Inquiry into the Migration Amendment (Temporary Sponsored Visas) Bill 2013

ACTU Submission

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ACTU
australian council of trade unions

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Introduction

The ACTU welcomes the opportunity to provide a submission to this Inquiry into the *Migration Amendment (Temporary Sponsored Visas) Bill 2013*.

The ACTU and affiliated unions strongly support the introduction of the Bill as it introduces a range of measures that will improve protections under the 457 visa program, both for Australian citizens and residents, and for temporary overseas workers. These are matters that unions have been advocating and campaigning on consistently for a number of years.

In this submission, we first provide a brief overview of the ACTU position in relation to the 457 visa program and skilled migration generally, and the need for the reforms contained in this Bill. Against that background, the submission then addresses a number of the specific provisions of the Bill currently before the Committee.

The union position on the temporary 457 visa program

Our interest in the 457 visa program, 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 accessing the benefits of union membership and representation.

The third is 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. This is also 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 this debate, 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.

The key fundamental problems that we continue to see with the 457 visa program are firstly, that employers have no obligation to employ qualified Australian workers before gaining access to 457 visas, and secondly, that visa holders remain dependent on their sponsoring employer for their ongoing visa status and, in the majority of cases, their desire for permanent residency. In these circumstances, the risk of exploitation is much greater as overseas workers are less prepared to speak out if they are underpaid, denied their entitlements, or otherwise treated poorly, a problem identified by the 2008 Deegan report into the 457 visa program.

The Need for Reform

Labour Market Testing

The fundamental tenet 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. On the basis of public statements made by all those with an interest in the program, it is common ground that the first priority should always be the employment and training of Australian workers i.e. citizens and permanent residents. However, the lack of any requirement for local labour market testing under the program means there is no mechanism to ensure this is actually the case.

Without genuine labour market testing, 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. There is no requirement for employers to actually do anything to employ local workers before they can access the 457 visa program. This is clearly inadequate, and only serves to undermine community confidence in the program.

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 fundamental tenet of the program described 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].

Recent figures available from DIAC show the 457 visa numbers continue to grow. For example:

- At 30 April 2013 there were 108, 867 457 visa holders in Australia, an increase of 20% over the past 12 months;
- The number of 457 visas granted in 2012-13 to 30 April 2013 was 56,946 - 1.7 per cent higher than the same program period last year;
- The number of visas granted to trades and technician workers increased by 15.4% in the period to 30 April this year compared to the same program period last year.

At the same time, apprentice numbers are down. Figures from the National Centre for Vocational Education and Research show that apprenticeship commencements have fallen over each of the past three quarters (September and December 2012, and March 2013).

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.

[1] ABS Labour Force Survey detailed quarterly, February 2013 (trend basis).

[2] DIAC Subclass 457 State/Territory Summary reports.

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.

Against this evidence, labour market testing is a sensible and appropriate measure to ensure that, before temporary migrant workers are employed, there is evidence that employers have made all reasonable efforts to employ locally and that Australian workers are not being displaced. Our experience with labour agreements under the 457 visa program suggests that when presented with some form of external scrutiny, the employer's professed need for 457 labour is often not pressed any further.

Since labour market testing was removed in 2001, the integrity of the 457 program has been undermined and its absence continues to allow a situation where 457 visas can be granted where there is local labour available or where employers could train local workers to do the job.

In the meantime, labour market testing continues to feature as a central element of temporary overseas workers policy used in other developed countries such as the UK, Canada, US, and various EU countries.

The argument often heard against labour market testing is that employers will of course always look to employ locally first, particularly considering that it is more expensive to bring in a 457 visa worker from overseas than a local worker of the same skills and experience. In our submission, it is simply naïve to assume and blindly accept this will always be the case. Furthermore, it is factually incorrect to continue asserting that it is considerably more expensive to engage workers from overseas. In fact, with the majority of 457s – now 50% - already in Australia and many already working for the 457 sponsor on other visa types (eg. 417 visa), the extra costs are negligible or non-existent.

Even DIAC now acknowledges that the availability of a large pool of temporary visa holders in Australia, many seeking 457 visas, has changed the environment. As a senior DIAC official told a Senate 457 Inquiry on 27 May 2013:

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

"Most of the Deegan reforms were implemented in 2008-09. Since them, we have had a change in the environment – economic changes, changes in terms of the number of visa holders and those under other temporary visas in the country who have an opportunity to apply for a 457 visa. At the time when we had the 2008-09 changes implemented, we did not have this many temporary visa holders on other visas in the country. Our temporary visa program report, which was just released, shows that we have a very large number of temporary visa holders on other visas in the country and they are all eligible to apply for 457 visas if they find an employer who will sponsor them. This is where we have seen the largest growth, when the labour market is softening, in the onshore applications."[4]

In fact, DIAC unpublished data shows that in the 12 months to 31 August 2012:

- 70% of all 457 visa grants went to foreign nationals who had previously been in Australia on a substantive visa, many of whom would have worked for or established a relationship with their 457 sponsor;
- 51% of all 457 visa grants went to foreign nationals in Australia at the time of their visa grant, again many already working for the 457 sponsor. [5]

The argument that employers will always employ locally first is also not borne out by evidence in a recent report by the Migration Council of Australia. The findings in that report include:

- 15% of sponsoring employers said they did not find it difficult to hire or employ workers from the local labour market (p. 76), yet they still employed workers under the 457 visa program – this finding points to widespread and fundamental abuse of 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 (p. 77).

[4] Mr Kruno Kukoc, DIAC, Hansard p.71, 27 May 2013, http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/d4e041b4-18e9-4dcb-a9f8-795b0134f533/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2013_05_27_1967_Part.pdf;fileType=application%2Fpdf#search=%22committees/estimate/d4e041b4-18e9-4dcb-a9f8-795b0134f533/0000%22

[5] DIAC unpublished data, cited in CFMEU submission to Senate 457 visa inquiry.

- 26% of 457 visa employers said they found their 457 visa workers because the workers themselves approach the employer (p.78) - 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' (p. 80) - 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.

Evidence of ongoing rorting and exploitation under the 457 program

The ACTU continues to receive disturbing reports of rorting and exploitation of overseas workers under the 457 visa program.

These reports come from a variety of sources including through the ACTU's confidential 457 visa hotline, from affiliated unions of the ACTU, and through our relationships with other community organisations such as Migrante Australia, who advocate on behalf of Filipino workers in Australia.

The cases of rorting and exploitation reported to the ACTU include:

- 457 visa workers being engaged where skilled and qualified Australian workers were available to do the work;
- Breaches of employer sponsorship obligations;
- Under-payment of workers;
- Workplace bullying;
- Debt bondage;
- 457 visa workers nominated to work in skilled occupations and then being required by their employer to perform unskilled work on a regular or permanent basis;
- Exorbitant charges and interest payments on loans for 457 visa holders to be placed in jobs;
- Contracts that 457 visa workers are forced to sign stipulating they can be sacked for talking to a trade union;
- Attempts by employers to recover costs such as accommodation and food;
- A number of cases where overseas workers have uprooted themselves to come to Australia only to find after a short time (or immediately in some cases) the job is no longer there.

As requested by this same Committee, the ACTU has previously provided examples of these cases on a confidential basis in correspondence of 30 May 2013 and we refer the Committee to that material again. There have also been a number of cases reported publicly. [6].

It will also be the case that cases that come to public attention only ever represent the tip of the iceberg, a point that was well made in the 2008 Deegan report. Again, in large part, this comes down to the inherent nature of the 457 program as a sponsored visa type. As the Migration Council of Australia report showed, about half (48%) of all 457 visa holders indicated the reason for applying was to live in Australia or become a permanent resident (p. 69), and 71% intended to apply to become permanent residents after their visas expired (p. 71). This desire for permanent residency is perfectly understandable on the part of those visa holders, but it also makes them more susceptible to exploitation and reluctant to make any complaint that may put their employment at risk (p.14).

Evidence of poor treatment and exploitation also emerged from recent findings in the report by the Migration Council of Australia. These include:

- 2% of visa holders were paid well below threshold figures (i.e. earning less than $40 000 per annum compared to the TSMIT of $51 400 per annum) and 5% did not feel their employer was meeting their obligations. Extrapolating this finding based on the total number of primary visa holders currently in Australia (108, 807 as at 30 April 2013), the MCA report indicates that 5, 443 visa holders were not receiving their full and proper entitlements i.e. 5, 443 individual breaches of the 457 visa program. There is also a further 6% who don't know if the employer is meeting their obligations (p. 74, MCA report).

- 7% of visa holders said their working conditions were not equal to Australian colleagues (p. 14). For those visa holders of non-English speaking background, this figure was higher again at 8.6% (p. 72).

- 25% of respondents didn't know how much they were paid or refused to say; no other question in the survey elicited this type of response (p. 14).

[6] See for example, McKenzie, N. and Schneider, B. "Visa scheme rorting leaves foreigners in debt bondage", The Age, p. 4, 6 Jun 2013.

Improved Compliance Monitoring and Enforcement

The ACTU and unions have consistently advocated for more resources to be directed towards compliance monitoring and enforcement. As the Second Reading Speech that introduced this Bill indicated, at present there are just 32 inspectors across Australia; this at a time when the latest figures provided by DIAC show there are over 29,000 sponsoring employers under the 457 visa program. 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.

In the Northern Territory for example, the ACTU is advised there are just two inspectors to cover the whole region. This had led to a situation where a matter that was reported to DIAC over 3 months ago involving alleged under-payment of 457 visa workers at McArthur River Mine is still not complete due to the remoteness of the site and a lack of resources.

To address these issues, the ACTU welcomes the initiative in the Bill that will give powers under the Migration Act to over 300 Fair Work Inspectors.

Specific comments on the Bill

Outlined below are areas of the Bill where unions consider the legislation can be further strengthened and improved. Specific proposed amendments are provided in 'tracked changes' in **Attachment 1**.

Schedule 1 – Sponsorship Visas: Purpose

Clause 17 of the Explanatory Memorandum which refers to the purposes to be inserted through new section 140AA provides the following:

17. However, new section 140AA of the Act is not intended to impact on the way Division 3A is interpreted or administered, nor to limit or restrict any future interpretation of the provisions in the Division.

This clause should be taken out because:

- it is wrong in principle – the stated purposes of the Bill should of course impact upon how the provisions are interpreted and administered;
- it is confusing as there is nothing in the proposed Bill that reflects Clause 17. It is an established legal principle that clauses in explanatory memoranda cannot prevail over provisions of an Act; it is the Act that is to be interpreted and administered. Including clause 17 might result in this principle being sidelined if clauses in the EM are used directly by DIAC staff.

Schedule 2 - Labour Market Testing

Requirement for labour market testing before visa nominations can be approved

Section 140GB(2) provides that '*The Minister must approve an approved sponsor's nomination if . . . the labour market testing condition under section 140GBA is satisfied'.*

As currently drafted, this provision does not fully achieve the policy objective which is correctly expressed in clause 22 of the Explanatory Memorandum as follows: *'...the Minister must be satisfied that the labour market testing condition . . . is met before approving a nomination by an approved sponsor'* i.e. our concern is that the provision, as it stands, obliges the Minister to grant a nomination if the labour market testing condition is satisfied, but it leaves open the possibility of a nomination being granted without the required labour market testing.

To achieve the policy intention, Section 140 GB(2) should be amended to provide that the Minister must only (or shall only) approve a nomination if the labour market testing condition is satisfied. Alternatively, the same wording from clause 22 of the Explanatory Memorandum should be adopted.

Timeframe for Labour Market Testing

Section 140GBA(4) indicates the Minister may, by legislative instrument, determine a period within which labour market testing is required. The Second Reading Speech indicates that six months is the proposed timeframe. Unions submit that this allows for too long a period to elapse in a dynamic labour market where conditions change. For example, labour market testing done in August 2008 before the GFC hit could not have been considered relevant six months later in February 2009.

In any event, unions and other stakeholders should be consulted before any such legislative instrument is made. This could be a role for the tripartite Ministerial Advisory Council (see below). The Bill should also provide for this discretion to be exercised by the Minister with particular regard to the central purposes of the 457 scheme as set out in s140AA.

In our submission, this period should be no more than 3 months, for all LMT evidence specified. A 457 visa nomination made in December 2013 should not be able to rely on the results of job advertising conducted in June 2013, because market conditions can change too rapidly.

Evidence of Labour Market Testing

Section 140GBA (5) (b) includes as evidence in relation to labour market testing:
' Copies of, or references to, any research released in the previous six months relating to labour market trends generally and in relation to the nominated occupation".

This provision is problematic and should be removed in its current form. The concern with the provision in practice – as was apparent from the experience that unions had with the Roy Hill EMA consultations – is that this could amount simply to a report commissioned by a consultant that makes a general and untested case that skill shortages exist in the relevant occupations. It falls well short of evidence that the local labour market has been actively tested.

The provision should be amended so that it refers specifically to research relating to the availability of suitably qualified and experienced Australian citizens or Australian permanent residents (see attachment 1). The reference to 6 months should also be reduced to 3 months for the same reasons identified above in relation to the timeframe for labour market testing.

Attachment 1 sets out further proposed amendments to ensure that labour market testing - , and the evidence required in support of it - is focused on genuine bone fide efforts to recruit Australian citizens and permanent residents who are suitably qualified and experienced, and the results of those efforts. As s140GBC currently stands, an employer could simply rely on evidence from general labour market research or expressions of support from governments, without having to provide evidence of actual and bone fide recruitment efforts.

We also note that in 140GBA Labour market testing—condition, the standard specified is that "a suitably qualified and experienced Australian citizen or Australian permanent resident is not readily available" (emphasis added).

This has the potential to allow employers to discriminate against young Australians, by specifying unwarranted experience requirements for positions.

Skill and Occupational Exemptions from Labour Market Testing

S140GBC of the Bill provides for specified occupations to be exempted from the labour market testing requirement by way of legislative instrument. The power to do this under the Bill is limited to ANZSCO 1 and 2 occupations (which covers managers and professionals, including occupations such as nurses, engineers, and IT workers). ANZSCO 3 and above i.e. trades and sub-trade occupations cannot be exempted.

Particular concerns have been raised with the ACTU about this provision and the potential for occupations such as registered nurses to be exempted from the labour market testing provisions in the Bill. Similar concerns would apply to other occupations covered by our affiliated unions, such as engineers and IT workers.

Our submission notes that in his second reading speech the Minister indicated his intention to make a legislative instrument to exempt most, if not all, skill level 1 occupations (ANZSCO 1). If that is the case, nurses and other ANZSCO 2 occupations would not be affected, but the potential is there for the exemptions to be made much wider at a later date.

It is our strong view that labour market testing should apply to all occupations and this would be best achieved by removing the provision in the Bill altogether.

At the very least, our submission recommends that unions and other stakeholders be consulted before any decisions are made on such exemptions. This could be a role for the tripartite Ministerial Advisory Council on Skilled Migration (MACSM). The Bill should also provide for this discretion to be exercised by the Minister with particular regard to the central purposes of the 457 scheme as set out in s140AA.

Another option the Committee may consider is a salary threshold at which 457 workers would be exempt from labour market testing requirements. If this approach was adopted, the threshold should be set at a level that ensures exemptions apply only to executive level positions. Our submission recommends $250,000 per annum as an appropriate threshold for that purpose, consistent with the Government's proposed salary threshold for exemptions to the 'market rates' obligations.

Tripartite Oversight

There needs to be effective tripartite oversight of the 457 visa program, as well as the skilled migration program generally. Unions therefore welcome the establishment of the Ministerial Advisory Council on Skilled Migration as a mechanism to perform this function. In our submission, the following aspects of this Council should be mandated by legislation:

- The membership of the Council should be tripartite, including relevant unions and other stakeholders;
- The Council should oversee and provide advice on all aspects of the skilled migration program, including, but not limited to:

    - EMAs (including the operation of the Resources Sector Jobs Board);
    - RMAs;
    - The standard 457 visa program; and
    - temporary visa programs generally;

- The Council should have a regular meeting schedule.

Whistleblower Protection for Visa Holders

Whistleblower protections or other amnesty-type arrangements should be introduced in the legislation for temporary visa holders of all types – not just 457s – in recognition of the very real difficulties and sanctions they face in reporting cases of exploitation and poor treatment i.e. having their visa cancelled and being deported. For example, student visa holders who are being underpaid but are working beyond the 20 hours a week allowed under their visa are very reluctant to report their cases.

Unions recognise that the provisions in the Bill giving additional time for 457 visa holders to find alternative employment (from 28 days to 90 days) will help to address these issues to some extent. These provisions will assist in reducing the fear of deportation if a visa holder loses their job or leaves their existing sponsor.

Attachment 1 – Specific Proposed Amendments to the Bill

Schedule 2 – Labour Market Testing

Part 1 – Amendment of the Migration Act 1958

1 Subsection 140GB(2) 3

Repeal the subsection, substitute:
(2) The Minister shall only ~~must~~ approve an approved sponsor's nomination if:
(a) in a case to which section 140GBA applies, unless the sponsor is exempt under section 140GBB or 140GBC—the labour market testing condition under section 140GBA is satisfied; and
(b) in any case—the prescribed criteria are satisfied.
Note: Section 140GBB provides an exemption from the labour market testing condition in the case of a major disaster. Section 140GBC provides for exemptions from the labour market testing condition to apply in relation to the required skill level and occupation for a 14 nominated position.

140GBA Labour market testing—condition

Labour market testing condition

(3) The labour market testing condition is satisfied if:
  (a) the Minister is satisfied that the approved sponsor has undertaken labour market testing in relation to the nominated position within a period determined under subsection (4) in relation to the nominated occupation; and
  (b) the nomination is accompanied by evidence in relation to that labour market testing; and
  (c) the evidence includes the evidence covered by subsection (5); and
  (d) having regard to that evidence, the Minister is satisfied that a suitably qualified and experienced Australian citizen or Australian permanent resident is not readily available to fill the nominated position.

(4) For the purposes of paragraph (3)(a), the Minister may, by legislative instrument, determine a period within which labour market testing is required in relation to a nominated occupation.

Evidence

(5) This subsection covers evidence consisting of ~~one or more of the following~~:
  (a) information about the approved sponsor's attempts to recruit suitably qualified and experienced Australian citizens or Australian permanent residents to the position and any other similar positions (see also subsection (6));
  and one or more of the following:
  (b) copies of, or references to, any research released in the previous 3~~6~~ months relating to the availability of suitably qualified and experienced Australian citizens or Australian permanent residents and labour market trends generally, in relation to the nominated occupation;
  (c) expressions of support from Commonwealth, State and Territory government authorities with responsibility for employment matters;
  (d) any other type of evidence determined by the Minister, by legislative instrument, for this paragraph.

(6) For the purposes of paragraph (5)(a) (but without limiting the paragraph), the information mentioned ~~may~~ shall include the following:

(a) details of any bona fide advertising (paid or unpaid) of the position, and any similar positions, commissioned or authorised by the approved sponsor;

(b) information about the approved sponsor's participation in relevant job and career expositions;

(c) details of fees and other expenses paid (or payable) for any recruitment attempts mentioned in paragraph (5)(a) (including any advertising or participation mentioned in paragraphs (a) and (b) of this subsection);

(d) details of the results of such recruitment attempts, including details of any positions filled as a result~~.~~, the number of applicants who were Australian citizens or Australian permanent residents and the reasons why they were considered not suitably qualified and experienced.

Definitions

(7) In this section:

Australian permanent resident means an Australian permanent resident within the meaning of the regulations.

labour market testing, in relation to a nominated position, means testing of the Australian labour market to demonstrate ~~whether~~ that a suitably qualified and experienced Australian citizen or Australian permanent resident is not readily available to fill the position.