CHAPTER 2

KEY ISSUES

2.1 The key issues raised in the submissions to the inquiry can broadly be categorised as:

- whether there is a need for labour market testing for the subclass 457 visa program; and
- the impact that labour market testing would have on employers using the subclass 457 visa program to hire workers where there is a shortage of skilled Australian workers.

Need for a labour market testing condition for subclass 457 visas

2.2 There was some support expressed for labour market testing for subclass 457 visas.[1] The Australian Council of Trade Unions (ACTU) argued:

> Without genuine labour market testing, no proper assessment can be made as to whether there are in fact genuine skill shortages that justify the employment of overseas labour in any given case. At present, all that employers are required to do to gain access to overseas workers under the 457 program is attest to the fact that they have a strong record of, or a demonstrated commitment to, employing local labour. There is no requirement for employers to actually do anything to employ local workers before they can access the 457 visa program. This is clearly inadequate, and only serves to undermine community confidence in the program.[2]

2.3 In a similar vein, Dr Joo-Cheong Tham of the Melbourne Law School at the University of Melbourne contended:

> If the central goal of the 457 visa scheme is to address skill shortages then it must have some regulatory mechanism to ensure that workers brought under the scheme meet actual shortages (and not simply the desires of sponsoring employers). A labour market testing requirement is a rather straightforward mechanism for this – it expressly requires sponsoring employers to demonstrate a labour shortage.[3]

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1 Australian Council of Trade Unions (ACTU), *Submission 15*, p. 2; Associate Professor Joo-Cheong Tham, *Submission 22*, p. 14; Australian Nursing Federation, *Submission 23*, p. 1.

2 *Submission 15*, p. 2. See also, Mr Tim Shipstone, ACTU, *Committee Hansard*, 21 June 2013, p. 1.

3 *Submission 22*, p. 14.

2.5 The Transport Workers' Union made a similar claim in relation to the need for clearer labour market testing:

> We have genuine concern that currently no labour market testing is required by employers to prove they have sought to fill the position with a local residents. At present, all that employers are required to do to gain access to overseas workers under the 457 program is attest to the fact that they have a strong record of, or a demonstrated commitment to, employing local labour.[4]

2.6 As did the Australian Workers' Union, arguing that:

> Temporary migration visas are issued due to a scarcity of supply that is alleged by an employer. It is only logical that such a lack of supply be proved through some form of evidence with the onus of proof falling upon the applicant, which in this case is the employer.[5]

2.7 However, other submissions opposed the introduction of labour market testing.[6] For example, the Business Council of Australia argued:

> The fundamental tenets of Australia's current approach – a government-determined list of eligible occupations coupled with a requirement to pay market salary rates – are effective in striking the right balance between filling skill shortages quickly and safeguarding job opportunities for Australian workers.[7]

2.8 At the public hearing, Mr Simon Pryor from the Business Council of Australia stated:

> [Business Council of Australia does] not see any evidence of systemic problems nor excessive growth, the two key arguments which the government makes for bringing this scheme in. On the contrary, official data reveals a scheme moderating along with the economy. Growth in visas is only 1.7 per cent higher this year than last year, a total of 940 additional visas. Again, the few cases that do come up where there might be problems should be dealt with by enforcement and not by onerous new rules for all.[8]

2.9 The Australian Mines and Metals Association (AMMA) contended that employers already face a 'high regulatory bar' to accessing skilled migrants and that the additional requirement of labour market testing was unnecessary:

> Before a position in a business can be filled with a temporary skilled migrant, the sponsor must certify that [the] position is suitably skilled and that the qualifications and experience of the visa holder are equivalent to

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4 Transport Workers' Union, Additional Information, 21 June 2013.

5 Australian Workers' Union, Additional Information, 21 June 2013.

6 See, for example, Migration Council of Australia, *Submission 4*, p. 3; Master Builders Australia, *Submission 7*, p. 2; Australian Industry Group, *Submission 12*, p. 2; Migration Institute of Australia, *Submission 20*, p. 3; Law Council of Australia, *Submission 24*, p. 2.

7 *Submission 14*, p. 3.

8 *Committee Hansard*, 21 June 2013, p. 7.

> what would be required of an Australian employed in that approved occupation. Market rates and conditions that would be paid to an Australian in the same job in the same workplace must also be provided.
>
> Sponsors incur additional costs for employing workers on 457 visas including application fees (recently [doubled] from $455 to $900), health insurance, language testing, flights to and from Australia, and agent fees for finding the worker. These additional costs make it typically $15,000 (though up to $60,000) more expensive to hire a skilled migrant than a local, in addition to the much lengthier process required. These in-built mechanisms render the onerous documentation and bureaucracy associated with [labour market testing] redundant.[9]

2.10 Submissions argued that the subclass 457 visa program does not provide employers with a 'low cost option' to avoid hiring Australian workers.[10] For example, the Business Council of Australia argued:

> It makes no sense to suggest employers would seek to use the 457 visa scheme to avoid hiring Australians because it is cheaper and faster to hire local labour when it is available. Employers already incur higher costs when employing a foreign worker compared to local workers. In making the decision that a skills shortage can only be met by hiring a 457 visa holder, business needs to factor in additional costs arising from:
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> - funding assistance to help with relocation and repatriation – these costs vary and are generally higher for professionals
> - on-costs associated with worker top-up training, providing health insurance cover, funding and/or subsidising visa and residency applications
> - program compliance costs, e.g. demonstrating payment at the market rate, demonstrating that training requirements are being met, monitoring and reporting obligations.[11]

2.11 However, Dr Tham questioned the extent to which the 457 visa program imposes higher costs on the engagement of 457 visa holders:

> [M]any 457 visa workers are recruited on-shore so there is no relocation costs for these workers and the recruitment costs for these workers will be comparable to those incurred for local workers. [I]t also fails to adequately account for the trajectory of many 457 visa workers who go on to become permanent residents. [I]t does not acknowledge at all the cost incentive of hiring some 457 visa workers. With local workers, there is structural wage inflation with local workers tending to seek wage increases commensurate to the increase in Australian living standards; such pressure is much less

9 *Submission 9*, p. 7.

10 See Australian Mines and Metals Association, *Submission 9*, p. 7.

11 *Submission 14*, p. 3.

> present with many 457 visa workers especially those from countries with lower living standards.[12]

Government and Department responses

2.12 In his Second Reading Speech, the Minister set out the purpose of the subclass 457 visa and outlined the government's concerns that the program was not working as intended:

> [The Bill] will require subclass 457 sponsors to undertake labour market testing in relation to a nominated occupation, in a manner consistent with Australia's relevant international trade obligations, to ensure that Australian citizens and permanent residents are given the first opportunity to apply for skilled vacancies in the domestic labour market.
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> ...
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> The use of the subclass 457 visa program has been growing strongly in recent years. The number of primary subclass 457 visa holders in Australia has risen from 68, 400 in June 2010 to 106, 680 as at 31 May 2013, an increase of 56 per cent.
>
> Many growing industries, including those connected with the resources boom, such as mining, as well as non-resource-sector users of the program, such as health care and information and communications technology, accounted for a large portion, over half, of all subclass 457 visa grants in 2011-12.
>
> However, strong growth has also been recorded in industries in which employment has fallen recently, such as accommodation and food service, and retail trade.
>
> It concerns the government that, at a time when the labour market has been flattening and some sectors and regions have experienced lay-offs and increased unemployment, the subclass 457 program has continued to grow.
>
> Coupled with this strong growth is a tendency for some employers to source foreign labour through the subclass 457 program without regard to the Australian domestic labour force.
>
> These trends highlight that current requirements do not commit sponsors to using the sub class 457 program as a supplement to, rather than a substitute for, the domestic labour force.
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> In the recently released report of the Migration Council Australia, survey data of subclass 457 employer sponsors revealed that 15 per cent of employers say that they have no difficulty finding suitable labour locally and yet they sponsor employees from overseas under this scheme.[13]

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12 *Submission 22*, pp 15-16.

13 The Hon Brendan O'Connor MP, Second Reading Speech, *House of Representatives Hansard*, 6 June 2013, p. 1.

2.13 In its submission, the Department of Immigration and Citizenship (Department) reiterated why labour market testing was being introduced:

> Labour market testing means testing the Australian labour market to demonstrate whether a suitably qualified and experienced Australian citizen or Australian permanent resident is readily available to fill the position.
>
> The purpose of the labour market testing element of the Bill is to ensure that the Subclass 457 visa is only used to meet genuine skill needs, and cannot be used by businesses that do not make genuine efforts to provide employment opportunities to Australian citizens and permanent residents.[14]

Impact of labour market testing

2.14 A number of submissions contended that the introduction of labour market testing would be contrary to the fundamental purpose of the 457 visa program, that is, to provide a fast, flexible solution to skilled labour shortages.[15] AMMA described the proposed changes as 'unworkable, impractical and [likely to] lead to a blowout in processing times and costs for 457 visas'.[16]

2.15 The submission from the ANU College of Law, Migration Law Program argued:

> [T]he provisions concerning Labour Market Testing create an added burden on genuine sponsors without improving the 457 visa process or filtering out any participants misusing the program…
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> [T]he introduction of Labour Market Testing condition will only add another layer of complexity, delay and administrative cost to the 457 visa scheme, without addressing the objective. These amendments are likely to deter employers from pursuing sponsorship altogether. The provisions effectively compel employers to spend more time and money on advertising even where that advertising will be ineffective.[17]

2.16 However, at the public hearing, Mr Tim Shipstone of the ACTU described this type of opposition to the Bill as 'completely overblown'.[18] Mr Shipstone explained:

> It is not clear exactly to us what the massive burden is in expecting that employers will first have made attempts to recruit suitably qualified and experienced workers and that they provide evidence of those recruitment efforts. If an employer is genuine about sourcing local workers first, it

14 *Submission 18*, p. 6.

15 See, for example, Australian Chamber of Commerce and Industry, *Submission 10*, p. 3; Business Council of Australia, *Submission 14*, p. 3.

16 *Submission 9*, p. 5.

17 *Submission 19*, p. 1.

18 *Committee Hansard*, 21 June 2013, p. 1.

> would be reasonable to assume that those recruitment efforts were happening already, as a matter of course.[19]

2.17 Submissions highlighted three specific aspects of the labour market testing condition that were problematic:

- the proposed six month time frame for labour market testing;
- the type of evidence required of labour market testing; and
- the skill and occupation exemption to labour market testing.

Time frame for labour market testing

2.18 Submissions criticised the period of six months that the Minister indicated in his Second Reading Speech would be the time frame within which labour market testing is required.[20] The ACTU argued that a period of six months for labour market testing is too long:

> [Six months] allows for too long a period to elapse in a dynamic labour market where conditions change. For example, labour market testing done in August 2008 before the [global financial crisis] hit could not have been considered relevant six months later in February 2009…
>
> [T]his period should be no more than 3 months, for all [labour market testing] evidence specified. A 457 visa nomination made in December 2013 should not be able to rely on the results of job advertising conducted in June 2013, because market conditions can change too rapidly.[21]

2.19 The Migration Institute of Australia suggested that a period of six months for labour market testing may disadvantage both employers and visa applicants:

> It is difficult to see how employers will be able to access skilled workers under the 457 programme in a timely manner, if they are required to carry out [labour market testing] over a period of six months. In many instances this may either disadvantage the employer because of the critical loss of time involved in carrying out the [labour market testing] and/or may disadvantage the visa applicant as they may lose the opportunity of being sponsored because adequate [labour market testing] had not been carried out previously by the proposed sponsor.[22]

Department response

2.20 In its submission, the Department confirmed that the proposed period to be specified for labour market testing is six months:

> The intention of the amendment is to provide a balance between giving Australian citizens and permanent residents an opportunity to apply for jobs

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19 *Committee Hansard*, 21 June 2013, pp 1-2.

20 See, for example, Business Council of Australia, *Submission 14*, p. 3; Australian Council of Trade Unions, *Submission 15*, p. 9.

21 *Submission 15*, p. 9.

22 *Submission 20*, p. 3.

> and ensuring that Australian businesses do not experience undue delays in filling skilled labour needs which would negatively impact on their businesses.[23]

Committee view

2.21 The committee is aware that there is some uncertainty about the six month time frame for labour market testing. Some of the evidence that the committee received showed that some stakeholders believed that they would have to wait six months after advertising a vacancy before they could apply to employ someone under a 457 visa. It is the committee's view that the intent of the Bill is to allow employers to apply to use a 457 visa within a six month period after advertising the initial vacancy. For example, a vacancy could be advertised in January, a recruitment process could be concluded some 4 weeks later, and then, if no suitable applicant had been found, an application could be made then to employ someone under the subclass 457 visa program.

2.22 Because of the above uncertainty, the committee urges the government to provide immediate clarification about the operation of the proposed six month time frame for labour market testing.

Evidence of labour market testing

2.23 Some submissions raised concerns in relation to some of the types of evidence that would satisfy the labour market testing conditions. For example, the ACTU argued that evidence of '[c]opies of, or references to, any research released in the previous six months relating to labour market trends generally and in relation to the nominated occupation' (proposed new paragraph 140GBA(5)(b)) was problematic:

> The concern with the provision in practice…is that this could amount simply to a report commissioned by a consultant that makes a general and untested case that skill shortages exist in the relevant occupations. It falls well short of evidence that the local labour market has been actively tested.[24]

2.24 AMMA argued that the provision to the Department of some of the evidence of labour market testing in proposed new subsection 140GBA(6) – such as details of fees and other expenses paid in the course of recruitment – may mean that employers face the possibility of breaching commercial-in-confidence and even privacy obligations.[25]

Department response

2.25 In relation to the evidence of recruitment processes in proposed new subsection 140GBA(6), the EM states:

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23 *Submission 18*, p. 7.

24 *Submission 15*, p. 10.

25 *Submission 9*, p. 7.

> The purpose of this amendment is to provide guidance on the kinds of evidence an approved sponsor may give about the attempts of the approved sponsor to recruit suitably qualified and experienced Australian citizens or Australian permanent residents to the nominated position (and any similar positions). However, this provision is not intended to preclude the approved sponsor from providing other kinds of evidence in this regard.
>
> It would be in the sponsor's own interest to provide authenticating detail about recruitment attempts and other relevant information with a nomination application. If insufficient detail is given, that could make the case for the nomination less persuasive.[26]

2.26 On the provision of evidence of recruitment processes, the Department's submission explained:

> In providing details of the result of recruitment attempts, sponsors can provide reasons, if having undertaken labour market testing in relation to the nominated position, and having received an application/s from suitably qualified Australian citizens or permanent residents, why the applicants for the position were not recruited.[27]

2.27 At the public hearing, an officer from the Department provided the following explanation as to what would be expected in relation to the evidentiary requirements:

> The way the bill is written at the moment obviously focuses primarily on what we would see as a normal recruitment method, which is that people advertise and consider whether or not the applicants are suitable for the positions. In the event that they are not, they would come to us with a nomination for a 457 worker. What the department would be seeking is the evidence of that activity occurring, which is something we do not do at the moment. While there is an attestation saying, 'We've looked locally,' it is not enforceable. This is the mechanism that the government has chosen to make that enforceable.
>
> The range of evidence proposed is also to recognise that we have everything from very large global companies to very small businesses seeking to use the process. Some use agents to do their recruitment for them; some recruit within their particular geographic area. The department is of the view that the measures proposed in the bill under proposed section 140GBA, subsection 5(a) to (d), give a degree of flexibility in what evidence the department would accept in considering whether a genuine attempt has been made to access Australian citizens and permanent residents from the labour market prior to looking overseas for a 457 worker.[28]

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26 EM, p. 9.

27 *Submission 18*, p. 7.

28 Mr David Wilden, Department of Immigration and Citizenship, *Committee Hansard*, 21 June 2013, p. 33.

Skill and occupation exemption

2.28 A number of submissions commented on the skill and occupation exemption in proposed new section 140GBC (item 2 of Schedule 2).[29] For example, AMMA contended:

> Section 140GBC of the bill provides for the Minister, by way of legislative instrument, to make exemptions from the [labour market testing] requirement for certain occupations within Skill Levels 1 and 2.
>
> Managers, Professionals and certain Technicians are Skill level 1 and 2 occupations, while Trades occupations are generally Skill level 3. Given that trade and technical roles are estimated to comprise 40% of all 457 visa applications – and they remain in acute shortages – AMMA is particularly disappointed that the government has not explained why it is targeting these occupations.[30]

2.29 The Australian Chamber of Commerce and Industry (ACCI) expressed concern at the proposal to allow the Minister, by way of legislative instrument, to exempt occupations from the labour market testing condition, without the requirement for consultation with industry:

> ACCI believes that this would create uncertainty and confusion amongst employers as the list for exempt occupations could become a fluid listing, prone to frequent change and not adequately communicated to employers.[31]

2.30 The ACTU argued that all occupations should be subject to labour market testing and proposed new section 140GBC should be removed from the Bill altogether. However, if the exemption was to remain, the ACTU recommended '[a]t the very least…unions and other stakeholders [should] be consulted before any decisions are made on such exemptions'.[32]

Department response

2.31 The EM provides the following rationale for the skill and occupation exemption:

> Reforms to the Subclass 457 Visa Program are designed to address areas of greatest risk. Growth in use of the Subclass 457 Visa Program and evidence of inappropriate use is concentrated in lower skill level and lower paid occupations.
>
> [Proposed n]ew section 140GBC recognises that most occupations classified as Skill Level 1 or Skill Level 2 in ANZSCO are generally considered to be low risk, and accordingly, allows the Minister to exempt

29 See, for example, Consult Australia, *Submission 6*, p. 2; Fragomen, *Submission 16*, p. 3.

30 *Submission 9*, p. 6. See also, Australian Chamber of Commerce and Industry, *Submission 10*, p. 3.

31 *Submission 10*, pp 3-4.

32 *Submission 15*, p. 11.

certain approved sponsors from the requirement to undertake labour market testing on the basis of the skill level required for the nominated occupation.

The legislative instrument mechanism provides the Minister with the flexibility to specify different occupations within the 'Skill Level 1' and 'Skill Level 2' classification in ANZSCO to be exempt from labour market testing. This would allow the Minister to make a legislative instrument to exempt most, but not all, Skill Level 1 occupations and certain Skill Level 2 occupations.[33]

Committee view

2.32 The committee agrees with the many submissions which emphasised the important role that the subclass 457 visa program has to play in enabling employers to address skilled labour shortages where appropriately qualified Australian workers are not available.[34]

2.33 Given that the 457 visa program is intended as a means of complementing the local labour force, and not as a means of supplementing this workforce, it would seem a central element of the scheme that it only be used in cases where there is, in fact, a demonstrated genuine labour shortage which is unable to be filled by Australian workers. The Australian Government has identified trends in the subclass 457 visa program which call into question whether the scheme is effectively achieving this.[35]

2.34 While the committee acknowledges that there was significant opposition to the introduction of a labour market testing condition for the subclass 457 visa program, in the committee's view, the proposals in the Bill ensure that the subclass 457 visa program provides a balance between ensuring job opportunities for Australian workers and enabling employers to fill skilled positions.

2.35 The committee understands that many submissions to the inquiry were critical of the lack of a Regulation Impact Statement in relation to the amendments proposed in Schedule 2.[36] However, the committee notes that, on the basis of exceptional circumstances, an exception has been granted to the requirement for a Regulation Impact Statement for this schedule of the Bill. Instead, a post-implementation review will be required within one to two years of the Bill's implementation.[37]

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33 EM, pp 12-13.

34 See, for example, Australian Industry Group, *Submission 12*, p. 1; Migration Program, Legal Workshop Program, ANU College of Law, *Submission 19*, p. 1.

35 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, Second Reading Speech, *House of Representatives Hansard*, 6 June 2013, p. 1. See also Department of Immigration and Citizenship, *Submission 18*, pp 4-5.

36 See, for example, Australian Mines and Metals Association, *Submission 9*, p. 3; Australian Chamber of Commerce and Industry, *Submission 10*, p. 2; Australian Industry Group, *Submission 12*, p. 2; Restaurant and Catering Industry Australia, *Submission 13*, p. 2; Migration Institute of Australia, *Submission 20*, p. 1.

37 EM, p. 2.

2.1 The committee appreciates that some submissions expressed reservations about a number of specific provisions of the Bill. The committee believes that the post-implementation review would be the best forum in which to assess the operation of the changes in the Bill and address any issues.

2.36 Accordingly, the committee supports the passage of the Bill.

Recommendation 1

2.37 The committee recommends that the bill be passed.

Senator Trish Crossin

Chair