The Senate

Legal and Constitutional Affairs References Committee

Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements

June 2013

ISBN: 978-1-74229-877-1

This document was produced by the Senate Legal and Constitutional Affairs Committee secretariat and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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RECOMMENDATIONS

Recommendation 1

2.105 The committee recommends that, for the exclusive purposes of the 457 visa program, the Australian Workforce and Productivity Agency be given the responsibility and commensurate funding to compile and prepare a skills in-demand list which also takes into account regional labour market skill shortages.

Recommendation 2

2.106 The committee recommends that the government institute a review of the extent to which Australia's immigration system does and should facilitate the flow of low- and- semi-skilled labour into Australia.

Recommendation 3

2.110 The committee recommends that a dedicated pathway for intra-company transfers be introduced to the 457 visa program.

Recommendation 4

3.76 The committee recommends that the *Fair Entitlements Guarantee Act 2012* be amended to make 457 visa holders eligible for entitlements under the Fair Entitlements Guarantee scheme.

Recommendation 5

3.79 The committee recommends that the Government initiate an inquiry into the extent to which relevant workplace and occupational health and safety legislation protects the legal rights, remedies and entitlements of 457 visa holders and whether temporary migrant workers in Australia are adequately protected by relevant workplace and occupational health and safety laws.

Recommendation 6

3.80 The committee recommends that the immigration program be reviewed and, if necessary, amended to provide adequate bridging arrangements for 457 visa workers to pursue meritorious claims under workplace and occupational health and safety legislation.

Recommendation 7

3.91 The committee recommends that the Department of Immigration and Citizenship be required to provide 457 visa holders, on each approval, variation or re-approval of an application, with comprehensive information regarding sponsors' obligations; relevant workplace and human rights governing the employment relationship; and sources of workplace, legal and migrant advice and assistance while working in Australia.

Recommendation 8

4.24 The committee recommends that the Government prepare and release submission guidelines for Enterprise Migration Agreements and Regional Migration Agreements.

Recommendation 9

5.104 The committee recommends that the government initiate a review of the Ministerial Advisory Council on Skilled Migration (MACSM) to establish clear terms of reference, operating guidelines and consultation and communication strategies for that body.

Recommendation 10

5.111 The committee recommends that the proposed changes to on-hire arrangements and sponsors' obligation not to recover certain costs be effected immediately and separately to the regulation currently proposed to commence on 1 July 2013.

Recommendation 11

5.114 The committee recommends that the proposed empowerment of Fair Work Inspectors under the *Migration Act 1958* and to subclass 457 visa condition 8107 be effected immediately and separately to the Migration Amendment (Temporary Sponsored Visas) Bill 2013.

CHAPTER 1
INTRODUCTION

Referral of the inquiry

1.1 On 20 March 2013, the Senate referred the following matters to the Legal and Constitutional Affairs References Committee (committee), for inquiry and report by 3 June 2013:

> The current framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements, including:
>
> (a) 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;
>
> (b) 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;
>
> (c) the process of listing occupations on the Consolidated Sponsored Occupations List, and the monitoring of such processes and the adequacy or otherwise of departmental oversight and enforcement of agreements and undertakings entered into by sponsors;
>
> (d) the process of granting such visas and the monitoring of these processes, including the transparency and rigour of the processes;
>
> (e) the adequacy of the tests that apply to the granting of these visas and their impact on local employment opportunities;
>
> (f) the economic benefits of such agreements and the economic and social impact of such agreements;
>
> (g) 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;
>
> (h) the capacity of the system to ensure the enforcement of workplace rights, including occupational health and safety laws and workers' compensation rights;
>
> (i) the role of employment agencies involved in on-hiring subclass 457 visa holders and the contractual obligations placed on subclass 457 visa holders;
>
> (j) the impact of the recent changes announced by the Government on the above points; and

(k) any related matters.[1]

1.2 On 3 June 2013, the committee presented an interim report in which it indicated its intention to table its final report by 24 June 2013.[2]

Context of the inquiry

1.3 As term of reference (j) makes clear, the inquiry arises in response to a number of proposed changes to the Temporary Work (Skilled) (subclass 457) visa program (the 457 visa program), which were announced on 23 February 2013 by the Minister for Immigration and Citizenship (the minister).[3]

1.4 On 6 June 2013, the minister introduced the Migration Amendment (Temporary Sponsored Visas) Bill 2013 (the bill) into the Parliament, giving effect to a number of changes to the 457 visa program. The minister indicated that further changes would be effected by amendments to the Migration Regulations 1994, intended to commence on 1 July 2013.[4]

The 457 visa program

1.5 The purpose of the Temporary Work (Skilled) - Standard Business Sponsorship (Subclass 457) visa program (457 visa program) is to allow employers to address skilled labour shortages by sponsoring skilled workers from overseas to fill vacancies that cannot be filled by appropriately skilled Australian workers.[5]

1.6 The 457 visa program is uncapped and therefore driven by employer demand. As at 30 April 2013 there were 108 810 primary 457 visa holders in Australia.[6]

1.7 The 457 visa scheme was introduced in 1996 and has undergone a number of significant changes since that time including,[7] for example, in 2003,[8] 2004,[9] 2007,[10]

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1 *Journals of the Senate*, No. 142-20, March 2013, pp 3826-3827.

2 Senate Legal and Constitutional Affairs References Committee, *Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements*, Interim Report, June 2013, p. 2.

3 The Hon Brendan O'Connor, MP, Minister for Immigration and Citizenship, 'Reforms to the temporary work (skilled) (subclass 457) program', media release, 23 February 2013.

4 The Hon Brendan O'Connor, MP, Minister for Immigration and Citizenship, *House of Representatives Hansard*, 6 June 2013, p. 3.

5 Department of Immigration and Citizenship website, 'Fact Sheet 48b – Temporary Work (Skilled) (subclass 457) Visa', November 2012, http://www.immi.gov.au/media/fact-sheets/48b-temporary-business-visa.htm (accessed 27 March 2013).

6 Department of Immigration and Citizenship, 'Subclass 457 State/Territory summary report, 2012-13 to 30 April 2013', p. 2.

7 For an account of the program's history, see Dr Joo-Cheong Tham and Dr Iain Campbell, 'Temporary Migrant Labour in Australia: The 457 visa scheme and challenges for labour regulation', Centre for Employment and Labour Relations Law, March 2011, Working Paper No. 50, additional information received 26 March 2013, pp 9-18.

8 Migration Amendment Regulations 2003 (No. 5) (Cth) [F2003B00167].

2008,[11] and 2009.[12] The scheme has also been the subject of a number of specific and related inquiries, including:

- an inquiry by the Joint Standing Committee on Migration into temporary business visas (2007);[13]
- an inquiry by the Visa Subclass 457 External Reference Group into the capacity of temporary migration to ease labour shortages (2008);[14]
- the Visa Subclass 457 Integrity Review (the Deegan review) arising from concerns about the exploitation of temporary migrant workers (2008);[15] and
- an inquiry into the Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012 [Provisions] by the Senate Standing Committee on Education, Employment and Workplace Relations.[16]

Elements of the 457 visa program

1.8 In broad terms, the policy settings of the 457 visa program seek to balance the goal of addressing skilled labour shortages with the need to protect the employment opportunities and conditions of local (that is, Australian or permanent resident) workers, as well as the working conditions of 457 visa holders.[17] The extent to which an effective balance is achieved in these respects depends on the program design and

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9 *Migration Legislation Amendment (Migration Agents Integrity Measures) Act 2004* (Cth); and Migration Amendment Regulations 2004 (No. 3) [F2004B00151].

10 Migration Amendment Regulations 2007 (No. 5) [F2007L01980]; and Migration Amendment Regulations 2007 (No. 11) F2007L03558

11 *Migration Legislation Amendment (Worker Protection) Act 2008*.

12 Migration Amendment Regulations 2009 (No. 5) [F2009L02373]; Migration Amendment Regulations 2009 (No. 9) [F2009L03143]; and Migration Amendment Regulations 2009 (No. 2) [F2009L01048].

13 Joint Standing Committee on Migration, Inquiry into temporary business visas, *Temporary visas...permanent benefits: ensuring the effectiveness, fairness and integrity of the temporary business visa program*, August 2007.

14 Department of Immigration and Citizenship, *Final Report to the Minister for Immigration and Citizenship*, Commonwealth of Australia, Canberra, April 2008.

15 Department of Immigration and Citizenship, *Visa Subclass 457 Integrity Review Final Report*, Commonwealth of Australia, Canberra, October 2008.

16 Senate Standing Committee on Education, Employment and Workplace Relations, *Inquiry into the Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012 [Provisions]*, 12 March 2013.

17 Department of Immigration and Citizenship; Department of Education, Employment and Workplace Relations; Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and Department of Resources, Energy and Tourism, *Submission 24*, p. 1. See also: Dr Joo-Cheong Tham and Dr Iain Campbell, 'Temporary Migrant Labour in Australia: The 457 visa scheme and challenges for labour regulation', Centre for Employment and Labour Relations Law, March 2011, Working Paper No. 50, additional information received 26 March 2013, p. 7.

administrative processes supporting the granting of 457 visas and compliance monitoring of the scheme.

1.9 There are three processing stages in the sponsoring of an overseas employee under the 457 visa program: sponsorship, nomination and visa application.

Sponsorship

1.10 Before an Australian business is able to sponsor an overseas skilled worker on a Subclass 457 visa, they must be approved as a Standard Business Sponsor (SBS). To qualify as an SBS the business must be lawfully operating and:

- have a strong record or demonstrated commitment to employing local labour and non-discriminatory work practices; and
- meet one of two specified training benchmarks, being either:
    - expenditure of one per cent of payroll expenditure on the provision of structured training to employees; or
    - a contribution equivalent to two per cent of payroll expenditure to an industry training fund.[18]

1.11 The business must also demonstrate a commitment to meeting one of the specified training benchmarks for each fiscal year for the term of their approval as a sponsor.[19]

1.12 If a business has been trading for less than 12 months, it must instead demonstrate that it has an auditable plan to meet one of the benchmarks.[20]

Nomination

1.13 The 457 visa program is restricted to the eligible occupations included on the Consolidated Sponsored Occupations List (CSOL). The skill level (qualification and experience requirements) of those occupations is defined by reference to the Australian and New Zealand Standard Classification of Occupations (ANZSCO).[21]

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18 Department of Immigration and Citizenship; Department of Education, Employment and Workplace Relations; Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and Department of Resources, Energy and Tourism, *Submission 24*, p. 6.

19 Department of Immigration and Citizenship; Department of Education, Employment and Workplace Relations; Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and Department of Resources, Energy and Tourism, *Submission 24*, p. 6.

20 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, 'Strengthening the Integrity of the Subclass 457 Program', discussion paper, December 2012, p. 4.

21 Department of Immigration and Citizenship; Department of Education, Employment and Workplace Relations; Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and Department of Resources, Energy and Tourism, *Submission 24*, p. 7.

1.14 Also, before a position in a business can be filled, the sponsor must:

- certify that a nominated visa applicant is suitably skilled, and that their qualifications and experience are commensurate with those that would be required of Australians employed in the nominated occupation; and
- demonstrate that the proposed terms and conditions of employment are no less favourable than those provided to Australians to perform equivalent duties in that particular workplace or the local labour market.[22]

1.15 The nomination stage includes an assessment of the market salary rate for the nominated position and the salary to be paid to the prospective employee. Employers are required to pay the market salary rate for the nominated position, and this must be an amount greater than the Temporary Skilled Migration Income Threshold (TSMIT), which is currently set at $51 400.[23] The purpose of the TSMIT is to ensure that 457 visa holders can adequately provide for themselves and do not therefore impose undue costs on the Australian community.

1.16 A sponsor may be exempt from the requirement to demonstrate payment of the market salary rate if the proposed annual earnings of the worker is at least $180 000.[24]

Visa application

1.17 A nominated Subclass 457 visa holder must demonstrate that they have the skills, qualifications and experience to perform the occupation for which they have been nominated, and that they have sufficient proficiency in the English language.[25]

1.18 Certain trade occupations are also required to undergo a formal skills assessment (the indicative skill levels for approvable occupations are defined by the ANZSCO classifications).

Monitoring and compliance

1.19 Employers and 457 visa holders are routinely monitored by the department to ensure that sponsor's obligations and visa conditions are being met, and the department is also able to respond to information, such as that arising from allegations or media reports. The three main avenues of compliance monitoring are:

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22 Department of Immigration and Citizenship; Department of Education, Employment and Workplace Relations; Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and Department of Resources, Energy and Tourism, *Submission 24*, p. 6.

23 Department of Immigration and Citizenship website, 'SkillSelect (Subclass 457 visa)', http://www.immi.gov.au/skills/skillselect/index/visas/subclass-457/ (accessed 16 May 2013).

24 Department of Immigration and Citizenship website, 'SkillSelect (Subclass 457 visa)', http://www.immi.gov.au/skills/skillselect/index/visas/subclass-457/ (accessed 16 May 2013).

25 Department of Immigration and Citizenship; Department of Education, Employment and Workplace Relations; Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and Department of Resources, Energy and Tourism, *Submission 24*, p. 7.

- information exchange with other Australian, state and territory government agencies;
- requests to sponsors to provide information in accordance with their sponsorship obligations; and
- visiting business with or without notice.[26]

1.20 Where a sponsor fails to meet their obligations, the department may impose a range of sanctions, including cancellation of existing sponsorship approvals, barring further sponsorships for a specified period and fines of up to $6600 (individual) or $33 000 (body corporate).[27]

1.21 A failure by a 457 visa holder to comply with their visa conditions could lead to cancellation of the visa. The main conditions that specifically apply to a 457 visa holder are:

- requirements to work in the nominated occupation, to work for the nominating sponsor and not to cease employment for a period longer than 28 days; and
- a requirement to maintain adequate health insurance for themselves and their family.[28]

Enterprise Migration Agreements

1.22 Enterprise Migration Agreements (EMAs) are project-wide temporary overseas migration arrangements for large-scale resource projects that are intended to address the skilled labour needs of the resource sector.[29] EMA's are designed to supplement a local labour force to meet a temporary spike in demand associated with major project and ensure that skill shortages do not act as a constraint.[30]

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26 Department of Immigration and Citizenship website, 'Temporary Business (Long Stay) – Standard Business Sponsorship (Subclass 457)' (Sponsors [sic] Obligations), http://www.immi.gov.au/skilled/skilled-workers/sbs/obligations-employer.htm (accessed 16 May 2016).

27 Department of Immigration and Citizenship website, 'SkillSelect (Subclass 457 visa)', http://www.immi.gov.au/skills/skillselect/index/visas/subclass-457/ (accessed 16 May 2013).

28 Department of Immigration and Citizenship website, 'Temporary Business (Long Stay) – Standard Business Sponsorship (Subclass 457)' (Sponsors [sic] Obligations), http://www.immi.gov.au/skilled/skilled-workers/sbs/obligations-employer.htm (accessed 16 May 2016).

29 Department of Immigration and Citizenship website, 'Fact Sheet 48a – Enterprise Migration Agreements', http://www.immi.gov.au/media/fact-sheets/48a-enterprise.htm (accessed 16 May 2013).

30 Department of Immigration and Citizenship; Department of Education, Employment and Workplace Relations; Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and Department of Resources, Energy and Tourism, *Submission 24*, p. 4.

Regional Migration Agreements

1.23 Regional Migration Agreements (RMAs) are agreements between the Australian Government and a state or territory government or local council that are intended to address labour shortages in regional Australia, particularly remote regions or regions impacted by resource projects.[31] Information on the department's website indicates that RMAs will establish the overarching arrangements for the sponsorship of overseas workers in a particular location, including eligible occupations, the number of workers and local training, under which employers will sign individual labour agreements.[32]

Conduct of the inquiry

1.24 The committee advertised the inquiry in *The Australian* newspaper on 27 March 2013. The committee also wrote to 88 organisations and individuals, inviting submissions by 26 April 2013. Submissions continued to be accepted after the official closing date. Details of the inquiry were also placed on the committee's website at www.aph.gov.au/senate_legal.

1.25 The committee received 46 submissions and certain additional information, listed at Appendix 1. The committee also received a number of confidential submissions. The committee held a public hearing on 23 May 2013 at Parliament House in Canberra. A list of witnesses who appeared at the hearing is at Appendix 2, and copies of the *Hansard* transcript are available through the committee's website.

Acknowledgement

1.26 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

Structure of the report

1.27 The committee's report is structured in the following way:

- Chapter 2 examines the effectiveness of the 457 visa program;
- Chapter 3 examines the protection of 457 visa holders' rights;
- Chapter 4 examines EMAs and RMAs; and
- Chapter 5 examines the impacts of the proposed changes to the 457 visa program.

Note on references

1.28 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

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31 Department of Immigration and Citizenship website, 'Fact Sheet 48c – Regional Migration Agreement', http://www.immi.gov.au/media/fact-sheets/48c-rma.htm (accessed 16 May 2013).

32 Department of Immigration and Citizenship website, 'Fact Sheet 48c – Regional Migration Agreement', http://www.immi.gov.au/media/fact-sheets/48c-rma.htm (accessed 16 May 2013).

CHAPTER 2

EFFECTIVENESS OF THE 457 VISA PROGRAM

Introduction

2.1 As noted in Chapter 1, the policy settings of the Temporary Work (Skilled) - Standard Business Sponsorship (Subclass 457) visa program (457 visa program) broadly seek to balance the goal of addressing temporary skilled labour shortages with the need to protect the employment opportunities and conditions of local (Australian or permanent resident) workers, and the working conditions of 457 visa holders.[1]

2.2 This view of the program is confirmed by the submission of the Department of Immigration and Citizenship (the department); the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism (the departments' submission), which identified the program's two 'fundamental tenets' as being:

- to enable a business to sponsor a skilled overseas worker if they cannot find an appropriately skilled Australian citizen or permanent resident to fill a skilled position; and
- to ensure that the working conditions of a sponsored visa holder are no less favourable than those provided to an Australian worker and that overseas workers are not exploited.[2]

2.3 The extent to which the program's design and administration effectively achieves a balance between its fundamental tenets is therefore the question underpinning the issues raised by the inquiry's term of reference. As the Migration Council of Australia (MCA) has observed, the inherent tension in the program's policy aims is reflected in the 'extensive media coverage and political attention' it has received since its inception.[3] The committee notes also that the program has undergone a number of significant changes over that time.[4]

2.4 Accordingly, this chapter considers broadly the effectiveness of the 457 visa program, with particular reference to inquiry terms of reference (a) to (g) and (i),

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1 The question of the extent to which the program protects the rights of 457 visa workers (term of reference (h)) is considered in the next chapter.

2 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 1.

3 Migration Council of Australia, 'More than temporary: Australia's 457 visa program', additional information received 14 May 2013, p. 3.

4 For an overview of the various iterations of the 457 visa program, see Migration Council of Australia, 'More than temporary: Australia's 457 visa program', additional information received 14 May 2013, pp 33-61.

which required the committee to examine the framework and operation of the program, including:

> (a) …[its] 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;
>
> (b) …[its] accessibility and the criteria against which applications are assessed, including whether stringent labour market testing can or should be applied to the application process;
>
> (c) the process of listing occupations on the Consolidated Sponsored Occupations List, and the monitoring of such processes and the adequacy or otherwise of departmental oversight and enforcement of agreements and undertakings entered into by sponsors;
>
> (d) the process of granting such visas and the monitoring of these processes, including the transparency and rigour of the processes;
>
> (e) the adequacy of the tests that apply to the granting of these visas and their impact on local employment opportunities;
>
> (f) the economic benefits of such agreements and the economic and social impact of such agreements;
>
> (g) 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; and
>
> …
>
> (i) the role of employment agencies involved in on-hiring subclass 457 visa holders and the contractual obligations placed on subclass 457 visa holders…[5]

2.5 The inquiry's terms of reference also asked the committee to consider the above with reference to Enterprise Migration Agreements (EMAs) and Regional Migration Agreements (RMAs), and with reference to the proposed changes announced by the Government in February 2013. These matters are considered in chapters 4 and 5, respectively.

5 *Journals of the Senate*, No. 142-20, March 2013, pp 3826-3827.

The economic benefits and economic and social impact of the 457 visa program (term of reference (f))

2.6 The committee notes that there is general support for an effective system of temporary skilled migration in Australia, and this was evident across the range of interests represented by the groups and individuals that provided evidence to the inquiry.[6]

2.7 Mr Andrew Bartlett, a Research Fellow at the Australian National University Migration Law Program, observed that, of all migration visa subclasses, 457 visa holders provide the most 'immediate and…significant' fiscal benefits for Australia',[7] and support for the 457 visa program is generally premised on recognition of the direct economic benefits flowing from the ability to address genuine skill shortages in the local labour market. The Australian Mines and Metals Association (AMMA), for example, observed that the program:

> …provides a 'circuit breaker' when appropriate labour cannot be sourced locally, allowing important job creating projects and investments to proceed that would be unviable or significantly delayed without access to such labour…[8]

2.8 It was also noted that 457 visa workers make a direct contribution through the payment of taxes and the spending of wages in the Australian economy.[9]

2.9 Further, the 457 program was recognised as supporting skill shortages in respect of critical industries or services, such as healthcare and hospitals.[10]

2.10 Many submissions noted that, in addition to the direct benefits of addressing temporary skill shortages, the program provides an avenue of skills exchange and development by allowing overseas workers to impart their skills, knowledge and experience to local workers.[11] In this way, 457 visa workers 'enhance Australia's skill

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6 See, for example, Mr Tony Sheldon, National Secretary, Transport Workers' Union of Australia, *Committee Hansard*, 23 May 2013, p. 1; Mr Dave Noonan, National Secretary, Construction and General Division, Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 23 May 2013, p. 5; Ms Angela Chan, National President, Migration Institute of Australia, *Committee Hansard*, 23 May 2013, p. 23; Mrs Anne O'Donoghue, Law Council of Australia, *Committee Hansard*, 23 May 2013, p. 31; and Australian Mines and Metals Association, *Submission 22*, p. 5.

7 Mr Andrew Bartlett, Research Fellow, Migration Law and Practice, Migration Law Program, Australian National University, *Committee Hansard*, p. 58.

8 Australian Mines and Metals Association, *Submission 22*, p. 5.

9 Australian Mines and Metals Association, *Submission 22*, p. 10.

10 See, for example, Ramsay Health Care, *Submission 32*, p. 4; and Mr Dave Noonan, National Secretary, Construction and General Division, Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 23 May 2013, p. 5.

11 See, for example, Mr Stephen Bolton, Senior Adviser, Employment Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 23 May 2013, p. 15.

base and assist in developing Australia's economy to become more efficient on a global comparison'.[12]

2.11 In social terms, the 457 visa program represents an avenue of cultural exchange and, in many cases, significant economic opportunity for individual 457 visa holders in terms of enhancing their social, family and career prospects.[13]

2.12 It was also recognised in a number of submissions that the operation of the 457 visa program should be seen in the context of a global employment market.[14]

Effectiveness of the 457 visa program in addressing areas of identified skill shortages (term of reference (a))

2.13 Notwithstanding the general level of support for the 457 visa program, the evidence to the inquiry revealed significant concerns regarding the effectiveness of the program in addressing areas of genuine skill shortages, and whether the program is achieving its stated policy aim of ensuring that the 457 visa workers are used only where skilled labour cannot be sourced locally.

457 visa applications and the general rate of unemployment

2.14 A particular focus of the evidence to the inquiry on this question was the apparent significance of recent data showing a divergence between the number of 457 visa applications and the general rate of unemployment, which, historically, have been closely aligned.[15] In a May 2013 Senate estimates hearing, an officer of the department commented on the significance of the relationship between these two measures, noting:

> …the effectiveness [of the 457 visa program] will be measured by how responsive…[it] is to the business cycle. If you…are seeing growth rates in 457 at the time of growing unemployment that is the first test for 457, and the most important one…[16]

2.15 The significance of this statistical relationship as an indication of the effectiveness of the 457 visa program appears to be well-accepted. The AMMA submission, for example, noted:

> The demand-driven nature of the program is…an in-built mechanism that renders it responsive to prevailing economic and labour market conditions.[17]

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12 Berry Appleman and Leiden (BAL Australia), *Submission 12*, p. 3.

13 Australian Mines and Metals Association, *Submission 22*, p. 10.

14 See, for example, Fragomen, *Submission 26*, p. 2.

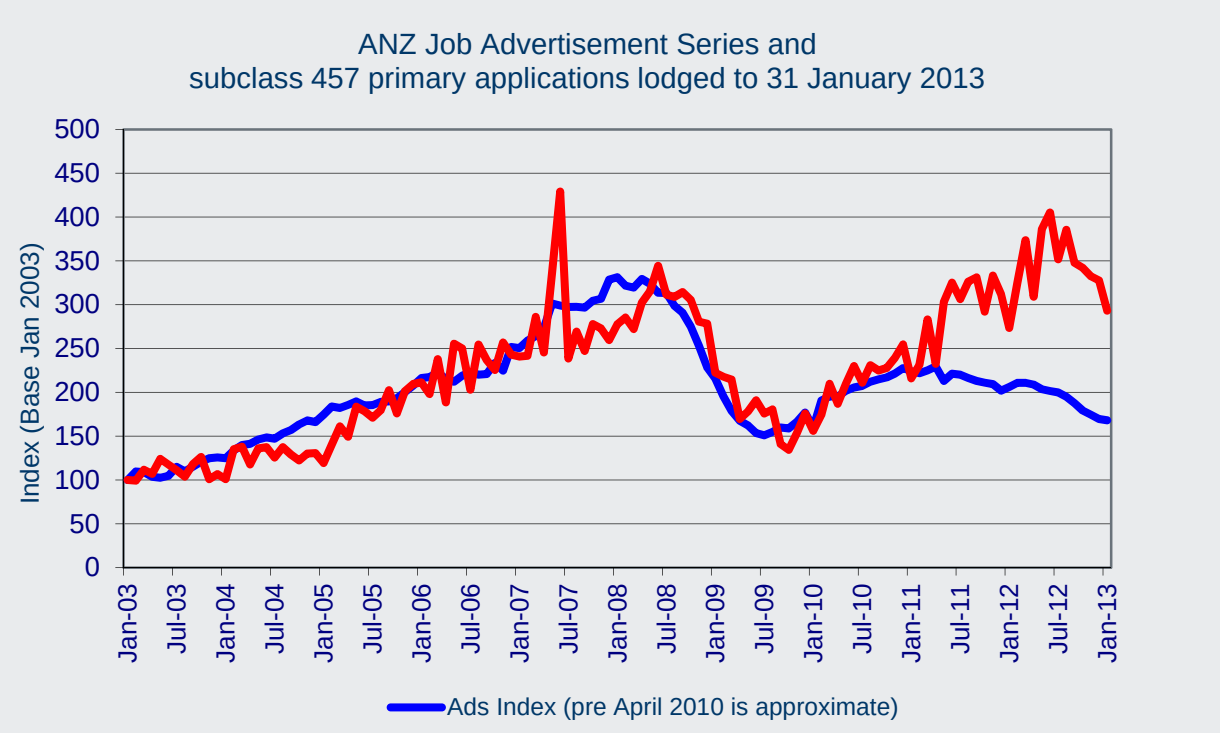
15 Law Council of Australia, responses to questions on notice, 23 May 2013 (received 31 May 2013), p. 5.

16 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, 27 May 2013, p. 71.

17 Australian Mines and Metals Association, *Submission 22*, p. 5.

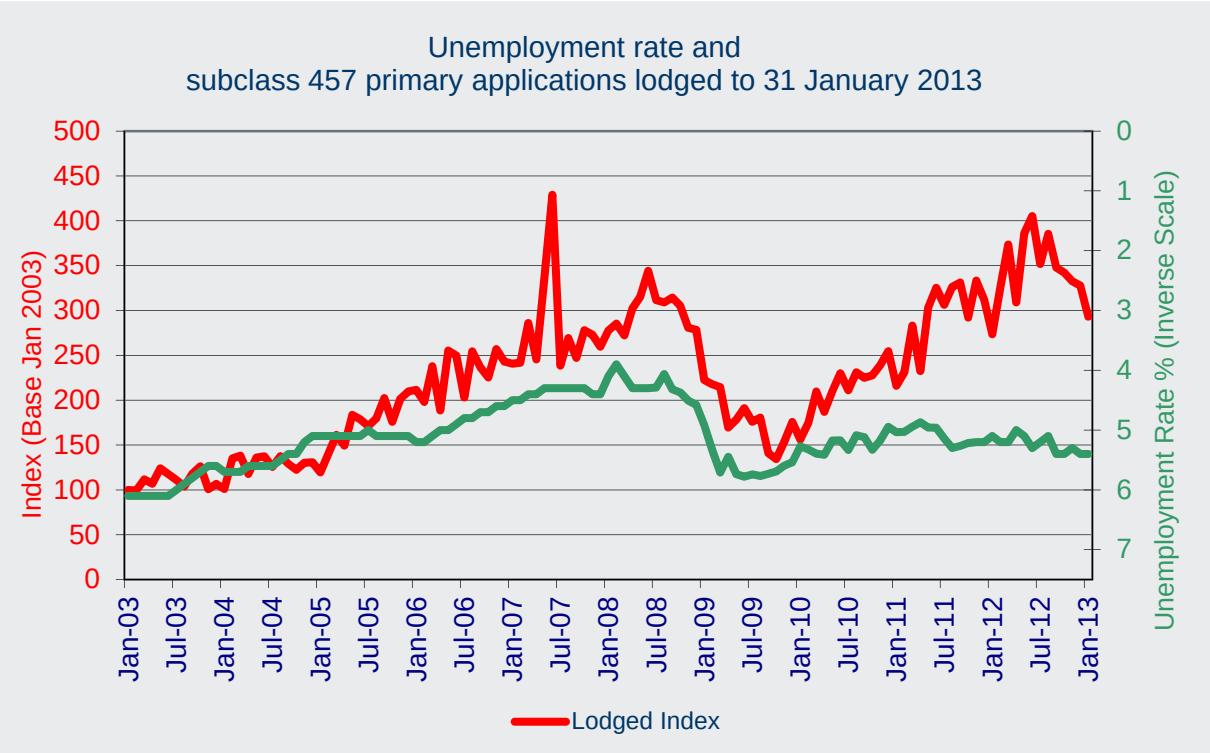
2.16 Similarly, the MCA has described the program as 'an automatic relief valve', whereby '[s]urges in skilled labour requirements or dips in economic activity see numbers of temporary skilled workers ebb and flow'.[18]

2.17 The divergence of the number of 457 applications and the general rate of unemployment was demonstrated in the departments' submission, which provided the following graphs showing the number of primary 457 visa applications as against the number of job advertisements (using the ANZ Job Advertisement Series) and the general rate of unemployment, respectively.[19]



18 Migration Council of Australia, 'More than temporary: Australia's 457 visa program', additional information received 14 May 2013, p. 3.

19 Department of Immigration and Citizenship; Department of Education, Employment and Workplace Relations; Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and Department of Resources, Energy and Tourism, *Submission 24*, pp 2-3.



2.18 The departments' submission noted that the above graphs demonstrate that the program has 'continued to grow since July 2011 to mid-2012 despite a softening of the Australian labour market'.[20]

2.19 However, the strength of this trend was disputed, with some groups pointing to downward trends since June 2012 as 'reinforcing the responsiveness of the program and [minimising] any concerns' about divergent trends.[21] A February 2013 media release from the department was cited in support of this view:

> Temporary work visa applications have been heading downwards since June 2012 and have now declined for the last three consecutive months…
>
> Reinforcing this trend has been a drop in actual 457 visa grants since August. This movement demonstrates the 457 visa program's responsiveness to the changing needs of the Australian economy.[22]

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20 Department of Immigration and Citizenship; Department of Education, Employment and Workplace Relations; Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and Department of Resources, Energy and Tourism , *Submission 24*, p. 3.

21 Australian Chamber of Commerce and Industry, *Submission 21*, pp 7-8.

22 Department of Immigration and Citizenship, '457 visa program responds well to economic needs', media release, 3 February 2013, cited in Australian Chamber of Commerce and Industry, *Submission 21*, p. 7; and Australian Mines and Metals Association, *Submission 22*, p. 5.

Underlying causes

2.20 The inquiry heard different views as to the underlying causes of the divergent trends in the number of 457 visa applications and the general rate of unemployment (notwithstanding any recent improvement that may have occurred).

2.21 Some submitters and witnesses interpreted this divergence as indicating that the program was failing to ensure that 457 visa workers were being employed only as a measure of last resort in areas of genuine skills shortage.[23] This was acknowledged as potentially being the case by the departments' submission, which noted:

> …it is possible under the current program settings for employers to source skilled workers from offshore without sufficient commitment to recruiting or training locally by using various loopholes in the current legislative framework.[24]

2.22 Evidence arising from a May 2013 estimates hearing confirmed at least some incidence of 457 visa holders being employed in the absence of a genuine skill shortage. An officer of the department noted:

> [The department has]…come across evidence that some employers that are clearly discriminating against Australian workers…
>
> …we have seen some companies that have a policy of not employing Australian workers.[25]

2.23 A discussion paper on strengthening the integrity of the 457 visa program, which was prepared for the Ministerial Advisory Council on Skilled Migration (MACSM) and released under freedom of information laws on 2 May 2013, also cited some occurrences of this type:

> Recent cases include examples of certain sponsors who have advised the Department that they do not seek to recruit locally as it does not fit with their business model, or because it is too expensive to recruit domestically.[26]

2.24 Other groups, however, submitted that the break down in the historic alignment of the number of primary visa applications and the general rate of unemployment was due to 'structural' factors within the broader immigration program. The Law Council of Australia (LCA), for example, identified these factors as being:

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23 See, for example, Construction, Forestry, Mining and Energy Union, *Submission 41*, p. 9.

24 Department of Immigration and Citizenship; Department of Education, Employment and Workplace Relations; Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education ; and Department of Resources, Energy and Tourism , *Submission 24*, p. 3.

25 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, 27 May 2013, p. 48.

26 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, 'Strengthening the Integrity of the Subclass 457 Program', discussion paper, December 2012, p. 3.

- since February 2010 student visa holders have been precluded from applying for on-shore general skilled permanent residence visas. Student visa holders are therefore applying for 457 visas where previously they would have applied for a general skilled migration visa;
- since February 2010, for the same reason, student visa holders have been transitioning first to Graduate Skilled 485 visas, allowing them to remain in Australia for a further 18 months, and subsequently applying for 457 visas;
- since July 2012, the minimum period which student visa holders must wait before being able to seek permanent residence has increased from one year to two years, increasing the number of people remaining on 457 visas;[27] and
- since mid-2012, delays in the processing times for visa subclasses 186 and 187, increasing the number of people remaining on 457 visas.[28]

2.25 In a May 2013 estimates hearing, an officer of the department confirmed that some increase in 457 visa applications since mid-2012 was attributable to increased applications via the student visa stream.[29]

457 visa applications and other labour market trends

2.26 The relationship of 457 visa numbers with certain other labour market trends was also raised as relevant to the question of whether the program is effectively ensuring that overseas workers are used only in areas of genuine skill shortage.

2.27 The Construction, Forestry, Mining and Energy Union (CFMEU) submission argued that a 'similar picture of 457 worker growth outstripping general employment growth emerges at an industry and occupation level'; and noted, for example, that in the 12 months to February 2013 a 1.1 per cent growth in the Australian construction industry was exceeded by growth of 25 per cent in the number of 457 workers in that industry.[30]

2.28 In contrast, with reference to the same industry, AMMA pointed to a 3 per cent reduction in the number of 457 visa applications in construction, in the 2012-13 year to November, compared to the same period in the previous year.[31]

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27 The committee notes that this factor would appear to go the issue of the total number of 457 visa holders as opposed to the number of applications.

28 Law Council of Australia, responses to questions on notice, 23 May 2013 (received 31 May 2013), pp 5-6. See also: Fragomen, *Submission 36*, pp 20-21. The committee notes that this factor would appear to go the issue of the total number of 457 visa holders as opposed to the number of applications.

29 Mr Martin Bowles PSM, Secretary, Department of Immigration and Citizenship, *Estimates Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, 27 May 2013, p. 47.

30 Construction, Forestry, Mining and Energy Union, *Submission 41*, p. 9.

31 Australian Mines and Metals Association, *Submission 22*, p. 5.

2.29 In a May 2013 estimates hearing, an officer of the department advised that in mid-2012 concerns arose about the growth of the 457 visa program in relation to particular industries and regions:

> Midway through…[2012] the department identified that the 457 program was growing at quite a rapid rate…[We] identified much of the growth as being in industries and geographical regions where there had been a softening of the labour market. Some examples of that include accommodation and food service and the retail industry.[32]

2.30 At the same hearing another officer noted that, beyond concerns arising from divergent patterns of growth per se, concern could also arise where growth occurred in industries and occupations traditionally exhibiting higher levels of noncompliance:

> There has been some growth in specific occupations, where we have integrity concerns. Traditionally, the accommodation and food services industry is the industry where we have a larger percentage of noncompliance. Also, those occupations are where the salary levels are very low and very close to the minimum salary level prescribed under the temporary skilled migration income threshold limit…We also have some occupations that are not clearly defined, like project manager/administrator, where it is really difficult to identify the particular skills required in that occupation. These two occupations, project administration and project manager or problem manager, have [also] been growing quite significantly…[33]

32 Mr Martin Bowles PSM, Secretary, Department of Immigration and Citizenship, *Estimates Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, 27 May 2013, p. 47.

33 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, 27 May 2013, p. 69.

The accessibility and criteria against which 457 visa applications are assessed, including whether stringent labour market testing can or should be applied to the application process (term of reference (b));

The process of listing occupations on the Consolidated Sponsored Occupations List, and the monitoring of such processes and the adequacy or otherwise of departmental oversight and enforcement of agreements and undertakings entered into by sponsors (term of reference (c));

The process of granting such visas and the monitoring of these processes, including the transparency and rigour of the processes (term of reference (d)); and

The adequacy of the tests that apply to the granting of these visas and their impact on local employment opportunities (term of reference (e))

2.31 Terms of reference (b), (c), (d) and (e) collectively relate to the extent to which the 457 visa program's design and administration effectively achieve a balance between its fundamental policy objectives.

2.32 The following issues are discussed below:

- impact on local employment opportunities;
- labour market testing;
- cost of employing 457 visa workers;
- the Consolidated Sponsored Occupations List;
- transparency and rigour of the 457 visa application process and adequacy of relevant tests;
- impact of the 457 visa program on the national training effort and apprenticeships; and
- impact of better long-term forecasting and skills training.

Impact on local employment opportunities

2.33 The committee notes that, where a genuine skill shortage does not exist in relation to a position, the employment of a 457 visa holder represents a fundamental breach of the program's central aims, and as a matter of course must impact negatively on the opportunity for local workers to fill that position.

2.34 Evidence in support of this proposition was received from a number of submitters and witnesses. The Australian Nursing Foundation (ANF), for example, pointed to high levels of employment of overseas nurses on 457 visas at a time when 'an increasing number of new graduate nurses unable to find work as nurses'. The ANF expressed concern that:

> …the inability of our home grown nurses to obtain employment is not only a serious waste of public monies but will also lead a decline in those taking

> up undergraduate nursing courses and a consequent decrease in the levels of nursing care.[34]

2.35 Similarly, the Communications Plumbing Electrical Union (CEPU) submitted that its members commonly experienced difficulty in obtaining employment in the mining and resource industry, despite possessing the appropriate skills and willingness to work.[35]

2.36 Conversely, the committee notes that, where a genuine skill shortage exists in relation to a position, the inability of an employer to readily access a 457 visa worker to fill that position frustrates the key economic objectives of the program and could impact negatively on both business activity and the availability of critical services.

2.37 The submissions of the Chamber of Commerce Northern Territory and the Chamber of Commerce and Industry Western Australia provided valuable insights into the particular impacts of an inability to readily access employees through the (standard business sponsorship) 457 visa program, subject as these regions are to the pressures of geographical remoteness and large-scale resource projects on the pool of local labour.[36]

Labour market testing

2.38 'Labour market testing' (LMT) may be understood as 'a legal obligation on employers to demonstrate, before being able to access an overseas worker through the 457 [visa] program, that they have tried to recruit Australian resident workers for the job vacancy on the open market through designated means and have not been able to find a suitably qualified Australian resident worker'.[37]

2.39 The committee notes that, in simple terms, in the absence of a requirement for LMT to establish that there exists a genuine skill shortage in relation to a specific position,[38] this must otherwise be achieved via the combined effect of the program's policy settings.

2.40 A number of submitters and witnesses argued strongly for the introduction of LMT to the application processes for the 457 visa program. In general, those in favour of this regarded the current policy settings of the program as being ineffective at

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34 Australian Nursing Foundation, *Submission 27*, p. 6.

35 Communications Electrical Plumbing Union, *Submission 30*, p. 4.

36 Chamber of Commerce Northern Territory, *Submission 28*; Chamber of Commerce and Industry Western Australia, *Submission 34*.

37 Australian Council of Trade Unions, *Submission 40*, p. 22.

38 LMT was a feature of the 457 visa program on its introduction in 1996, at least in respect of non-key activities; however, this requirement was later removed (Dr Joo-Cheong Tham and Dr Iain Campbell, 'Temporary Migrant Labour in Australia: The 457 visa scheme and challenges for labour regulation', Centre for Employment and Labour Relations Law, Working Paper No. 50, additional information received 26 March 2013, pp 11 and 13).

ensuring that it is used only in respect of genuine skill shortages and, concomitantly, offering adequate protection to the rights of local and 457 workers.[39]

2.41 Equally, the inquiry registered strong opposition to any imposition of LMT. Generally, the view of those against LMT was that the program's current policy settings are effective to ensure that it is used only in respect of genuine skill shortages and, accordingly, offers adequate protection to the rights of local and 457 visa workers.

2.42 In a number of cases, opponents of LMT pointed to previous experience of a LMT requirement in the context of the 457 visa program. The Migration Institute of Australia submission (MIA), for example, observed:

> Whilst [LMT]…may appear prima facie to be a thorough way of testing the market it [previously] proved to be cumbersome and ineffective as…many advertisements were left unanswered or suitable applicants were simply not found.
>
> In many cases, employers received applications from people who required sponsorship to remain in Australia, which again defeated the purpose of carrying out labour market testing to attract local Australians.[40]

2.43 Similarly, the LCA submitted:

> …when labour market testing was [previously] compulsory as part of the company sponsored temporary visa program…[i]t was our experience that those requirements were poorly managed, largely ineffective and honoured more in form than substance.[41]

2.44 Dr Joanna Howe, appearing in a private capacity, pointed to particular design features of the previous LMT requirement as being problematic:

> …our experience in Australia has been that it did not work too well between 1996 and 2001. There were reasons for that. In the system there was this artificial distinction between key activities and non-key activities, so it was quite a difficult…system to work.[42]

2.45 Beyond the question of previous experiences, it was also argued that, in many cases, LMT is unnecessary because an employer is seeking highly specialist skills,[43] or is otherwise aware that the skills being sought are not available in the local labour market—for example, there may be industry or government information clearly demonstrating that a skill shortage exists in a particular occupation or region.[44] In such

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39 See, for example, Construction, Forestry, Mining and Energy Union, *Submission 41*, pp 6-7.

40 Migration Institute of Australia, *Submission 7*, p. 5.

41 Law Council of Australia, *Submission 29*, pp 9-10.

42 Dr Joanna Howe, private capacity, *Committee Hansard*, 23 May 2013, p. 59.

43 Mr Scott Barklamb, Executive Director, Industry, Australian Mines and Metals Association, *Committee Hansard*, 23 May 2013, p. 41.

44 Migration Institute of Australia, *Submission 7*, p. 10.

cases, a requirement for LMT was said to impose delay and cost that could ultimately frustrate the fundamental economic objectives of the program.[45]

Cost of employing 457 visa workers

2.46 A number of submitters and witnesses drew attention to the cumulative financial impact of sponsorship requirements as the main design feature of the 457 visa program to ensure that employers preference local workers over 457 visa holders. The true relative cost differential between the employment of local as against 457 visa holders is therefore of fundamental importance to the question of whether employers may seek to use the program exclusively in respect of genuine skill shortages.

2.47 On this point, the departments' submission pointed to a number of 'strong economic incentives' for employers to employ Australian workers before seeking workers through the 457 visa program. It identified the costs related to the sponsorship of a 457 visa holder as:

- sponsorship and nomination fees;
- recruitment costs;
- providing equal terms and conditions including paying market salary rate;
- meeting training expenditure benchmarks and maintaining a financial commitment to training levels; and
- being liable for the cost of the 457 visa worker's return to their country of origin.[46]

2.48 The submission observed:

> These costs…make foreign workers more costly to employ than Australian workers, provided that there are Australian workers available and that employers abide by the intent of the legislation.[47]

2.49 A number of submitters and witnesses attested to the effectiveness of these requirements in imposing higher costs on the employment of 457 workers relative to local workers. Mr Stephen Bolton, a Senior Adviser for the Australian Chamber of Commerce and Industry (ACCI), for example, submitted:

> ...it is almost universally the case that workers on 457 visas are significantly more expensive than local workers when you factor in not only the recruitment costs that an employer may incur by going overseas but also

45 Australian Industry Group, *Submission 16*, p. 4.

46 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, pp 1-2.

47 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 2.

> healthcare provision in many cases, subsidised accommodation and ongoing training, as well as their wages and entitlements. It can be a very expensive prospect for an employer.[48]

2.50 Some submitters and witnesses questioned the extent to which employers face relatively higher costs to employ 457 visa holders. The CFMEU, for example, argued that 'the costs to employers of accessing temporary foreign workers on 457 visas are either declining, as a consequence of the falling costs of offshore recruitment; relatively modest or avoidable;[49] or in fact largely avoided because the 457 visa is sought in respect of an onshore applicant.[50]

2.51 On this last point, at a Senate estimates hearing in May 2013 an officer of the department confirmed a trend of 'strong growth' in onshore 457 visa applications, and confirmed that such applications would generally involve lower costs:

> This is the area where we have identified some integrity concerns, given that the legislative framework around the current system was developed on the basis of…[the] price signal that actually provides economic incentive for employers to look domestically, if the labour is available, before looking overseas...
>
> …if you have a large number of temporary visa holders under the other visa categories onshore, with the pathway to 457s, that price signal may not work as effectively as for offshore applicants.[51]

The Consolidated Sponsored Occupations List

2.52 The Consolidated Sponsored Occupations List (CSOL) is an important feature of the 457 visa program, specifying as it does the occupations that can be sponsored for the program, in addition to a number of other employer and state and territory nominated visa subclasses.[52]

Form and content of CSOL

2.53 The evidence of a number of submitters and witnesses addressed the question of whether the current form and content of the CSOL effectively supports the operation and objectives of the 457 program.

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48 Mr Stephen Bolton, Senior Adviser, Employment Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 23 May 2013, p. 15.

49 Construction, Forestry, Mining and Energy Union, *Submission 41*, pp 7 and 13-14 (table).

50 Construction, Forestry, Mining and Energy Union, *Submission 41*, pp 7 and 10.

51 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, 27 May 2013, pp 69-70.

52 These are the subclass 186 Employer Nomination Scheme, subclass 190 Skilled – Nominated visa and subclass 489 Skilled Regional (Provisional) visa (Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 5).

2.54 Regarding the content of the CSOL, the departments' submission advised that, with reference to the visa subclasses that it supports, the CSOL seeks to achieve an appropriate balance between allowing employers 'access to workers which they need to sponsor to retain their skills [sic], and ensuring that appropriately skilled migrants would be [sic] accessing the skilled migration program'.[53] Occupations are included on the CSOL:

> …based on the skill level of occupations as defined in the Australian and New Zealand Standard Classification of Occupations (ANZSCO)…[with] [m]ost occupations specified in ANZSCO with a skill level of 1, 2 or 3 [currently included]…unless a particular occupation has significant integrity concerns or Australian citizenship is a pre-requisite for appointment.[54]

2.55 A number of submitters and witnesses expressed the view that the CSOL effectively targets occupations subject to identified skill shortage, thereby negating the need for LMT. The Australian Industry Group submission, for example, stated:

> The…CSOL ensures that 457 visas apply to occupations where there are identified skill shortages.[55]

2.56 Similarly, Mr Scott Barklamb, Executive Director, Industry, AMMA, stated:

> …we already have, in our view, significant labour market testing by virtue of the government's scheduled occupations that can use these visas, based on research and the government's extensive labour market knowledge.[56]

2.57 However, Mr Alan Chanesman, a policy adviser with the Australian National University, characterised the CSOL as a 'static list of occupations' as opposed to one that lists occupations on the basis of identified skill shortages.[57] Other submitters and witnesses expanded on this point, noting that the CSOL, in servicing a number of visa types by reference to the skill level of occupations rather than identified skill shortages, is by definition composite and very broad in nature.[58] A joint submission

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53 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 5.

54 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 5.

55 Australian Industry Group, *Submission 16*, p. 1.

56 Mr Scott Barklamb, Executive Director, Industry, Australian Mines and Metals Association, *Committee Hansard*, 23 May 2013, p. 41.

57 Mr Alan Chanesman, External, Migration and Policy Adviser, Migration Law Program, Legal Workshop, Australian National University, *Committee Hansard*, p. 61.

58 Law Council of Australia, *Submission 29*, p. 10; and Berry Appleman and Leiden (BAL Australia), *Submission 12*, p. 5.

from Dr Joanna Howe, Associate Professor Alexander Reilly and Professor Andrew Stewart observed:

> …[the 457 program currently relies] upon a broadly-based occupational list to identify the occupations for which employers can sponsor temporary migrant workers. Crucially, this list is not compiled with reference to skill shortages in the domestic economy. The CSOL currently has 742 occupations on it from A[NZ]SCO skill levels 1–4. So long as an occupation is on this list, an employer can make a 457 nomination and the occupation is deemed to be in shortage. Present on this list is a number of occupations where there is clearly no domestic labour shortfall.[59]

2.58 A number of examples were provided in evidence to the inquiry of occupations currently included on the CSOL, but clearly either not presently the subject of a skill shortage (such as 'print journalist', despite the high level of redundancies in that profession on recent years) or not requiring a particularly high level of skill (such as 'flight attendant' and 'cook', which are Certificate III occupations requiring only two years of on-the-job training).[60]

2.59 On the basis of the composite and broad nature of CSOL, Dr Howe observed:

> …[the CSOL]…is not finely attuned to shortages. So long as an occupation is on this list then an employer can nominate an overseas worker...
>
> …[This is] a fairly broad, crude mechanism for identifying skill shortages and…is fairly ineffective for that key first threshold test of identifying Australia's skill needs. As such, because of this design flaw…the 457 visa has become more of a general labour supply visa…[61]

2.60 Notwithstanding evidence regarding the overly broad nature of the CSOL, the committee heard evidence that the range of occupations listed on the CSOL poorly services a number of regions, industries or areas of particular or emerging skill shortages.

2.61 The Chamber of Commerce and Industry Queensland, for example, indicated that the CSOL's current focus on skill levels does not 'reflect the skills needs of Queensland's small to medium businesses, particularly those in regional and remote areas'.[62] Similarly, the MIA noted:

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59 Dr Joanna Howe, Associate Professor Alexander Reilly and Professor Andrew Stewart, *Submission 11*, pp 3-4.

60 Dr Joanna Howe, private capacity, *Committee Hansard*, 23 May 2013, p. 57; and Dr Joanna Howe, Associate Professor Alexander Reilly and Professor Andrew Stewart, *Submission 11*, p. 4; Ms Katie Malyon, Vice-Chair, Migration Law Committee, Law Council of Australia, *Committee Hansard*, 23 May 2013, p. 36.

61 Dr Joanna Howe, private capacity, *Committee Hansard*, 23 May 2013, p. 57.

62 Chamber of Commerce and Industry Queensland, *Submission 13*, p. 9. See also: Chamber of Commerce Northern Territory, *Submission 28*; Chamber of Commerce and Industry Western Australia, *Submission 34*.

> Many would argue that the…[CSOL] is not broad enough and does not include those occupations that assist employers to address their skill shortages. For example, restaurateurs are often seeking ways in which they can sponsor experienced sommeliers or maitre d'hotel for their fronts of houses. Similarly, with the abundance of seafood restaurants…there is also a need for the skills of experienced fishmongers to be employed. This is also apparent in the mining and rural sectors in which employers are not able to sponsor people in specific occupations.
>
> …
>
> The CSOL is not representative of critical business needs and skill shortages in the regional and remote areas of Australia. There should be an expanded list for rural and remote areas of Australia, for example in the horticultural and nursery sectors where specialist workers are required for the cultivation of the nation's food.[63]

2.62 Mr Bolton also questioned whether the use of a skill-based occupations list for the 457 visa program (as opposed to an occupations-in-demand list) was well suited to Australia where geographical regions could experience disparate skill shortages, and noting that regional differences were already subject to tailored approaches, including regionally based and state occupations-in-demand lists.[64] Mr Bolton was also critical of the responsiveness of the CSOL in servicing emerging and growth industries.[65]

Process of listing occupations on the CSOL

2.63 The committee received very little detailed evidence or insight regarding the process for listing occupations on the CSOL.

2.64 The departments' submission briefly noted that the CSOL is approved by the Minister for Immigration and Citizenship (the minister) following consultation between the department, the Department of Education, Employment and Workplace Relations and the Australian Workforce and Productivity Agency (AWPA).[66]

2.65 The submission from Berry Appleman and Leiden (BAL Australia) noted also that the Ministerial Advisory Council on Skilled Migration (MACSM) is able to recommend changes on any aspect of Australia's skilled migration program, and may

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63 Migration Institute of Australia, *Submission 7*, pp 5-6. See also: Chamber of Commerce and Industry West Australia, *Submission 34*, p. 5.

64 Mr Stephen Bolton, Senior Adviser, Employment Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 23 May 2013, p. 21.

65 Mr Stephen Bolton, Senior Adviser, Employment Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 23 May 2013, pp 20-21.

66 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 5.

also therefore provide input to the department regarding the content of the CSOL.[67] The Minerals Council of Australia attested to its own experience of participation in the MACSM, noting that, through that forum, it had successfully negotiated the addition of 'skill-shortage occupations' to the CSOL in recent years.[68]

2.66 In broad terms, a relatively consistent message from submissions on the current listing process for the CSOL was that there is a lack of transparency as to the methodology by which occupations are added and removed. The joint submission from Dr Joanna Howe, Professor Alexander Reilly and Professor Andrew Stewart, for example, noted:

> ...[there is] limited transparency and accountability in the compilation of the list. It is unclear when annual reviews of this list take place. It is unclear as to how and why occupations are added to this list. Very little justification, if any, is given for the occupations that are on this list.[69]

2.67 Similarly, the ACCI submission noted:

> Changes made to the CSOL…are often not immediately or widely communicated. This leads to considerable confusion and frustration on the part of employers and can further exacerbate time lags in cases where access to skills in order to progress work is time critical.[70]

2.68 The submission of the Transport Workers' Union of Australia (TWU) pointed to concerns, voiced previously by the Joint Standing Committee on Migration and the Visa Subclass 457 Integrity Review (the Deegan review), regarding a lack of clarity about the extent to which the CSOL is customised in terms of 'listing not only skilled occupations but also migration occupations in demand' (that is, occupations subject to skill shortages).[71]

2.69 More generally, the LCA contrasted the relatively opaque administrative processes supporting the compilation of the CSOL with the more consultative and public approach taken to determining the content of the Skilled Occupation List (SOL),[72] which lists occupations for the purposes of nominating occupations in relation to general skilled migration visas:

> The SOL is compiled by AWPA…[I]t contains those occupations that are widely recognised to be in short supply and include such occupations as

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67 Berry Appleman and Leiden (BAL Australia), *Submission 12*, p. 6. For information on the MACSM's term of reference and current membership see Department of Immigration and Citizenship website, ' Ministerial Advisory Council on Skilled Migration', http://www.immi.gov.au/about/stakeholder-engagement/national/advisory/macsm/ (accessed 10 June 2013).

68 Minerals Council of Australia, *Submission 8*, p. 5.

69 Dr Joanna Howe, private capacity, *Committee Hansard*, 23 May 2013, p. 57.

70 Australian Chamber of Commerce and Industry, *Submission 21*, p. 12.

71 Transport Workers' Union of Australia, *Submission 20*, pp 8-9.

72 Department of Immigration and Citizenship website, ' Skilled Occupation List (SOL): Schedule 1', http://www.immi.gov.au/skilled/_pdf/sol-schedule1.pdf (accessed 10 June 2013).

> health professionals, engineers, lawyers and certain trades. AWPA analyses a range of evidence when updating the SOL. Evidence is also gathered from industry and key stakeholders: comprehensive submissions from industry stakeholders are available from…[AWPA's] website. As well, a variety of indicators and information is considered to make determinations about relevant occupations to include in the SOL.[73]

Suggestions for improving the effectiveness of the CSOL

2.70 With reference to the issues outlined above regarding the effectiveness of the CSOL in the context of the 457 visa program, a number of submitters and witnesses offered suggestions as to how it and related processes might be reformed to better support the operation and objectives of the program. The general theme of these was that the narrowing and targeting of the list to occupations demonstrably the subject of a skills shortage would both improve the ability of employees to readily access workers to fill positions for which a local worker could not be found,[74] and remove the potential or pressure for the program to be used to fill low- and semi-skilled positions against the fundamental tenets of its policy aims.[75]

2.71 Submitters and witnesses advocating for a narrower and more targeted CSOL generally acknowledged that such an approach would involve an element of LMT or labour market analysis to establish whether an occupation was the subject of a genuine skills shortage. It was also suggested that any such approach would need to be consultative and timely in order to add and remove occupations in response to labour market conditions and trends.[76]

2.72 The committee notes also suggestions that a more narrow and targeted CSOL may require complementary consideration of whether and how to accommodate the demand for low- and semi-skilled workers through the Australian immigration system.[77]

2.73 AWPA was generally identified as the appropriate agency to undertake primary responsibility for maintaining the (modified) CSOL and overseeing and/or

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73 Law Council of Australia, *Submission 29*, p. 10. The committee notes, however, that the CSOL incorporates the SOL.

74 Mr Alan Chanesman, External, Migration and Policy Adviser, Migration Law Program, Legal Workshop, Australian National University, *Committee Hansard*, p. 61.

75 See, for example, Law Council of Australia, *Submission 29*, p. 10.

76 See, for example, Mr Alan Chanesman, External, Migration and Policy Adviser, Migration Law Program, Legal Workshop, Australian National University, *Committee Hansard*, p. 61; and Berry Appleman and Leiden (BAL Australia), *Submission 12*, p. 6.

77 See, for example, Dr Joanna Howe, Professor Alexander Reilly and Professor Andrew Stewart, *Submission 11*, p. 3; Dr Joanna Howe, private capacity, *Committee Hansard*, 23 May 2013, p. 57; and Chamber of Commerce and Industry Queensland, *Submission 13*, p. 10.

undertaking the required labour market testing or analysis.[78] Dr Howe, for example, observed:

> …[AWPA could be used] to compile a list [for the purposes of the 457 visa program]. They currently compile the skilled occupation list [SOL], which has 192 occupations on it. So they are already doing labour market analysis. We think that organisation could potentially be used to rigorously compile a 457 visa list that would more accurately identify skill shortages.[79]

Transparency and rigour of 457 visa application process and adequacy of relevant tests

2.74 Evidence to the inquiry in relation to the transparency and rigour of the 457 visa application process suggested that, while some stakeholders are generally satisfied with the process,[80] others feel that there are inconsistencies in the assessment of applications at various stages of the process.

Refusal of applications at application stage

2.75 A number of submitters and witnesses outlined concerns regarding what was said to be a large number of refusals occurring at the (visa) application stage (that is, after approvals have been granted at the sponsorship and nomination stages) on the basis of concerns that the nominated position with the employer was not in fact genuine.

2.76 On this issue, the MIA submitted:

> …after a sponsorship and nomination have been approved by [the department]…case officers are refusing some visa applications because they have decided that it is not a genuine position. Assessment by a [department]…officer of the nominated position is outside their mandate when assessing a visa application. The requirements that a position meets a "genuine need" is not current policy but has been mooted by the Government to be changed, however, until such time that new legislation and policy has been announced, then…[department] officers should implement current Immigration policy and not take it upon themselves to interpret what they believe will be the new policy.[81]

2.77 The LCA, similarly, was concerned that this apparent practice was leaving the outcome of applications unduly dependent on the discretion and policy interpretation of individual decision makers, leading applications of similar merit to be determined

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78 See, for example, Berry Appleman and Leiden (BAL Australia), *Submission 12*, p. 6; Dr Joanna Howe, private capacity, *Committee Hansard*, 23 May 2013, p. 57; and Dr Joanna Howe, Associate Professor Alexander Reilly and Professor Andrew Stewart, *Submission 11*, p. 4

79 Dr Joanna Howe, private capacity, *Committee Hansard*, 23 May 2013, pp 57-58. See also: Transport Workers' Union of Australia, *Submission 20*, p. 8; and Law Council of Australia, *Submission 29*, p. 3. See Australian Workplace and Productivity Agency, *Submission 6*, for discussion of that agency's work, methodology and focus.

80 See, for example, Minerals Council of Australia, *Submission 8*, p. 5.

81 Migration Institute of Australia, *Submission 7*, p. 8.

inconsistently and thereby introducing uncertainty into the process. The LCA noted that, under current arrangements, the department may have little evidence before it at the nomination stage to consider the question of whether a nominated position is genuine, but contended that in such circumstances further investigation should be undertaken so that refusal, if warranted, can take place at that earlier stage of the application process.[82]

2.78 In relation to improved transparency around decision making more generally, the LCA called for:

> …the implementation of stricter guidelines and collation of precedents for case officer's adherence and increased case officer training for a greater transparency in DIAC's decision making process.[83]

Intra-company transfers

2.79 The committee heard evidence that the application of the criteria attached to the 457 visa program is unwieldy in respect of intra-company transfers. In response to a question on notice, Fragomen noted that the current sponsorship criteria reflected the program's focus on the filling of short term skill shortages, and were not well suited to accommodating or regulating temporary intra-company transfers.

2.80 Fragomen submitted that transfers of this type were a common practice among multinational companies, which 'routinely assign key staff and executives to their operations around the world in the normal course of conducting their business'.[84]

2.81 In light of the particular purpose and benefits of intra-company transfers, Fragomen called for the creation of a distinct 'intra-company transfer' category within the 457 visa program, with a tailored application process and eligibility criteria to better match the particular characteristics and risks attached to such requests. The adoption of the specific criteria and processes could support a truncated application process, in which the nomination stage could be removed. Specific and appropriate visa conditions could ensure that an intra-company transfer category would be incorporated easily within the existing regulatory framework, which was already premised on distinct 'streams' within the subclass 457 visa category.[85]

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82 Law Council of Australia, responses to questions on notice, 23 May 2013 (received 31 May 2013), p. 8.

83 Law Council of Australia, responses to questions on notice, 23 May 2013 (received 31 May 2013), p. 8.

84 Fragomen, responses to questions on notice, 23 May 2013 (received 31 May 2013), p. 3.

85 Fragomen, responses to questions on notice, 23 May 2013 (received 31 May 2013), p. 7.

Extent to which the 457 visa program may result in a decline in Australia's national training effort, with particular reference to apprenticeship commencements (term of reference (a)); and

Whether better long-term forecasting of workforce needs, and the associated skills training required, would reduce the extent of the current reliance on 457 visas (term of reference (g))

2.82 Term of reference (a) and (g) required the committee to look at the inter-related issues of the impact of the 457 visa program on Australia's national training effort, including apprenticeships; and the extent to which better long-term forecasting of workforce needs, and associated skills training, would reduce the extent of the current reliance on the 457 visa program to address skill shortages.

Impact of the 457 visa program on national training effort and apprenticeships

2.83 A number of submitters and witnesses expressed concern that the 457 visa program impacts negatively on Australia's national training effort and apprenticeships because it reduces the need for employers to directly invest in workforce training. The CEPU, for example, submitted:

> The 457 visa scheme provides an attractive alternative to investing in training by employers faced with the skills shortage. Rather than investing in training or taking on apprentices, employers can simply poach trained employees from overseas.[86]

2.84 However, other submitters and witnesses noted that approval as a sponsor under the program requires employers to meet one of two training benchmarks, being:

- expenditure of one per cent of payroll expenditure on the provision of structured training to employees; or
- a contribution equivalent to two per cent of payroll expenditure to an industry training fund.[87]

2.85 A business must also demonstrate a commitment to meeting one of the specified training benchmarks for each fiscal year for the term of their approval as a sponsor.[88]

2.86 The program's training benchmark requirements for sponsors were said to ensure that the 457 visa program has a positive impact on training, by requiring

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86 Communications Electrical Plumbing Union, *Submission 30*, p. 12.

87 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 6.

88 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 6.

businesses either to invest directly in staff development,[89] or to provide a financial contribution to the national training effort more generally, and so providing 'the flexibility to direct training effort where it provides maximum economic benefit'.[90] Further, it was noted that the program's focus on filling immediate demand for skilled labour did not directly compete with the skill level demands and training timelines for apprenticeships.[91]

2.87 The absence of a demonstrable link between the program and apprenticeships was addressed by an officer of the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, who advised the committee:

> …there is no evidence that there has been any impact on apprenticeship commencements…[T]rade apprenticeship commencements have remained relatively steady over the last 10 years, with a slight increase…There is no evidence of a relationship between 457s and commencements. Where there have been downturns in non-trade commencements, that has generally been related to changes to apprenticeship incentives.[92]

2.88 More generally, the committee heard that the level of the Commonwealth's funding commitment did not appear to be linked to the operation of the 457 visa program:

> …in the area of training, funding for training has increased rather than decreased over the last five or six years. This would tend to indicate that the use of 457s is not about reducing the federal government commitment to training.[93]

2.89 Notwithstanding differences of view regarding the impacts of the 457 visa program on the national training effort and apprenticeships, the evidence of submitters and witnesses revealed a relatively consistent view that deficiencies in the national training effort reflect a 'broader failure…to ensure that young people have employability skills as well as the vocational skills to meet the areas of large demand in the economy'[94] through increased resourcing,[95] and more effective and responsive

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89 See, for example, Australian Mines and Metals Association, *Submission 22*, p. 6.

90 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 6.

91 Australian Industry Group, *Submission 16*, p. 3.

92 Dr Melissa McEwen, General Manager, Trades Recognition Australia, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, *Committee Hansard*, 23 May 2013, p. 70.

93 Dr Melissa McEwen, General Manager, Trades Recognition Australia, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, *Committee Hansard*, 23 May 2013, p. 71.

94 Mr Stephen Bolton, Senior Adviser, Employment Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 23 May 2013, p. 18.

demand-side strategies for matching the needs of industry with the activities of the education and training sectors.[96]

Impact of better long-term forecasting and skills training

2.90 In general terms, while submitters and witnesses broadly accepted the proposition that improved long-term forecasting can allow training settings to be adjusted to reflect upcoming skills needs',[97] this view was tempered by a number of significant caveats.

2.91 First, there was some question as to the significance of the link between the national training effort and the level of use of the 457 visa program, given the program's focus on addressing temporary skills shortages. Mr Robert Walsh, Managing Partner, Australia and New Zealand, Fragomen, for example, stated:

> I do not think in any way that…[a more effective national skills training program] would deal with the vast majority of people who come to Australia on a 457 visa because…the vast majority of those people are professional and managerial level staff or skilled tradespeople.[98]

2.92 Second, it was noted that, due to a range of personal, cultural and geographical factors, skill shortages in Australia arise due to not only a lack of relevant skills but also a lack of mobility in the Australian workforce.[99]

2.93 Third, there was recognition that long-term forecasting is unable to wholly address skill shortages. ACCI, for example, noted that it was 'generally accepted that current mechanisms used in workforce projections and planning have limited validity and cannot predict major shifts and changes in the economy'.[100]

2.94 The qualified view of the ability of long-term forecasting or modelling to address skill shortages was encapsulated by the evidence of AWPA, whose submission noted that such forecasting makes a valuable contribution to matching available skills to demand, but will not reduce the need for skilled migration entirely:

> AWPA views the long-term modelling of workforce needs and the associated skills training required to meet them as an essential component

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95 See, for example, Mr Tony Sheldon, National Secretary, Transport Workers' Union of Australia, *Committee Hansard*, 23 May 2013, p. 6; and Migration Institute of Australia, *Submission 7*, p. 4.

96 Australian Chamber of Commerce and Industry, *Submission 21*, p. 14.

97 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 1.

98 Mr Robert Walsh, Managing Partner, Australia and New Zealand, Fragomen, *Committee Hansard*, 23 May 2013, p. 52.

99 Mr Stephen Bolton, Senior Adviser, Employment Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 23 May 2013, p. 14.

100 Australian Chamber of Commerce and Industry, *Submission 21*, p. 14.

> in achieving an adaptable workforce where skills are used effectively to meet the increasingly complex needs of industry, and individuals are able to fulfil their potential…The scenario modelling produced by AWPA is a leading contributor to the long-term modelling of workforce needs and indicates that the tertiary qualifications held by the workforce need to grow by between 3 and 3.9 per cent per annum over the years to 2025 to meet Australia's skill needs. AWPA is of the view that although such an increase would not remove the need for skilled migration, it would reduce the extent to which skilled migration is required to meet Australia's skill needs.[101]

COMMITTEE COMMENT

2.95 Evidence to the inquiry has confirmed that the 457 visa program, as the main instrument of Australia's system of temporary skilled migration, attracts widespread support based on recognition of the significant economic and social benefits that flow from the ability to address genuine skill shortages in the local economy through the use of overseas workers.

2.96 Equally, however, it is accepted that the goal of ensuring that employers are able to readily access skilled migrants must be balanced against the need to ensure that the employment opportunities and conditions of local workers are protected, and that 457 visa workers enjoy no less favourable conditions and are not otherwise subject to abuse or exploitation. Each of these important policy elements interacts with and affects the others, and the effectiveness of the program is dependent on the balance that is achieved by its overall design and administration. Given this, concerns must arise if the program is able to be used to employ 457 workers in occupations not subject to skill shortages, and if 457 workers are able to be employed on less favourable terms than local workers. Where this occurs, the economic objective of the program may be frustrated, the employment opportunities and conditions of local workers may be undermined, and the rights and working conditions of 457 visa holders may be compromised.

2.97 The committee heard that a core indicator of the effectiveness of the 457 visa program in addressing areas of genuine skill shortage is the relationship between the number of 457 visa applications and the general rate of unemployment, which, historically, have been closely aligned. Evidence on this 'automatic' indicator showed that there has been some divergence in the growth or demand for 457 visas relative to the rate of general unemployment. Further, at a geographical, industry and occupation level, there is evidence of a divergence in the growth or demand for 457 visas relative to the strength of the labour market, of increasing use of 457 visa holders in less skilled and broadly defined occupations, and an increasing number of onshore applicants. A number of submitters and witnesses pointed to these trends as showing that the 457 visa program is not effectively achieving its core economic aim of directing skilled overseas workers to areas of genuine skill shortages. Others, however, pointed to policy and systemic factors in the immigration system, such as

101 Australian Workforce and Productivity Agency, *Submission 6*, p. 5.

changes impacting student visa holders, as the underlying cause of these trends in the data.

2.98 In relation to this issue, the committee notes that, while it seems clear that policy and systemic factors are likely to be contributing to the number and rate of primary applications for 457 visas, the divergence in the historical alignment of this measure and the general rate of unemployment gives rise to legitimate questions as to whether the program's policy settings are currently effective to ensure that overseas workers are in all cases being employed in areas subject to genuine skill shortages. Given this, an assessment of the effectiveness of the program, including consideration of proposals for changes to its current policy settings, is appropriate at this time. The committee notes that, over the course of its life under successive governments, the 457 visa program has undergone a number of substantial reviews and revisions in seeking to achieve or maintain an effective balance between its policy settings and aims.

Cost of employing 457 visa workers

2.99 The committee heard that the main way in which the 457 visa program ensures that it is used only in respect of areas subject to genuine skill shortages is through the imposition of higher costs on employment of 457 visa holders, including sponsorship and nomination fees, recruitment costs, training expenditure benchmarks and travel costs. These costs are intended to create a price signal such that employers will seek to engage a 457 visa holder only where a local worker cannot be found to fill a position. Evidence was provided to the inquiry from a number of sources attesting to the fact that this price differential is substantial and therefore effective in achieving this aim. However, other submitters and witnesses questioned the strength of this price signal, claiming that such costs are in many cases not substantial, or in fact avoidable, particularly in relation to onshore applicants.

The Consolidated Sponsored Occupations List

2.100 Another main focus of the inquiry was the Consolidated Sponsored Occupations List (CSOL), which specifies the occupations that can be sponsored under the 457 visa program, and is therefore an important consideration in assessing the extent to which the program addresses genuine skill shortages. The committee heard that the CSOL is broadly based, incorporating the Skilled Occupations List (SOL) in addition to most occupations defined in levels 1 to 3 of the Australian and New Zealand Standard Classification of Occupations (ANZSCO). The CSOL is not, as such, a well-targeted list of occupations in demand (that is, subject to skill shortages), and in fact services a number of other visa subclasses. Evidence from submitters and witnesses suggested that the CSOL is in some respects both too narrow, with employers unable to access in-demand occupations not present on the list, and too broad, with the inclusion of occupations both not in demand (for example, print journalists) and not possessing the requisite skill requirements (for example, flight attendants) to justify the use of a 457 visa holder to fill such positions. The committee heard that these problems with the content of the CSOL arise not only because the ANZSCO definitions are ill matched to Australia's skill needs (for example, through overly broad occupation descriptions or ascribing too high a skill

level to an occupation), but also because there is a lack of rigour, transparency and consultation around the processes for determining its content.

2.101 In light of these concerns about the CSOL, the committee heard calls for the development of a specific skills in-demand list for the 457 visa program, with many recommending that the Australian Workforce and Productivity Agency (AWPA) be tasked with compiling and maintaining such a list. It was argued that the development of a 457 program specific list based on labour market analysis and consultation conducted by AWPA could operate as a de facto form of labour market testing, and also more easily accommodate labour market changes and regional and geographical differences in terms of in-demand occupations.

2.102 Such an approach, however, may require complementary consideration of whether and how Australia's immigration system should facilitate the flow of low- and semi-skilled labour into Australia. This is suggested by evidence to the inquiry that, in the shift to an increasingly demand-driven program, the 457 visa program is under pressure to act as a pathway for bringing low- and semi-skilled workers into the Australian labour market.

2.103 In the committee's view, the evidence to the inquiry has established that the 457 visa program should be serviced by a specific list or lists of in-demand skilled occupations for Australia and, where necessary, specific state or regional labour markets. As occurs with the SOL, AWPA should be tasked with and appropriately funded to compile and regularly review the content of the 457 visa program list.

2.104 The committee also considers that a complementary review of whether and how Australia's immigration system should facilitate the flow of low- and semi-skilled labour into Australia is needed.

Recommendation 1

2.105 The committee recommends that, for the exclusive purposes of the 457 visa program, the Australian Workforce and Productivity Agency be given the responsibility and commensurate funding to compile and prepare a skills in-demand list which also takes into account regional labour market skill shortages.

Recommendation 2

2.106 The committee recommends that the government institute a review of the extent to which Australia's immigration system does and should facilitate the flow of low- and- semi-skilled labour into Australia.

Transparency and rigour of 457 visa application process and adequacy of relevant tests

2.107 While evidence to the committee revealed some level of dissatisfaction with the transparency and rigour of the 457 visa application process, the committee considers that the administration of the program is generally satisfactory. Notable improvements to the administration of the program have occurred through the department's industry outreach strategies, and there was also particular support expressed for the consultative mechanism of the Ministerial Advisory Council on Skilled Migration.

2.108 A particular matter raised was the apparent practice of the department in refusing applications at the (visa) application stage of the 457 visa process. This matter is addressed in Chapter 5.

2.109 A further matter raised was the absence of a dedicated 457 visa 'stream' for intra-company transfers. The committee considers that the arguments in favour of establishing a dedicated stream to ensure that the movement of such skilled labour is properly accommodated by the program have merit.

Recommendation 3

2.110 The committee recommends that a dedicated pathway for intra-company transfers be introduced to the 457 visa program.

Labour market testing

2.111 Based on the concerns outlined above in relation to the 457 visa program, a number of submitters and witnesses called strongly for the introduction of labour market testing (LMT) to the 457 visa program, which in simple terms is a requirement on employers to advertise a position locally to ensure that a genuine skill shortage exists in relation to a position.

2.112 However, others raised concerns about the effectiveness of LMT. Some submitters and witnesses noted that this requirement had previously been an element of the 457 visa application process, which had proven to be generally a barrier to employers accessing skilled labour, and nevertheless ineffective at restricting the use of the program to areas of genuine skill shortages. LMT was criticised as imposing an often unnecessary additional cost and delay, particularly in cases where a clear skill shortage exists or highly specialist skills are being sought, and as susceptible to manipulation to achieve desired outcomes.

2.113 In the committee's view, the evidence to the inquiry regarding LMT suggests that the introduction of such a requirement to the 457 visa application process could assist with ensuring that the program is better targeted to occupations that are genuinely the subject of skill shortages. However, it is also clear that there are valid concerns regarding the potential for LMT to impose additional cost and delay and therefore to act as a barrier to addressing genuine skill shortages through the program.

2.114 In this regard, the evidence to the committee has shown that the combined interactions of individual policy settings in the 457 visa program may impact on its underlying policy aims in complex or unintended ways. It is therefore clear that a LMT requirement would need to be carefully designed and calibrated against the other elements of the 457 visa program to ensure that it would be effective in demonstrating labour market shortages, while not undermining the responsiveness of the program in meeting employers' needs.

2.115 In this regard, the committee notes that the evidence to the inquiry addressing the issue of LMT did not address the specific legislative proposal for LMT contained in the Migration Amendment (Temporary Sponsored Visas) Bill 2013 (the bill), given that the bill was introduced to the House of Representatives well after the receipt of evidence in submissions and at the hearing for the inquiry. Further, the lack of any Regulation Impact Statement (RIS) assessment or formal consultation on the detail of

the LMT proposal contained in the bill was a significant limitation on the committee's ability to assess the practical implications of the proposal for the operation of the 457 visa program. This matter is further discussed in Chapter 5 of this report.

Impact of the 457 visa program on national training effort and apprenticeships

2.116 Evidence to the inquiry regarding the impact of the 457 visa program on the national training effort, and particularly the number of apprenticeship commencements, was divided. A number of submitters and witnesses expressed concern that the program undermines the incentive for employers to support the training of local workers and apprentices by providing ready access to skilled overseas workers. Others, however, claimed that the higher cost of employing 457 visa holders, and particularly the training expenditure requirements for sponsors, are effective to remove any such incentive and, in fact, ensure that the program contributes positively to the national training effort.

2.117 More generally, there was a relative consensus of view that, the impact of the 457 visa program aside, to be effective in addressing skill shortages the national training effort requires both a greater funding commitment and level of integration between the supply- and demand-side sectors of the labour market. While these matters fall outside the scope of this inquiry, the committee endorses this view.

2.118 With this in mind, however, it is important to recognise that the promoting of the national training effort is, in one sense, not a core but almost an incidental aim of the 457 visa program. That is to say, the primary policy purpose of the training benchmarks appears to be to contribute to the cost differential in the hiring of overseas workers which ensures the preferencing of local workers. While the training benchmarks may have a self-correcting effect on skill shortages in the local labour market (particularly training benchmark A), they may also be less targeted to actual skill shortages (training benchmark B).

2.119 On this view, the committee considers that the impact of the 457 visa program on the national training effort should, overall, be a positive one, but with the important caveat that this is in circumstances where the overall policy settings of the program are effective in ensuring that the 457 visa holders are only sought, or able to be accessed, for the purposes of addressing genuine skill shortages.

Impact of better long-term forecasting and skills training

2.120 In relation to the issue of better long-term skills forecasting and skills training, and the extent to which this may reduce the need to rely on the 457 visa program, the evidence to the inquiry broadly supported the proposition that improved forecasting could reduce Australia's reliance on systems of temporary skilled migration. However, it is also generally accepted that, as noted by AWPA, there will, regardless, remain a need for a system of temporary skilled migration to address areas of need in the economy.

2.121 The committee notes that, if implemented, Recommendation 1 (above) should ensure that analysis and forecasting of Australia's skill needs is undertaken by the appropriate specialist and expert agency, properly tasked and operating with adequate resources to support this important task.

2.122 In relation to the targeting of skills training via labour market analysis and forecasting, the committee again draws attention to the evidence to the inquiry regarding the need for greater funding and integration of Australia's national training effort.

CHAPTER 3

PROTECTION OF 457 VISA HOLDERS' RIGHTS

Introduction

3.1 This chapter details the committee's consideration of the framework and operation of the Temporary Work (Skilled) - Standard Business Sponsorship (Subclass 457) visa program (457 visa program) in relation to the maintenance and enforcement of 457 visa workers' rights. These issues relate to both terms of reference (d) and (h), which tasked the committee with inquiring into the monitoring of the 457 visa program and:

> …the capacity of the system to ensure the enforcement of workplace rights, including occupational health and safety laws and workers' compensation rights…

3.2 As noted previously in this report, the protection of 457 visa workers' rights is an explicit and significant aim of the policy settings of the program. The extent to which the program effectively protects the rights of 457 visa holders, and ensures they receive no less favourable working conditions, impacts on the other priorities of the 457 visa program, namely ensuring that 457 visa holders are employed only in response to genuine skill shortages, and that employment opportunities and conditions of local workers are adequately protected.

3.3 The committee notes that this concern also intersects with fundamental issues of human rights. The Human Rights Council of Australia (HRCA) submission drew attention to this, noting that Australia's immigration program was relevant to the overarching principles of, first, non-discrimination and, second, the protection of the rights of all non-citizens on temporary visas working in Australia. The HRCA emphasised that conformity with these rights would 'substantially strengthen Australia's ability, through the 457 visa program, to protect and fulfil the rights of both local and migrant workers'.[1]

Vulnerability of 457 visa holders

Factors associated with vulnerability of 457 visa holders

3.4 The committee notes that what may be termed the 'special vulnerability' of 457 visa holders has long been recognised in relation to the framework and operation of the 457 visa program. For example, an issues paper released by the 2008 Visa Subclass 457 Integrity Review (the Deegan review) noted that '457 visa holders are potentially vulnerable to exploitation, arising out of their position as temporary visa holders in Australia'.[2]

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1 Human Rights Council of Australia, *Submission 33*, p. 1.

2 Visa Subclass 457 Integrity Review, Issues Paper #3: Integrity/Exploitation, September 2008, p. 12.

3.5 Pointing to the analysis of the Deegan review, the submission of Dr Joanna Howe, Professor Alexander Reilly and Professor Andrew Stewart noted that the vulnerability of 457 visa holders is particularly associated with:

> ….[those] at the lower end of the salary and skill scale because they are reluctant to make any complaint which may put their employment at risk, and they possess less labour market power as their skill level is more easily replaceable than for highly skilled workers.[3]

3.6 The committee heard that the potential vulnerability of 457 visa holders is increased for those who may have aspirations towards permanent residency.[4] Mr Tim Shipstone, Industrial Officer, Australian Council of Trade Unions (ACTU), for example, noted that in such cases a worker may be less likely to 'speak out or to challenge their employer or seek outside help for fear of jeopardising their visa status'.[5]

3.7 More generally, the submission of Dr Joanna Howe, Professor Alexander Reilly and Professor Andrew Stewart observed:

> [The] vulnerability of subclass 457 visa holders is exacerbated by their profile as migrants. The vulnerability of temporary migrant workers in general is well documented. Migrant workers lack the capacity of citizens to participate in the political system that determines their work rights, they lack security of residence, and they often face language and cultural barriers which makes it less likely they will know their rights as workers, and more difficult for them to assert them against a local employer.[6]

3.8 Appearing at the hearing for the inquiry in a private capacity, Dr Joanna Howe, while noting that most employers seek to employ 457 visa holders for legitimate purposes, pointed to academic literature and anecdotal evidence ascribing a range of motivations for the exploitation of the special vulnerability of 457 visa workers:

> There is a range of motivations for why an employer may seek to use a 457 visa worker [against the policy intention of the program]…One of those agendas could be de-unionisation. Firstly, a 457 visa worker is much less likely to be a member of a union and to identify with a union. Secondly…457 visa workers tend to be more compliant and less likely to complain about working hours, conditions and expectations of them.[7]

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3 Dr Joanna Howe, Professor Alexander Reilly and Professor Andrew Stewart, *Submission 11*, p. 5.

4 Visa Subclass 457 Integrity Review, Issues Paper #3: Integrity/Exploitation, September 2008, p. 12.

5 Mr Tim Shipstone, Industrial Officer, Australian Council of Trade Unions, *Committee Hansard*, 23 May 2013, p. 4.

6 Dr Joanna Howe, Professor Alexander Reilly and Professor Andrew Stewart, *Submission 11*, pp 5-6.

7 Dr Joanna Howe, private capacity, *Committee Hansard*, 23 May 2013, p. 59.

Risks associated with vulnerability of 457 visa holders

Impact on rights and conditions of local workers

3.9 As noted in Chapter 2, where a genuine skill shortage does not exist in relation to a position, the employment of a 457 visa holder represents a fundamental breach of the program's central aims, and as a matter of course must impact negatively on the opportunity for local workers to fill that position. The submission of the HRCA highlighted this relationship between the protection of 457 visa holders' rights and the protection of the employment opportunities and conditions of local workers:

> If the Australian industrial relations system conforms to international human rights standards then it follows that all local workers will be guaranteed the opportunities of employment to which they are fairly entitled because employers will have no incentive to use the 457 visa program as a means to avoid the employment entitlements of local workers... So long as violations of the rights of migrant workers persist and are tolerated, local workers will be exposed to the risk of degraded labour standards which arise when any worker's entitlements are withheld.[8]

3.10 The importance of ensuring a 'fair playing field' in this regard was also emphasised by Mr Tony Sheldon, National Secretary, Transport Workers' Union of Australia (TWU):

> You cannot have a fair playing field in the market between companies that employ Australians…[using] the same skill and in many circumstances paying more money…whilst other companies…are employing 457 visa holders without the same rights and with lower wages and the capacity for instant dismissal.[9]

Impact on rights and conditions of 457 visa workers

3.11 A number of submitters and witnesses pointed to a range of abusive and exploitative behaviours to which 457 holders may be subject in the employment context, including:

- being engaged where skilled and qualified Australian workers were available to do the work;
- being required to perform unskilled work, outside the sponsor-nominated occupation, on a regular or permanent basis;
- breaches of employer sponsorship obligations, such as the requirement not to recover certain expenses from 457 visa holders;
- breaches of workplace and occupational health and safety laws;
- under-payment of wages;
- workplace bullying; and

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8 Human Rights Council of Australia, *Submission 33*, p. 2.

9 Mr Tony Sheldon, National Secretary, Transport Workers' Union of Australia, *Committee Hansard*, 23 May 2013, p. 7.

- debt bondage.[10]

3.12 As well as pointing to publicly reported instances of abuse and exploitation of 457 visa workers,[11] the committee was provided with a number of confidential submissions outlining other instances of claimed abuse or exploitation not currently in the public domain.[12] Regarding the unreported status of such claims, the ACTU submitted:

> The ACTU has reported individual cases to the Department of Immigration [DIAC], where appropriate and subject to the wishes of the visa holders themselves. Callers to the [ACTU] hotline are often very reluctant to go to DIAC, or to have the ACTU contact DIAC on their behalf, for fear of losing their visa and being deported.[13]

3.13 In addition to evidence of specific cases of exploitation and abuse, the committee heard that the special vulnerability of 457 visa workers may have implications for not only the level of reporting of employer exploitation but also the level of reporting of workplace health and safety issues, including workplace accidents and injury. Representatives of the Construction, Forestry, Mining and Energy Union (CFMEU) drew the committee's attention to reports about the reluctance of 457 visa workers to report workplace safety issues,[14] and to data suggesting that, in the period March 2007 to December 2011, the work-related fatality rate among 457 visa workers was 'more than double the rate among Australian workers in equivalent occupations'.[15]

Extent of exploitation of 457 visa workers

3.14 Submissions and the hearing for the inquiry devoted some time to the question of the extent of abuse and exploitation of workers in the context of the 457 visa program.

3.15 A number of submitters and witnesses sought to contextualise their views on this question by reference to reported estimates by the Minister for Immigration and

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10 Australian Council of Trade Unions, responses to questions on notice, 23 May 2013 (received 30 May 2013), p. 1.

11 See, for example, Transport Workers' Union of Australia, *Submission 20*, pp 7, 9, 13 and 14.

12 Confidential submissions were received, for example, from the Australian Council of Trade Unions and Construction, Forestry, Mining and Energy Union. The committee requested information pertaining to unreported cases of abuse to be provided confidentially to ensure the protection of all parties to such matters.

13 Australian Council of Trade Unions, responses to questions on notice, 23 May 2013 (received 30 May 2013), p. 2.

14 Mr Dave Noonan, National Secretary, Construction and General Division, Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 23 May 2013, p. 12.

15 Mr Bob Kinnaird, National Research Director, Construction and General Division, Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 23 May 2013, p. 12; and Construction, Forestry, Mining and Energy Union, response to questions on notice, 23 May 2013 (received 3 June 2013), pp 2-5.

Citizenship (the minister), in April 2013, that instances of 'illegitimate use of 457s would exceed 10 000' instances,[16] being approximately 9 per cent of the total number of principal visa holders in Australia as at 30 April 2013 (108 810).[17]

3.16 Evidence relied on in support of arguments going to this question included:

- anecdotal evidence of particular instances of abuse and exploitation (discussed above);
- the level of reporting to the unions generally, and to union and departmental hotlines;[18]
- statistical trends in the 457 visa program (discussed in Chapter 2);
- compliance monitoring and enforcement outcomes (discussed below); and
- the findings of the Migration Council of Australia (MCA) report, 'More than temporary: Australia's 457 Visa Program', 11 May 2013 (the MCA report), particularly in relation to that report's finding that '2 per cent of 457 visa holders reported incomes less than the threshold income set by regulation'.[19]

3.17 In general terms, some submitters and witnesses, particularly the groups representing employee interests, relied on broader statistical trends in the 457 visa program, and anecdotal evidence of specific instances, to argue that 457 visa workers are subject to a substantial degree of abuse and exploitation under the 457 visa program,[20] such as would justify significant changes to the policy settings of the program.

3.18 Conversely, other submitters and witnesses, particularly those representing employer and industry groups, relied on broader statistical trends in the 457 visa

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16 See, for example, Bianca Hall, *Sydney Morning Herald*, '457 visas: more than 10,000 are rorting system, says minister', 28 April 2013, http://www.smh.com.au/opinion/political-news/457-visas-more-than-10000-are-rorting-system-says-minister-20130428-2imcy.html (accessed 11 June 2013).

17 Department of Immigration and Citizenship, 'Subclass 457 State/Territory summary report 2012-13 to 30 April 2013', p. 2.

18 See, for example, Australian Council of Trade Unions, responses to questions on notice, 23 May 2013 (received 30 May 2013), p. 2; and Mr David Wilden, Assistant Secretary, Skilled Migration Policy Section, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Committee Hansard*, 23 May 2013, p. 69.

19 Migration Council of Australia, 'More than temporary: Australia's 457 Visa Program', 11 May 2013, p. 4. See, for example, Mr Anthony Melville, Director, Public Affairs and Government Relations, Australian Industry Group, *Committee Hansard*, 23 May 2013, p. 40; Mr Scott Barklamb, Executive Director, Industry, Australian Mines and Metals Association, *Committee Hansard*, 23 May 2013, p. 41; and Construction, Forestry, Mining and Energy Union, responses to questions on notice, 23 May 2013 (received 3 June 2013), p. 8.

20 See, for example, Mr Dave Noonan, National Secretary, Construction and General Division, Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 23 May 2013, pp 5 and 10; and Mr Tim Shipstone, Industrial Officer, Australian Council of Trade Unions, *Committee Hansard*, 23 May 2013, p. 11.

program, the level of reporting to unions and to union and departmental hotlines, compliance monitoring and enforcement outcomes, and the MCA report to argue that the extent of abuse and exploitation of 457 visa workers is within the expected margins of compliance,[21] can be adequately dealt with under the current arrangements, and would not justify anything other than minor changes to the policy settings of the program.[22]

Compliance monitoring and enforcement

3.19 The committee notes that the capacity to effectively monitor compliance with and enforce the sponsorship obligations designed to preserve the integrity of the 457 visa program is integral to ensuring that the program's fundamental tenets are not undermined.[23]

Current arrangements and performance

3.20 The departments' submission advised that the Department of Immigration and Citizenship (the department) monitors sponsors to ensure they continue to meet sponsorship obligations, including:

- to provide overseas workers with the same terms and conditions of employment as Australians performing equivalent work in the business; and
- to pay a 457 visa holder's return travel costs to their home country at the conclusion of their employment.[24]

3.21 The main monitoring mechanisms are:

- information exchange with Australian state and territory government agencies;
- written requests to sponsors to provide information in accordance with sponsorship obligations; and
- visiting businesses (with or without notice).[25]

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21 Mr Scott Barklamb, Executive Director, Industry, Australian Mines and Metals Association, *Committee Hansard*, 23 May 2013, p. 41.

22 See, for example, Law Council of Australia, *Submission 29*, p. 11.

23 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 17.

24 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 17.

25 Department of Immigration and Citizenship website, 'Sponsors [sic] Obligations', http://www.immi.gov.au/skilled/skilled-workers/sbs/obligations-employer.htm (accessed 11 June 2013).

3.22 The departments' submission provided the following table showing the compliance monitoring and enforcement outcomes in relation to the 457 visa program over the period 2009-12.[26]

26 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 18.

Measure	2009–10	2010–11	2011–12
Active sponsors (sponsors with a primary visa holder in Australia at the end of the financial year)	18 270	18 520	22 450
Sponsors monitored	2 546	2 091	1 754
Sponsors' sites visited	1 245	814	856
Sponsors formally sanctioned	164	140	125
Sponsors formally warned	510	453	449
Referrals to other agencies	65	61	18
Sponsors issued with an infringement notice	n/a	9	49
Sponsors subject to pecuniary penalty by the Federal Magistrates Court	0	0	1

3.23 With reference to these outcomes, the departments' submission noted that there had been a recent shift in monitoring activities from conduct of educational site visits to investigation of 'significant failures of sponsorship obligations' based on the targeting of sponsors 'with a greater risk of exploiting visa holders or abusing the sponsorship program'.

3.24 The departments' noted that the investigation of cases of abuse and exploitation was an inherently time consuming process, involving the 'meticulous gathering and assessing of evidence, including affidavits and documentary evidence, to present a sound case and optimise the chances of a successful prosecution'. The shift in focus to investigation was therefore reflected in the lower number of sponsors monitored and increased number of sanctions and infringement notices in 2012-13.[27]

3.25 In relation to the resources available to support compliance monitoring and enforcement, it was noted that the department currently has 32 inspectors across Australia. The inspectors have the following powers:

- to enter a premises or place without force;
- to require a person to produce a record or documents;
- to inspect and make copies of any number of documents; and
- to interview people while at a premises or place.[28]

3.26 A sponsor that fails to meet a sponsorship obligation may be:

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27 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 18.

28 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 17.

- sanctioned, including:
    - being barred from sponsoring or applying to sponsor a 457 visa worker for a specified period, and
    - cancellation of existing sponsorship approvals.
- issued with an infringement notice for each failure of up to $1320 (for individuals) and $6600 (for body corporates); and
- subject to civil court action, with potential fines for each failure of up to $6600 (for individuals) and $33 000 (for body corporates).[29]

3.27 At the hearing for the inquiry, an officer of the department advised that compliance monitoring and enforcement are managed according to assessments of risks and the most effective use of available resources, noting:

> The monitoring function the department has…goes right across our visa categories, so decisions about where the main issues of concern are regularly reviewed, monitored and then have action taken as required.[30]

3.28 A number of submitters and witnesses described the compliance monitoring and enforcement powers currently available to the department as sufficient, with some pointing to the introduction, with the passing in 2009 of the *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth), of the current framework, including sponsorship obligations (with attendant civil penalties); the appointment of departmental inspectors; and greater powers for the department to disclose personal information relating to employers and 457 visa holders.[31] The Migration Institute of Australia (MIA), for example, described the current arrangements as conferring on the department 'extensive powers in every possible aspect of compliance of a sponsoring employer'.[32]

3.29 Mr Bob Kinnaird, National Research Director, Construction and General Division, CFMEU, however, criticised the absence of any penalty for the engagement of a 457 visa worker where a qualified local worker was available:

> It is worth noting that there is absolutely no sanction whatsoever for what is in effect the fundamental breach of the 457 visa program by an employer—and that is to engage a 457 visa worker when there was a qualified Australian worker available. That is intended to be the fundamental objective of the 457 visa program, yet under the current regulations there is

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29 Department of Immigration and Citizenship website, 'Sponsors [sic] Obligations', http://www.immi.gov.au/skilled/skilled-workers/sbs/obligations-employer.htm (accessed 11 June 2013).

30 Mr David Wilden, Assistant Secretary, Skilled Migration Policy Section, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Committee Hansard*, 23 May 2013, p. 69.

31 Dr Joo-Cheong Tham and Dr Iain Campbell, 'Temporary Migrant Labour in Australia: The 457 visa scheme and challenges for labour regulation', Centre for Employment and Labour Relations Law, Working Paper No. 50, additional information received 26 March 2013, p. 18.

32 Migration Institute of Australia, *Submission 7*, p. 7.

> no breach of the regulations where an employer actually discriminates against an Australian worker. Our view is that that particular breach, which is currently non-existent, should exist and should in fact attract the highest penalty under the sanctions regime.[33]

3.30 A number of submissions also recommended the establishment of a name-and-shame register to publicise the details of employers found to have breached their sponsorship obligations under the 457 visa program.[34]

3.31 More generally, concerns were expressed regarding the extent and outcomes of the department's compliance monitoring and enforcement effort. Mr Peter Tighe, National Secretary, Communications Electrical Plumbing Union (CEPU), for example, cited the low level of prosecutions as indicative of an inadequate level compliance monitoring, giving rise to doubts about the effectiveness of the enforcement regime as a deterrent to noncompliant behaviour:

> …[in] the last financial year…[there] was one successful prosecution and three or four in train. When you consider that there are 22,000 sponsoring employers under the 457 arrangement and 100,000-plus people working on those visas, the level of compliance [monitoring] and the degree of sanctions [imposed] are very limited…The first action by the department is usually cancellation of the right to sponsor or suspension of the right to sponsor. It is only on rare occasions when the pursuit of breaches of the act and legislation take it to a court where [the substantial] fines [may be imposed]…The likelihood of [noncompliant employers]…being caught…and having to pay the ultimate penalty is very limited.[35]

3.32 A number of submitters and witnesses contended that, while the powers and sanctions supporting compliance monitoring and enforcement for the 457 visa program are adequate, the department is not sufficiently well resourced to effectively administer that regime.[36]

Empowerment of Fair Work Inspectors

3.33 The committee notes that, on 18 March 2012, the minister and the Minister for Employment and Workplace Relations jointly announced that Fair Work

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33 Mr Bob Kinnaird, National Research Director, Construction and General Division, Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 23 May 2013, p. 12.

34 See, for example, Migration Institute of Australia, *Submission 7*, p. 8.

35 Mr Peter Tighe, National Secretary, Communications Electrical Plumbing Union, *Committee Hansard*, 23 May 2013, p. 11. See also, for example, Human Rights Council of Australia, *Submission 33*, p. 7.

36 See, for example, Mr Alan Chanesman, External, Migration and Policy Adviser, Migration Law Program, Legal Workshop, Australian National University, *Committee Hansard*, 23 May 2013, p. 60; Mr Stephen Bolton, Senior Adviser, Employment Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 23 May 2013, p. 19; Ms Katie Malyon, Vice-Chair, Migration Law Committee, Law Council of Australia, *Committee Hansard*, 23 May 2013, pp 33-34; and Communications Electrical Plumbing Union, *Submission 30*, p. 5.

Ombudsman (FWO) inspectors would be given the power to monitor and enforce compliance with 457 visa conditions to ensure that workers were employed in the jobs for which they were nominated and receiving the correct market salary rates.[37] This would entail FWO inspectors being given relevant powers under the *Migration Act 1958* to enable them to do such things as enter premises, interview people and request and collect documents.[38] At a May 2013 Senate estimates hearing, an officer of the department explained:

> The changes will empower fair work inspectors to monitor key aspects of employer compliance with sponsorship obligations—that 457 visa holders are being paid the market rates and that the job being done by 457 visa holders matches the job title and description approved at the time of nomination. These are the two key features of the 457. During their regular work site visits, when…[FWO inspectors] come across 457 visa holders, they would need to check that information and pass that information or any information about non-compliance on those two aspects of 457 visas to [the department].[39]

3.34 A number of submitters and witnesses expressed their support for this development, and commented that the addition of the FWO inspectors should increase the effectiveness of the compliance monitoring and enforcement effort in relation to the 457 visa program, as well as potentially providing a better appreciation of the level of abuse and exploitation of 457 visa workers.[40]

Workplace rights, including occupational health and safety laws

3.35 The committee notes that, as with sponsorship obligations, the capacity to effectively monitor compliance with and enforce workplace rights, including occupational health and safety laws, is integral to ensuring that the 457 visa program's fundamental tenets are not undermined.

3.36 The departments' submission advised that, as with all Australian workers, 457 visa workers' rights and conditions are protected by workplace relations law, with the FWO, Fair Work Building and Construction and state and territory departments all having a role in ensuring compliance with and enforcement of workplace rights and

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37 The Hon Brendan O'Connor, MP, Minister for Immigration and Citizenship; and the Hon Bill Shorten, MP, 'Fair Work inspectors to monitor rogue 457 employers', joint media release, 23 February 2013.

38 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, Senate Legal and Constitutional Affairs Committee, 27 May 2013, p. 72.

39 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, Senate Legal and Constitutional Affairs Committee, 27 May 2013, p. 72.

40 See, for example, Mr Stephen Bolton, Senior Adviser, Employment Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 23 May 2013, p. 20; Law Council of Australia, *Submission 29*, p. 12; and Australian Industry Group, *Submission 16*, p. 5.

safety in relation to the 457 visa program.[41] If a 457 visa sponsor is found to have contravened a Commonwealth, state or territory law the department may sanction that sponsor.[42]

3.37 The department currently has or is seeking cooperative arrangements with relevant agencies and bodies regarding workplace rights and safety matters, including:

- an Australia-wide memorandum of understanding with Workcover to formally enable the exchange of information on workplace safety related matters; and
- an umbrella agreement with all states and territories in relation to the harmonisation of workplace health and safety laws under the *Work Health and Safety Act 2011* (Cth).[43]

3.38 The committee heard that, in a number of areas, laws protecting workers' rights do not provide sufficient protection or entitlement for 457 visa workers. The HRCA submission observed that such differential treatment gives rise to concerns regarding the rights of 457 visa workers not to be discriminated against and to have access to effective remedies. Further, it noted:

> By creating the potential for a second-tier of workers alongside local workers, these regulatory gaps can depress wages and working conditions for local workers.[44]

3.39 The CFMEU submission noted that 457 visa workers are currently not eligible for Commonwealth financial assistance in the case of insolvency or bankruptcy of their sponsoring employee, and called for the *Fair Entitlements Guarantee Act 2012* to be amended to provide them with entitlements under this scheme.[45]

3.40 The HRCA noted that, in other cases, although 457 visa holders possess the same substantive rights as local workers, they face potential barriers to effective enforcement of these rights arising from their special vulnerability as migrants. In particular, the requirement for a 457 visa holder to leave Australia on cessation of the employment relationship could substantially impair their ability to pursue claims under anti-discrimination and workplace legislation:

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41 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 20.

42 Department of Immigration and Citizenship website, 'Sponsors [sic] Obligations', http://www.immi.gov.au/skilled/skilled-workers/sbs/obligations-employer.htm (accessed 11 June 2013).

43 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 20.

44 Human Rights Council of Australia, *Submission 33*, p. 8.

45 Construction, Forestry, Mining and Energy Union, *Submission 41*, pp 19-21.

> To provide just one example, 457 visa-holders are legally entitled to bring claims of unfair dismissal against their employer sponsor under the *Fair Work Act 2009*. However, once an employer has terminated the employment relationship, 457 visas are liable to cancellation…[of their visa] after 28 days. There is no standard process through which workers with meritorious claims can be granted a Bridging visa to regularise their status past this time period…It has been commonly reported that some employers take advantage of these relative difficulties faced by 457 visa-holders. This area of employment law also illuminates the differential remedial entitlements of temporary migrants workers: the primary remedy for unfair dismissal, reinstatement, is typically not be available where a visa sponsorship is no longer in effect.[46]

3.41 Similarly, the CFMEU also observed that 457 visa holders' entitlements under Commonwealth and state and territory workplace compensation Acts cease upon their leaving Australia, and called for the making of relevant amendments to legislation, and agreements with the states and territories, to address this loss of entitlement. It was suggested that this could be achieved through providing that any entitlement would be retained in the event that a 457 visa worker left Australia, or be provided as a lump sum.[47]

457 visa condition 8107

3.42 The requirement for 457 visa holders to depart Australia within 28 days of ceasing to work for their sponsoring employer, discussed immediately above, arises from visa condition 8107, relating to employment conditions. In summary, this condition provides that a 457 visa holder must:

- work in the occupation for which they were nominated;
- work for the sponsor who nominated the position they are working in (or an associated entity); and
- not cease employment for a period of more than 28 consecutive days.

3.43 In the event that a 457 visa holder ceases working for their employer they may either:

- find another employer to sponsor them;
- apply for another type of substantive visa; or
- make appropriate arrangements to depart Australia.[48]

3.44 A number of submitters and witnesses noted that the effect of condition 8107 on the ability 457 visa holders to pursue their rights and to remain in Australia

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46 Human Rights Council of Australia, *Submission 33*, p. 8.

47 Construction, Forestry, Mining and Energy Union, *Submission 41*, p. 21.

48 Department of Immigration and Citizenship website, 'Conditions and obligations for holders of a subclass 457 visa', http://www.immi.gov.au/skilled/skilled-workers/sbs/obligations-employee.htm (accessed 12 June 2013).

(particularly where they may aspire to permanent residency) is to increase their vulnerability to, and potential unwillingness to report, workplace abuse and exploitation. The HRCA submission for example, noted:

> The [International Covenant on Civil and Political Rights] (ICCPR)] guarantees freedom from forced labour. The [International Covenant on Economic, Social and Cultural Rights (ICESCR)] safeguards, more broadly, the 'right of everyone to the opportunity to gain his living by work which he freely chooses or accepts' (Art 6.1). Serious questions arise as to whether the employer sponsorship mechanism in the 457 visa scheme compromises these rights of migrant workers.
>
> …Condition 8107…[including] the extremely tight timeframe within which the visa's validity is affected, arguably restrict visa-holders' freedom of employment. There are clear disadvantages in such an inflexible process, since a migrant worker's dependency on a particular employer or enterprise may result in an unproductive employment relationship or exploitative conditions.[49]

3.45 The HRCA concluded that '[a]s long as 457 visas rely for their validity on the ongoing sponsorship of employers, 457 visa-holders may have as much if not more to lose from government detection of an employers' non-compliance with immigration rules'.[50]

3.46 In light of concerns about the effect of the 28-day limit on 457 visa holders remaining in Australia on cessation of the employment relationship, the HRCA, in addition to a number of other submitters and witnesses, supported an extension of the period, with some specifying 90 days as appropriate.[51]

3.47 However, other witnesses maintained that the apparent harshness of condition 8107 is ameliorated in practice by the department's administrative approach to enforcement of the condition. Mr Wayne Parcell, Secretary, Australian Capital Territory and New South Wales, MIA, for example, advised:

> …the department's practices at around the 28-day mark are to notify the individual of the department's intention to consider cancellation of the visa if they have no further employment, at which point the individual has an opportunity to respond to the department, usually in about 14 days, to advise the department of reasons why the visa should not be cancelled. The

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49 Human Rights Council of Australia, *Submission 33*, p. 5. See also, for example, Mr Tony Sheldon, National Secretary, Transport Workers' Union of Australia, *Committee Hansard*, 23 May 2013, pp 7 and 9-10.

50 Human Rights Council of Australia, *Submission 33*, p. 6.

51 Human Rights Council of Australia, *Submission 33*, p. 6. See also: Mr Richard Gunn, Migration law Committee, International Law Section, Law Council of Australia, *Committee Hansard*, 23 May 2013, p. 35; Ms Katie Malyon, Vice-Chair, Migration Law Committee, Law Council of Australia, *Committee Hansard*, 23 May 2013, p. 35; Mr Stephen Bolton, Senior Adviser, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 23 May 2013, p. 21; and Ms Angela Chan, National President, Migration Institute of Australia, *Committee Hansard*, 23 May 2013, p. 29.

> practical reality is, though, that people can in fact put their case to the department and an officer can make a decision to allow the person more time. Alternatively, the department could go on to make a decision, the ultimate outcome being that the person might potentially be in Australia for 60 days or so.[52]

Provision of migration assistance by employers

3.48 A number of submitters and witnesses expressed concerns that a potential area of vulnerability of 457 visa holders arose in connection with the current ability of employers, under current legislation, to provide assistance to prospective 457 visa employees.[53]

3.49 The LCA, for example, submitted that employers being able to act as intermediary between a prospective employee and the department represents a conflict of interest and potentially diminishes the former's 'knowledge of, and access to, their rights under Australian immigration and workplace laws'.[54] The LCA was aware of 'numerous instances' in which sponsored employees had not received copies of visa approval notifications and were unaware of their visa conditions and sources of information regarding work rights.[55]

3.50 In addition, employers were not necessarily adequately versed in the legislation, policies and procedures relevant to the 457 visa program, and were not accountable under the code of conduct and ethical and professional standards that apply to registered migration agents.[56]

3.51 In light of these concerns, the LCA recommended that employers be prevented from providing assistance to prospective employees or, alternatively, be required to provide a full copy of the visa approval notification to a 457 visa holder, as well as information regarding the sponsor's obligations and penalties for any failure to comply.[57]

Provision of information to 457 visa holders

3.52 More generally, a number of submitters and witnesses suggested to the inquiry that improved dissemination of information to 457 visa holders regarding

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52 Mr Wayne Parcell, Secretary, Australian Capital Territory and New South Wales, Migration Institute of Australia, *Submission 7,* p. 29. See also: Mr Richard Gunn, Migration Law Committee, International Law Section, Law Council of Australia, *Committee Hansard*, 23 May 2013, p. 33; and Mr Robert Walsh, Managing Partner, Australia and New Zealand, Fragomen, *Committee Hansard*, 23 May 2013, p. 53.

53 Law Council of Australia, *Supplementary submission*, p. 6.

54 Law Council of Australia, *Supplementary submission*, p. 7.

55 Law Council of Australia, *Supplementary submission*, p. 7. See also: Human Rights Council of Australia, *Submission 33*, Attachment 1, p. 5.

56 Law Council of Australia, *Supplementary submission*, p. 7; and Migration Institute of Australia, *Submission 7*, pp 15-16.

57 Law Council of Australia, *Supplementary submission*, p. 7.

sponsors' obligations, workplace and human rights, and sources of information, advice and assistance while working in Australia could help to reduce any vulnerability of such workers.[58]

3.53 Suggestions in relation to this issue included introducing mandatory requirements for the department and/or employers to provide specified information, and ensuring a sufficiently broad array of printed and online resources directed at 457 visa holders.

457 visa program as a permanent migration pathway

3.54 A further issue of concern to some submitters and witnesses was the extent to which the vulnerability of 457 visa workers is affected by the policy settings relevant to the 457 visa program as a permanent migration pathway.

3.55 On this issue, the submission of Dr Joanna Howe, Professor Alexander Reilly and Professor Andrew Stewart, recalling the special vulnerability of 457 visa workers (particularly in the case of low- and semi-skilled workers and those aspirating to permanent residency), noted that exclusive reliance on an employer-sponsored pathway to permanent residency could increase a person's vulnerability to pressure to perform unsafe work, accept low wages or suffer sub-standard conditions without complaint.[59]

3.56 The HRCA submitted that reliance on employer-nominated pathways to permanent residence had in fact increased since changes affecting independent migration pathways in 2008. Conditions attached to the Employer Nomination Scheme (subclass 186), for example, through which 457 visa holders may transition to permanent residency, could therefore be operating to increase or entrench the vulnerability of such persons:

> ...this scheme requires 457 visa-holders to have worked for their sponsoring employer for the last two years and to secure an offer from that same employer for at least a further two years. By creating such strong incentives to remain employed with a sponsoring employer, this policy amplifies 457 visa-holders' reliance upon employers and increases the prospect of abuse of migrant workers' rights.[60]

3.57 The HRCA recommended that 457 visa holders and holders of employer nominated visas generally be permitted to change employers more easily so as to reduce their dependence on sponsoring employers.[61]

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58 See, for example, Migration Institute of Australia, *Submission 7*, p. 10; Mr Stephen Bolton, Senior Adviser, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 23 May 2013, p. 22; and Mr Andrew Bartlett, Research Fellow, Migration Law and Practice, Migration Law Program, Australian National University, *Committee Hansard*, 23 May 2013, p. 58.

59 Dr Joanna Howe, Professor Alexander Reilly and Professor Andrew Stewart, *Submission 11*, p. 7.

60 Human Rights Council of Australia, *Submission 33*, pp 5-6.

61 Human Rights Council of Australia, *Submission 33*, pp 5-6.

3.58 Similarly, the CFMEU noted that the employer-sponsored Regional Sponsored Migration Scheme (RSMS) visa is a frequent pathway for 457 visa holders, with approximately 80 per cent of such visas granted to 457 visa holders.[62] The CFMEU was concerned that a condition of this visa is that the visa holder remain employed in the nominated position in the regional area for at least two years, or risk cancellation of the visa:

> It is unacceptable that a single employer can effectively determine whether a worker can continue to hold a PR [permanent residency] visa in Australia. This arrangement continues the state of labour bonded to the employer that is such an objectionable feature of the original 457 temporary visa program.
>
> It places excessive powers in the hands of employers and completely distorts the bargaining relationship between employers and workers. It guarantees – under duress – compliance with employer-determined wages and conditions for the duration of the bonded period.[63]

3.59 Accordingly, the CFMEU called for the removal of this condition on holders of an RSMS visa.[64]

3.60 Dr Joanna Howe, Professor Alexander Reilly and Professor Andrew Stewart suggested that a possible way to ameliorate the potential for increased vulnerability of 457 visa holders arising from the use of the program as an avenue to permanent migration would be to restrict the length of time which a person may hold such a visa. At the end of that time, the person would be required either to return home or be offered permanent residence.[65]

3.61 The CEPU, however, called for the severing of the 'link between the [457 visa] temporary scheme and permanent residency', given that the less stringent requirements for entry through the 457 visa program made it likely that the program was being used as a preferred avenue of permanent migration, to the detriment of the stated policy aims of both the 457 and general skilled migration programs.[66]

COMMITTEE COMMENT

3.62 A significant body of evidence received by the inquiry drew attention to the special vulnerability of 457 visa holders, and the relevance of this fact to the extent to which the policy settings of the 457 visa program effectively ensure the protection of such workers' rights, and that their employment conditions are no less favourable than those under which local workers are employed. These matters raise fundamental issues of human rights, and interact directly with the labour market objectives of the 457 visa program, which are to ensure that 457 visa holders are employed only in

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62 Construction, Forestry, Mining and Energy Union, *Submission 41*, p. 22.

63 Construction, Forestry, Mining and Energy Union, *Submission 41*, p. 22.

64 Construction, Forestry, Mining and Energy Union, *Submission 41*, pp 3 and 22-23.

65 Dr Joanna Howe, Professor Alexander Reilly and Professor Andrew Stewart, *Submission 11*, p. 7.

66 Communications Electrical Plumbing Union, *Submission 30*, pp 6 and 28.

response to genuine skill shortages, and that employment opportunities and conditions of local workers are adequately protected.

3.63 In simple terms, any unwarranted discrimination (that is, discrimination not reasonably and proportionally directed to the legitimate aims of the 457 visa program) or shortfall in the employment conditions pertaining to 457 visa holders may increase the potential for their abuse and exploitation, and for employers to seek to engage such workers for reasons other than to fill a position subject to a genuine skill shortage.

3.64 The particular vulnerability of 457 visa workers may arise from any one or a combination of factors connected to their migrant status, such as language barriers. This is particularly the case for those 457 visa workers aspiring to permanent residency, who may be more likely to accept, and less likely to report, any instances of abuse or exploitation for fear of jeopardising their visa status or prospects of permanent residency.

3.65 A number of submitters and witnesses addressed the question of the current extent of abuse and exploitation of 457 visa workers in Australia. The committee considered a range of evidence on this point, including anecdotal and publicly reported cases and surveys, confidential submissions detailing alleged cases of abuse and exploitation, levels of reporting through various means and the results of the department's compliance monitoring and enforcement activities in relation to the 457 visa program. This evidence suggests that, while there is certainly a degree of noncompliant behaviour, the majority of employers use the 457 visa program for its legitimate purposes—that is, to source overseas workers to fill positions which are unable to be filled locally.

3.66 However, a prudent analysis of any degree of abuse and exploitation of 457 visa holders must also take into account the seriousness of the consequences of abuse and exploitation for 457 visa workers, and reflect an appreciation of the likelihood that there is at least some degree of under-reporting arising from their particular vulnerability. In this respect, the committee notes that abuse and exploitation of 457 visa workers may involve serious breaches of their human and workplace rights, and there was some evidence that 457 visa workers may be vulnerable to higher rates of workplace injury and death.

3.67 Accordingly, the focus of the committee's consideration of such matters was not to determine whether there is an 'acceptable' degree of noncompliance in the 457 visa program, but whether the current policy settings of the program are appropriate to prevent, detect and sanction noncompliant behaviour, taking into account the seriousness of the consequences of any such behaviour.

3.68 However, given the possibility that 457 visa workers may have been or are subject to higher rates of workplace injury and death, which the committee regards as a matter of the utmost seriousness, and, more broadly, the potential for under-reporting of abuse and exploitation in relation to such workers, the committee considers that the Government should initiate an inquiry on the question of whether temporary migrant workers in Australia are adequately protected by relevant

workplace and occupational health and safety laws. Recommendation 5 below is directed to this matter.

Compliance monitoring and enforcement

3.69 The inquiry revealed relatively widespread concern over the extent and effectiveness of compliance monitoring and enforcement that takes place in relation to the 457 visa program. Such concerns were generally based on the small proportion of sponsors annually subject to monitoring events, as well as the small number of sanctions and civil penalties annually arising from the compliance monitoring and enforcement effort.

3.70 Many submitters and witnesses expressed the view that, on the basis of these outcomes, the department is significantly under-resourced in terms of its compliance monitoring and enforcement activities.

3.71 Evidence from the department indicated that the compliance monitoring and enforcement effort in relation to the 457 visa program has recently undergone a shift in focus from education of sponsors to detection and enforcement activities.

3.72 The department also drew attention to the Government's intention to empower FWO inspectors to monitor sponsorship obligations under the *Migration Act 1958*. This proposal drew widespread support from submitters and witnesses. The legislative basis for this proposal was included in the Migration Amendment (Temporary Sponsored Visas) Bill 2013 (the bill), introduced into the House of Representatives on 6 June 2013, and the matter is therefore further discussed in Chapter 5 of this report.

Workplace rights, including occupational health and safety laws

3.73 Evidence to the inquiry revealed a number of areas of concern in relation to the application of Australian workplace rights, including occupational health and safety laws.

3.74 First, the committee was advised that 457 visa workers are currently not eligible for Commonwealth financial assistance, under the *Fair Entitlements Guarantee Act 2012*, in the case of insolvency or bankruptcy of their sponsoring employee.

3.75 In the committee's view, the omission of 457 visa workers from eligibility for this scheme is, on its face, discriminatory, given that there is no coherent policy basis justifying the distinction between the entitlements of local and 457 visa workers in such circumstances. Accordingly, the committee considers that the *Fair Entitlements Guarantee Act 2012* should be amended such that 457 visa holders are made eligible for entitlements under the scheme.

Recommendation 4

3.76 The committee recommends that the *Fair Entitlements Guarantee Act 2012* be amended to make 457 visa holders eligible for entitlements under the Fair Entitlements Guarantee scheme.

3.77 Second, a number of submitters and witnesses provided evidence that 457 visa workers face potential barriers to seeking effective remedies under workplace and

occupational health and safety laws. In particular, the requirement for a 457 visa holder to leave Australia on cessation of the employment relationship can substantially impair their ability to pursue claims under anti-discrimination and workplace legislation. Further, a 457 visa holders' entitlements under Commonwealth and state and territory workplace compensation Acts ceases upon their leaving Australia, again leading to substantively discriminatory and unfair outcomes, particularly in cases where that person was required to leave the country due to cessation of the employment relationship.

3.78 In the committee's view, the substantive impairment of 457 visa holders in respect of seeking effective remedies or maintaining entitlements under workplace and occupational health and safety laws undermines one of the clear policy aims of the 457 visa program, namely that 457 visa holders receive no less favourable conditions than local workers. The committee notes that, in addition to amendment and harmonisation of relevant Commonwealth and state and territory legislation and schemes, addressing this substantive impairment of 457 visa workers' rights may also require changes to the immigration program to provide adequate bridging arrangements to allow 457 visa workers to pursue meritorious claims under workplace and occupational health and safety legislation.

Recommendation 5

3.79 The committee recommends that the Government initiate an inquiry into the extent to which relevant workplace and occupational health and safety legislation protects the legal rights, remedies and entitlements of 457 visa holders and whether temporary migrant workers in Australia are adequately protected by relevant workplace and occupational health and safety laws.

Recommendation 6

3.80 The committee recommends that the immigration program be reviewed and, if necessary, amended to provide adequate bridging arrangements for 457 visa workers to pursue meritorious claims under workplace and occupational health and safety legislation.

457 visa condition 8107

3.81 In a related matter, a number of submitters and witnesses were critical of the current 457 visa condition which requires a visa holder not to cease working for their sponsoring employer for a period of more than 28 days, or else face cancellation of their visa and subsequent deportation.

3.82 The committee heard that this requirement may contribute to the vulnerability of 457 visa workers, insofar as the very short timeframe may increase a visa holder's dependence on their sponsor for maintaining their visa status, thereby reducing their willingness to report, and increasing their vulnerability to, abuse and exploitation.

3.83 In light of these concerns, the inquiry registered a broad level of support for increasing the 28-day period in relation to condition 8107 to 90 days, in acknowledgement that a longer period may reduce the dependence of 457 visa workers on their employers and potentially increase rates of reporting of abuse and exploitation.

3.84 The committee notes that the legislative basis for this proposal was included in the bill introduced into the House of Representatives on 6 June 2013, and the matter is therefore further discussed in Chapter 5 of this report.

Provision of migration assistance by employers

3.85 A number of submitters and witnesses expressed concern that, under current legislation, employers are able to provide assistance to prospective 457 visa employees.

3.86 This was seen as being problematic on a number of fronts. First, such arrangements may increase the reliance of 457 visa workers on their employers, potentially increasing their vulnerability to abuse and exploitation. Second, an employer's lack of expertise or knowledge in relation to the immigration system may result in a visa holder having an inaccurate or incomplete understanding of the rights, obligations and conditions pertaining to the 457 visa and program. Third, employers are not accountable under the code of conduct and ethical and professional standards that apply to registered migration agents in the giving of such assistance.

3.87 While the committee acknowledges concerns in this area, it notes that the amount of evidence received on this issue was limited. Given this, and without an appreciation of the full range of circumstances in which it might be desirable or even necessary for employers to provide assistance to prospective workers, the committee makes no recommendation in this case.

3.88 The committee notes that the concerns which might arise from the giving of incomplete or defective advice to prospective or successful 457 visa holders by employers may be ameliorated by ensuring more generally the provision of complete and accurate information.

Provision of information to 457 visa holders

3.89 On this issue, a number of submitters and witnesses suggested to the inquiry that improved dissemination of information to 457 visa holders regarding sponsors' obligations; workplace and human rights; and sources of information, advice and assistance while working in Australia could help to reduce the vulnerability of such workers.

3.90 While the committee acknowledges that there exists a number of sources of information and assistance on which 457 visa holders in Australia may rely, including the department, the FWO, unions and formal and informal community migrant networks, it notes also the importance of ensuring that authoritative, comprehensive and accessible (that is, in a language and form able to be easily comprehended by the intended recipient) information is provided to 457 visa workers upon approval, and any subsequent amendment or re-approval, of their visa application. The committee considers that such information provided at early and transitional stages could reduce the potential for misinformation and misunderstanding to intrude, and ensure that 457 visa workers are in possession of complete and accurate information at critical times.

Recommendation 7

3.91 The committee recommends that the Department of Immigration and Citizenship be required to provide 457 visa holders, on each approval, variation or re-approval of an application, with comprehensive information regarding sponsors' obligations; relevant workplace and human rights governing the employment relationship; and sources of workplace, legal and migrant advice and assistance while working in Australia.

CHAPTER 4

ENTERPRISE MIGRATION AGREEMENTS AND REGIONAL MIGRATION AGREEMENTS

Introduction

4.1 This chapter addresses the inquiry's terms of reference as they apply to Enterprise Migration Agreements (EMAs) and Regional Migration Agreements (RMAs).

Enterprise Migration Agreements

4.2 EMAs are project-wide temporary overseas migration arrangements for large-scale resource projects that are intended to address the skilled labour needs of the resource sector.[1] EMAs are designed to supplement a local labour force to meet a temporary spike in demand associated with major projects and ensure that skill shortages do not act as a constraint.[2]

4.3 To be eligible to request an EMA, resource projects must have a capital expenditure of more than two billion dollars and a peak workforce of more than 1500 workers.[3]

4.4 The implementation of EMAs was announced in the 2011-12 Budget in response to recommendations from the National Resources Sector Employment Taskforce (NRSET), which had been tasked with the development of a workforce development plan for major resource, energy and related infrastructure projects in Australia, as well as a plan to address labour and skill shortage issues in the resources sector.[4] The final report of the NRSET recommended the introduction of EMAs as a new temporary migration initiative to help address the skill needs of the resources sector.

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1 Department of Immigration and Citizenship website, 'Fact Sheet 48a – Enterprise Migration Agreements', http://www.immi.gov.au/media/fact-sheets/48a-enterprise.htm (accessed 16 May 2013).

2 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 4.

3 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 4.

4 Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education website, 'National Resources Sector Employment Taskforce' (Terms of Reference), http://www.innovation.gov.au/Skills/SkillsTrainingAndWorkforceDevelopment/NationalResourcesSectorWorkforceStrategy/NationalResourcesSectorEmploymentTaskforce/Pages/default.aspx (accessed 16 May 2013).

4.5 The inquiry heard that there are currently no EMAs in place; however, there is in-principle approval for an EMA with Roy Hill Holdings (Roy Hill) for the Roy Hill Iron Ore Project, subject to negotiation of a deed of agreement, with three further applications for an EMA currently subject to internal government processes.[5] The submission of the Department of Immigration and Citizenship (the department); the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism (the departments' submission) advised that the terms of the prospective Roy Hill EMA are still being negotiated.[6]

4.6 At a Senate estimates hearing in May 2013, an officer of the department advised that Roy Hill has announced that, while the project may no longer need overseas workers due to labour market changes, the company intended to continue to negotiate the deed of agreement as a safety net should the need for overseas labour arise.[7] Regarding the nature of the negotiations over the deed of agreement, the officer advised:

> Essentially, the finalisation of the negotiation will be dependent upon both sides reaching a mutually satisfactory position on the draft deed of agreement and all the clauses and provisions in the draft deed of agreement. …[The] department [has] made significant progress in resolving a number of issues that were initially raised by Roy Hill. There are still a few outstanding issues that…essentially involve consideration by the government, and the government is now looking into this.[8]

Process of negotiating EMAs

4.7 A number of submitters and witnesses expressed concern at the apparent difficulties attendant to the successful negotiation of EMAs. The Migration Institute of Australia (MIA) submitted that the absence of guidelines for the making of EMA applications was a factor in this:

> It should be noted that there are presently no EMA Submission Guidelines in place on DIAC's website as they are understood to be currently being rewritten…
>
> It is understood that there are three other EMAs [in addition to Roy Hill] that were lodged by Bechtel and there may be others. However, it is well known in the migration industry that companies are holding off lodging

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5 Mr Kruno Kukoc, Department of Immigration and Citizenship, *Estimates Hansard*, Senate Legal and Constitutional Affairs Committee, 11 February 2013, pp 36-37; and *Estimates Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, 27 May 2013, p. 65.

6 Department of Immigration and Citizenship, *Submission 24*, p. 4.

7 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, 27 May 2013, p. 65.

8 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, 27 May 2013, p. 66.

> …[EMAs] and Labour Agreements until after September because of the uncertainty of the outcome...[9]

4.8 The Minerals Council of Australia submitted:

> Enterprise Migration Agreements have not been allowed to work effectively since their introduction. Already somewhat unattractive to many employers because of their heavy union consultation requirements, they have faced a hysterical campaign from fringe elements and sections of the labour movement, despite strong safeguards including the need for employers to provide a training plan, labour market analysis and workforce plan. EMAs would have been market responsive like 457s, but on a mass scale for large scale projects, acting as a safety net in the event of local skills shortages. It is our view, however, that the campaign for further tightening of the EMA guidelines is aimed at rendering them unworkable, thus adding an extra element of risk to large construction projects in the mining sector.[10]

Regional Migration Agreements

4.9 RMAs are agreements between the Australian Government and a state or territory government or local council that are intended to address labour shortages in regional Australia, particularly remote regions and regions impacted by resource projects.[11] Information on the department's website indicates that RMAs will establish the overarching arrangements for the sponsorship of overseas workers in a particular location, including eligible occupations, the number of workers and training, under which employers will sign individual labour agreements.[12]

4.10 The implementation of RMAs was announced as a new temporary skilled migration initiative in the 2011-12 Budget, to help regions that are isolated from large population centres or experiencing workforce needs, including as a result of the resources boom.

4.11 There are currently no RMAs in place; however, the Government is currently considering a submission for an RMA from the Northern Territory Government (NTG), which was lodged in 'late 2012.[13]

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9 Migration Institute of Australia, *Submission 7*, p. 9.

10 Minerals Council of Australia, *Submission 8*, p. 4.

11 Department of Immigration and Citizenship website, 'Fact Sheet 48c – Regional Migration Agreement', http://www.immi.gov.au/media/fact-sheets/48c-rma.htm (accessed 16 May 2013).

12 Department of Immigration and Citizenship website, 'Fact Sheet 48c – Regional Migration Agreement', http://www.immi.gov.au/media/fact-sheets/48c-rma.htm (accessed 16 May 2013).

13 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 4; and Northern Territory Government, *Submission 25*, p. 15; and Northern Territory Government, *Submission 25*, p. 15.

Demand for RMAs

4.12 The evidence of a number of submitters and witnesses highlighted the need for the regionally-based RMAs as an element of the 457 visa program. In general terms, it was argued that the current requirements of the mainstream 457 visa program prevent many regional employers from accessing the program, despite the workforce pressures that arise from geographical factors and the impacts of large-scale resource projects. On this issue, The MIA submission observed:

> Rural industries and trades are desperately in need of support in regional and remote areas and find it very difficult to fit within the very narrow Subclass 457 criteria at present.[14]

4.13 The MIA noted that the Temporary Skilled Migration Income Threshold (TSMIT), for example, was 'out of kilter' with salaries paid to workers in rural and regional Australia, making it difficult for employers to sponsor overseas workers under the scheme.[15]

4.14 Similarly, the submission of the NTG noted that the current (mainstream) 457 visa program 'does not effectively respond to skills shortages in the private sector in the Northern Territory', due to such factors as low unemployment, high growth and high demand generated by major resource projects.[16] The impact of an LNG Plant between 2006 and 2008, for example, had resulted in skill shortages impacting on the Northern Territory's small and medium enterprises (SMEs), many of which utilised overseas workers to meet their workforce needs. However, the current sponsorship requirements and program settings, including the English language requirements and TSMIT, were not well suited to the particular characteristics of the Northern Territory employer profile and labour market.[17] In the context of these considerations, the NTG submission noted:

> …predicted workforce demands of major resource projects in northern Australia, including the Darwin based Ichthys LNG project, and the impact it is believed they will have on Northern Territory SMEs' workforces were the catalysts for the Northern Territory seeking RMAs for the Territory. Experience suggests that SMEs in regions proximate to where these projects are located will struggle to retain their workforces as they are not able to match the salaries being offered by the resources sector.[18]

Process of negotiating RMAs

4.15 In light of the apparent need for RMAs, submitters and witnesses expressed concern at the uncertainty in the process for negotiating such agreements to date. In respect of the agreement currently under negotiation, the NTG submission stated:

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14 Migration Institute of Australia, *Submission 7*, p. 12.

15 Migration Institute of Australia, *Submission 7*, p. 12.

16 Northern Territory Government, *Submission 25*, pp 2 and 8.

17 Northern Territory Government, *Submission 25*, pp 9-13.

18 Northern Territory Government, *Submission 25*, p. 15.

> It is understood that the Australian Government is yet to endorse the guidelines for RMAs. Further DIAC cannot finalise its consideration of the Northern Territory's RMA submission until the government's policy is in place. The Australian Government's policy and the DIAC processes are not yet known. Consequently the final composition and elements of RMAs for the Northern Territory are also yet to be determined. Therefore it is not possible to provide informed comments or assessments of the impact and benefits of the RMAs or on how responsive they will be to labour market demands.[19]

4.16 The Western Australian Government submission stated that it was 'frustrated with the continual delays in the release of the guidelines for [the RMA program]', noting that the RMAs were considered to be 'an effective mechanism' for addressing skill shortages experienced in the regional areas of that state.[20]

4.17 The submission of the Chamber of Commerce and Industry Queensland, noting that an RMA had yet to be approved, stated that the apparent 'difficulties involved with their establishment makes their role in the overall skilled migration framework questionable'.[21] It noted:

> The NT's experience with putting an RMA in place has implications for Queensland. While the announcement of major development projects in central and northern Queensland (such as those recently announced on Great Keppel Island) are welcomed, those regions have been identified as having pronounced skills shortages and labour mobility issues, which could put such developments (or future developments) at risk due to difficulties in securing an adequate skilled workforce. The time that is apparently involved with putting an RMA in place does not make them a viable means of alleviating this issue, as doing so would delay projects significantly.[22]

Labour market testing

4.18 Some submitters and witnesses were critical that EMAs and RMAs are not subject to labour market testing (LMT). The submission of the Australian Council of Trade Unions, for example, stated:

> 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.[23]

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19 Northern Territory Government, *Submission 25*, p. 15.

20 Western Australian Government, *Submission 45*, p. 6.

21 Chamber of Commerce and Industry Queensland, *Submission 13*, p. 1.

22 Chamber of Commerce and Industry Queensland, *Submission 13*, p. 6.

23 Australian Council of Trade Unions, *Submission 40*, p. 6.

4.19 With reference to the particular example of the Roy Hill RMA, Mr Peter Tighe, National Secretary, Communications Electrical Plumbing Union, noted:

> With the RMA that was signed in relation to the Roy Hill project, there was a requirement to bring some 500 electrical workers into Australia. We have now been told that, quite frankly, that is probably not going to be the case, because the measurement done in relation to the RMA was based on an academic document, basically on labour market analysis, not on labour market testing. And that is the critical thing here. Labour market testing—a requirement for someone to go to a jobs board, a requirement for rigorous testing of the employer's requirement for that skilled labour that they say they cannot find in Australia—needs to be tightened up.[24]

4.20 The submission of the Australian Industry Group, however, stated that labour market testing was already a requirement of EMAs and RMAs:

> …[EMAs and RMAs] require significant demonstration that the proposed positions cannot be filled from the local labour market. As the Department of Immigration and Citizenship web site itself states…[in relation to RMAs:]
>
> The employer must be able to demonstrate that they have made significant efforts to recruit workers from the Australian labour market before the Australian Government will consider entering into a labour agreement with them. They must provide concrete evidence that there are no appropriately qualified Australian workers readily available.
>
> The employer must provide detailed information about all advertising and recruiting efforts over the past six months. This includes the period the job was advertised for, the number of applications received, the number of applicants who were hired, and reasons why those unsuccessful were found to be unsuitable.
>
> This is sufficient testing given the broader scope of these Agreements over standard 457s. Also, criteria such as TSMIT and Training Commitments (and to some extent the Sponsor obligations) effectively prompt the employers to consider the local labour market first. Adding any further administrative burdens to the visa program will make the visa less accessible and less able to meet the economic need for which it was designed.
>
> Similarly EMAs require: a) Evidence that there are genuine skills shortages in the local area, and b) Evidence of efforts to use Australian workers first.[25]

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24 Mr Peter Tighe, National Secretary, Communications Electrical Plumbing Union, *Committee Hansard*, 23 May 2013, p. 3.

25 Australian Industry Group, *Submission 16*, pp 4-5.

COMMITTEE COMMENT

4.21 The committee notes that Enterprise Migration Agreements (EMAs) and Regional Migration Agreements (RMAs) would appear to offer significant potential to address skill shortages attendant on large-scale resource projects and labour market shortages affecting regional areas due to the impacts of such projects and geographical factors more generally, which are not currently well served by the mainstream 457 visa program.

4.22 The evidence to the inquiry registered frustration at the lack of progress on the negotiation of EMAs and RMAs to date, and the apparent absence of guidelines to assist in the negotiation of such agreements.

4.23 While the committee acknowledges that the element of negotiation required to establish EMAs and RMAs injects an unavoidable level of uncertainty into the expected timeframes and outcomes in relation to finalising such agreements, it is concerned at the absence of guidelines to assist the application process, and to allow stakeholders to frame assessments and expectations regarding the likely suitability of any such agreement to specific projects or regional circumstances. Accordingly, the committee considers that the government should prepare and release submission guidelines for the EMA and RMA application processes.

Recommendation 8

4.24 The committee recommends that the Government prepare and release submission guidelines for Enterprise Migration Agreements and Regional Migration Agreements.

4.25 Beyond these remarks, the committee considers that, in the absence of any operative EMAs or RMAs, the impact of the proposed changes to the 457 visa program on these types of agreements is unclear.

Senate Standing Committee on Education, Employment and Workplace Relations inquiry into the provisions of the Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012

4.26 The committee notes that the Senate Standing Committee on Education, Employment and Workplace Relations finalised an inquiry into the provisions of the Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012 (the EMA bill) in March 2013.

4.27 Given the significant intersection of the issues examined in that inquiry and the terms of reference for this inquiry, the committee draws attention to the analysis of issues contained in Senate Standing Committee on Education, Employment and Workplace Relations report on the EMA bill.

CHAPTER 5

POTENTIAL IMPACT OF PROPOSED CHANGES TO THE 457 VISA PROGRAM

Introduction

5.1 This chapter addresses inquiry term of reference (j), which required the committee to consider the potential impact of the recently proposed changes to the Temporary Work (Skilled) (subclass 457) visa program (the 457 visa program) on the matters raised by terms of reference (a) to (i).

5.2 As term of reference (j) makes clear, the inquiry arose in response to a number of proposed changes to the 457 visa program announced on 23 February 2013 by the Minister for Immigration and Citizenship (the minister). The minister's media release announcing the changes outlined seven areas of proposed reform.[1]

5.3 Information subsequently posted on the website of the Department of Immigration and Citizenship (the department) indicated that the proposed changes would 'be introduced' on 1 July 2013.[2]

5.4 Two of the proposed changes, relating to sponsorship obligations, were the subject of a Regulation Impact Statement (RIS) (dated January 2013) published on the Office of Best Practice Regulation website on 10 April 2013.[3]

5.5 On 2 May 2013, the minister announced the release under freedom of information laws of a Ministerial Advisory Council on Skilled Migration (MACSM) discussion paper in relation to the proposed changes.

5.6 Further information regarding the proposed changes was provided by officers of the department during the May 2013 Senate estimates hearings conducted by the Senate Legal and Constitutional Affairs Legislation Committee.[4]

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1 The Hon Brendan O'Connor, MP, Minister for Immigration and Citizenship, 'Reforms to the temporary work (skilled) (subclass 457) program', media release, 23 February 2013.

2 Department of Immigration and Citizenship, 'Strengthening the integrity of the 457 program', http://www.immi.gov.au/skilled/strengthening-integrity-457-program.htm (accessed 24 April 2013).

3 OBPR ID: 2012/14171, January 2013, available at Department of Finance and Deregulation, 'Sponsorship Obligation Amendments -- Regulation Impact Statement – Department of Immigration and Citizenship', http://ris.finance.gov.au/2013/04/10/sponsorship-obligation-amendments-regulation-impact-statement-department-of-immigration-and-citizenship/ (accessed 13 May 2013).

4 Senate Legal and Constitutional Affairs Legislation Committee, *Estimates Hansard*, 27 May 2013

Migration Amendment (Temporary Sponsored Visas) Bill 2013

5.7 On 6 June 2013, the Government introduced the Migration Amendment (Temporary Sponsored Visas) Bill 2013 (the bill) into the Parliament. Given the timing of the introduction of the bill, it is important to note that none of the evidence provided to, or considered by, the committee for the inquiry was able to specifically address the detail of the bill.

5.8 The explanatory memorandum (EM) to the bill provides the following statement of its purpose:

> The Bill seeks to deal with sponsors who are behaving contrary to the intention of the Temporary Sponsored Work Visa program. Some employers are turning to overseas workers first, rather than investing in local training and recruitment. To address this, the Bill also seeks to ensure a balance between ensuring employment and training opportunities for Australian citizens and Australian permanent residents with that of upholding the rights of non-citizens to work in Australia under the Temporary Sponsored Work Visa program.[5]

5.9 With reference to the inquiry's terms of reference and the main focus of evidence received by the inquiry, the main features of the bill are proposed amendments to the *Migration Act 1958* (the Migration Act) and Migration Regulations 1994 (the regulations) to:

- introduce a labour market testing requirement (LMT)
- enshrine the kinds of sponsorship obligations for which the minister must take reasonable steps to ensure are prescribed in the regulations;
- enhance the enforcement framework in relation to sponsorship to include enforceable undertakings between the minister and an approved sponsor or former approved sponsor and the enforcement of those undertakings;
- empower Fair Work Inspectors to be inspectors under the Migration Act; and
- extend the period in which a Subclass 457 visa holder subject to visa condition 8107 can seek new sponsored employment from 28 consecutive days to 90 consecutive days.[6]

Reason for proposed changes

5.10 In announcing the proposed changes in February 2013, the minister's media release stated that the reforms to the 457 visa program were being proposed 'in response to the changing needs of the Australian economy and domestic employment market', and particularly in the light of concerns that the growth of the 457 visa

5 Migration Amendment (Temporary Sponsored Visas) Bill 2013, explanatory memorandum, p. 2.

6 Migration Amendment (Temporary Sponsored Visas) Bill 2013, explanatory memorandum, pp 2-3.

program was 'out of step' with current skills shortages.[7] The department's website stated that the reforms were 'intended to strengthen the department's 'capacity to identify and prevent employer practices that are not in keeping with the criteria of the subclass 457 program'.[8]

5.11 At the May 2013 Senate estimates hearings and in its submission to the inquiry, the department advised that the package of reforms was being proposed in light of a number of 'integrity concerns' identified by the department in 2012 (see Chapter 2),[9] including:

- a divergence in the historical alignment of the number of 457 visa applications and the general rate of unemployment;[10]
- disparities between the number of 457 visa applications and labour market trends in certain sectors, industries and occupations;
- disparities between the number of 457 visa applications and labour market trends in certain states;
- increased rates of 457 visa applications in historically high-risk occupations for noncompliance;[11]
- increased numbers of onshore 457 visa applications;[12] and
- 'legislative loopholes' allowing the employment of 457 'against the spirit of the 457 legislation and the policy objectives of the overall program'.[13]

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7 The Hon Brendan O'Connor, MP, Minister for Immigration and Citizenship, 'Reforms to the temporary work (skilled) (subclass 457) program', media release, 23 February 2013.

8 Department of Immigration and Citizenship, 'Strengthening the integrity of the 457 program', http://www.immi.gov.au/skilled/strengthening-integrity-457-program.htm (accessed 24 April 2013); and Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, Senate Legal and Constitutional Affairs Legislation Committee , 27 May 2013, p. 70.

9 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, 27 May 2013, p. 71.

10 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, 27 May 2013, p. 71. See also: Department of Immigration and Citizenship; Department of Education, Employment and Workplace Relations; Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and Department of Resources, Energy and Tourism , *Submission 24*, p. 3.

11 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, 27 May 2013, pp 48-49.

12 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, 27 May 2013, p. 71.

13 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Committee Hansard*, 23 May 2013, pp 67-68.

5.12 As Chapter 2 outlines, the need for changes to the 457 visa program on the basis of integrity concerns was disputed in much of the evidence received by the inquiry.

Proposed changes and impacts

Changes affecting nomination of positions

Employer attestation provisions

5.13 Under the current 457 program, sponsors are required to attest to a strong record of, or demonstrated commitment to, employing local labour and non-discriminatory work practices. This is a non-binding commitment, and the MACSM discussion paper noted that the department currently lacks:

> …a legislative basis to take action against sponsors who fail to comply with their attestation, for example by sanctioning or barring the sponsor, or cancelling their sponsorship, where evidence suggests that Subclass 457 visa holders are being employed in preference to Australian citizens and permanent residents.[14]

5.14 The paper stated that the proposed change would 'strengthen the current attestation to make it an ongoing binding commitment' applying for the duration of sponsorship. Regarding the expected impact of the change, the paper stated:

> Nil impact would be anticipated for most program users. In the rare instances where there is a significant body of evidence that an employer is discriminating in favour of overseas workers, an employer may be sanctioned.[15]

Labour market testing

5.15 While the information in the MACSM paper was somewhat unclear on how the proposed strengthening of the attestation provisions would be achieved (particularly given the conclusion that the change would have nil impact on most program users), the minister's media release announcing the changes subsequently suggested that the strengthening of the nomination process would in fact involve the introduction of labour market testing (LMT). It stated that the change would require employers to '*demonstrate* that they are not nominating positions where a genuine shortage does not exist [italics added].[16] The information provided on the department's website stated that it would involve:

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14 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 3.

15 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 3.

16 The Hon Brendan O'Connor, MP, Minister for Immigration and Citizenship, 'Reforms to the temporary work (skilled) (subclass 457) program', media release, 23 February 2013.

> …a requirement for the nominated position to be a genuine vacancy within the business…[with discretion] to allow the department to consider further information if there are concerns the position may have been created specifically to secure a 457 visa without consideration of whether there is an appropriately skilled Australian available.[17]

5.16 The introduction of the bill confirmed the proposal for LMT as a condition to the approval of nominations. In simple terms, the main elements of the LMT condition appear to be:

- sponsors will be required to undertake LMT in relation to a nominated occupation (in a manner consistent with Australia's international trade obligations);
- the condition will be satisfied if the minister is satisfied that a suitably qualified and experienced local worker is not readily available to fill the nominated position;
- the nomination must be accompanied by evidence of LMT, including:
  - information about the sponsor's attempts to recruit suitably qualified and experienced local workers to the position and any other similar positions (such as paid or unpaid advertising),
  - copies of, or references to, any research released in the previous six months relating to labour market trends generally and the nominated occupation,
  - expressions of support from Commonwealth, state or territory government authorities with responsibility for employment matters, and
  - the minister will be able to specify by legislative instrument the class or classes of sponsor to which the LMT will apply, the periods within which LMT must take place, and other types of evidence that may be taken into account for LMT purposes.
- a major disaster exemption to allow sponsors to be exempted from the LMT condition; and
- the ability of the minister to exempt via legislative instrument certain occupations from the LMT condition if the position in relation to the occupation requires certain levels of qualification and/or experience (equating to Australian and New Zealand Standard Classification of Occupations (ANZCO) Skill Level 1 and 2).[18] The minister indicated in the second reading

17 Department of Immigration and Citizenship, 'Strengthening the integrity of the 457 program', http://www.immi.gov.au/skilled/strengthening-integrity-457-program.htm (accessed 15 May 2013).

18 Migration Amendment (Temporary Sponsored Visas) Bill 2013, explanatory memorandum, pp 6-21.

speech to the bill that it would be his intention to exempt most, but not all, Skill Level 1 occupations.[19]

5.17 The explanatory memorandum (EM) to the bill notes that, while a Regulation Impact Statement (RIS) was required for this proposed change, 'the Prime Minister granted an exemption on the basis of exceptional circumstances' and that a 'post-implementation review will be required within 1 to 2 years of implementation'.[20] It is noted that the minister's second reading speech, however, indicated that the Government intended to review the efficacy of the reforms 'within three years' of implementation'.[21]

5.18 The committee notes that the evidence to the inquiry indicated a level of uncertainty amongst submitters and witnesses as to whether LMT was to be a part of the proposed changes. For example, while the Australian Council of Trade Unions (ACTU) was critical of the 'apparent absence' of LMT from the package of changes,[22] the Chamber of Commerce and Industry Queensland was critical on the basis that 'rigorous labour market testing' was being introduced.[23]

5.19 Given this, and noting that all submissions and evidence to the inquiry on the issue of LMT were prepared without reference to the legislative proposal that is now before the Parliament, the committee notes that it is difficult to draw conclusions about the impacts of the proposed change on the 457 visa program beyond the evidence and discussion contained in Chapter 2. This is particularly so in light of the absence of a RIS assessment or dedicated consultation in relation to the proposal.

5.20 To summarise the views in support of and against the introduction of LMT to the 457 visa program, those in favour regarded the broader trends in the program as indicating that, without LMT, the current policy settings of the program are failing to ensure that a proper assessment is being made as to 'whether there are in fact genuine skill shortages that justify the employment of overseas labour in any given case'.[24]

5.21 Opponents of the proposal to introduce LMT generally submitted that the current policy setting of the program are effective in making it more costly for employers to engage 457 visa holders, such that they are sought only when a local worker cannot be found to fill a position. LMT was characterised not only as therefore

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19 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, *House of Representatives Hansard*, 6 June 2013, p. 1.

20 Migration Amendment (Temporary Sponsored Visas) Bill 2013, explanatory memorandum, p. 2.

21 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, *House of Representatives Hansard*, 6 June 2013, p. 1.

22 Australian Council of Trade Unions, *Submission 40*, p. 18.

23 Chamber of Commerce and Industry Queensland, *Submission 13*, p. 6.

24 Australian Council of Trade Unions, *Submission 40*, p. 5.

'unnecessary' but also 'unworkable, impractical and fraught with administrative and bureaucratic problems'.[25]

Genuineness criterion

5.22 The MACSM discussion paper stated that, currently, while employers are required to certify that a nominated position corresponds to the tasks of an occupation eligible under the 457 program, there is no ability for a delegate to consider the veracity of the certification provided. It noted:

> It is not possible for a delegate to refuse a 457 nomination where they have concerns about the occupation. For instance, where the position has been 'dressed up' to appear more skilled or where there is a more appropriate Australian and New Zealand Standard Classification of Occupations (ANZSCO) classification available.
>
> To date delegates have used the 457 visa genuineness criterion to refuse applications. However the validity of approach is in question as many of these decisions have been overturned by the Migration Review Tribunal on the basis that the nomination has already been considered and approved.
>
> There are also concerns that the 457 program is being used to secure the entry or stay of persons, such as a family member or associate, rather than to alleviate a genuine skill shortage. In circumstances where these concerns might be identified there is no recourse for a delegate to reject an application on this basis.[26]

5.23 To address these concerns, it was proposed that the nomination requirements would be amended to require the delegate:

- to be satisfied that the tasks of the nominated occupation correspond to the tasks of an eligible occupation;
- to be satisfied that the position associated with the nominated occupation is genuine; and
- to refuse a nomination where there are integrity concerns, taking a range of factors into account, including:
    - whether the terms and conditions of employment are sufficient to attract a qualified person locally
    - whether the tasks of the position correspond to the tasks of the nominated occupation, and
    - whether the nominated position fits broadly within the scope of the activities and scale of the business.

25 Australian Mines and Metals Association, *Submission 22*, p. 13.

26 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 6.

5.24 The measure was expected to have 'no impact on genuine applicants'.[27]

5.25 As discussed in Chapter 2, a number of submitters and witnesses commented on the matter of refusals occurring at the (visa) application stage (that is, after approvals being granted at the sponsorship and nomination stages) on the basis of concerns that the nominated position with the employer was not in fact genuine. This evidence acknowledged that the department may have difficulty making this assessment at the nomination stage under current program settings, and indicated that the current practice contributes to both inconsistency and uncertainty in the application process overall.[28] The committee notes that, on this basis, the impact of the proposed change may be beneficial.

5.26 However, a number of submitters and witnesses noted that the effectiveness and consequent impacts of the change will depend ultimately on the specific legislative proposal for its implementation. Berry Appleman and Leiden (BAL Australia), for example, offered in-principle support for the change but cautioned that its realisation should not penalise the 'vast majority of compliant business sponsors' through 'increased processing times' and 'excessive bureaucratic scrutiny of applications'.[29]

5.27 More particularly, the Australian Chamber of Commerce and Industry noted that the measure:

> [p]otentially will inhibit the ability of businesses to meet skills demand in new and emerging fields. If an employer is looking to branch out into a new field of operation that is not traditionally a 'fit' for the company, this could prevent that business from accessing skilled labour.[30]

Mandatory regulation of certain sponsorship obligations

5.28 Section 140H of the Migration Act (Sponsorship obligations) provides that a sponsor must satisfy the sponsorship obligations prescribed by the regulations. The bill would introduce new section 140HA to prescribe certain sponsorship obligations for which the minister must take all reasonable steps to be prescribed in the regulations for the purposes of section 140H. These are:

- paying a market salary rate (however described) to a visa holder;
- paying prescribed costs to the Commonwealth in relation to locating a former visa holder, and removing a former visa holder from Australia;
- paying prescribed costs of the departure of a visa holder (or a former visa holder) from Australia;

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27 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 6.

28 Law Council of Australia, *Supplementary submission*, p. 8.

29 Berry Appleman and Leiden (BAL Australia), *Submission 12*, p. 10.

30 Australian Chamber of Commerce and Industry, *Submission 21*, p. 17.

- complying with prescribed requirements to keep information, and provide information to the minister;
- notifying the department of prescribed changes in the circumstances of an approved sponsor, a former approved sponsor, a visa holder or a former visa holder;
- cooperating with the exercise of powers under or for the purposes of Subdivision F (which deals with inspector powers);
- ensuring that a visa holder participates in an occupation, program or activity nominated by an approved sponsor (including by preventing the on-hire of a visa holder);
- requiring an approved sponsor or former approved sponsor not to transfer, charge or recover prescribed costs;
- requiring an approved sponsor or former approved sponsor to meet prescribed training requirements.[31]

5.29 In the second reading speech for the bill, the minister stated that this amendment would 'complement the reforms…announced in February 2013' by ensuring that the regulations include sponsorship obligations in relation to the above matters, and indicated that the 'details of these new obligations will be spelt out' in regulations proposed to commence on 1 July 2013.[32]

5.30 While a number of these sponsorship obligations appear to relate to the proposed areas of reform to the 457 visa program, the bill does not contain the detailed legislative proposal for the changes to be introduced on 1 July 2013. The committee notes that this proposed amendment would not, of itself, impact on the current framework and operation of the 457 visa program until such time as regulations are made giving effect to or amending sponsor obligations in the prescribed areas.

5.31 However, some indication of what may be the substance of certain changes is able to be drawn from the sources outlined in the introduction to this chapter.

Market salary rate

5.32 Currently, a sponsor is required to engage a 457 visa holder on equivalent terms and conditions that are or would be provided to a local worker in an equivalent role or position. The MACSM discussion paper notes that, where an Australian worker is employed in an equivalent role, the market salary rate for the nominated position is based on the terms and conditions of that worker. Where there is no equivalent Australian worker, the employer is required to satisfy the department that the terms and conditions of employment are appropriate for that location and industry

31 Migration Amendment (Temporary Sponsored Visas) Bill 2013, explanatory memorandum, pp 19-20.

32 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, *House of Representatives Hansard*, 6 June 2013, p. 3.

and result in earnings above the Temporary Skilled Migration Income Threshold (TSMIT). Evidence might include:

- an applicable modern award or enterprise agreement;
- an enterprise agreement for employees performing equivalent work in similar local workplaces; and
- relevant remuneration surveys or published earnings data or other information endorsed by industry or union associations.[33]

5.33 The requirement to pay the market salary rate to 457 visa holders is intended to ensure that the employment terms and conditions of such workers are no less favourable than local workers, ensuring that they are not discriminated against and that the employment conditions of local workers are not undermined. However, the MACSM discussion paper stated that the current market salary rate provisions are 'not sufficient to ensure equitable remuneration arrangements or that Australians are not disadvantaged', and 'it may be possible for a 457 visa holder to displace an Australian employee on less beneficial terms and conditions of employment for performing the same work in the same location'.[34] This is because, where a sponsor determines the market salary rate according to the methodology specified in accordance with the regulations, the department cannot refuse a nomination if the market salary rate is believed to be uncompetitive compared to other employers.

5.34 As a particular example, the current market rate provisions:

> …allow an employer to create their own market rate through sourcing just one Australian citizen or permanent resident worker willing to work for a particular wage, even though other employers in the same geographical region may remunerate equivalent workers at a higher rate.[35]

5.35 The proposed change to address this concern was identified as amending the market rate provisions to expand their application beyond the particular workplace to that workplace's regional locality. Information on the department's website indicated that, specifically, this would allow consideration of ' comparative salary data for the local labour market'.[36]

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33 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 11.

34 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 11.

35 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 12.

36 Department of Immigration and Citizenship, 'Strengthening the integrity of the 457 program', http://www.immi.gov.au/skilled/strengthening-integrity-457-program.htm (accessed 24 April 2013).

5.36 A further concern was raised in relation to the market rate exemption threshold. This currently provides that if a sponsor nominates annual earnings of $180 000 or more then there is no requirement for the nominated salary to be assessed against market salary rates, which recognises that people earning higher salaries are generally in a position of relative strength in negotiating their employment terms and conditions and are at low risk of exploitation. The MACSM discussion paper stated that conditions in the domestic labour market could also be undermined in cases where an occupation commands a market salary greater than $180 000, and an employer was to engage a 457 visa worker willing to work for $180 000.[37]

5.37 The proposed change to address this concern was identified as increasing the market salary exemption threshold to $250 000. The MACSM discussion paper stated that this would ensure that 'most senior company executives and highly paid professionals will continue to be exempt', but ensure that 457 visa holders on high level salaries are provided equitable remuneration arrangements and that Australian workers are not discriminated against.[38]

5.38 Regarding the expected impact of the proposed changes, the MACSM discussion paper stated:

> The proposed widening of the Market Rates assessment, and associated increase in the exemption threshold to $250 000 would have no impact on genuine users of the program. Rather, these measures would assist in ensuring that the 457 program does not cause a distortion to the genuine market rate by allowing employers to sponsor overseas workers at a less than market rate.[39]

5.39 The Australian Council of Trade Unions offered support for these measures as 'long overdue improvements', and offering some confirmation of the capacity for the current policy settings to impact on the terms and conditions of local workers:

> 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 nonexecutive positions (eg Ship Captains) can fall between $180 000 and $250 000. Under the current threshold, employers can exploit this by

37 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, pp 11-12.

38 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 12.

39 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 12.

> employing a 457 visa workers on $180 000, thereby undercutting Australian workers in those positions.[40]

5.40 Berry Appleman Leiden (BAL Australia) offered in-principle support for these changes, subject to the ability to review the detailed legislation and policy proposal. It noted also that 'appropriate guidelines' should be produced to indicate when the department will exercise the discretion to review comparative salary data.[41]

5.41 Other groups, however, considered that there was no evidence to indicate that the proposed changes were necessary,[42] and endorsed the current arrangements as being adequate.[43]

5.42 Concern about the regulatory impact of the new arrangements was expressed by the Australian Mines and Metals Association (AMMA), which submitted that the ability for a broader assessment of the applicable market rate would impose a debilitating time and expense burden on the employer.[44] AMMA also objected to any increase to the market rate exemption, arguing:

> If this threshold is increased to $250,000 then there will be very few 457 visa applicants who will be eligible for this exemption. Only 457 visa applicants who occupy a very senior executive-level position in the company will be exempt from market rates justification. This will simply increase red-tape for employers and is unnecessary. Clearly workers being paid $180,000 are not having their wages or conditions undercut by their employer.[45]

Sponsor obligation not to transfer, charge or recover prescribed costs, including departure costs

5.43 Currently, the regulations provide that a sponsor must not recover certain costs from a sponsored person (Regulation 2.87). These costs relate specifically to the recruitment of the primary sponsored person and costs associated with becoming or being an approved sponsor (or former approved sponsor), including migration agent costs and departure costs. This requirement is intended to contribute to the policy aim of ensuring that 457 visa workers are relatively more expensive to engage than a local worker.

5.44 The concern underlying proposed changes in relation to this obligation was outlined in the January 2013 RIS relating to sponsorship obligations, which explained:

> Whilst this obligation is operating effectively to prevent the 'recovery' of such costs, it does not prevent a small number of sponsors from transferring these costs to visa holders by requesting upfront payment (thus avoiding the

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40 Australian Council of Trade Unions, *Submission 40*, p. 20.

41 Berry Appleman Leiden (BAL Australia), *Submission 12*, p. 11.

42 Law Council of Australia, *Submission 29*, p. 20.

43 Australian Industry Group, *Submission 16*, p. 8.

44 Australian Mines and Metals Association, *Submission 22*, p. 15.

45 Australian Mines and Metals Association, *Submission 22*, p. 14.

> act of 'recovery'). This practice is contrary to the intention of the obligation and is against the spirit of the 457 visa program.[46]

5.45 The RIS advised that the proposed change to this sponsorship obligation would involve re-wording of the legislation to ensure that approved sponsors are solely responsible for recruitment costs, and are not able to circumvent the act of 'recovery' by otherwise transferring the cost to a visa holder or requesting a visa holder to pay up-front:

> Specifically, it is proposed to require that a sponsor does not transfer or seek to transfer to the sponsored visa holder such costs; or seek payment of such costs from the sponsored visa holder.[47]

5.46 The impact of the change was considered to be minor as it would 'not impact on the majority of sponsors who behave in accordance with program objectives'.[48] The minister's second reading speech to the bill indicated that this change would be effected by the regulations to be introduced from 1 July 2013.[49]

5.47 This measure was not the subject of significant comment in the evidence to the inquiry. However, it was explicitly supported by the Law Council of Australia.[50]

5.48 The committee notes, however, that the analysis provided in the RIS establishes a reasonable case in identifying shortcomings in the current legislation in respect of ensuring that sponsors exclusively bear recruitment and other related costs relating to the engagement of a 457 visa worker. As this is an accepted policy intention of the program's current settings, the proposed change to give effect to this intention appears unlikely to significantly impact on the framework and operation of the 457 visa program.

On-hire arrangements and requirement to keep records

5.49 In relation to on-hire arrangements involving 457 visa workers, the January 2013 RIS relating to sponsorship obligations states that the policy intention of the 457 visa program is that such visa holders 'be in continual paid employment for the period of their visa'. This intention is expressed in Regulation 2.86, which provides that a primary sponsored person be engaged only as an 'employee' of the sponsor (or an associated entity). The RIS notes:

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46 OBPR ID: 2012/14171, January 2013, available at Department of Finance and Deregulation, 'Sponsorship Obligation Amendments -- Regulation Impact Statement – Department of Immigration and Citizenship', p. 16.

47 OBPR ID: 2012/14171, January 2013, available at Department of Finance and Deregulation, 'Sponsorship Obligation Amendments -- Regulation Impact Statement – Department of Immigration and Citizenship', p. 22.

48 OBPR ID: 2012/14171, January 2013, available at Department of Finance and Deregulation, 'Sponsorship Obligation Amendments -- Regulation Impact Statement – Department of Immigration and Citizenship', p. 23.

49 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, *House of Representatives Hansard*, 6 June 2013, p. 3.

50 Law Council of Australia, *Submission 29*, p. 20.

> For the purpose of regulation 2.86, it was never intended that a 457 visa holder be on-hired or engaged in an employment arrangement that resembles that of an independent contractor (unless it is an exempt occupation). These employment arrangements are inherently less secure and it is more likely that employment will not be available on an ongoing basis. Also, an employer is able to bypass the terms and conditions of employment that are associated with a direct employer-employee relationship.[51]

5.50 The RIS outlined two concerns in relation to this sponsorship obligation. First, it noted that in its current form Regulation 2.86 may not prevent employers from being able to on hire 457 visa workers against the policy intent of the program. This is because, under the modern test for determining the employer/employee relationship, a 457 visa worker who is on-hired may still, legally, be an employee of the on-hiring sponsor. While the extent of on-hiring was not known, the RIS noted that some examples of this practice had been identified, and in such cases the department was not able to take action as it was considered the employer would be able to argue that the visa holder had remained their 'employee'.[52]

5.51 Second, the RIS noted concerns over unintended independent contracting arrangements, which, as with on-hire arrangements, are against the policy intention that 457 visa workers fill only genuine skilled vacancies within the sponsor's business. While this was not considered to be widespread, a number of cases had been identified, particularly in the construction industry. As above, the department considered that the application of the legal test for determining the employer/employee relationship may not give rise to a breach of Regulation 2.86 in such cases, as the employer may be able to argue that the visa holder had remained their 'employee'.[53]

5.52 The RIS advised that the proposed change to this sponsorship obligation would involve an amendment to Regulation 2.86 to:

- prohibit on-hire arrangements (outside approved labour agreements), thereby enabling the department to take action against sponsors who do not comply; and
- prevent sponsors from engaging visa holders under unintended independent contracting arrangements by requiring that:

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51 OBPR ID: 2012/14171, January 2013, available at Department of Finance and Deregulation, 'Sponsorship Obligation Amendments -- Regulation Impact Statement – Department of Immigration and Citizenship', p. 13.

52 OBPR ID: 2012/14171, January 2013, available at Department of Finance and Deregulation, 'Sponsorship Obligation Amendments -- Regulation Impact Statement – Department of Immigration and Citizenship', p. 14.

53 OBPR ID: 2012/14171, January 2013, available at Department of Finance and Deregulation, 'Sponsorship Obligation Amendments -- Regulation Impact Statement – Department of Immigration and Citizenship', pp 14-15.

- the sponsored visa holder be engaged on a written contract of employment at nomination and for the duration of the sponsorship,
- the sponsor maintain records of, and provide to the department on request, copies of a written contract of employment vis-à-vis a sponsored visa holder, and
- any subsequent written contract of employment vis-à-vis the sponsored visa holder contains terms and conditions no less beneficial than those approved at nomination.

5.53 A consequential amendment to Regulation 2.82 (Obligation to keep records) was identified as also necessary to enable monitoring to detect and take action against non-compliance.[54]

5.54 The impact of the change was considered to be minor as the change would 'not impact on the majority of sponsors who behave in accordance with program objectives and already create and maintain records relating to contracts of employment'.[55]

5.55 As above, the committee notes that the analysis provided in the RIS establishes a reasonable case in identifying shortcomings in the current legislation in respect of ensuring that 457 visa holders are employed by their sponsoring employers. This is an accepted policy intention of the program's current settings, and the proposed change to give effect to this intention appear unlikely to significantly impact on the framework and operation of the 457 visa program.

Training benchmark requirement and requirement to keep records

5.56 Currently, to qualify as a sponsor in the 457 visa program a business must meet one of the specified training benchmarks, being:

- expenditure of one per cent of payroll expenditure on the provision of structured training to employees; or
- a contribution equivalent to two per cent of payroll expenditure to an industry training fund.

5.57 The business must also demonstrate a commitment to meeting one of the specified training benchmarks for each fiscal year for the term of their approval as a sponsor.[56]

5.58 If a business has been trading for less than 12 months, it must instead demonstrate that it has an auditable plan to meet one of the benchmarks.[57]

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54 OBPR ID: 2012/14171, January 2013, available at Department of Finance and Deregulation, 'Sponsorship Obligation Amendments -- Regulation Impact Statement – Department of Immigration and Citizenship', p. 22.

55 OBPR ID: 2012/14171, January 2013, available at Department of Finance and Deregulation, 'Sponsorship Obligation Amendments -- Regulation Impact Statement – Department of Immigration and Citizenship', p. 23.

56 Department of Immigration and Citizenship, *Submission 24*, p. 6.

5.59 The MACSM discussion paper noted that the training benchmark requirement:

> …is a fundamental component of the program. It ensures that where a business has chosen to access an overseas worker they are actively reducing their reliance on the program in the future by up skilling Australians in that field.[58]

5.60 Where a sponsor is found not to be meeting the training benchmark requirement, the sponsor may be sanctioned under Regulation 2.91 (Application or variation criteria no longer met), as the sponsor no longer meets one of the criteria required for approval as a sponsor. However, the MACSM discussion paper stated that assessment and enforcement of the requirement is difficult because:

- there is currently no specific requirement for the sponsor to keep any associated records, which hinders the department's ability to make a full and proper assessment of whether a sponsor is meeting their commitment to the training benchmarks;
- a business that has been trading for less than 12 months and therefore has an auditable plan to meet the training benchmarks is not currently required to make an ongoing commitment to continue to meet the training benchmarks for the duration of their sponsorship. Therefore, if the department became aware that a sponsor was not meeting their plan, no sanction action could be considered; and
- a sponsor seeking ongoing approval is not required to demonstrate that they met their commitments to training Australians throughout the term of their previous sponsorship.[59]

5.61 In the second reading speech to the bill, the minister stated that these changes had arisen in light of evidence that some sponsors are 'failing to commit to the training requirements of the program'.[60]

5.62 The MACSM discussion paper stated that to address these concerns relevant amendments would be made to make the training benchmarks, both at approval and post approval stages, a binding requirement rather than a commitment. It would also involve amending the obligations to require a sponsor to maintain records relating to

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57 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 4.

58 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 4.

59 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, pp 4-5.

60 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, *House of Representatives Hansard*, 6 June 2013, p. 2.

training, and to strengthen the ability of the department to sanction sponsors who do not meet this requirement.

5.63 The proposed changes were expected to have a 'nil or low impact' as:

> …most sponsors already maintain training records. Some sponsors may be concerned if additional sanction options are introduced for failure to meet the training benchmarks. Examples where an employer would be sanctioned would be rare, and limited to the small number of employers not abiding by their commitment.[61]

5.64 It is noted, however, that the Best Practice Regulation Update of 15 March 2013, identified this proposed change as requiring a RIS, but that one was not completed and assessed as adequate by the OBPR prior to the minister's announcement.[62] The committee notes that the requirement for a RIS would tend to indicate that the proposal has the capacity for a more than insignificant regulatory impact. A number of submitters and witnesses expressed concerns on this front. The Migration Institute of Australia (MIA), for example, submitted that, although it was unclear how the proposal was to be implemented, the change would be likely to make the program more restrictive and therefore act as a disincentive for employers to use the scheme.[63]

5.65 More particularly, the Chamber of Commerce and Industry of Western Australia indicated that employers were concerned about the proposed change to the current training benchmark requirements, and submitted:

> Any changes would need to reflect the actual capacity of employers to meet the benchmarks, and have the flexibility to accommodate the wide range of training needs and practices across the employer community.
>
> Any flow-on consequences of changes to the 457 training benchmarks on the employer sponsored permanent migration categories must also be considered. Both the Employer Nomination Scheme (ENS) and Regional Sponsored Migration Scheme (RSMS) categories have requirements that the employer must also meet the 457 training benchmarks.[64]

5.66 In contrast to concerns about potential impacts, the ACTU suggested that, in addition to the proposed change:

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61 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 5.

62 Department of Finance and Deregulation, 'Non-compliance with the Australian Government's best practice regulation requirements – Reforms to the Temporary Work (Skilled) (Subclass 457) Visa Program– Department of Immigration and Citizenship', http://ris.finance.gov.au/2013/03/15/non-compliance-requirements-subclass-457-visa/ accessed 13 May 2013).

63 Migration Institute of Australia, *Submission 7*, pp 14-15.

64 Chamber of Commerce and Industry of Western Australia, *Submission 34*, pp 9-10.

> …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.[65]

English language requirements

5.67 Currently, 457 visa applicants are required to provide evidence of an International English Language Testing System (IELTS) score. The required levels of English language proficiency are:

- for a standard sponsorship, the English language proficiency equivalent to an IELTS test score of at least 5 in each of the four test components of speaking, reading, writing and listening;
- for a person required to have a specific level of English ability to obtain licensing or registration for their nominated occupation, that level of English language ability; and
- for a party to a labour agreement, the English language ability specified in the agreement'.[66]

5.68 A range of exemptions may apply to this requirement, including where:

- the person is to receive a salary that exceeds the English language requirement exemption (currently $92 000);
- the occupation does not need a level of English language proficiency for grant of registration, licence or membership;
- the person is a passport holder from Canada, New Zealand, the Republic of Ireland, the United Kingdom or the United States of America;
- the nominated occupation is a highly skilled occupation that is on the gazetted list of English-language exempt occupations;
- the person has completed at least five years of continuous full time study in a secondary and/or higher education institution where instruction was conducted in English; and
- the nominated occupation will be performed at a diplomatic or consular mission of another country or an office of the authorities of Taiwan located in Australia.[67]

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65 Australian Council of Trade Unions, *Submission 40*, p. 19.

66 Department of Immigration and Citizenship website, 'Requirements for skilled workers (primary visa applicants)', http://www.immi.gov.au/skills/skillselect/index/visas/subclass-457/ (accessed 15 June 2013).

67 Department of Immigration and Citizenship website, 'Requirements for skilled workers (primary visa applicants)', http://www.immi.gov.au/skills/skillselect/index/visas/subclass-457/ (accessed 15 June 2013).

5.69 Regarding the English language requirement, the MACSM discussion paper stated:

> The ability of a worker to be able to communicate clearly in English is an important aspect of the Subclass 457 program. A reasonable ability in English in most roles ensures that Subclass 457 visa holders are able to work efficiently, understand Workplace Health and Safety matters as well as supporting better social inclusion outcomes.[68]

5.70 The MACSM discussion paper identified concerns regarding the ability of the English language requirement to be circumvented in cases where a 457 visa holder, who is exempt from the requirement as their salary is above the exemption threshold of $92 000, changes employers to fill a position for which the salary falls below the exemption threshold. In such cases, there is 'no ability in the legislation to re-consider the visa holder's English ability'.

5.71 It was therefore proposed that a new regulation would be introduced at the employer nomination stage. The new criterion would require the visa holder to have met the English language requirement or be exempt.

5.72 The proposed change was considered to have 'no impact on businesses or genuine applicants'.[69]

5.73 It is noted, however, that the Best Practice Regulation Update of 15 March 2013, identified this proposed change as requiring a RIS, but that one was not completed and assessed as adequate by the OBPR prior to the minister's announcement.[70]

5.74 Further, information placed on the department's website regarding this proposed change following the minister's February announcement appeared to propose a broader range of changes. It advised:

> …strengthening the English language requirements [will include] removing exemptions for applicants from non-English speaking backgrounds who are nominated with a salary less than $92 000 and requiring applicants who were exempt from the English language requirement when granted a visa to continue to be exempt from, or to meet the English language requirement

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68 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 16.

69 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 16.

70 Department of Finance and Deregulation, 'Non-compliance with the Australian Government's best practice regulation requirements – Reforms to the Temporary Work (Skilled) (Subclass 457) Visa Program– Department of Immigration and Citizenship', http://ris.finance.gov.au/2013/03/15/non-compliance-requirements-subclass-457-visa/ accessed 13 May 2013).

> when changing employers. Additionally, the definition of English language will be better aligned with the permanent Employer Sponsored.[71]

5.75 The minster's second reading speech on the bill suggested that these changes would be included in the regulations proposed to commence on 1 July 2013.[72]

5.76 A number of submitters and witnesses expressed concern about the potential regulatory impacts of this proposal. Such concerns were well encapsulated by the submission of Berry Appleman and Leiden (BAL Australia), which did not support the change. The BAL Australia submission stated:

> The current system for English language testing is already at times too rigorous for a temporary visa program. The further strengthening of English requirements adds unnecessary costs to business and unnecessary delays to securing labour. This change will reduce Australia's appeal to skilled potential visa applications whilst enhancing the appeal of our competitors – including America, Canada, New Zealand and western- European countries.[73]

5.77 The submission went on to note that, if the change is directed at concerns in particular industries and occupations, a targeted response would be more appropriate:

> Rather than having an unnecessary blanket heavy handed approach to English language requirements, it would be more appropriate to identify what industries and occupations are of concern supported by appropriate primary evidence. These identified industries and occupations could then be targeted for appropriate English language testing.[74]

5.78 Apart from the potential for the change to act generally as a barrier to employers accessing skilled labour through the 457 visa program,[75] a number of submissions outlined concerns about its particular impact on regional areas. The Northern Territory Government submission, for example, noted:

> The Northern Territory Department of Business believes that such an approach will be a barrier to the growth of investment in the mining/mineral exploration activities, particularly from China…[as] the imposition of English language requirements on professionals and semi-professional positions will pose challenges to mining exploration and development activities.

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71 Department of Immigration and Citizenship website, 'Strengthening the integrity of the 457 program', http://www.immi.gov.au/skilled/strengthening-integrity-457-program.htm (accessed 24 April 2013).

72 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, *House of Representatives Hansard*, 6 June 2013, p. 2.

73 Berry Appleman and Leiden (BAL Australia), *Submission 12*, p. 11. See also, for example, Migration Institute of Australia, *Submission 7*, pp 13-14.

74 Berry Appleman and Leiden (BAL Australia), *Submission 12*, p. 12. See also, for example, Northern Territory Government, *Submission 25*, pp 16-17.

75 See, for example, Migration Institute of Australia, *Submission 7*, pp 13-14; and Western Australian Government, *Submission 45*, p. 6.

> …[The] national approach [being proposed] does not take into consideration that some industries are primarily located in regional Australia e.g. mining/resources industries. There could be major consequences for the viability and development of projects even though the proposed changes have been assessed by DIAC to only impact on a small percentage of the overall Subclass 457 nominations.[76]

5.79 In relation to the impact of the proposed changes on potential 457 visa applicants, the MIA questioned the relevance of such a level of English language proficiency to the ability of a worker to work productively in many nominated occupations, and was concerned that any change to the current English language exemptions would act as an 'artificial barrier to the ability of non-English speaking 457 visa workers to be sponsored under the program'.[77] On this point, the Australian Chamber of Commerce and Industry submitted:

> Such a change could mean that the nominated employee loses their ability to change employers because they cannot meet the English language requirement for another employer who may offer a salary less than the original employer but with better working conditions (eg, hours, location etc). They would therefore be "tied" to their original nominator – an issue the current 457 program [settings] sought to eliminate…[78]

5.80 In light of the range of possible impacts, the Western Australian Government submission was concerned that the proposal was not accompanied by any modelling or assessment of the potential impacts of the 'considerably more onerous' requirements.[79] The Chamber of Commerce and Industry Queensland called for the proposed changes to be subject to consultation given concerns about how they might affect the capacity of the program to attract skilled migrants.[80]

5.81 In contrast to the concerns outlined above, the submission of the Australian Council of Trade Unions indicated that the proposed change was generally supported by unions:

> 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.[81]

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76 Northern Territory Government, *Submission 25*, pp 16-17.

77 Migration Institute of Australia, *Submission 7*, pp 13-14.

78 Australian Chamber of Commerce and Industry, *Submission 21*, p. 18.

79 Western Australian Government, *Submission 45*, p. 6.

80 Chamber of Commerce and Industry Queensland, *Submission 13*, p. 5.

81 Australian Council of Trade Unions, *Submission 40*, p. 21.

Enhancing compliance and enforcement powers

5.82 The minister's February 2013 announcement indicated that the proposed changes would strengthen compliance and enforcement powers, and it is noted that a number of the proposed changes discussed above appear to involve or include measures that support this intention, such as by closing identified legal loopholes, allowing sponsorship obligations to be enforced and enhancing requirements around the keeping of records.

Empowerment of Fair Work Inspectors

5.83 On 18 March 2013, the minister announced that powers would be given to the Fair Work Ombudsman (FWO) and Fair Work Inspectors to monitor and investigate compliance with sponsorship obligations to ensure workers are working in their nominated occupation and being paid market salary rates.[82] The minister's media release stated:

> The FWO will now be empowered to monitor key aspects of employers' compliance with 457 visa conditions, namely:
>
> - 457 visa holders are being paid at the market rates specified in their approved visa
> - The job being done by the 457 visa holder matches the job title and description approved in their visa.
>
> FWO staff will also be able to immediately refer any suspicious activity to [the department's]…investigation team for more detailed examination beyond these basic checks on pay, conditions, and jobs being done.[83]

5.84 The bill will seek to implement this proposal as foreshadowed.[84]

5.85 Evidence to the inquiry indicated that this proposal is widely supported (see Chapter 3), with submitters and witnesses generally indicating that improved resourcing for the detection of noncompliant behaviour would improve enforcement outcomes under the current program settings. It was also noted that a level of monitoring more in keeping with the scale of the program could provide a more accurate understanding of the extent of noncompliance.

Enforceable undertakings

5.86 The bill will also seek to introduce enforceable undertakings as an additional administrative sanction to the current 457 visa program enforcement framework. While this proposal was not explicitly outlined in any of the information available prior to the release of the bill, the committee notes that it would appear to support the

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82 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, *House of Representatives Hansard*, 6 June 2013, p. 1.

83 The Hon Brendan O'Connor, MP, Minister for Immigration and Citizenship, ' Fair Work inspectors to monitor rogue 457 employers', media release, 18 March 2013.

84 Migration Amendment (Temporary Sponsored Visas) Bill 2013, explanatory memorandum, pp. 34-43.

Government's broad statements of intention to enhance compliance and enforcement measures and to 'allow the department to take action against sponsors who engage in discriminatory recruitment practices'.[85]

5.87 In the second reading speech to the bill, the minister advised:

> Enforceable undertakings are promises enforceable in court which would be agreed between the minister and a sponsor.
>
> Enforceable undertakings would be used as an alternative to, or work in combination with, barring a sponsor or cancelling a sponsor's approval.
>
> Enforceable undertakings might also avoid the substantial legal costs associated with litigation in the courts. They are designed to be flexible and to secure compensation for any loss resulting from contraventions (for example, payments to compensate for underpayment of workers).
>
> The amendment will also allow the minister to publish enforceable undertakings on the department's website. This is an important tool to encourage compliance by all sponsors and a means of providing transparency to the Australian public on the monitoring of sponsors.[86]

5.88 In relation to the minister's ability to publish enforceable undertakings, the EM to the bill notes:

> As the undertaking will have been given in circumstances where the approved sponsor or former approved sponsor fails to satisfy an applicable sponsorship obligation, the publication of the undertaking draws public attention to the breach, and is designed to deter the approved sponsor or former approved sponsor from breaching undertakings in future.
>
> The published undertaking will not include the personal information of any person or any other information that may assist in the identification of a person who has provided the undertaking. This will ensure the privacy of the relevant person is protected.[87]

5.89 The committee received no specific evidence on the potential impact of this proposal. However, it is noted that a number of submitters and witnesses maintained that the current enforcement regime is, subject to proper resourcing, adequate.[88] Fragomen noted that, in general, any enhancement of compliance mechanisms should

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85 Department of Immigration and Citizenship, 'Strengthening the integrity of the 457 program', http://www.immi.gov.au/skilled/strengthening-integrity-457-program.htm (accessed 24 April 2013)

86 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, *House of Representatives Hansard*, 6 June 2013, p. 3.

87 Migration Amendment (Temporary Sponsored Visas) Bill 2013, explanatory memorandum, p. 25.

88 See, for example, Australian Mines and Metals Association, *Submission 22*, p. 14; and Australian Chamber of Commerce and Industry, *Submission 21*, p. 12.

avoid the creation of barriers designed to impede the efficient and effective transfer or recruitment of skilled workers to Australia'.[89]

Amendment to 457 visa condition 8107

5.90 Currently, 457 visa holders are subject to visa condition 8107, which provides that a visa holder must not cease employment for 28 consecutive days. If a visa holder does not comply with this condition there are grounds to cancel their visa.

5.91 The bill proposes to amend the regulations to extend this period from 28 days to 90 consecutive days.[90] The minister's second reading speech to the bill indicated that the intention behind this proposal was to enable:

> …a more socially just outcome for visa holders as they will have more time find an alternative job with an employer sponsor or to arrange their personal affairs at the conclusion of sponsored employment.[91]

5.92 Evidence to the inquiry indicated that this proposal is widely supported (see Chapter 3), with submitters and witnesses generally indicating that attaching a longer period to condition 8107 could reduce the dependency of 457 visa holders on employers, thereby decreasing their potential vulnerability to abuse and exploitation and, possibly, increasing their willingness to report any such behaviour by employers.

5.93 Positive impacts aside, evidence to the inquiry that the department's common-sense administration of the 28-day requirement to date—which was commended for having generally being applied to take into account circumstances of individual cases—would indicate that the potential for negative impacts due to this change is low, as in many if not most cases visa holders have been afforded more than 28 days under condition 8107.

General responses on impact of proposed changes

5.94 In addition to evidence going to the nature and impact of particular proposed changes, a number of submitters and witnesses addressed the matter more generally. Such comments tended to characterise the changes collectively as a regulatory dead-weight, not sufficiently justified by evidence of any significant need for change to the current 457 visa program policy settings. The Business Council of Australia, for example, submitted:

> …we do not see the need for ad hoc changes to the rules that only add cost, undermine business confidence, slow business activity and job creation and create disincentives for future investment.[92]

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89 Fragomen, *Submission 36*, p. 21.

90 Migration Amendment (Temporary Sponsored Visas) Bill 2013, explanatory memorandum, p. 2.

91 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, *House of Representatives Hansard*, 6 June 2013, p. 4.

92 Business Council of Australia, *Submission 18*, p. 8. See also, for example, Migration Law Program, Legal Workshop, Australian National University College of Law, *Submission 19*, p. 20.

5.95 Similarly, the Australian Federation of Employers and Industries submitted:

> The proposed changes to the scheme announced by the Minister will create [an] additional resource burden and costs for employers and will stifle businesses already looking to recruit employees needed to maintain productivity and competitiveness.[93]

5.96 While supporting the proposed changes aimed at correcting legislative deficiencies in supporting the established policy design and settings of the 457 visa program, the Northern Territory Government submitted:

> It would appear that regulation drafting deficiencies have occurred in the policy changes made to the Subclass 457 visa in 2009. As a consequence some unforeseen practices have emerged. While understanding the need to make the changes to address these issues, the Department believes that, as well as seeking to address these anomalies, the additional regulation changes that have been proposed will further decrease the effectiveness of the Subclass 457 visa in addressing workforce shortages in tight labour markets, such as that in the Northern Territory.[94]

5.97 A number of submitters and witnesses were critical of the level of information and consultation around the proposed changes. The BAL Australia submission, for example, in addition to noting a number of areas in which it was unable to provide a response due to the lack of detail regarding proposed responses, noted more generally:

> The Government's reforms are unfortunately somewhat vague at this time. It is unfortunate that the supporting legislation and policy interpretation have not yet been released. It is quite common, although bad practice, for the substantial information associated with important immigration changes, to be released very close to the commencement date of the intended reforms. Such practice inhibits effective debate on the reforms and leads to unnecessary anxiety within certain sections of the Australian community.[95]

5.98 This sentiment was echoed by AMMA, in calling for any detailed legislative proposal to be subject to a 'proper process of legislative scrutiny based on…[the] specific terms and intended effect [of the proposed legislation]'.[96]

5.99 In contrast, other groups indicated broad support for the changes and for the aspects of the processes underlying their development. The Transport Workers' Union of Australia (TWU), for example, offered support for the changes, noting that the program had been subject to a number of policy refinements since 2007.[97]

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93 Australian Federation of Employers and Industries, *Submission 23*, p. 10. See also, for example, Australian Chamber of Commerce and Industry, *Submission 21*, p. 15.

94 Northern Territory Government, *Submission 25*, p. 16.

95 Berry Appleman and Leiden (BAL Australia), *Submission 12*, p. 13.

96 Australian Mines and Metals Association, *Submission 22*, p. 16.

97 Transport Workers' Union of Australia, *Submission 20*, p. 15. See also, for example, Australian Council of Trade Unions, *Submission 40*, p. 18.

5.100 At a May 2013 Senate estimates hearing, an officer of the department described the range of proposed changes generally as:

> …very comprehensive and actually [making]…the legislation stronger. They give…[the department] sufficient powers to act when we see activities that are clearly not within the key terms of the 457 program, within the spirit of the 457 program.[98]

5.101 The Communications Electrical Plumbing Union pointed to the MACSM as an inclusive forum for consultation around immigration policy:

> We support the creation of the Ministerial Advisory Council on Skilled Migration (MACSM). MACSM is a positive initiative which involved all the stakeholders in improving skilled migration.[99]

COMMITTEE COMMENT

Policy development processes in relation to proposed changes

5.102 The committee's comments and recommendations regarding the impacts of the proposed changes to the 457 visa program must be understood against the broader context of the policy development and consultation processes surrounding the changes announced in February 2013, and the subsequent introduction of the Migration Amendment (Temporary Sponsored Visas) Bill 2013 (the bill) on 6 June 2013.

5.103 A number of submitters and witnesses drew attention to the role and effectiveness of the Ministerial Advisory Council on Skilled Migration (MACSM) as a core consultative process around which immigration policy development currently takes place. While the committee commends this initiative, the comments above suggest that the MACSM currently lacks both transparency and a role in engaging stakeholders and the public more broadly. The committee considers that this key consultative mechanism should be reviewed as part of establishing more transparent and inclusive immigration policy development processes. Such a review should, at a minimum, involve the development of clear terms of reference, operating guidelines and consultation and communication strategies to assist in the ongoing immigration policy development process.

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98 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, 27 May 2013, p. 71.

99 Communications Electrical Plumbing Union, *Submission 30*, p. 27.

Recommendation 9

5.104 The committee recommends that the government initiate a review of the Ministerial Advisory Council on Skilled Migration (MACSM) to establish clear terms of reference, operating guidelines and consultation and communication strategies for that body.

Labour market testing

5.105 As noted above, the introduction of the Migration Amendment (Temporary Sponsored Visas) Bill 2013 (the bill) on 6 June 2013 confirmed that introduction of labour market testing (LMT) was to be a part of the proposed changes to the 457 visa program. Given this, all submissions and evidence to the inquiry on the issue of LMT was prepared without reference to the detail of the legislative proposal for LMT contained in the bill. Indeed, there was a significant level of uncertainty as to whether LMT was to be proposed, based on the available sources of information outlined in the introduction to this chapter.

5.106 A particular and critical question raised by the LMT proposal in this regard is how it will interact with and impact upon the other policy and design elements of the 457 visa program. For example, given the changes to the program in 2009 were premised on the notion that the relatively higher costs of employing 457 visa workers would operate to ensure that employers seek to engage 457 visa holders only in cases of genuine need, it is unclear to the committee whether those obligations would still be necessary or may need adjustment if LMT were to be introduced.

Training benchmark requirements and English language requirements

5.107 Similarly, the committee notes that the proposed changes in relation to training benchmark requirements and English language requirements were not the subject of a RIS, despite the Office of Best Practice Regulation (OBPR) identifying these proposed measures as having a potentially significant regulatory impact.

5.108 The potential impacts of these measures is made more uncertain given that the specific legislative proposals, to be in the form of regulations intended to commence on 1 July 2013, have not been made public.

Changes relating to on-hire arrangements and sponsors' obligation not to recover certain costs

5.109 Notwithstanding the comments and recommendation above, the committee notes that the proposed changes in relation to on-hire arrangements and sponsors' obligation not to recover certain costs were the subject of a RIS assessment.

5.110 While the committee notes that there were some objections to the proposal going to on-hire arrangements, the committee considers that, given the appropriate level of transparency and consultation and information about the justification for and intent of these proposals, these proposals should be effected immediately and separately to the regulation currently proposed to commence on 1 July 2013.

Recommendation 10

5.111 The committee recommends that the proposed changes to on-hire arrangements and sponsors' obligation not to recover certain costs be effected immediately and separately to the regulation currently proposed to commence on 1 July 2013.

Empowerment of Fair Work Inspectors and amendment to condition 8107

5.112 The committee notes that the inquiry has revealed widespread support for the proposals to empower Fair Work Inspectors under the *Migration Act 1958* and to extend from 28 days to 90 days the period for which a visa holder must not cease employment.

5.113 The committee considers that, to enable these measures to be implemented as soon as possible, they should be effected immediately and separately to the bill.

Recommendation 11

5.114 The committee recommends that the proposed empowerment of Fair Work Inspectors under the *Migration Act 1958* and to subclass 457 visa condition 8107 be effected immediately and separately to the Migration Amendment (Temporary Sponsored Visas) Bill 2013.

Senator Penny Wright

Chair

DISSENTING REPORT BY COALITION SENATORS

Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements

Introduction

1.1 Coalition Senators believe that Australian workers should, as a priority, be adequately resourced to enable them to be up-skilled and empowered, to gain meaningful employment.

1.2 Australian businesses overwhelmingly prefer to hire Australian workers in preference to overseas workers on the basis that it is more economical and less complicated to fill skill requirements from the local workforce.

1.3 There is a shared consensus across business and the community that Australia's skilled and semi-skilled migration program should only be employed to supplement our domestic workforce where necessary.

1.4 The Coalition does not consider that an effectively managed temporary labour migration program will threaten Australian jobs. Rather, it is an important tool to secure the future of businesses and grow employment opportunities to enable business to employ more Australians.

1.5 The Australian skilled and semi-skilled migration program should be sufficiently robust to ensure that the employment opportunities of Australians must always be protected, whilst recognising that an appropriate and sustainable human capital strategy for Australia must be readily available to safeguard business from labour and skills shortages.

1.6 The 457 visa is the dominant component of Australia's temporary skilled migration program. It is designed to provide a prompt response to fluctuations in demand for skilled and semi-skilled workers where such demand cannot be met by the Australian workforce.

1.7 An effective policy for temporary skilled migration is vital to the efficient operation of the labour market and has the capacity to deliver significant economic benefits at a national and regional level.

1.8 Foreign workers on 457 visas account for approximately one per cent of Australia's labour force.[1] and account for approximately two per cent of our skilled workforce.

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1 Department of Immigration and Citizenship, Subclass 457 State/Territory Report: 2012-13 to 30 April 2013, p. 1.

1.9 At these low levels it is both unrealistic and naive to suggest that the 457 skilled migration program is flooding the national labour market with foreign workers.

1.10 There is significant evidence to show that 457 visa holders make a positive economic contribution to the economy through the payment of taxes and the spending of wages, whilst in Australia.[2] It is also relevant to acknowledge that 457 visa holders are required to pay for health care insurance and are not entitled to access government welfare programs.

1.11 Australia faces an increasing labour shortage and responding to this labour challenge in a positive manner is a key productivity issue for Australia that cannot be ignored.

1.12 The ongoing demand for labour and skills and the challenges that they present cannot be underestimated by Government and failure to effectively respond to identified labour shortages will negatively impact on the national economy.

1.13 The failure of the Labor Government to develop appropriate human capital strategies is all the more alarming against the background of numerous projects across the nation which could be jeopardised by labour shortages.

1.14 Included in this pipeline are projects to the value of (approximately):

- Western Australia: $293.9 billion worth of projects;
- Queensland: $199.1 billion worth of projects;
- New South Wales: $84.6 billion worth of projects;
- Victoria and Tasmania: $57.6 billion worth of projects;
- South Australia: $50.1 billion worth of projects; and
- Northern Territory: $43.5 billion worth of projects.[3]

1.15 Currently across Australia there are approximately 259 approved projects with a value of $446.4 billion, while a pipeline of 163 less advanced projects will potentially deliver a further $282.4 billion of investment.[4]

1.16 The National Resources Sector Employment Taskforce has predicted there could be a shortage of skilled tradespeople in the resources sector of approximately 36 000 by 2015. [5]

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2 Australian Mines and Metals Association, *Submission 22*, p. 10.

3 Pit Crew Consulting, Labour Market Report, January 2013.

4 Pit Crew Consulting, Labour Market Report, January 2013.

5 Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education website, 'Resourcing the future: National Resources Sector Employment Taskforce report', July 2010, http://www.innovation.gov.au/Skills/National/Documents/FinalReport.pdf (accessed 17 June 2013).

1.17 Effectively addressing labour shortages through skilled and semi-skilled migration programs is not a new phenomenon in Australia.

1.18 The Howard Government's record of strong economic management was supported by sound policies designed to provide flexibility for Australia's migration intake and to serve the national interest. These policies included options to assist business to address skills shortages.

1.19 The Howard Government oversaw an increase in the proportion of skilled migration in Australia's permanent migration program, from around 30 per cent when it assumed office in 1996 to almost 70 per cent when it left office in 2007.

1.20 The introduction by the Howard Government of the 457 temporary skilled visa program ensured greater responsiveness and flexibility in responding to fluctuating labour demands.

1.21 In contrast to the Howard Government policies which successfully addressed labour shortages through skilled and semi-skilled migration programs, the current Labor Government has burdened the 457 visa program with unnecessary red tape and has effectively locked many regional areas out of the program. As a result of the mismanagement of the 457 visa program, business has been frustrated and inconvenienced in its attempts to address labour shortages.

1.22 To accommodate Australia's growing requirements for skilled labour, it is critical for the Government to recognise the need to implement sound policies that can assist in immediately addressing the labour shortages that business and industry are experiencing, in particular by making the present 457 visa program more efficient and user friendly. Up-skilling of Australian workers, along with supplementation through an effectively managed 457 visa program, will assist in ensuring the creation of long-term jobs into the future.

1.23 Australia has been a successful and prosperous nation in large part due to its skilled and productive workforce. It is critical that appropriate policies be implemented if Australia is to have a workforce that is capable of ensuring the nation's strong growth and continued economic success.

1.24 It is clear from an objective analysis of the evidence given to the inquiry by employers and employer related groups that the current Labor Government has failed to implement appropriate policies to address current and future labour shortages in Australia.

1.25 The Labor Government's lack of appropriate workforce policies has created a situation where the Australian labour market is unlikely to produce the stable and reliable source of labour required to meet both the future short- and long-term demands of business and industry.

1.26 The former Rudd Government and the current Gillard Government, in responding to union objections to the current 457 visa program, have diminished the effectiveness, reliability and integrity of Australia's skilled and semi-skilled migration program.

Terms of Reference relating to Enterprise Migration Agreements and Regional Migration Agreements

1.27 The terms of reference of the inquiry also refer to Enterprise Migration Agreements (EMAs) and Regional Migration Agreements (RMAs).

Enterprise Migration Agreements

1.28 The National Resources Sector Employment Taskforce (taskforce) reported the resources sector could be 36 000 tradespeople short by 2015.[6] It advocated the establishment of EMAs for mega resource projects.

1.29 The taskforce's recommendation was accepted by the current Government and was strongly supported by the Coalition.

1.30 The former Minister for Immigration and Citizenship, Minister Bowen, announced the introduction of EMAs on 10 May 2011.[7]

1.31 Subsequent to Minister Bowen's announcement, the Government developed the EMA program to assist Australia overcome both temporary and acute labour shortages for positions which are unable to be filled by Australian workers in the high-performing sectors which currently underpin the national economy.

1.32 EMAs are project-wide temporary overseas migration arrangements for large-scale resource projects that are intended to address the skilled labour needs of the resource sector.[8] EMA's are designed to provide a strategic practical solution to a complex skilled labour shortage issue for large-scale resource projects in Australia.

1.33 Coalition Senators strongly support the introduction of EMAs and believe that these agreements can play a crucial role in assisting Australia manage temporary and acute labour shortages affecting major resource projects that contribute significantly to the national economy.

1.34 EMAs provide a flexible approach to short-term human capital needs, ensuring a balance in the supply of labour between Australian and foreign workers, based on the capacity of the existing workforce.

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6 Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education website, 'Resourcing the future: National Resources Sector Employment Taskforce report', July 2010, http://www.innovation.gov.au/Skills/National/Documents/FinalReport.pdf (accessed 17 June 2013).

7 Minister for Immigration and Citizenship, 'Budget 2011-12: New Temporary Migration Agreements to Further Address Skills Demand', media release, 10 May 2011, http://www.minister.immi.gov.au/media/cb/2011/cb165283.htm (accessed 17 June 2013).

8 Department of Immigration and Citizenship website, 'Fact Sheet 48a – Enterprise Migration Agreements', http://www.immi.gov.au/media/fact-sheets/48a-enterprise.htm (accessed 18 June 2013).

Regional Migration Agreements

1.35 The Government announced the introduction of RMAs in May 2011 as part of the 2011-12 Budget proposals. RMAs are designed to assist resource projects in regional and remote areas that are impacted by labour shortages.

1.36 In introducing RMAs, the Government envisaged that they would enable local employers to sponsor workers from outside Australia where they have a genuine need for labour assistance, while ensuring Australian workers remain the first choice. The agreements were intended to have a strong focus on fostering training initiatives for Australians.[9]

1.37 RMAs provide an important way to support regional skill shortages where those shortages extend beyond an individual enterprise and also impact on other service organisations in a community. This situation can often be found in large-scale resourcing projects where a rapid growth in a resources company quickly outstrips local service industry capacity. Where this occurs in locations remote from a ready source of workers, labour supply and skill shortages in the services area can quickly emerge.

Government's failure to progress EMAs and RMAs

1.38 The Labor Government's failure to effectively progress EMAs and RMAs is an indictment on the Government and an indication of their lack of genuine commitment to address the skill needs of the resources sector.

1.39 Since the Government announced its intention to establish EMAs and RMAs a number of Australian unions, with strong links to the Government, have mounted an aggressive media campaign opposing these agreements.

1.40 Despite the Government's earlier claims to support EMAs and RMAs to address the skilled labour needs of the resource sector, the Government appears to have succumbed to the negative union campaign, as to date, only one EMA has been given in-principle support, although it is not yet operational, and no RMAs have been formalised.

1.41 EMAs and RMAs are of no benefit if it involves long, drawn out processes.

1.42 Sadly, this has been experienced by the only RMA announced to date between the Commonwealth and the Northern Territory (NT). The RMA was announced many months ago but turning this into an actual agreement has been a slow and frustrating experience for the NT government.

1.43 Despite Coalition support for EMAs and RMAs, the evidence given to the inquiry indicates that business and, in particular, the mining industry are both frustrated and disappointed that, despite 22 months having elapsed since the

9 Department of Immigration & Citizenship website, 'Fact sheet 48c: Regional Migration Agreements', http://www.immi.gov.au/media/fact-sheets/48c-rma.htm (accessed 17th June 2013).

Government introduced EMAs, it has failed to negotiate a final agreement with any organisation.

1.44 Coalition Senator's concerns regarding the Government's failure to effectively progress EMAs and RMAs were shared by a number of submitters to the inquiry.

1.45 The Business Council of Australia (BCA) stated in its submission:

> The Committee should enquire as to why the guidelines for the EMA submissions, released in 2011, are no longer available on the Department of Immigration website. Removing program guidelines from a government website without explanation does not send a positive signal to investors already wary of chopping and changing government policy as it relates to major project investment in Australia.[10]

1.46 The submission of the Australian Chamber of Commerce and Industry (ACCI) observed:

> Evidence in relation to the operation of Enterprise Migration Agreements and Regional Migration Agreements cannot be presented due to the unnecessary and largely political delay in their implementation.[11]

1.47 The Chamber of Commerce and Industry WA submission noted:

> While CCI supports the EMA instrument, the complexity to establish an agreement has proven to be difficult.[12]

1.48 Similarly, the WA Government in its submission advised that it was:

> …frustrated with the continual delays in the release of the guidelines for this program since its announcement…The State Government has been approached by potential applicants for an RMA but the lack of guidelines is limiting the extent to which the State can provide the necessary support.[13]

Compelling evidence given in support of the EMAs and RMAs

1.49 Coalition Senators also note the compelling evidence given in support of EMAs and RMAs.

1.50 In the Master Builders Australia (MBA) submission, Mr Wilhelm Harnisch, CEO, stated:

> The terms of reference for the Inquiry also refer to Enterprise Migration Agreements and Regional Migration Agreements. We understand that there is only one signed EMA and no RMAs so it [is] difficult to comment on their operation. However, Master Builders supports this framework as an

10 Business Council of Australia, *Submission 18,* p. 9.

11 Australian Chamber of Commerce and Industry, *Submission 21*, p. 8.

12 Chamber of Commerce and Industry of Western Australia, *Submission 34*, p. 6.

13 Western Australian Government, *Submission 45*, p. 6.

> appropriate one for allowing a degree of extra flexibility for e.g. very large resource projects.[14]

1.51 Mr Simon Bennison, CEO, Association of Mining and Exploration Companies (AMEC), stated:

> AMEC considers that EMAs are a valid process and provide another avenue in which to access high numbers of skilled labour.[15]

1.52 BCA stated:

> …it will be important to continue to offer an efficient EMA program that will allow 457 visas and EMA's to remain a flexible and fast means of addressing skills shortages on eligible projects given the important of timeliness or appraisals to arranging project finance and the timeliness of work schedules to project success.[16]

1.53 ACCI observed:

> These schemes reflected good policy and they should be progressed as soon as possible to assist large projects and regional areas crying out for labour.[17]

1.54 The submission of the Chamber of Commerce and Industry WA (CCIWA) also addressed the issue of EMAs, noting:

> … [CCIWA] is supportive of this instrument and commends the Federal Government for working with industry to design the EMA. Industry was concerned that it would be unable to adequate resource major projects if there was not a supply of skilled labour available.[18]

Coalition Senators' conclusions on EMAs and RMAs

1.55 Coalition Senators support EMAs and RMAs.

1.56 They note the supportive comments of the Shadow Minister for Immigration and Citizenship, Mr Scott Morrison, MP, who is on the record as stating that 'if backed up and competently implemented, EMAs and RMAs represent good policy'.

1.57 EMAs and RMAs should be available to play a crucial role in assisting employers manage temporary and acute labour shortages affecting major resource projects that contribute significantly to Australia's economy. These agreements provide a flexible approach to short-term human capital needs, ensuring a balance in the supply of labour between Australian and foreign workers, based on the capacity of the existing workforce.

1.58 The most effective way to ensure an ongoing availability of jobs for Australians in the resources sector is to create a business climate which encourages

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14 Master Builders Australia, *Submission 9*, p. 3.

15 Association of Mining and Exploration Companies, *Submission 17***,** p. 1.

16 Business Council of Australia, *Submission 18*, p. 9.

17 Australian Chamber of Commerce and Industry, *Submission 21*, p. 8.

18 Chamber of Commerce and Industry of Western Australia, *Submission 34*, p. 6.

investment in developing Australian resource assets by offshore multinationals and Australian companies.

1.59 Actions which discourage investors doing business in Australia will potentially have a profound effect on our economy and employment opportunities.

1.60 Coalition Senators therefore recommend that the Government instruct the Department of Immigration and Citizenship (the department) to process in a timely fashion the EMAs and RMA that are currently lodged with the department.

Recommendation 1

1.61 Coalition Senators recommend that the Government instruct the Department of Immigration and Citizenship to process in a timely fashion the EMAs and RMA currently lodged with that department.

Deliberate campaign to undermine 457 visa program

1.62 Over recent months, the Government and elements within the union movement have run a media campaign claiming abuse in the 457 visa program and have resorted to making statements aimed at demonising both 457 visa holders and their employers.

1.63 The Minister for Immigration and Citizenship (the Minister), the Hon Brendan O'Connor, MP, claimed on 28 April 2013 that there have been in excess of 10 000 cases of abuse in the 457 program. As a result of these alleged rorts the Minister committed the Government to introduce legislation to crack down on the use of 457 visas.

1.64 Coalition Senators note that the Minister's claim of 10 000 cases of abuse in the 457 program equated to approximately 9 per cent of the total number of principal visa holders in Australia at 30 April 2013 (108 810).[19]

1.65 In scrutinising the obvious exaggeration and un-believability of the Minister's claim of 10 000 cases of abuse in the 457 program, the Coalition repeatedly called on the Minister to produce evidence to substantiate his claims.

1.66 It is unsurprising that the Minister has failed to produce any evidence. In attempting to justify his exaggerated comments alleging abuse of the 457 visa program, in March 2013 in the House of Representatives the Minister referred to a department document which focussed on strengthening the integrity of the 457 visa program, provided to his Ministerial Advisory Council on Skilled Migration early this year.

1.67 The Coalition Shadow Minister, Mr Scott Morrison, MP, subsequently obtained a copy of this document under Freedom of Information and challenged the Minister on the veracity of his original allegations.

19 Department of Immigration and Citizenship, 'Subclass 457 State/Territory summary report 2012-13 to 30 April 2013', p. 2.

1.68 Contrary to the Minister's false claims, the document did not suggest any widespread rorting or concerns with the program.[20]

1.69 Following the Shadow Minister's challenge to produce factual evidence that there have been in excess of 10 000 cases of abuse in the 457 program, the Minister subsequently admitted that he had made this number up and that his allegations were not based on any authoritative statistics or other probative evidence.[21]

1.70 Coalition Senators note that the concerted negative campaign by Minister O'Connor and a number of unions alleging abuse in the use of 457 visas was strongly criticised by industry groups, labour market experts and the Migration Council of Australia (MCA).

1.71 In May 2013, the MCA released a landmark report on the 457 visa program, including analysis based on a survey of 3800 visa holders and 1600 businesses. It found that only two per cent of foreign workers were being underpaid.[22]

1.72 As stated by Ms Carla Wilshire, CEO, MCA:

> …the findings show that the 457 visa program is critical in keeping Australia competitive in an era when industry is global and 98 per cent of innovation happens outside of Australia'.[23]

1.73 In its submission, the Australian Industry Group (Ai Group) stated:

> The current debate over the program has unfairly focused on the relatively few employers who do not meet their obligations. In our view, those employers should face whatever sanctions are available. However, no evidence has been presented which points to widespread or systemic abuse and we strongly object to the tone of the public debate which has had the effect of vilifying both employers and those who themselves hold 457 visas.[24]

1.74 The BCA submission observed:

> The unsubstantiated claims by the government of excessive growth and widespread rorting in the temporary skilled migrant 457 visa scheme are harming our international reputation and risk undermining a program that is vital for the economy. The facts are that there are 105,000 primary 457 visa holders performing critical roles in Australia, which is less than one per cent of the workforce, and that number fell in March as visa grants

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20 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012.

21 ABC Radio, *AM*, Interview with Alexandra Kirk, 3 May 2013.

22 Migration Council of Australia, 'More than temporary: Australia's 457 visa program', additional information received 14 May 2013.

23 Migration Council of Australia website, '457 visa program is more than temporary', media release, 14 May 2013.

24 Australian Industry Group, *Submission 16*, p. 1.

declined…If there is evidence of systemic rorting then it should be produced, otherwise the government should simply deal with any employers who are found to be abusing the system.[25]

1.75 The BCA also stated:

The government's changes to the 457 visa scheme announced in February were said to be in response to excessive use and so-called rorting, but with little justification presented. Individual visa holders or employers not complying with the legislation should be dealt with directly. Ad hoc changes to the rules only add cost, undermine business confidence and slow business activity.

1.76 The ACCI submission stated:

Given the importance of skilled migration, ACCI has become increasingly alarmed at recent policy announcements and public commentary around important elements of migration. Worthy programs such as 457 visas, EMAs and RMAs have, in recent months, become subjected to a series of unsubstantiated claims of widespread rorting and have been used to invoke parochial and even racist sentiment with claims of foreign workers 'stealing' jobs from unemployed Australians. ACCI feels that a careful, considered approach, based on clear and substantiated evidence, is needed to ensure that we maintain the value and integrity of the schemes and don't further harm our reputation overseas as a good destination to do business, work or learn.[26]

1.77 The Australian Mines and Metals Association submission stated:

…the recent demonisation of 457 visa workers is extremely damaging. AMMA is particularly concerned at the politically charged context in which the government announced further changes to the system for 457 visas, and the lack of essential consultation with industry as a critical interest in the effective operation of both short term and ongoing skilled labour migration.

a. The depiction of skilled migrants as foreigners that need to be 'put at the back of the queue', and that Australians are being 'discriminated against', is base rhetoric that borders dog-whistling and invites allegations of industrial xenophobia.

b. These emotive claims also ignore the reality that current rules require labour to first be sourced from the local workforce.[27]

1.78 The Ernst & Young submission noted:

Recent sensational media reports about the subclass 457 visa program are unhelpful to a rational public dialogue and discussion about the appropriateness of Australia's skilled migration program. The program is important to the needs of business to fill temporary vacancies with skilled

25 Business Council of Australia, *Submission 18*, p. 2.

26 Australian Chamber of Commerce and Industry, *Submission 21*, p. 4.

27 Australian Mines and Metals Association, *Submission 22*, pp 1-2.

> foreign workers. Records published by the Department of Immigration and Citizenship indicate that there are rare and isolated instances of concern in the program. It is essential that the current sanctions regime deal with inappropriate use of the program.[28]

1.79 The Migration Institute of Australia, in its oral evidence at the Inquiry, confirmed that the actual statistics did not support the Minister's false claims:

> **Senator CASH:** Ms Chan, you would be aware that the Minister, Mr O'Connor, claimed that there were at least 10,000 rorts occurring in the 457 visa system, which was then proven to be a 'guesstimate'. Mr Sheldon of the TWU this morning threw a rounder figure of 100,000 breaches of human rights in relation to the 457 visa program. Given that you do represent almost half of the migration industry, what is your experience in relation to the allegations of rorting within the 457 visa program? And if there are rorts, are they dealt with by way of a legislative basis?
>
> **Ms Chan:** We would only have the information that is provided through DIAC, and the statistics do not support either a 10,000 rort or a 100,000 rort.[29]

1.80 Perhaps the most damning evidence in relation to the Minister's false claims of widespread rorting was provided by his own department at the public hearing of the inquiry.

1.81 The department confirmed under questioning from Senator Cash that it did not provide the Minister with any advice that would form the basis of his false claims:

> **Dr Southern:** We certainly did not provide advice around a number of 10,000.[30]

Claims of rorting by the CFMEU and the TWU

1.82 Evidence given by the Construction, Forestry, Mining and Energy Union (CFMEU) in its submission to the inquiry was to the effect that there were fundamental abuses or rorts of the 457 visa program:

> The fundamental abuse or rort of the 457 visa program is when the Australian government authorises an employer to employ a foreign national on a 457 visa when a qualified Australian citizen or permanent resident is available and willing to do the work.[31]

1.83 The CFMEU submission went onto state that the union would 'provide to the committee, on a confidential basis and upon request, numerous examples of the exploitation of 457 visa workers'.[32]

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28 Ernst & Young, *Submission 39*, p. 1.

29 *Committee Hansard*, 23 May, p. 24.

30 *Committee Hansard*, 23 May, p. 67.

31 Construction, Forestry Mining and Energy Union, *Submission 41*, p. 8.

32 Construction, Forestry, Mining and Energy Union, *Submission 41*, p. 8.

1.84 Coalition Senators note that the evidence provided by the CFMEU on a confidential basis to the inquiry referred to six cases of alleged rorting.

1.85 At the public hearing for the inquiry, Mr Tony Sheldon of the Transport Workers' Union of Australia (TWU) stated that he believed there were more than 100 000 people on 457 visas having their human rights exploited:

> **Mr Sheldon:** And you would look at the question Senator Cash rightly asked, as you are asking: is there exploitation of people on 457 visas beyond those two months? When you are talking about having a human right taken from you whereby you can be deported from the country, I would argue that the entire 100,000 plus are human rights exploited…[33]

1.86 Coalition Senators note that the total number of principal visa holders in Australia at 30 April 2013 was estimated by DIAC to be 108 810.[34]

1.87 When asked by Senator Cash how many allegations of cases of exploitation or rorting had been reported the TWU, Mr Sheldon's evidence was that there were only 24 such cases:

> **Senator CASH:** In your oral evidence today you did use the word 'exploiting' in relation to 457 visas. How many allegations or cases of either exploitation or rorting have been reported to the TWU?
>
> **Mr Sheldon:** It is 24.[35]

1.88 The evidence of Mr Sheldon regarding his claims of exploitation of people on 457 visas appears to be similar to the exaggerated and factually inaccurate claims made by Minister O'Connor and the CFMEU.

Work-related fatalities among 457 workers

1.89 The inquiry at its public hearing heard evidence from Mr Kinnaird of the CFMEU that the CFMEU had data on the work-related fatality rate among 457 visa workers which showed that it is more than double the rate as that amongst Australian workers:

> **Mr Kinnaird:** Finally, we have data on the work-related fatality rate among 457 visa workers, which shows that the fatality rate is more than double the rate among Australian workers in equivalent occupations. So you would expect that the injury rate would be similar.
>
> **CHAIR:** What is the source of that and can you provide that further information on notice, please?

1.90 In relation to the evidence provided by Mr Kinnaird on notice to the committee, Coalition Senators note that the data that Mr Kinnaird referred to only

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33 *Committee Hansard*, 23 May, p. 11.

34 Department of Immigration and Citizenship, 'Subclass 457 State/Territory summary report 2012-13 to 30 April 2013', p. 2.

35 *Committee Hansard*, 23 May, p. 9.

covers the period 2008-09, one financial year, and that the number of such deaths in that year was atypically high.

1.91 In relation to work-related fatalities among 457 visa holders, Coalition Senators note that the department holds a register of deaths of 457 visa holders.

1.92 The department on notice advised the committee that it was aware of the death of 58 visa holders since 2007. Forty-seven of these deaths were non work-related and 11 work related.[36]

Coalition Senators' conclusions on allegations of rorting the 457 visa program

1.93 The lack of authoritative statistical or substantive evidence provided by Minister O'Connor, the CFMEU and the TWU in their spurious claims of widespread rorting of the 457 visa program is not consistent with the records published by the department, which indicate that such incidents are rare and isolated within the 457 visa program.

1.94 Based on the evidence provided to the inquiry, Coalition Senators conclude that the extremely damaging statements made by Minister O'Connor, the CFMEU and the TWU, alleging widespread rorting of the 457 visa program, were politically motivated and designed to undermine the 457 visa program and are not supported by their own evidence or any other authoritative statistics or sources.

Evidence regarding Labor Market Testing

1.95 Labour Market Testing (LMT) was previously a requirement for not only subclass 457 sponsorship but also sponsorship under the Employer Nomination Scheme (ENS) and Regional Sponsored Migration Scheme (RSMS).

1.96 LMT was abolished in all of those areas as it was deemed to be complex, onerous and ineffective.

1.97 The 457 visa program is only accessible to those employers with a strong record of, or a demonstrated commitment to, employing local labour and, also, a demonstrated financial commitment to training Australian workers

1.98 Coalition Senators note the compelling evidence from industry groups and labour market experts who argued against the introduction of stringent LMT as part of the 457 visa application process.

1.99 Coalition Senators agree that the reintroduction of stringent LMT will undermine the rationale and purpose of the 457 visa program, which is intended to facilitate the rapid filling of employment positions during temporary skill shortages.

1.100 Coalition Senators note that there is already an adequate inbuilt mechanism for LMT within the current 457 visa process.

36 Department of Immigration and Citizenship, responses to questions on notice, 23 May 2013 (received 12 June 2013), p. 8.

1.101 The adequacy of the current inbuilt mechanism for LMT was supported by the evidence of the Australian Mines and Metals Association (AMMA), which set out and described the basis upon which an employer is able to access the 457 visa program:

> Before a position in a business can be filled with an overseas worker, the sponsor must certify that it is suitably skilled and that the qualifications and experience of the visa holder are equivalent to what would be required of an Australian employed in that occupation. Market rates and conditions that would be paid to an Australian in the same job in the same workplace must also be provided.
>
> Sponsors incur additional costs for employing workers on 457 visas such as paying for health insurance, flights to and from Australia, and agent fees for finding the worker. These additional costs of sponsorship can amount to $60,000 per person.
>
> 457 visas are not a low cost option to avoid the costs of employing Australian residents. It would be unsound to proceed on any other basis than that employer's hire foreign workers only as a last resort. This in-built mechanism makes it unnecessary to incorporate further labour market testing into the visa application process.
>
> Furthermore, labour market testing – insisting that employers show evidence of having recruited locally would be debilitating for employers urgently seeking to fill a position, and who are familiar with the challenges of the local employment market. Employers seek foreign workers when they urgently need skills that are not otherwise accessible to them.
>
> Labour market testing would also be fraught with bureaucratic and administrative problems, as DIAC case officers would also have to assess the additional information provided, thereby increasing DIAC workload and inflating processing times for 457 visas. To take this a step further and be absolutely clear, deliberately inflating process times as a disincentive to using 457 visas would be: very poor governance indeed, a rank waste of public resources; and would ill serve the interests of the Australian economy and job opportunities.[37]

1.102 Coalition Senators believe that the introduction of stringent LMT ignores the reality that it is in the employer's best interests to conduct their own LMT and assess the availability of local skills prior to seeking to utilise the 457 visa process.

1.103 Coalition Senators note the evidence from various submitters, including Consult Australia, that Australian businesses overwhelmingly prefer to hire Australians. Consult Australia submitted that, as it is more economical and less complicated to fill skills requirements from the local workforce, employers unsurprisingly conduct their own LMT in the first instance.

1.104 Consult Australia's submission stated that employers consistently advise that they prefer to recruit locally available staff rather than having to seek out temporary skilled migrants:

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37 Australian Mines and Metals Association, *Submission 22*, p. 7.

> The cost of employing a temporary skilled migrant is much larger than the cost of recruiting locally, especially in terms of the cost of the process and the cost of relocating a new employee and their family to Australia. Temporary skilled migrants require more support to settle into Australian business practices, and their families require support to ensure their experience is a positive one and they do not return home early.
>
> This demonstrates that labour market testing is a normal procedure for employers in the built environment consulting sector. Placing new requirements on employers to document and report on labour market testing is not required, and will end up as unnecessary regulation.[38]

1.105 Consult Australia's evidence was supported by the submission of Hamilton's Migration Law, which stated:

> …labour market testing is already conducted by employers with a range of means…Employers are entitled to determine how best to recruit to fill a vacancy given the workforce available in their particular area. The statutory form of labour market testing has already been rejected as a feature of the 457 regime as it was seen to be incompatible with the purpose of the program which is to flexibly and quickly fill short-term vacancies.[39]

1.106 The evidence of the Ai Group also supported an employer's preference to recruit locally available staff:

> Sourcing skilled labour via 457 visas attracts a significant premium over hiring locally and this ensures that in the vast majority of cases employers will only go down the 457 path when they have exhausted local options. In this way, employers themselves test the market thoroughly before choosing to hire through the 457 program. The visas are also available only for skills which are demonstrated to be in demand. Stringent testing will simply add more unnecessary bureaucracy...Delays caused by such testing could prevent a business from meeting urgent commercial needs.[40]

Government proposal to introduce stringent labour market testing

1.107 The Gillard Government is proposing to reintroduce LMT as a requirement for 457 visa sponsorship through the Migration Amendment (Temporary Sponsored Visas) Bill 2013 (the Bill), which is currently before the Parliament.

1.108 The Bill provides that employers may be required to provide evidence that they have made attempts to fill the position locally before seeking to become a 457 visa sponsor. Evidence to be provided would include:

- advertising of the position by the employer;
- participation in career expos;
- fees paid for recruitment; and

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38 Consult Australia, *Submission 3*, p. 6.

39 Hamiltons Migration Law, *Submission 15*, pp 3-4.

40 Australian Industry Group, *Submission 16*, p. 4.

- results of recruitment attempts.

1.109 The Bill introduces new LMT requirements across all skill level occupations with the Minister having the power to exempt some, but not all, higher skill level occupations.

1.110 The Bill proposes that the following types of occupations may be exempted if specified in a legislative instrument:

- professionals and managers: occupations requiring a bachelor degree or five years of work experience would be exempt by default; and
- associate professionals: occupations requiring a diploma or three years of work experience would be exempt by default.

Evidence against the introduction of stringent labour market testing

1.111 Coalition Senators note that the inquiry received strong and credible evidence that the introduction of stringent LMT will reverse the balance of minimal administrative burden, which is vital to the success of the 457 visa program, and reduce the ability of an employer to access skilled labour in an efficient and economical manner.

1.112 In its submission, the Chamber of Commerce and Industry Queensland stated its belief that LMT is ineffective, time consuming and of little value to small and medium employers.[41]

1.113 BCA strongly recommended against the introduction of LMT as an onerous requirement that would impose additional, unnecessary regulatory costs on industry, and would be impractical in most cases. BCA noted that LMT introduces complex and costly process without providing any demonstrated benefits:

> Businesses overwhelmingly prefer to hire Australians first. It is cheaper and faster to fill skills requirements from the permanent local workforce. Employers are taking on additional costs of hiring, training and relocating overseas when applying for 457 visas – it is in their commercial interest to have already assessed whether there might be Australian workers available to fill the roles.
>
> There is next to nothing to be gained from mandatory labour market testing. Labour market testing would only add more cost and delay to employers and curtail business activity.
>
> Furthermore, the introduction of labour testing could be inconsistent with Australia's commitments under World Trade Organization and free trade agreements, as noted in the government response to the report of the Joint Standing Committee on Migration in 2009.[42]

41 Chamber of Commerce and Industry Queensland, *Submission 13*, p. 7.

42 Business Council of Australia, *Submission 18*, p. 10.

1.114 The evidence of the ANU College of Law was that the introduction of stringent LMT within the application processes for the 457 visa program would be inefficient and ineffective.[43]

1.115 ACCI submitted that the introduction of stringent LMT requirements could cause significant time delays and would only slow down access to skilled overseas workers under what is supposed to be a fast, flexible visa solution to skilled labour shortages.[44]

Failure of government to provide a Regulation Impact Statement

1.116 Coalition Senators have significant concerns regarding the failure of the Government to provide a Regulation Impact Statement (RIS) in relation to Schedule 2 of the Bill, which contains the LMT provisions, given the cogent evidence of the likely detrimental impact these provisions will have on business.

1.117 The requirement for a RIS is set out on the Office of Best Practice (OBPR) website, which states:

> A Regulation Impact Statement (RIS) is required, under the Australian Government's requirements, when a regulatory proposal is likely to have an impact on business or the not-for-profit sector, unless that impact is of a minor or machinery nature and does not substantially alter existing arrangements.[45]

1.118 On 14 May 2013, the OBPR advised the department that a RIS was required in relation to Schedule 2 of the Bill, which contains the LMT provisions.

1.119 The department advised the OBPR that it would not be able to fulfil the request in the short time frame given that the Bill was to be tabled on 29 May 2013.

1.120 On 22 May 2013, the Minister requested the Prime Minister to grant an exemption to the RIS process, and on 27 May 2013 the Prime Minister granted that exemption.

1.121 No reasons have been provided in relation to why the Prime Minister granted an exemption citing 'exceptional circumstances'.

1.122 The Government was advised of the concerns of business and industry in relation to the detrimental impacts of the Bill in the 'Open letter to members of the Federal Parliament regarding the Migration Amendment (Temporary Sponsored Visas) Bill 2013' (17 June 2013).

1.123 The letter was from the MCA and signed by: Innes Willox, Chief Executive Officer of the Ai Group; Jennifer Westacott, Chief Executive of the Business Council

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43 Migration Law Program, Legal Workshop, Australian National University College of Law, *Submission 19*.

44 Australian Chamber of Commerce and Industry, *Submission 21*, p. 10.

45 Department of Finance and Deregulation website, 'Australian Government RIS', http://www.finance.gov.au/obpr/ris/gov-ris.html (accessed 19 June 2013).

of Australia; and Carla Wilshire, Chief Executive Officer of the Migration Council Australia.

1.124 An extract from the text of the letter setting out the concerns of business and industry is as follows:

> We are writing to ask for your support in opposing the Migration Amendment (Temporary Sponsored Visas) Bill 2013 in full when it is introduced into the parliament this week.
>
> We are greatly concerned by the lack of supporting evidence, damaging rhetoric and poor process associated with the proposed changes to the 457 visa scheme, along with the considerable risks posed for investment, job creation and economic growth. Furthermore, there has been minimal consultation with industry about these changes. The legislation risks undermining the capacity to fill identified skills gaps in a timely way without a proper assessment of whether there is a genuine problem to be solved. What is so concerning is that the government is seeking to rush these changes through the final session of parliament before the election without subjecting its claims about alleged scheme abuses and inadequacies to the rigor of its own Regulatory Impact Statement (RIS) process.
>
> The RIS exemption for the new labour market testing requirements in the Bill cites 'exceptional circumstances'. It is unclear what these circumstances are, given that the minister's department has provided no hard evidence of a systemic problem with the scheme. The government's primary argument for a systemic problem rests on a misleading interpretation of an ambiguous survey finding in a recent Migration Council Australia report. This is not an adequate foundation for introducing costly new regulation.
>
> A Regulatory Impact Statement, with full consultation with industry, is the appropriate way to assess whether a problem exists with the 457 visa scheme and the costs and benefits of solving any purported problems through specific actions, including regulation.
>
> Unwarranted additional regulation of the 457 visa scheme risks penalising all employers and their employees, and undermining investment, skills transfer and development and broader job creation, to address a relatively small number of instances that may be better dealt with through other means.

Coalition Senators' conclusions on Labour Market Testing

1.125 Coalition Senators concur with the concerns highlighted by the evidence from business and industry that the Government's LMT requirement undermines the rationale and purpose of the 457 visa program, which is intended to facilitate the rapid filling of employment positions during temporary skill shortages.

1.126 The ability to rapidly fill vacancies with a skilled overseas worker is an important feature in the overall success of the program.

1.127 Coalition Senators believe the proposed regime for LMT will be cumbersome to implement and difficult to monitor, and will increase the burden of regulation, obligations, compliance and enforcement on employers seeking to sponsor workers on 457 visas.

1.128 Based on the evidence provided to the inquiry, and the false statements of the Minister in relation to the 10 000 alleged cases of abuse and rorts and the spurious evidence of the CFMEU and TWU regarding abuse of the 457 visa program, Coalition Senators have formed the view that the re-introduction of LMT is politically motivated and is being used as a vehicle to frustrate and discourage business from utilising the benefits that underpin the 457 visa regime.

1.129 Coalition Senators do not support the introduction of stringent LMT.

1.130 Coalition Senators consider that the Government should delay the passage of the Migration Amendment (Temporary Sponsored Visa) Bill 2013 to allow a RIS assessment and consultation with relevant parties in relation to the Bill and, in particular, its impact on business and industry.

Recommendation 2

1.131 Coalition Senators recommend that the Government delay the passage of the Migration Amendment (Temporary Sponsored Visa) Bill 2013 (the Bill) to allow a RIS assessment and consultation with relevant parties in relation to the Bill and, in particular, its impact on business and industry.

Labour market testing and Enterprise Migration Agreements

1.132 Coalition Senators note that EMAs require significant demonstration by business that the proposed positions cannot be filled from the local labour market. As set out on the department's website:

> Labour from outside Australia will only be supplementary, with resources projects required to demonstrate effective, genuine and ongoing local recruitment efforts…
>
> All 457 sponsors, whether under an EMA or not, have to attest to having a strong record of, or a demonstrated commitment to, employing local labour and non-discriminatory employment practices. The jobs board provides a way for EMA holders to show they have made genuine attempts to recruit Australian workers before recruiting workers from outside Australia.[46]

1.133 The department's advice was confirmed by evidence from the Ai Group that EMAs require:

> a) Evidence that there are genuine skills shortages in the local area, and b) Evidence of efforts to use Australian workers first.[47]

The economic and social benefits of skilled migration and the 457 visa program

1.134 The department's submission to the inquiry acknowledges that the 457 visa program is an important mechanism to address skills needs in the labour market which

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46 Department of Immigration and Citizenship website, 'Fact Sheet 48a – Enterprise Migration Agreements', http://www.immi.gov.au/media/fact-sheets/48a-enterprise.htm (accessed 20 June 2013)

47 Australian Industry Group, *Submission 16*, pp 4-5.

cannot be met domestically. It states that the 457 visa program and EMAs are particularly important for the resources and construction sectors.

1.135 The submission also states that temporary skilled migration ensures that major resources projects are not constrained or jeopardised by a shortage of appropriately skilled workers that are needed to deliver a project on time and on budget.

1.136 For the resources sector, temporary skilled migration is an important mechanism to demonstrate labour security and the capacity to deliver major projects on time, which can be a critical factor to support business and investor confidence, and access to project finance.

1.137 In the report 'Population Flows: Immigration Aspects 2010-11 Edition', the department confirms the economic benefits of the 457 visa program. The report states:

> The fiscal contribution of migrants to Australia's bottom line is significant. According to the Migrants' Fiscal Impact Model the total contribution from the 2010–11 Migration and Humanitarian programs and the Temporary Business subclass 457 program is $1.6 billion in the first year after arrival and $15.4 billion over the first 10 years.[48]

1.138 The department also noted that 457 visas generate a larger immediate return to Australian taxpayers than all other visa categories.

1.139 The Ai Group provided compelling evidence on the economic benefits of the 457 visa program and what could be lost if access to required labour is not facilitated. Its submission stated that, for a company already under significant economic pressure, failure to be able to source skilled labour could 'mean the difference between their survival and continuing operations'.[49]

1.140 Ai Group concluded that for those without access to the program the pressure to move operations off-shore may become compelling to the detriment of the employees in domestic operations.[50]

1.141 The ACCI submission noted that Australia garners significant economic and social benefit welcoming migrants to work in Australia. It observed that skilled migrants live and work in Australian communities, rent houses, buy groceries, holiday in our major tourist areas, send their children to our schools and provide employers with the skills they need to operate effectively and productively.[51]

1.142 This evidence was supported by AMMA:

> With regard to the general economy, 457 visas workers were found to transfer their knowledge, skills, cultural richness and contribute directly to the economy through spending money on living expenses and by paying

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48 Department of Immigration and Citizenship, 'Population Flows: Immigration Aspects 2010-11 Edition', April 2012, p. 151.

49 Australian Industry Group, *Submission 16*, p. 6.

50 Australian Industry Group, *Submission 16*, p. 6.

51 Australian Chamber of Commerce and Industry, *Submission 21*, p. 13.

> taxes. They often possess world-class project management experience that rubs off on the local enterprise and advances the skills and employability of Australian employees. Skilled migrants in the resource industry are subject to a high rate of taxation, without the offsets afforded to domestic taxpayers. On average, 457 visa holders were found to pay a tax rate of about 8.5% more than Australian citizens and residents, which represents valuable tax receipts to the Government and a legacy for our community of their period working in this country.[52]

1.143 AMMA also provided evidence as to the benefits of the 457 visa program to the 457 visa holders themselves:

> Amidst all the hysteria surrounding the 457 visa 'debate', one voice has been forgotten in particular: the 457 visa holders themselves. The Edith Cowan research indicated several benefits for visa holders working even for a short time in Australia including: improved choice, career prospects, equality in that they are valued for their skills, financial reward, a safe working environment, the weather and a pleasant lifestyle. Workers from the Philippines, for example, found the higher financial rewards available highly beneficial to improving the lives of their children back home (this is simply Australia becoming part of the massive Philippine Diaspora around the world seeking to bring remittances back into that country).[53]

1.144 The submission from Fragomen noted:

> …[it seems] inconceivable how many infrastructure projects recently completed, currently underway or those being proposed could possibly have been undertaken without access to the engineers, IT professionals, contract and project managers and other highly skilled professionals from around the world. Australian companies and staff and the underlying labour market in Australia would simply not be able to undertake this scale of work.[54]

1.145 Fragomen's views were supported by the submission from Consult Australia, which stated:

> If the facility to quickly and efficiently recruit temporary skilled migrants did not exist the Australian economy would cease to function as we know it. Large infrastructure projects would be slow to complete, and it would be impossible for private investors and developers to make planning decisions that rely on accurate workforce supply data.[55]

1.146 The evidence of the Minerals Council of Australia was that:

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52 Australian Mines and Metals Association, *Submission 10*, p. 10.

53 Australian Mines and Metals Association, *Submission 10*, p. 10.

54 Fragomen, *Submission 36*, p. 6.

55 Consult Australia, *Submission 3*, pp 6-7.

> Simply, without temporary skilled migration, the Australian minerals industry would not have been able to respond to the significant investment demand in mining experienced over the past decade.[56]

1.147 In relation to the social impact of such agreements, the Minerals Council of Australia submitted:

> …regional economic and social impacts are clear with thriving mining communities across Australia – a recent MCA KPMG Report based on 2006 and 2011 ABS Census data shows that incomes and educational attainment are higher, unemployment is lower and there are more families and working aged residents in Australia's mining regions than in regional Australia more generally.[57]

1.148 The MCA, in its report 'More than temporary: Australia's 457 visa program (the MCA report), concluded that its survey results reinforced that skills transfer and knowledge from 457 visa holders play an essential part in building Australia's human capital.[58] The MCA report observed:

> …temporary migration does not just fill skills shortages; it addresses skills deficits by training Australian workers. It is critical in keeping us competitive in the era of international knowledge wars, when industry innovation is global. In effect, Australia's temporary migration system is our answer to the 'brain drain': that is, brain circulation. The flow of people has not only helped us to keep pace, it also has created a skills pull in some sectors that has enabled Australia to lead innovation.[59]

1.149 Fragomen in its submission to the Inquiry set out the benefits of the subclass 457 visa to Australia:

> The subclass 457 visa allows multinational businesses to transfer skills and talent in an efficient and effective manner and Australian business to access a global pool of talent, often with skills and experience not available in the Australian labour market. This results in:
>
> - increased competitiveness and productivity in the Australian economy;
> - the ability to introduce new skills, processes and technology and increased employment opportunities for Australians that derive from this;
> - skills transfer from overseas trained professionals to the Australian workforce;
> - the ability to satisfy short-term labour demands; and

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56 Minerals Council of Australia, *Submission 8*, p. 5.

57 Minerals Council of Australia, *Submission 8*, p. 5.

58 Migration Council of Australia, 'More than temporary: Australia's 457 visa program', additional information received 14 May 2013, p. 4.

59 Migration Council of Australia, 'More than temporary: Australia's 457 visa program', additional information received 14 May 2013, p. 4.

- The ability to manage Australia's permanent migration needs by ensuring that migrants are tried and tested and that they have had the opportunity to properly assess a long-term commitment to life in Australia.[60]

1.150 The MCA report concluded that its survey provided a body of evidence indicating that the 457 visa program is meeting the needs of both employers and 457 visa holders. It also found that a high level of employment satisfaction demonstrated that 457 visa holders are integrating well into the Australian workforce. It concluded that, on the whole, employer usage and attitudes reflect the policy intention of the 457 visa program and found that employers indicate a high level of satisfaction and an ongoing commitment to using the program.[61]

1.151 The submission of Berry Appleman and Leiden (BAL Australia) stated:

> …it is apparent from our observations that temporary skilled migration across all relevant visa categories provides a wide range of benefits including by not limited to:
>
> - ensuring complex projects— of substantial economic significance and of importance to the nation—may advance even when there are local labour market bottlenecks because of lack of required local expertise or labour shortages in particular occupations
> - ensuring the Australian economy has access to world-best technology and practices, to ensure the economy is able to enhance efficiencies and local based knowledge
> - Sharing of overseas cultures for the enrichment of Australian society as a whole.[62]

1.152 The Commonwealth Fisheries Association (CFA) submission noted the economic benefit of access to 457 visa labour to ensure the sustainability of its industry:

> At present we employ at the deckhand level on 457 visas. Some of these employees have over three years service with us and have been promoted up the ranks...and are critical to our operations... is a recognised regional centre that has chronic labour shortages...We also employ another 20-30 deckhands at any one time that are foreigners from various countries who are on working holidays visas, and can only be employed with us for 6 months, although most would love to stay longer with us. Without a doubt we need to have access to 457 employees at the deckhand level to remain viable. (Fishing operator, March 2011; communication with CFA)[63]

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60 Fragomen, *Submission 36*, pp 5-6.

61 Migration Council of Australia, 'More than temporary: Australia's 457 visa program', additional information received 14 May 2013, p. 12.

62 Berry Appleman and Leiden, *Submission 12*, p. 8.

63 Commonwealth Fisheries Association, *Submission 14*, p.

1.153 In the same vein, the Law Council of Australia (LCA) submission noted that, without the ability for employers to sponsor foreign workers, it has been recognised that many business, including public hospitals, would cease to function. It noted that the Premier of NSW has stated that the NSW Health Department engages 2800 foreigners on 457 visas, and that these individuals 'ensure the continued functioning of the state's hospitals: [and that] without them the health system in NSW would simply collapse.[64]

Coalition Senators' conclusions on the economic benefits of the 457 visa program

1.154 Coalition Senators believe that the 457 visa program plays a vital role for employers to source skilled labour if appropriate skills cannot be found locally, and that Australia's skilled and semi-skilled migration program should only be employed to supplement our domestic workforce where necessary.

1.155 If designed effectively, the 457 visa program should enable employers to respond to short term skill shortages.

1.156 There is a national economic benefit in enabling highly skilled migrants to complement the local workforce, bring expertise and global experience and make a positive long-term contribution to the Australian community.

1.157 Coalition Senators believe that the 457 visa program has provided significant benefits to Australia.

1.158 The program, if managed in an efficient and effective manner, has the capacity to deliver the skilled workers Australia needs to remain competitive in the global economy. Australia has been a successful and prosperous nation in large part due to its skilled and productive workforce.

1.159 It is critical that appropriate policies be implemented if Australia is to have a workforce that is capable of ensuring the nation's strong growth and continued economic success.

Fair Work Ombudsman

1.160 On 18 March 2013, the Government announced that it would 'give powers to the Fair Work Ombudsman to monitor and enforce compliance with 457 visa conditions, to ensure workers are employed in the right jobs and are receiving market salary rates'.[65]

1.161 Given the previous false claims by Minister O'Connor regarding claims of 457 visa rorting, Coalition Senators were at the time concerned that this move was another cheap political stunt that would mean an increased workload for the Fair Work Ombudsman with little to no evidence for an additional regulatory burden.

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64 Law Council of Australia, *Submission 29*, p. 14.

65 The Hon Brendan O'Connor, MP, Minister for Immigration and Citizenship; and the Hon Bill Shorten, MP, 'Fair Work inspectors to monitor rogue 457 employers', joint media release, 23 February 2013.

1.162 At Senate Estimates, departmental officials advised that a Memorandum of Understanding (MoU) between the Fair Work Ombudsman and the department would be needed:

> **Senator CASH:** Can I now move on to the $3.4 million that has been allocated to the dual arrangements with Fair Work Australia. Could you take me through how the arrangements are actually going to work, who will have jurisdiction and in what circumstances?
>
> **Mr Kukoc:** We are still working out an MoU with the Fair Work Ombudsman but we hope to finalise this MoU very soon. Based on the current policy, the intention is to have 300-plus Fair Work Ombudsman inspectors with the power to investigate 457 noncompliance when they visit work sites, as part of their regular duties. They will focus on two aspects of the 457 program. The first is the salary that is being paid—whether the 457s are engaged under the same terms and conditions as an equivalent Australian worker—and the second will be whether they are working in the occupation that was nominated by the sponsor. They will provide that information to our operational integrity and operational integrity will then, based on the risk matrix that they have, make a decision on how to deal with that noncompliance.[66]

1.163 Yet, courtesy of the Bill introduced into the House of Representatives on 6 June 2013, it is now clear that a MoU will not suffice and that amendments to the *Fair Work Act 2009* (Fair Work Act) will be required.

1.164 This comes after Labor promised at the 2010 election that it would make no changes to the Fair Work Act in this term of government, and we have now seen more than 400 pages of legislation. This is just another breach of promise, on a long list, in order to appease union bosses.

1.165 While the Government have provided an additional allocation in the budget to the Fair Work Ombudsman, they have provided evidence at Senate Estimates that this will employ only an additional six or seven inspectors.[67]

1.166 Further, this additional burden should be viewed in the context that, since 1 July 2011, due to financial and budgetary constraints and budget cuts, there has been a cut of 213 inspectors at the Fair Work Ombudsman.[68]

1.167 Coalition Senators are deeply concerned that this highly political move by the Government will spread the Fair Work Ombudsman thin and could impede the Fair Work Ombudsman from assisting small businesses and employees.

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66 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Committee Hansard*, 23 May 2013, p. 55.

67 Mr Michael Campbell, Acting Fair Work Ombudsman, Fair Work Ombudsman, *Estimates Hansard*, Senate Standing Committee on Education, Employment and Workplace Relations, 3 June 2013, p. 10.

68 Senate Standing Committee on Education, Employment and Workplace Relations, Question on Notice EW0768_13.

COALITION'S RESPONSE TO RECOMMENDATIONS

CHAPTER 2 (Effectiveness of the 457 visa program)

Recommendation 1

The committee recommends that, for the exclusive purposes of the 457 visa program, the Australian Workforce and Productivity Agency be given the responsibility and commensurate funding to compile and prepare a skills in-demand list which also takes into account regional labour market skill shortages.

Coalition Senators' response:

1.168 Coalition Senators do not oppose this recommendation.

1.169 Coalition Senators note, however, that in the current fiscal environment the allocation of 'commensurate funding' may not fall within the current budget parameters.

Recommendation 2

The committee recommends that the government institute a review of the extent to which Australia's immigration system does and should facilitate the flow of low- and- semi-skilled labour into Australia.

Coalition Senators' response:

1.170 Coalition Senators do not oppose this recommendation.

Recommendation 3

The committee recommends that a dedicated pathway for intra-company transfers be introduced to the 457 visa program.

Coalition Senators' response:

1.171 Coalition Senators do not oppose this recommendation.

CHAPTER 3 (Protection of 457 visa holders' rights)

Recommendation 4

The committee recommends that the *Fair Entitlements Guarantee Act 2012* be amended to make 457 visa holders eligible for entitlements under the Fair Entitlements Guarantee scheme.

Coalition Senators' response:

1.172 Coalition Senators do not oppose this recommendation.

1.173 The Coalition has a long and proud history of protecting employees' entitlements. It was the Coalition that established the General Employee Entitlements and Redundancy Scheme (GEERS) safety net almost ten years ago, following the high-profile collapse of National Textile.

1.174 The GEERS safety net is a basic payment scheme established to assist employees who have lost their employment due to the liquidation or bankruptcy of their employer and who are owed certain employee entitlements. GEERS covers

capped unpaid wages, annual and long service leave, capped payment in lieu of notice and capped redundancy pay.

1.175 Coalition Senators note that the Government in 2012 legislated this program and what is now the Fair Entitlements Guarantee.

1.176 Coalition Senators support the extension of the *Fair Entitlements Guarantee Act 2012* to protect workers let down by employers who have not left provision for employee entitlements at a time of company insolvency or bankruptcy.

Recommendation 5

The committee recommends that the Government initiate an inquiry into the extent to which relevant workplace and occupational health and safety legislation protects the legal rights, remedies and entitlements of 457 visa holders and whether temporary migrant workers in Australia are adequately protected by relevant workplace and occupational health and safety laws.

Coalition Senators' response:

1.177 Coalition Senators do not support this recommendation.

1.178 Coalition Senators remain to be convinced of the evidentiary need for such an inquiry noting the majority report did not point to any evidence.

1.179 That said, should there be a clear need and evidence, Coalition Senators would be minded to further consider any proposals put forward in that context.

Recommendation 6

The committee recommends that the immigration program be reviewed and, if necessary, amended to provide adequate bridging arrangements for 457 visa workers to pursue meritorious claims under workplace and occupational health and safety legislation.

Coalition Senators' response:

1.180 Coalition Senators do not support this recommendation.

1.181 Coalition Senators remain to be convinced of the evidentiary need for such an amendment noting the majority report did not point to any compelling evidence.

1.182 Coalition Senators note that any claim could only be considered meritorious after the conclusion of any such proceedings and such proposals seem to be ill-considered. That said, should there be a clear need and evidence, Coalition Senators would be minded to genuinely consider any proposals put forward in that context.

Recommendation 7

The committee recommends that the Department of Immigration and Citizenship be required to provide 457 visa holders, on each approval, variation or re-approval of an application, with comprehensive information regarding sponsors' obligations; relevant workplace and human rights governing the employment relationship; and sources of workplace, legal and migrant advice and assistance while working in Australia.

Coalition Senators' response:

1.183 Coalition Senators do not support this recommendation.

1.184 Section 125 of the Fair Work Act requires employees to be provided with a Fair Work Information Statement, prepared by the Fair Work Ombudsman.

1.185 Given the Fair Work Ombudsman is a well trusted institution that already provides information to both employers and employees on the operation of the Fair Work Act, Coalition Senators believe that the Fair Work Ombudsman is best placed to assist all workers, including 457 visa holders, with information.

1.186 The department is not equipped to provide the kinds of advice that is being suggested and would require a significant duplication of work already undertaken.

1.187 Coalition Senators contend that the information that is being suggested is already available courtesy of the Fair Work Ombudsman and more specific information about the operation of 457 visas is provided to visa-holders already.

CHAPTER 4 (EMAs and RMAs)

Recommendation 8

The committee recommends that the Government prepare and release submission guidelines for Enterprise Migration Agreements and Regional Migration Agreements.

Coalition Senators' response:

1.188 Coalition Senators do not oppose this recommendation.

1.189 Coalition Senators note that the recommendation above goes to this issue—that is, that the Government instruct the department to process in a timely fashion the EMAs and RMAs that are currently lodged with the department.

CHAPTER 5 (Potential impact of proposed changes to the 457 visa program)

Recommendation 9

The committee recommends that the government initiate a review of the Ministerial Advisory Council on Skilled Migration (MACSM) to establish clear terms of reference, operating guidelines and consultation and communication strategies for that body.

Coalition Senators' response:

1.190 Coalition Senators do not oppose this recommendation.

Recommendation 10

The committee recommends that the proposed changes to on-hire arrangements and sponsors' obligation not to recover certain costs be effected immediately and separately to the regulation currently proposed to commence on 1 July 2013.

Coalition Senators' response:

1.191 Coalition Senators do not support this recommendation.

Recommendation 11

The committee recommends that the proposed empowerment of Fair Work Inspectors under the *Migration Act 1958* and to subclass 457 visa condition 8107 be effected immediately and separately to the Migration Amendment (Temporary Sponsored Visas) Bill 2013.

Coalition Senators' response:

1.192 Coalition Senators do not support this recommendation.

Senator Michaelia Cash **Senator Sue Boyce**

Senator Gary Humphries

ADDITIONAL COMMENTS BY SENATOR NICK XENOPHON

1.1 The ability of the Australian labour market to respond in a time effective manner to changing labour market needs is of utmost importance. During the course of this inquiry the committee heard how the Temporary Work (Skilled) Standard Business Sponsorship (Subclass 457) visa program (457 visa program) seeks to strike a balance in addressing temporary labour shortages with protecting the employment opportunities and conditions of Australian (or permanent resident) workers. Based on the evidence received by the committee, it appears as though the right balance has not yet been struck. The committee has made a number of important recommendations which I believe go some way to achieving this sought after balance. However, I would like to take this opportunity to reflect further on some of the issues explored in the committee's report and to make additional recommendations.

The effectiveness of the 457 visa program

The social, cultural and economic benefits of the 457 visa program

1.2 The 457 visa program can provide a meaningful 'circuit-breaker' when employers are faced with an inability to source appropriately skilled candidates from the local market, which has the flow-on benefit of allowing job-creating projects to begin without significant delays.[1]

1.3 Labour shortages in critical industries and services, such as the healthcare sector have also been addressed through the use of the 457 visa program. It is important however not to over emphasise the necessity of the 457 program in filling critical skills shortages, particularly in light of the Australian Nursing Foundation's evidence that Australian graduate nurses are often being overlooked in favour of 457 visa holders.[2]

1.4 The committee also heard how the 457 visa program has been a valuable platform for skills exchange between local and overseas workers:

> The employment of subclass 457 visa holders is extremely beneficial, as the skill the visa holder possesses is passed to existing and new employees of the Australian sponsor. Subclass 457 visa holders accordingly enhance

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1 Australian Mines and Metals Association, *Submission 22*, p. 5.

2 Australian Nursing Foundation, *Submission 27*, p. 6.

> Australia's skill base and assist in developing Australia's economy to become more efficient on a global comparison.[3]

Deeper systemic issues

1.5 The inquiry touched on but did not have the time or resources to explore deeper systemic issues relating to education and particularly vocational training in Australia. Whilst such issues strictly fell outside the scope of the inquiry, they cannot be ignored if medium to long term labour and skills shortages are to be addressed. Tackling these issues would of necessity involve better labour market forecasting, and a thorough assessment of where improvements can be made in our education and training programs. It would also need to assess mobility of the workforce, appropriately balancing incentives and social criteria.

Recent divergence of 457 visa applications from labour market trends

1.6 However, concerning evidence was received by the committee in relation to a recent divergence between Australia's unemployment rate, the number of job advertisements and the number of 457 visa applications. Mr Kruno Kukoc of the Department of Immigration and Citizenship told the committee:

> Quite frankly, this was something that became of concern to the department last year, when we briefed the government and minister.[4]

1.7 As to the underlying causes of the divergence, there is now suspicion that the 457 visa program is no longer being used as a measure of last resort and that 'various loopholes in the current legislative framework' are enabling 'employers to source skilled workers from offshore without sufficient commitment to recruiting and training locally'.[5]

1.8 I fully endorse the committee's support for assessment of the effectiveness of the 457 visa program in ensuring overseas workers are only employed in situations where there is a genuine skills shortage. Particular attention should be paid to industries (such as the accommodation and food services industries),[6] which

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3 Berry Appleman and Leiden (BAL Australia), *Submission 12*, p. 3.

4 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Committee Hansard*, 23 May 2012, p. 71.

5 Department of Immigration and Citizenship; Department of Education, Employment and Workplace Relations; Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education ; and Department of Resources, Energy and Tourism, *Submission 24*, p. 3.

6 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, 27 May 2012, p. 69.

historically have been shown to exhibit higher levels of non-compliance with the requirements of the 457 visa program.

1.9 I believe the lack of penalties associated with hiring a 457 visa holder where a qualified worker is available has contributed to the inappropriate and unnecessary use of the 457 visa program. As Mr Bob Kinnaird, National Research Director, Construction and General Division, Construction, Forestry, Mining and Energy Union, told the committee:

> It is worth noting that there is absolutely no sanction whatsoever for what is in effect the fundamental breach of the 457 visa program by an employer – and that is to engage a 457 visa worker when there was a qualified Australian worker available. That is intended to be the fundamental objective of the 457 visa program, yet under the current regulations there is no breach of the regulations where an employer actually discriminates against an Australian worker. Our view is that that particular breach, which is currently non-existent, should exist and should in face attract the highest penalty under the sanctions regime.[7]

Recommendation 1

1.10 That a system of warnings and penalties apply for hiring a 457 visa holder when an appropriately skilled Australian worker is available, and there was evidence no genuine effort was made to source a suitably qualified local worker.

The Consolidated Sponsored Occupations List

1.11 Occupations are included in the Consolidated Sponsored Occupations List (CSOL) based on their level of skill as defined in the Australian and New Zealand Standard Classification of Occupations (ANZSCO).[8] The committee identified serious concerns that the composition of the CSOL is not reflective of identified skill shortages but is rather a 'broadly based occupational list' which has transformed the 457 visa program into a source of 'general labour supply'.[9]

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7 Mr Bob Kinnaird, National Research Director, Construction and General Division, Construction and General Division, Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 23 May 2013, p. 12.

8 Department of Immigration and Citizenship; the Department of Education, Employment and Workplace Relations; the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and the Department of Resources, Energy and Tourism, *Submission 24*, p. 5.

9 Dr Joanna Howe, Associate Professor Alexander Reilly and Professor Andrew Stewart, *Submission 11*, pp 3-4.

1.12 Dr Joanna Howe, Associate Professor Alexander Reilly and Professor Andrew Stewart told the committee that, rather than skill shortages dictating which occupations appear on the CSOL, it is now the case that the CSOL is dictating which occupations are deemed to be in shortage.[10] The result of this inversion of roles is the appearance of occupations such as 'cook' and 'flight attendant' on the CSOL when 'it is arguable these are jobs for which unemployed Australian workers can be trained to do'.[11]

1.13 The committee noted that it received very little detailed evidence regarding how the CSOL is compiled. This lack of transparency has been of concern to me for some time, particularly in relation to the inclusion of 'flight attendant' on the CSOL. As the Transport Workers' Union of Australia explained:

> …flight attendants were added to the CSOL on 1 July 2012. The DIAC did not seek advice from the DEEWR on the labour market status before considering it for inclusion. This is despite ABS Labour Force (Air and Space Transport) figures showing the number of persons working in the aviation industry, including flight attendants has fallen from 59,400 in November 2010 to 53,500 for the same period last year.[12]

1.14 The committee has recommended:

> That for the exclusive purposes of the 457 visa program, the Australian Workforce and Productivity Agency be given the responsibility and commensurate funding to compile and prepare a skills in-demand list which also takes into account regional labour market skill shortages.

1.15 While I support this recommendation, I believe it needs to be made explicitly clear that transparency as to how a skills in-demand list is compiled is paramount in order to avoid confusion in the future as to why certain occupations appear on the list.

Recommendation 2

1.16 That the input and processes used by the Australian Workforce and Productivity Agency in compiling a skills in-demand list be made publicly available.

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10 Dr Joanna Howe, Associate Professor Alexander Reilly and Professor Andrew Stewart, *Submission 11*, p. 3.

11 Dr Joanna Howe, Associate Professor Alexander Reilly and Professor Andrew Stewart, *Submission 11*, p. 4.

12 Transport Workers' Union of Australia, *Submission 20*, p. 9.

Protection of 457 visa holders' rights

Vulnerability of 457 visa holders

1.17 The committee heard how 457 visa holders are in a position of great vulnerability, largely due to:

- their reluctance to speak out about unfair working conditions or breaches of work health and safety legislation for fear of putting their employment at risk and jeopardising their opportunity to obtain permanent residency;[13]
- their reliance on their sponsors as the main conduit through which information to and from the Department of Immigration and Citizenship is shared;[14] and
- condition 8107 attached to 457 visas, which requires these visa holders to leave Australia within 28 days of ceasing work for their sponsoring employer, which makes it virtually impossible for visa holders to pursue their rights in instances where work health and safety or employment laws may have been contravened.[15]

1.18 Shockingly, it was reported to the committee that, for the period March 2007 to December 2011, the work-related fatality rate among 457 visa holders was more than double the rate among Australian workers.[16] Any evidence that there is a higher death and injury rate in industries amongst 457 visa holders needs to be addressed urgently. Part of addressing this issue is to ensure 457 visa holders are empowered to speak up when they feel unsafe in the workplace, without fear of repercussions.

Senator Nick Xenophon

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13 Australian Council of Trade Unions, responses to questions on notice, 23 May 2013 (received 30 May 2013), p. 2.

14 Law Council of Australia, *Supplementary submission*, pp 6-7.

15 Human Rights Council of Australia, *Submission 33*, p. 6.

16 Mr Bob Kinnaird, National Research Director, Construction and General Division, Construction, Forestry, Mining and Energy Union, *Committee Hansard*, 23 May 2013, p. 12; and Construction, Forestry, Energy and Mining Union, response to questions on notice, 23 May 2013 (received 3 June 2013), pp 2-5.

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Hallmark Immigration
2	Pluralists for a Referendum
3	Consult Australia
4	Community Services and Health Industry Skills Council
5	Australian Motor Industry Federation
6	Australian Workforce and Productivity Agency
7	Migration Institute of Australia
8	Minerals Council of Australia
9	Master Builders Australia
10	E-Oz Energy Skills Australia
11	Dr Joanna Howe, Associate Professor Alexander Reilly and Professor Andrew Stewart
12	Berry Appleman and Leiden (BAL Australia)
13	Chamber of Commerce and Industry Queensland
14	Commonwealth Fisheries Association
15	Hamiltons Migration Law
16	Australian Industry Group

17	Association of Mining and Exploration Companies
18	Business Council of Australia
19	Migration Law Program, Legal Workshop, Australian National University College of Law
20	Transport Workers' Union of Australia
21	Australian Chamber of Commerce and Industry
22	Australian Mines and Metals Association
23	Australian Federation of Employers and Industries
24	Department of Immigration and Citizenship and other Commonwealth departments
25	Northern Territory Government
26	Scarlet Alliance
27	Australian Nursing Federation
28	Chamber of Commerce Northern Territory
29	Law Council of Australia
30	Communications Electrical Plumbing Union
31	Community Relations Commission NSW
32	Ramsay Health Care
33	Human Rights Council of Australia
34	Chamber of Commerce and Industry of Western Australia
35	Expat International

36	Fragomen
37	Broome Chamber of Commerce and Industry
38	Migration Alliance
39	Ernst and Young
40	Australian Council of Trade Unions
41	Construction, Forestry, Mining and Energy Union
42	Australian Hotels Association
43	Protect Vietnamese Workers
44	Tasmanian Department of Economic Development, Tourism and the Arts
45	Western Australian Government

ADDITIONAL INFORMATION RECEIVED

1	Dr Joo-Cheong Tham and Dr Iain Campbell, 'Temporary Migrant Labour in Australia: The 457 visa scheme and challenges for labour regulation', provided by Dr Joo-Cheong Tham on 26 March 2013
2	Submission to the Senate Standing Committee on Education, Employment and Industrial Relations, Inquiry into the Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012, provided by Dr Joo-Cheong Tham on 26 March 2013
3	'Multiculturalism and temporary migration: where does justice fit?', provided by Dr Joo-Cheong Tham on 26 March 2013
4	'More than temporary: Australia's 457 visa program', provided by Migration Council of Australia on 14 May 2013

5 Responses to questions on notice provided by Australian Mines and Metals Association on 27 May 2013

6 Responses to questions on notice provided by Australian Council of Trade Unions on 30 May 2013

7 A selection of material covering aspects of major immigration reform legislation under consideration by the US Senate provided, by Fragomen on 31 May 2013

8 'US Senate-Immigration Reform Bill', provided by Fragomen on 31 May 2013

9 'US Senate-Border Security Economy Opportunity and Immigration Modernisation Bill', provided by Fragomen on 31 May 2013

10 Responses to questions on notice provided by Australian Chamber of Commerce and Industry on 31 May 2013

11 Responses to questions on notice provided by Transport Workers' Union on 31 May 2013

12 Response to a question on notice provided by Law Council of Australia on 31 May 2013

13 Responses to questions on notice provided by Fragomen on 31 May 2013

14 Responses to questions on notice provided by Construction, Forestry, Mining and Energy Union on 3 June 2013

15 Responses to questions on notice provided by Department of Immigration and Citizenship on 12 June 2013

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, 23 May 2013

ACHTERSTRAAT, Mr Luke, Policy Adviser, Australian Mines and Metals Association

BARKLAMB, Mr Scott, Executive Director, Industry, Australian Mines and Metals Association

BARTLETT, Mr Andrew, Research Fellow, Migration Law and Practice, Migration Law Program, Legal Workshop, Australian National University College of Law

BOLTON, Mr Stephen, Senior Advisor, Employment Education and Training, Australian Chamber of Commerce and Industry

CHAN, Ms Angela, National President, Migration Institute of Australia

CHANESMAN, Mr Alan, External, Migration Law and Policy Adviser, Migration Law Program, Legal Workshop, Australian National University College of Law

GUNN, Mr Richard, Migration Law Committee, International Law Section, Law Council of Australia

HAAG, Mr Simon, Associate Solicitor, Fragomen Global LLP

HOWE, Dr Joanna, Private capacity

KAVADIAS, Mr Spiro, Acting General Manager, Tourism Policy Branch, Tourism Division, Department of Resources, Energy and Tourism

KINNAIRD, Mr Bob, National Research Director, Construction and General Division, Construction, Forestry, Mining and Energy Union

KUKOC, Mr Kruno, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship

MALYON, Ms Katie, Vice-Chair, Migration Law Committee, Law Council of Australia

McEWEN, Dr Melissa, General Manager, Trades Recognition Australia, Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education

MELVILLE, Mr Anthony, Director, Public Affairs and Government Relations, Australian Industry Group

NIVEN, Mr Richard, Manager, Bulk Ores and Infrastructure, Department of Resources, Energy and Tourism

NOONAN, Mr Dave, National Secretary, Construction and General Division, Construction, Forestry, Mining and Energy Union

O'DONOGHUE, Mrs Anne, Law Council of Australia

O'HARA, Mrs Lisa, Lecturer, Migration Law, and Registered Migration Agent, Migration Law Program, Legal Workshop, Australian National University College of Law

PARCELL, Mr Wayne, Secretary, Australian Capital Territory and New South Wales Executive, Migration Institute of Australia

PEDROSA, Mr Jules, Manager, Migration Services, Australian Mines and Metals Association

RODDAM, Mr Mark, Acting Group Manager, Social Policy and Economic Strategy Group, Department of Education, Employment and Workplace Relations

SHELDON, Mr Tony, National Secretary, Transport Workers' Union of Australia

SHIPSTONE, Mr Tim, Industrial Officer, Australian Council of Trade Unions

SOUTHERN, Dr Wendy, Deputy Secretary, Policy and Program Management Group, Department of Immigration and Citizenship

TIGHE, Mr Peter, National Secretary, Communications Electrical Plumbing Union

WALSH, Mr Robert, Managing Partner, Australia and New Zealand, Fragomen Global LLP

WILDEN, Mr David, Assistant Secretary, Skilled Migration Policy Section, Migration and Visa Policy Division, Department of Immigration and Citizenship

WILLIAMS, Mrs Gemma, Adviser, Media and Communications, Australian Industry Group