The Senate

Education, Employment and Workplace Relations Legislation Committee

Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012 [Provisions]

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RECOMMENDATIONS

Recommendation 1

2.85 The committee recommends that the government amend the Enterprise Migration Agreement (EMA) guidelines to require that robust labour market testing be conducted prior to project owners making an EMA application. Adequate labour market testing should include the following:

- **advertising vacancies locally and nationally at genuine market rates, including mandatory use of the resources sector Jobs Board;**
- **offering relocation assistance measures where required; and**
- **providing information on specific measures undertaken to employ groups who are currently disadvantaged or under-represented in the workforce such as indigenous workers, women, unemployed local job-seekers, recently retrenched workers, and older, and why positions sought under the EMA cannot be filled by increasing the participation of these groups.**

Recommendation 2

2.86 The committee recommends that the government continue to develop and improve the Jobs Board. Improvements should include the provision of a range of incentives and obligations to ensure that companies participate in the Jobs Board, and the exclusion of employers who do not use the Jobs Board from accessing workers through the subclass 457 visa program.

Recommendation 3

2.87 The committee recommends that the government assess the extent to which the resource sector requires Australian workers to have direct industry experience, but then seeks to employ (and train) overseas labour to fill alleged skill shortages.

Recommendation 4

2.88 The committee recommends that the government establish a complaints mechanism for Australians who are unable to obtain work with an Enterprise Migration Agreement holder, despite being available for work and possessing the requisite qualifications or the ability to be trained in the relevant qualification.

Recommendation 5

2.89 The committee recommends that the government conduct a reassessment of the skills shortages in the resources sector.

Recommendation 6

2.90 The committee recommends that the government consider changing the definition of 'project workforce' for the purposes of calculating training

obligations under the subclass 457 visa program. The new definition should include employees and independent contractors.

Recommendation 7

2.91 The committee recommends that the government amend the Enterprise Migration Agreement guidelines to ensure that training of workers from other sectors be a requirement.

Recommendation 8

2.92 The committee recommends that the government create a new sponsorship obligation requiring sponsors to inform each subclass 457 visa holder in writing of their rates of pay and terms and conditions of employment, and provide a document outlining the role of the Department of Immigration and Citizenship, the Fair Work Ombudsman and unions in pursuing underpayment claims.

Recommendation 9

2.93 The committee recommends that the Enterprise Migration Agreement applicants provide timely information to unions and other stakeholders about the proposed project during the stakeholder consultation phase.

Recommendation 10

2.94 The committee recommends that the Department of Immigration and Citizenship work with the resource sector to determine a definition of commercial-in-confidence, for the purposes for redacting Enterprise Migration Agreements before public release.

Recommendation 11

2.95 The committee recommends that the government make relevant and timely information relating to Enterprise Migration Agreements, subclass 457 visas and Regional Migration Agreements publicly available.

Recommendation 12

2.96 In light of the committee's view that weaknesses in the subclass 457 system could be addressed through the reforms detailed in foregoing recommendations, the committee recommends that the bill not be proceeded with.

CHAPTER 1
Introduction

Reference

1.1 On 23 August 2012, the Senate referred the provisions of the Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012 (the bill) to the Senate Education, Employment, and Workplace Relations Legislation Committee (the committee) for inquiry and report by 29 October 2012.[1] The Senate subsequently extended the reporting date to 12 March 2013.[2]

Conduct of inquiry

1.2 The committee advertised in *The Australian* on 29 August 2012, calling for submissions by 13 September 2012. Details of the inquiry were also made available on the committee's website.[3]

1.3 The committee contacted a number of organisations inviting submissions to the inquiry. Submissions were received from 15 individuals and organisations, as detailed in Appendix 1.

1.4 A public hearing was held in Melbourne on 25 October 2012. The witness list for the hearing is at Appendix 2.

Background

1.5 Enterprise Migration Agreements (EMAs) are intended to streamline negotiation arrangements for access to overseas workers and guarantee faster processing times for subclass 457 visa applications.[4]

1.6 The policy emerged from recommendations made by the National Resource Sector Employment Taskforce (NRSET).[5] The NRSET was established by the government in 2009 to examine how to respond to the skills demands of more than 75 major resource projects in the pipeline. NRSET provided its report to the government in July 2010, and made 31 recommendations to address skills shortages in the

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1 *Journals of the Senate*, 2012, p. 2864.

2 *Journals of the Senate*, 2012, p. 3009.

3 Senate Standing Legislation Committee on Education, Employment and Workplace Relations, Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=eet_ctte/enterprise_migration_agreements/index.htm (accessed 30 August 2012).

4 Department of Immigration and Citizenship, Fact Sheet 48a – Enterprise Migration Agreements. Available online: http://www.immi.gov.au/media/fact-sheets/48a-enterprise.htm (accessed 31 August 2012).

5 Department of Immigration and Citizenship, *Submission 9*, p. 1.

resources sector. Amongst these recommendations, was the recommendation that the government introduce EMAs.[6]

1.7 In March 2011 the government accepted all 31 recommendations. Shortly afterwards, EMAs were announced in the 2011 Federal Budget.[7] In September 2011 the EMA program formally commenced with the release of the government's EMA Submission Guidelines. The Department of Immigration and Citizenship (DIAC) advised that these guidelines were the result of consultations with unions, industry and government agencies.[8]

1.8 EMAs are available to projects with a capital expenditure of at least $2 billion and a peak workforce of 1500 workers. Applicants must submit a comprehensive training plan that demonstrates how the project will equip Australian workers to meet future skills needs in the resources sector. A Deed of Agreement is negotiated covering the entire project, so the parties do not have to negotiate a number of separate labour agreements with individual sub-contractors.[9]

1.9 Workplace relations advice is available for project owners well as the subclass 457 visa workforce from the Department of Education, Employment and Workplace Relations (DEEWR). This includes advice on salary and employment conditions.[10]

1.10 The government launched the Jobs Board on 10 June 2012. The Board is designed to provide Australian job seekers with an opportunity to apply for jobs in the resource sector. The Jobs Board also incorporates jobs listings advertised elsewhere, such as jobs listed by the Australian Mines and Metals Association and the Resource Channel. DEEWR advised it is working to continually improve the website, and recent changes include improvements to the job seeker registration profile and an improved search engine.[11]

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6 Recommendation 4.2: That the Australian Government introduce and promote the appropriate use of Enterprise Migration Agreements for 'mega' resources projects. As part of these agreements, the Australian Government should provide for pre-qualification of skilled occupations to create greater efficiency and certainty to project proponents during the critical construction phase (Accepted 'in principle' by the Government). See *Australian Government Response to the National Resources Sector Employment Taskforce Report* http://www.innovation.gov.au/Skills/SkillsTrainingAndWorkforceDevelopment/Documents/AGResponseNRSET.pdf (accessed 10 December 2012).

7 Department of Immigration and Citizenship, *Submission 9*, p. 1. See also: National Resources Sector Employment Taskforce, *Resourcing the future*, July 2010. Available online: http://www.innovation.gov.au/Skills/SkillsTrainingAndWorkforceDevelopment/NationalResourcesSectorWorkforceStrategy/NationalResourcesSectorEmploymentTaskforce/Pages/default.aspx (accessed 18 December 2012).

8 Department of Immigration and Citizenship, *Submission 9*, p. 1.

9 Department of Immigration and Citizenship, *Submission 9*, p. 1.

10 Department of Education, Employment and Workplace Relations, *Submission 12*, p. 1.

11 Department of Education, Employment and Workplace Relations, *Submission 12*, p. 2.

1.11 Currently, the Jobs Board has almost 3000 jobs listed with a consistent amount of interest from job seekers comprising 10 000 visits each week.[12]

1.12 The government gave 'in principle' approval on 25 May 2012 for an EMA with the Roy Hill iron ore mining project in the Pilbara region of Western Australia. The EMA permits Roy Hill to sponsor up to 1715 workers through the 457 visa program during the three year construction phase, where Australian workers cannot be found. The project requires more than 8000 workers, with the remaining 6285 jobs to be filled by Australian workers. As part of the EMA, Roy Hill must provide 2000 training places for Australians, including more than 200 Australian apprentices and trainees.[13]

1.13 The specific terms of the Roy Hill EMA are still subject to negotiation between the parties. DIAC confirmed during the Melbourne hearing that:

> The Deed of Agreement has not yet been executed, no contractors have been able to access overseas workers through the EMA, and no visa applications have been lodged or decided in relation to the EMA.[14]

1.14 The committee was advised that while there is no 'end date' both parties are doing their best to 'progress the negotiations'.[15] The final decision to grant an EMA is made by the Minister for Immigration and Citizenship, following advice from DIAC (informed by consultations with other government departments).[16] The status of these negotiations means that the government will have time to take into account the recommendations made by the committee in this report.

Purpose of the bill

1.15 The bill was introduced in the House of Representatives by Mr Adam Bandt MP, on 18 July 2012.

1.16 The bill proposes to create a legislative framework for EMAs to ensure that such agreements are only used where genuinely necessary and do not adversely affect

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12 Department of Education, Employment and Workplace Relations, *Submission 12*, p. 2.

13 The Hon. Chris Bowen MP, Minister for Immigration and Citizenship and the Hon. Martin Ferguson AO MP, Minister for Resources and Energy, 'First Enterprise Migration Agreement approved', Joint Media Release, 25 May 2012. Available online: http://www.minister.immi.gov.au/media/cb/2012/cb187050.htm (accessed 31 August 2012).

14 Department of Immigration and Citizenship, *Submission 9*, p. 2.

15 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Proof Committee Hansard*, 25 October 2012, p. 39.

16 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Proof Committee Hansard*, 25 October 2012, p. 32.

local job opportunities.[17] To promote transparency of the EMA process, the bill proposes that all EMA agreements be tabled in Parliament.[18]

1.17 Broadly, the bill proposes to amend:

- the *Fair Work Act 2009* to include the terms 'EMA participant' and 'enterprise migration agreement';
- the *Fair Work Act 2009* and the *Migration Act 1958* to outline the terms and conditions relevant to the Minister approving EMAs, as well as further conditions the Minister can propose;
- the *Migration Act 1958* to include and define the terms 'EMA participant', 'enterprise migration agreement', 'Workplace Relations Minister' and 'local jobs board';
- the *Migration Act 1958* to incorporate terms that regulate the application of EMAs to ensure they are used only when necessary and do not impact local employment; and
- the *Migration Act 1958* to require the Minister to table a copy of an EMA as soon practically possible after it is agreed to.[19]

1.18 Mr Bandt MP has subsequently circulated amendments to the bill that would broaden its application to cover all types of work agreements, such as Regional Processing Agreements.[20]

Key provisions of the bill

Conditions for approval of EMAs

1.19 The bill seeks to provide that the Minister for Workplace Relations must not agree to make an EMA unless he or she is satisfied that the EMA participant has complied and will continue to comply with workplace laws.[21] The bill seeks to permit the relevant Minister to impose conditions on the agreement of EMAs so that the

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17 Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012, Item 8 (proposed section 140ZKA, insertion to the *Migration Act 1958*).

18 Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012, Item 8 (proposed section 140ZKE, insertion to the *Migration Act 1958*).

19 Explanatory Memorandum, Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012, pp 2–5.

20 Mr Adam Bandt MP, Correspondence to the Committee, 23 August 2012. *Note*: The amendments circulated include other minor changes, for example the requirement to consult with unions in particular circumstances (proposed amendment to section 536A, *Migration Act 1958*).

21 Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012, Item 4, proposed section 536A, addition the *Fair Work Act 2009*.

employment of local and recently retrenched workers is prioritised.[22] Conditions include that the EMA participant has a local jobs plan, and the Minister could require the participant to employ a specified number of Australian residents on the project concerned from one or more of the following groups:

- people living in the area of the project;
- people recently retrenched;
- people of culturally and linguistically diverse groups experiencing high rates of unemployment; people from Indigenous groups; and/or
- people from regions of high unemployment.[23]

1.20 Additionally, the EMA participant may be required to provide specified training to persons employed from the above list. The Minister could also require that the EMA participant directly provides training or funds training to other Australian residents who are not employed by the EMA participant at that time.[24]

1.21 One or more of these conditions could be placed on employers before an EMA is made and there would be no limits to the grounds on which the Minister could refuse to make an EMA.[25]

Definition and insertion of terms in the Migration Act 1958

1.22 The bill proposes to insert and define a number of terms in the Migration Act 1958.

- An *EMA participant* would be either the project owner or the prime contractor for the resources project;
- An *enterprise migration agreement* would be a work agreement made with an EMA participant to grant visas for work on a resources project;
- The *Workplace Relations Minister* would be the Minister administering section 1 of the *Fair Work Act 2009*; and
- The Minister would also maintain the *local jobs board*, which would consist of a website that would advertise jobs to be filled in the resources sector.[26]

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22 Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012, Item 4 (proposed section 536B); Explanatory Memorandum, Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012, p. 2.

23 Explanatory Memorandum, Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012, p. 2.

24 Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012, Item 4 (proposed section 536B).

25 Explanatory Memorandum, Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012, pp 2–4.

Regulation and tabling of EMAs

1.23 The bill proposes to amend the *Migration Act 1958* to provide that the Minister for Immigration must not make an EMA unless the Minister for Workplace Relations consents to the agreement being made and the agreement is made subject to any conditions determined by the Workplace Relations Minister (as discussed above).[27]

1.24 The conditions imposed by the Minister for Workplace Relations must be submitted to the EMA participant in writing and would be considered a sponsorship obligation.[28] The bill does not place any limits to the sponsorship obligations that may be imposed under an enterprise migration agreement.[29]

1.25 In addition, the Minister for Immigration and Citizenship would not be able to make an EMA unless he or she was satisfied that:

- The EMA participant has made all practicable attempts to employ local workers for the jobs to be covered by the EMA; and
- The jobs have been advertised on the local jobs board and more widely.[30]

1.26 As soon as the Minister for Immigration and Citizenship finalises an EMA, the Minister must table a copy of the agreement in each House of Parliament promptly.[31]

Compatibility with human rights

1.27 The explanatory memorandum contains a Statement of Compatibility with Human Rights. The Statement maintains that the bill is compatible with human rights and would not engage any of the applicable rights or freedoms. The Parliamentary Joint Standing Committee on Human Rights has considered the bill and sought clarification from Mr Bandt on 'whether the bill could be said to engage the right to

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26 Explanatory Memorandum, Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012, p. 5. The terms *EMA participant* and *enterprise migration agreement* as defined by the bill, have the same meaning when used in the *Fair Work Act 2009*. Note: Mr Bandt's amendments also propose to insert a definition for 'work agreements'.

27 Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012, Item 8 (proposed subsection 140ZKD(1), insertion to the *Migration Act 1958*).

28 Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012, Item 8 (proposed subsection 140ZKD(2), insertion to the *Migration Act 1958*).

29 Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012, Item 8 (proposed subsection 140ZKD(3), insertion to the *Migration Act 1958*).

30 Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012, Item 8 (proposed subsection 140ZKC, insertion to the *Migration Act 1958*).

31 Explanatory Memorandum, Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012, p. 5.

work contained in Article 2 of the International Covenant on Economic, Social and Cultural Rights'.[32]

Acknowledgement

1.28 The committee thanks those individuals and organisations who contributed to the inquiry by preparing written submissions and giving evidence at the hearing.

Notes on references

1.29 References in this report to the *Hansard* for the public hearing are to the *Proof Hansard*. Please note that page numbers may vary between the proof and the official transcripts.

32 Parliamentary Joint Committee on Human Rights, *First Report of 2012: Bills introduced 18-29 June 2012*, 22 August 2012, p. 25.

CHAPTER 2

Key Issues

2.1 The bill received enthusiastic support from some submitters, and strident criticism in other quarters. A number of submitters supported reforms to the Enterprise Migration Agreement (EMA) program, but argued that more reforms are needed.

2.2 Generally, employer organisations opposed the bill. The Australian Chamber of Commerce and Industry (ACCI) submitted that the bill would duplicate existing conditions already required in EMA applications, and add unnecessary bureaucratic and political oversight which could have the effect of deterring investment.[1] The Business Council of Australia (BCA) described the current EMA framework as a 'critical contingency planning tool' in the face of rising costs, supply chain issues and increased competition, and noted that the current framework provided 'strong' protections.[2]

2.3 Similarly, the Victorian Employers' Chamber of Commerce and Industry (VECCI) described the measures proposed by the bill as 'simplistic, impractical and burdensome' and argued that if passed, the bill would result in 'unnecessary' and 'misguided' political and administrative interference in infrastructure projects.[3] VECCI also expressed concern that the proposals could spread beyond the resources sector and apply to infrastructure projects more generally.[4]

2.4 The Australian Mines and Metals Association (AMMA) criticised the bill on a number of grounds, including it entailing an increase in red tape for businesses. AMMA submitted that the bill was not needed as adequate safeguards are already built into EMAs.[5]

2.5 Those who supported the broad objectives of the bill provided a wide ranging and well researched discussion of the use of EMAs and migrant labour more generally. The Construction, Forestry, Mining and Energy Union (CFMEU) submitted that the bill would ensure that EMAs are only used when they are necessary to supplement the Australian labour market and not as a substitute for the employment or training of local workers.[6]

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1 Australian Chamber of Commerce and Industry, *Submission 2*, p. 1.

2 Business Council of Australia, *Submission 11*, p. 2.

3 Victorian Employers' Chamber of Commerce and Industry, *Submission 10*, p. 2.

4 Victorian Employers' Chamber of Commerce and Industry, *Submission 10*, p. 2.

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

6 Construction, Forestry, Mining and Energy Union, *Submission 6*, paragraph 6.

2.6 The Australian Council of Trade Unions (ACTU) supported greater scrutiny for EMAs, submitting that under current arrangements the DIAC guidelines 'do not provide a sufficient level of confidence' that adequate scrutiny is present.[7] The ACTU listed a number of other persistent concerns about EMAs, some of which are not addressed by the bill.

2.7 Unions WA supported the key objectives of the bill, and identified other areas of improvement, to ensure that protections for local jobs are 'strengthened'.[8]

2.8 Dr Joo-Cheng Tham, Associate Professor, particularly supported the amendment of the bill to expand its operation to all types of work agreements, and to provide a legislative framework for agreements, rather than couching it in a policy document.[9]

2.9 Submissions provided by the Department of Education, Employment and Workplace Relations (DEEWR) and the Department of Immigration and Citizenship (DIAC) were brief and failed to engage with either the substance of the bill or the issues raised by other submitters.[10] Both Departments provided more detailed information in response to the committee's questions during the hearing.

Jobs for Australians

2.10 A key focus of the bill is to ensure that EMAs are only used when genuinely necessary and do not adversely affect local job opportunities and conditions. Throughout this inquiry witnesses and submitters have emphasised the primacy that must be given to Australian workers, while acknowledging that at times overseas workers will be required.[11] The bill was seen by many submitters as a good step towards achieving this balance.

2.11 During the hearing in Melbourne, Mr Dave Noonan, CFMEU, told the committee that there was general support in the Australian community for the idea that Australian workers should have the first opportunities of the mining boom, particularly as many skilled Australians are looking for work.[12]

2.12 The CFMEU were concerned that the current skilled migration trend was a departure from previous periods where people would migrate and settle in Australia. The current situation was one where:

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7 Australian Council of Trade Unions, *Submission 3*, p. 1.

8 Unions WA, *Submission 5*.

9 Dr Joo-Cheong Tham, Associate Professor, *Submission 1*, pp 4–5.

10 Department of Education, Employment and Workplace Relations, *Submission 12*; Department of Immigration and Citizenship, *Submission 9*.

11 The phrase 'Australian workers' includes Australian citizens and permanent residents, and New Zealand citizens entitled to work in Australia.

12 Mr Dave Noonan, National Secretary, Construction and General Division, CFMEU, *Proof Committee Hansard*, 25 October 2012, p. 15.

> [S]ome of the large resource and construction companies essentially argue for a skilled migration policy that means they can bring workers here for short periods of time and return them home when they are finished with them.[13]

2.13 The ACTU submitted that 'Australian citizens and permanent residents' should 'have the first, primary right to jobs in the resources sector and elsewhere'. Mr Tim Shipstone, Industrial Officer, explained that the ACTU recognised that there will be times when migrant labour is needed, but that this must be properly tested:

> We do accept and recognise that in some cases there may be a need for temporary migration to fill positions where there are genuine shortages that cannot be met locally, but this needs to be properly tested to ensure that the project owners and employers in the resources sector are making every effort to employ and train locally before they go down the path of entering into EMAs in the first place, and then engaging overseas labour under EMAs to fill vacant positions.[14]

2.14 Unions WA also acknowledged that 'where genuine labour shortages exist then some use of temporary overseas labour is justified as a last resort'.[15] However, to ensure that this process is fair:

> [R]igorous processes for labour market testing are needed to ensure that employment opportunities are available in a meaningful way to those already in the Australian labour market.[16]

2.15 The committee heard that where overseas workers are used, Australian workers should be given preferential treatment when there is less demand for labour down the track.[17] The CFMEU explained this reasoning:

> [As] work opportunities recede, local workers should have a legislated preference in redundancy situations over overseas workers, who have been retained and granted access to the Australian labour market on the clear understanding that they are filling a temporary labour shortage in the area in which they work. Equally, local workers should have a legislated preference in redundancy situations over all other overseas workers holding temporary residence visas with work rights (for example Working Holiday visa holders).[18]

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13 Mr Dave Noonan, National Secretary, Construction and General Division, CFMEU, *Proof Committee Hansard*, 25 October 2012, p. 15.

14 Mr Tim Shipstone, Industrial Officer, Australian Council of Trade Unions, *Proof Committee Hansard*, 25 October 2012, p. 16.

15 Unions WA, *Submission 5*, p. 2.

16 Unions WA, *Submission 5*, p. 2.

17 Australian Council of Trade Unions, *Submission 3*, p. 13; Construction, Forestry, Mining and Energy Union, *Submission 6*, paragraph 9.

18 Construction, Forestry, Mining and Energy Union, *Submission 6*, paragraph 9.

2.16 Mr Dave Noonan explained the logic behind the CFMEU's support for the redundancy provisions in the bill:

> We would say that the situation ought to be very clear: if an employer has made the argument successfully under the proposed new bill that they had not been able to attract suitably skilled workers locally and in fact had to go to the overseas market to bring in temporary overseas workers for particular skilled occupations, we ought not to have a situation where Australian resident workers are being made redundant whilst workers who come on a temporary basis from overseas are being kept. Again, we think that would undermine confidence in the proper operation of a skilled migration system in Australia.[19]

2.17 In response to these arguments, DEEWR outlined the government's commitment to Australian workers:

> The Australian Government is committed to ensuring that Australian job seekers are the first to benefit from investment in the resource sector. This commitment is reflected in a requirement for EMA project owners to demonstrate their workforce needs cannot be met from the Australian labour market and for project owners and companies to place vacancies in occupations covered by EMAs on the Jobs Board.[20]

2.18 The committee asked also asked DIAC to explain how it would ensure that companies with an EMA recruit and train Australian workers. DIAC advised that, in addition to the requirement that the Resources Sector Jobs Board be used, other obligations would be imposed:

> These obligations will require the company to ensure that they are only using the agreement to supplement an existing Australian workforce and they continue to demonstrate a commitment to the provision of employment, training and career progression opportunities to Australians. The business will also be required to regularly demonstrate that they have met specific benchmarks for the training of their Australian employees.[21]

2.19 Compliance and monitoring of EMAs is discussed in more detail later in this chapter.

Labour market testing

2.20 Some submitters and witnesses expressed doubt that the resource sector was experiencing skills shortages to the extent that it needed to employ overseas workers. For example, Mr Noonan told the committee:

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19 Mr Dave Noonan, National Secretary, Construction and General Division, CFMEU, *Proof Committee Hansard*, 25 October 2012, p. 15.

20 Department of Education, Employment and Workplace Relations, *Response to question taken on notice*, 25 October 2012 (received 12 November 2012), p. 2.

21 Department of Immigration and Citizenship, *Response to question taken on notice*, 25 October 2012 (received 21 November 2012), p. 16.

> Our experience and what our members and the community tell us is that there are many, many Australians who are skilled, ready, willing and able to work in the construction industry and the construction of the resource facilities and who are not getting the opportunity to do those jobs at the moment.[22]

2.21 In order to ensure that Australian workers have a first right to jobs in the resources sector, robust labour market testing must occur. Under the current EMA guidelines, outlined in Chapter 1, only a 'commitment' to ongoing local recruitment is required. In addition to the proposals in the bill, such as an obligation to employ particular groups of job seekers and the requirement to have a local jobs plan, the committee heard that more reforms were needed to ensure that EMA applications were only granted when strictly necessary.

2.22 The ACTU, and its affiliates, submitted that a 'genuine' labour market testing regime would require EMA applicants to first prove that they have made 'every possible effort' to fill vacancies with Australian workers.[23] Such an effort would include the following measures:

- advertising vacancies locally and nationally at genuine market rates, including mandatory use of the resources sector Jobs Board;
- offering relocation assistance measures where required; and
- providing information on specific measures undertaken to employ groups who are currently disadvantaged or under-represented in the workforce such as Indigenous workers, women, unemployed local job-seekers, recently retrenched workers, and older workers – all groups the NRSET report identified as a priority – and why the 457 visa positions sought under the EMA cannot be filled by increasing the participation of these groups.[24]

2.23 Skills Tasmania submitted that efforts to recruit local workers should be 'scaled according to the size of the employer and the nature of the occupation'.[25] Employers should recruit from local, regional and national labour markets and consider whether the need can be met by 'better skills utilisation within the employer's existing workforce'.[26] Skills Australia also noted that:

> The employer's contribution to developing skills in the potential workforce is a matter that may be both a requirement in order to access an EMA and a condition placed on the approval of an EMA.
>
> Skills Tasmania suggests that employers' active engagement in workforce planning at enterprise, regional and industry sector levels is an appropriate

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22 Mr Dave Noonan, National Secretary, Construction and General Division, CFMEU, *Proof Committee Hansard*, 25 October 2012, p. 15.

23 Australian Council of Trade Unions, *Submission 3*, p. 5.

24 Australian Council of Trade Unions, *Submission 3*, pp 5–6.

25 Skills Tasmania, *Submission 15*, p. 1.

26 Skills Tasmania, *Submission 15*, p. 1.

> demonstration of reasonable attempts to recruit and develop suitably skills workers from within the Australian labour markets.[27]

2.24 However, the committee heard that, due to a lack of mobility in the Australian workforce, some jobs were hard to fill. ACCI submitted that:

> [The] limited mobility of the Australian labour market means that job losses in the South Eastern Australian manufacturing and services sectors do not automatically translate into a boost in the available workforce for resources projects and major infrastructure developments in the northern and western parts of Australia.[28]

2.25 Mobility could be improved if labour market testing included relocation assistance. Mr Allen Hicks, Communications Electrical and Plumbing Union, suggested that incentives need to be 'advertised widely' so that workers across Australia are aware of the opportunities.[29]

2.26 Mr Kruno Kukoc, DIAC, explained the process that was followed once an EMA application is received:

> Once we have an application for an EMA, we go through an interdepartmental process of the application and test those claims in a joint effort with the Department of Education, Employment and Workplace Relations, the Department of Resources, Energy and Tourism and a range of other agencies, including Treasury, before we submit the advice to the government on whether the EMA application can be approved or not.[30]

2.27 The committee understands that currently there is no process or redress for complaints from qualified Australian workers who apply for work through the jobs board and are unsuccessful. The ACTU and its affiliates called for independent oversight of the jobs board:

> [T]he operation of the Jobs Board needs to be monitored to ensure it operates in accordance with the government's stated objectives. To that end, unions recommend the establishment of an independent body to oversee the operation of the Jobs Board, including an opportunity for individual complaints, to ensure it is transparent, accountable and is delivering on jobs and training opportunities for local workers.[31]

2.28 Officers from DIAC and DEEWR indicated during the Melbourne hearing that provision had not been made to investigate these types of complaints. However, DIAC sought to assure the committee that a company's compliance with its obligation to employ Australians would be:

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27 Skills Tasmania, *Submission 15*, p. 1.

28 Australian Chamber of Commerce and Industry, *Submission 2*, p. 2.

29 Mr Allen Hicks, National Assistant Secretary, Communications Electrical and Plumbing Union, *Proof Committee Hansard*, 25 October 2012, p. 24.

30 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Proof Committee Hansard*, 25 October 2012, pp 31–32.

31 Australian Council of Trade Unions, *Submission 3*, p. 8.

> [M]onitored on a regular basis as to whether they are meeting those commitments. If they are not meeting those commitments, there are certain consequences for the company and all companies involved in the EMA.[32]

2.29 Mr Kukoc further advised that while DIAC consider it should be handling complaints, the department would:

> [M]ake sure that if there are many complaints and if the companies are not using the jobs board and the companies do not have ongoing domestic recruitment activity, the deal may be off.[33]

2.30 The approaches outlined by DIAC and DEEWR appears to be methodical, however it is not clear whether these processes involve genuine market testing, of the kind suggested by the ACTU and outlined earlier. The committee is not convinced that the current EMA framework is sufficient to ensure that EMA holders only use migrant labour when Australian workers cannot be found. In the absence of robust labour market testing there is a real risk that qualified Australian workers will continue to miss out on opportunities to work in the resources sector. The committee is concerned that DEEWR and DIAC are relying on responses from employers and statistical data to determine skills shortages, rather than listening to anecdotal evidence from actual job applicants in the industry.

Training and apprenticeships

2.31 The committee heard concerns that the resource sector did not employ its fair share of apprentices and that there was a lack of training provided to Australian workers to assist with the transition to employment in the resources sector. In this regard, the evidence provided during this inquiry is consistent with material presented to the Senate Education, Employment and Workplace Relations References Committee during its inquiry into engineering skills shortages.[34]

2.32 The National Resource Sector Employment Taskforce (NRSET), discussed in Chapter 1, found in 2010 that the resources sector 'currently employs considerably fewer apprentices than would be expected given its share of trade employment' and recommended that the resources sector 'significantly increase the number of apprentices it employs'.[35] Three years later, it would seem that this remains a problem.

2.33 It is true that training requirements are built into the 457 visa program, and by extension, into EMAs. Among other requirements, employers of skilled overseas workers (as part of the 457 visa program) with a business that operates in Australia must meet benchmarks relating to training Australian citizens and permanent residents

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32 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Proof Committee Hansard*, 25 October 2012, p. 33.

33 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Proof Committee Hansard*, 25 October 2012, p. 38.

34 Senate Education, Employment and Workplace Relations References Committee, *The shortage of engineering and related employment skills*, July 2012.

35 National Resources Sector Employment Taskforce, *Resourcing the future*, July 2010, Recommendation 2.1, p. 4.

to be eligible.[36] Employers who have been trading in Australia for more than 12 months may choose between different training benchmarks:

- Training Benchmark A: the employer pays the equivalent of at least two per cent of recent payroll expenditure to an industry training fund for the training of Australian citizens or permanent residents, each year that the employer is a sponsor;[37] or
- Training Benchmark B: the employer must provide evidence of spending the equivalent of one per cent of payroll on training for their employees who are Australian citizens or permanent residents.[38]

2.34 Eligible expenditure for the purposes of meeting Training Benchmark B includes a wide range of training, including 100 per cent of apprentice and graduate salaries, as well as expenditure on courses for more experienced staff and scholarships.[39]

2.35 However, the evidence suggests that this training requirement is insufficient. Mr Allen Hicks, submitted that resources sector is not investing enough in training, explaining to the committee that instead it recruits from other sectors:

> It is my view that the resources sectors do not do enough to train. What they do is poach. Because of the higher wages and conditions that are in those areas, they poach. So rather than actually putting in and providing back to the communities that they are deriving so much out of through their profits and the like, they are not doing enough to train those young apprentices, but they will poach tradespeople that are ready to go and work on the job. That is one of the main reasons why we have a skill shortage.[40]

2.36 Unions WA submitted that the resource sector 'should contribute to training up the next generation of skilled workers' in order to benefit from programs such as EMAs.[41] This training should be meaningful:

> [Investment] in skills is not simply a question of putting money in a fund. Resources companies must demonstrate their commitment to having

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36 Department of Immigration and Citizenship, 'Training Temporary Business (Long Stay) – Standard Business Sponsorship (Subclass 457)', available online: http://www.immi.gov.au/skilled/skilled-workers/sbs/eligibility-employer.htm (accessed 30 May 2012).

37 Department of Immigration and Citizenship, 'Training benchmarks, Frequently asked questions – sponsors, p. 2. Available online: http://www.immi.gov.au/skilled/skilled-workers/_pdf/faq-457-training-benchmarks.pdf (accessed 30 May 2012).

38 Department of Immigration and Citizenship, 'Training benchmarks, Frequently asked questions – sponsors, p. 3.

39 For more detail on eligible training, see: Legislative Instrument IMMI 09/07, made under the *Migration Regulations 1994*, subregulations 2.59(d) and 2.68(e).

40 Mr Allen Hicks, National Assistant Secretary, Communications Electrical Plumbing Union,, *Proof Committee Hansard*, 25 October 2012, p. 27.

41 Unions WA, *Submission 5*, p. 4.

> apprentices and trainees physically present on resources projects. This will involve living allowance payments and/or wage increases to address the very high costs of living in many resource sector regions, as well as fly-in and fly-out arrangements.[42]

2.37 The ACTU suggested that the training obligations of sponsors who are employing workers under the 457 visa program could be improved by linking training requirements to the total labour costs of a project. This change would bring independent contractors into the definition of 'project workforce', which currently only includes employees, thus increasing the total amount of money required to be devoted to training.[43] Relying on research conducted by the CFMEU, the ACTU argued that this reform is necessary because:

- In the construction industry, only 54 per cent of the total workforce is classified as employees compared to 84 per cent in all other Australian industries (ABS FOES data 2009);
- 35 per cent of the total workforce are classified as independent contractors by the ABS, compared to only 7 per cent in all other Australian industries; and
- up to 46 per cent of independent contractors in construction are likely to be sham contractors, i.e. effectively working as employees.[44]

2.38 The committee heard that a large number of skilled workers are unsuccessful obtaining work in the resource sector because they 'lack experience' in the mining industry.[45] At a minimum, resource companies should be required to provide training to experienced Australian workers who lack specific experience in the resources sector – particularly in light of the training commitments made under an EMA.

Parliamentary accountability

2.39 The bill proposes that each EMA should be tabled in Parliament as soon as practicable after it is made. The bill makes no allowance for commercially sensitive material to be redacted.

2.40 Some employer groups rejected the proposed tabling requirement. VECCI submitted that:

> There is no justifiable reason for the tabling of EMAs in parliament. They are already adequately regulated and parties employing them ought to be afforded privacy when it comes to commercially sensitive components of them.[46]

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42 Unions WA, *Submission 5*, p. 4.

43 Australian Council of Trade Unions, *Submission 3*, p. 11.

44 Australian Council of Trade Unions, *Submission 3*, p. 11.

45 See for example, Mr Dave Noonan, National Secretary, CFMEU, *Proof Committee Hansard*, 25 October 2012, pp 15–16.

46 Victorian Employers' Chamber of Commerce and Industry, *Submission 10*, p. 3.

2.41 AMMA also rejected the proposal, on the basis that commercially sensitive information 'must be kept in confidence for project owners and contractors alike'. AMMA observed that:

> Under the current guidelines, the Department of Immigration & Citizenship publishes the capital expenditure and peak workforce of any project with an active EMA. However, DIAC does not disclose the number or occupations of workers that are available under a particular EMA. Nor does it disclose the particular companies that have signed labour agreements under the EMA. It is imperative that the commercially sensitive nature of these agreements be protected.

2.42 In contrast, other submitters supported the proposal to provide parliamentary accountability. Unions WA submitted that greater transparency is needed to ensure that resource companies 'are held accountable for the commitments they make on paper', particularly in relation to providing opportunities for local workers.[47] Unions WA described the bill's proposal to require tabling in Parliament as 'only a first step' and called for regular public reporting, particularly in relation to local training and employment commitments.[48] Unions WA explained that the cost was high if resource companies were not held to account, as the following example illustrates:

> The inability of local steel fabrication manufacturers in the Kwinana to win contracts during the boom has contributed to the South West Area of WA having the worst youth full-time unemployment outcomes in the state (23 per cent in June 2012). In some cases competition was simply unfair; as overseas companies would award contracts to manufacturers from their own country by offering generous terms of financing that were not available to domestic manufacturers.[49]

2.43 Mr Noonan suggested that concerns about the disclosure of commercially sensitive material could be 'easy dealt with' by redacting this material from an EMA application prior to publication:

> That is a very common process in respect of commercial documents when they are published. We think it is in the interests of the community that these documents are public and transparent, because the proposition that skilled migration should be determined by secret agreements between an employer and the government undermines confidence in a proper skilled migration program—which we fully agree this nation needs.[50]

2.44 Mr Allen Hicks agreed there was scope for EMAs to be tabled in Parliament with confidential material redacted:

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47 Unions WA, *Submission 5*, p. 5.

48 Unions WA, *Submission 5*, p. 5.

49 Unions WA, *Submission 5*, p. 5. Unions WA advised that this situation has improved as a consequence of its work with the resource sector.

50 Mr Dave Noonan, National Secretary, Construction and General Division, CFMEU, *Proof Committee Hansard*, 25 October 2012, p. 15.

> I think there is a capacity to table information in parliament about raw numbers without having to actually detail the commercial arrangements and how they are going to attract those people and what they are going to do. So I think the raw numbers could be satisfied without having to provide great details of information about how they are going to source that sort of stuff.[51]

2.45 Dr Tham submitted that in addition to the requirement to table each EMA in Parliament, the agreement should also be accompanied by a statement from the Minister 'with an explanation as to how the Work Agreement fulfils' the purposes of the 457 visa category.[52]

2.46 On a related point, the ACTU called for increased disclosure during the consultation phase prior to the finalisation of an EMA. The ACTU submitted that during the mandatory consultation phase, the EMA applicant should disclose, 'at a minimum', the following:

- The number of 457 visa workers required in each occupation over each of the years covered by the proposed agreement, both skilled and semi-skilled;
- the specific entity or entities who will be the direct employer of the 457 workers, i.e. the names of all subcontractors in the case of EMAs;
- the wages and conditions the 457 visa workers will receive and the proposed industrial instrument;
- how the proposed wages and conditions compare to the wages and conditions of the equivalent Australian workers and the market rate for the industry or occupation;
- the evidence on which it is claimed that, over the proposed 5 year life of the EMA, the nominated occupations, and the number of positions for each occupation, will be required, and the evidence for the claim that these positions cannot be filled by Australian citizens and residents, including evidence of recent and ongoing recruitment efforts; and
- all elements of the proposed project Training plan, and other social inclusion initiatives.[53]

2.47 In its submission, DIAC advised that 'due to commercially sensitive information, the entirety of these contracts cannot be publically disclosed currently'.[54] During the Melbourne hearing the committee sought to understand what type of

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51 Mr Allen Hicks, National Assistant Secretary, Communications Electrical Plumbing Union, *Proof Committee Hansard*, 25 October 2012, p. 15.

52 Dr Joo-Cheong Tham, Associate Professor, *Submission 1*, p. 8. (See also pp 9–11 for a summary of the subclass 457 visa requirements).

53 Australian Council of Trade Unions, *Submission 3*, pp 14–15.

54 Department of Immigration and Citizenship, *Submission 9*, p. 2.

material would be considered commercially sensitive. DIAC said that the assessment is conducted by companies, and not by the government:

> [C]ommercial-in-confidence information is identified by commercial agents, business agents, and it is the business agents that identify sensitive information that put them at a competitive disadvantage or information that is sensitive in terms of their commercial operations. It is not up to this department or anyone else outside the commercial businesses to identify this commercial information.[55]

2.48 It is surprising that DIAC does not appear to be willing to judge the assessments made by companies that material is commercially sensitive. Mr Kukoc explained that as a party to the contract, the government has 'to oblige with the confidentiality provisions in the contract'.[56] However, disclosure because of the operation of law, or to comply with a request made by Parliament, would not be in breach of contract. [57]

2.49 In response to concerns expressed by the committee about transparency, DIAC advised that it is usual practice for commercial in-confidence material to be removed from publication. For example, by analogy, all government contracts with a value of $10 000 and above are listed on AusTender, and no confidential information is disclosed. Due to the nature of EMAs, they are not listed on AusTender. [58]

2.50 Following this explanation, it is clear that confidentiality concerns can be addressed by drafting appropriate clauses within the EMA itself or by legislative amendment. The better and simpler approach is to update the EMA program guidelines to require disclosure.

Monitoring and compliance

2.51 The committee heard that the current monitoring arrangements in place by DIAC and DEEWR are insufficient to protect the rights of overseas workers and to ensure that companies who employ people under the 457 visa process have taken adequate steps to recruit local workers in the first instance. While the bill does not directly deal with monitoring or compliance, adequate monitoring will help to ensure that Australian workers and migrant workers are not adversely affected by an EMA arrangement.

2.52 Robust oversight will protect not just Australian workers, but also migrant workers. Dr Tham submitted that workers from overseas who come lawfully to Australia under the 457 visa program are entitled to work rights:

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55 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Proof Committee Hansard*, 25 October 2012, p. 35.

56 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Proof Committee Hansard*, 25 October 2012, p. 40.

57 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Proof Committee Hansard*, 25 October 2012, p. 40.

58 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Proof Committee Hansard*, 25 October 2012, p. 40.

> [Non-citizenship] does not cut them off from common humanity and respect for their human rights. These *workers* are also entitled to justice at work: while not citizens in the eyes of migration law, they share in industrial citizenship. Both these statuses suggest that 457 visa workers should, in many respects, be treated no less favourable than Australian citizens and permanent residents.[59]

2.53 Mr Noonan advised that committee that the current monitoring arrangements were 'completely' inadequate:

> We certainly believe that the current levels of compliance from DIAC are completely inadequate and that the resourcing of this is not as much of a focus as it should be.
>
> We have had situations where we received complaints about particular workplaces where DIAC officers attended those workplaces and relied on translators employed by the company that the guest workers were engaged by to ask them about whether they had any problems. When you are dealing with people from mainland China, we do not think that is a serious and bona fide attempt to find out whether those people are being exploited and ripped off. We are very critical of that.[60]

2.54 The CFMEU submitted that accountability procedures could be made more robust by involving the Minister for Workplace Relations in the decision making process. During the Melbourne hearing Mr Noonan stated that specialist oversight, especially in relation to training, would be beneficial:

> It is our view that clearly whilst the Department of Immigration and Citizenship has particular skills around some areas of immigration, monitoring training is not amongst them. It seems to us to bolster the case that the other minister also ought to be involved in the EMA process.[61]

2.55 The ACTU observed that adequate funding for compliance monitoring was a 'question of priorities', noting that in the 2011 budget a further $10 million was allocated to faster processing of 457 visas, but that no further funds were directed at compliance.[62] To ensure that workers on 457 visas are properly supported, the ACTU urged the government to create a new sponsorship obligation to inform each 457 visa holder in writing of their rates of pay and terms and conditions of employment, and provide a document outlining the role of DIAC, Fair Work Ombudsman and unions in pursuing underpayment claims.[63]

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59 Dr Joo-Cheong Tham, Associate Professor, University of Melbourne Law School, *Submission 1*, p. 3. (Emphasis in original, additional footnotes removed).

60 Mr Dave Noonan, National Secretary, Construction and General Division, CFMEU, *Proof Committee Hansard*, 25 October 2012, p. 22.

61 Mr Dave Noonan, National Secretary, Construction and General Division, CFMEU, *Proof Committee Hansard*, 25 October 2012, p. 18.

62 Australian Council of Trade Unions, *Submission 3*, p. 16.

63 Australian Council of Trade Unions, *Submission 3*, p. 16.

2.56 The committee was concerned that DIAC may not be adequately funded or experienced to carry these types of monitoring activities. Mr Kukoc advised that the role was properly resourced:

> The department is already resourced for that activity. We do have sponsoring and monitoring activity. We have a range of monitoring officers. We have a range of inspectors under the 457 regime. If you look into the resources per capita take and take into account the overall size of the Australian labour force, we have more resources per capita than Fair Work Australia. Fair Work Australia is monitoring a workforce of around 10 million people. We are monitoring in the order of 70,000 457 visa holders. There have been public comments about the first EMA application. The first EMA application contains the request for up to 1,715 workers. Relative to the numbers of people who we are monitoring, we are well resourced to do that.[64]

2.57 DEEWR also advised that EMA project sites are subject to coordinated monitoring by 'DIAC, the Fair Work Ombudsman (FWO), Fair Work Building and Construction (FWBC) and relevant State and Territory work health and safety authorities.[65] DEEWR also assured the committee that:

> To support these monitoring arrangements, the FWO and FWBC will establish a dedicated email address for – and undertake priority processing of all – complaints relating to alleged breaches of Fair Work Act on resource project sites where EMAs are in use.[66]

2.58 In response to requests for further detail, DIAC provided more information about the compliance procedures.[67] An EMA will be subject to quarterly reporting requirements and must provide statistical information to DIAC that covers issues such as:

- the number of overseas workers on-site, by occupation and the type of temporary visa held;
- the ratio of overseas workers as a proportion of the total workforce on-site;
- salaries paid to overseas workers compared to Australian workers in the same occupation;
- the recruitment and training of Australians, including apprentices, trainees, and graduates; and

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64 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Proof Committee Hansard*, 25 October 2012, p. 34.

65 Department of Education, Employment and Workplace Relations, *Response to question taken on notice*, 25 October 2012 (received 12 November 2012).

66 Department of Education, Employment and Workplace Relations, *Response to question taken on notice*, 25 October 2012 (received 12 November 2012).

67 Department of Immigration and Citizenship, *Response to question taken on notice*, 25 October 2012 (received 12 November 2012).

- use of the Resources Sector Jobs Board.[68]

2.59 DIAC advises that it will also conduct additional monitoring and reporting, including:

- undertaking a search of its computer and information systems to locate any information held by the Department relevant to the project owner and/or approved sponsors; and
- seeking information from Commonwealth and State and Territory Government agencies relevant to the project owner and/or approved sponsors on various issues, including:
    - use of the Resources Sector Jobs Board;
    - compliance with workplace relations legislation; and
    - compliance with work, health and safety legislation.[69]

2.60 The EMA holder will be required to provide DIAC with site access for the purposes of monitoring activities, and notify DIAC immediately if it becomes aware that an approved sponsor is breaching their sponsorship obligations.[70]

2.61 DIAC advises that work agreements under an EMA will be monitored by a specialised team of 17 DIAC officers. Monitoring may include the following activities:

- visits to the site, either with or without notice in order to interview visa holders, other employees and representatives of the sponsor;
- requesting records and information from the sponsor in order to determine their compliance with the sponsorship obligations; and
- exchanging information with other Commonwealth, State and Territory agencies, in particular the Fair Work Ombudsman.[71]

2.62 The committee is pleased to hear that both DEEWR and DIAC consider that they are adequately funded to perform an oversight role. However, in order for Australian workers and migrant workers to be properly protected, there should be a review mechanism and recommendations made by the ACTU and the CFMEU should be given due consideration.

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68 Department of Immigration and Citizenship, *Response to question taken on notice*, 25 October 2012 (received 12 November 2012), p. 2.

69 Department of Immigration and Citizenship, *Response to question taken on notice*, 25 October 2012 (received 12 November 2012), p. 2.

70 Department of Immigration and Citizenship, *Response to question taken on notice*, 25 October 2012 (received 12 November 2012), p. 2.

71 Department of Immigration and Citizenship, *Response to question taken on notice*, 25 October 2012 (received 12 November 2012), p. 3.

Consequences for breach

2.63 The CFMEU expressed concern about DIAC's policy on sanctioning employers who are in breach of EMA and 457 program obligations. Mr Kinnaird observed that DIAC was 'not interested in heavy punitive measures' and contrasted this approach with that taken by the Fair Work Ombudsman:

> The first court case against a 457 sponsor since the 2009 worker protection act was passed was brought only a few months ago, in 2012. It was a good case. To their credit, they did get an employer who was abusing the system badly. But, in contrast to a regulator like the Fair Work Ombudsman, the department takes a view that it should not publicise too much the results of its inspections of 457 employers. It takes a view that they have a right to privacy. The Fair Work Ombudsman, for example, does not take the same view. The Fair Work Ombudsman operates under a policy that, the more it publicises action against employers in breach of the Fair Work Act, the more likely that is going to act as a deterrent against other employers breaching the act. But the Department of Immigration does not seem to hold that view, and that is another factor which I think means that 457 employers are not exactly trembling in their boots at the thought of being inspected by the department of immigration. [72]

2.64 The committee asked DIAC to provide further detail about the consequences that may follow where an EMA holder is found to be in breach of their obligations. DIAC explained that the following actions may be taken where a party to a work agreement under an EMA fails to meet a sponsorship obligation:

- the work agreement may be suspended preventing a contracting business from sponsoring any more overseas workers;
- the work agreement may be terminated;
- an application may be made to a Court for a civil penalty order against the sponsor (the maximum penalty for a civil penalty order is $33 000 per contravention); and
- the sponsor may be issued an infringement notice for each failure (for a first offence, the fine is $3 300 – these fines double for a second offence).[73]

2.65 DIAC further advised that:

> The work agreement also contains clauses that provide for termination for non-compliance.
>
> An EMA places an obligation on the project owner and contractors to preference Australian workers to overseas workers and abide by their commitments to train Australians.

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72 Mr Bob Kinnaird, National Research Director, CFMEU, *Proof Committee Hansard*, 25 October 2012, p. 22.

73 Department of Immigration and Citizenship, *Response to question taken on notice*, 25 October 2012 (received 12 November 2012), p. 17.

> Where there is evidence of widespread, ongoing and/or egregious abuse, which the Government is not satisfied the project owner has taken adequate steps to rectify, the contractual sanctions in an EMA will allow the Department to suspend, limit or cancel an EMA (and all associated work agreements).[74]

2.66 The committee considers that a rigorous monitoring and compliance regime must be in place to protect the rights not only of Australian workers seeking work through the Jobs Board, but also those of foreign workers in Australia under an EMA.

Technical issues and other proposed amendments

2.67 A number of technical issues were discussed by submitters and witnesses, and these are dealt with briefly here.

2.68 The bill purports to amend both the Migration Act 1959 and the Fair Work Act 2009. The primary decision maker under the each Act is, respectively, the Minister for Immigration and Citizenship and the Minister for Employment and Workplace Relations. ACCI submitted that, if passed, this could give rise to conflicts in decision making and issues in relation to appeals under different legislation:

> It is unclear how the provisions can operate with two primary decision makers needing to be satisfied of certain matters before making a decision where one Minister's statutory jurisdiction is enlivened only when another Minister is satisfied of certain pre-conditions. Where a participant is aggrieved by a decision, this could be agitated with different forms of judicial or tribunal review given that appeals under the Fair Work Act 2009 are not consistent with appeals under the Migration Act 1958. These unintended consequences would create uncertainty for those participants involved in the EMA scheme, which is intended to provide a level of certainty to participants and large scale projects. The two legislative frameworks are distinctive as they have different policy objectives and there is currently no similar or analogous provision which involves the Fair Work Act 2009 regulating aspects of the Migration Act 1958 or vice-versa.[75]

2.69 Neither DEEWR nor DIAC identified this proposal as a concern in submissions to the committee.

2.70 Dr Tham, identified a number of areas where the bill could be improved on technical and policy grounds. For example, Dr Tham recommended that the proposed requirement that 'all practicable attempts' should be made to employ local workers should be changed to the less onerous 'reasonable attempts'.[76] Dr Tham noted that this would be consistent with the standard in DIAC's Labour Agreement Information policy document.[77] In contrast, the CEPU described the standard proposed by the bill

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74 Department of Immigration and Citizenship, *Response to question taken on notice*, 25 October 2012 (received 12 November 2012), p. 17.

75 ACCI, *Submission 2*, p. 3.

76 Dr Joo-Cheong Tham, Associate Professor, *Submission 1*, p. 7.

77 Dr Joo-Cheong Tham, Associate Professor, *Submission 1*, p. 7.

as 'far from onerous'.[78] Dr Tham also suggested that the term 'project workforce' should be changed to include contractors as well as general employees.

2.71 The CFMEU recommended that the phrase 'local jobs plan' in proposed section 536B (amending the *Fair Work Act 2009*) be defined in the bill. The CFMEU explained its reasoning:

> The proposed section 536B amendment to the Fair Work Act 2009 sets out the conditions which the Workplace Relations Minister may impose on the making of a work agreement. These include (at ss (1)(a)), 'that any employer participant has a local jobs plan'. The expression 'local jobs plan' does not appear to be defined in the existing legislation, the Bill or the proposed amendments to the Bill. When the Bill was introduced, it was stated that such a plan should have a particular focus on project will reduce reliance on overseas labour by targeting training at those occupations in short supply. The CFMEU would support the insertion of a definition of 'local jobs plan' which is consistent with these stated objectives.[79]

2.72 Neither DIAC nor DEEWR addressed these concerns in their submissions or during the hearing.

Reforms to the subclass 457 visa program

2.73 On 23 February 2013 the Minister for Immigration and Citizenship, the Hon. Brendan O'Connor MP, announced a number of significant reforms to the subclass 457 visa program. The Minister observed that the growth of the 457 visa program was 'out of step' with skills shortages and some employers were 'using 457 visas to discriminate against locals'. [80] The changes have been introduced to ensure that 'the system is working appropriately and that local workers are not disadvantaged'.[81] Under the new changes:

- Employers must demonstrate that they are not nominating positions where a genuine shortage does not exist;
- The English language requirements for certain positions will be raised;
- The enforceability of existing training requirements for businesses using the program will be strengthened;
- The market salary exemption will rise from $180 000 to $250 000[82];

78 Mr Allen Hicks, National Assistant Secretary, Communications Electrical Plumbing Union, *Proof Committee Hansard*, 25 October 2012, p. 25.

79 CFMEU, *Submission 6*, paragraph 10.

80 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.

81 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.

82 The market salary exemption rate refers to the rate above which sponsors do not have to provide evidence that the salary is set according to the market salary rate for that occupation.

- On-hire arrangements of 457 visa workers will be restricted (this will ensure businesses seeking to recruit overseas workers do not hire out to unrelated businesses);
- Compliance and enforcement powers will be improved to stop employers who have routinely abused the 457 system; and
- Stakeholders will be consulted to ensure market rate provisions more effectively protect local employment. [83]

2.74 The committee welcomes the announced changes to the subclass 457 visa program and commends the Minister for taking strong action to ensure that the 457 visa process does not continue to be misused by some employers. Ongoing monitoring of the effectiveness of the changes is required. Welcome though these changes are, it is clear from the discussion above that significant amendments are still required to the operation of 457s in the context of EMAs. It is to a summary of these changes that the committee now turns.

Committee view

2.75 The evidence before the committee largely supports the key objective of the bill to establish a robust and transparent framework for the EMA process to ensure that Australian workers are protected. However, the committee heard that in order to achieve that objective a number of adjustments are required to ensure that the EMA approval process is rigorous, and appropriate review mechanisms are in place. The EMA process as it stands, even as amended by the bill, is inadequate.

2.76 The committee considers that, for the most part, weaknesses could be addressed through reforms within the existing legislative framework. However, depending on the success of the measures described below, some legislative amendment may be required in the future.

2.77 The committee's recommendations centre on four themes central to this inquiry: protecting Australian jobs, accountability, training, and workplace rights.

2.78 The committee is alarmed by evidence that some companies in the resource sector are turning away experienced, qualified Australian workers who do not have direct industry experience, while at the same time seeking to fill these vacancies with overseas labour. The committee believes that the extent of this practice could be significant and needs to be closely examined.

2.79 Action must be taken to ensure that robust labour market testing is conducted prior to the granting of an EMA. In order to meet this requirement, an EMA applicant should be required to prove that they had made all possible efforts to employ and train local workers, before looking to migrant labour. In the committee's view, this should involve a significantly higher threshold than the current requirement to demonstrate a 'commitment' to employ local workers.

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83 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.

2.80 To better assist employers to find local labour, the government should continue to develop and improve the Jobs Board, with a particular view to ensuring that companies participate in it, and are required to draw staff from it, to the maximum extent possible. This could be achieved, for example, by developing a range of incentives and appropriately enforced obligations for employers, including making employers who do not use the Jobs Board ineligible to access workers through the 457 visa system.

2.81 The committee sees merit in establishing a complaint mechanism for Australian workers who have applied through the Jobs Board, yet are unable to obtain employment with resource sector companies who are using migrant labour. The existing EMA framework contains training requirements. However, the committee heard that some Australian workers are refused employment because, in spite of holding relevant qualifications and experienced, they lack direct experience in the resource sector. The committee also heard that many resource sector companies prefer to 'poach' experienced workers rather than take on apprentices. The skilled migration program should be calibrated to ensure that EMA holders train local workers before resorting to migrant labour.

2.82 However, notwithstanding the recently-announced changes to the operation of the subclass 457 visa, further strengthening of obligations is desirable and appropriate. The committee supports ACTU's recommendation that the government should create a new sponsorship obligation to inform each 457 visa holder in writing of their rates of pay and terms and conditions of employment, and provide a document outlining the role of DIAC, FWO and unions in pursuing underpayment claims.

2.83 The committee accepts that EMAs, and other work agreements such as Regional Migration Agreements, are likely to contain commercially sensitive material. However, there is a clear public interest argument for publishing relevant and timely information about these work agreements, particularly in relation to labour market testing. The bill's proposal that EMAs be tabled in full does not properly balance these two competing interests. A better approach would be for EMAs, and other work agreements, to be made publically available, with commercial-in-confidence material redacted. This could be achieved in a number of ways: through legislative reform, government amendment to the EMA program guidelines, or stipulation of disclosure in the EMA deed of agreement.

2.84 Finally, the skill needs of the industry were last considered by the National Resources Sector Employment Taskforce in its 2010 report. Given subsequent developments in the resources jobs market, it is timely that an assessment of the skills needs of the sector be conducted. Depending on the outcome of such a study, and in addition to the recommendations made in this report, it may also be appropriate to revisit the program guidelines for EMAs.

Recommendation 1

2.85 The committee recommends that the government amend the Enterprise Migration Agreement (EMA) guidelines to require that robust labour market testing be conducted prior to project owners making an EMA application. Adequate labour market testing should include the following:

- **advertising vacancies locally and nationally at genuine market rates, including mandatory use of the resources sector Jobs Board;**
- **offering relocation assistance measures where required; and**
- **providing information on specific measures undertaken to employ groups who are currently disadvantaged or under-represented in the workforce such as indigenous workers, women, unemployed local job-seekers, recently retrenched workers, and older, and why positions sought under the EMA cannot be filled by increasing the participation of these groups.**

Recommendation 2

2.86 The committee recommends that the government continue to develop and improve the Jobs Board. Improvements should include the provision of a range of incentives and obligations to ensure that companies participate in the Jobs Board, and the exclusion of employers who do not use the Jobs Board from accessing workers through the subclass 457 visa program.

Recommendation 3

2.87 The committee recommends that the government assess the extent to which the resource sector requires Australian workers to have direct industry experience, but then seeks to employ (and train) overseas labour to fill alleged skill shortages.

Recommendation 4

2.88 The committee recommends that the government establish a complaints mechanism for Australians who are unable to obtain work with an Enterprise Migration Agreement holder, despite being available for work and possessing the requisite qualifications or the ability to be trained in the relevant qualification.

Recommendation 5

2.89 The committee recommends that the government conduct a reassessment of the skills shortages in the resources sector.

Recommendation 6

2.90 The committee recommends that the government consider changing the definition of 'project workforce' for the purposes of calculating training obligations under the subclass 457 visa program. The new definition should include employees and independent contractors.

Recommendation 7

2.91 The committee recommends that the government amend the Enterprise Migration Agreement guidelines to ensure that training of workers from other sectors be a requirement.

Recommendation 8

2.92 The committee recommends that the government create a new sponsorship obligation requiring sponsors to inform each subclass 457 visa holder in writing of their rates of pay and terms and conditions of employment, and provide a document outlining the role of the Department of Immigration and Citizenship, the Fair Work Ombudsman and unions in pursuing underpayment claims.

Recommendation 9

2.93 The committee recommends that the Enterprise Migration Agreement applicants provide timely information to unions and other stakeholders about the proposed project during the stakeholder consultation phase.

Recommendation 10

2.94 The committee recommends that the Department of Immigration and Citizenship work with the resource sector to determine a definition of commercial-in-confidence, for the purposes for redacting Enterprise Migration Agreements before public release.

Recommendation 11

2.95 The committee recommends that the government make relevant and timely information relating to Enterprise Migration Agreements, subclass 457 visas and Regional Migration Agreements publicly available.

Recommendation 12

2.96 In light of the committee's view that weaknesses in the subclass 457 system could be addressed through the reforms detailed in foregoing recommendations, the committee recommends that the bill not be proceeded with.

Senator Gavin Marshall
Chair, Legislation Committee

COALITION SENATORS' MINORITY REPORT

Introduction

1.1 The Coalition is committed to ensuring jobs for Australian workers. However, there is a need for temporary workers to keep our economy strong.

1.2 The Coalition does not see temporary labour migration as a threat to Australian jobs. Rather it is an important tool to secure the future of businesses to ensure they can employ more Australians.

1.3 Safeguards are essential. The Coalition supports the sanctions and penalty regime implemented following the Deegan Review of the integrity of the Subclass 457 program.[1] There should be no tolerance for anyone who abuses the system. An employer abusing the 457 programme can expect the same tough stance from a Coalition Government as anyone else seeking to undermine the integrity of our immigration program.

1.4 Circumstances do arise where gaps open up and skills demand cannot be met within the Australian labour market as swiftly as required by project deadlines.

1.5 To this end, the Coalition welcomed the announcement of the first Enterprise Migration Agreement by the Minister for Immigration and Citizenship when it was introduced in the 2011 Federal Budget.[2]

1.6 The Enterprise Migration Agreement (EMA) program was conceived to help Australia overcome temporary and acute labour shortages, unable to be filled by Australian workers, in the high-performing sectors which are underpinning our economy.

1.7 Coalition Senators note that EMAs are intended to streamline negotiation arrangements for access to overseas workers and guarantee faster processing times for subclass 457 visa applications.

1.8 Coalition Senators are deeply disappointed that despite 22 months having passed since the Government introduced EMAs, and having given in-principle approval to enter into the first EMA with Roy Hill Holdings, the Government has failed to negotiate a final agreement.

1.9 Officials from the Department of Immigration and Citizenship (DIAC) testified at Senate Estimates that:

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1 Barbara Deegan, *Subclass 457 Integrity Review*, October 2008. Available online: http://www.immi.gov.au/skilled/457-integrity-review.htm (accessed 8 March 2013).

2 Department of Immigration and Citizenship, *Submission 9*, p. 1.

> [A] lot of businesses are waiting for the first application to be approved to see what sorts of concessions the government has approved before they make a decision to proceed.[3]

1.10 This failure is directly impacting on jobs for more than 6,000 Australians who would be employed on this project.

Evidence

Existing protections in place

1.11 The EMA guidelines state, as part of its training plan, the project owner needs to:

- commit to training in occupations of known or anticipated shortage;
- commit to reducing reliance on labour from outside Australia over time, with particular focus on semi-skilled labour where this is approved for the EMA;
- demonstrate that training strategies are commensurate with the size of the workforce from outside Australia utilised on a project; and
- demonstrate how training targets will be enforced through its contracting model and measured and monitored over the term of the EMA.[4]

1.12 In addition, individual sub-contractors will need to meet one of the standard training benchmarks associated with the 457 program, either by:

- contributing two per cent of payroll to a relevant industry training fund
- spending one per cent of payroll on training for their Australian employees.

1.13 This contribution should be consistent with the broader training plan for the project.

1.14 The EMA guidelines also state that direct employers will need to comply with sponsorship obligations, including paying Australian market salary rates. [5] This means workers from outside Australia cannot be used to undercut Australian working conditions.

1.15 Employers who do not comply with sponsorship obligations will be subject to sanctions such as a bar on sponsoring further workers from outside Australia or termination of the labour agreement.

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3 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy, Department of Immigration and Citizenship, Senate Legal and Constitutional Affairs Committee, Budget Estimates, Committee Hansard, 22 May 2012, p. 66.

4 Department of Immigration and Citizenship, Enterprise Migration Agreement: submission guidelines, p.15-16

5 Department of Immigration and Citizenship, *Enterprise Migration Agreement: submission guidelines*, p. 7.

1.16 Where there is evidence of widespread abuse, contractual sanctions in an EMA will allow the department to suspend or cancel an EMA (and associated agreements).

1.17 The EMA guidelines stipulate workers from outside Australia will need to demonstrate English language proficiency and the skills and experience necessary to perform the occupation in Australia. Relevant licensing or registration requirements will also apply.

1.18 The DIAC website itself states that 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.[6] The Resources Sector 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.

1.19 As with any employer, it will not be compulsory to recruit people from the board, or from any other source, where they do not meet the business' skill requirements or applicable Australian licensing criteria.

1.20 Coalition Senators note, consistent with multiple submissions received by the Committee, that the resources sector (led by the Australian Mines and Metals Association) has for some time maintained a highly successful jobs board that has provided employers and potential employees with a medium to advertise and locate potential opportunities for employment in the resources sector.

1.21 In submissions to the committee, the Australian Chamber of Commerce and Industry (ACCI) stated that:

> A new Local Jobs Board would struggle to gain the reputation and following of the existing service. It is in the best interests of the resources industry and the Australian community more broadly, to have in place a service with proven following and usability, maintained by the industry it services.
>
> Current government jobs boards such as jobsearch.gov.au have struggled to maintain relevance in the current jobs market and are generally considered as a fringe product, rarely used by employers.[7]

1.22 In relation to the requirement to consult local jobs board, the Victorian Employers' Chamber of Commerce and Industry (VECCI) states:

> This would impose an additional administrative requirement of questionable value. It is a case of regulatory overkill for no productive benefit. Under current guidelines, employers are already required to

6 Department of Immigration and Citizenship,' Employer sponsored workers', http://www.immi.gov.au/skilled/skilled-workers/sbs/eligibility-employer.htm (Accessed 7 March 2013)

7 Australian Chamber of Commerce and Industry, *Submission 2*, p. 3.

> illustrate their attempts to firstly employ local workers and why sufficient numbers cannot be sourced.[8]

1.23 The Australian Mines and Metals Association (AMMA) contend that:

> The amendment to make usage of the local jobs board compulsory for employers is not supported by the industry. Employers must already provide evidence that the relevant skills cannot be sourced locally. Furthermore, employers across the sector have implemented significant recruitment campaigns with the objective of attracting local candidates.[9]

1.24 The government announced the first 'in principle' EMA for the Roy Hill project in Western Australia's Pilbara region on 25 May 2012. Minister the Hon. Chris Bowen MP said at the time that 'the first EMA was an important development in helping meet critical skills shortages in the resources sector'.[10]

1.25 The Roy Hill project is worth $9.5 billion to Australia and will employ more than 6,000 Australians and requires just 1700 foreign skilled workers.

1.26 Under the Roy Hill agreement, the company will provide up to 2000 training places for Australians – including 230 apprentices and trainees, and preparing 110 indigenous Australians for work in construction.

1.27 The English language requirements are consistent with the 457 program, which commenced under the Howard Government – applicants must have an IELTS score of 5 across all test components.

1.28 The arrangements would be reviewed every six to twelve months and employers would be bound by migration law to provide overseas workers with 'the same terms and conditions of employment as Australian project employees'.[11]

1.29 This was all carefully engineered to protect Australian workers and act as a disincentive to the exploitation of foreign labour.

1.30 Coalition Senators note the national recruitment drive by Roy Hill to help source local workers for the construction phase of the Roy Hill project as part of the organisation's ongoing commitment to employing local workers and in line with the requirements of the EMA. The national recruitment drive built on the $1.4 billion investment made by Roy Hill in Western Australia and the popular local supplier expos which were conducted in Port Hedland, Newman, Kwinana and in Perth.

1.31 Coalition Senators also note with disappointment that these efforts, in addition to Roy Hill's on-line applications, as well as other avenues including The Resource Channel online service and the Federal government's Jobs Board, see Roy Hill no

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8 Victorian Employers' Chamber of Commerce and Industry, *Submission 10*, p. 2

9 Australian Mines and Metals Association, Submission 8, p. 3

10 Minister the Hon. Chris Bowen, Media Release, 25 May 2012 http://www.minister.immi.gov.au/media/cb/2012/cb187050.htm (Accessed 7 March 2013)

11 Response to Question taken on Notice, Additional Estimates hearing, Senate Legal and Constitutional Affairs Committee, February 2012 AE12/0172.

closer to a signed EMA than they were before undertaking these extensive and costly exercises.

Jobs for Australians

1.32 Coalition Senators reaffirm the Coalition's policy position that Australian workers should be sourced, up-skilled and empowered. Our immigration program should be employed to supplement that workforce where necessary.

1.33 Coalition Senators note the comments made by the BCA in their submission to the Senate Inquiry that:

> Finding enough Australian workers with the specialised skills who are prepared to work in or move to what are often remote locations away from their families and friends can be difficult.[12]

1.34 Foreign labour on subclass 457 visas in Australia accounts for less than one per cent of Australia's labour force.[13] Any suggestion that the subclass 457 program is flooding our labour market with foreign workers is not sustained by the evidence.

1.35 Coalition Senators strongly disagree with assertions made by the Construction, Forestry, Mining and Energy Union (CFMEU), that where overseas workers are used, Australian workers should be given preferential treatment when there is less demand for labour down the track. Coalition Senators believe this is discriminatory and would prevent the employer from retaining the best person for the job, should that person be a 457 visa holder.

1.36 Coalition Senators are of the opinion that companies should not be unfairly demonized for utilising short term skilled foreign labour where an Australian worker is unable to fill the position.

1.37 Evidence provided to the Committee by the BCA indicates that companies 'prefer to employ Australians wherever possible' and that:

> There is no financial incentive to employ temporary migrant workers ahead of Australians because migrant workers cannot be paid less than Australians and the administration and compliance requirements associated with employing temporary migrant workers add to costs.[14]

1.38 Coalition Senators also strongly agree with comments by AMMA in their submission that :

> The amendment to confer upon Workplace Relations Minister power to prioritise and influence resource sector employment decisions is opposed by industry. This is not a role for government. Workforce planning and

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12 Business Council of Australia, *Submission 11*, p. 1.

13 Department of Education, Employment and Workplace Relations, *Australian Jobs*, p. 5. http://www.deewr.gov.au/Employment/ResearchStatistics/Documents/AustralianJobs.pdf

14 Business Council of Australia, *Submission 11*, p. 1.

employment decisions are best left to individual employers and the industry.[15]

1.39 Coalition Senators oppose Committee Recommendation 7 – that the government should amend the EMA guidelines to ensure that training of workers from other sectors be a requirement.

1.40 Coalition Senators agree with the recommendation of the CFMEU that a definition of the phrase 'local jobs plan' would be useful.

Labour market testing

1.41 Coalition Senators are supportive of advertising locally and nationally at genuine market rates to attract suitably qualified and experienced Australian workers. Coalition Senators however do not agree with offering relocation assistance measures where required. This measure is both costly and ineffective. This is supported by the report in the West Australian Newspaper of May 2012, where it was stated that despite the Federal government offering cash incentives of up to $9,000 for jobless workers to move to Western Australia, only 37 took them up on the offer over a period of 18 months.[16]

1.42 Coalition Senators note the Australian Council of Trade Unions (ACTU) submission. The ACTU call for a 'genuine' labour market testing regime, requiring EMA applicants to first prove that they have made 'every possible effort' to fill vacancies with Australian workers, including providing information on specific measures undertaken to employ groups who are currently disadvantaged or under-represented in the workforce such as indigenous workers, women, unemployed local job seekers, recently retrenched workers and older workers.[17]

1.43 Coalition Senators are deeply concerned by this recommendation and question whether the Prime Minister made 'every possible effort' to fill the vacancy of the Director of Communications within her own office using an Australian worker, before making use of a skilled migrant on a 457 visa.[18]

1.44 Coalition Senators believe the standard of 'every possible effort' is impractical and unachievable. It would be an additional constraint on businesses who have already demonstrated a temporary and acute labour shortage unable to be filled by domestic workers.

1.45 Coalition Senators agree that there needs to be a process and that reliable accurate data needs to be available during the EMA assessment process, but do not

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15 Australian Mines and Metals Association, *Submission 8*, p. 3.

16 Andrew Tillett, 'Cash Incentive fails to bring job snobs West', *West Australian Online*, 30 May 2012, http://au.news.yahoo.com/thewest/a/-/newshome/13811688/cash-incentive-fails-to-bring-job-snobs-west/ (access 8 March 2013).

17 Australian Council of Trade Unions, *Submission 3*, pp 5–6.

18 Andrew Probyn, 'Spin doctor drawn into visa row', *The West Australian*, 6 March 2013, http://au.news.yahoo.com/thewest/a/-/breaking/16303839/spin-doctor-drawn-into-visa-row/ (accessed 8 March 2013). See also Majority Report, Chapter 2, paragraph [2.22].

believe that anecdotal evidence is an appropriate measure as suggested in the Majority Report.[19]

Training and apprenticeships

1.46 Coalition Senators challenge the validity of the assertion made by the ACTU in their submission that 'up to 46 per cent of independent contractors in construction are likely to be sham contractors', as there is no evidence to support what is a deliberately inflammatory claim.[20]

1.47 Coalition Senators support the following statement by the BCA in their submission to the inquiry:

> Continuing to up-skill Australian workers is a priority, but this cannot be relied on to ensure a sufficient supply of workers, particularly in the intensive construction phase of major projects in the short term.[21]

Parliamentary accountability

1.48 Coalition Senators strongly oppose the Committee Majority's proposal that each EMA should be tabled in Parliament. Coalition Senators therefore oppose Recommendations 10 and 11.

1.49 Coalition Senators agree with the assertions of industry bodies regarding the tabling of EMAs in the Parliament.

1.50 In their submission to the committee, VECCI states:

> There is no justifiable reason for the tabling of EMAs in parliament. They are already adequately regulated and parties employing them ought to be afforded privacy when it comes to commercially sensitive components of them.[22]

1.51 Coalition Senators support the statement by AMMA that:

> The requirement to table written EMAs in Federal Parliament is not supported by industry. Commercially sensitive information must be kept in confidence for project owners and contractors alike.[23]

1.52 Coalition Senators note concerns by Unions WA regarding greater transparency however we believe that transparency could be gained through a clear process established by DIAC for monitoring and reporting on skills development and shortages.[24]

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19 Majority Report, Chapter 2, paragraph [2.30].

20 Australian Council of Trade Unions, *Submission 3*, p. 11.

21 Business Council of Australia, *Submission 11*, p. 1.

22 Victorian Economic Chamber of Commerce and Industry, *Submission 10*, p. 3.

23 Australian Mines and Metals Association, *Submission 8*.

24 Unions WA, Submission 5, p. 5.

Monitoring and compliance

1.53 Coalition Senators note and support the statement made in evidence to the Committee by Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, regarding adequate funding and experience within DIAC to carry out monitoring activities:

> The department is already resourced for that activity. We do have sponsoring and monitoring activity. We have a range of monitoring officers. We have a range of inspectors under the 457 regime. If you look into the resources per capita and take into account the overall size of the Australian labour force, we have more resources per capita than Fair Work Australia. Fair Work Australia is monitoring a workforce of around 10 million people. We are monitoring in the order of 70,000 457 visa holders. There have been public comments about the first EMA application. The first EMA application contains the request for up to 1,715 workers. Relative to the numbers of people who we are monitoring, we are well resourced to do that.[25]

1.54 Coalition Senators note and support the statement by the Department of Education, Employment and Workplace Relations (DEEWR) in response to questions on notice from the committee, that EMA projects sites are subject to coordinated monitoring by DIAC, the Fair Work Ombudsman, Fair Work Building and Construction and 'relevant State and Territory work health and safety authorities'.[26]

1.55 Coalition Senators support the current compliance regime described by DIAC in response to questioning by the committee, and notes DIAC's evidence that its oversight role is adequately resourced.[27]

1.56 Coalition Senators believe a key element of reducing business compliance costs and removing unnecessary regulation is the ability to allow our businesses to be businesses again, rather than compliance officers for the Federal Government.

1.57 Over regulation is killing business innovation, it is crowding out the most important activity a business can undertake – the development of new products, services and markets that will fuel future growth and employment and looking after their customers.

1.58 Coalition Senators agree with the statement made by ACCI in their submission to the Committee that:

> The proposed conditions outlined in the Bill represent an unnecessary duplication of existing guidelines and create an additional layer of

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25 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Proof Committee Hansard*, 25 October 2012, p. 34.

26 Department of Education, Employment and Workplace Relations, Response to question taken on notice, 25 October 2012 (received 12 November 2012).

27 Department of Immigration and Citizenship, *Response to question taken on notice*, 25 October 2012 (received 12 November 2012). For a detailed discussion see Chapter 2, paragraphs [2.58]–[2.61] of the Majority Report.

> bureaucratic and political oversight that may cause significant delays in processing time, causing project delays and increasing costs for the developer.[28]

1.59 In their submission to the Inquiry, the BCA describes the types of challenges faced by Australia:

> A challenge for Australia is that rising costs, supply chain issues and increased competition from other countries mean successful delivery of the investment pipeline is far from assured. A major risk to delivery of the pipeline is the shortage of sufficient labour with the required skills, especially in the construction phase.[29]

1.60 The Business Council of Australian adds that:

> EMAs are a critical contingency planning tool for resources companies facing potential skills shortages and a tough market for finance. Having approval to bring in additional skilled workers, if required, helps companies demonstrate to financiers that they have the capacity to source sufficient workers.[30]

1.61 In the report *Pipeline or pipe dream: securing Australia's investment future*, released in June 2012, the Business Council of Australia identified three key areas relating to workforce development that were of concern to them: labour mobility, skills training and retraining, and migration.[31]

1.62 As identified in the Business Council of Australia report, Australia has a problem matching the location of growing job opportunities with our major population centres. The West Australian reported in May 2012, that despite the Federal government offering cash incentives of up to $9,000 for jobless workers to move to Western Australia, only 37 took them up on the offer over a period of 18 months.[32]

1.63 In their submission to the committee inquiry, ACCI states:

> Low labour mobility within Australia presents a significant barrier to meeting high labour demand during construction……the limited mobility of the Australian labour market means that job losses in the South Eastern Australian manufacturing and services sectors do not automatically translate into a boost in the available workforce for resources projects and major infrastructure developments in the northern and western parts of Australia.

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28 Australian Chamber of Commerce and Industry, *Submission 2*, p. 2.

29 Business Council of Australia, *Submission 11*, p. 1.

30 Business Council of Australia, *Submission 11*, p. 2.

31 Business Council of Australia, 'Pipeline or pipe dream: securing Australia's investment future', June 2012, http://www.bca.com.au/DisplayFile.aspx?FileID=831.

32 Andrew Tillett, 'Cash Incentive fails to bring job snobs West', *West Australian Online*, 30 May 2012, http://au.news.yahoo.com/thewest/a/-/newshome/13811688/cash-incentive-fails-to-bring-job-snobs-west/ (access 8 March 2013).

> Endemic and systemic issues in the Australian labour market and across the Australian workforce more broadly often prevent workers from undertaking significant relocations for employment, especially where employment opportunities are short term, living conditions are not conducive to family relocation and there is little access to services and amenities, as is often the case with new resources developments in their construction phase.[33]

1.64 The current Labor Government does not have appropriate policies to address the current and future labour shortages in Australia. Under Labor's failed workforce policies the Australian labour market is unlikely to be the stable and reliable source of labour that is required if we are to meet the future short and long terms demands of business and industry.

1.65 Coalition Senators agree that labour mobility, as recognised in the Majority Report,[34] however, Coalition Senators believe it is not the role of resource projects to engineer socio-cultural change through the provision of incentives such as relocation expenses. Coalition Senators do support a wider canvassing of job vacancies.

1.66 Coalition Senators note and welcome DIAC's commitment to monitor and provide advice to government regarding the applicants' ongoing domestic recruitment activity.

Unintended consequences

1.67 Coalition Senators agree with the concerns of the Australian Chamber of Commerce and Industry, who assert in their submission:

> The bill would significantly amend the Fair Work Act 2009 and create unintended consequences, particularly when the primary subject matter to be regulated is dealt with under other legislation in the form of the Migration Act 1958…..It is unclear how the provisions can operate with two primary decision makers needing to be satisfied of certain matters before making a decision where one Minister's statutory jurisdiction is enlivened only when another Minister is satisfied of certain pre-conditions. Where a participant is aggrieved by a decision, this could be agitated with different forms of judicial or tribunal review given that appeals under the Fair Work Act 2009 are not consistent with appeals under the Migration Act 1958.
>
> These unintended consequences would create uncertainty for those participants involved in the EMA scheme, which is intended to provide a level of certainty to participants and large scale projects.[35]

1.68 Delays in the negotiation and approval of EMAs directly flow into delaying job opportunities for Australian workers.

1.69 The Roy Hill project has, at the absolute maximum usage of foreign workers, a ratio of domestic to foreign workers of 5:1. This means that every delay to the

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33 Australian Chamber of Commerce and Industry, *Submission 2*,

34 Majority Report, Chapter 2, paragraph [2.24].

35 Australian Chamber of Commerce and Industry, *Submission 2*,

approval of the Roy Hill EMA costs the Australian economy and Australian workers jobs. That is over 8,000 Australian workers who are missing out on jobs as a result of delays brought about by this government. That is just the direct impact on jobs – the secondary job impacts in the services sector are also affected. Putting more and more bureaucracy around EMAs does not just hurt the company, does not just hurt the Australian economy, it directly hurts Australian workers.

Conclusion

1.70 Enterprise Migration Agreements play a crucial role in helping us manage temporary and acute labour shortages affecting major resource projects that underpin Australia's economy. They 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.

1.71 The best way to ensure an ongoing supply of jobs for Australians in the resources sector is to create a climate which encourages investment by offshore multinationals and Australian companies in developing Australian resource assets.

1.72 Any action which sends investors away from Australia will have a profound effect on our economy and employment.

1.73 Overseas workers are only considered for EMA opportunities if and when employment of suitably qualified Australians is exhausted.

1.74 Coalition Senators believe that the bill's proposed amendments to the *Migration Act 1958* and the *Fair Work Act 2009* are unjustified and unnecessary. Further, these proposals have the potential to jeopardise future resource development projects in Australia, and in turn jeopardise our continuing prosperity as a nation.

1.75 Coalition Senators believe the Australian Greens need not worry about any of the concerns contained within this bill, as the Labor Government will never sign an Enterprise Migration Agreement. They are but a mirage.

Recommendation

1.76 Coalition Senators recommend that the bill not be proceeded with.

Recommendation

1.77 Coalition Senators recommend that the government implement a more timely and efficient approval process for Enterprise Migration Agreements.

Senator Chris Back **Senator Bridget McKenzie**

Deputy Chair

AUSTRALIAN GREENS ADDITIONAL COMMENTS

SENATOR LEE RHIANNON

1.1 The Australian Greens, an alternative voice in Parliament with the guts to stand up to the big miners, have been leading the Parliamentary charge to protect local jobs.

1.2 Labor has sat on its hands for most of this Parliament and even only a few months ago Labor was extolling the virtues of secretive Enterprise Migration Agreements (EMAs), signed at the behest of the big miners, which have the potential to undermine access by local workers to local projects.

1.3 Worse, in recent weeks we have seen an unedifying public debate about the value and impact of subclass 457 visas on society and the economy.

1.4 Important policy questions regarding the role and regulation of temporary skilled migration within the Australian labour market have been reduced to a slanging match between the old parties.

1.5 It is unfortunate to say the least that xenophobic election tactics have not only brought Pauline Hanson out of retirement but have also prevented a rational discussion about when and how overseas skilled workers should supplement the local labour force.

1.6 It is important that we not allow the dog whistle to drown out or distort the genuine and legitimate concerns that the Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012 ('the bill') is seeking to address.

1.7 That is why the Australian Greens wish to thank the committee members and those who gave evidence to the inquiry for the rational and evidence based contributions and the manner in which the deliberations of the committee have been conducted. It has made an important contrast to the sometimes febrile atmosphere with which these issues are discussed.

1.8 The Committee Majority report identifies many of the problems that the bill seeks to address. These include: the lack of a role for the Employment Minister in decisions on EMAs; the need for labour market testing; legislated requirements for local jobs plans; locking in a jobs board; and putting in place transparency requirements for EMAs.

1.9 It is because the Australian Greens are in Parliament that we are seeing action on these fronts.

1.10 However, rather than support a legislative response the Committee Majority report recommends government action and strengthening of the EMA guidelines to address these problems.

1.11 While the Australian Greens welcome the support of the Senate Committee for the Greens' policy solutions – such as labour market testing including advertising – we do not accept that legislation is not required.

1.12 The Australian Greens are not confident in the government's commitment to address the problems with EMAs that we have identified and that have been confirmed by this inquiry.

1.13 The Committee's report contains no compelling argument against putting these protections in legislation.

1.14 Indeed, the Committee accepts the legitimacy of the concerns addressed by the Bill. These protections should be enshrined in law.

1.15 It is clear that Parliament must take responsibility to put in place proper regulation of EMAs.

1.16 Further, the Australian Greens would like to see many of the provisions in the bill, especially the requirement for advertising job vacancies locally, applying to all subclass 457 visas, not just those covered by EMAs.

Recommendation

1.17 While welcoming the Committee's support for the policy underlying the Australian Greens' Bill and supporting the thrust of the recommendations contained in the majority report, which mirror the provisions of the Bill, the Australian Greens believe a legislative response is required and therefore recommend the bill be passed.

Senator Lee Rhiannon

APPENDIX 1

Submissions received

Submission Number	Submitter
1	Associate Professor Joo-Cheong Tham
2	Australian Chamber of Commerce and Industry
3	Australian Council of Trade Unions
4	Victorian Electrical Trades Union
5	UnionsWA
6	Construction, Forestry, Mining and Energy Union
7	EE-Oz Training Standards
8	AMMA
9	Department of Immigration and Citizenship
10	Victorian Employers' Chamber of Commerce and Industry
11	Business Council of Australia
12	Department of Education, Employment and Workplace Relations
13	Restaurant and Catering Australia
14	Communications Electrical Plumbing Union
15	Skills Tasmania

Responses to questions taken on notice

1 Answers to questions on notice from DEEWR received 12 November, 2012.

2 Answers to questions on notice from DIAC received 21 November, 2012.

APPENDIX 2

Witnesses who appeared before the committee

Melbourne, Thursday, 25 October 2012.

Committee Members in attendance: Senators Back, Bilyk, Di Natale, Marshall, McKenzie, Rhiannon

Witnesses

BOLTON, Mr Stephen Bernard, Senior Adviser, Employment, Education and Training, Australian Chamber of Commerce and Industry

CLANCY, Mr Richard, Executive Director, Industry Policy and Workplace Relations Services, Victorian Employers Chamber of Commerce and Industry

HICKS, Mr Allen, National Assistant Secretary, Communications Electrical Plumbing Union

KINNAIRD, Mr Bob, National Research Director, CFMEU

KUKOC, Mr Kruno, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship

MAMMONE, Mr Daniel, Director of Workplace Policy and Director of Legal Affairs, Australian Chamber of Commerce and Industry

McAULIFFE, Mr Phil, Director, Resource Agreements Policy Section, Department of Immigration and Citizenship

NOONAN, Mr Dave, National Secretary, CFMEU

PARSONS, Mr Anthony, Group Manager, Employment Services Management and Procurement Group, Department of Education, Employment and Workplace Relations

RODDAM, Mr Mark, Branch Manager, Migration, COAG and Evidence Branch, Department of Education, Employment and Workplace Relations

SHIPSTONE, Mr Tim, Industrial Officer, ACTU