Committee Secretary

Senate Education, Employment and Workplace Relations Committees

By email: eewr.sen@aph.gov.au

11 September 2012

Dear Secretary,

Inquiry into the Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012 [Provisions][*]

This inquiry into the Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012 [Provisions] (Cth) ('the Bill') should be welcomed: it is an important opportunity to examine the role of work agreements under the Subclass 457 Business (Long Stay) visa program ('the 457 visa scheme').

There are two major pathways for an employer to sponsor a worker under the 457 visa scheme: standard business sponsorship and Work Agreements. Standard business sponsors are subject to a range of requirements in terms of their approval as sponsors and in terms of their nominated positions being approved (see Appendix). On the other hand, businesses that are party to Work Agreements[1] (which are made by the Immigration Minister on behalf of the Commonwealth) do not need to be approved as standard business sponsors, and so do not necessarily have to meet the applicable requirements. Moreover, such businesses generally do not have to meet the requirements that apply to the approval of a position

[*] The author of the submission was consulted by the office of Adam Bandt MP in relation to draft amendments to the Bill.

[1] The legislation is confusing in that it refers to 'Labour Agreements' in terms of the approval of the visa (*Migration Regulations 1994* (Cth) sch 2, cl 457.223(2)) but refers to 'Work Agreements' in relation to the approval of the nomination (*Migration Regulations 1994* (Cth) regs 2.70, 2.72). This confusion does not seem to be of any real significance as 'work agreements' are defined as 'labour agreements' between the Commonwealth represented by the Immigration Minister (or the Immigration Minister and other Minister/s) and a business that authorises 'the recruitment, employment, or engagement of services' of 457 workers: *Migration Regulations 1994* (Cth) reg 2.76. This submission will use the term 'Work Agreement' as it is the term used by the Bill.

nominated by a standard business sponsor. For positions nominated by a party to a Work Agreement, the crucial requirement is that the position falls within the terms of the agreement.

It should be noted, however, that like standard business sponsors, parties to such agreements are subject to the 'no less favourable' obligation in relation to the wages and conditions of the 457 visa worker – the terms and conditions of employment of nominated person should be no less favourable than those provided to an Australian citizen or permanent resident performing equivalent work in the nominating business's workplace at the same location[2] (unless the remuneration exceeds specified annual earnings, currently $180 000[3]).

What is clear from this brief outline is that Work Agreements represent a way in which businesses can be exempted from the normal strictures of the 457 visa program through the exercise of executive power. The exercise of such power is very much at the discretion of the Immigration Minister, with the *Migration Act 1994* (Cth) placing few constraints or requirements on the power despite its significance. For this reason alone, the role of Work Agreements deserves scrutiny. The case of scrutiny is even stronger given the growing use of these agreements, most notably through Regional Migration Agreements (RMAs)[4] and Enterprise Migration Agreements (EMAs).[5]

While the controversy over the EMA for Hancock Prospecting's Roy Hill iron ore project has provided an occasion for such scrutiny, the ensuing debate has left much to be desired. It has tended to be narrow and, at times, it has been simplistic and dangerous. Its scope has been narrow in that it has focussed on EMAs when it should have dealt with Work Agreements more generally. In this, this submission strongly

[2] *Migration Regulations 1994* (Cth) reg 2.79.
[3] Legislative instrument under *Migration Regulations 1994* (Cth), Specification of Income Threshold and Annual Earnings (para 2.72(10)(cc), sub-reg 2.72(10AB) and para 2.79(1A)(b) (IMMI 11/041).
[4] See Department of Immigration and Citizenship, *Regional Migration Agreements* <http://www.immi.gov.au/skilled/regional-migration-agreements.htm>.
[5] See Department of Immigration and Citizenship, *Fact Sheet 48a – Enterprise Migration Agreements* (June 2012) <http://www.immi.gov.au/media/fact-sheets/48a-enterprise.htm>.

endorses the amendments made to the Bill which broaden its scope to Work Agreements rather than dealing only with EMAs.

The debate has also gravitated around concerns over EMAs resulting in a loss of jobs for Australian workers.[6] This neglects the other purposes of the 457 visa scheme (see below) and the rights and interests of foreign workers more broadly. At times, this legitimate concern over protecting the employment opportunities of Australian workers has – unfortunately - been accompanied by more than a tinge of xenophobia.

Xenophobia – dislike and fear of foreigners – writes out the rights and interests of 457 visa workers. It denies the entitlement of such workers to justice by virtue of their status as *human beings* - 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.[7] Both these statuses suggest that 457 visa workers should, in many respects, be treated no less favourably than Australian citizens and permanent residents.[8]

While xenophobia is not the same as racism, the former can easily shade into the latter. The references made to 'Chinese workers' taking jobs of Australians should be of concern here. One can ask – somewhat rhetorically – why there aren't there similar references to 'American workers' stealing the jobs of Australians especially

[6] See, for example, AAP, '1500 rally for local jobs in the Pilbara', *Perth Now* (Perth) 15 July 2012.
[7] See generally R McCallum, 'Industrial Citizenship' in J Isaac and R Lansbury (eds), *Labour Market Deregulation: Rewriting the Rules* (Federation Press, 2005) 15; R McCallum, 'Justice at Work: Industrial Citizenship and the Corporatisation of Australian Labour Law' (2006) 48(2) *Journal of Industrial Relations* 131.
[8] See Joo-Cheong Tham and Iain Campbell, *Equal Treatment for Temporary Migrant Workers and the Challenge of their Precariousness* (2012) <http://www.labourlawresearch.net/Portals/0/Equal%20Treatment%20for%20Migrant%20Workers%20(Tham&Campbell).pdf>. Regard should also be had to their distinctive status as temporary residents. This is likely to mean that such workers should be provided services that enable them to fully realise the benefits of their stay in Australia.

when there is significant number of workers from the United States coming under the 457 visa program (including in the resources sector)?[9]

The Committee should take the opportunity in this inquiry to underscore the legitimate interests and rights of 457 visa workers (and foreign workers more generally). It should further emphasise that xenophobia and racism should have no place in the politics and policies of temporary labour migration schemes in Australia.

Such a stance would, in fact, fit squarely within the framework of the 457 visa program. The program has three central purposes. It is to:

- Address skill shortages;
- Protect the employment and training opportunities and working conditions of Australian workers; and
- Protect the working conditions of 457 visa workers.[10]

These purposes involve both the interests of employers and Australian workers as well as those of 457 visa workers. A rounded examination of the role of Work Agreements should consider these three purposes (and the various interests implicated by those purposes) and not merely focus on 'Protecting Local Jobs' (as the title of the Bill implies).

Establishing a legislative framework to govern Work Agreements

The *Migration Act 1994* (Cth) and the *Migration Regulations 1994* (Cth) presently say very little as to how the power of the Immigration Minister to make Work Agreements should be exercised. The key source of regulation for this power are policies issued by the Department of Immigration and Citizenship (DIAC). These policies are primarily found in the document entitled *Labour Agreement Information.*[11] While issued to businesses seeking a Work Agreement, this document

[9] See, for example, Ewin Hannan, 'Union bid to import US workers: Up to 2000 Americans needed to plug gaps on resources projects', *The Australian,* 18 July 2012.
[10] See Department of Immigration and Multicultural and Indigenous Affairs, *In Australia's Interests: A Review of the Temporary Residence Program* (2002) 23-24; Commissioner Barbara Deegan, *Visa Subclass 457 Integrity Review: Final Report* (2008) 20.
[11] Department of Immigration and Citizenship, *Labour Agreement Information* (January 2012) (copy on file with author).

does not appear to be publicly available on DIAC's website.[12] In addition to policies found in this document, there are separate policies applying to RMAs[13] and EMAs.[14]

The current position is unsatisfactory. The absence of a proper legislative framework governing Work Agreements represents – and results in – diminished parliamentary accountability.

Such a framework should, firstly, make clear that the purposes of the 457 visa scheme apply to Work Agreements. To make these purposes more effective, this submission recommends that the power of the Immigration Minister to make Work Agreements should be exercised only in furtherance of these purposes. This obligation means that the terms of the Work Agreements should provide concrete measures that advance these purposes. It also implies that such Agreements should provide for effective enforcement arrangements. This is particularly crucial given the risk of non-compliance with migration and labour laws that affects the situation of many 457 visa workers.[15] Proposed section 536B of the *Migration Act 1994* (Cth) gives some examples of such measures. (It should be added that, strictly speaking, this proposed section is unnecessary as the Immigration Minister already has the power to impose the various conditions enumerated in this section).

> *Recommendation One:* The *Migration Act 1958* (Cth) and *Migration Regulations 1994* (Cth) should be amended to require the Immigration Minister to exercise the power to make Work Agreements only if the Work Agreement:
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> - Addresses skill shortages;

[12] See http://www.immi.gov.au/skilled/skilled-workers/la/
[13] See Department of Immigration and Citizenship, *Regional Migration Agreements* <http://www.immi.gov.au/skilled/regional-migration-agreements.htm>.
[14] See Department of Immigration and Citizenship, *Fact Sheet 48a – Enterprise Migration Agreements* (June 2012) <http://www.immi.gov.au/media/fact-sheets/48a-enterprise.htm>.
[15] For a fuller discussion, see Joo-Cheong Tham and Iain Campbell, 'Temporary Migrant Labour in Australia: The 457 Visa Scheme and Challenges for Labour Regulation'(Working Paper No 50, Centre for Employment and Labour Relations Law, The University of Melbourne, March 2011), 34-43 <http://celrl.law.unimelb.edu.au/files/CELRL_Working_Paper_No__50_-_March_2011_%28FINAL%29.pdf>.

- Adequately protects the employment and training opportunities and working conditions of Australian workers; and
- Adequately protects the working conditions of 457 visa workers.

A proper legislative framework to govern the making of Work Agreements should also set out the key requirements to be met in this process. In this respect, the Bill proposes through a new section 140ZKC(1) of the *Migration Act 1994* (Cth) that a Work Agreement must not be made in relation to jobs currently available unless:

- the participant to the Agreement has made all practicable attempts to employ local workers, including by advertising the jobs; and
- the jobs have been advertised on the local jobs board.

It also proposes through a new section 140ZKC(1A) of the *Migration Act 1994* (Cth) that a Work Agreement must not be made in relation to jobs *not yet available* unless the Immigration Minister is satisfied that:

- there is credible evidence of an existing labour shortage and that such shortage would continue for the duration of the Work Agreement; and
- when the jobs become available:
    - the participant to the Agreement will make all practicable attempts to employ local workers, including by advertising the jobs; and
    - the jobs will be advertised on the local jobs board.

The requirement that the Bill proposes that the jobs (current or future) be advertised on the local jobs board should *not* be adopted. The 'local jobs board' (as defined by proposed section 140ZKC(2) of the *Migration Act 1994* (Cth)) applies only to the resources sector. It is, therefore, inappropriate to subject Work Agreements to a general requirement of advertising on the 'local jobs board' when such agreements would apply to sectors other than the resources sector. A requirement of advertising on the 'local jobs board' is best imposed by the Immigration Minister when s/he considers it appropriate.

The requirement in relation to credible evidence of labour shortages should be supported as it directly advances a central purpose of the 457 visa scheme, addressing skill shortages. Indeed, it should be broadened out to jobs currently available and not just to jobs yet to be available. This would, in many ways, merely codify the requirement currently found in the *Labour Agreement Information* document that '(t)he employer must demonstrate that there is a labour market need for the requested occupation and that there are no appropriately qualified Australian workers readily available'.[16]

> *Recommendation Two:* The *Migration Act 1958* (Cth) and *Migration Regulations 1994* (Cth) should be amended so that Work Agreements are not to be made unless the Immigration Minister is satisfied there is credible evidence of a labour shortage pertaining to the jobs to be covered by such Agreements.

The purpose of protecting the employment opportunities of local workers should also be advanced through a legislative requirement that participants to Work Agreements make certain attempts to employ local workers, including by advertising. The Bill, however, would seem to set too onerous an obligation by requiring 'all practicable attempts'. A more appropriate requirement would be to require 'reasonable attempts'. Such a requirement would, in substance, mirror the requirement currently found in the *Labour Agreement Information* document that '(t)he employer must be able to demonstrate, among other things, that it has genuinely attempted to recruit Australian workers for the positions'.[17]

> *Recommendation Three:* The *Migration Act 1958* (Cth) and *Migration Regulations 1994* (Cth) should be amended so that Work Agreements are not to be made unless participants to such agreements have made reasonable attempts to employ local workers, including by advertising the relevant jobs.

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[16] Department of Immigration and Citizenship, *Labour Agreement Information* (January 2012) 6 (copy on file with author).

[17] Department of Immigration and Citizenship, *Labour Agreement Information* (January 2012) 1 (copy on file with author).

The Immigration Minister should also be obliged to table these Agreements (as required by proposed s 140ZKE of the *Migration Act 1994* (Cth) of the Bill) and accompany such tabling with a detailed explanation as to how particular Work Agreements advance the purposes of the 457 visa scheme. These measures clearly promote transparency. This is beneficial on at least three grounds: it promotes accountability; it addresses concerns raised regarding the opaqueness of Work Agreements;[18] and it will help build confidence in the 457 visa program, a matter of some importance given the controversy surrounding it.

> *Recommendation Four:* The *Migration Act 1958* (Cth) and *Migration Regulations 1994* (Cth) should be amended to oblige the Immigration Minister to:
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> - Table each Work Agreement before Parliament; and
> - Provide with such tabling with an explanation as to how the Work Agreement fulfils the above purposes.

I hope this submission has been of assistance to you.

Yours sincerely,

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[18] See Joint Standing Committee on Migration, Commonwealth of Australia, *Temporary visas... permanent benefits: Ensuring the effectiveness, fairness and integrity of the temporary business visa program* (2007) 101; Visa Subclass 457 External Reference Group, Commonwealth of Australia, *Final Report to the Minister for Immigration and Citizenship* (2008) 35-36.

Appendix: Key requirements relating to standard business sponsorship under the 457 visa scheme

Approval as standard business sponsor[19]	**Approval of nomination**[20]	**Issuing of visa**[21]
• Lawfully operating business (in Australia or overseas) • If lawfully operating business in Australia: - meets training benchmarks[22]; and - has attested in writing that has strong record of, or demonstrated commitment to, employing local labour and non-discriminatory employment practices. • If lawfully operating business overseas, has auditable plan to meet training	• Provision of information relating to nominated person • Provision of information relating to nominated occupation • No adverse information known of nominating business or person associated (unless it is reasonable to disregard) • Nominated occupation corresponds with occupation specified in a legislative instrument, currently a list of various occupations in ASCO 1-4 together with miscellaneous non-ASCO listed occupations[23] • Terms and conditions of employment of nominated person no less favourable than those	• Nominated occupation corresponds to occupation specified in a legislative instrument, currently a list of various occupations in ASCO 1-4 together with miscellaneous non-ASCO listed occupations[28] • If sponsoring business's activities include recruitment of labour to supply to unrelated businesses or hiring of labour to unrelated businesses, occupation is in a position in the business (or associated entity) (unless an exempt occupation) • Visa applicant's intention to perform the occupation is genuine; • The position associated with nominated occupation is genuine; • If required by Minister, visa applicant has skills necessary

[19] *Migration Regulations 1994* (Cth) reg 2.59.
[20] Ibid reg 2.72.
[21] Ibid sch 2, Subclass 457, cl 457.223(4).
[22] These benchmarks can be met in two ways: expenditure by the sponsoring business equivalent to at least 2% of its payroll to an industry training fund together with a commitment to maintain such expenditure during the term of sponsorship; or expenditure by the sponsoring business equivalent to at least 1% of its payroll in the provision of training to its employees together with a commitment to maintain such expenditure: Legislative instrument under *Migration Regulations 1994* (Cth), Specification of Training Benchmarks (sub-regs 2.59(d), 2.68(e)) (IMMI 09/107).
[23] Legislative instrument under *Migration Regulations 1994* (Cth), Specification of Occupations (sub-paras 2.72(10)(a), 2.72I(5)(b) (IMMI 09/125).

benchmarks • No adverse information known about applicant or person associated (unless it is reasonable to disregard)	provided to an Australian citizen or permanent resident performing equivalent work in the nominating business's workplace at the same location (unless exceed specified annual earnings, currently $180 000[24]) • Base rate of pay in 'no less favourable' situation greater than TSMIT, currently $49 330[25] (unless exceed specified annual earnings, currently $180 000[26]) • Nominating employer has certified that: - nominated occupation is a position in its business (unless an exempt occupation)[27]; and - nominated worker has qualifications and experience commensurate to applicable ASCO occupation.	to perform the occupation; • IELTS test score of at least 5 in each of 4 tests (unless exempt); • If required to obtain licence, registration or membership, English proficiency required for such qualification; • No adverse information known of sponsoring employer or person associated (unless reasonable to disregard).

[28] Legislative instrument under *Migration Regulation 1994* (Cth), Specification of Occupations (sub-paras 2.72(10)(a), 2.72I(5)(b) (IMMI 09/125).
[24] Legislative instrument under *Migration Regulations 1994* (Cth), Specification of Income Threshold and Annual Earnings (para 2.72(10)(cc), sub-reg 2.72(10AB) and para 2.79(1A)(b) (IMMI 11/041).
[25] Ibid.
[26] Ibid.
[27] The occupations currently exempt largely relate to occupations as managers and senior health professionals, see Legislative instrument under *Migration Regulations 1994* (Cth), Specification of Occupations for Nominations in Relation to Subclass 457 (Business (Long Stay)) for Positions other than in the Business of the Nominator (sub-sub-paras 2.72(10)(d)(ii)(B), 2.72(10)(d)(iii)(B), 2.72(10)(e)(ii)(B), 2.72(10)(e)(iii)(B), sub-reg 2.86(2B) and sub-para 457.223(4)(ba)(iv) (IMMI 10/030).