

# CHAPTER 3

## Impact of the 457 visa program on employment opportunities

### Introduction

3.1 One of the key concerns about the 457 visa program is the impact the program has on employment opportunities for Australian permanent residents and citizens. Over the last two decades, these concerns have been addressed by adjusting the degree to which the 457 visa program is regulated. To a large extent, regulation of the 457 visa program has therefore involved a trade-off between the efficiency and productivity of the program versus the integrity and equity of the outcomes.

3.2 Submissions generally reflected this tension between the competing aims of efficiency and integrity, namely employers seeking to supplement their workforce with overseas workers in the most efficient and flexible manner, and unions seeking to protect the wages, conditions and job opportunities of Australian workers by requiring certain pre-conditions to be met prior to the hiring of overseas workers.

3.3 At the outset, the committee reiterates two points made in a previous inquiry into these matters by the Senate Legal and Constitutional Affairs References Committee. Firstly, where a genuine skill shortage does not exist in relation to a position, the employment of a 457 visa holder represents a fundamental breach of the program's central aims and must, as a matter of course, impact negatively on the opportunity for local workers to fill that position.<sup>1</sup>

3.4 Secondly, and conversely, where a genuine skill shortage exists in relation to a position, the inability of an employer to readily access a 457 visa worker to fill that position frustrates the key economic objectives of the program and could negatively impact on both business activity (and the employment of local workers) and the availability of critical services.<sup>2</sup>

3.5 Given the concerns about the effect of the 457 visa program on employment opportunities for Australian permanent residents and citizens, the key issues raised by submitters about the 457 visa program include:

- the balance between permanent and temporary migration, and the responsiveness of the 457 visa program to changes in domestic labour supply (in general, proponents such as employers and their organisations argued that the 457 program responded to changes in skills shortages in the domestic

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1 Senate Legal and Constitutional Affairs References Committee, *Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements*, 27 June 2013, p. 18.

2 Senate Legal and Constitutional Affairs References Committee, *Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements*, 27 June 2013, p. 19.

- labour market, while critics such as unions argued that the responsiveness was not evident, particularly in a softening job market);<sup>3</sup>
- the displacement of Australian workers by 457 visa workers;<sup>4</sup>
  - the importance of 457 visa workers to rural industries (particularly in the agricultural sector) that have struggled to attract domestic labour;<sup>5</sup>
  - the threshold up to which the 'market salary rate' is to be applied;<sup>6</sup>
  - the level and indexation of the Temporary Skilled Migration Income Threshold (TSMIT);<sup>7</sup>
  - the composition, flexibility, and regulation of the Consolidated Sponsored Occupation List (CSOL) from which occupations may be sponsored under the 457 visa program (including the make-up of the body responsible for

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- 3 Dr Joanna Howe and Professor Alexander Reilly, *Submission 5*, p. 5; Australian Government Departments, *Submission 41*, pp 5–6; Engineers Australia, *Submission 4*, pp 1 and 4; Ms Jenny Lambert, Director, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 17 July 2015, p. 16; Migration Council Australia, *Submission 27*, p. 6; Australian Nursing and Midwifery Federation, *Submission 37*, pp 4–6; Ms Ruth Kershaw, Research Consultant, Victorian Branch, Electrical Trades Union, *Committee Hansard*, 19 June 2015, p. 27; Australian Council of Trade Unions, *Submission 48*, p. 24; Mr Ron Monaghan, General Secretary, Queensland Council of Unions, *Committee Hansard*, 12 June 2015, p. 1.
- 4 Mr Benjamin Loeve, *Committee Hansard*, 26 June 2015, pp 2–3; The Australian Federation of Air Pilots, *Submission 15*, p. 2; Australian Maritime Officers Union, *Submission 18*, pp 3–5; Mr Matthew Boyd, Branch Organiser, Electrical Trades Union, *Committee Hansard*, 19 June 2015, pp 32–33; Australian Workers Union, *Submission 44*, pp 1–2; Ms Ruth Kershaw, Research Consultant, Victorian Branch, Electrical Trades Union, *Committee Hansard*, 19 June 2015, pp 27–28.
- 5 Ms Donna Mogg, Commercial Services Manager, Growcom, *Committee Hansard*, 12 June 2015, p. 19; Mrs Laura Wells, Tastensee Farms, *Committee Hansard*, 12 June 2015, p. 21; Mr David Fairweather, Tastensee Farms, *Committee Hansard*, 12 June 2015, p. 20; Ms Deborah Kerr, General Manager, Policy, Australian Pork Limited, *Committee Hansard*, 19 June 2015, p. 9; Ms Sarah McKinnon, Manager, Workplace Relations and Legal Affairs, National Farmers' Federation, *Committee Hansard*, 26 June 2015, p. 31; Mrs Roma Britnell, Chair, Markets, Trade and Value Chain Policy Advisory Group, Australian Dairy Farmers Ltd, *Committee Hansard*, 26 June 2015, p. 39; Mr Guy Gaeta, *Committee Hansard*, 26 June 2015, p. 36; Mr Justin Roach, *Committee Hansard*, 26 June 2015, p. 36; Mr Bernard Murray and Mrs Kerry Murray, Owners, Murray Free Range, *Committee Hansard*, 17 July 2015, pp 28–29; Mrs Elizabeth Mary Wallace, Human Resources, Compliance and Feed Purchasing, Windridge Farms, *Committee Hansard*, 17 July 2015, p. 29.
- 6 Australian Institute of Marine and Power Engineers, *Submission 17*, pp 4 and 8; Australian Higher Education Industrial Association, *Submission 20*, pp 2–3.
- 7 Migration Council Australia, *Submission 27*, p. 5; United Voice, *Submission 19*, pp 2–3; Maritime Union of Australia, *Submission 22*, p. 9; Northern Territory Government, *Submission 39*, pp 1–2.

compiling the CSOL), and the balance between permanent and temporary migration;<sup>8</sup>

- the technical competency of foreign workers particularly in sectors where safety is paramount;<sup>9</sup> and
- labour market testing as a means to ensure Australians have the first opportunity to apply for jobs (in general, employers criticised labour market testing as an excessive and unnecessary burden on employers, while unions supported labour market testing but criticised the requirements as lacking rigour).<sup>10</sup>

3.6 In order to provide context for the above issues, the chapter begins by looking at the balance between permanent and temporary migration, and the degree to which the 457 visa program responds to changes in the domestic labour market.

3.7 The next two sections present evidence on Australian labour markets. The first considers evidence that 457 visa workers have displaced Australian workers. The second considers the importance of 457 visa workers in certain sectors of Australian agriculture. The role and impacts of the 417 visa program, including both the

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8 Dr Joanna Howe and Professor Alexander Reilly, *Submission 5*, pp 8–13; Dr Joanna Howe, 'Is the net cast too wide? An assessment of whether the regulatory design of the 457 visa meets Australia's skill needs', *Federal Law Review*, vol. 41 issue 3, pp 20 and 23; Australian Council of Trade Unions, *Submission 48*, pp 20–22; Unions NSW, *Submission 35*, pp 5 and 7; Maritime Union of Australia, *Submission 22*, pp 6–7; Electrical Trades Union, *Submission 12*, p. 3; United Voice, *Submission 19*, pp 2–3; Australian Chamber of Commerce and Industry, *Submission 10*, pp 8–9; Australian Higher Education Industrial Association, *Submission 20*, pp 1–2; Ms Jenny Lambert, Director, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 17 July 2015, pp 17–18; Migration Council Australia, *Submission 27*, p. 14.

9 Engineers Australia, *Submission 4*, p. 5; Electrical Trades Union, *Submission 12*, pp 8–9; Mr Matthew Boyd, Branch Organiser, Electrical Trades Union, *Committee Hansard*, 19 June 2015, p. 32.

10 Australian Government Departments, *Submission 41*, pp 3–7; Migration Council Australia, *Submission 27*, p. 7; Migration Institute of Australia, *Submission 40*, pp 10–13; Engineers Australia, *Submission 4*, p. 5; Ms Ruth Kershaw, Research Consultant, Victorian Branch, Electrical Trades Union, *Committee Hansard*, 19 June 2015, pp 27–28; Dr Joanna Howe, 'Is the net cast too wide? An assessment of whether the regulatory design of the 457 visa meets Australia's skill needs', *Federal Law Review*, vol. 41 issue 3, p. 16; Ms Jenny Lambert, Director, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 17 July 2015, pp 12–13 and 17–18; Australian Council of Trade Unions, *Submission 48*, pp 25–35 and 97–105; The Australian Federation of Air Pilots, *Submission 15*, p. 2; Australian Maritime Officers Union, *Submission 18*, p. 5; Australian Institute of Marine and Power Engineers, *Submission 17*, p. 6; Australian Chamber of Commerce and Industry, *Submission 10*, p. 13; Maritime Union of Australia, *Submission 22*, pp 5–6; United Voice, *Submission 19*, p. 2; Migration Council Australia, *Submission 27*, p. 7; Australian Workers Union, *Submission 44*, pp 1–2; Ms Donna Mogg, Commercial Services Manager, Growcom, *Committee Hansard*, 12 June 2015, p. 22; Mr Ron Monaghan, General Secretary, Queensland Council of Unions, *Committee Hansard*, 12 June 2015, p. 2; Ai Group, *Submission 33*, p. 18; Business Council of Australia, *Submission 26*, p. 2.

importance of 417 visa workers in horticulture, viticulture, and fruit picking, and the displacement of local workers by 417 visa workers in the meat processing sector, are covered in chapter 4.

3.8 This is followed by several sections that examine the policy settings around the 457 visa program and Designated Area Migration Agreements (DAMAs), including the 'market salary rate', the TSMIT, the CSOL, the technical competencies required of temporary visa workers, and labour market testing.

3.9 The chapter finishes with the committee's view on these matters.

### **The balance between permanent and temporary migration**

3.10 As background context to the discussion in the next section on the responsiveness of the 457 visa program to changes in the domestic labour market, the committee notes that unions and employers hold conflicting views on the current direction of migration policy, and in particular, the balance between permanent and temporary migration.

3.11 The Australian Council of Trade Unions (ACTU) expressed concern about the greater reliance on temporary migration. The ACTU pointed out that the short-term interests of employers are not necessarily consistent with either the long-term national interest or the interests of migrant workers:

...this trend towards temporary and employer-sponsored migration is effectively outsourcing decisions about our national migration intake to employers and their short-term needs, over the national interest and a long-term vision for Australia's economy and society.<sup>11</sup>

3.12 Concerns about labour migration policy relying too heavily on employer preferences are not just restricted to unions and certain academics. In 2009, the Organisation for Economic Cooperation and Development (OECD) stated:

A regulated labour migration regime would, in the first instance, need to incorporate a means to identify labour needs which are not being met in the domestic labour market and ensure that there are sufficient entry possibilities to satisfy those needs. In theory, employers could be considered the group of reference for determining this, but historically, requests by employers have not been considered a fully reliable guide in this regard, at least not without some verification by public authorities to ensure that the requests represent actual labour needs that cannot be filled from domestic sources.<sup>12</sup>

3.13 The ACTU set out the reasons for their preference for permanent over temporary migration:

...permanent migrants provide a more stable source of skilled workers with a greater stake in Australia's future and in integrating into all aspects of

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11 Australian Council of Trade Unions, *Submission 48*, p. 20.

12 Organisation for Economic Cooperation and Development (OECD), *International Migration Outlook 2009*, p. 134.

Australian community life. With permanent residency, migrants have a secure visa status. This makes them less susceptible (though not immune) to exploitation and less likely to generate negative impacts on other Australian workers in terms of wages, employment conditions and job and training opportunities.<sup>13</sup>

3.14 The ACTU therefore recommended that:

...the current weighting of Australia's skilled migration program towards employer-sponsored pathways should be re-evaluated, with greater emphasis given to the permanent, independent stream as the 'mainstay' of the skilled migration program.<sup>14</sup>

3.15 The Australian Nursing and Midwifery Federation (ANMF) acknowledged that nurses and midwives 'have a strong tradition of international collaboration, with nurses and midwives moving around the globe to gain further training and different clinical experiences', and recognised the 'clear merit in international exchange and diversity'.<sup>15</sup>

3.16 The ANMF noted that nursing features strongly in both the temporary and permanent skilled migration programs (see Table 3.1 and 3.2 below).

**Table 3.1: Number of 457 visa grants to nurses, 2005 to 2013–14**

Year	2005	2006	2007–08	2008–09	2009–10	2010–11	2011–12	2012–13	2013–14
457 visas	2609	3011	3375	3977	2624	2146	3095	2853	1489

Source: Australian Nursing and Midwifery Federation, Submission 37, p. 5.

**Table 3.2: Number of permanent visa grants to nurses, 2005 to 2013–14**

Year	2005	2006	2007–08	2008–09	2009–10	2010–11	2011–12	2012–13	2013–14
457 visas	2161	2174	2478	3492	4133	3400	3160	2930	N/A

Source: Australian Nursing and Midwifery Federation, Submission 37, p. 6.

3.17 While expressing a preference for permanent migration, the ANMF saw a place for temporary migration provided that certain safeguards for both local and overseas workers were met. These safeguards included genuine testing of the labour

13 Australian Council of Trade Unions, *Submission 48*, p. 22.

14 Australian Council of Trade Unions, *Submission 48*, p. 22; see also Electrical Trades Union, *Submission 12*, p. 3; United Voice, *Submission 19*, pp 2–3; Australian Workers Union, *Submission 44*, p. 2.

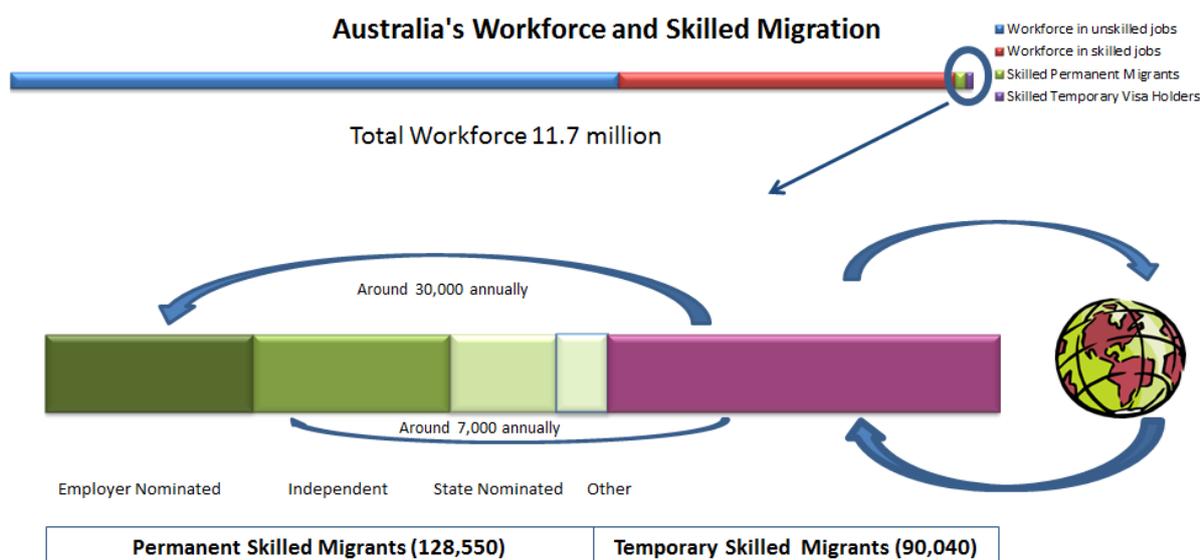
15 Australian Nursing and Midwifery Federation, *Submission 37*, p. 4.

market, investment in the training of local nurses and midwives, and an English language standard of International English Language Testing System (IELTS) 7.<sup>16</sup>

3.18 The preference for permanent over temporary migration was condemned as illogical by the Australian Chamber of Commerce and Industry (ACCI). ACCI noted the economic benefits of growth in the education and tourism sectors that results from the student and Working Holiday Maker (WHM) visa programs. It was also pointed out that temporary work visa programs 'provide an effective feeder into permanent migration' and that there were benefits to 'someone coming temporarily in advance of making a permanent commitment'. Given these connections, ACCI argued that temporary migration should not be reviewed in isolation from permanent migration.<sup>17</sup>

3.19 ACCI estimated the skilled workforce in Australia to be around 4.2 million, of which primary 457 visa holders accounted for around 2.1 per cent of the skilled workforce (see Figure 3.1 below).

**Figure 3.1: Australia's Workforce and Skilled Migration**



Source: Australian Chamber of Commerce and Industry, *Submission 10*, p. 14.

3.20 ACCI made the point that temporary and permanent migration is inextricably linked and that the value of temporary migration in this equation was its responsiveness to immediate needs:

16 Australian Nursing and Midwifery Federation, *Submission 37*, p. 4.

17 Australian Chamber of Commerce and Industry, *Submission 10*, pp 8–9; see also Eventus, *Submission 25*, p. 20.

The temporary skilled migration programme should be seen as the responsive end of the total skilled migration programme. It enables the fulfilment of immediate needs, and if those needs are temporary, then the worker returns to their own country. If the need is permanent they are sponsored or apply independently to stay.<sup>18</sup>

3.21 Ms Jenny Lambert, Director of Employment, Education and Training at ACCI, also argued that because employer sponsored migration programs required strong employer commitment, the pay and employment outcomes for migrants would likely be superior to those delivered by the independent skilled migration stream.<sup>19</sup>

### **The responsiveness of the 457 visa program to changes in domestic labour supply and skills demand**

3.22 In general terms, the advantage of temporary migration is its ostensible responsiveness to changes in the domestic economy. In theory, a responsive temporary migration program benefits the host nation during both economic upturns and downturns. As Dr Joanna Howe and Associate Professor Alexander Reilly note:

In theory, when permanent migrants lose their jobs, they are a burden on the Australian welfare state, whereas temporary migrants return home.<sup>20</sup>

3.23 One of the key areas of contention regarding the 457 visa program is the responsiveness of the program to changes in the domestic supply of skilled labour. In the main, proponents (such as employers and their organisations) argued that the 457 program responded to changes in skills shortages in the domestic labour market, while critics (such as unions) argued that the responsiveness was not evident.

3.24 The crux of the issue is whether temporary migration has a negative impact on jobs particularly in a softening job market. This boils down to a broader question about the extent to which the 457 visa program responds to changes in the labour market and whether, for example, an increase in domestic unemployment is matched to a reasonable extent by a reduction in demand for 457 visa workers. The more specific question is the extent to which the 457 visa program responds to changes in the supply of skilled labour in particular occupations.

3.25 On the latter question, the Australian Government Department submission provided evidence of an association between the demand for 457 visa workers and skill shortages in the nursing and engineering occupations:

The number of primary subclass 457 visas granted for Midwifery and Nursing Professionals (ANZSCO minor group) and Enrolled Nurse declined from 3239 in 2011–12 to 2999 in 2012–13 to 1597 in 2013–14 (and 832 for the 9 months to 31 March 2015). Department of Employment

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18 Australian Chamber of Commerce and Industry, *Submission 10*, p. 13.

19 Ms Jenny Lambert, Director, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 17 July 2015, p. 17.

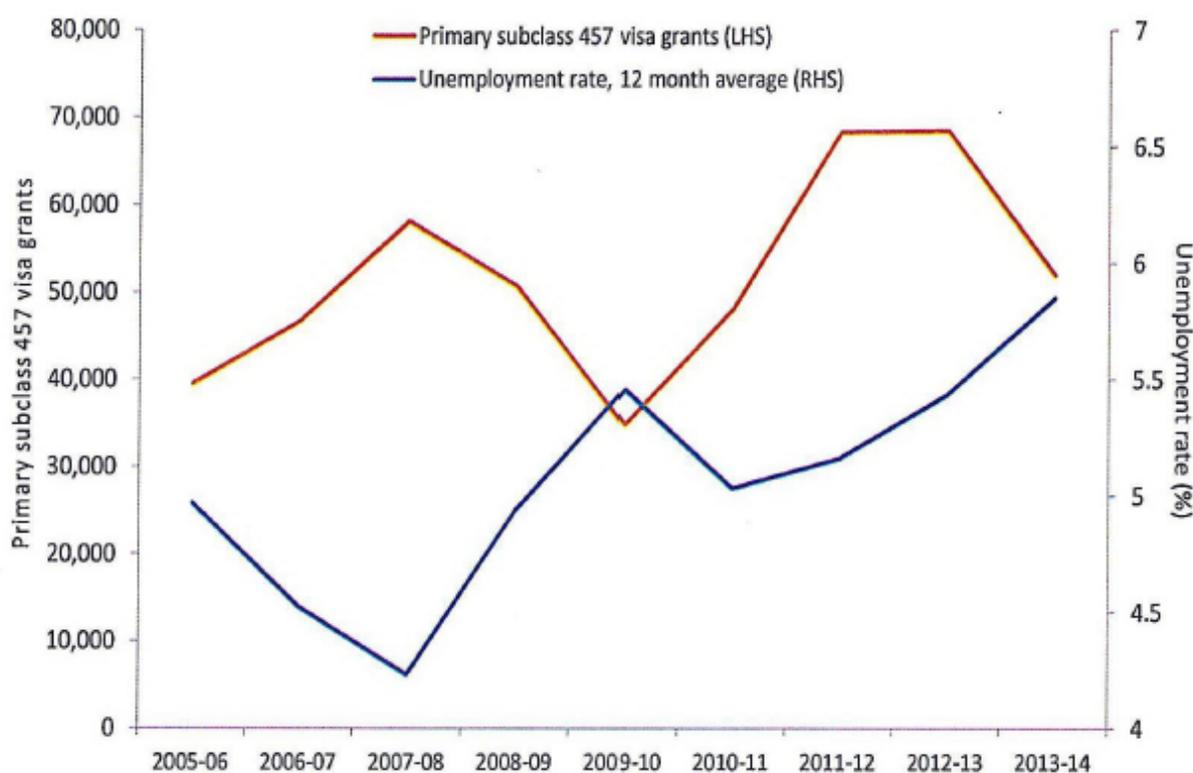
20 Dr Joanna Howe and Professor Alexander Reilly, *Submission 5*, p. 5.

research shows that Registered Nurse has not been in national shortage since 2011.

The number of primary subclass 457 visas granted in the Engineering Professionals (ANZSCO minor group) and Building and Engineering Technicians (minor group, excluding Architecture, Building and Surveying Technicians) declined from 7795 in 2011–12 to 5943 in 2012–13 to 3586 in 2013–14 (and 2349 for the 9 months to 31 March 2015). Most engineering professions ceased to be classified as in shortage on the Department of Employment's national Skill Shortage List in 2013.<sup>21</sup>

3.26 The Australian Government Department submission also provided a graph (Figure 3.2 below) to illustrate a more general association between the granting of 457 visas and the unemployment rate between 2005–06 and 2013–14:

**Figure 3.2: The association of grants of 457 visas and the rate of unemployment.**



Source: Australian Government Department, *Submission 41*, p. 6.

3.27 The committee notes that between 2005–06 and 2009–10, there appears to be a reasonably close association between the granting of primary 457 visas and the unemployment rate. As the unemployment rate fell between 2005–06 and 2007–08, there was an increase in the number of primary 457 visas granted. As the unemployment rate rose between 2007–08 and 2009–10, there was a corresponding decrease in the number of primary 457 visas granted.

21 Australian Government Departments, *Submission 41*, p. 5.

3.28 However, a similar association between the unemployment rate and the granting of visas did not materialise between 2010–11 and 2012–13. During this period, the unemployment rate rose from approximately five to five and a half per cent and yet grants for primary 457 visas also rose from approximately 45 000 to approximately 70 000. Therefore, over a two-year period, the continued increase in the number of primary 457 visas being granted did not respond to the increase in unemployment for a period of two years. As the unemployment rate continued to rise between 2012–13 and 2013–14, the granting of primary 457 visas declined to approximately 50 000 (the figures for 2014–15 were approximately 38 000 based on the figures supplied in Table 2.3). The number of primary 457 visas granted has therefore declined significantly, although not quite to the levels of 2009–10 when the unemployment rate was approximately five and a half per cent (the unemployment rate for the period 2014–15 averaged above 6 per cent).

3.29 In summary, an argument could be made both ways about the responsiveness on the 457 visa program to the unemployment rate. However, it is clear that as Australia's rate of unemployment has increased over the last four years, there has been a time lag of two to three years in the responsiveness of the demand for, and granting of, primary 457 visas.

3.30 The ACTU fundamentally disagreed with the proposition that the 457 visa program was responsive to changes in the domestic labour market. The ACTU pointed to trends in both the general rate of unemployment and trends in particular industry sectors such as construction and food as evidence that the 457 visa program does not reflect the realities of the domestic labour market.<sup>22</sup>

3.31 For example, the ACTU noted that the unemployment rate is above six per cent with over three quarters of a million Australians unemployed and looking for work, and the youth unemployment rate is over 13 per cent with over a quarter of a million young people out of work.<sup>23</sup>

3.32 Given the evidence on the granting of 457 visas at a time of relatively high unemployment, the ACTU maintained:

...labour market testing is a sensible, appropriate, and necessary measure to ensure that, before temporary migrant workers can be employed, there is evidence that employers have made all reasonable efforts to employ Australian workers and that Australian workers are not being displaced.<sup>24</sup>

3.33 Concerns about the responsiveness of the 457 visa program to changes in domestic demand for labour, and a corresponding impact upon job opportunities for local workers, were echoed by certain peak bodies. Engineers Australia noted:

...throughout the years when the demand for engineers was high, the number of 457 visas increased and that there were falls in the number

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22 Australian Council of Trade Unions, *Submission 48*, pp 103–105.

23 Australian Council of Trade Unions, *Submission 48*, p. 24.

24 Australian Council of Trade Unions, *Submission 48*, p. 105.

during the GFC and in 2013–14 when demand conditions changed. However, given the dramatic change in the engineering labour, Engineers Australia is astonished that the 457 visa intake was as high as 5501.<sup>25</sup>

3.34 Noting that the 457 visa program is 'designed to be a safety valve for employers when there is excess demand for engineers', Engineers Australia stated that the demand for engineers under the 457 visa program did not match the situation in the domestic labour market for engineers:

There is no general shortage of engineers in Australia and the number of 457 visa approved last year are far higher than one would expect if some employers experienced difficulties recruiting an engineer practicing in a particular area of engineering, especially in view of there being no skills assessment.<sup>26</sup>

3.35 Engineers Australia stated that the 457 visa program as it applied to the engineering occupation was having a detrimental effect on employment opportunities for Australian engineering graduates particularly in a situation where there was no shortage of engineers in Australia.<sup>27</sup>

3.36 As engineering has become increasingly specialised, Engineers Australia disagreed with the proposition that use of the 457 visa program in its current format was of value to the profession:

Statistics show that pressures in the engineering labour market have eased dramatically in all States and Territories. Jurisdictions were differentiated essentially by when the decline commenced and the rate of deterioration. Engineers Australia sees no evidence of any general shortage of engineers.

As the development of the Australian economy has become more sophisticated, new areas of engineering specialisation have developed. Indeed, the breadth of specialisation is an important characteristic of modern engineering. It is entirely possible that somewhere in Australia an employer is experiencing difficulties recruiting an engineer that matches a particular specialisation. However, given that there are no formal assessments of qualifications and experience for 457 visas, Engineers Australia fails to understand how temporary recruitment assists this situation.<sup>28</sup>

3.37 As a result, Engineers Australia believed that labour market testing should be applied in all cases.<sup>29</sup>

3.38 By contrast, Consult Australia the industry association representing the business interests of consulting firms operating in the built and natural environment,

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25 Engineers Australia, *Submission 4*, p. 4.

26 Engineers Australia, *Submission 4*, p. 1.

27 Engineers Australia, *Submission 4*, p. 4.

28 Engineers Australia, *Submission 4*, pp 5–6.

29 Engineers Australia, *Submission 4*, p. 5.

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argued that the number of engineers on 457 visas varied on a year-on-year basis 'in response to local skills needs and availability':

The numbers of engineers of all levels arriving on temporary visas rose from 2260 in 2003–04 to 7490 in 2007–08, before dropping to 6900 in 2008–09 and further to 4460 in 2009–10, and then rising again to 6940 in 2010.<sup>30</sup>

3.39 Consult Australia stressed the value that a responsive temporary migration program brought to Australian business and submitted that the use of engineers on 457 visas had not been subject to abuse. Consult Australia was therefore very concerned that the inclusion of engineering in the labour market testing regime would hinder project construction:

A flexible temporary skilled migration visa that is responsive to market requirements is therefore essential for engineering-related businesses. Consulting services in particular often require specialist staff to join teams at short notice to address challenges that invariably arise in complex projects.<sup>31</sup>

3.40 Likewise, Fragomen, a global immigration law firm, emphasised both the value of the 457 visa program to the Australian economy and the its responsiveness to fluctuations in the domestic demand for skills:

The boom and then levelling off of demand for skilled workers in most segments of the resources sector demonstrates the value of the subclass 457 programme to the Australian economy. It seems to us inconceivable how many infrastructure projects could possibly have been undertaken without access to the engineers, IT professionals, contract and project managers and other highly skilled professionals from around the world. Australian companies and staff and the underlying labour market in Australia would simply not have been able to meet the demand for this work; either in terms of the volume of workers needed, or the peaks and troughs of demand for particular skills sets as a project moves through its various development phases. Equally, remaining one of the most successful economies in the world in this post-boom period depends partly on maintaining our attractiveness as a regional hub for global business.<sup>32</sup>

3.41 Fragomen also highlighted the importance of two-way intra-corporate transfers that benefit Australia by facilitating the bringing in of skills and knowledge, often at short notice, that cannot be sourced from Australia while also allowing for Australian employees to develop their careers overseas:

Intra-corporate transferees are generally required in Australia because they have proprietary knowledge and/or experience required to achieve business goals for the Australian operations or to deliver a project or train the Australian arm of the business. Because it is proprietary, this knowledge

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30 Consult Australia, *Submission 30*, p. 4.

31 Consult Australia, *Submission 30*, p. 6.

32 Fragomen, *Submission 21*, p. 5.

and experience cannot generally be sourced from the Australian labour market, other than from within the Australian business itself. These transfers are often connected with large project wins or the expansion of a company's operations in Australia but can also result from a policy of assigning individuals to different roles in different country operations as part of the normal course of business or normal career progression. As mentioned, Australian employees in these circumstances also have the opportunity to work in the company's overseas operations and develop their careers.<sup>33</sup>

3.42 In this regard, Fragomen also observed that the movement of employees on intra-corporate transfers does not have a negative impact on the domestic labour market:

A person entering Australia for a specific, short term project requiring proprietary knowledge is not competing with Australians for the role. Because it is proprietary, this experience cannot generally be sourced from the Australian labour market because the skills and expertise are simply not available in Australia outside the business. Similarly, a manager whose offshore role incorporates responsibility for Australian operations, and who is required to visit for days or weeks at a time on a regular basis, is not entering—or even seeking entry—to the Australian labour market despite performing work while in Australia.<sup>34</sup>

3.43 ACCI refuted the perception that the interaction between temporary migration and employment was a zero-sum game and that jobs could be taken by migrant workers. Ms Lambert from ACCI was adamant that the relationship between temporary migration and employment was positive and that migration stimulated economic growth and therefore created jobs.<sup>35</sup>

3.44 Furthermore, Ms Lambert noted that unemployment rates and labour shortages vary dramatically across Australia. She argued, therefore, that a simple correlation between unemployment and the number of temporary migrant workers in Australia was misleading because the demographic of the unemployed was, in general, 'dramatically different' to the demographic being satisfied by 457 visa workers.<sup>36</sup>

3.45 Similarly, the Migration Council of Australia (the Migration Council), a non-partisan research and policy body with an independent board drawn from business, unions and the community sector, maintained that labour markets in advanced industrial economies adjust dynamically to immigration:

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33 Fragomen, *Submission 21*, p. 6.

34 Fragomen, *Submission 21*, p. 19.

35 Ms Jenny Lambert, Director, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 17 July 2015, p. 16; see also Fragomen, *Submission 21*, pp 5 and 20.

36 Ms Jenny Lambert, Director, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 17 July 2015, p. 21.

There has been a continual discourse that argues that migration crowds out youth employment opportunities. This assertion rests on the claim that 10 additional people will become unemployed, or will remain unemployed at the same time 10 new migrants arrive, with the migrants 'taking' the jobs that could have been filled by our domestic labour force.

Yet this ignores how labour markets work in practice, with new workers adding economic demand or enabling investment, hence generating other positions in the labour market. Employers who use temporary work visas as dictated by legislation should not be substituting migrants for young workers given requirement for market wages and the focus on skilled migration.<sup>37</sup>

3.46 The Migration Council drew on data from their own modelling in Australia as well as various international studies to support their view that 'a flow of new arrivals into a labour market will change both demand and supply in the economy, not a simple displacement of one worker for another', and that, over the longer term, migration had 'very little impact on the unemployment rate'.<sup>38</sup>

3.47 The National Farmers' Federation (NFF) stated that agriculture differed significantly from other parts of the Australian economy in that many parts of the agricultural sector could not support permanent employment. Consequently, the NFF contended that, in general terms, visa workers do not compete with local workers for jobs in agriculture because local workers are not applying for the jobs that visa workers are doing.<sup>39</sup>

3.48 With reference to the resource sector, the Australian Mines and Metals Association (AMMA) pointed out that the demand for temporary skilled workers under the 457 program did in fact match the changes in the economic cycle. For example, as the resource industry moved from the construction phase of projects to the less labour-intensive production phase, the number of primary 457 visa applications lodged by the mining industry in the 2014–15 program year to 31 December 2014 had declined by 1010, or 24.9 per cent, compared to the same period in the previous year.<sup>40</sup>

### **The nature of the Australian labour market**

3.49 The committee notes that, in general terms, labour markets are not uniform. The committee received ample evidence indicating significant differences in labour markets including across industries, occupations, and regions, and over time (for example, at different stages of the business and economic cycle). It is therefore clear that concerns about the availability of labour and employment opportunities for Australians vary significantly according to circumstances.

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37 Migration Council Australia, *Submission 27*, pp 5–6.

38 Migration Council Australia, *Submission 27*, p. 6; see also Eventus, *Submission 25*, p. 5.

39 Ms Sarah McKinnon, Manager, Workplace Relations and Legal Affairs, National Farmers' Federation, *Committee Hansard*, 26 June 2015, pp 32–33.

40 The Australian Mines and Metals Association, *Submission 34*, p. 3.

3.50 For example, the committee heard from producers in rural Australia about their difficulties in sourcing suitable local labour and their utter dependence on 457 visa workers. Conversely, the committee heard from unions that 457 visa workers were getting and retaining jobs despite the availability of job-ready local workers. In some cases, the committee received evidence of local workers being made redundant while less qualified 457 visa workers took their positions.

3.51 The next section deals with evidence in support of the proposition that 457 visa workers have displaced Australian workers in certain industries.

3.52 This is followed by a section that explores the labour dynamics in the agricultural sector and evidence in support of the proposition that 457 visa workers are essential to the viability and prosperity of rural Australia.

#### ***457 visa workers displacing Australian workers***

3.53 The committee received evidence from several unions that 457 visa workers were being used to fill positions that could have been taken by qualified Australian workers, and that 457 visa workers were also displacing some Australian workers.<sup>41</sup>

3.54 The ANMF highlighted the 'parlous employment situation facing many new Australian graduates'. As a result of a questionnaire completed by over 200 nurses in 2014, the ANMF stated that evidence from the questionnaire showed:

- large numbers of new graduates fail to find employment in their field;
- many graduates receive numerous employment rejections, in one case over 70;
- most graduates fortunate enough to obtain employment are engaged on a precarious basis through agency, part time or casual arrangements;
- many graduates go to extraordinary lengths to obtain work, for example by moving interstate and separating themselves from their families;
- most new graduates are saddled with a HECS debt and many believe their university course was a waste of money; and
- most employers named in the questionnaire as rejecting new graduates use temporary offshore labour.<sup>42</sup>

3.55 A similar questionnaire of nurses and midwives who graduated in 2014 was conducted over ten days in early 2015. It revealed over a third had been unable to gain employment, and only 15 per cent had been offered permanent employment.<sup>43</sup>

3.56 The ANMF therefore drew attention to the disconnect between the lack of employment for graduate nurses and midwives and the continued ability of employers

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41 Ms Ruth Kershaw, Research Consultant, Victorian Branch, Electrical Trades Union, *Committee Hansard*, 19 June 2015, pp 27–28.

42 Australian Nursing and Midwifery Federation, *Submission 37*, pp 8–9.

43 Australian Nursing and Midwifery Federation, *Submission 37*, p. 11.

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to 'access large numbers of nurses and midwives on temporary work visa arrangements'.<sup>44</sup>

3.57 The committee was keen to understand whether the problem was in fact a maldistribution of the workforce with graduates being unwilling to move to areas where jobs are located in regional and rural parts of the country. The ANMF assured the committee that many graduates have moved states to try to get a job and have gone out to rural areas including in Western Australia to try and secure employment.<sup>45</sup>

3.58 The committee was also keen to understand why, in particular parts of the healthcare sector, overseas workers were preferred to Australian graduates. Mr Nicholas Blake, Senior Industrial Officer with the ANMF, stated that that the ANMF believed that many employers, particularly in the residential aged-care sector, 'see the foreign workforce as more compliant in terms of what they are required to do' and that the barriers to accessing overseas workers have become lower in recent years.<sup>46</sup>

3.59 The consequences for nursing graduates of failing to obtain ongoing, permanent employment can be dire because the Nursing and Midwifery Board of Australia Annual recency of practice registration standard 'requires nurses have a minimum of three months full-time equivalent practice in their profession'. A failure to meet this requirement can mean graduates risk losing their registration, without which they cannot work as a nurse.<sup>47</sup> Significantly, the problem is affecting not just first year graduates, but is in fact an early career problem for nurses and midwives.<sup>48</sup>

3.60 In addition, the failure of a large proportion of graduate nurses to obtain employment has ramifications in terms of investment in the education of professional health workers and future workforce planning.<sup>49</sup> Issues around employment opportunities are covered further in the section on labour market testing. Issues relating to training, graduate programs, and workforce planning, are covered in chapter 5.

3.61 The Australian Federation of Air Pilots (AFAP) submitted that abuse of the 457 visa program was having a detrimental impact on the employment and career prospects of Australian pilots. The AFAP noted that certain regional airlines have employed pilots under the 457 visa program and yet 'all major aviation operators in Australia, including the regional airlines...have significant 'hold files' of qualified

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44 Australian Nursing and Midwifery Federation, *Submission 37*, p. 11.

45 Ms Annie Butler, Assistant National Secretary, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, p. 22; Australian Nursing and Midwifery Federation, answer to question on notice, 19 June 2015 (received 2 July 2015).

46 Mr Nicholas Blake, Senior Industrial Officer, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, p. 24.

47 Australian Nursing and Midwifery Federation, *Submission 37*, p. 12.

48 Ms Annie Butler, Assistant National Secretary, Australian Nursing and Midwifery Federation, *Committee Hansard*, 19 June 2015, p. 21.

49 Australian Nursing and Midwifery Federation, *Submission 37*, pp 11–12.

commercial pilots who wish to progress their careers with that operator'. The AFAP concluded:

The practical impact of pilots being employed under the s457 visa program on the Australian labour market is that Australian pilots remain unemployed or have their career progression delayed.<sup>50</sup>

3.62 The AFAP therefore offered to assist the Department of Immigration and Border Protection (DIBP) in assessing the availability of suitably skilled Australians in cases of employers seeking to employ pilots under the 457 visa program and determining the genuineness of employer claims that suitable Australian candidates are not available.<sup>51</sup>

3.63 The Australian Maritime Officers Union (AMOU) relayed the grave concerns of their members, both younger members and the older generation of seafarers, that their industry was undergoing irrevocable change as a result of what they described as the 'perverse use' of temporary visas. The AMOU has a list of over 100 currently unemployed members<sup>52</sup> and noted that newly qualified seafarers are unable to secure work because multinational companies persist in employing 457 visa workers even where 'suitably qualified locals are willing and able to perform the jobs'.<sup>53</sup>

3.64 The AMOU set out the ramifications for a host of other maritime positions of the short-term approach of employing temporary visa workers. Not only will younger seafarers be denied the opportunities afforded to previous generations in terms of securing a career at sea, but there will be a flow-on effect in later years that will result in 'a scarcity of Australians able to fill the many seafaring associated onshore jobs such as harbour masters, pilots, vessel traffic officers and lecturers at the maritime training facilities' which are positions that have typically been filled in the past by seafarers with many years of experience at sea.<sup>54</sup>

3.65 Ms Ros McLennan, Assistant General Secretary of the Queensland Council of Unions, drew the committee's attention to the top three jobs for 457 visa holders in Queensland: cook; cafe or restaurant manager; and customer service manager. Ms McLennan argued that, taken at face value, these jobs did not appear to be ones for which there would be skill shortages or any lack of Australians willing and able to take those jobs given some training.<sup>55</sup> These matters are considered further in a later section on the skilled occupation lists and also in chapter 5 on training.

3.66 The committee also heard from Mr Benjamin Loeve, a former employee of Downer EDI Mining and Boggabri Coal in regional New South Wales (NSW), who

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50 The Australian Federation of Air Pilots, *Submission 15*, p. 2.

51 The Australian Federation of Air Pilots, *Submission 15*, p. 2.

52 Australian Maritime Officers Union, *Submission 18*, p. 3.

53 Australian Maritime Officers Union, *Submission 18*, p. 5.

54 Australian Maritime Officers Union, *Submission 18*, p. 5.

55 Ms Ros McLennan, Assistant General Secretary, Queensland Council of Unions, *Committee Hansard*, 12 June 2015, p. 8.

was made redundant and his position taken by a 457 visa worker. As a trade qualified heavy diesel fitter, Mr Loeve had received specialised training from original equipment manufacturers such as Caterpillar and Hitachi and was employed in the maintenance section at the Boggabri coal mine in NSW.<sup>56</sup>

3.67 Mr Loeve stated that about ten months after a number of Papua New Guinea 457 visa workers were brought onto the site, the company made 106 workers redundant, including 40 staff in the maintenance division where Mr Loeve had worked. Eight 457 visa workers were retained as maintenance workers for a further 18 months to do the work of the now redundant Australian workers.<sup>57</sup>

3.68 Mr Loeve made the point that the visa workers did not have the necessary competencies and skills that the Australian maintenance staff had. In addition to making Australian workers redundant to be replaced by 457 visa workers, it also appears that the company hired the 457 visa workers ahead of better qualified Australian workers. Mr Loeve stated that he knew local workers (with trade and original equipment manufacturer training) that applied for jobs at Boggabri Coal but 'were knocked back' at about the time the 457 workers were employed.<sup>58</sup>

#### ***Agricultural labour markets and the role of 457 visa workers***

3.69 The committee heard evidence from farmers and their industry organisations that despite high rates of unemployment in general, and youth unemployment in particular, the agricultural sector experienced ongoing difficulties with the recruitment of willing and able local workers. The difficulties in finding suitable local labour applied irrespective of whether growers were seeking casual short-term employees for intensive periods during the picking season or ongoing year-round employees in livestock production.

3.70 Ms Sarah McKinnon, Manager of Workplace Relations and Legal Affairs at the NFF, estimated that 'about a third of the agricultural workforce in Australia is from overseas', made up largely of 417 visa workers but also 457 workers and seasonal workers under the Seasonal Worker program.<sup>59</sup>

3.71 Growers and their representative associations warned that without the additional labour supplied by the 457 and 417 visa programs, many rural industries were at risk of a contraction in production, and some businesses simply could not continue to operate. These producers therefore stressed the vital importance of the 457 and 417 visa programs in keeping many rural businesses afloat.

3.72 The two following sections present evidence from the pork industry and the wine industry and the role of 457 visa workers in their industries. The role of 417 visa workers in Australian agriculture is covered in chapter 4.

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56 Mr Benjamin Loeve, *Committee Hansard*, 26 June 2015, p. 2.

57 Mr Benjamin Loeve, *Committee Hansard*, 26 June 2015, pp 2–3.

58 Mr Benjamin Loeve, *Committee Hansard*, 26 June 2015, p. 3.

59 Ms Sarah McKinnon, Manager, Workplace Relations and Legal Affairs, National Farmers' Federation, *Committee Hansard*, 26 June 2015, p. 31.

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*The pork industry*

3.73 The Australian pork industry employs over 20 000 people in Australia and contributes approximately \$2.8 billion in gross domestic product to the Australian economy. The pork industry contributes just over two per cent of total Australian farm production with roughly 1500 pig producers producing around 4.7 million pigs annually.<sup>60</sup>

3.74 Noting that their industry 'has had significant long-standing difficulties attracting and retaining skilled piggery workers', Australian Pork stated that the labour shortages were 'compounded by the perception of the pork industry being a relatively unattractive career choice, exacerbated by the diminishing labour supply in regional Australia'. According to Australian Pork, long term critical shortages existed in recruiting and retaining skilled piggery stock persons.<sup>61</sup>

3.75 Ms Deborah Kerr, General Manager of Policy at Australian Pork Limited, noted that the piggeries were predominantly looking for skilled permanent workers rather than seasonal workers, and the industry therefore strongly favoured recruiting workers under the 457 visa program rather than the WHM (417 visa) program.<sup>62</sup>

3.76 Employees on 417 visas are estimated to comprise 3 to 4 per cent of the pork industry workforce. Australian Pork also indicated there was limited use of labour hire contractors in the pork industry and that there was no knowledge of the extent to which labour hire contractors employed 417 visa holders.<sup>63</sup>

3.77 Ms Kerr explained that the low use of labour hire firms by the pork industry was due to the nature of the work required on piggeries, namely permanent skilled work:

...pigs farrow a couple of times a year. There is always work on a pig farm. That come-and-go workforce is not particularly suitable. The 457 visa holders are what we use more for the purpose of pig production. It is also to do with the skill requirements. We need people employed in our sheds who can look after the animals—can comply with animal welfare laws, can comply with the Model Code of Practice for the Welfare of Animals, which is picked up in many of the states' regulations, and are appropriately trained. And for our 457 visa holders we require the appropriate skill qualification plus three years, or at least five years of experience in our industry overseas, before they will come in. The employer tends to want a different skill set to a 417, so we do not interact very much with a labour hire

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60 Australian Pork, *Submission 9*, p. 1.

61 Australian Pork, *Submission 9*, p. 1.

62 Ms Deborah Kerr, General Manager, Policy, Australian Pork Limited, *Committee Hansard*, 19 June 2015, p. 8.

63 Australian Pork, answer to question on notice, 19 June 2015 (received 8 July 2015).

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company per se. As I said, they tend to use 457 visas, and they tend to have them directly on the employee.<sup>64</sup>

3.78 The committee was keen to explore why the pork industry experienced difficulties in recruiting and retaining a suitably skilled domestic workforce despite the high levels of unemployment and youth unemployment in particular, in rural and regional areas. Ms Kerr attributed the difficulties to the nature of the work (including close interaction with animals), the location of the work, and competition for employment from the resource sector:

I think generally agriculture does tend to have difficulties in rural and regional areas, and I think the two states where it is particularly evident are WA and Queensland, where there have been a lot of what were traditionally agricultural employees going to the mining and coal seam gas sectors. We had this translocation of employment of choice, if you like. That is one area. The other area is that to work on a pig farm you have to like working with animals and in particular like working with pigs. It can be a smelly job, and not a lot of Australian workers particularly want to go and work in pig farms. Those who do tend to really enjoy what they do and love what they do, whether they are Australian workers or are under a 457 visa. To attract workers, our producers go out and advertise, and they do all the things they are required to do under the 457 program to justify getting a 457 visa holder in, but they still have difficulty. They cannot retain the workforce they have.

...

My understanding is that our producers have actually done a lot to advertise and to try to keep workers on. Unfortunately, they are in a situation in which they do have a labour shortage. They are competing with somebody who does cropping, for example, so the employee might be driving a tractor rather than working with pigs. That can stop people. Livestock can be particularly difficult and challenging for some employees. So it is not just within the general workforce; it is also within the agriculture sector. Our pig-producing farms are located in the wheat-sheep zone, and often people do not want to relocate to those areas from, for example, a major metropolitan area. There is the usual gamut of limitations around what our producers do, but they certainly try to source Australian workers who are keen to be in piggeries. They just cannot find the appropriate people.<sup>65</sup>

3.79 The committee also heard from pork producers, Mrs Kerry Murray and Mr Bernard Murray from Murray Free Range near Cobram in Victoria, and Mrs Elizabeth Wallace from Windridge Farms in Young, NSW.

3.80 Mr and Mrs Murray and Mrs Wallace recounted their difficulties in attracting suitable labour. Mrs Wallace noted that in the past year, only six out of 17 Australian

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64 Ms Deborah Kerr, General Manager, Policy, Australian Pork Limited, *Committee Hansard*, 19 June 2015, p. 9.

65 Ms Deborah Kerr, General Manager, Policy, Australian Pork Limited, *Committee Hansard*, 19 June 2015, p. 9.

and permanent resident workers had been retained, and of those six, two were Filipino permanent residents that had previously worked in other piggeries, and one was a Filipino permanent resident with no piggery experience. Of those workers that left Windridge Farms, one left because of drug issues, one resigned, and nine simply did not come to work after five days or less.<sup>66</sup>

3.81 The committee was curious to know whether wages and conditions were a factor in Australians not wanting to work on farms. Mr and Mrs Murray and Mrs Wallace confirmed that their businesses pay above award wages. Mrs Wallace stated that their workers are on a 38 hour week and that any work done above 38 hours a week is paid at time and half or double time, with public holidays paid at triple time or time and a half based on the award. She also noted that the company provided additional staff benefits:

We have regular barbecues for our staff on all sites. We have four sites. We regularly provide barbecues, meals, tea and coffee, a lunch room, shower facilities and amenities that would equal anything in a city area. We give the employees an extra 20 minutes a day for their morning break, and that is paid for by the company and not taken out of their time at work.<sup>67</sup>

3.82 Mrs Wallace stated that a manager of five to ten people at their piggery would be on an attractive salary package of \$85 000 to \$90 000 a year plus a house and car. Similarly, Mrs Murray stated that a foreman who had been with them for five years was on a \$100 000 with a three bedroom house, a car, electricity, phone and fuel.<sup>68</sup>

3.83 Mr Murray dismissed the notion that producers might underpay their 457 visa workers by noting that two of their Filipino workers have now bought their own homes. He also claimed that their farm pays their workers more than the engineers and welders at the local engineering plant and yet still cannot attract Australian workers.<sup>69</sup>

3.84 Both sets of farmers agreed that without the workers from the 457 visa program, their businesses simply could not survive.<sup>70</sup>

3.85 Given that piggeries are looking to retain a permanent skilled workforce, Ms Kerr also noted that the pork industry is actively assisting 457 visa holders to gain permanent residency.<sup>71</sup>

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66 Mrs Elizabeth Wallace, Human Resources, Compliance and Feed Purchasing, Windridge Farms, *Committee Hansard*, 17 July 2015, p. 31.

67 Mrs Elizabeth Wallace, Human Resources, Compliance and Feed Purchasing, Windridge Farms, *Committee Hansard*, 17 July 2015, pp 29–30.

68 Mrs Elizabeth Wallace, Human Resources, Compliance and Feed Purchasing, Windridge Farms, *Committee Hansard*, 17 July 2015, p. 30; Mrs Kerry Murray, Owner, Murray Free Range, *Committee Hansard*, 17 July 2015, p. 30.

69 Mr Bernard Murray, Owner, Murray Free Range, *Committee Hansard*, 17 July 2015, p. 30.

70 Mrs Elizabeth Wallace, Human Resources, Compliance and Feed Purchasing, Windridge Farms, *Committee Hansard*, 17 July 2015, p. 32; Mrs Kerry Murray, Owner, Murray Free Range, *Committee Hansard*, 17 July 2015, p. 32.

3.86 The transition of staff from the 457 visa program to permanent residency was confirmed by Mrs Murray. She stated that the Filipino staff currently employed on their farm were previously 457 visa holders and are all now permanent residents.<sup>72</sup>

*The wine industry*

3.87 Mr Brian Smedley, Chief Executive of the South Australian Wine Industry Association (SAWIA) told the committee that over the last decade, approximately 38 winemakers and viticulturists have been recruited by South Australian wine industry employers through the 457 visa system.<sup>73</sup>

3.88 He noted that while these numbers are low in relative terms, the 457 visa program has been 'essential' in enabling wine industry employers to access suitably skilled and experienced winemakers and viticulturists 'where the employer has been unable to fill those roles with domestic applicants'.<sup>74</sup>

3.89 SAWIA also pointed out that the global movement of skilled and experienced winemakers and viticulturists brings mutual benefits to a global industry:

...employees with experience and skills from key overseas winemaking countries, including Spain, Italy, France, Chile, Argentina, USA and South Africa can bring important know-how and different perspectives and skills regarding wine grape growing and winemaking to the benefit of the South Australian wine industry. Just as Australian winemakers and viticulturists can take bring their different experience and skills with them to overseas vintage/wine industry work arrangements.<sup>75</sup>

**Regulations and obligations under the 457 visa program, Designated Area Migration Agreements (DAMAs) and Labour Agreements**

3.90 Employees working under a temporary visa are subject to the same Australian workplace laws as Australian employees,<sup>76</sup> and therefore issues of regulation, compliance and enforcement of these laws are a key aspect of this inquiry, and are dealt with to a large extent in chapter 9.

3.91 In addition to the overarching requirement for compliance with Australian workplace laws, further obligations are in place under the 457 visa program designed to safeguard both the 457 visa worker themselves and the wages, conditions and opportunities of Australian workers.

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71 Ms Deborah Kerr, General Manager, Policy, Australian Pork Limited, *Committee Hansard*, 19 June 2015, p. 10.

72 Mrs Kerry Murray, Owner, Murray Free Range, *Committee Hansard*, 17 July 2015, p. 28.

73 Mr Brian Smedley, Chief Executive, South Australian Wine Industry Association, *Committee Hansard*, 14 July 2015, p. 1.

74 Mr Brian Smedley, Chief Executive, South Australian Wine Industry Association, *Committee Hansard*, 14 July 2015, p. 1.

75 South Australian Wine Industry Association, *Submission 5*, p. 5.

76 See Australian Government Department, *Submission 41*, p. 1.

3.92 The two key obligations placed on the employer (sponsor) under the 457 visa program are that:

- the employer pays their sponsored employee(s) the amount that was originally agreed under the terms of the sponsorship grant; and
- the sponsored employee does the work for which they were originally nominated.<sup>77</sup>

3.93 The obligation to pay a 457 visa worker the amount agreed under the sponsorship agreement is underpinned by what the migration legislation terms the 'market salary rate' and the TSMIT.<sup>78</sup>

3.94 457 visa holders are also required to work in the occupation for which they were nominated (under visa condition 8107). This requirement is an obligation on both the visa holder and the sponsor.<sup>79</sup>

3.95 The obligations placed on employers combined with other policy settings such as the skilled occupation lists (covered in a later section) play an important part in ensuring that the 457 visa program is used for legitimate purposes and that the entitlements of 457 visa workers are maintained and the employment opportunities of Australian workers are protected.

#### ***Market salary rate***

3.96 Employers seeking to employ a 457 visa worker must guarantee that as part of the sponsor obligation the terms and conditions of employment of 457 visa holders, including pay and hours of work, are no less favourable than the terms and conditions that are, or would be, provided to an Australian citizen performing equivalent work in the same location. In other words, the DIBP must be satisfied that a 457 visa holder will be paid the 'market salary rate'.<sup>80</sup>

3.97 The purpose of this market salary rate requirement is twofold:

- to ensure that Australian workers are protected from any adverse impact on wages; and
- to protect skilled overseas workers from exploitation by ensuring they are not paid less than the market salary rate.<sup>81</sup>

3.98 The obligation on employers to pay at least market salary rates is monitored by the DIBP and the Fair Work Ombudsman (FWO).<sup>82</sup>

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77 Australian Government Departments, *Submission 41*, pp 2–3.

78 Australian Government Departments, *Submission 41*, p. 2.

79 Australian Government Departments, *Submission 41*, p. 3.

80 Australian Government Departments, *Submission 41*, p. 1.

81 Australian Government Departments, *Submission 41*, p. 2.

82 Australian Government Departments, *Submission 41*, p. 2.

3.99 On 18 April 2015, the threshold for exemption from a market salary assessment for the 457 visa program was lowered from \$250 000 to \$180 000<sup>83</sup> legislative instrument.<sup>84</sup> However, the reduction was effectively revoked on 16 June 2015 when the Senate disallowed the legislative instrument.<sup>85</sup>

3.100 Submitters expressed different views on this matter. Employer groups such as the Australian Higher Education Industrial Association (AHEIA) welcomed the reduction in the threshold to \$180 000.<sup>86</sup> In contrast, the Australian Institute of Marine and Power Engineers (AIMPE) argued that the lowering of the market salary rate threshold from \$250 000 to \$180 000 'had an immediate impact with many chief engineers and class 2's losing their jobs'.<sup>87</sup> The AIMPE therefore recommended that the market salary rate threshold of \$250 000 be reinstated.<sup>88</sup>

### ***Temporary Skilled Migration Income Threshold (TSMIT)***

3.101 In addition to the market salary rate, the income of 457 visa workers is also protected by the TSMIT which is designed to ensure that 457 visa holders earn sufficient money to be self-reliant in Australia:

The TSMIT, currently set at \$53 900 per annum, provides an income floor for subclass 457 visa holders, in recognition that visa holders are temporary residents and are not usually eligible for the same income support benefits as Australian citizens and permanent residents.

The TSMIT represents an entry level salary point for the subclass 457 programme. The underlying premise of the TSMIT is that visa holders should be able to reside in Australia without government support and not find themselves in difficult financial circumstances that could make them vulnerable to exploitation or encourage them to breach their visa conditions.<sup>89</sup>

3.102 The Migration Council noted that the TSMIT acts as the floor for wages for migrants on temporary work visas because 457 visa holders cannot fill occupations with a market salary rate below the TSMIT.<sup>90</sup>

3.103 The Migration Council further noted that the TSMIT has traditionally been indexed according to average fulltime weekly ordinary time earnings (AWOTE) each financial year. However, indexation did not occur on 1 July 2014 or 1 July 2015.<sup>91</sup>

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83 The threshold was set at \$180 000 when initially introduced in 2008. It was increased to \$250 000 in 2013.

84 Migration Regulations 1994 – Specification of Income Threshold and Annual Earnings 2015 – IMMI 15/050 [F2015L00569].

85 *Journals of the Senate*, No. 16—16 June 2015, p. 2673.

86 Australian Higher Education Industrial Association, *Submission 20*, pp 2–3.

87 Australian Institute of Marine and Power Engineers, *Submission 17*, p. 4.

88 Australian Institute of Marine and Power Engineers, *Submission 17*, p. 8.

89 Australian Government Departments, *Submission 41*, p. 2.

90 Migration Council Australia, *Submission 27*, p. 5.

3.104 Without indexation, the salary floor decreases in real terms each year as wage inflation occurs, meaning that temporary migrants are less able to support themselves in society. The Migration Council therefore recommended that the TSMIT be indexed as at 1 July 2015 to the AWOTE.<sup>92</sup>

### *Designated Area Migration Agreements (DAMAs)*

3.105 As noted in chapter 2, labour agreements and Designated Area Migration Agreements (DAMAs) allow a proponent to negotiate an agreement under which employers in areas experiencing skills and labour shortages can sponsor skilled and semi-skilled overseas workers.

3.106 Pointing to the softening labour market and the fact that the construction boom in the resources sector had already peaked, the ACTU called on the DIBP and the government to provide evidence to demonstrate the ongoing case for DAMAs to be retained.<sup>93</sup>

3.107 The ACTU was of the view that DAMAs 'should be explicitly limited to skilled and specialised semi-skilled occupations' in 'high-growth, low unemployment regions'.<sup>94</sup> In order to ensure the integrity of a DAMA, the ACTU strongly suggested that a DAMA be vetted by an independent tripartite body and that access to 457 visa workers under a DAMA be restricted to 'best practice' employers.<sup>95</sup>

3.108 The ACTU also recommended that labour market testing should apply to all positions to be filled by a 457 visa worker under a DAMA.<sup>96</sup>

### *Designated Area Migration Agreements and the TSMIT*

3.109 The Northern Territory (NT) government stated that the very low unemployment rate in the NT<sup>97</sup> meant that 'many employers had no other option but to sponsor workers from overseas to fill vacant positions'.<sup>98</sup>

3.110 The NT government pointed out that the TSMIT was above the market salary rate across a number of occupations in the NT. The NT government was therefore concerned that paying 457 visa workers the TSMIT had the potential to generate

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91 Migration Council Australia, *Submission 27*, p. 5.

92 Migration Council Australia, *Submission 27*, p. 5; see also United Voice, *Submission 19*, p. 3.

93 Australian Council of Trade Unions, *Submission 48*, p. 12.

94 Australian Council of Trade Unions, *Submission 48*, p. 84.

95 Australian Council of Trade Unions, *Submission 48*, p. 84.

96 Australian Council of Trade Unions, *Submission 48*, p. 85.

97 As at May 2015, the unemployment rate in the Northern Territory was 4.5 per cent. See Northern Territory Government, Department of Treasury and Finance, *Economic Brief—Labour Force*, May 2015, p. 1.

98 Northern Territory Government, *Submission 39*, p. 1.

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wider wage inflation across the NT, reducing the competitiveness of local businesses and ultimately increasing the cost of living in the region.<sup>99</sup>

3.111 However, under a DAMA, all employers throughout the NT would be able to access the 10 per cent TSMIT concession. This would effectively allow all employers to pay a sponsored temporary visa worker 10 per cent less than the TSMIT, provided that the TSMIT was above the market salary rate for that occupation. It was for this reason that the NT government negotiated a DAMA with the DIBP.<sup>100</sup>

3.112 United Voice noted an increase in the number of regional areas looking to use a DAMA 'to fill the shortfall of workers in particular occupations and sectors where Awards are the dominant mechanism by which conditions of employment are determined'. United Voice noted that the areas where a DAMA might be used were often isolated locations with a higher cost of living. Given that a DAMA allows the designated region to have wages up to 10 per cent lower than the TMSIT (equating to approximately \$48 510), United Voice was concerned that temporary migrant workers 'would not have sufficient income to independently support themselves'. United Voice therefore recommended that DAMAs include the same minimum standards as 457 visas.<sup>101</sup>

3.113 The Maritime Union of Australia (MUA) opposed the use of DAMAs and argued that allowing employers to pay 10 per cent under the TSMIT would undercut wage growth in areas where a DAMA was in operation.<sup>102</sup>

3.114 However, AMMA disputed these assertions by pointing out that the potential 10 per cent reduction in the TSMIT under a DAMA was still required to operate in conjunction with the market salary rate. As AMMA explained, this means that any 457 visa worker must still be paid the comparable Australian worker's salary:

Under a DAMA, TSMIT of \$53 900 can be reduced by up to 10% to a minimum of \$48 510 a year.

However, it must be remembered that employers are required to pay the market salary rate (i.e. what they would pay an equivalent Australian employee) or the concessional income threshold, whichever is higher. That means if an employer pays an Australian worker less than \$48 510 they can bring in an overseas worker if they are prepared to pay that worker at least \$48 510. However, if the market salary rate (i.e. the comparable Australian worker's salary) is \$60 000, the employer must pay the foreign worker \$60 000.

In simple terms, concessions to wages are only available under DAMAs when the equivalent Australian wage is equal to or less than the concessional income threshold of \$48 510. So there is no possibility of

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99 Northern Territory Government, *Submission 39*, p. 2.

100 Northern Territory Government, *Submission 39*, p. 2.

101 United Voice, *Submission 19*, p. 3.

102 Maritime Union of Australia, *Submission 22*, p. 9.

foreign workers undercutting Australian wages as a result of the concessions.<sup>103</sup>

### ***Labour agreements***

3.115 The mandatory stakeholder consultation requirements that apply to labour agreements were criticised by the ACTU as manifestly inadequate:

Despite some improvements to the process in recent years, most notably there is still no requirement for labour agreement proponents to provide unions with any evidence to demonstrate there are in fact shortages in those occupations where 457 visa workers are being sought and what recruitment efforts have been made to fill them.<sup>104</sup>

3.116 In order to reassure the community, the ACTU stated that a labour agreement should include the following evidentiary requirements:

- The evidence on which it is claimed that the nominated occupations, and the number of positions for each occupation, will be required over the life of the agreement, and the evidence for the claim that these positions cannot be filled by Australian citizens and residents.
- Evidence of recent and ongoing recruitment efforts, including evidence of the wage rates the jobs have been advertised at and relocation assistance that has been offered to allow Australian workers to take up the positions.<sup>105</sup>

3.117 The ACTU did acknowledge that:

To their credit, some labour agreement proponents do engage with unions in a meaningful way and have had no difficulties in providing additional evidence and information that is requested.<sup>106</sup>

3.118 The ACTU emphasised that unions have collaborated successfully with employers in order to help fill positions with local workers.<sup>107</sup> However, the ACTU also drew attention to the need for external scrutiny of labour agreements:

It is also worth noting that in several cases where unions have challenged the inclusion of certain occupations in labour agreements on the basis that the positions could be filled locally, the proponents have agreed to drop them off their list of nominated occupations. This highlights the importance of external scrutiny, and the fact that when such scrutiny is applied the professed need for 457 visa labour can become less pressing.<sup>108</sup>

3.119 The lack of transparency and public accountability of labour agreements was also criticised. Mr Henry Sherrell, Policy Analyst at the Migration Council noted that

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103 The Australian Mines and Metals Association, *Submission 34*, pp 17–18.

104 Australian Council of Trade Unions, *Submission 48*, p. 88.

105 Australian Council of Trade Unions, *Submission 48*, p. 88.

106 Australian Council of Trade Unions, *Submission 48*, p. 88.

107 Australian Council of Trade Unions, *Submission 48*, p. 88.

108 Australian Council of Trade Unions, *Submission 48*, p. 89.

it was very hard to find out how many labour agreements are in operation, the conditions they cover and the exemptions they provide. He noted that while there may be some commercial-in-confidence aspects to a company's application for a labour agreement, the remainder of the application should be publicly available to facilitate greater understanding of how and why particular labour agreements are used.<sup>109</sup>

### ***Consolidated Sponsored Occupation List and Skilled Occupation List***

3.120 Australia's skilled migration program operates under two designated lists, one for the temporary skilled stream and the other for the permanent skilled stream:

- the CSOL is a general list of occupations that may be sponsored under the 457 visa program; and
- the Skilled Occupation List (SOL) designates the relevant occupations for the independent points-based permanent skilled migration scheme.<sup>110</sup>

3.121 The CSOL and the SOL are prescribed in a legislative instrument. The current instrument is effective from 1 July 2015.<sup>111</sup>

#### *Skilled Occupation List (SOL)*

3.122 The SOL lists 190 high-value occupations. As such, the SOL 'identifies occupations that would benefit from independent skilled migration for the purpose of meeting the medium to long term skill needs of the Australian economy, where such needs may not be more appropriately met by sponsored migration programs or up-skilling Australians'.<sup>112</sup>

3.123 The Commonwealth Department of Education and Training (DET) is responsible for providing advice on the composition of the SOL. However, the final decision on the composition of the SOL is taken by the Minister for Immigration and Border Protection.<sup>113</sup>

3.124 The functions of the former Australian Workforce Productivity Agency (AWPA) were transitioned into the Department of Industry in July 2014.<sup>114</sup> The

109 Mr Henry Sherrell, Policy Analyst, Migration Council of Australia, *Committee Hansard*, 17 July 2015, p. 6; see also Eventus, *Submission 25*, p. 20.

110 Department of Immigration and Border Protection, Skilled Occupations— Skilled Occupation List (SOL), available at <https://www.border.gov.au/Trav/Work/Work/Skills-assessment-and-assessing-authorities/skilled-occupations-lists> (accessed 18 August 2015).

111 Migration Regulations 1994 – Specification of Occupations, a Person or Body, a Country or Countries 2015 – IMMI 15/092 [F2015L01059]; see also Department of Immigration and Border Protection, answer to question on notice, (received 19 November 2015).

112 Department of Education and Training, 2015–16 Skilled Occupations List, available at <https://education.gov.au/news/2015-16-skilled-occupations-list> (accessed 18 August 2015).

113 Department of Education and Training, answer to question on notice, 22 October 2015 (received 16 December 2015).

114 Department of Education and Training, Former Australian Workforce Productivity Agency (AWPA), <https://www.education.gov.au/former-australian-workforce-and-productivity-agency-awpa-publications> (accessed 2 February 2015).

ACTU were critical of the decision to abolish the AWPA as an independent, tripartite national skills body that previously provided advice on the SOL:

The discussion of the merits of a MAC-type body to provide independent, labour market analysis really points to the mistake the current Government made in abolishing the independent, tripartite national skills body, the Australian Workforce Productivity Agency (AWPA). AWPA had a tripartite board structure supported by a secretariat wide with a wide range of economic, labour market and policy expertise. Among other things, AWPA was responsible for advice on the Skilled Occupations List (SOL) which is used for the permanent skilled migration program.<sup>115</sup>

3.125 Similarly, Dr Howe and Associate Professor Reilly warned that the abolition of AWPA risked diminishing the rigour and transparency around the compilation of the SOL. In their view, a genuinely selective SOL would encourage employers and government to address skills shortages with suitable training as well as send a signal to citizens that the migration intake was indeed focussed on areas of genuine need.<sup>116</sup>

3.126 The DET outlined the current process for identifying occupations for inclusion on the SOL. The first step involves identifying occupations that are most susceptible to supply side constraints and/or most likely to warrant government intervention should supply constraints occur. An occupation satisfies this first step if it meets at least two of the following three criteria:

- long lead time—skills are highly specialised and require extended education and training over several years;
- high use—skills are deployed for uses intended (i.e. there is a good occupational 'fit' between qualification and occupation); or
- high risk—disruption caused by skills being in short supply imposes a significant risk to the Australian economy and/or community.<sup>117</sup>

3.127 The second step involves analysing the medium to long-term skill needs of the economy for each occupation identified in the first step in order to determine whether it would benefit from skilled independent migration. The analysis is done on the basis of stakeholder submissions in combination with information on areas of economic activity where skills imbalances may be observed. The areas of economic activity considered are:

- the state of the labour market, focusing on indicators that provide insight into current and anticipated occupational conditions;
- the recruitment experience, focusing on the outcomes of recruitment activity;

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115 Australian Council of Trade Unions, answer to question on notice, 6 August 2015 (received 17 August 2015).

116 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 11.

117 Department of Education and Training, answer to question on notice, 22 October 2015 (received 16 December 2015).

- the education experience, focusing on the effect that skills imbalances may have on a student's choice of study; and
- new entrants, focusing on the outcomes of graduates and migrants entering the labour market.

3.128 The DET noted that the assessment process incorporates education, labour market, migration, and general economic and demographic data and considers views from Industry Skills Councils, peak industry associations, professional and trade associations, education and training providers, employee representatives, and Commonwealth, State and Territory government agencies and the public.<sup>118</sup>

3.129 The DET also noted that, based on the above analysis, a shortlisted occupation would not be included on the SOL if:

- the occupation is likely to be in surplus in the medium-to-long term;
- there are other more appropriate and/or specific migration options (for example, employer or State/Territory nominated or temporary skilled migration); and
- the occupation is a niche occupation with few employers or employment opportunities.<sup>119</sup>

#### *Consolidated Sponsored Occupation List (CSOL)*

3.130 The CSOL is compiled by the DIBP. It has two components: the 190 occupations listed on the SOL, and another list of 460 occupations (set out below) plus the addition of the occupation of Primary School Teacher which was originally omitted by oversight. The combined total of occupations on the CSOL is therefore 651.<sup>120</sup>

3.131 The CSOL includes Australian and New Zealand Standard Classification of Occupations (ANZSCO)<sup>121</sup> occupations in Skill Levels 1, 2 and 3 (and the occupation of Driller at Skill Level 4). The occupations are classified as follows:

- Skill Level 1 Managers—qualification commensurate with a bachelor degree or higher or 5 years relevant experience;
- Skill Level 2 Professionals—qualification commensurate with an Australian Qualifications Framework (AQF) Associate Degree, Advanced Diploma or Diploma or 3 years relevant experience; and

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118 Department of Education and Training, answer to question on notice, 22 October 2015 (received 16 December 2015).

119 Department of Education and Training, answer to question on notice, 22 October 2015 (received 16 December 2015).

120 Department of Immigration and Border Protection, answer to question on notice, (received 19 November 2015).

121 The Australian and New Zealand Standard Classification of Occupations (ANZSCO) is published by the Australian Bureau of Statistics and is current as at 1 July 2015.

- Skill Level 3 Technicians and Trades Workers—qualification commensurate with an AQF Certificate IV; or an AQF Certificate III plus a minimum of two years on the job training. Three years relevant experience may substitute for relevant formal qualifications.<sup>122</sup>

3.132 The committee notes that the CSOL is a list of skills, rather than a list of occupations where those skills are in short supply. As such, the committee received conflicting evidence about the nature of the CSOL and its impact on the Australian labour market.

3.133 Dr Howe submitted that there are flaws in the CSOL—particularly when compared to the SOL—which include:

- the CSOL is particularly broad;
- inclusion on the list is only determined by skill level and not that the occupation is in shortage;
- use of the CSOL abdicates responsibility for determining skill shortages to employers as the 457 visa is entirely demand-driven;
- the definition of skill used to determine the CSOL is too wide-ranging and includes skilled occupations in which it would only take a short time to train domestic workers; and
- the CSOL does not operate to protect the precarious labour market status of many 457 workers.<sup>123</sup>

3.134 Dr Howe argued that it is difficult for the DIBP to independently assess whether 457 visa workers are being employed in the appropriate position given that the 457 visa scheme is based on employer demand, that there is a broad range of occupations listed on the CSOL under which 457 visa workers are eligible to be sponsored, and that certain occupations listed on the CSOL such as 'Program or Project Administrator' (the second most popular occupation on the CSOL for the 457 visa for 2012–13) have a very imprecise meaning. Dr Howe therefore argued there is a risk that 457 visa workers may be employed for reasons other than genuine skill shortage.<sup>124</sup>

3.135 The MUA criticised the lack of reliable up-to-date data on labour market trends that underpinned the CSOL and Regional Migration Agreements (RMAs). The MUA noted the difficulties it had encountered 'in getting the NT government to

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122 Department of Immigration and Border Protection, answer to question on notice, 19 October 2015 (received 19 November 2015).

123 Dr Joanna Howe, Additional Information: 'Is the net cast too wide? An assessment of whether the regulatory design of the 457 visa meets Australia's skill needs', *Federal Law Review*, 2013, p. 20.

124 Dr Joanna Howe, Additional Information: 'Is the net cast too wide? An assessment of whether the regulatory design of the 457 visa meets Australia's skill needs', *Federal Law Review*, 2013, p. 23; see also Unions NSW, *Submission 35*, p. 5.

remove 'Marine Cook' from the RMA...despite significant numbers of unemployed local Marine Cooks being available and seeking work'.<sup>125</sup>

3.136 Unions NSW proposed that a five-year sunset provision apply to occupations listed on the CSOL to provide the impetus to address skill shortages promptly.<sup>126</sup>

3.137 ACCI fundamentally disagreed with Dr Howe's position on the CSOL. Ms Lambert from ACCI argued that any list that underpins an employer nomination scheme has to be an occupation list and not a shortage list because a shortage list could not possibly capture the myriad rapidly changing permutations of skills shortages in a dynamic labour market:

...we need to be very clear about the role of the CSOL, which is the underpinning for employer-nominated both temporary and permanent migration, and the role of the Skilled Occupations List, the SOL, which is the shortages list. The critical thing about anything that underpins employer nomination schemes is that it needs to be just an overarching skills list. It is not a shortages list and it should never be a shortages list. It needs to be a list of skilled occupations that are allowed to be dealt with by migration. The main reason for that is that you cannot possibly analyse every regional town and every business in terms of their needs and say, 'You're not in shortage, because our macro figure says that we're not in shortage.' You could not invent a system that could actually suggest to a particular business in regional town: 'Your shortages that you may think you are experiencing, you are not experiencing, because our figures tell us that.' That is an absurdity. It does not work that way.<sup>127</sup>

3.138 The Migration Council drew attention to difficulties with the CSOL encountered particularly by small business and therefore suggested simplifying the CSOL to mitigate these problems by introducing 4-digit unit codes:

...the classification index is complicated and very specific. For example, under ANZSCO, an Accountant could be: Accountant (general), Management Accountant or a Taxation Accountant. In the workforce, particularly for smaller businesses, one accountant may incorporate each of the duties associated with these occupations into their role. This is because each occupation is defined to by a 6-digit code under ANZSCO, creating a high degree of specificity.

To clarify this issue for employers, migrants and government, the Migration Council recommends the Consolidated Sponsored Occupation List used for temporary work visas be simplified to outline 4-digit unit groups under ANZSCO instead of 6-digit occupations. In the previous example, a sponsor could nominate a unit group 2221—Accountants instead of

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125 Maritime Union of Australia, *Submission 22*, pp 6–7.

126 Unions NSW, *Submission 35*, p. 7.

127 Ms Jenny Lambert, Director, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 17 July 2015, p. 18.

specifying exactly which account occupation a 457 visa holder will work in.<sup>128</sup>

3.139 Similar concerns were raised by the AHEIA. The AHEIA stated that the CSOL lacked the flexibility to enable Australian universities 'to compete in the global labour market for the best education resources'. The AHEIA provided an example of how greater flexibility would assist the university sector:

Flexibility currently exists for medical practitioners (and general managers) to work for an employer other than their sponsor or an associated entity of their sponsor. This flexibility should be extended to enable a medical practitioner to alternatively work for a university as a Clinical Academic performing teaching and research closely aligned to their specified occupation. Similarly, flexibility should also be provided to enable a Clinical Academic to work for another employer performing work in their specialist medical field. This outcome would pay proper recognition to the fact that Clinical Academics perform clinical duties within the setting of teaching hospitals or medical research institutes associated with the employing university.<sup>129</sup>

***An independent tripartite panel to advise on temporary migration policy***

3.140 As noted earlier, the 457 visa program is largely driven by employer demand such that an occupation is taken to be in skill shortage if it listed on the CSOL and if an employer can show evidence that their recruitment efforts have failed.

3.141 Critics of the demand-driven approach argued that the current system fails to examine whether the skill shortage is genuinely a skills shortage as opposed to, for example, being a 'skills gap', a 'labour shortage', or a 'recruitment difficulty'.<sup>130</sup>

3.142 These critics warned that the 457 visa program risked capture by special interests and therefore recommended the establishment of a genuine tripartite body to advise government on skills shortages.<sup>131</sup>

3.143 As noted in chapter 2, the Azarias review identified the need to provide a more robust evidence-based approach to improving the transparency and responsiveness of the CSOL.<sup>132</sup> The Azarias review therefore recommended that a new tripartite ministerial advisory council, supported by a dedicated labour market

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128 Migration Council Australia, *Submission 27*, p. 14.

129 Australian Higher Education Industrial Association, *Submission 20*, pp 1–2.

130 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 8; Dr Chris Wright and Dr Andreea Constantin, *Submission 23*, p. 3.

131 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 8.

132 See John Azarias, Ms Jenny Lambert, Professor Peter McDonald and Ms Katie Malyon, *Robust New Foundations: A streamlined, transparent and responsive system for the 457 programme*, September 2014, pp 44–51.

analysis resource, be established in lieu of the existing Ministerial Advisory Council on Skilled Migration (MACSM).<sup>133</sup>

3.144 The Azaraias review suggested that:

...it is important that the advisory committee be tripartite and include representation from key stakeholders such as peak councils, industry and trade unions. This construction would enable the council to create stronger linkages between industry, trade unions, and government to provide advice on matters relating to skilled migration.<sup>134</sup>

3.145 MACSM was created on 1 July 2012 and sits within the Immigration and Border Protection portfolio. It is a tripartite body comprising industry, union and government representatives and was established to provide advice to the Minister and Assistant Minister for Immigration and Border Protection on Australia's temporary and permanent skilled migration programs and associated matters. MACSM had its inaugural meeting on 19 June 2015.<sup>135</sup>

3.146 While the reinstatement of MACSM by the current government attracted responses ranging from cautious optimism to support, disagreements were expressed over the role and constitution of MACSM.

3.147 The ACTU supported the development of a more rigorous eligible occupation list for the 457 visa program through a tripartite MACSM. However, the ACTU was adamant that such a list was 'no substitute for each individual employer having to test the market'. The ACTU was of the view that 'an employer should not be relieved of that obligation just because an occupation might be identified as being in shortage nationally'.<sup>136</sup>

3.148 ACCI was supportive of MACSM and the need for independent stakeholders to be part of the process of providing advice to government on Australia's temporary and permanent skilled migration programs. However, Ms Lambert stated that ACCI thought that MACSM as currently constituted was adequate for its task and that the technical expertise and analysis for the panel was best provided by government.<sup>137</sup>

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133 John Azarias, Ms Jenny Lambert, Professor Peter McDonald and Ms Katie Malyon, *Robust New Foundations: A streamlined, transparent and responsive system for the 457 programme*, September 2014, p. 51; see also Dr Chris Wright and Dr Andreea Constantin, *Submission 23*, p. 3; Eventus, *Submission 25*, p. 1.

134 John Azarias, Ms Jenny Lambert, Professor Peter McDonald and Ms Katie Malyon, *Robust New Foundations: A streamlined, transparent and responsive system for the 457 programme*, September 2014, p. 49.

135 Australian Government Department of Finance, Ministerial Advisory Council on Skilled Migration, <http://www.finance.gov.au/resource-management/governance/register/body/92321/> (accessed 8 March 2016).

136 Australian Council of Trade Unions, *Submission 48*, p. 28; see also Electrical Trades Union, *Submission 12*, p. 4.

137 Ms Jenny Lambert, Director, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 17 July 2015, p. 18.

3.149 Dr Howe and Associate Professor Reilly supported the establishment of a genuinely tripartite body such as MACSM, but were critical of the way it is currently constituted. They set out four key criteria for the establishment of a what they viewed as a properly constituted MACSM:

- independent from government;
- genuinely tripartite;
- evidence-based; and
- transparent and publicly accountable.<sup>138</sup>

*Independent from government*

3.150 Dr Howe and Associate Professor Reilly argued that in order for recommendations made by MACSM to be based on the national interest, MACSM needs to operate independently from government. They therefore preferred the appointment of highly respected professional members whose terms do not coincide with those of the government, rather than the current system where labour market analysis is provided by officers of the department.<sup>139</sup>

3.151 In this regard, Dr Howe and Associate Professor Reilly noted that the United Kingdom (UK) has appointed an expert commission, the Migration Advisory Committee (MAC), that was 'established as a non-statutory, non-time limited non-departmental public body funded by the Home Office':

It is comprised of a Chair and four other committee members who are appointed as individuals to provide independent and evidence-based advice to the Government on migration issues. Committee members are selected on the basis of their expertise in law and/or economics. The MAC's modus operandi is to receive questions from the Government, which it seeks to respond to in a timely fashion, usually within three to six months. The MAC's response is in the form of a public report that identifies the questions posed by the government, the economic analysis and its recommendations.

...

Although supported by a secretariat within the Home Office, the MAC is operationally independent and is not influenced by Home Office officials or the Minister. As such, the secretariat takes direction only from the MAC on the deployment of resources delegated to it by the Home Office.<sup>140</sup>

3.152 In order to reinforce the integrity and credibility of its work, Dr Howe and Associate Professor Reilly therefore recommended a similarly independent approach in Australia:

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138 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, pp 8–13.

139 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 9.

140 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, pp 9–10.

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We recommend that the MACSM receive support from relevant government departments such as the Department of Industry, the Department of Immigration and Border Protection, the Treasury and the Department of Employment. However, the MACSM should be operationally independent and not be subject to influence from any one government department or minister.<sup>141</sup>

### *Genuinely tripartite*

3.153 Dr Howe and Associate Professor Reilly argued that a genuinely tripartite body would act as 'a safeguard against regulatory capture by special interests'. They believed MACSM 'should include representatives from both business and unions, as well as, representatives from government and academia' to ensure that its recommendations were 'balanced and credible'.<sup>142</sup>

3.154 While acknowledging that it was a member of MACSM, the ACTU pointed out that MACSM is not a genuinely tripartite body:

There may be a role for a body similar to MAC, but in our view there also needs to be a body that is properly tripartite, not only a body of expert economists, and it should have a role to provide policy advice to the Minister, not only to provide economic and labour market analysis.

In this respect, the ACTU has consistently supported an ongoing legislated role for a tripartite Ministerial Advisory Council for Skilled Migration (MACSM) to provide independent oversight and advice in relation to all elements of the program.

The MACSM was first established under the Labor Government in 2012 and we were disappointed to see it languish for more than 18 months under the current government without a single meeting.

As the Committee would be aware, the MACSM has recently been reconstituted. Part of its role will be a review of the Consolidated Skilled Occupation List, which appears to be akin to the type of work the MAC does in the UK.

The ACTU is a member of the reconstituted MACSM, but there is no longer a crossrepresentative of unions on it as we believe there should be under a genuinely tripartite body. Dr Howe made the observation in her evidence to the Inquiry that 7 of the 8 members of the new MACSM hold the same overall view of the skilled migration program whereas the previous MACSM had a more equal balance of views.<sup>143</sup>

3.155 The ACTU noted that while the UK MAC was not genuinely tripartite, it nonetheless engaged with stakeholders and seemed to perform a valuable role in providing independent advice to government:

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141 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 10.

142 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 8.

143 Australian Council of Trade Unions, answer to question on notice, 6 August 2015 (received 17 August 2015).

The evidence and advice available to the ACTU is that the UK Migration Advisory Committee (MAC) has done a good job since it was established. The MAC has responsibility for providing independent, evidence-based advice to the Government on migration issues and has produced a number of well-reasoned reports into which sectors of the economy are experiencing skill and labour shortages and whether migration should be used to fill shortages.

It should be noted, however, that the MAC itself is not a tripartite body. Instead, its membership comprises a chair, five other independent economists, and several government representatives. There are no representatives from unions, employers, or any other community groups for that matter. That said, unions in the UK have confirmed to us that the MAC has engaged proactively with unions, as it has with others, in developing their advice.<sup>144</sup>

### *Evidence-based analysis of skills shortages*

3.156 Dr Howe and Associate Professor Reilly argued that there was a lack of robust evidence underpinning the inclusion of particular skilled occupations on the CSOL. They suggested that establishing an expert commission on migration in Australia would provide the opportunity 'to develop rigorous, transparent and credible occupational shortage lists for both the permanent and temporary labour migration programs'.<sup>145</sup>

3.157 Dr Howe and Associate Professor Reilly noted that employers may 'use labour migration for a motive other than to meet a genuine skill shortage' and that historically, the OECD has found that the requests made by employers about domestic occupational shortages have not been considered completely reliable.<sup>146</sup>

3.158 Dr Howe and Associate Professor Reilly provided an outline of the combination of objective (labour market indicators and formulas) and subjective (submissions) criteria that the UK MAC uses to inform its assessment concerning the composition of the occupational shortage list:

For the past five years since its inception, the MAC has provided recommendations to government on an annual basis using a combination of both hard economic data and input from stakeholders. With regards to the former, 12 top-down labour market indicators are relied upon to determine if a particular occupation should be deemed as being in shortage. Each indicator has to reach a certain threshold in order for the occupation to be in shortage. This data is publicly released by the MAC and the formulas involved are also available for external scrutiny. This is supplemented by

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144 Australian Council of Trade Unions, answer to question on notice, 6 August 2015 (received 17 August 2015).

145 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 11.

146 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 11.

evidence through an annual submissions process from employers, unions and others as to which occupations are in shortage.<sup>147</sup>

3.159 It was also observed that the MAC takes a nuanced approach to its recommendations to government about which occupations are deemed to be in shortage. For example, while there may be no general occupational shortage of secondary school teachers, there may be a shortage of secondary school mathematics teachers.<sup>148</sup>

3.160 Further, 'the MAC seeks to differentiate between skill shortages that are best met by temporary migration and those that could be met by increased training of domestic workers'. In this regard, 'the MAC can request a formal review of the training system that trains British workers for that occupation in question'. This approach facilitates a strategic approach to the allocation of training resources in order to improve the employment prospects of local workers.<sup>149</sup>

3.161 Importantly, Dr Howe and Associate Professor Reilly emphasised that while the independent commission makes credible and informed recommendations, the final decisions should be made by elected representatives:

It is important to note that under the model we propose, the MACSM would not make final decisions about the composition of the occupational shortage list. This is a political responsibility best left to elected officials with accountability to the parliament and to the electorate through a cycle of regular elections.

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As such, an Australian expert commission could make recommendations which parliament could modify, reject or allow to take effect. This would provide greater public confidence in the process as an expert commission could develop agreed-upon definitions and measures.<sup>150</sup>

#### *Transparent and publicly accountable*

3.162 Dr Howe and Associate Professor Reilly drew attention to a lack of transparency in the process for determining the composition of the CSOL. The unfortunate outcome of this approach is that there is no way of discerning whether or not the decisions have merit and whether they were based on robust evidence or were instead potentially influenced by special interest lobbying:

One of the key drawbacks of the current Australian approach to managing migration policy is that it is characterised by secrecy and there is a lack of transparency and accountability around decisions. When decisions are made in a non-transparent fashion and internally within government departments, there can be confusion as to whether these decisions were made on a sound

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147 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 12.

148 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 12.

149 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 12.

150 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 12.

basis or because of lobbying by a particular group. The recent addition of flight attendants to the CSOL by the Department is one such example. The addition of this occupation to the occupational shortage list for the subclass 457 visa occurred after the head of the Department met with the CEO of Qantas who was lobbying for the reform. Although adding flight attendants to the CSOL was opposed by unions who were not consulted on this change, a week after the meeting occurred, the CSOL was amended. No public justification was provided by the Department for this change. Whilst this decision may have been evidentially sound and based on data revealing a labour shortage in domestic flight attendants, this remains unproven because of the lack of accountability and transparency that characterises decision-making in the labour migration program.<sup>151</sup>

3.163 Dr Howe and Associate Professor Reilly also submitted that a further advantage of making decisions in a transparent and publicly accountable way is that it would not only improve ministerial decision-making, but would also enhance the quality of public debate on labour migration matters:

This is because a more transparent and rigorous process for selecting occupations to be on a shortage list has the benefit of increasing public confidence that only occupations which are in shortage are eligible for labour migration. In this way, the MACSM can also assist in communicating to the public the shared prosperity and economic gains that ensue from labour migration, leading to greater public acceptance of the use of labour migration to address domestic shortfalls.<sup>152</sup>

3.164 Eventus Corporate Migration strongly supported both the findings of the Azarias review on a reinstated MACSM to provide oversight of the CSOL, and the role of the MAC in the UK. In effect, the position of Eventus broadly aligned with the proposals set out above for an independent body that would review future workforce needs in collaboration with external stakeholders, and advise government on future labour needs.<sup>153</sup>

### ***Technical competency and English language competency***

3.165 Concerns were raised by certain submitters about the technical and English language competency of some temporary visa workers.

3.166 As an approved assessment authority for most engineering occupations, Engineers Australia stated that 'the procedures for permanent migration at least compare to standards expected from new Australian engineering graduates'. However, significant differences exist in the assessment of qualifications of new Australian engineering graduates and applicants for permanent migration as engineers, as compared to engineering applications for the 457 visa program. Engineers Australia therefore expressed grave concerns about the lack of any adequate process for assessing the qualifications of engineering applicants for the 457 visa program:

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151 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 13.

152 Dr Joanna Howe and Associate Professor Alexander Reilly, *Submission 5*, p. 13.

153 Eventus, *Submission 25*, p. 8.

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Applicants for 457 temporary visas are not required to have their qualifications assessed in any way. Providing an applicant satisfies an employer as to their engineering capacity, they are deemed good enough to be an engineer. Engineers Australia argues that that these arrangements are unsatisfactory and risk compromising the standards of engineering work in Australia.<sup>154</sup>

3.167 It was therefore the view of Engineers Australia that the use of engineers employed under the 457 visa program was problematic in terms of potentially lowering the standards within the profession as a whole.<sup>155</sup>

3.168 The Electrical Trades Union (ETU) voiced similar concerns about the technical competency of foreign workers particularly in sectors where safety is paramount:

While every effort can be made to ensure technical equivalency with Australian standards it is almost impossible for foreign workers to have the knowledge/experience with the Australian standards required to work in a safe and compliant manner.

Electrical regulators are especially concerned that the gap be addressed in regulated trade vocations such as electrical, refrigeration and air conditioning, electricity linework and cable jointing, where the work context may differ markedly in overseas countries and where such differences could endanger lives, infrastructure or systems.<sup>156</sup>

3.169 Mr Matthew Boyd, Branch Organiser for the ETU, pointed out that to qualify as a linesman in Australia a four-year apprenticeship is required, but in some other countries a two-year traineeship allows a person to be qualified as a linesman.<sup>157</sup>

3.170 The ETU therefore recommended formal, independent assessments of visa worker qualifications and recommended that 'the mandatory skills assessment that applies to all permanent General Stream Migration applicants should be the standard applied to all visa types'.<sup>158</sup>

3.171 Mr Boyd raised concerns about the low level of English competency that ETU members encountered among visa workers, particularly given that a critical aspect of being a lineworker is signing and understanding a permit that states where the power is still live and where it has been switched out.<sup>159</sup>

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154 Engineers Australia, *Submission 4*, p. 5.

155 Engineers Australia, *Submission 4*, p. 5.

156 Electrical Trades Union, *Submission 12*, p. 8.

157 Mr Matthew Boyd, Branch Organiser, Electrical Trades Union, *Committee Hansard*, 19 June 2015, p. 32.

158 Electrical Trades Union, *Submission 12*, pp 8–9.

159 Mr Matthew Boyd, Branch Organiser, Electrical Trades Union, *Committee Hansard*, 19 June 2015, pp 31–32.

3.172 Safety concerns were also raised by the Australian Maritime Officers Union (AMOU), particularly where 457 visa workers held positions of responsibility but had only limited command of English:

Many members have related stories of situations where they have worked beside temporary work visa holders who held positions of authority on vessel and were responsible for the health and safety of the crew, the seaworthiness of the ship and the protection of the environment but had only a limited ability to speak or understand English.<sup>160</sup>

3.173 The Freedom Partnership to End Modern Slavery (the Freedom Partnership) noted that it had warned the DIBP 'not to make assumptions about the level of English required for low skilled work'. Consequently, the Freedom Partnership did not agree with lowering English language requirements. However, recognising that the government had accepted the recommendation in the Azarias review to lower the English proficiency requirements, the Freedom Partnership recommended 'providing access to the Adult Migrant English Program or a comparable program, for workers with low to medium IELTS scores'. Such access would reduce social isolation and help migrant workers to connect and share information on the rights and responsibilities of workers in Australia.<sup>161</sup>

### ***Labour market testing***

3.174 Given that the 457 visa program is driven by employer demand for skilled temporary migrant labour, and with unions questioning the impact of the 457 visa program in a softening job market, there has been renewed focus on ensuring that Australians have the first opportunity to apply for jobs.

3.175 This next section sets out the current requirements for labour market testing. This is followed by a section on the potential impact of Free Trade Agreements (FTAs) on the requirements for labour market testing. Subsequent sections set out the key arguments for and against labour market testing. This is followed by alternative methods for determining skill shortages in particular sectors.

### ***Current requirements***

3.176 Labour market testing was reintroduced for the 457 visa program on 23 November 2013. It currently applies to skill level 3 occupations (Technicians and Trades Workers) on the Australian and New Zealand Standard Classification of Occupations (ANZSCO) which are not otherwise exempt from labour market testing on the basis of an international trade obligation. It also applies to occupations in the fields of nursing and engineering.<sup>162</sup>

3.177 The Australian Government Department submission set out the criteria for testing the labour market:

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160 Australian Maritime Officers Union, *Submission 18*, p. 4.

161 The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, p. 13.

162 Australian Government Department, *Submission 41*, pp 3–4.

To meet the labour market testing requirement, standard business sponsors must provide evidence to DIBP that they have tested the local labour market in the 12 months prior to nominating an overseas worker for a subclass 457 visa. This may include providing evidence of their attempts to recruit Australian workers, such as advertising details and information on how they determined, on the basis of these attempts, that there were no suitably qualified and experienced Australian citizens, permanent residents or eligible temporary visa holders available to fill the position. Where there are integrity concerns with the provided information, further inquiries may be undertaken to validate the labour market testing process.

Where labour market testing applies, sponsors are required to provide DIBP with information on retrenchments and redundancies in their business or an associated entity that occurred within the four months prior to lodging a subclass 457 nomination. In this case, sponsors must provide information on labour market testing since the redundancies have occurred.<sup>163</sup>

3.178 Labour market testing is not required where its application would be inconsistent with Australia's international trade obligations under the World Trade Organisation (WTO) General Agreement on Trade in Services, and under FTAs. In addition, labour market testing is not required where the nomination is for an occupation at ANZSCO skill level 1 (Managers) or skill level 2 (Professionals), with the exception of the 'protected' occupational categories of nurses and engineers.<sup>164</sup>

3.179 The ACTU strongly supported the *Migration Amendment (Temporary Sponsored Visa) Act 2013* which introduced the labour market testing provisions. In particular, the ACTU welcomed the fact that there was now a legal obligation on employers to provide evidence that they have sought to employ Australian workers in the first instance and that no suitably qualified and experienced Australian was readily available to fill the position.<sup>165</sup>

3.180 The ACTU was also very supportive of the requirement for an employer seeking to sponsor a 457 visa worker to advise the minister if any Australians have been made redundant or retrenched in the previous four months, and which requires labour market testing to be undertaken in such circumstances.<sup>166</sup>

3.181 However, the ACTU noted that the vast majority of all occupations available for sponsorship under the 457 visa program are exempt from labour market testing. All skill level 1 and 2 occupations (except nursing and engineering) are exempt plus occupations covered by FTAs with Thailand, Chile, South Korea and Japan.<sup>167</sup>

3.182 Based on the figures in Table 3.3 below, 77 per cent of all 457 visa grants were exempt from labour market testing in 2014–15 up until 31 December 2014. The

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163 Australian Government Department, *Submission 41*, p. 4.

164 Australian Government Department, *Submission 41*, pp 6–7.

165 Australian Council of Trade Unions, *Submission 48*, p. 25.

166 Australian Council of Trade Unions, *Submission 48*, p. 25.

167 Australian Council of Trade Unions, *Submission 48*, pp 29–30.

ACTU also noted that, depending on the outcomes of the FTAs with China and India, an even greater proportion of occupations could be excluded from labour market testing (see Table 3.3 below).<sup>168</sup>

**Table 3.3: Coverage of labour market testing provisions based on current and likely future exemptions**

457 visa grants	2013–14		2014–15 (to 31 December 2014)	
<b>Total grants</b>	51 939		25 533	
Grants covered by LMT occupational exemptions	38 199	73.6%	19 627	76.8%
(plus) Grants in LMT occupations that are covered by FTA exemptions (e.g. Thailand, Chile, South Korea, Japan)	585	1.1%	275	1.1%
<b>Total grants exempt from LMT</b>	38 784	74.7%	19 902	77.9%
<b>Total grants covered by LMT</b>	13 155	25.3%	5 631	22%
(minus) Grants in LMT occupations from China and India	4159		1774	
<b>Total grants covered by LMT if China and India FTAs have LMT exemptions</b>	8 996	17.3%	3 857	15.1%

Source: DIBP subclass 457 visa quarterly pivot tables in Australian Council of Trade Unions, *Submission 48*, p. 30.

Key: LMT = labour market testing; FTA = Free Trade Agreement.

### *The impact of Free Trade Agreements on the current requirements*

3.183 Under two legislative instruments made under subsection 140GBA(2) of the *Migration Act 1958*, which commenced immediately after the Korea-Australia FTA (KAFTA) came into force on 12 December 2014, and immediately after the China-Australia FTA (ChAFTA) came into force on 20 December 2015, the labour market testing condition of the 457 visa program has been removed from the following international trade agreements:

- Japan-Australia Economic Partnership Agreement;
- Thailand-Australia FTA;
- ASEAN-Australia-New Zealand FTA;
- Australia-Chile FTA;
- KAFTA; and

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168 Australian Council of Trade Unions, *Submission 48*, p. 30.

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- ChAFTA.<sup>169</sup>

3.184 Associate Professor Joo-Cheong Tham examined whether international trade agreements to which Australia is a party prohibit the imposition of a labour market testing condition under the 457 visa program. The provisions of the various FTAs that relate to labour market testing are technical and complicated, and are summarised below.

3.185 The power to remove the labour market testing condition of the 457 visa program with respect to FTAs is provided in section 140GBA of the *Migration Act 1958* (Migration Act):

...the power of the Immigration Minister to remove the labour market testing condition of the 457 visa program in relation to international trade agreements can only be exercised when there is an *obligation* under such agreements to which Australia is a party.<sup>170</sup>

3.186 Associate Professor Tham noted that the removal of the labour market testing condition under the 457 visa program in relation to the Japan-Australia Economic Partnership Agreement, the Thailand-Australia FTA, and the ChAFTA appeared to be lawful:

...with ChAFTA, Article 10.4(3) of that agreement prohibits the application of quotas and economic needs test to commitments made under the agreement. A similar situation applies under the Japan-Australia Economic Partnership Agreement through Annex 10(2) of that agreement. With the Thailand-Australia Free Trade Agreement, Chapter 10—Movement of Natural Persons, Annex 8 specifically prohibits labour market testing.<sup>171</sup>

3.187 By contrast, Associate Professor Tham observed that prohibitions on labour market testing were not found in the ASEAN-Australia-New Zealand FTA, the Australia-Chile FTA, or the KAFTA. According to Associate Professor Tham, this meant there was no obligation under these agreements that would enliven the power to remove the labour market testing condition on the basis of international trade agreements pursuant to section 140GBA of the Migration Act. Therefore, the lawfulness of removing the labour market testing provisions from these three FTAs was 'seriously doubtful'.<sup>172</sup>

3.188 In summary, it appears there is a clear legal basis to remove the labour market testing provision from the Japan-Australia Economic Partnership Agreement, the

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169 Determination of International Trade Obligations Relating to Labour Market Testing [F2014L01510]; Determination of International Trade Obligations Relating to Labour Market Testing [F2015L01940].

170 Associate Professor Joo-Cheong Tham, *Second Supplementary Submission 3*, p. 5, italics original.

171 Associate Professor Joo-Cheong Tham, *Second Supplementary Submission 3*, p. 6.

172 Associate Professor Joo-Cheong Tham, *Second Supplementary Submission 3*, p. 6.

Thailand-Australia FTA, and the ChAFTA, but not from the ASEAN-Australia-New Zealand FTA, the Australia-Chile FTA, or the KAFTA.<sup>173</sup>

3.189 With respect to the Trans-Pacific Partnership Agreement (TPP), the TPP appeared, on its face, to restrict labour market testing. However, in its Schedule to Annex II, Australia reserved:

...the right to adopt or maintain any measure with respect to the supply of a service by the presence of natural persons, subject to the provisions of Chapter 12 (Temporary Entry for Business Persons), that is not inconsistent with Australia's obligations under Article XVI of the General Agreement on Trade in Services (GATS).<sup>174</sup>

3.190 In addition, Article 12.4 of the TPP did not prohibit economic needs tests like labour market testing or quotas in relation to commitments with regard to temporary entry of business persons made in Annex 12-A. Therefore, with respect to various articles and the application of the above Schedule, Associate Professor Tham concluded that the TPP did not prohibit the imposition of a labour market testing condition.<sup>175</sup>

3.191 Further, Associate Professor Tham was of the view that the power pursuant to section 140GBA(2) of the Migration Act was '*not* enlivened by the TPP as the TPP does not give rise to any obligation to remove the labour market testing condition'.<sup>176</sup>

3.192 The ETU stated that labour market testing would not occur in any of the following circumstances:

- the worker you nominate is a citizen of Chile or Thailand, or is a Citizen/Permanent Resident of New Zealand;
- the worker you nominate is a current employee of a business that is an associated entity of your business that is located in an Association of South-East Asian Nations (ASEAN) country (Brunei, Myanmar, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand and Vietnam), Chile or New Zealand;
- the worker you nominate is a current employee of an associated entity of your business who operates in a country that is a member of the World Trade Organisation (WTO), where the nominated occupation is listed below as an 'Executive or Senior Manager' and the nominee will be responsible for the entire or a substantial part of your company's operations in Australia;

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173 Associate Professor Joo-Cheong Tham, *Second Supplementary Submission 3*, pp 6–7.

174 Associate Professor Joo-Cheong Tham, *Second Supplementary Submission 3*, p. 3.

175 Associate Professor Joo-Cheong Tham, *Second Supplementary Submission 3*, pp 1–4.

176 Associate Professor Joo-Cheong Tham, *Second Supplementary Submission 3*, p. 5, italics original.

- your business currently operates in a WTO member country and is seeking to establish a business in Australia, where the nominated occupation is listed below as an 'Executive or Senior Manager'; or
- the worker you nominate is a citizen of a WTO member country and has worked for you in Australia on a full-time basis for the last two years.<sup>177</sup>

3.193 Unions expressed concern about the impact that certain clauses within FTAs signed by Australia would have on the domestic labour market and the opportunities for Australians to have first access certain jobs.

3.194 The ETU stated that a key union concern related to 'attempts to manipulate the classification of workers' so that they fell into an exempted category, for example, 'mid-level employees 'dressed up' as executives and senior managers under the intra-corporate transferee's category'.<sup>178</sup>

3.195 Mr Owen Whittle, Assistant Secretary of UnionsWA noted that the new investment facilitation agreements (IFAs) in the ChAFTA allowed companies with projects worth more than \$150 million 'to negotiate to bring in lower skilled workers, rather than just skilled workers, at wage rates that fall below the current floor for a standard 457 visa'.<sup>179</sup> The Freedom Partnership warned that it was 'unclear how the government will ensure access to protections for workers' who come under the ChAFTA IFAs.<sup>180</sup>

3.196 Mr Whittle was concerned that a similar provision would be included in the proposed FTA with India. UnionsWA were of the view that 'blanket 457 visa concessions' did not 'have anything to do with international trade' and therefore should not be included in FTAs.<sup>181</sup>

3.197 The Freedom Partnership also expressed concern that despite the ongoing concerns about exploitation of WHM visa holders in Australia (see chapter 7), the ChAFTA included a Work and Holiday Arrangement that provided working holiday visas for up to 5000 Chinese workers.<sup>182</sup> The committee makes a recommendation in chapter 8 on the rights and protections available to temporary visa workers under any visa issued pursuant to an FTA.

#### *Effectiveness of labour market testing*

3.198 During the inquiry the committee heard a number of views relating to the current labour market testing provisions. This section presents arguments about the effectiveness of labour market testing and the following sections present arguments

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177 Electrical Trades Union, *Submission 12*, pp 13–14.

178 Electrical Trades Union, *Submission 12*, p. 14.

179 Mr Owen Whittle, Assistant Secretary, UnionsWA, *Committee Hansard*, 10 July 2015, p. 26.

180 The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, p. 14.

181 Mr Owen Whittle, Assistant Secretary, UnionsWA, *Committee Hansard*, 10 July 2015, p. 26.

182 The Freedom Partnership to End Modern Slavery, The Salvation Army, *Submission 16*, p. 15.

about the relative costs of employing 457 visa workers, and the costs that labour market testing imposes on employers.

3.199 The effectiveness of labour market testing has been a highly contested issue between employers and unions. Opinion was sharply divided on the merits of labour market testing as a means to ensuring that Australians get first access to jobs.

3.200 Dr Howe was scathing about the current labour market testing requirements as being both inefficient and ineffective:

...employer-conducted labour market testing penalises decent employers who wish to use the 457 visa in areas of genuine skill shortage through making them go through the farce of advertising, but it is also ill-equipped to deter unscrupulous employers from evading the statutory requirement of advertising jobs locally.<sup>183</sup>

3.201 Consult Australia agreed with Dr Howe's view and also noted that it was consistent with the Azarias review which found that:

On the evidence presented to us we have concluded that the labour market testing provisions introduced in 2013 are easily circumvented and do not prevent employers from engaging overseas workers in place of Australians. In addition, recruitment practices are highly diverse across occupations and industries: to design a system that encompasses this diversity is impractical. While the provisions are symbolic of what is trying to be achieved, in practice they do not assist in achieving the objective of providing evidence that suitable Australian workers are not available. Therefore the requirement adds unnecessary regulatory cost for little or no actual benefit. In its current form the labour market testing requirement is costly for sponsors who have done the right thing and subject to manipulation by those that have not made a serious effort to find a local worker.<sup>184</sup>

3.202 Likewise, the NT government observed that the current labour market testing regime 'adds little or no value in protecting the integrity of the subclass 457 visa scheme as it is uniformly applied regardless of the location of business or their employment practices'.<sup>185</sup>

3.203 In general, employers have criticised labour market testing as an excessive and unnecessary burden on employers, while unions have supported labour market testing but criticised the requirements as lacking rigour.

3.204 The ACTU presented evidence based on unpublished DIBP data on the effect of labour market testing since its re-introduction in 2013. The data showed significant

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183 Dr Joanna Howe, Additional Information: 'Is the net cast too wide? An assessment of whether the regulatory design of the 457 visa meets Australia's skill needs', *Federal Law Review*, 2013, p. 16; see also Eventus, *Submission 25*, p. 6; Consult Australia, *Submission 30*, pp 6–7.

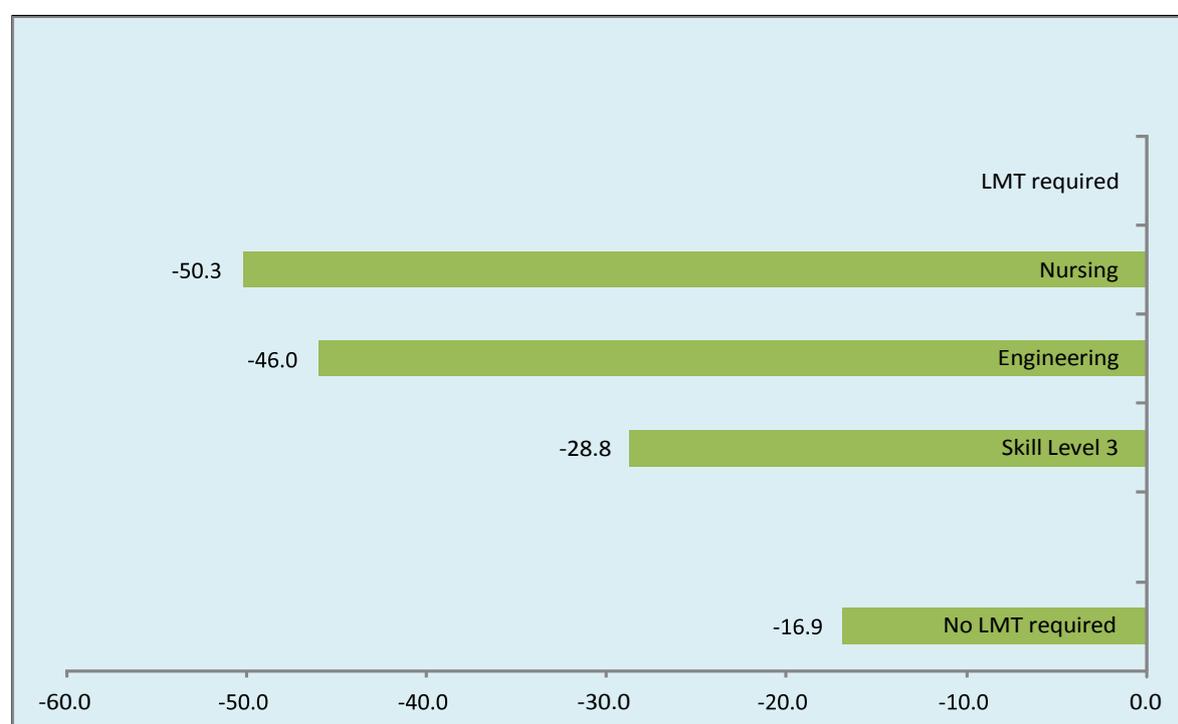
184 Consult Australia, *Submission 30*, p. 6; see also Mr John Azarias, Ms Jenny Lambert, Professor Peter McDonald and Ms Katie Malyon, *Robust New Foundations: A streamlined, transparent and responsive system for the 457 programme*, September 2014, pp 45–46.

185 Northern Territory Government, *Submission 39*, p. 2.

reductions in 457 visa nominations in those occupations covered by labour market testing (see Figure 3.2 below):

Data made available to unions on the operation of labour market testing to 30 September 2014 shows that it is having a significant effect on those occupations it covers. This is evidenced by a much larger decline in 457 visa nominations by employers in occupations covered by labour market testing, compared to average monthly numbers in the occupations exempted from labour market testing. Nominations for non-LMT occupations have fallen by 17% whereas LMT occupations have fallen by 50% in Nursing, 46% in Engineering and 29% in Skill level 3 occupations.<sup>186</sup>

**Figure 3.2: Percentage change in average monthly 457 visa nominations lodged (a) after labour market testing implemented, and (b), by selected occupations**



Source: DIBP unpublished data, June and November 2014, (BE7406 and BE7826), in Australian Council of Trade Unions, *Submission 48*, p. 27.

3.205 The AIMPE supported this analysis and noted that since the introduction of labour market testing, the majority of its members had been able to find work.<sup>187</sup>

3.206 ACCI disputed the conclusion by the ACTU that the decline in 457 visa nominations was attributable to the re-introduction of labour market testing. ACCI noted several salient factors that could account for the trend:

Evidence that the visa granted for trade occupations has fallen since labour market testing was introduced does not take into account other significant

<sup>186</sup> Australian Council of Trade Unions, *Submission 48*, p. 26.

<sup>187</sup> Australian Institute of Marine and Power Engineers, *Submission 17*, p. 6.

influences such as the introduction of the 'genuiness' test, the work of the FWO and DIBP in ramping up compliance and a drop off in economic conditions in industries that were accessing the programme including mining.<sup>188</sup>

*Relative costs of employing local and overseas workers*

3.207 The Migration Institute of Australia (Migration Institute) is the peak organisation representing the Australian migration advice profession. The Migration Institute maintained that the economics of recruiting and hiring overseas workers effectively ensured that local workers would be preferred and that dodgy employers would be deterred by the extra effort and cost of employing overseas workers:

The cost of becoming a Subclass 457 Business Sponsor, nominating and bringing overseas skilled workers to Australia, exceeds the cost of recruiting and employing from local labour forces, especially in the higher salary bands. Sponsors only revert to the more costly practice of sponsoring overseas workers where local labour is not available. The operation of market forces and cost effective business practices should ensure that the lower cost recruitment method is preferred, making the need to demonstrate LMT redundant as a mechanism for protecting local jobs.

As the 457 programme is primarily designed for skilled occupations and to fill genuine labour market shortages, businesses legitimately requiring high skilled recruits are likely to be able to absorb these costs, while those seeking to exploit the system with marginal salary levels and in sham positions are occupations are less likely to bother.<sup>189</sup>

3.208 This view was supported by the NT government which pointed out that 93 per cent of the businesses in the NT were small to medium enterprises, the vast majority of them employing less than 20 staff:

The costs and complexity of sponsoring overseas workers under the subclass 457 visa scheme are not insignificant, particularly for the smaller business cohort. Therefore, for the overwhelming majority of Northern Territory employers these factors alone are sufficient to ensure that sponsoring overseas workers is a last resort.<sup>190</sup>

3.209 In this regard, Mr Wayne Parcell, Director of the Migration Institute and a partner at Ernst and Young, noted that an Ernst and Young survey of about 1500 client employers revealed that the costs of recruiting an overseas worker and bringing them to Australia were as follows:

- more than 10 per cent of the employers said it cost them less than \$5000;
- more than 30 per cent said it cost them between \$5000 and \$10 000; and

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188 Australian Chamber of Commerce and Industry, *Submission 10*, p. 13.

189 Migration Institute of Australia, *Submission 40*, p. 13; see also South Australian Wine Industry Association, *Submission 5*, p. 5.

190 Northern Territory Government, *Submission 39*, p. 3.

- 50 per cent of them said it cost them more than \$10 000.<sup>191</sup>

3.210 Likewise, AMMA completely rejected the idea that skilled migrants were 'able to cheaply displace the employment prospects of Australian workers'. Indeed, AMMA argued that their commissioned research demonstrated that it 'may cost up to \$60 000 more to employ a foreign national rather than an Australian to work in the resource industry when relocation, recruitment and compliance costs are taken into account'.<sup>192</sup>

3.211 However, the ACTU argued that the notion that it was far more costly for employers to employ overseas workers was incorrect. Noting that almost half of all 457 visas are being granted onshore (to workers already in Australia), the ACTU pointed out that 'the extra costs to hire the overseas worker over an Australian citizen or permanent resident are often negligible'.<sup>193</sup>

3.212 This trend is even more apparent in the food and construction trades where over 81 and 75 per cent respectively of all 457 visas are granted 'to foreign nationals already in Australia at the time of the visa grant, many already working for their 457 sponsor on other temporary visas, particularly student visas and working holiday visas'.<sup>194</sup>

3.213 The large pool of temporary onshore migrant labour is an outcome of the combination of Australia's temporary visa programs. The ACTU noted that officials from what was then the Department of Immigration and Citizenship had acknowledged in 2013 that onshore temporary visa holders are eligible to apply for a 457 visa if they can find an employer willing to sponsor them. The presence of this pool of onshore visa holders has had a dramatic impact on the increase of onshore 457 visa applications and this has occurred at a time when the domestic labour market has softened.<sup>195</sup>

#### *The administrative costs of labour market testing*

3.214 The Migration Council based their critique of labour market testing on the premise that there was no evidence to support the claim that labour market testing benefits Australian workers. According to this view, therefore, labour market testing merely places a cumbersome administrative burden on employers.<sup>196</sup>

3.215 Likewise, the NT government pointed to extensive research that identified ongoing skilled and low-skilled labour shortages in the NT. In such a tight labour

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191 Mr Wayne Parcel, Director, Migration Institute of Australia, *Committee Hansard*, 17 July 2015, p. 12.

192 The Australian Mines and Metals Association, *Submission 34*, p. 3.

193 Australian Council of Trade Unions, *Submission 48*, p. 98.

194 Australian Council of Trade Unions, *Submission 48*, p. 99.

195 Australian Council of Trade Unions, *Submission 48*, pp 100–101.

196 Migration Council Australia, *Submission 27*, p. 7; see also Consult Australia, *Submission 30*, pp 6–7.

market, the NT government argued that labour market testing merely imposed more 'red tape' on small and medium sized businesses while doing nothing to protect job opportunities for Australian workers.<sup>197</sup>

3.216 Fragomen stressed the potential economic losses that flowed from what they described as an inflexible, protectionist approach that increased the delays in sourcing labour with the requisite skills:

...particularly for time-sensitive project work or in other circumstances where work must begin urgently. Even a delay of a few days in a visa being granted can result in loss of production and potential penalties for the employer. In circumstances where project timetables can shift regularly, it is simply not possible for employers to plan their visa needs with the degree of malleability that would enable them to allow for processing delays.<sup>198</sup>

3.217 The Migration Institute made the point that the 457 visa program is the most heavily regulated of all the temporary work visa programs. The Migration Institute noted that on top of the regulatory mechanisms built into the 457 visa program, recent developments meant that 457 visa workers were well covered by both migration and employment legislation. These developments included the risk tiering approach implemented by the DIBP to monitor business sponsors, the memorandum of understanding between the DIBP and the Australian Tax Office (ATO) to access salary payment details of 457 visa workers through their tax file number, and increased resources directed to compliance and enforcement.<sup>199</sup>

3.218 The Migration Institute also questioned the need for labour market testing for 457 visa nominations given the vast majority of temporary visa holders are not 457 visa workers. The Migration Institute noted that this much larger cohort of temporary migrant workers are more likely to compete with Australian workers trying to enter the job market:

The student and working holiday visa holders particularly congregate in the lower levels and lower skilled sectors of the labour market and potentially compete with new entrant and low skilled Australian workers at this level.<sup>200</sup>

3.219 Ms Lambert of ACCI began her critique of labour market testing by making the point that under the 457 visa program, 'an obligation for 457 visa sponsors to commit to employing Australians is already built into the system', and that employers support that objective and the obligation to treat migrant workers no less favourably than Australian workers:

There is a basic obligation in the program to do it. That was there before labour market testing came back in and that is there now for occupations which do not require labour market testing. It is a fundamental tenet of the

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197 Northern Territory Government, *Submission 39*, p. 3.

198 Fragomen, *Submission 21*, p. 14.

199 Migration Institute of Australia, *Submission 40*, pp 10–11.

200 Migration Institute of Australia, *Submission 40*, p. 13.

program that there is an obligation on sponsors to put Australian employment first.

It is part of the very objectives of the 457 program that is very strongly supported by the employer communities that the 457 program is there to enable businesses to sponsor a skilled overseas worker if they cannot find an appropriately skilled Australian. The second part of it is to protect those workers and to make sure that they are no less favourably treated than Australians. Employers across the community fundamentally support those two basic objectives. That is not labour market testing.<sup>201</sup>

3.220 While insisting that employers supported the twin objectives of the 457 visa program, ACCI was contemptuous of labour market testing obligations on employers arguing that the requirements were excessive, inefficient and ineffective:

Labour market testing only works in the same way that asking employers to walk through wet cement does. It provides a regulatory burden that means that some will not be bothered. This is not good policy as it does not allow the programme to be responsive to need.<sup>202</sup>

3.221 The Ai Group pointed out that the additional cost of hiring a 457 visa worker meant a business was already 'effectively prompted' to test the market. By contrast the labour market testing as currently required was unnecessary and bureaucratic:

For example, advertising in a period of time before applying can be costly when a business may know from past experience that their chances of sourcing labour locally are non-existent. Delays caused by such testing could prevent a business from meeting urgent commercial needs. Labour market testing is inefficient and unnecessary red tape for business.<sup>203</sup>

3.222 Ernst and Young stated that labour market testing imposed a significant burden for no observable benefit and was 'inappropriate in a modern global economy'. Ernst and Young therefore recommended that labour market testing be abolished.<sup>204</sup>

3.223 A similar view was expressed by Mrs Rita Chowdhury, Vice-Chair of the Migration Law Committee at the Law Council of Australia. She stated that labour market testing has created an unnecessary administrative burden because an employer only has to show evidence of advertisements, but does not have to demonstrate that they could not find a local worker. In other words, labour market testing as currently conceived merely forces employers to go through the motions for no actual benefit in terms of finding a local worker to fill a skilled position.<sup>205</sup>

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201 Ms Jenny Lambert, Director, Employment, Education and Training, Australian Chamber of Commerce and Industry, *Committee Hansard*, 17 July 2015, p. 17.

202 Australian Chamber of Commerce and Industry, *Submission 10*, pp 12–13.

203 Ai Group, *Submission 33*, p. 18; see also Business Council of Australia, *Submission 26*, p. 2; Consult Australia, *Submission 30*, pp 6–7.

204 Ernst and Young, *Submission 24*, p. 4.

205 Mrs Rita Chowdhury, Vice-Chair, Migration Law Committee, Law Council of Australia, *Committee Hansard*, 17 July 2015, p. 40.

3.224 Ms Donna Mogg, Commercial Services Manager at Growcom agreed that labour market testing was important to ensure that Australian workers were given first preference, but pointed out that employers in the horticulture industry had a 'fairly strong sense of what skills are available' in their region at any given time and that repeated testing was onerous and time consuming.<sup>206</sup>

3.225 Ms McKinnon from the NFF advised that the NFF did not oppose the principle of labour market testing, but suggested it was burdensome and unnecessary for farmers wanting to use the seasonal worker program:

To make the seasonal worker program work well, you have to invest in it over a number of years. You will not get to that point unless you realise that you are going to have an ongoing labour force need because you cannot fill your need from the local market. So, you have made a decision to go with a good program which brings you in returning, reliable, productive workers every year, but you are still required, before you access workers over that program, to advertise under the labour market testing rules. So, you do that; you advertise your jobs. And you cannot say, when you advertise for the job, that only Australians need apply, because that would be discriminatory. But that is why you are advertising: because you are required to test for Australians, for local workers.

So, you advertise your job, and what happens is that lots of backpackers apply. You get a stream of backpackers applying for work, and you have decided as a business that you are not going to use backpackers anymore; you are going to use the seasonal worker program. But you then have to process a number and a number and a number of backpacker applications, even though you have no intention of hiring those workers. You might get the odd application from an Australian, and that will be considered, along with all of them, but really we do not see that in this circumstance.<sup>207</sup>

3.226 The ACTU disputed claims that labour market testing provisions are too onerous and create a burden on employers. The ACTU noted that labour market testing should occur as a matter of course 'if an employer was genuine about sourcing Australian workers first'. Furthermore, the ACTU noted that 'the majority of 457 visa occupations are not even covered by the labour market testing laws by virtue of various exemptions in place'.<sup>208</sup> Finally, the ACTU pointed out that:

...the 457 visa program is not, and should not, be designed to provide an unfettered right for employers to take on temporary overseas workers. Even during periods when the program has been very poorly regulated, access to the 457 visa program has always, at least in theory, been subject to certain conditions and obligations, including an overriding tenet of the program that it is there only to fill skill shortages that cannot first be filled by

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206 Ms Donna Mogg, Commercial Services Manager, Growcom, *Committee Hansard*, 12 June 2015, p. 22.

207 Ms Sarah McKinnon, Manager, Workplace Relations and Legal Affairs, National Farmers' Federation, *Committee Hansard*, 26 June 2015, p. 35.

208 Australian Council of Trade Unions, *Submission 48*, p. 97.

Australian workers. In that sense, the labour market testing laws simply give practical (and long overdue) effect to what has always been an understood principle underpinning the program endorsed by both sides of politics.<sup>209</sup>

### ***Proposals for improving labour market testing***

3.227 While the NT government supported the intention of labour market testing, it was very critical of its current application, arguing that it was a monolithic and impractical approach that took no consideration of the actual labour market conditions in various regions of the country.<sup>210</sup>

3.228 The NT government therefore argued that labour market testing 'could be made far more effective through better targeting'. Proposals for improvement included that the DIBP adopt a 'risk-tiering' approach to focus on areas of potential misuse. In other words, more resources should be directed to compliance rather than additional regulations.<sup>211</sup>

3.229 The NT government also argued that greater flexibility would reduce unnecessary burdens on employers. This could be achieved by concessions and/or exemptions to labour market testing requirements 'for employers located in areas of low unemployment and in 'micro' labour markets, such as regional and remote areas of the NT'.<sup>212</sup>

3.230 The MUA submitted that the current requirements for labour market testing were neither credible nor robust. Noting the advice provided on the DIBP website, the MUA pointed out that the requirements for labour market testing could conceivably be satisfied by a Facebook post. Furthermore, the MUA argued that the current requirements lacked transparency because of the difficulty in independently verifying that adequate labour market testing had occurred in a given instance.<sup>213</sup>

3.231 While voicing similar concerns about the content of job advertisements, the ANMF was also concerned that employers were placing unreasonable requirements in job advertisements that effectively excluded recent Australian nursing graduates from employment:

It is now becoming commonplace to see advertisements that require extensive years of experience and multiple nursing qualifications. We believe in many cases these vacancies could have been readily filled by an Australian worker eligible to practice nursing who may have graduated in the preceding one to two years.<sup>214</sup>

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209 Australian Council of Trade Unions, *Submission 48*, p. 97; see also Unions NSW, *Submission 35*, p. 3.

210 Northern Territory Government, *Submission 39*, p. 3.

211 Northern Territory Government, *Submission 39*, p. 3.

212 Northern Territory Government, *Submission 39*, p. 3.

213 Maritime Union of Australia, *Submission 22*, p. 5.

214 Australian Nursing and Midwifery Federation, *Submission 37*, p. 19.

3.232 The ANMF therefore proposed 'that sponsors demonstrate that their attempts to fill positions locally also included realistic prerequisites with regard to academic qualifications and years of experience'.<sup>215</sup>

3.233 To improve the robustness and veracity of the labour market testing process, both the MUA and United Voice recommended the establishment of a skilled workforce database(s) listing people looking for work.<sup>216</sup> The MUA proposed an unemployed assistance service as set out below:

1. People seeking work in a specific industry and/or location contact the database and are able to list themselves on the database.
2. The database provides contact details (mobile telephone and email) and the job category they work in and or are qualified to do. These details are then collated.
3. Every Monday people seeking work are contacted by SMS to confirm they are still looking for work—if they do not confirm by Wednesday they are removed from the database. This ensures the accuracy of the database.
4. Employers and agents are sent the database details in table form three times per week by email. The database shows the types of skills and contact details of the people looking for work.
5. If employers seek a position(s) to be filled, they contact the person directly and take matters from there.<sup>217</sup>

3.234 The MUA argued that an unemployed assistance service had several advantages. The service would be relatively straightforward to coordinate and, if using the service was free, participation rates would be high. Furthermore, workers would be able to self-manage their availability for work, employers would have ready access to a pool of experienced local labour, and workers and employers could be matched quickly.<sup>218</sup>

3.235 The MUA proposed that it be mandatory for an employer to use such a database to satisfy the labour market testing requirements and that use of the database should be a precondition to accessing the 457 visa program.<sup>219</sup>

3.236 The ACTU also had some recommendations that would, in their view, strengthen the labour market testing provisions and improve the system:

- labour market testing should be conducted for at least four weeks for it to constitute a meaningful attempt to recruit Australian workers;

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215 Australian Nursing and Midwifery Federation, *Submission 37*, p. 19.

216 United Voice, *Submission 19*, p. 2.

217 Maritime Union of Australia, *Submission 22*, pp 5–6.

218 Maritime Union of Australia, *Submission 22*, p. 6.

219 Maritime Union of Australia, *Submission 22*, p. 6.

- given the potential for rapid change in labour markets, labour market testing should be considered valid for no longer than four months;
- job advertisements should contain basic mandatory information such as the job title, main duties and responsibilities, location, relevant industrial instrument, necessary skills, qualifications and experience, and the salary and conditions';
- job advertisements should be prohibited from targeting temporary visa workers;
- advertising should be local and national at genuine market rates; and
- job advertising should be supported by information on what the results were (for example, the number of applications received, the number of applicants hired, and reasons why unsuccessful applicants were not considered suitable).<sup>220</sup>

3.237 Given the current high levels of unemployment and under-employment amongst Australian professionals, the ACTU also recommended the government reverse current exemptions on labour market testing for skill levels 1 and 2.<sup>221</sup>

3.238 Similarly, Ms Ruth Kershaw, Research Consultant at the Victorian Branch of the ETU questioned why electricians and linesmen were still on the skills in demand list given that the unemployment rate amongst ETU members was particularly high, and was getting worse with the 'downturn in power construction and manufacturing'.<sup>222</sup>

3.239 United Voice also made a series of recommendations to improve transparency around the use of temporary visas and to ensure that 'current salary requirements are being met':

- the DIBP should be required to publish information for which temporary visa nominations have been approved, including data by industry sector and detailed occupation groupings;
- the DIBP, or an authorised agency such as the ATO, should also collect and publish regular data on actual salaries paid to temporary visa holders; and
- the FWO should also be required to publish information on temporary visas where their investigations uncover issues relating to workers on these visas, and that information should include salary level, occupation, and sector.<sup>223</sup>

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220 Australian Council of Trade Unions, *Submission 48*, pp 28–32; see also Unions NSW, *Submission 35*, p. 6; Australian Workers Union, *Submission 44*, pp 1–2.

221 Australian Council of Trade Unions, *Submission 48*, p. 35.

222 Ms Ruth Kershaw, Research Consultant, Victorian Branch, Electrical Trades Union, *Committee Hansard*, 19 June 2015, p. 27.

223 United Voice, *Submission 19*, pp 2–3.

### ***Proposals to change the 457 visa nomination process***

3.240 Various organisations including employers, unions and independent analysts proposed changes to the 457 visa nomination process. Certain proposals involved a trade-off—such as replacing labour market testing with a sponsorship nomination fee—while other proposals recognised a strong compliance record. These proposals are covered below.

#### *Higher nomination fees and altered nomination timeframes*

3.241 The Migration Council proposed changes to the sponsorship model, arguing that this would reduce administrative costs for business and at the same time discourage rogue employers from exploiting the 457 visa program. In exchange for abolishing labour market testing, the Migration Council proposed an increased nomination fee for employers seeking to sponsor a 457 visa worker. The Migration Council argued that the increased cost of the nomination fee would be offset by the reduction in administrative costs:

...the Migration Council recommends an improved price signal that increases the initial cost to nominate a temporary work visa in exchange for a reduction in administration costs...

A higher nomination fee would better discourage exploitative employers to immediately seek migrants on temporary work visas instead of Australians by increasing the difference in price between the two options.<sup>224</sup>

3.242 Furthermore, the increased nomination fee would restore to some extent the price differential between recruiting a 457 visa worker and an Australian that has, in many instances, been eroded by virtue of the fact that almost half 457 visa workers are now recruited onshore (and therefore cost no more to recruit than an Australian citizen).<sup>225</sup>

3.243 Unions also recognised that the issue of a price signal is important. For example, the ACTU noted that the claim made by employers that employers will always seek to employ Australians first because it is easier and cheaper than recruiting overseas is rendered fallacious by the substantial shift to onshore recruitment of 457 visa workers.<sup>226</sup>

3.244 The Migration Council also proposed a tiered system to better support the 'market salary rate'. This system would enable closer monitoring at more regular timeframes of 457 visa workers on lower salaries:

In addition to raising the price signal, a tiered system of nominations should be introduced to better support the 'market salary rate'. This would shorten the validity of the nomination for lower salaried migrants. For example, instead of all 457 visa nominations being valid for four years, the following validity could be introduced:

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224 Migration Council Australia, *Submission 27*, p. 7.

225 Migration Council Australia, *Submission 27*, p. 7.

226 Australian Council of Trade Unions, *Submission 48*, p. 98.

2 years: Salary above TSMIT but below AWOTE;

3 years: Salary above AWOTE but below the Fair Work High Income Threshold; and

4 Years: Above the Fair Work High Income Threshold.<sup>227</sup>

3.245 The AHEIA proposed a reward and incentive system 'such as priority visa processing and fee concessions' for employers with a strong compliance history.<sup>228</sup>

3.246 The ETU recommended rewarding employers 'who meet or exceed their obligations to labour market testing and domestic employment and training' by introducing 'fee reductions via a sliding scale linked to performance targets in the areas of labour market testing, wages and training'.<sup>229</sup>

### **Committee view**

3.247 The goal of the 457 visa program is to enable employers to address short to medium term workforce needs by sponsoring skilled overseas workers on a temporary basis to fill positions where the employer is unable to find suitably skilled Australian workers. Evidence to the inquiry confirmed broad acceptance that the goal of enabling employers to readily access skilled migrant labour must be balanced against the twin principles of protecting the employment opportunities and work conditions of Australian workers, and ensuring that 457 visa workers enjoy no less favourable conditions than Australian workers and are not otherwise subject to abuse or exploitation.

3.248 In order for the 457 visa program to be effective in achieving this balance, the employment of 457 visa workers must match genuine, short-term skill shortages. Concerns must therefore arise when evidence is presented that 457 visa workers have been employed in occupations not subject to skill shortages, take positions normally filled by Australian graduates (covered in chapter 5), suffer gross exploitation (covered in chapter 6), and when demand for 457 visa workers seems unresponsive to the trend in unemployment.

3.249 Meeting these criteria is essential to ensure that temporary migrant labour is not exploited and does not undercut Australian wages and conditions or reduce job opportunities for Australians. Given this criteria, the key question then becomes how to assess the genuineness of employer needs. In general, there have been two approaches to this question.

3.250 The first approach, broadly put in evidence to the committee by employers, is that a business is best placed to judge the skills shortages that it is confronted with and best placed to determine the need for temporary visa workers. Employers also argued that bringing skilled workers to Australia from overseas involves significant costs for employers, and that those employers are unlikely to incur these costs if they can find

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227 Migration Council Australia, *Submission 27*, p. 8.

228 Australian Higher Education Industrial Association, *Submission 20*, p. 2.

229 Electrical Trades Union, *Submission 12*, p. 4.

the skilled local workers. In sum, this approach accepts the claims made by employers regarding skills shortages and their need for temporary migrant workers.

3.251 The second approach, broadly put in evidence to the committee by unions and certain academics, is that there should be either independent verification of the employer's labour needs, and/or a requirement for employers to demonstrate that they have explored the availability of suitably skilled local labour. Unions noted that the demand for temporary migrant labour is currently driven by the special interests of employers and may not necessarily coincide with the national or public interest.

3.252 The committee received evidence that a key indicator of the effectiveness of the 457 visa program in addressing genuine skills shortages is the responsiveness of the demand for 457 visa workers to changes in the general rate of unemployment, and to changes in the supply of skilled labour in particular occupations.

3.253 Evidence to the committee indicated that the responsiveness of the 457 visa program to the upturn in the unemployment rate lagged by two to three years. Furthermore, the committee received evidence that the 457 visa program was having a detrimental impact on the employment opportunities for Australian graduates in specific occupations such as engineering and nursing.

3.254 The committee acknowledges that it received conflicting evidence regarding the balance between permanent and temporary migration. In theory, the value of temporary migration is that it allows business to meet short-term skills shortages. In this respect, there is an advantage in having some element of temporary migration because addressing skills shortages solely through the permanent migration scheme could result in a skills surplus, particularly if a sector that was booming experienced a sudden down-turn (the resources sector for example). Addressing short-term skill shortages with the 457 visa scheme should be a way of moderating these types of rapid transformations in discrete segments of the skilled job market.

3.255 However, the committee is concerned that the broader temporary visa program, and specifically the 457 visa program, is not sufficiently responsive either to higher levels of unemployment, or to labour market changes in specific skilled occupations.

3.256 The committee notes that the effectiveness and legitimacy of the 457 visa program is to a large extent underpinned by the combined effect of various policy settings. The committee is of the view that it is better to correct structural problems within the design of the 457 program than it is to monitor and ensure compliance with the program's aims that may, in part, arise from poorly calibrated and unresponsive policy settings.

3.257 The committee notes that the 457 visa program has been subject to several substantial reviews and revisions under successive governments in order to ensure its integrity and effectiveness. Given the concerns raised in this inquiry, it is therefore appropriate to review the policy settings of the 457 visa program and labour agreements at this juncture to ensure they are set correctly.

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### *Labour agreements and Designated Area Migration Agreements*

3.258 Labour agreements provide for the sponsorship of semi-skilled overseas workers, as well as concessions to the Temporary Skilled Migration Income Threshold (TSMIT). Evidence to the committee highlighted a disturbing lack of transparency around both the numbers and substantive conditions of labour agreements. The committee considers the transparency of labour agreements is essential for public accountability and community endorsement.

#### **Recommendation 3**

**3.259 The committee recommends that the Department of Immigration and Border Protection be required to maintain an online public register of current labour agreements in operation, as well as any future Designated Area Migration Agreements. The committee also recommends that the register note any exemptions provided under a labour agreement.**

#### **Recommendation 4**

**3.260 The committee recommends that the Department of Immigration and Border Protection be required to advise all stakeholders that were consulted as to the outcome of the labour agreement application.**

3.261 The committee's recommendations regarding labour market testing for labour agreements are contained at the end of this section.

### *Temporary Skilled Migration Income Threshold (TSMIT)*

3.262 Evidence to the committee confirmed that the TSMIT is an essential aspect of the policy settings underpinning the 457 visa program. The TSMIT acts as a salary floor for 457 visa holders and ensures that these workers are able to support themselves in Australia.

3.263 The TSMIT has traditionally been indexed according to average fulltime weekly ordinary time earnings (AWOTE) each financial year. However, indexation did not occur on 1 July 2014 or 1 July 2015.

3.264 Without indexation, the TSMIT decreases in real terms each year, meaning that temporary migrants on 457 visas are less able to support themselves in society.

3.265 The committee is of the view that the TSMIT should be indexed as at 1 July 2015 to the AWOTE, and that indexation should occur each financial year.

#### **Recommendation 5**

**3.266 The committee recommends that the Temporary Skilled Migration Income Threshold (TSMIT) be indexed to average fulltime weekly ordinary time earnings (AWOTE) as at 1 July 2015 and that indexation occur each financial year.**

### *Market salary rate*

3.267 The requirement to pay the 'market salary rate' effectively means that employers must guarantee that the terms and conditions of employment of 457 visa holders, including pay and hours of work, are no less favourable than the terms and

conditions that are, or would be, provided to an Australian performing equivalent work in the same location. The requirement serves the dual purpose of ensuring Australian workers are protected from any adverse impact on wages, and protecting skilled migrant workers from exploitation by ensuring 457 visa workers are not paid less than the market salary rate.

3.268 Although submitters expressed different views on this matter, the committee is of the view that \$250 000 is an appropriate threshold for the requirement to pay the 'market salary rate' and should be retained.

### ***The Consolidated Sponsored Occupations List***

3.269 The Consolidated Sponsored Occupations List (CSOL) specifies the occupations that can be sponsored under the 457 visa program. As such, it forms an important element in assessing the extent to which the 457 visa program addresses areas of genuine skills shortage.

3.270 The CSOL is a broad list of occupations incorporating the Skilled Occupations List (SOL) and includes most occupations defined in levels 1 to 3 of the Australian and New Zealand Standard Classification of Occupations (ANZSCO).

3.271 The committee heard evidence that the CSOL is not a list of occupations subject to skill shortages, but rather a particularly broad, imprecisely defined, and poorly targeted list of occupations.

3.272 The committee heard arguments that the imprecise meanings of certain occupations (for example, 'Program or Project Administrator') listed on the CSOL, the very broad range of occupations listed on the CSOL, and the fact that the 457 visa program is based on employer demand make it difficult to assess whether 457 visa workers are being employed in the appropriate position. This gave rise to concerns that the CSOL is open to abuse.

3.273 On the other hand, the committee heard evidence from employers that the CSOL has to be an occupation list and not a shortages list because a shortage list could not possibly capture the myriad rapidly changing permutations in a dynamic labour market. Arguments were also made that the classification index underlying the CSOL is too complicated and overly specific.

3.274 On balance, the committee is concerned that the broad nature of the occupations listed on the CSOL undermines the value of the CSOL as a regulatory mechanism because it allows the sponsorship of occupations for which a skills shortage does not necessarily exist in Australia. The committee also notes that the compilation of the SOL appears to involve a much more rigorous process than that for compiling the CSOL.

3.275 In saying that, however, the committee is critical of the government's decision to abolish the Australian Workforce Productivity Agency (AWPA). As is the case with the CSOL, the committee is convinced of the value that an independent, tripartite body can add in terms of providing rigorous, independent, expert and transparent advice to government regarding the compilation of the SOL.

3.276 The committee is therefore of the view that there needs to be a much more rigorous, independent, evidence-based, and transparent process in place for determining the CSOL. The details for such a process are described below.

***Independent tripartite panel to advise on migration policy***

3.277 The committee notes that the Azarias review identified the need to provide a more robust evidence-based approach to improving the transparency and responsiveness of the CSOL. The Azarias Review recommended the establishment of a new tripartite ministerial advisory council, supported by a dedicated labour market analysis resource, be established.

3.278 The committee notes the government's decision to establish the Ministerial Advisory Council on Skilled Migration (MACSM). However, the committee is of the view that the MACSM is neither genuinely tripartite, nor sufficiently independent from government.

3.279 In this regard, the committee condemns the abolition of the former AWWA. Disbanding the only independent source of research and policy advice on matters relating to tertiary education and the needs of the labour market was a particularly short-sighted and counter-productive move. Incorporating these functions into the Department of Industry effectively compromises the ability of the government to receive independent expert advice on these matters. Further, the consequent lack of transparency and public accountability flowing from this decision seriously diminishes the credibility of ministerial decisions on matters of workforce capacity, skills training, and, ultimately, labour migration.

3.280 To address these matters, the committee recommends that the MACSM be re-constituted to embody elements of the United Kingdom Migration Advisory Committee such as operational independence, and public accountability in its deliberations. This should help ensure the development of rigorous, transparent, and credible occupational shortage lists for both the permanent and temporary labour migration programs.

3.281 At the same time, MACSM needs to be genuinely tripartite. In this regard, a close examination of the membership of MACSM reveals that seven out of the eight members of the current MACSM hold a similar view of the skilled migration program, and that the Australian Council of Trade Unions is the sole union presence on MACSM. An impartial observer cannot help but conclude that the current MACSM does not present a reasonably balanced range of views.

3.282 These are important matters. If MACSM is to be deemed credible by the broader public, it must be seen to be representative. To be fit for purpose, therefore, MACSM needs to include representatives from business, unions, government, and academia.

3.283 It is the committee's view that a genuinely independent tripartite body would be able to perform a de facto labour market testing function in that it would be able to scrutinise employer claims that a particular skills shortage exists.

3.284 Properly constituted, MACSM could improve the integrity of the CSOL and provide valuable independent advice to government. It is expected that this advice

would differentiate between skill shortages that are best met by temporary migration and those that could be met by increased training of Australian workers. Such advice would not only add value to ministerial decision-making on migration matters, but might also increase public acceptance of temporary labour migration where necessary to address domestic skills shortages.

3.285 In this regard, the committee considers that a properly constituted MACSM would be well-placed to address key policy questions such as the reliance of key sectors of the Australian agricultural sector (in particular, horticulture, orchards, and vineyards) on 417 visa holders. As will be evident in chapter 7, the committee has grave concerns about the exploitation of whole classes of temporary visa holders such as 417 visa holders. It is clear to the committee that while specific recommendations around labour hire, monitoring and compliance are made in subsequent chapters, holistic solutions to labour shortages in specific industry sectors need far greater consideration than they have hitherto received.

### **Recommendation 6**

**3.286 The committee recommends that the Ministerial Advisory Council on Skilled Migration (MACSM) be re-constituted as a genuinely tripartite, independent, and transparent body with responsibility and commensurate funding to provide objective evidence-based advice to government on matters pertaining to skills shortages, training needs, workforce capacity and planning, and labour migration (including Designated Area Migration Agreements and the full range of temporary visa programs with associated work rights). The committee further recommends that the reports produced by MACSM be made publicly available.**

#### *Intra-corporate transfers*

3.287 The committee received evidence that stressed the value of intra-corporate transfers and the need to introduce a dedicated intra-corporate transfer stream within the 457 visa program. The committee notes that the Senate Legal and Constitutional Affairs References Committee report into the 457 visa program considered that the arguments in favour of establishing a dedicated stream had merit, and therefore recommended that a dedicated pathway for intra-company transfers be introduced into the 457 visa program. The committee further notes that the government referred this recommendation to the Azarias review.

#### *Cost of employing 457 visa workers*

3.288 The committee received evidence from employers and independent organisations stating that the additional costs of employing an overseas worker were substantial. The implication of this proposition was that an employer would only incur these extra costs if a suitable Australian worker could not be found. In effect, it was argued that the cost involved in hiring an overseas worker would deter unscrupulous operators that might be seeking to circumvent the system.

3.289 The committee does not dispute that, in many cases, there may be a substantial additional cost to employing a 457 visa worker if that visa worker is brought in from overseas. However, the most recent statistics from the Australian

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Government Department submission show that almost half of all primary 457 visas granted in 2014–15 (to March 2015) were for people already in Australia.

3.290 It seems clear to the committee that in instances where the 457 visa applicant is already in Australia, it is hard to avoid the conclusion that the hiring of a 457 visa worker may actually involve negligible extra cost to the employer. This effectively negates the argument that the hiring of an overseas worker necessarily incurs greater cost to the employer than hiring an Australian worker.

### ***Labour market testing***

3.291 The committee received a substantial amount of evidence from growers and producers in regional Australia regarding the difficulty in attracting (and, in some instances, retaining) suitable labour. The committee recognises that labour markets are diverse and the demands for labour vary across industries, regions, and time. At the same time, the committee also received evidence that the employment opportunities for Australians across numerous sectors of the economy had declined.

3.292 Further, although the extent to which it is occurring is difficult to quantify, the committee is deeply disturbed by evidence of workers losing their jobs only to be replaced by 457 visa workers. In this regard, the committee is of the view that there should be a prohibition against replacing local workers with 457 visa workers.

3.293 The committee notes that the vast majority of all occupations available for sponsorship under the 457 visa program are exempt from labour market testing (all ANZSCO skill level 1 and 2 occupations except nursing and engineering, plus occupations covered by Free Trade Agreements with Thailand, Chile, South Korea, China and Japan). In fact labour market testing only applies to ANZSCO skill level 3 occupations (technicians and trades).

3.294 The committee also notes evidence it received that in the food and construction trades, over 81 and 75 per cent respectively of all 457 visas were granted to foreign nationals already in Australia at the time of the visa grant, many already working for their 457 sponsor on other temporary visas, particularly student visas and working holiday visas.

3.295 Given the potential for a 457 visa worker to be employed at no greater cost than employing a local worker, the committee considers it essential that the policy settings of the 457 visa program are calibrated so as to ensure that local workers still get the first opportunity to apply for jobs and that 457 visa holders are only employed in occupations subject to genuine skills shortages.

3.296 The committee notes evidence from the Australian Federation of Air Pilots and the Australian Maritime Officers Union that qualified pilots and seafarers respectively are unable to secure work because companies persist in employing 457 visa workers even where suitably qualified locals are willing and able to perform the jobs.

3.297 Conversely, the committee notes the Australian Institute of Marine and Power Engineers submitted that the majority of its members had been able to find work since the introduction of labour market testing.

3.298 The committee is also persuaded by unpublished data from the Department of Immigration and Border Protection that shows a much larger decline in 457 visa nominations by employers in occupations covered by labour market testing, compared to average monthly numbers in the occupations exempted from labour market testing.

3.299 The committee therefore considers labour market testing to be an essential aspect of the 457 visa program and that the current labour market testing provisions should be retained. In this regard, the committee notes that in its response to the Azarias review, the government resisted industry pleading to remove the labour market testing provisions in the current legislation.

3.300 Given the current high levels of unemployment and under-employment amongst Australian professionals, however, the committee is of the view that the labour market testing should be further strengthened. In particular, the current exemptions on labour market testing for ANZSCO skill levels 1 and 2 should be removed, and labour market testing should be required prior to all 457 visa nominations.

3.301 Further, the committee is of the view that labour market testing should apply to all positions for which a 457 visa holder is nominated under labour agreements and Designated Area Migration Agreements.

#### **Recommendation 7**

**3.302 The committee recommends that the replacement of local workers by 457 visa workers be specifically prohibited.**

#### **Recommendation 8**

**3.303 The committee recommends that the current exemptions on labour market testing for ANZSCO skill levels 1 and 2 be removed.**

#### **Recommendation 9**

**3.304 The committee recommends that the Migration Regulations be amended to specify that labour market testing applies to all positions nominated by approved sponsors under labour agreements and Designated Area Migration Agreements.**