australia and which does not have a commercial presence within Australia; or*
> >
> > *(b) engaged by an enterprise lawfully and actively operating in Australia in order to supply a service under a contract within Australia."*

Effectively, this means the exemption from labour market testing under article 10.4 (3) applies to any and all workers from China with trade, technical and professional skills i.e. all 651 occupations currently under the standard 457 visa program. [8] The exemption applies regardless of whether the employer is a Chinese company or an Australian company.

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[6] http://dfat.gov.au/trade/agreements/chafta/news/Documents/information-note-on-movement-of%20natural-persons-provisions.pdf

[7] Paragraph 157

[8] As set out in the Consolidated Skilled Occupations List: https://www.border.gov.au/Trav/Work/Work/Skills-assessment-and-assessing-authorities/skilled-occupations-lists/CSOL

It is true that some of these occupations at professional and managerial skill levels are already exempt from labour market testing on other grounds – exemptions the ACTU has never supported – but the real impact and change that will result from CHAFTA is that hundreds of occupations across nursing, engineering, and the trades, that are currently covered by labour market testing will no longer be covered. The full list of occupations that will be removed from labour market testing obligations as a result of CHAFTA is set out in the dissenting Labor members report from the Joint Standing Committee on Treaties (JSCOT). [9]

This key change was confirmed in the following evidence to JSCOT from the Department of Immigration and Border Protection on 7 September 2015:

> *Mr KELVIN THOMSON: Mr Wilden, you referred in your evidence again this morning to engineers, nurses and category 3 trades. Are Chinese tradespersons at category 3, engineers and nurses currently subject to labour market testing conditions and requirements?*
>
> *Mr Wilden: If they were to come in currently and they were not exempt, they would be required to be subjected to labour market testing—that is, the sponsors would be.*
>
> *Mr KELVIN THOMSON: And if the China FTA comes into force, will they be subject to those labour market testing conditions then?*
>
> *Mr Wilden: No, they would be exempted.*
>
> *Mr KELVIN THOMSON: So the situation for engineers, nurses and others in category 3 will change?*
>
> *Mr Wilden: Correct.*

It is unfortunate that it took this long for this critical point to be conceded and that it fell to a public servant to clarify the correct position rather than the responsible Minister. Until that point, Minister Robb had continued to insist on a number of occasions that the exemption from labour market testing under the terms of CHAFTA applied only to a small group of high-level executives and managers, and possibly to workers installing specific machinery. [10] This was clearly wrong and misleading. It is beyond doubt that CHAFTA removes labour market testing for a whole range of occupations, including nurses, engineers, electricians, plumbers, carpenters, bricklayers, tilers, mechanics, and chefs, that are currently covered by labour market testing.

The inclusion of contractual service suppliers in the labour mobility provisions of CHAFTA, and the broad definition given to it, means CHAFTA goes much further than previous trade agreements. For example, the free trade agreement with Chile defined contractual service suppliers as people in 'high level technical or professional' occupations and did not include trades workers. Free trade agreements with Singapore, Malaysia and the US were able to confine the exemptions to labour market testing to higher-level executive type positions and did not include the category of contractual service suppliers at all. The danger now is that the CHAFTA labour mobility provision will provide the model for future free trade agreements that Australia signs up to, including the looming FTA with India.

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[9] Joint Standing Committee on Treaties, Report 154, Treaty Tabled on 17 June 2015, October 2015, Canberra, pp. 82-89.

[10] See for example, Media transcripts, Minister Robb interview with Kieran Gilbert Sky News AM Agenda, 7 September 2015; Minister Robb interview with Leon Byner, radio 5AA, 24 August 2015; Minister Robb interview with David Speers, Sky News – PM Agenda, 4 August 2015.

Unions have had a consistent position on these issues. In our view, labour market testing should be applied to all positions and occupations under the temporary 457 visa program. For that reason, we have said consistently that the Australian Government should not be entering into any free trade agreements - regardless of which country the agreement is with - that trade away the right of the Australian Government and the Australian community to require that labour market testing occurs and Australian workers are given first right to Australian jobs. Free trade agreements should not be used for the purpose of further widening exemptions to labour market testing.

Notwithstanding this position, we have said that where Australian Governments nevertheless continue to make commitments in free trade agreements on the 'movement of natural persons' that provide exemptions from domestic labour market testing laws, those commitments should not be extended to the category of 'contractual service suppliers', given the expansive meaning applied to that term across professional, technical and trade occupations.

In summary then, the implications from the text of CHAFTA and, specifically, article 10.4 (3) (b), and clauses 9 and 10 of Annex 10-A, are that Chinese workers across a wide range of skilled, trade and technical positions who are accessing Australia's 457 temporary work visa program will not require their positions to have passed labour market testing requirements that determine if any Australian workers are able and willing to do the work. As a direct consequence, there can be no guarantee that Chinese workers employed under the agreement are not occupying jobs that could and should be occupied by the growing number of Australians looking for work in those occupations.

Commitments in the MOU on Investment Facilitation Arrangements

In addition to the commitments on temporary entry in the text of CHAFTA described above, an MOU establishes special provisions for new Investment Facilitation Arrangements (IFAs) for infrastructure projects in Australia. This is the first time Australia has signed a free trade agreement that has such provisions attached to it.

IFAs will apply to infrastructure projects across the sectors of food and agribusiness, resources and energy, transport, telecommunications, power supply and generation, environment, and tourism, which have an expected capital expenditure of $150m or more over the term of the project (MOU clause 2 (b) and (c)).

IFAs will be negotiated between the DIBP and the project company. Under the terms of the MOU, the project company will be eligible to establish an IFA where either:

> *… a single Chinese enterprise owns 50% or more of the project company; or, where no single enterprise owns 50% or more of the project company, a Chinese enterprise holds a substantial interest in the project company (MOU clause 2 (a)).*

Under the MOU, a 'substantial interest' occurs when a single foreign person has 15 per cent or more, or several foreign persons and associates have 40 per cent or more, of the issued shares, voting power, or potential voting power.

This means that IFAs will be available for any infrastructure projects worth $150million plus, where the project company is majority Chinese-owned, or even where a single Chinese company has a stake of just 15 per cent or more in the project company, in cases where there is no majority owner.

A key attraction of IFAs is 'increased labour flexibilities' for Chinese companies. [11] This means the ability for those companies to negotiate 'concessions' to bring in a specified number of overseas workers with lower-level skills and experience, lower-level English language, or lower wages than would otherwise be allowed under the standard 457 visa program, [12] as the text from the MOU indicates below:

> 3. *The areas which will be subject to negotiation between DIBP and the project company in respect of the eligible project will include:*
>
>   a) *the occupations covered by the IFA project agreement;*
>
>   b) *English language proficiency requirements;*
>
>   c) *qualifications and experience requirements; and*
>
>   d) *calculation of the terms and conditions of the Temporary Skilled Migration Income Threshold (TSMIT).*

The significance of these provisions was well captured by migration expert Bob Kinnaird:

> *"The Coalition government will not admit that these IFA arrangements are unprecedented. Australia has never before in an FTA package deal permitted concessional 457 visas for even skilled workers, let alone for semi-skilled workers (like concretors, scaffolders, truck drivers, even office workers).* [13]

Unions are opposed to any such moves to use free trade agreements to extend the 457 visa program into lower-skilled occupations, lower wage levels, and to workers with lower level English. This only serves to increase the increase the prospects of exploitation of already vulnerable temporary overseas workers who are effectively tied to their employer if they wish to stay in Australia, and who do not understand their rights at work or are not in a position to enforce them.

Large numbers of student visa holders and working holiday makers can already work unrestricted in low-paid, lower-skilled occupations with no English language requirements, and the current Temporary Work Visa Inquiry has heard a stream of evidence of how such workers have been exploited, including the recent examples of workers at 7 Eleven and in the farm sector. Further opening migration pathways for lower-skilled, lower paid temporary overseas workers sends all the wrong messages to employers and the community generally and should not be facilitated through free trade agreements.

Turning to the question of labour market testing under IFAs, Minister Robb has claimed that:

> *Under CHAFTA, a Chinese company investing more than $150 million in specific types of Australian infrastructure projects MUST USE AUSTRALIAN WORKERS (his emphasis), unless it can prove there are no qualified Australians to do the job."* [14]

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[11] http://dfat.gov.au/trade/agreements/chafta/fact-sheets/Pages/fact-sheet-movement-of-natural-persons.aspx

[12] It should be noted that the provision for a 'specified number' of workers to be negotiated relates only to those positions where concessions are negotiated to the standard 457 visa program requirements eg skill level, English language etc. There are no such limits on the number of Chinese workers who can be employed, either by Chinese or Australian companies, on standard, or 'non-concessional', 457 visas that do meet all the standard program requirements. These workers can be employed in unlimited numbers without the need for labour market testing.

[13] Kinnaird, B., "More government dishonesty on China FTA", 23 July 2015 http://johnmenadue.com/blog/?p=4268

[14] Minister Robb, press release, 7 July 2015.

This would be a welcome statement if it were correct (and putting to one side the fact a Chinese company will not necessarily need to be investing $150 million to be eligible for an IFA, as Minister Robb states. As indicated above, a Chinese company could access an IFA with as little as a 15 per cent stake). A mandatory requirement for all Australian workers to have first priority on Australian infrastructure projects would be entirely consistent with the position advocated by Australian unions and in line with community expectations.

However, there is nothing in the text of CHAFTA or in the MOU that provides such a guarantee.

There is certainly no provision for labour market testing to be part of the IFA approval process up-front. In fact, the MOU states explicitly that '*there will be no requirement for labour market testing to enter into an IFA'* (MOU, clause 6). At the same time, the IFA can approve the inclusion of overseas workers in lower skill level occupations and with lower English language levels than would be allowed under the standard 457 visa program, and can waive the current minimum wage floor for the program. [15]

The Government has tried to argue the provisions for IFAs are the same major project provisions Labor introduced when in office for Enterprise Migration Agreements (EMAs). This is yet another incorrect claim. Key differences between EMAs and IFAs include:

- The threshold for access to EMAs was capital expenditure of $2 billion and a peak construction workforce of at least 1,500. The threshold for access to IFAs is only $150 million total project expenditure and no minimum workforce size. Chinese participation can be as low as a 15 per cent stake in order to access the IFA concessions.

- IFAs cover a far broader range of infrastructure projects and sectors than EMAs which were designed specifically for major resources construction sector projects.

- Under EMAs, consultation with relevant unions and other stakeholders was mandatory, before an EMA could be approved. Under IFAs, a project is approved as 'eligible to establish an IFA' simply by agreement between DFAT and the China International Contractors Association (CHINCA) that the project meets the eligibility criteria. This will be followed by agreement between DIBP and the project company on the concessions that will be granted on skill levels, English language, qualifications and experience, and minimum wage requirements (MOU clauses 2, 3 and 6).

Once an IFA is agreed to, individual labour agreements can fall under its umbrella. The text in this section of the MOU appears to suggest labour market testing may apply at that stage, but it is far from definitive on that point. There is certainly no mandatory requirement as the earlier statement from Minister Robb suggests. The relevant clause of the MOU (clause 8), and the footnote that accompanies it, reads:

> *"A labour agreement will be entered into in a timely manner and will set out the number, occupations and terms and conditions under which temporary skilled workers can be nominated, consistent with the terms of the IFA, and the sponsorship obligations associated with the labour agreement, including any requirements for labour market testing. Where labour market testing is required, employers may satisfy this requirement by demonstrating that they have first tested the Australian labour market and not found sufficient suitable workers. DIBP will make publicly available information on how any labour market testing requirements could be met."*

[15] The Temporary Skilled Migration Income Threshold, or TSMIT, currently $53 990 p.a.

In support of their assertion that labour market testing will (and must) in fact apply to the individual labour agreements under an IFA, the Government has relied on a set of guidelines for what they are calling project agreements. The Government position is that IFAs will be covered by these project agreement guidelines[16] and the guidelines (p. 8) say labour agreements will require evidence of labour market need and domestic recruitment efforts.

However, labour market testing in a policy document or guidelines is not the same as a legislated requirement. Policy guidelines could be changed at any time by the government of the day.

The MOU itself makes no reference at all to the project agreement guidelines. If the Government's commitment, or claim, that labour market testing will apply to IFA labour agreements was so rock solid, it begs the question as to why the MOU did not expressly state that. This could be a simple provision in the MOU along the lines of "…*Labour market testing will be required for individual labour agreements under IFAs, in accordance with the provisions of the Australian Government project agreement guidelines."*

The fact the MOU has no such guarantee in it means that unions and the community at large have been left to accept the word of the government that labour market testing will apply, rather than having a mandatory, enforceable legal provision for labour market testing under the terms of CHAFTA.

Even if we took the Government at its word that some form of labour market testing will apply under IFAs, there are still a range of further questions the Government has yet to answer. These include who such labour market testing would apply to and what type of labour market testing would it be.

On the first point, the Government has failed to address or clarify the issue of how the general prohibition on labour market testing in the text of CHAFTA (article 10.4 (3)) relates to the provisions on IFAs in the MOU. The Government needs to be very clear how these provisions intersect. Read together, it appears on our interpretation that any labour market testing that might occur under IFA labour agreements would apply only to the additional lower-skilled 'concessional' 457 visa holders engaged under an IFA (ANZSCO 4 and above). It would not apply to the ANZSCO 1-3 skilled occupations ('trade, technical and professional') under the standard 457 visa program because they are caught by the prohibition on labour market testing in article 10.4 (3) of CHAFTA.

This means that all China-based and Australian companies contracted to do work on these IFA projects will be able to use unlimited numbers of 457 visa workers from China in all 651 skilled occupations under the standard 457 program with no legal obligation to prove there are no qualified Australian workers to do the job i.e. to undertake labour market testing. We are happy to be wrong on this point, but the Government is still to properly address this issue and has failed to engage with and explain the detail of its own agreement. This is not helped by the fact, highlighted above, that whenever this question has been raised Minister Robb confused the issue by continuing to insist, wrongly in our view, that the exemption from labour market testing in article 10.4(3) applies only to high-level management positions.

[16] http://www.border.gov.au/WorkinginAustralia/Documents/project-agreement-employer.pdf

Any labour market testing that does apply to IFA labour agreements will also fall short of the legislated standard for labour market testing under the Migration Act. For example, the project agreement guidelines - if they are to apply to labour agreements under IFAs - only refer to evidence of recruitment efforts that must be provided at the time of entering into a project labour agreement. As Bob Kinnaird has pointed out:

> *"This is a much lower standard than the legislated 457 LMT obligation where sponsors must prove to DIBP that no suitably qualified Australian is available to do the job, at the time of each 457 visa nomination (our emphasis added)".* [17]

Kinnaird also picks up on the practical issues and considerations that would arise once an IFA is in place.

> *"The Minister's attempt to assure that these 'guidelines' offer adequate protection for Australian workers also conveniently ignores the fact that these applications for concessional 457 visa workers by individual IFA project employers will be made in a context where the project owner has already secured approval for large numbers in the umbrella IFA agreement. This places undue pressure on DIBP officers to approve 457 visa applications from individual IFA employers, especially operating in a high-profile 457 visa program area with no legislative framework and far too much room for Ministerial and political intervention."* [18]

Finally, there is a further point that is often lost as much of the debate has been focused on the IFAs that cover infrastructure projects. That is, that even in the event that labour market testing in some form does apply to IFA projects, not all Chinese workers coming to Australia on the 457 visa program or other temporary visa types will be employed in workplaces covered by the IFA provisions. For all other jobs that are filled by Chinese workers under temporary work visas, again under the terms of article 10.4 (3), there is a clear prohibition on any labour market testing being applied at all. To take just one example, nursing positions will not be subject to labour market testing where an employer is seeking to employ a Chinese national.

In summary, our analysis of the text of the labour mobility provisions in chapter 10 of the agreement and in the MOU indicates that labour market testing will not be required for most, if not all, workers from China who work in Australia under the 457 visa program or any other temporary visa types.

This means both Australian companies and Chinese companies operating in Australia will be able to employ Chinese workers without having to first check if there was an Australian who could do the job. Without the requirement for labour market testing, the potential is there for whole projects to be staffed by Chinese workforces, with Australian workers excluded.

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[17] For more on this point and further analysis of the China FTA provisions, see Kinnaird, B., "More government dishonesty on China FTA", 23 July 2015 http://johnmenadue.com/blog/?p=4268; and "China FTA 'labour mobility fails the national interest test", 24 June 2015, http://johnmenadue.com/blog/?p=4130

[18] Kinnaird, B., "More government dishonesty on China FTA", 23 July 2015 http://johnmenadue.com/blog/?p=4268;

Report of the Joint Standing Committee on Treaties

Many, if not all, of the issues identified above have been ventilated before the Joint Standing Committee on Treaties, which just released its final report into CHAFTA on 19 October. Unfortunately, the JSCOT report, at least from the Government members, has failed to provide any certainty on a number of issues that require clarification surrounding the labour mobility provisions in CHAFTA. It is concerning that the Parliament is being asked to ratify an agreement where the Government is still unable to spell out exactly what the agreement means for the rights of Australian workers to have Australian jobs subject to labour market testing. We make some observations on the report below.

The majority report from Government members of JSCOT says it ‘understands that the classification changes provided in CHAFTA will open up access to temporary entry to a broader range of workers’. This appears to be a concession that CHAFTA has removed labour market testing for a number of occupations, which is more than Minister Robb appears to have conceded thus far, but the report still fails to provide a clear, categorical statement of what CHAFTA means in terms of current labour market testing obligations.

To the extent that it concedes that CHAFTA has in fact removed labour market testing, the majority report now appears to shift the Government’s argument from one that says CHAFTA retains current labour market testing protections to one that says there are other safeguards and it does not matter if labour market testing is removed. Unions are happy to have the debate about the merits of labour market testing if that is where the debate has now turned, but we note that until now the Government has been insisting that unions have been wrong to even suggest labour market testing protections will not be in place under CHAFTA.

We reject the suggestion in the majority report that the cost to the employer of using the 457 visa program is a deterrent to misuse of the program and is somehow a substitute for a robust legal obligation on employers to test the local labour market before employing overseas workers because there is an in-built bias to look for Australians first. This is one of many perennial arguments against labour market testing that does not stand up to scrutiny.

In our submission, it is simply naïve to assume and blindly accept this argument that all employers will always want to employ locally first, including because it is more expensive to hire a 457 worker from overseas. It plays to what is a common misperception that employers, having exhausted all local options, are then having to comb the world to find a suitable overseas worker, when in fact the overseas worker is often on their doorstep and may already be in their employ.

For this reason, it is not only naïve but factually incorrect to continue asserting that it is considerably more expensive to engage workers from overseas. In fact, with around half of all 457 visa grants being granted onshore to workers already in Australia, and many already working for the 457 sponsor on other visa types (eg. a working holiday 417 visa), the extra costs to hire the overseas worker over an Australian citizen or permanent resident are often negligible.

The increasingly easy access to temporary visa workers already in Australia demonstrates why rigorous labour market testing laws are even more important to protect Australian employment opportunities. In such cases, the employment of the overseas worker will appeal to some employers as the easy option, particularly where the worker is already employed in the workplace, as is often the case, and is keen to obtain an employer-sponsored permanent residence visa. It is especially important that labour market testing requirements are applied and enforced effectively in those circumstances.

The oft-stated argument that employers will always seek to employ Australians first is also not borne out by survey evidence in a report by the Migration Council of Australia in 2013. The findings in that report include:

- 15% of sponsoring employers surveyed said they did not find it difficult to hire or employ workers from the local labour market, yet they still employed workers under the 457 visa program – this finding suggests that some employers may be admitting they are not complying with a fundamental tenet of the 457 program that 457 visa workers should be engaged only where there is a genuine skill shortage that cannot be filled locally.

- Only 1.1% of employers said they would 'increase salary' for the job if they cannot find someone who matches their preferred job specifications, while 33.5% said they would seek overseas workers - this indicates to us that many employers are not willing to pay genuine market rates to attract and retain employees and prefer to take the easy option of obtaining 457 visa workers.

- 26% of 457 visa employers said they found their 457 visa workers because the workers themselves approach the employer - this means that those employers incurred none of the search and recruitment costs that many claim make 457 visa workers more expensive than Australian workers.

- Around 20% of employers surveyed cited the benefits of sponsoring 457 visa workers being 'increased loyalty' and 'great control of employees' - this points to concerns that unions have continually raised about some employers favouring the use of 457 visa workers over Australian citizens and permanent residents because it gives them a more compliant workforce. [19]

As the dissenting Labor JSCOT report says, by not requiring independent confirmation of skill shortages, employers will always say they have a demand for foreign workers.

In relation to the question of labour market testing under IFAs, the majority JSCOT report notes the confusion over the key issue identified above of whether the exemption from labour market testing for 457 visa applications under section 10.4 (3) (b) of CHAFTA applies to applicants under the IFA provisions. As the dissenting Greens report observed: *"This confusion reflects the contradictory and convoluted nature of the agreement, with labour market testing being addressed at different points in the agreement itself, a side letter and a MoU; and with there being little legal guidance or precedence as to the actual interplay between these sections."* However, inexplicably, the majority report fails to provide any findings or conclusion on this point and no recommendation for the question to be clarified.

The only recommendation from the Government members in relation to the labour mobility provisions is a generic call for all relevant agencies responsible for curbing unlawful immigration activity to be adequately resourced to perform their functions effectively and efficiently. This begs the question of why this would not already be the case as a matter of course, but unfortunately, the evidence is that current resourcing has not been sufficient to guard against widespread exploitation of temporary overseas workers.

19 Migration Council of Australia, More than temporary: Australia's 457 visa program, pp. 76-78, 80.

We also agree with the dissenting report of Labor members that '*given the extent of abuse of temporary overseas workers going on in Australia right now, we regard this view [that the current system can maintain and contain breaches] as hopelessly naïve and out of touch with reality*'. We refer the Committee to our submission to the current temporary work visa inquiry for a comprehensive range of responses that we believe are required to help support vulnerable migrant workers and end the exploitation.

The dissenting Labor report details the erosion of safeguards for Australian jobs under CHAFTA, including labour market testing obligations, and proposes a set of amendments to the Migration Act that we deal with below.

Proposed Labor Amendments to the Migration Act and the subsequent Government-Opposition agreement on amendments to the Migration Regulations and policy guidelines

In their dissenting JSCOT report and in other public statements, Labor outlined a series of proposed amendments to the Migration Act to overcome flaws in CHAFTA and provide better support and protection for Australian jobs and training opportunities.

The proposed Labor amendments covered three elements of CHAFTA:

- IFAs – codifying in legislation the labour market testing requirements for employers who use labour agreements (work agreements) under IFAs. These requirements are modelled on what is currently set out in government policy guidelines, and include provisions for an Australian jobs test, a labour market need statement, training plans, overseas worker support plans, and a public register of work agreements.

- General 457 visa stream – increasing the minimum base rate of pay (TSMIT) to $57 000 p.a. with annual indexation (while conceding there are limits on what else can be done to fix the impact of CHAFTA under the general 457 visa stream if the text of CHAFTA itself is left unchanged).

- Skills assessments - Requiring 457 visa workers in trades like electrical work to obtain the relevant licence or registration within 60 days of arriving in Australia and before commencing work, with the onus on sponsoring employers to provide proof the licence has been obtained.

The safeguards are designed to be complementary to CHAFTA – they will not breach the agreement or require it to be renegotiated. They will apply to all work agreements and therefore do not single out China.

The proposed Labor amendments have since been the subject of subsequent negotiations between the Government and Opposition and an agreement was reached and announced on 21 October. The agreement picks up a number of Labor's suggested amendments but rather than legislate them in the Migration Act itself, they will instead be prescribed in the Migration Regulations and departmental guidelines. Other areas where the final agreement with Government departed from Labor's original amendments include:

- Agreement was not reached to increase the TSMIT and index it annually. Instead it will be subject to a review that will commence before the end of 2015. Meanwhile, the TSMIT will remain frozen at $53 900, where it has been since the Government came to office in 2013.

- The deadline for 457 visa holders to obtain any necessary licence, registration or membership for the relevant occupation has been extended from 60 to 90 days, with no onus of proof on sponsoring employers to show a 457 visa worker has a licence.

- A new provision in the Regulations to specify that the market salary rate requirements for 457 visa holders will use enterprise agreement rates as the salary benchmark.

- There will not be a public register of work agreements; instead the Department of Immigration and Border Protection will report annually on the number of work agreements each year, the number of 457 visa holders, and the occupations and industries in which they are engaged.

In response to the Labor amendments and the subsequent Government-Opposition agreement, the first point to make is that this Committee should be very clear about the limitations of these changes in addressing the real shortcomings of CHAFTA and the related MOU.

On our reading, the labour market testing provisions in the proposed amendments and subsequent agreement will have limited application. The provisions only purport to safeguard or restore labour market testing in relation to IFA projects, and then, it would seem, only in relation to 'concessional' 457 visa holders under IFAs i.e. workers at lower skill levels or with lower level English than the standard 457 visa program and who are not captured by the express prohibition on labour market testing under CHAFTA that applies to all workers with 'trade, technical and professional skills'.

Accordingly, any requirements for labour market testing set out in the Regulations or in guidelines as a result of this agreement, while welcome, will not cover positions filled by Chinese nationals under the standard 457 visa program. Under the terms of CHAFTA, these workers would not be subject to labour market testing. Neither do the agreed amendments address the issue of labour market testing for installers and servicers on 400 visas who under the terms of CHAFTA cannot be made subject to labour market testing.

The problem remains that the express terms of CHAFTA remove labour market testing for all occupations – trade, technical and professional – under the standard 457 visa program. Therefore, while the changes initiated by Labor make some improvements they do not (and, more to the point, cannot) reverse what CHAFTA says in black and white. The only real solution to this would be the renegotiation of CHAFTA itself.

Again, we are happy to be wrong on this point, and this is a key question this Inquiry and the Government should clarify. We note that Labor has already acknowledged the limits on what can be done if CHAFTA remains untouched and has made clear that in office they would not have agreed to key items in CHAFTA including the general exemption from labour market testing.

In the absence of CHAFTA being renegotiated, and mindful of the limited effect of changing the Migration Act and Regulations, we recommend the following further amendments that would help strengthen protections for both Australian and temporary overseas workers.

- A requirement for an online 'Project Jobs Board' to be established for each IFA to advertise all project positions. This would ensure Australian workers can view all vacancies on the project and apply for positions and register their interest. Use of the Project Jobs Board should be built-in to the labour market testing requirements under IFAs.

- A provision for the Minister to impose as a further condition on IFA projects 'a minimum number of apprentices and trainees to be employed (or graduate employment places be provided).'

- Aligning the TSMIT for 457 visa workers with Average Weekly Earnings (currently around $77 000 p.a.). This would make the TSMIT more effective in reducing incentives for employers to overlook local workers (while still not overcoming the fact labour market testing is removed), and ensure the 457 visa program does not operate in lower-skilled, lower-paid sections of the labour market where workers are typically more vulnerable.

- Extending the requirement to pay 'market rates' to installers and servicers on short-term 400 visas.

- A requirement for a public register of work agreements that includes the full text of all agreements, available online once they are finalised. Enterprise agreements and awards are public documents and there is no reason why sponsors of 457 visa workers should not have the same level of accountability and transparency. At the very least the public register should include details of:

  - The town/location where the work agreement will operate;

  - The concessions which are granted under the work agreement with regards to wage levels, skills and English language levels, and the justification for those concessions;

  - The occupations which are covered by the work agreement;

  - The salary rates to be paid to workers for each occupational category under the work agreement;

  - The number and proportion of overseas workers to be employed under the agreement compared with Australian workers.

- Specific requirements for consultation with relevant unions and other stakeholders as part of the negotiation of IFAs, consistent with those that applied under the EMA guidelines and the current Project Agreement guidelines.

- Placing the onus of proof on sponsoring employers to provide evidence that the visa holder has obtained the appropriate licence within 60 days of the visa being issued.

- Ensuring that all 457 visa holders under IFA work agreements are direct employees and not contractors.

- A provision for training plans under work agreements to specify the occupations the training relates to, with a requirement for training to be focused on those same occupations which are purportedly in shortage and where 457 visa workers are being used.

Our view is that these amendments should be implemented through the Migration Act. We are not clear why the agreement between Labor and the Government has settled in the end on the amendments being implemented through the Regulations and departmental policy guidelines.

We note that these comments relate to general summary information that is available on the agreement reached between the Government and Opposition. We would welcome the opportunity to make comments on specific amendments to current Regulations or guidelines once these are in the public domain.

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