ACTU Submission

Inquiry into the current framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements

ACTU
australian council of trade unions

unions australia

SECURE JOBS BETTER FUTURE

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1. Introduction

The ACTU welcomes the opportunity to provide a submission to this Inquiry into the current framework and operation of subclass 457 visas, Enterprise Migration Agreements (EMAs) and Regional Migration Agreements (RMAs). These are matters that unions have been advocating and campaigning on consistently on for a number of years.

Our interest in the 457 visa program (including EMAs and RMAs), and the debate that surrounds it, has always been driven by three key, interrelated, priorities.

The first is to maximise jobs and training opportunities for Australians – that is, citizens and permanent residents of Australia, regardless of their background and country of origin – and ensure they have the first right to access Australian jobs.

The second is to ensure that those overseas workers who do come here under the 457 program to meet genuine skill shortages that can't be filled locally are treated well, that they receive their full and proper entitlements, and they are safe in the workplace – and if this does not happen, they are able to seek a remedy just as Australian workers can do, including by accessing the benefits of union membership and representation.

The third is that to ensure that employers are not able to take the easy option and go down the 457 visa route, without first investing in training and undertaking genuine testing of the local labour market. In this vein, we support the recent comments by the Minister that this is about ensuring those employers who do the right thing are not undercut by those employers who exploit and abuse the 457 visa program and the workers under it.

As we have emphasised throughout, Australian unions strongly support a diverse, non-discriminatory skilled migration program. Our clear preference is that this occurs primarily through permanent migration where workers enter Australia independently, but we recognise there may be a role for some level of temporary migration to meet critical skill needs. However, there needs to be a proper, rigorous process for managing this and ensuring there are genuine skill shortages and Australian workers are not missing out.

Against that background, the submission that follows addresses a number of the specific terms of reference for the Inquiry.

2. Overview of key issues and recommendations

Unions recognise there will be a role in some cases for temporary skilled migration to fill genuine skill shortages, but as ACTU Congress Policy states unions will not support this unless satisfied that every effort has first been made to fill positions locally, that concrete measures are in place to employ and train locally in future, and the employment of 457 visa workers will not undercut the wages and conditions of Australian workers.

The key priorities for unions in relation to the 457 visa program (also including EMAs, RMAs, and labour agreements) are as follows:

- An effective labour market testing regime with a legislated requirement that employers make all reasonable efforts to employ Australians before they can access temporary overseas workers under the 457 visa program (as outlined in section 3.1, 3.2 and appendix 1).

- Mandatory use of relevant online Jobs Boards by EMA and RMA proponents and 457 visa sponsors (as outlined in section 3.2).

- Robust and enforceable training obligations on 457 visa sponsors (as set out in section 3.1).

- Independent skills assessment for all temporary overseas workers (as outlined in section 3.7).

- Opportunities for recently retrenched workers (as outlined in section 3.2).

- Preference for local workers over 457 visa holders in redundancy situations, (as outlined in section 3.6).

- Stronger compliance monitoring (as outlined in section 3.4).

- New sponsor obligations to increase understanding by visa holders of their workplace rights (as outlined in section 3.4)

- Far more robust information and evidentiary requirements on EMA and RMA proponents, as well as labour agreement proponents (as outlined in section 3.2. and 3.5).

3. Responses to selected terms of reference

3.1 Their effectiveness in filling areas of identified skill shortages and the extent to which they may result in a decline in Australia's national training effort, with particular reference to apprenticeship commencements.

Addressing skill shortages

The underlying rationale of the 457 visa program is that it is there to fill temporary skill shortages that cannot be met through the employment and training of Australian workers. However, the lack of any requirement for local labour market testing under the program means that no proper assessment can be made as to whether there are in fact genuine skill shortages that justify the employment of overseas labour in any given case. At present, all that employers are required to do to gain access to overseas workers under the 457 program is attest to the fact that they have a strong record of, or a demonstrated commitment to, employing local labour.

In the absence of labour market testing that could provide direct evidence of skill shortages, the data at the macro-level suggests the 457 visa program is not being used in a manner consistent with the underlying rationale above. If it works as its proponents claim, the program is designed to simply reflect changes in labour demand. However, the evidence is that 457 visa numbers have continued to grow as the labour market softens and jobs are lost i.e. the program is going in the opposite direction to the general labour market.

For example, the relationship between 457 visa applications lodged and the ANZ Bank Job Ads series appeared to have collapsed through 2012. The close relationship between the two was previously cited as evidence that the 457 visa program was truly responsive to changes in labour demand. However, in recent times, 457 visa applications have gone in completely the opposite direction, continuing to rise through 2012 (and up 40% in the first 4 months of FY 2013 to end- October 2012) - while the number of Job Ads in the ANZ series has *fallen* for 10 consecutive months and in December 2012 was 20% *below* February 2012 levels.

A similar picture of 457 worker growth outstripping general employment growth emerges at an industry level. For example, in the construction industry, in the 12 months to February 2013, while Australian construction industry employment grew by only 1.1%[1], the number of 457 visa holders working in the industry actually increased by 25% (or 2,020 workers) to 14,080[2].

The number of 457 visa workers in construction recorded a fall between February and March 2013. But the same occurred in 2012 before the number of 457s working in construction grew strongly throughout the rest of the year.

[1] ABS Labour Force Survey detailed quarterly, February 2013 (trend basis).
[2] DIAC Subclass 457 State/Territory Summary reports.

These trends match the anecdotal experience of our affiliated unions who report that they have unemployed members on their 'out of work' registers while 457 visa numbers in the same occupations have continued to grow. There continue to be cases reported such as that at Werribee in outer Melbourne recently where 457 visa workers were literally flown in over the top of local unemployed skilled workers to work on a City West Water project.

We also refer this Inquiry to the recent report of the Senate Committee for Education, Employment and Workplace Relations[3], inquiring into proposed Greens' legislation to govern EMAs, which found further evidence some companies in the resources sector are turning away qualified Australian workers and hiring overseas workers.

We also note the evidence the Government has cited of wage growth dampening and real wages falling in areas where 457 visas are widely used, with the biggest rates of growth occurring in low-paid sectors, suggesting that skill shortages are not an issue.

In relation to EMAs and RMAs, no assessment can be made as no such agreements have come into operation, but the same issue identified above for the standard 457 program applies in that the EMA and RMA guidelines fail to require any proper labour market testing and therefore provide no means to verify the existence or otherwise of genuine skill shortages. We note that the in-principle EMA that was struck for the Roy Hill project is no longer required as it now appears the project will not need to use overseas workers.

Training effort

In the same way that there is a lack of direct evidence of what employers wanting to use the 457 visa program are doing to employ Australians first, there is a similar lack of evidence on what they are doing to train Australians.

For example, at present the Government places no obligations on sponsoring employers to be offering apprenticeships and traineeships in areas of skill shortages, and collects no data on the numbers of apprentices and trainees that are being trained by those employers that sponsor 457 visa workers. This means the Government and the community have no idea if employers using overseas labour are in fact making any effort to train Australian apprentices in those occupations. This is despite the Government's stated position that skilled migration should complement domestic training and should not be used as a substitute for training Australian workers and apprentices.

However, the evidence that is available suggests the use and availability of 457 labour has resulted in a decline in the national training effort, particularly in terms of apprenticeship training.

For example, this was a key issue highlighted by the 2010 report of the National Resources Sector Employment Taskforce. The NRSET report[4] found that ready access to temporary migration, along with the capacity to offer high wages and 'poach', has allowed resources companies to meet their skill needs with little thought to investment in skills development.

[3] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=eet_ctte/completed_inquiries/2010-13/enterprise_migration_agreements/report/index.htm

[4] Resourcing the Future: National Resources Sector Employment Taskforce Report, July 2010)

The NRSET report cited NCVER research[5] that the resource sector trained just 3.6% of Australia's apprentices, despite employing 5.6% of the nation's tradespeople. In response to this, the recommendation from NRSET, supported by Government, was that the resources sector needed to significantly increase the number of apprentices it employs, given that it currently employs considerably fewer than would be expected given its share of trade employment.

No doubt the Committee will be presented with examples of good practice from employers who are making strides with apprenticeship training, but across the board there is no great sign of any great improvement.

The evidence is that the situation has not improved in the ensuing period since the NRSET report. In its most recent report into the skill needs of the resources sector, AWPA found there were not enough apprentices and trainees in the resources and infrastructure sector, with only 4, 200 commencements in trade occupations under the relevant industry training package.[6] Even now, reports are that employer take-up of apprentices coming through the National Apprenticeships Program remains slow, despite good responses from some organisations.

The 2011 report of the Apprenticeship Expert Panel (the Expert Panel Report) also raised the concern that current rates and patterns of investment in training would not address skill shortages. This has been a concern repeatedly raised by a number of Industry Skills Councils and industry groups, as cited in the expert Panel report.[7]

In Western Australia, for example, the message has been that apprentice numbers will need to increase to meet industry demand for tradespeople and to reduce the reliance on migrant workers. In the electro-technology area for example, employment opportunities have been predicted to grow significantly, severely testing the States' capacity to train apprentices in sufficient numbers to meet the predicted demand for additional electricians.[8] Attracting new entrants into apprenticeships is also important for other industries which may be experiencing skills shortages and/or competing with the resources sector for skilled workers.

Despite this, amid the resources boom and continuing talk of skill shortages, there was no growth at all in apprenticeship and traineeship commencements in Western Australia in 2011[9]. Tellingly, over the same period, 457 visa numbers in the trades in Western Australia grew exponentially, as table 1 below shows. Nationally, NCVER figures show the number of people commencing apprenticeships in trade occupations fell by 5.9% in 2011 and had been on the decline since September 2010.[10]

[5] in Resourcing the Future: National Resources Sector Employment Taskforce, Technical Paper, pp. 37-38
[6] AWPA, Skills Needs of the Resources Sector, Commonwealth of Australia, 2012, p. 25
[7] A shared responsibility: Apprenticeships for the 21st Century Final Report of the Expert Panel, 31 January 2011, Commonwealth of Australia, 2011, pp. 25-26
[8] Electrical Utilities and Public Administration Training Council, Industry Workforce Development Plan 2010, p. 21
[9] 2011 December quarter, Apprentices and Trainees, Australian vocational education and training statistics, NCVER, 2012, p. 4
[10] Australian vocational education and training statistics, Apprentices and Trainees, Annual 2011, NCVER, 2012, p. 5; NCVER, News and Events, Fewer Trainees start, apprentices continue to slow, 18 May 2012); NCVER, News and Events, Apprentice and trainee December quarter 2011 statistics released, 5 June 2012

Table 1: 457 visa numbers in the trades in Western Australia 2010-2012

Program year 2010 – 2011 at 30 June 2011

Nominated Occupation	2010	2011	Change from 09 - 10	% of total
Technicians and Trades Workers	1600	3140	96.2	33.8

Sponsor Industry	2010	2011	Change from 09 - 10	% of total
Construction	1220	2420	99.2%	26.1
Electricity, Gas, Water and Waste Services	160	200	25.2	2.2
Mining	1580	2200	39.3	23.7

Program year 2011 – 2012 at 30 June 2012

Nominated Occupation	2011	2012	Change from 10 - 11	% of total
Technicians and Trades Workers	3140	6380	103.3	39.2

Sponsor Industry	2011	2012	Change from 10 - 11	% of total
Construction	2420	4100	68.9	25.1
Electricity, Gas, Water and Waste Services	200	350	71.6	2.1
Mining	2200	3630	64.9	22.3

Source: Compiled from various DIAC Subclass 457 State/Territory Summary reports

It is certainly true the raw numbers of apprentices and trainees have increased over time. Figures from the NCVER[11] show that at the end of 2011 there were 449 000 apprentices and trainees in training, compared to 318 000 in 2001. However, the training rate as a proportion of employed persons has remained virtually unchanged at 3.8% since 2002. [12] As a proportion of trade employment, there was an improvement in trade training rates in the mid-2000s but training rates have fallen off again since around 2008 across most major trades groups. For example, in the case of automotive and engineering, the training rate has gone from 15% to 13.9%. For construction trades workers the training rate went from 14.4% to 13.3%. Food trades dropped from 12.3% to 10.4%, the lowest rate in the past decade. Wood trades workers went from 16.7% in 2006 to 12% in 20111. The training rate for hairdressers dropped from 20.1% to 17.7% in a single year from 2010 to 2011.[13]

[11] Australian vocational education and training statistics: Apprentices and Trainees, 2011 December quarter 2011, NCVER, 2012
[12] Australian vocational education and training statistics, Apprentices and Trainees, Annual 2011, NCVER, 2012, p. 13, table 9
[13] Ibid, p. 14, table 12.

The latest NCVER data indicate that trade commencements did improve in the first half of 2012 but then dipped again in the September quarter.[14] While the numbers are subject to fluctuations up and down, unions believe a sustained increase in apprenticeship training and completion rates is required across Australian workplaces to compensate for under-investment in years gone by and to meet our future skill needs, lift productivity, and provide employment opportunities.

The issue with commencement rates in our view at least in part come down to the willingness of employers to invest in training and offer apprenticeship opportunities. For many potential apprentices the real challenge to start with is finding an employer able and willing to take them on. Anecdotally, unions are familiar with stories of apprentice positions being advertised in some cases and hundreds of applications are received. This suggests there is an unmet level of demand out for there for apprenticeships among school leavers, the unemployed, and those already in the workforce.

Another concern referred to earlier is that the apprentice training effort is not evenly spread among employers across the board, or between different industries. In the construction sector for example, there can be sites with hundreds of construction workers and no apprentices, but then there are example of employers who are putting serious effort and investment into apprenticeship training, in some limited cases even perhaps overtraining in the broader interests of the industry.

To address these issues under the 457 visa program, unions support stronger training obligations and benchmarks tied to the use of skilled migration, so that employers who have a genuine need to sponsor and bring in overseas workers to fill skill shortages are also training the future workforce. It is particularly important this happens also under any future EMAs or RMAs that may be entered into.

Training benchmarks for the 457 visa program are currently under consideration by the Ministerial Advisory Council for Skilled Migration. The unions' proposal in that forum is to strengthen the current training obligations to require a payment by employers of 457 visa trades workers equivalent to what the employer would have received in government incentive payments if they had employed an apprentice (currently $4850). Among other things, it also proposes that where 10 or more 457 visa workers are sought by a sponsor, Australian apprentices should make up at least 25% of the sponsor's trade workforce. This would reflect industry best practice.

3.2 Their accessibility and the criteria against which applications are assessed, including whether stringent labour market testing can or should be applied to the application process;

The ACTU and unions continue to express our concerns with the lack of rigour and scrutiny that is applied to the application process for EMAs, RMAs, the 457 visa program generally, as well as labour agreements. The fact there is no obligation on employers to even look for Australian workers first, let alone employ them, remains a key flaw of the program. Unions strongly support the need for stringent labour market testing to be applied to each of these avenues for engaging temporary overseas labour.

[14] 2012 September quarter, Apprentices and Trainees, Early trends and estimates NCVER 2012; 2012 June Quarter: Apprentices and Trainees, NCVER, 2012

In this respect, we again bring to this Committee's attention the recent report from their Senate colleagues on the Education, Employment and Workplace Relations Committee which made a number of important and sensible recommendations for improving the framework governing EMAs. This included a proper system of labour market testing that puts the onus on employers and EMA applicants to first demonstrate what they have done to employ and train Australian citizens and permanent residents.

Taking EMAs as an example, set out below are some of the key elements that unions say are required to ensure community confidence in the integrity of the 457 visa program. The same principles could be applied equally to RMAs, labour agreements and the standard 457 visa program.

Labour market testing

The starting point for unions with EMAs is that Australian workers (citizens and permanent residents) must have enforceable first rights to all jobs on major resource projects.

For this to happen, EMAs must be underpinned by a genuine labour market testing regime. This means that if major project owners and employers covered by EMAs wish to make use of 457 visa labour and other forms of temporary migration they should first have to demonstrate they have made every possible effort to employ locally to fill vacancies. This should include measures such as:

- advertising vacancies locally and nationally at genuine market rates, including mandatory use of the resources sector Jobs Board as outlined below;

- offering relocation assistance measures where required; and

- providing information on specific measures undertaken to employ groups who are currently disadvantaged or under-represented in the workforce such as indigenous workers, women, unemployed local job-seekers, recently retrenched workers, and older workers - all groups the NRSET report identified as a priority - and why the 457 visa positions sought under the EMA cannot be filled by increasing the participation of these groups.

Where project owners and employers seek to use 457 visa labour, they should be required to demonstrate why local recruitment efforts identified above have not been successful in meeting their skill needs.

Under the current EMA guidelines, there is no requirement for such labour market testing to occur for any position under an EMA, despite a general requirement for project owners to demonstrate their commitment to ongoing local recruitment efforts.

In relation to semi-skilled occupations under an EMA, there is a requirement in the guidelines for a limited form of 'labour market analysis'. In practice, this can amount to a report commissioned by a consultant that makes a general case that skill shortages exist in the relevant semi-skilled occupations. It falls well short of a requirement for evidence that the local labour market has been actively tested.

In the case of skilled occupations available under the standard 457 visa program there is no requirement for any form of labour market testing or analysis. This exempts from proper scrutiny a wide range of professional and trade occupations that are required on major resource projects.

Furthermore, there is no labour market testing, or even labour market analysis, required at all under the EMA guidelines for subsequent labour agreements that direct employers make under the umbrella of an EMA. The main stated rationale for this has been that it will allow labour agreements to be finalised 'off the shelf', streamlining the process and reducing the time involved in negotiating labour agreements.

In our view, this approach completely misplaces what the policy priorities should be. Rather than an emphasis on fast-tracking the process, the priority should be to ensure that available work goes first to Australian workers. For this to happen, it is vital that all individual labour agreements be properly labour market tested to ensure that skill shortages exist at the time that positions are actually being filled, and not just when the EMA is made at the start of a project.

Given that EMAs can run for up to five years, it is inconceivable that this would not be a requirement. It is obvious that labour market conditions could change during the duration of an EMA and this should be taken into account. During the term of an EMA, there would also be the time and opportunity for necessary training to take place to allow positions to be filled locally and this should also be taken into account in assessing the need for 457 visa labour as proposed by individual labour agreements.

In our submission, there is a need for clear requirements on the types of labour market testing measures that need to be taken in filling EMA positions locally before resorting to the use of 457 visa labour. The examples given above should be adopted for this purpose. It should also be clear that these requirements should apply to all sub-contractors and employers under an EMA.

For the further information of the committee, a consolidation definition of what is meant by labour market testing is provided at **appendix 1** of the submission.

Jobs Board

The ACTU congratulates the Government on the positive development of a public online Jobs Board that now advertises resources sector jobs around Australia and enables workers interested in working in the resources sector to lodge their relevant details. This is an initiative that unions strongly advocated for. Unions continue to work constructively with the Government to address initial operational shortcomings that have been identified since the Jobs Board went 'live' in June 2012.

If it works as intended, the Jobs Board can form an integral part of an effective labour market testing regime as outlined above, and help ensure that the Government, unions and the broader community can have confidence in the EMA process and that Australian workers are being given first opportunity to fill Australian jobs.

For it to be effective, it must be a mandatory, contractual requirement of any EMA that all jobs are advertised on the Jobs Board before the engagement of any 457 visa workers can be considered. Further, it should be mandatory to advertise on the Jobs Board before any EMA is entered into in the first place and companies must demonstrate that they have utilised the Jobs Board before any EMA is approved.

The commitment the Government has made to ensure mandatory use of the Jobs Board under EMAs must also be reflected in the exact terms of the deed of agreement between the Government and any EMA project owners.

Further, we note that the mandatory use of the Jobs Board should be in addition to a requirement that EMA proponents and employers use industry or occupational-specific custom and practice as part of their domestic recruitment efforts.

Unions also emphasise that the operation of the Jobs Board needs to be monitored to ensure it operates in accordance with the government's stated objectives. To that end, unions recommend the establishment of an independent body to oversee the operation of the Jobs Board, including an opportunity for individual complaints, to ensure it is transparent, accountable and is delivering on jobs and training opportunities for local workers. In practice, this would mean that if a qualified worker was willing and able to work in the resources sector, with their details on the Jobs Board, but they kept getting overlooked while companies continue to bring in 457 visa workers, there would be an avenue to address that. We note that this was another proposal that was adopted by the majority report of the Education, Employment and Workplace Relations Committee into the Greens' EMA legislation.

Opportunities for recently retrenched workers

The ACTU and unions have identified recently retrenched workers as a priority in efforts to maximise Australian employment and training opportunities.

There is a significant body of skilled workers recently made redundant, many of whom either have transferable skills or have a set of skills which could readily be supplemented with training in order to meet the job requirements on many of these resource projects.

For example, our submission notes that 130,000 jobs have been lost in manufacturing since 2008, based on ABS figures, although it's unclear just how many of these have dropped out of the labour force entirely. This includes a number of high profile cases of large scale job losses, including:

- Bluescope – Announced 1400 jobs to go after closing its export arm in August 2011.
- Qantas – Has been significantly reducing its workforce. Has cut 5000 jobs in the last 4 years, with 3300 announced in 2012.
- Kurri Kurri Smelter – 600 jobs in 2012.
- Caltex Kurnell Refinery – 700 jobs to go as refinery is converted to an import facility in 2014.

On top of this, there have been recent announcements by Fortescue and other mining proponents about closures, mothballing and reductions in capacity.

These are all highly skilled, well trained workers. Before EMAs can be granted, it is imperative that these workers be given the opportunity to work on major resource construction projects unless there is evidence to show these workers have been redeployed successfully in other sectors of the economy. The Jobs Board will form an important part of this evidentiary burden.

More robust information and evidentiary requirements on EMA proponents

The ACTU submits that the information and evidentiary requirements on EMA proponents must be strengthened.

A fundamental problem under the current guidelines is that skilled workers under EMAs are excluded from any proper assessment and scrutiny by unions that cover these occupations. For example, there is no requirement in the EMA consultation process to provide unions with any information on the number and occupations of skilled workers being sought, their wages and conditions, or any evidence to demonstrate there are in fact shortages in those skilled occupations and what recruitment efforts have been made to fill them.

This information is critical for a rigorous and transparent process in determining the need for skilled overseas workers. Without information on all workers and occupations nominated under an EMA, it is not a genuine consultation on the overall skill needs of a major resource project. This will only undermine community confidence in the EMA process as project owners and sub-contractors under EMAs can bring in overseas workers with impunity.

The Government's stated reason for this is that this information will not be required because skilled workers will be subject to the standard 457 program requirements. However, the project owner in an EMA is not like a standard business sponsor in the 457 program. A more relevant point of comparison is with a labour agreement, and under existing DIAC policy all labour hire companies must provide unions with information on the skilled workers they want in any labour agreement. This same requirement should apply to EMAs.

In our submission, mandatory stakeholder consultation for EMAs should include, as a minimum, the following matters:

- The number of 457 visa workers required in each occupation over each of the years covered by the proposed agreement, both skilled and semi-skilled;
- the specific entity or entities who will be the direct employer of the 457 workers, i.e. the names of all subcontractors in the case of EMAs;
- the wages and conditions the 457 visa workers will receive and the proposed industrial instrument;
- how the proposed wages and conditions compare to the wages and conditions of the equivalent Australian workers and the market rate for the industry or occupation;

- the evidence on which it is claimed that, over the proposed 5 year life of the EMA, the nominated occupations, and the number of positions for each occupation, will be required, and the evidence for the claim that these positions cannot be filled by Australian citizens and residents, including evidence of recent and ongoing recruitment efforts; and

- all elements of the proposed project Training plan, and other social inclusion initiatives.

3.3 Whether better long-term forecasting of workforce needs, and the associated skills training required, would reduce the extent of the current reliance on such visas

The ACTU supports any endeavours to provide better long-term forecasting of workforce needs and the associated skills and training required, and reduce the extent of the current reliance on such visas. Some of this work does already occur. Our only concern is that such research and forecasting is not used simply to buttress employer arguments for greater use of 457 labour when clearly the intention of such research is to provide greater scope to plan for future skill needs through domestic training effort.

However, the ACTU is concerned that developments elsewhere are acting against the clear need to focus on training and skills development to meet future skills needs. For example, the ACTU has made submissions to the current House of Representative Inquiry into TAFE and the impact of recent budget cuts. This includes the impact on apprenticeship training both in terms of campus closures and course cuts (RMIT have withdrawn from mechanical trades training after 130 years of continuous delivery), and increased fees and materials charges which act as a 'double whammy' for apprentices already struggling on rock bottom apprentice wages that cause one in two apprentices to pull out. Pulling money out of TAFE and keeping apprentices on subsistence wages doesn't appear to be helping the situation. If these sorts of matters could be resolved, there may not be a need to spend as much time debating the 457 visa program.

3.4 The capacity of the system to ensure the enforcement of workplace rights, including occupational health and safety laws and workers' compensation rights;

Unions have long held grave concerns about the capacity of the system to ensure the enforcement of workplace rights, whether they concern wages and conditions, OHS, or workers' compensation. There are three key elements to this concern that are worth noting.

First, in large part, the concern results from a continuing fundamental problem that we see with the inherent nature of the 457 program; that is, that workers remain dependent on their sponsoring employer for their ongoing employment and visa status, and in many cases, their desire for permanent residency. This was a problem identified by the Deegan report into the 457 program back in 2008, and in our submission it creates many of the problems we still see today, as workers in this situation who are being underpaid or working in unsafe conditions are less likely to speak out or challenge their employer or seek outside help for fear of jeopardising their visa status.

Along with the fact there is still no obligation on employers to even look for Australian workers first, let alone employ them, this remains a key flaw of the program.

As noted, it was the 2008 Deegan report that first highlighted the great potential for exploitation that exists when temporary overseas workers have permanent residency as their goal. Numerous examples were reported to that review of workers being underpaid, not paid overtime, working longer or more days than their local counterparts, limited access to sick leave, and instant dismissal. Unions continue to uncover such cases.

If privacy and confidentiality concerns can be addressed, the ACTU can provide the Committee with a wide selection of recent case studies and real life examples the ACTU has gathered from our affiliated unions and others, from calls to the ACTU 457 visa confidential hotline, as well as from publically available material. These case studies help to demonstrate the continued rorting and exploitation that operates under the program, and the adverse impact this has on both the treatment of overseas workers and for local job opportunities:

It is likely the cases uncovered represent just the tip of the iceberg. As the Deegan report noted, the cases of exploitation that are brought to public attention make up only a very small part of the overall problem.

For example, the ACTU has an informal relationship with Migrante, the Filipino community group. Filipino 457 visa workers who have been mistreated in the workplace and come to the ACTU through Migrante tell us they are reluctant to take action or join the union because they fear further retribution. Unions have been informed by Filipino community leaders that up to 70 per cent of workers from the Philippines experience exploitation including instant dismissal, bullying, low wages and are exposed to occupational health and safety risks.

To provide assistance and advice to workers in these situations, the ACTU recently established a confidential 457 visa hotline to provide assistance to workers, and already a number of disturbing cases have been reported through this mechanism. As appropriate, the ACTU then puts the callers in contact with relevant unions and government bodies who can help them further to find out about their rights and pursue any further action required.

The second issue is that the enforcement of workplace rights requires that sufficient resources are dedicated to compliance and monitoring activities. For some time now, the ACTU and unions have been raising serious concerns about the lack of effective monitoring and compliance of the 457 visa program overall.

At Senate estimates hearings last year, DIAC stated:

"At the moment we have around 37 inspectors across Australia and, for this program – 2011-12 until 30 April - we have done 861 site visits, which have been conducted to assess sponsor compliance with the sponsorship obligations." [15]

To put these numbers in perspective, that is 37 inspectors to monitor more than 22 000 employers (sponsors). With only 861 employers receiving a site visit, that is less than 4% of all 457 employers being actively monitored. Employers need to know there is at least some chance they will be subject to some form of scrutiny and this is not occurring at present.

[15] *Hansard*, Legal and Constitutional Affairs Legislation Committee, Senate Estimates, 22 May 2012, p. 68)

This is all happening while 457 visa numbers continue to grow, based on DIAC figures. For example, the total number of 457 visa workers in Australia at 31 March 2013 was 105, 500, an increase of 19.2% compared to the same time 12 months ago. For ANZSCO Major Group 3 (Technicians and Trades Workers) primary applications were 16.1 per cent higher in 2012-13 to 31 March 2013, compared with the same period last program year.[16]

Effective monitoring and compliance is even more important if the push continues to extend the migration program into more vulnerable, lower-skilled occupations as is the stated intention with EMAs, and also RMAs. As a case in point, the majority of the 1500 plus overseas worker nominations originally approved under the Roy Hill EMA were in semi-skilled occupations. Yet at the same time, in the same Senate estimates hearing DIAC stated that EMA monitoring will be covered "within the existing number of inspectors and resources". [17]

While we acknowledge the tight fiscal circumstances the Government is operating under, this comes down to a question of priorities. For example, in the 2011 budget, the Government found an additional $10m for faster processing of 457 visas, but couldn't find any additional money for compliance monitoring. Clearly in our view, this funding would be much better directed at improving compliance activity.

To provide additional support for 457 visa workers, our submission is that, at the very least:

- There should be a new sponsor obligation to inform every 457 visa-holder in writing of the rates of pay and terms and conditions of employment under which they are engaged; and

- All 457 visa workers should be provided with a hard copy version of their worker rights under Australian workplace and immigration laws, outlining particularly the role of the DIAC, FWO and unions in pursuing underpayment claims.

These provisions were supported in the recommendations of the March 2013 majority report of the Senate Education and Workplace Relations Committee into EMAs.

The third key problem has been the lack of progress until very recently with any sort of co-operative arrangements or protocols or MOUs being established between the different regulatory authorities with an interest in these matters. In that light, we welcome the Government's recent announcements that FWO inspectors will have a beefed up compliance role under the 457 program and co-operative arrangements have been established for the exchange of information and data-matching with the Australian Tax Office.

3.5 The role of employment agencies involved in on-hiring subclass 457 visa holders and the contractual obligations placed on subclass 457 visa holders;

The ACTU and unions have consistently raised concerns with the inadequate process governing labour agreement that cover employment agencies involved in on-hiring 457 visa holders.

[16] http://www.immi.gov.au/media/statistics/statistical-info/temp-entrants/subclass-457.htm
[17] *Hansard*, Legal and Constitutional Affairs Legislation Committee, Senate Estimates, 22 May 2012, p. 69

The ACTU strongly supports the need for improved mechanisms for scrutiny and oversight of labour agreements, particularly if they are to be used as a backdoor route by major resource construction projects wishing to access overseas labour but wanting to avoid the current EMA consultation process.

The ACTU believes that the labour agreement process requires comprehensive reform. It is seriously deficient both in terms of a process for consultation and the range of matters on which labour agreement proponents are required to consult on. This means there can be no confidence on the part of unions, the Government or the wider community that employers and labour hire companies wishing to source 457 visa workers under a labour agreement are first doing all they can to employ and train the local workforce.

The ACTU identifies the following matters that should be included as formal consultation requirements under the labour agreement program:

- the number and occupations of temporary skilled overseas workers to be sponsored over each of the years covered by the proposed agreement and the specific roles they will perform;

- the award/agreement classification and job titles of the workers;

- the specific locations in which the workers will be employed;

- the specific entity or entities who will be the direct employer of the workers;

- the specific locations in which the workers will be employed;

- the wages and conditions the visa workers will receive and the proposed industrial instrument that will cover them;

- how the proposed wages and conditions compare to the wages and conditions of the equivalent Australian workers and the market rate for the industry or occupation;

- a commitment from the company to exhaust all avenues for sourcing appropriate local labour workers, including the use of industry managed databases of unemployed workers where they exist, with evidence to demonstrate the nominated occupations, and the number of positions for each occupation, will in fact be required, and the evidence that these positions cannot be filled by Australian citizens and residents;

- evidence of recent and ongoing recruitment efforts, including evidence of the wage rates the jobs have been advertised at and relocation assistance that has been offered to allow Australian workers to take up the positions;

- specific commitments by the company directed at addressing the skills shortage through training in the occupations for which temporary overseas workers are sought;

- a workforce profile which shows the proportion of overseas workers to Australian workers;

- information on the process for settling the 457 visa workers in Australia, including assistance with accommodation, visa costs and expenses, including an undertaking by the company to comply with applicable ILO conventions which apply to temporary overseas workers; and

- a commitment to notify the ACTU and relevant affiliates before employing temporary overseas workers and to provide relevant unions with access to the workers within the first month of their employment to ensure compliance with labour agreement obligations.

- Measures to allow for ongoing testing of skills demand during the term of the labour agreement to ensure that local opportunity is not displaced.

3.6 The impact of the recent changes announced by the Government on the above points;

The ACTU broadly supports broadly the recent changes announced by the Government to help improve the integrity of the 457 visa program, as far as they go. The apparent absence of labour market testing remains a concern and in that respect the package as it stands falls short of what is required. We will continue to engage with the Government on the final detail to ensure that the rights of both Australian and overseas workers are protected and enhanced. Set out below is our understanding of some of the key proposed changes and our response.

Strengthening the employer attestation of commitment to employment Australians and non-discriminatory practices
Currently, all that 457 visa employers have to do is 'attest' to their commitment to employing local labour at the time of nomination. The Government proposes to strengthen this requirement by making the attestation a formal declaration or affidavit. This would make it an enforceable obligation with DIAC having additional powers to take action if the declaration proves to be false.

Unions welcome moves to strengthen the current requirement, but if the nature of the attestation itself is not changing it still falls well short of a genuine labour market testing requirement or an enforceable obligation that Australian workers have the first right to Australian jobs.

In our submission, there is also a need to clarify how redundancy situations are treated. The unions' position is that Australian citizens and permanent residents should have an express preference to retain their jobs over 457 visa workers in redundancy situations.

The clear logic to this is that the 457 visa program is designed to provide temporary overseas workers to fill skill shortages when the employer cannot find sufficient workers from the domestic labour market; if workers are having to be made redundant the employer is clearly no longer finding it difficult to find enough workers to perform the work and therefore the 457 visa workers are no longer required and they should be the first to go in those circumstances. Unions are aware of a number of examples over the years where this has not been the case, including a recent example cited in appendix 2.

DIAC has indicated that if employers have a past record of shedding local jobs while retaining 457 visa workers this would be taken into account in assessing their commitment to employing local labour if they apply for new 457 visa workers. This would be welcome, but it does not address the fundamental point we make above.

Strengthening the training benchmarks commitment to make it an enforceable requirement
The current training benchmarks for the 457 visa program provide that sponsoring employers should direct either 1% of payroll into training their local workforce or 2% into an approved industry training fund.

The Government proposes to establish these benchmarks as a binding sponsor obligation and extend the obligation to 3 years (i.e. the life of the sponsorship). Employers will have a sponsorship obligation to maintain records that demonstrate they are meeting the training benchmarks. The training obligations will also be extended to start-up businesses operating for less than 12 months that are currently exempt.

Unions support making the benchmarks a binding obligation, but believe there needs to be a broader overhaul of the training benchmarks so they meet their stated objective of increasing training of Australians in the occupations that 457 visa workers are being employed in order to meet the sponsor's future workforce needs. This would include for example specific requirements to support apprenticeship training. This matter is currently being dealt with by MACSM and was discussed earlier in the submission

Introducing a genuineness criterion in the assessment of subclass 457 visa nominations
The Government is seeking to ensure employers wanting to bring out 457 visa workers will have to demonstrate the nomination is for a genuine job that fits within the eligibility of the 457 visa. At present, DIAC has no discretion to make this assessment, even where there is evidence the nomination is not for a genuine skilled position but for other purposes eg. to gain residency. Examples include where businesses nominate family members on 457 visa positions.

Factors that could be taken into account in determining there is not a genuine need for the nominated position might include:

- A significant majority of the tasks of the nominated position are not commensurate with a skilled occupation;
- The position did not previously exist in the business;
- The nominated salary is significantly lower than industry standards for the nominated occupation;
- The nominee is a relative or personal associate of the sponsor.

Unions support this measure.

Strengthening the 'market rate' provisions
The current 'market rate' requirement introduced in 2009 is that 457 visa workers must receive terms and conditions no less favourable than the 'equivalent Australian worker at the workplace'. The Government is intending to strengthen this requirement in two stages:

(1) Increasing the threshold at which 457 workers are exempt from the market rates requirement from $180 000 to $250 000
(2) expanding the market rate provision to the regional locality

Union support both these measures as long overdue improvements, particularly in relation to (2). Unions have always argued the 'equivalent Australian worker' requirement should be based on a true industry or occupational market rate, not merely the 'site' rate in place at that individual business.

The increase in the threshold to $250 000 recognises that remuneration for some non-executive positions (eg Ship Captains) can fall between $180 000 and $250 000. Under the current threshold, employers can exploit this by employing a 457 visa workers on $180 000, thereby undercutting Australian workers in those positions.

Amending sponsorship terms of approval
Sponsors will be required to adhere to the agreed number of 457 visa workers contained in their initial application for the duration of their sponsorship, unless formally varied at a later date.

Union strongly support this, and argue further that the agreed initial ceiling on 457 visas must also be rigorously justified by the sponsor to DIAC, with measures in place to ensure sponsors do not simply inflate their initial requested number of 457 visas.

Strengthening assessment of generalist occupations
Unions have highlighted problems with occupations under the 457 program such as Program and Project Administrators which have been misused by employers to bring in workers doing unrelated semiskilled work such as scaffolding.

The Government proposal is that applicants for these positions be required to undertake a formal skills assessment. This will require applicants to have at least two years relevant work experience or a relevant qualification. If the salary is less than $92 000, they will also be required to meet English language requirements (IELTS 5 – Vocational English). As a further step, the Government proposes to extending English language requirements to additional 'at risk' occupations that are currently exempt.

This proposal provides some assurances that current rorts will be prevented, although the unions' view is that the problem would be better solved by removing such occupations from the 457 visa program altogether.

Prevent 'unintended' employment relationships
The stated intention is to prohibit sham contracting arrangements and other employment relationships, such as on-hire arrangements (except through approved on-hire labour agreements). This is to ensure the 457 program operates as intended; as a direct employer-employee arrangement. Sponsors will be required to keep a record of written contracts of employment with sponsored workers

Unions strongly support these measures. There should also be an explicit prohibition on 457 visa workers being required or directed to take out an ABN, as it is unlawful for 457 primary visa holders to do any work in Australia except as an employee of the sponsoring employer.

Strengthen obligation on sponsors not to recover certain costs
This measure will provide that approved sponsors are solely responsible for meeting certain costs, such as the costs of recruitment, sponsorship and nomination, including associated migration agent fees. This will strengthen the existing obligation on employers not to recover those costs from sponsored workers.

Some employers are exploiting the current obligation by requiring 457 visa workers to meet those costs up-front, thereby enabling the employer to technically avoid breaching the obligation to not recover those costs. It will be clear now that employers are obliged to meet such costs.

Unions support this measure.

Improvements to the English language requirement
This measure is designed to prevent the potential for misuse of the English language salary exemption. It will not affect the current English language requirement but rather introduce a supporting provision which will ensure a visa holder who is exempted because of a high nominated salary is not exempted if their salary falls below the exemption threshold level. It is also proposed that definitions of English ability will be aligned across skilled programs

Unions support this measure.

Amend terms of sponsorship approval for start-up businesses
The Government is proposing that the period of approved sponsorship for start up businesses – currently 3 years - be reduced to 12 months. Unions support this as it will potentially allow for more regulatory control by DIAC.

Increase the nomination fee
The current 457 visa nomination fee will be increased. In our submission, there is a strong case for increasing such fees. In the UK larger employers have to pay over $2300 for the privilege and small businesses pay $260.

3.7 Any related matters

Independent skills assessment

Unions are very concerned that the skills and qualifications of 457 visa holders and other temporary visa holders are not formally assessed by an independent body against the AQF occupational requirements and other relevant Australian endorsed standards (except in the case of 457 visa applicants from 'at risk' countries'). Currently, 457 visa holders need only satisfy their sponsor that they have the skills required.

In our submission, the mandatory skills assessment that applies to all permanent GSM applicants should be the standard applied consistently to all visa types. An independent and transparent process for both skilled and semi-skilled temporary migrants is essential to ensure that qualifications gained overseas and held by temporary overseas workers meet the contemporary requirements of Australian qualifications and licensing arrangements.

Appendix 1 - What is meant by labour market testing?

Labour market testing (LMT) for resources sector jobs reflects the principle that Australian workers have primary rights to Australian jobs, a principle endorsed in the 2011 ALP National Conference Platform and the 2012 ACTU Congress policy on skilled migration.

LMT means establishing a legal obligation on employers to demonstrate that they have tried to recruit Australian resident workers for the job vacancy on the open market though designated means and have not been able to find a suitably qualified Australian resident worker.

'Designated means' of recruitment includes advertising the job vacancy for at least 4 weeks on the Resources Sector Jobs Board (the Jobs Board) and using industry or occupational-specific recruitment custom and practice such as the longstanding maritime industry employment databases referenced in Enterprise Bargaining Agreements.

Before any application to recruit foreign workers is considered by the Department of Immigration and Citizenship (DIAC), employers will provide evidence of their efforts to recruit Australian resident workers to the Department and to the tripartite committee set up to oversee the project. This evidence will include information on the number of Australian resident workers who applied for the vacancy and the reasons these workers were assessed by the employer as not suitable for the position.

Australian resident workers who applied for the vacancy and were considered not suitable by the employer shall have a legally enforceable right of appeal against that assessment to an independent complaints body before the employer's application to fill the vacancy with a temporary foreign worker can proceed.

'Australian resident workers' means Australian citizens and Australian permanent residents and New Zealand citizens holding a valid Australian temporary visa.

ACTU
australian council of trade unions

level 6 365 queen street
melbourne victoria 3000
t 03 9664 7333
f 03 9600 0050
w actu.org.au

ACTU D No. 37/2013

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