Senate Standing Committee on
Education, Employment and Workplace Relations

Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012

Submission of the

Construction, Forestry, Mining and Energy Union
(Construction and General Division)

13 September 2012.

INTRODUCTION

1. The Construction, Forestry, Mining and Energy Union (Construction and General Division) (the CFMEU) supports the proposition that local workers[1] should have a legally enforceable first right to the employment opportunities created by and within the Australian economy. The CFMEU notes that this fundamental proposition is also embodied in the 2011 ALP National Platform on skilled migration policy, which states that Labor's skilled migration policies '*will recognise the primary right of Australian workers to Australian jobs'*.[2]

2. In most cases the local workforce is able to supply suitable candidates to meet the demands of the Australian labour market. However, the CFMEU also recognises that in some limited circumstances, a need will arise to use suitably skilled workers from other countries to supplement the local workforce. In this situation, those wanting to make the case for the use of overseas labour must bear the onus of showing that there is unquestionably a shortage of local workers who are able to perform the work. This includes being required to show that genuine efforts have been made to fill these positions with local workers, and that these efforts have been unsuccessful.

3. The engagement of workers from other countries must never be used to undermine Australian work rights, conditions or the employment security of the Australian workers. Nor should it be seen as a substitute for training local workers to meet the needs of our economy into the future. Likewise, it is fundamental that wherever overseas workers are engaged, they must receive the same benefits and protections that are available to local workers under the Australian workplace relations system.

4. If passed, the *Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill* 2012 (the Bill) and the proposed amendments which are presently being considered by this Committee, will establish a legislative framework for the consideration of Work Agreements, including Enterprise Migration Agreements (EMAs) and a mechanism designed to ensure that these agreements are only used

[1] In this submission, the expression 'local workers' has the same meaning as that proposed in the amendments to the Bill at s 140ZKC(3).
[2] Chapter 2.

where they are demonstrably necessary to supplement the Australian labour market and not as a substitute for the employment or training of local workers.

5. The Bill will also introduce some much-needed transparency into the work agreement process by requiring that these agreements be tabled in Parliament, thus making their terms publicly known and subject to public scrutiny.

6. The Bill and the amendments to it, propose changes to both the *Fair Work Act* 2009 and the *Migration Act* 1958. The CFMEU supports the proposition that the Minister for Workplace Relations be given a role in determining whether, and the terms in which, these agreements may be entered into. Work agreements involving the engagement of non-local workers clearly cut across the workplace relations and immigration portfolios. Requiring that the Minister for Workplace Relations satisfy him or herself that the employer participant has complied and will continue to comply with workplace laws and allowing the Minister to impose appropriate conditions on the making of these agreements, will help to ensure that workplace laws applying to local and non-local workers alike, are not undermined by the use of these work agreements. . The CFMEU notes that prior to 2008, it was a requirement that the Commonwealth Minister for Workplace Relations approve all labour agreements.

7. The Bill and the amendments stop short of providing the guaranteed 'first right' for local workers. However, the principles underlying this Bill go a considerable way to addressing these important issues and represent a significant improvement on the current position. For this reason the Bill and the amendments are supported by the CFMEU and the following brief comments are made with a view to ensuring that the principles embodied in the Bill can be most effectively implemented. The CFMEU also endorses the comments made in the ACTU Submission to this Committee on behalf of the various construction unions and other ACTU affiliates.

LEGISLATED 'FIRST RIGHT' AND PREFERENCE IN REDUNDANCY FOR LOCAL WORKERS

8. The current Bill, which seeks to amend both the *Migration Act* 1958 and the *Fair Work Act* 2009, is an appropriate vehicle to introduce a legislated 'first right' of local workers to the employment opportunities generated by the Australian economy. The *Migration Act* 1958 assumes that entry into Australia should be regulated. Its object gives effect to that proposition. Section 4(1) provides that '*the object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'*. The *Fair Work Act* 2009 sets out a comprehensive national system of workplace regulation in the Australian jurisdiction. These Acts should be amended by this Bill to make it clear that temporary access by overseas workers to the Australian labour market is at all times subject to the primary right of local workers to meet the available work opportunities.

9. Similarly, 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).

CONDITIONS ON WORK AGREEMENTS – LOCAL JOBS PLAN

10. 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 training to be provided by EMA proponents and that it should demonstrate how the

project will reduce reliance on overseas labour by targeting training at those occupations in short supply.[3] The CFMEU would support the insertion of a definition of 'local jobs plan' which is consistent with these stated objectives.

OBJECTS OF DIVISION 3B MIGRATION ACT

11. The proposed section 140ZKA sets out the object of a new Division 3B of the *Migration Act* 1958 dealing with work agreements. The section, as amended would provide:

> *This Division is enacted to regulate the use of work agreements to ensure such agreements are used only where genuinely necessary and do not adversely affect local job opportunities.*

The CFMEU suggests that this be amended to better capture the spirit and intent of the legislation and to make use of the term 'local workers' for which a new statutory definition is proposed by the amendments to the legislation (at s 140ZKC(3)) as follows:

> *This Division is enacted to regulate the use of work agreements to ensure such agreements:*
>
> *(a) are used as a temporary measure only in cases where a demonstrated labour shortage has been shown to exist;*
>
> *(b) do not adversely affect the employment opportunities and employment conditions of local workers;*
>
> *(c) include measures to promote training and address skills and/or labour shortages in the Australian economy;*
>
> *(d) provide for the fair treatment of non-local workers engaged under them; and*
>
> *(e) are entered into through a fair and transparent process which includes all interested stakeholders.*

[3] Hon. A Bandt MP Hansard Monday 18 June 2012 pg 6648.

CONDITIONS FOR MAKING WORK AGREEMENTS

12. The Bill, as amended, draws a distinction between the tests which a work agreement applicant must satisfy in circumstances where the jobs are 'not yet available' and those where the jobs are 'currently available' (see s 140ZKC(1A) and (1)). Central to these requirements is the obligation to advertise the available positions to local workers on the local jobs board and elsewhere. This is the key means by which the capacity of the local labour market to fill the available positions is to be tested.

13. However once the positions are advertised there is no further obligation to provide information relating to the responses received and the positions filled (or not filled) through the advertising process. There should be a mandatory requirement that participants report to the Minister on the response to the advertising prior to the Minister making any decision on the work agreement:

> *140ZKC(2A) The Minister must not make a work agreement unless the Minister has received from the participant a written report setting out:*
>
> (a) *where the jobs have been advertised;*
>
> (b) *the date the jobs were advertised;*
>
> (c) *the number and type of jobs advertised;*
>
> (d) *the number of applications or expressions of interest received in relation to each of the jobs advertised;*
>
> (e) *the number and type of jobs filled through the advertising process;*
>
> (f) *the number and type of jobs which have not been filled as at the date of the report;*
>
> (g) *the number of applications considered unsuitable for each position advertised and the reasons for that assessment; and*
>
> (h) *such other information as the Minister may, in writing, require.*

Such an obligation is consistent with the requirement imposed by these sections that the participant 'make(s) all practicable attempts to employ local workers for the jobs.'

14. Sections 140ZKC(1A) and (1) should be redrafted to make it clear that the requirements currently set out in s (1A)(a) - that the Minister be satisfied that there is credible evidence that there is an existing labour shortage and that the shortage will continue for the duration of the work - applies equally to the situation where there are jobs that are currently available, as it does where jobs are not yet available.

TRANSPARENCY AND THE PUBLIC INTEREST

15. The CFMEU strongly supports the proposed amendment which would require that the terms of any work agreement entered into be tabled in Parliament and therefore made publicly available.

16. It is an obvious flaw in the current system where neither the justification for nor the terms of an agreement such as the Roy Hill EMA, under which 1700 overseas workers can be brought to the country to work on a major project, are not made known to the public. There is a clear public interest in having these agreements subject to both Parliamentary and public scrutiny. It is simply not possible to test either the need to have these types of agreements in the first place or what the impact of those agreements is, unless the details of them are publicly available. The Commonwealth Ministers should commission and make publicly available the projections of demand and supply by occupation which in their view, justify the need for non-local workers.