The Senate

Legal and Constitutional Affairs Legislation Committee

Migration Amendment (Temporary Sponsored Visas) Bill 2013 [Provisions]

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2.37 The committee recommends that the bill be passed.

CHAPTER 1
INTRODUCTION

1.1 On 6 June 2013, the Migration Amendment (Temporary Sponsored Visas) Bill 2013 (Bill) was introduced by the Minister for Immigration and Citizenship, the Hon Brendan O'Connor MP (Minister).[1] On 18 June 2013, the Senate referred the provisions of the Bill to the Senate Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 20 August 2013.[2] In order to assist the parliament's timely consideration of the Bill, the committee decided to present its report on 24 June 2013.

Purpose of the Bill

1.2 According to the Explanatory Memorandum (EM), the Bill seeks to:

> [Amend] the *Migration Act 1958* (the Migration Act) to enhance the Government's ability to deter sponsor behaviour which is inconsistent with the policy intent of the Temporary Sponsored Visa Program (of which Subclass 457 visas are a part). The Bill, together with proposed amendments to the *Migration Regulations 1994* (the Migration Regulations), presents a comprehensive package of reform which would balance the interests of Australian workers with the need to strengthen protections for overseas workers.[3]

1.3 In his Second Reading Speech, the Minister set out the government's concerns regarding the current operation of the subclass 457 visa protection scheme:

> [T]he subclass 457 visa plays an important role in allowing employers to address skill shortages when skilled local labour is unavailable. It is intended as a vehicle to allow employers to quickly supplement the Australian labour market, including the use of enterprise migration agreements and regional migration agreements, where a genuine skill shortage exists…
>
> The use of the subclass 457 visa program has been growing strongly in recent years…
>
> 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.

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1 *Votes and Proceedings*, No. 171, 6 June 2013, p. 2383.

2 *Journals of the Senate*, No. 148, 18 June 2013, pp 4048-4050.

3 Explanatory Memorandum (EM), p. 1.

> 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 subclass 457 program as a supplement to, rather than a substitute for, the domestic labour force.[4]

Overview of the Bill

1.4 The Bill has six schedules. According to the EM, the Bill would amend the Migration Act to:

- reinforce the purpose of Division 3A of Part 2 of the Migration Act relating to sponsorship;[5]
- require prescribed classes of sponsors to undertake labour market testing in relation to a nominated occupation, in a manner consistent with Australia's international trade obligations;
- provide the evidence for labour market testing which is to accompany an application for a nomination;
- provide exemptions from labour market testing in circumstances where there has been a major disaster, or the skill level of the nominated occupation is equivalent to Skill level 1 or Skill Level 2 as provided for in the Australian and New Zealand Standard Classification of Occupations (ANZSCO);
- in relation to exemptions from labour market testing, provision for the Minister, by way of legislative instrument, to specify the occupations and for such legislative instruments to be subject to disallowance by either House of the Parliament;
- enshrine the kinds of sponsorship obligations for which the Minister must take reasonable steps to ensure are prescribed in the Migration Regulations;
- enhance the enforcement framework in relation to sponsorship to include enforceable undertakings between the Minister and an approved sponsor or former approved sponsor and the enforcement of those undertakings;
- empower Fair Work Inspectors to be inspectors under the Migration Act;

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4 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, Second Reading Speech, *House of Representatives Hansard*, 6 June 2013, p. 1.

5 Proposed new section 140AA (item 1 of Schedule 1) sets out broad principles to reinforce the importance of temporary skilled workers to the Australian economy while protecting Australian businesses and the employment and training of Australian citizens and Australian permanent residents. See: EM, p. 5.

- clarify that entry to premises under the *Fair Work Act 2009* will enable a Fair Work Inspector to exercise powers under the Migration Act; and
- provide that an additional purpose for exercising inspector powers under the Migration Act is to determine whether a person who is or was an approved sponsor has contravened a civil penalty provision in or committed an offence against relevant provisions of the Migration Act relating to work (employer sanctions provisions).[6]

1.5 The majority of submissions were concerned with the provisions in relation to labour market testing conditions, which are set out in Schedule 2.

Labour market testing (Schedule 2)

1.6 In his Second Reading Speech, the Minister noted that the government 'will seek assurance from employers that they are only utilising the 457 visa program in circumstances where there is a genuine skills shortage in Australia'.[7] To enable this outcome, Schedule 2 of the Bill introduces a requirement that sponsors must undertake labour market testing in relation to nominated occupations in a manner consistent with Australia's relevant international trade obligations (item 2 of Schedule 2, proposed new subsection 140GBA(1)).

1.7 The labour market testing conditions are satisfied if:

- the Minister is satisfied that the sponsor has undertaken labour market testing in relation to the nominated position within a period determined by the Minister, by legislative instrument, in relation to the nominated occupation;[8] and
- the nomination is accompanied by evidence in relation to that labour market testing; and
- having regard to that evidence, the Minister is satisfied that a suitably qualified and experienced Australian citizen or Australian permanent resident is not readily available to fill the nominated position.[9]

1.8 In relation to the period of labour market testing required, the Minister stated:

> It is proposed that the labour market testing requirement will initially require a sponsor to demonstrate that they have sought to find a suitably qualified Australian citizen or Australian permanent resident within six months prior to submission of an application for nomination approval.[10]

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6 EM, p. 1.

7 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, Second Reading Speech, *House of Representatives Hansard*, 6 June 2013, p. 3.

8 Proposed new subsection 140GBA(4) deals with the Minister's determination by legislative instrument.

9 Proposed new subsection 140GBA(3).

10 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, Second Reading Speech, *House of Representatives Hansard*, 6 June 2013, p. 3.

1.9 The evidence of labour market testing to accompany the nomination must include one or more of the following:

- information about the approved sponsor's attempts to recruit suitably qualified and experienced Australian citizens or Australian permanent residents to the position and any other similar positions;[11]
- copies 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;
- expressions of support from Commonwealth, State or Territory government authorities with responsibility for employment matters; or
- any other type of evidence determined by the Minister, by legislative instrument.[12]

1.10 The Bill contains two exemptions to the requirement for labour market testing, namely:

- a major disaster exemption (proposed new section 140GBB, item 2 of Schedule 2); and
- a skill and occupation exemption (proposed new section 140GBC, item 2 of Schedule 2).

1.11 The skill and occupation exemption provides that a sponsor is exempt from the requirement to satisfy the labour market testing condition in proposed new section 140GBA if:

- either or both of the following are required for the nominated position, in relation to the nominated occupation: a relevant bachelor degree or higher qualification, or five years or more of relevant experience; and the Minister, by way of legislative instrument, has specified that the nominated occupation is exempt (proposed new subsection 140GBC(2), item 2 of Schedule 2);[13] or
- either or both of the following are required for the nominated position, in relation to the nominated occupation: a relevant associate degree, advanced diploma or diploma covered by the Australian Qualifications Framework, or three years or more of relevant experience; and the Minister, by way of

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11 This information may include (but is not limited to): details of any advertising (paid or unpaid) of the position, and any similar positions, commissioned or authorised by the sponsor; information about the approved sponsor's participation in relevant job and career expositions; details of fees and other expenses paid (or payable) for any recruitment; or details of the results of such recruitment attempts, including details of any positions filled as a result (proposed new subsection 140GBA(6)).

12 Proposed new subsection 140GBA(5).

13 Proposed new subsection 140GBC(4) provides for the Minister, by way of legislative instrument, to specify an occupation for the purposes of proposed new subsections 140GBC(2) and (3).

legislative instrument, has specified that the nominated occupation is exempt (proposed new paragraph 140GBC(3), item 2 of Schedule 2).

Conduct of the inquiry

1.12 Details of the inquiry, including links to the Bill and associated documents, were placed on the committee's website at www.aph.gov.au/senate_legalcon. The committee also wrote to over 80 organisations and individuals, inviting submissions by 20 June 2013. Submissions continued to be accepted after that date.

1.13 The committee received 24 submissions, which are listed at Appendix 1. All public submissions were published on the committee's website.

1.14 The committee held a public hearing on 21 June 2013 at Parliament House in Canberra. A list of witnesses who appeared at the hearing is at Appendix 2, and the *Hansard* transcript is available through the committee's website.

Acknowledgement

1.15 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.16 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

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:
>
> - 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.
>
> ...
>
> 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.
>
> 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…
>
> [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

DISSENTING REPORT BY COALITION SENATORS

The Migration Amendment (Temporary Sponsored Visas) Bill 2013

1.1 The Explanatory Memorandum for The Migration Amendment (Temporary Sponsored Visas) Bill 2013 **(Bill)** states that the Bill amends the *Migration Act 1958* to enhance the Government's ability to deter sponsor behaviour which is inconsistent with the policy intent of the Temporary Sponsored Visa Program (of which Subclass 457 visas are a part).

1.2 The key issues in relation to the Bill raised in the submissions to the Inquiry were in relation to:

(a) whether there is a need for labour market testing for the subclass 457 visa program; and

(b) the impact that labour market testing would have on employers using the subclass 457 visa program.

1.3 In drafting this report Coalition Senators have drawn on and referred to the information provided in their dissenting report to the Legal and Constitutional Affairs References Committee Inquiry into the *Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements* **(457 Inquiry)** which is being tabled in conjunction with this Report.

Overview of the 457 visa program

1.4 Coalition Senators believe that Australian workers should, as a priority, be adequately resourced to enable them to be up-skilled and empowered, to gain meaningful employment.

1.5 Australian businesses overwhelmingly prefer to hire Australian workers in preference to overseas workers on the basis that it is more economical and less complicated to fill skill requirements from the local workforce.

1.6 There is a shared consensus across business and the community that Australia's skilled and semi-skilled migration program should only be utilised to supplement our domestic workforce where necessary.

1.7 Coalition Senators do not consider that an effectively managed temporary labour migration program will threaten Australian jobs. Rather, it is an important tool to secure the future of businesses and grow employment opportunities to enable business to employ more Australians.

1.8 The Australian skilled and semi-skilled migration program should be sufficiently robust to ensure that the employment opportunities of Australians must always be protected, whilst recognising that an appropriate and sustainable human capital strategy for Australia must be readily available to safeguard business from labour and skills shortages.

1.9 The 457 visa is the dominant component of Australia's temporary skilled migration program. It is designed to provide a prompt response to fluctuations in demand for skilled and semi-skilled workers where such demand cannot be met by the Australian workforce.

1.10 An effective policy for temporary skilled migration is vital to the efficient operation of the labour market and has the capacity to deliver significant economic benefits at a national and regional level.

1.11 Foreign workers on 457 visas account for approximately one percent of Australia's labour force,[1] and account for approximately 2% of our skilled workforce.

1.12 At these low levels it is both unrealistic and naive to suggest that the 457 skilled migration program is flooding the national labour market with foreign workers.

1.13 There is significant evidence to show that 457 visa holders make a positive economic contribution to the economy through the payment of personal taxes and the spending of wages, whilst in Australia.[2] It is also relevant to acknowledge that 457 visa holders are required to pay for health care insurance and are not entitled to access government welfare programs.

1.14 Australia faces an increasing labour shortage and responding to this labour challenge in a positive manner is a key productivity issue for Australia that cannot be ignored.

1.15 The ongoing demand for labour and skills and the challenges they present cannot be underestimated by Government and failure to effectively respond to identified labour shortages will negatively impact on the national economy.

1.16 The failure of the Labor Government to develop appropriate human capital strategies is all the more alarming against the background of numerous projects across the nation which could be jeopardised by labour shortages.

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1 Department of Immigration and Citizenship, *Subclass 457 State/Territory Report: 2012-13 to 30 April 2013*, p. 1.

2 Australian Mines and Metals Association, Submission to the Senate Legal and Constitutional Affairs References Inquiry, *Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements* (457 Inquiry), *Submission 22*, p. 10.

1.17 Included in this pipeline are projects to the value of (approximately):

- Western Australia: $293.9 Billion worth of projects;
- Queensland: $199.1 Billion worth of projects;
- New South Wales: $84.6 Billion worth of projects;
- Victoria and Tasmania: $57.6 Billion worth of projects;
- South Australia: $50.1 Billion worth of projects; and
- Northern Territory: $43.5 Billion worth of projects.[3]

1.18 Currently across Australia there are approximately 259 approved projects with a value of $446.4 Billion, while a pipeline of 163 less advanced projects will potentially deliver a further $282.4 billion of investment.[4]

1.19 The National Resources Sector Employment Taskforce has predicted there could be a shortage of approximately 36,000 skilled tradespeople in the resources sector of by 2015. [5]

1.20 Effectively addressing labour shortages through skilled and semi-skilled migration programs is not a new phenomenon in Australia.

1.21 The Howard Government's record of strong economic management was supported by sound policies designed to provide flexibility for Australia's migration intake and to serve the national interest. These policies included options to assist business to address skills shortages.

1.22 The Howard Government oversaw an increase in the proportion of skilled migration in Australia's permanent migration program, from around 30 per cent when it assumed office in 1996 to almost 70 per cent when it left office in 2007. The introduction by the Howard Government of the 457 temporary skilled visa program ensured greater responsiveness and flexibility in responding to fluctuating labour demands.

1.23 In contrast to the Howard Government policies which successfully addressed labour shortages through skilled and semi-skilled migration programs, the current Labor Government has burdened the 457 visa program with unnecessary red tape and has effectively locked many regional areas out of the program. As a result of the mismanagement of the 457 visa program, business has been frustrated and inconvenienced in its attempts to address labour shortages.

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3 Pit Crew Consulting, Labour Market Report, January 2013.

4 Pit Crew Consulting, Labour Market Report, January 2013.

5 Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education website, 'Resourcing the future: National Resources Sector Employment Taskforce report', July 2010, http://www.innovation.gov.au/Skills/National/Documents/FinalReport.pdf (accessed 17 June 2013).

1.24 To accommodate Australia's growing requirements for skilled labour it is critical for the Government to recognise the need to implement sound policies that can assist in immediately addressing the labour shortages that business and industry are experiencing, in particular by making the present 457 visa program more efficient and user friendly, not by increasing more red tape and regulation.

1.25 The former Rudd Government and the current Gillard Government, in responding to union objections to the current 457 visa program, have diminished the effectiveness, reliability and integrity of Australia's skilled and semi-skilled migration program.

Lack of Consultation in relation to the Bill

1.26 Coalition Senators have grave concerns in relation to the lack of consultation on the impact of the Bill and the abuse and complete disregard by the Government of due process in relation to Senate Committee Inquiry process.

1.27 On 18 June 2013, the Senate referred the Bill to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report.

1.28 Submissions to the Inquiry closed at midday on 20 June 2013.

1.29 The lack of adequate time for submitters to properly consider the bill and its potential impact and to provide considered comment was reflected in the submission to the Inquiry from Padma Raman, Executive Director of the Australian Human Rights Commission.

1.30 The submission stated:

> Dear [Committee Secretary]
>
> I refer to your invitation, by email at 7:56 pm yesterday Tuesday 18 June, for this Commission to make a submission to the Committee's Inquiry into the Migration Amendment (Temporary Sponsored Visas) Bill 2013, with submissions being requested by 12 pm tomorrow 20 June 2013.
>
> I note that the Senate referred this matter for inquiry on 18 June and that the Committee is required to report by 25 June.
>
> I must advise that the Commission is quite unable to make a submission on the substance of the Bill within this timeframe. I request, however, that you publish this email as the Commission's submission to the Inquiry.
>
> The Commission wishes to state for the information of the Parliament, and for the public record, that an inquiry process which is so truncated as not to provide a realistic opportunity for public participation is not consistent with the requirements of Article 25 of the International Covenant on Civil and Political Rights.
>
> Regards
>
> Padma Raman
> Executive Director, Australian Human Rights Commission[6]

6 *Submission 3*, p. 1.

1.31 The Law Council in its submission questioned why the Government was rushing the proposed changes through the Parliament without adequate consultation:

> The Law Council opposes the Bill because it has been introduced hastily without adequate consultation with stakeholders and whilst the Senate's Legal and Constitutional Affairs Reference Committee is yet to deliver its findings on its May 2013 Inquiry into subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements.
>
> The Government appears to be rushing proposed changes through the last Parliamentary session before the September 2013 election without due consideration to the views of stakeholders.[7]

1.32 Coalition Senators note that the Explanatory Memorandum to the Bill states that consultation has taken place with various Commonwealth agencies including the Attorney-General's Department, the Department of Foreign Affairs and Trade, the Department of Education, Employment and Workplace Relations, the Fair Work Ombudsman, the Department of the Prime Minister and Cabinet, the Department of Treasury, the Department of Resources, Energy and Tourism, the Department of Finance and Deregulation, and the Office of Best Practice Regulation.

1.33 Coalition Senators also note however, the failure by the Government to consult with business, industry or any other private interests in relation to the impact of this Bill.

1.34 The Government's failure to properly consult is made all the more serious by the fact that the Explanatory Memorandum states that "the financial impact of these amendments is medium".

1.35 Minister O'Connor is not in an informed position to assert the impact of the financial impact of the Bill as consultation in relation to these financial impacts has not taken place.

1.36 Minister O'Connor's assertions on the financial impact of the Bill are no more than political rhetoric.

Deliberate campaign to undermine 457 visa program

1.37 Over recent months, the Government and elements within the union movement have run an aggressive media campaign claiming abuse in the 457 visa program and have resorted to making statements aimed at demonising both 457 visa holders and their employers.

1.38 Minister O'Connor claimed on 28 April 2013 that there have been in excess of 10,000 cases of abuse in the 457 program. As a result of these alleged rorts Minister O'Connor committed the Government to introduce legislation to crack down on the use of 457 visas.

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7 *Submission 24*, p. 2.

1.39 Coalition Senators note that Minister O'Connor's claim of 10,000 cases of abuse in the 457 program equated to approximately 9 per cent of the total number of principal visa holders in Australia at 30 April 2013 being 108,810.[8]

1.40 In scrutinising the obvious exaggeration and unbelievability of Minister O'Connor's claim of 10,000 cases of abuse in the 457 program, the Coalition repeatedly called on Minister O'Connor and the Government to produce evidence to substantiate these claims.

1.41 Coalition Senators are unsurprised that Minister O'Connor has failed to produce any evidence.

1.42 In attempting to justify his exaggerated comments alleging abuse of the 457 visa program, Minister O'Connor referred in the House of Representatives, in March 2013, to a Department document which focussed on strengthening the integrity of the 457 visa program, provided to his Ministerial Advisory Council on Skilled Migration early this year.

1.43 The Coalition Shadow Minister, Mr Scott Morrison MP, subsequently obtained a copy of this document under Freedom of Information and challenged Minister O Connor on the veracity of his original allegations.

1.44 Contrary to Minister O Connor's false claims, the document did not suggest any widespread rorting or concerns with the program.[9]

1.45 Following the Shadow Minister's challenge to produce factual evidence that there have been in excess of 10,000 cases of abuse in the 457 program, Minister O'Connor subsequently admitted that he had made this number up and that his allegations were not based on any authoritative statistics or other probative evidence.[10]

1.46 Coalition Senators conclude that Minister O'Connor therefore misled the Australian people with his self-serving false comments.

1.47 Coalition Senators note that the concerted negative campaign by Minister O'Connor and a number of unions alleging abuse in the use of 457 visas was strongly criticised by industry groups, labour market experts and the Migration Council of Australia (MCA).

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8 Department of Immigration and Citizenship, *Subclass 457 State/Territory summary report 2012-13 to 30 April 2013*, p. 2.

9 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012.

10 ABC Radio, *AM*, Interview with Alexandra Kirk, Friday 3 May 2013.

1.48 In May 2013, the MCA released a landmark report on the 457 visa program, including analysis based on a survey of 3800 visa holders and 1600 businesses. It found that only two per cent of foreign workers were being underpaid.[11]

1.49 As stated by Ms Carla Wilshire, Chief Executive Officer, MCA:

> …the findings show that the 457 visa program is critical in keeping Australia competitive in an era when industry is global and 98 per cent of innovation happens outside of Australia'.[12]

1.50 In its submission to the 457 Inquiry, the Australian Industry Group referred to the fact that no evidence has been presented which points to widespread or systemic abuse of the 457 visa program:

> The current debate over the program has unfairly focused on the relatively few employers who do not meet their obligations. In our view, those employers should face whatever sanctions are available. However, no evidence has been presented which points to widespread or systemic abuse and we strongly object to the tone of the public debate which has had the effect of vilifying both employers and those who themselves hold 457 visas.[13]

1.51 The BCA submission to the 457 Inquiry noted the harm that was being done to the 457 visa program as a result of the Government's unsubstantiated claims:

> The unsubstantiated claims by the government of excessive growth and widespread rorting in the temporary skilled migrant 457 visa scheme are harming our international reputation and risk undermining a program that is vital for the economy. The facts are that there are 105,000 primary 457 visa holders performing critical roles in Australia, which is less than one per cent of the workforce, and that number fell in March as visa grants declined. [14]

1.52 BCA also called on the Government to provide its evidence of systemic rorting.[15]

1.53 The BCA also stated:

> The government's changes to the 457 visa scheme announced in February were said to be in response to excessive use and so-called rorting, but with little justification presented. Individual visa holders or employers not complying with the legislation should be dealt with directly. Ad hoc

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11 Migration Council of Australia, 'More than temporary: Australia's 457 visa program', additional information received 14 May 2013.

12 Migration Council of Australia website, '457 visa program is more than temporary', press release, 14 May 2013.

13 Australian Industry Group, Submission to the 457 Inquiry, *Submission 16*, p. 1.

14 Business Council of Australia, Submission to the 457 Inquiry, *Submission 18*, p. 2.

15 Business Council of Australia, Submission to the 457 Inquiry, *Submission 18*, p. 2.

changes to the rules only add cost, undermine business confidence and slow business activity.[16]

1.54 The ACCI submission to the 457 Inquiry stated:

> Given the importance of skilled migration, ACCI has become increasingly alarmed at recent policy announcements and public commentary around important elements of migration. Worthy programs such as 457 visas, EMAs and RMAs have, in recent months, become subjected to a series of unsubstantiated claims of widespread rorting and have been used to invoke parochial and even racist sentiment with claims of foreign workers 'stealing' jobs from unemployed Australians. ACCI feels that a careful, considered approach, based on clear and substantiated evidence, is needed to ensure that we maintain the value and integrity of the schemes and don't further harm our reputation overseas as a good destination to do business, work or learn.[17]

1.55 The Australian Mines and Metals Association submission to the 457 Inquiry stated:

> …the recent demonisation of 457 visa workers is extremely damaging. AMMA is particularly concerned at the politically charged context in which the government announced further changes to the system for 457 visas, and the lack of essential consultation with industry as a critical interest in the effective operation of both short term and ongoing skilled labour migration.
>
> a. The depiction of skilled migrants as foreigners that need to be 'put at the back of the queue', and that Australians are being 'discriminated against', is base rhetoric that borders dog-whistling and invites allegations of industrial xenophobia.
>
> b. These emotive claims also ignore the reality that current rules require labour to first be sourced from the local workforce.[18]

1.56 The Ernst & Young submission noted:

> Recent sensational media reports about the subclass 457 visa program are unhelpful to a rational public dialogue and discussion about the appropriateness of Australia's skilled migration program. The program is important to the needs of business to fill temporary vacancies with skilled foreign workers. Records published by the Department of Immigration and Citizenship indicate that there are rare and isolated instances of concern in the program. It is essential that the current sanctions regime deal with inappropriate use of the program.[19]

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16 Business Council of Australia, Submission to the 457 Inquiry, *Submission 18*, p. 3.

17 Australian Chamber of Commerce and Industry, Submission to the 457 Inquiry, *Submission 21*, p. 4.

18 Australian Mines and Metals Association, Submission to the 457 Inquiry, *Submission 22*, pp 1-2.

19 Ernst & Young, Submission to the 457 Inquiry, *Submission 39*, p. 1.

1.57 The Migration Institute of Australia, in its oral evidence at the 457 Inquiry, confirmed that the actual statistics did not support Minister O'Connor's false claims:

> **Senator CASH:** Ms Chan, you would be aware that the minister, Mr O'Connor, claimed that there were at least 10,000 rorts occurring in the 457 visa system, which was then proven to be a 'guesstimate'. Mr Sheldon of the TWU this morning threw a rounder figure of 100,000 breaches of human rights in relation to the 457 visa program. Given that you do represent almost half of the migration industry, what is your experience in relation to the allegations of rorting within the 457 visa program? And if there are rorts, are they dealt with by way of a legislative basis?
>
> **Ms Chan:** We would only have the information that is provided through DIAC, and the statistics do not support either a 10,000 rort or a 100,000 rort.[20]

1.58 Perhaps the most damning evidence in relation to Minister O'Connor's false claims of widespread rorting was provided by his own Department at the public hearing of the 457 Inquiry.

1.59 The Department confirmed under questioning from Senator Cash that it did not provide Minister O'Connor with any advice that would form the basis of his false claims:

> **Dr Southern:** We certainly did not provide advice around a number of 10,000.[21]

Claims of rorting by the CFMEU and the TWU

1.60 Evidence given by the Construction, Forestry, Energy and Mining Union (CFMEU) in its submission to the 457 Inquiry was to the effect that there were fundamental abuses or rorts of the 457 visa program:

> The fundamental abuse or rort of the 457 visa program is when the Australian government authorises an employer to employ a foreign national on a 457 visa when a qualified Australian citizen or permanent resident is available and willing to do the work.[22]

1.61 The CFMEU submission went onto state that the union would 'provide to the Committee, on a confidential basis and upon request, numerous examples of the exploitation of 457 visa workers'.[23]

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20 Senate Legal and Constitutional Affairs References Committee, 457 Inquiry, *Committee Hansard*, 23 May 2013, p. 24.

21 Senate Legal and Constitutional Affairs References Committee, 457 Inquiry, *Committee Hansard*, 23 May 2013, p. 67.

22 Construction, Forestry, Energy and Mining Union, Submission to the 457 Inquiry, *Submission 41*, p. 8.

23 Construction, Forestry, Energy and Mining Union, Submission to the 457 Inquiry, *Submission 41*, p. 8.

1.62 Coalition Senators note that the evidence provided by the CFMEU on a confidential basis to the 457 Inquiry referred to 6 cases of alleged rorting. This is hardly sufficient to justify intemperate claims of fundamental rorts and abuses.

1.63 At the public hearing for the 457 Inquiry, Mr Tony Sheldon of the Transport Workers' Union of Australia (TWU) stated that he believed there were more than 100,000 people on 457 visas having their human rights exploited:

> **Mr Sheldon:** And you would look at the question Senator Cash rightly asked, as you are asking: is there exploitation of people on 457 visas beyond those two months? When you are talking about having a human right taken from you whereby you can be deported from the country, I would argue that the entire 100,000 plus are human rights exploited…[24]

1.64 Coalition Senators note that the total number of principal visa holders in Australia at 30 April 2013 was estimated by DIAC to be 108,810.[25]

1.65 When asked by Senator Cash how many allegations of cases of exploitation or rorting had been reported to the TWU, Mr Sheldon's evidence was that there were only 24 such cases:

> **Senator CASH:** In your oral evidence today you did use the word 'exploiting' in relation to 457 visas. How many allegations or cases of either exploitation or rorting have been reported to the TWU?
>
> **Mr Sheldon:** It is 24.[26]

1.66 The evidence of Mr Sheldon regarding his intemperate claims of exploitation of people on 457 visas appears to be similar to the exaggerated and factually inaccurate claims made by Minister O'Connor and the CFMEU.

Office of the Prime Minister – Mr John McTernan

1.67 Coalition Senators have serious concerns with an article that appeared in the Australian newspaper on 22 June 2013 under the banner headline "*PM's office breeches FoI rules for spin doctor John McTernan*".

1.68 The article by the Australian's National Chief Correspondent, Hedley Thomas, states that the Prime Minister's office is "flouting Freedom of Information rules and is refusing to hand over documents relating to the hiring of her communications director John McTernan, a Scotsman on a 457 visa for foreign workers".

1.69 The article indicates that the Office of the Information Commissioner told the Weekend Australian that it had formally rejected the Office of the Prime Minister's

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24 Senate Legal and Constitutional Affairs References Committee, 457 Inquiry, *Committee Hansard*, 23 May 2013, p. 11.

25 Department of Immigration and Citizenship, *Subclass 457 State/Territory summary report 2012-13 to 30 April 2013*, p. 2.

26 Senate Legal and Constitutional Affairs References Committee, 457 Inquiry, *Committee Hansard*, 23 May 2013, p. 9.

request for more time to process the documents. Ms Gillard's office has already been granted two extensions totalling 40 days.

1.70 The article reveals that the Weekend Australia in early April 2013, sought all documents relating to the hiring of Mr McTernan in 2011 as chief spin doctor for the Prime Minister. Other documents sought relate to the efforts, if any, taken to identify a suitable person in Australia for the role, such as advertising, the engagement of recruitment agencies of direct contact with media outlets and highly qualified local journalists.

1.71 Coalition Senators are of the opinion that:

(a) given the stated reasons for this Bill being to enhance the Government's ability to deter sponsor behaviour which is inconsistent with the policy intent of the Temporary Sponsored Visa Program; and

(b) the false claims by Minister O'Connor, the largely unsubstantiated claims of the CFMEU and the TWU of widespread rorting,

the Prime Minister should immediately and without further delay authorise the release of all documents relating to the appointment of her chief spin doctor, Mr John McTernan.

1.72 Coalition Senators are of the opinion that if the Prime Minister fails to do this, coupled with her office's failure to comply with the Freedom of Information request, the conclusion that would most reasonably follow such a failure to disclose the requested information, is that the Prime Minister is culpable in attempting to deliberately cover up, to quote Minister O'Connor, "a case of abuse" within her own office in relation to the 457 visa program.

Coalition Senators' conclusions on allegations of rorting the 457 visa program

1.73 The lack of authoritative statistical or substantive evidence provided by Minister O'Connor, the CFMEU and the TWU in their spurious claims of widespread rorting of the 457 visa program, is not consistent with the records published by the Department, which indicate that such incidents are rare and isolated within the 457 visa program.

1.74 Following the Shadow Minister's challenge to produce factual evidence that there have been in excess of 10,000 cases of abuse in the 457 program, Minister O'Connor has subsequently admitted that he had made this number up and that his allegations were not based on any authoritative statistics or other probative evidence.[27]

27 ABC Radio, *AM*, Interview with Alexandra Kirk, Friday 3 May 2013.

1.75 Based on:

(a) the evidence of a lack of rorts in the 457 program provided to the 457 Inquiry,

(b) the fact that Minister O'Connor admitted that his claim that there has been in excess of 10,000 cases of abuse in the 457 program was false; and

(c) the fact that the CFMEU and the TWU were unable to provide authoritative statistics or substantial evidence to back up their claims of wide spread rorting,

Coalition Senators conclude that the extremely damaging statements made by Minister O'Connor, the CFMEU and the TWU, alleging widespread rorting of the 457 visa program, were politically motivated, without foundation and designed to undermine the 457 visa program.

1.76 Coalition Senators also note that if widespread rorting was as evident as the Prime Minister and Minister O'Connor claimed, then this failing and weakness in the system has occurred on Labor's watch over the past five years.

1.77 This Government has by its own admission failed to adequately police Australia's skilled migration program.

Labor Market Testing (LMT)

1.78 The Bill introduces new LMT requirements across all skill level occupations with Minister O'Connor having the power to exempt some, but not all, higher skill level occupations.

1.79 The Bill provides that employers may be required to provide evidence that they have made attempts to fill the position locally before seeking to become a 457 visa sponsor.

1.80 Evidence to be provided would include:

- advertising of the position by the employer;
- participation in career expos;
- fees paid for recruitment; and
- results of recruitment attempts.

1.81 LMT was previously a requirement for not only subclass 457 sponsorship but also sponsorship under the Employer Nomination Scheme and Regional Sponsored Migration Scheme.

1.82 LMT was abolished in all of those areas as it was deemed to be complex, onerous and ineffective.

Evidence of an adequate inbuilt mechanism for LMT

1.83 Coalition Senators note that there is already an adequate inbuilt mechanism for LMT within the current 457 visa process.

1.84 The adequacy of the current inbuilt mechanism for LMT was supported by the evidence of AMMA to the 457 Inquiry which set out and described the basis upon which an employer is able to access the 457 visa program:

> Before a position in a business can be filled with an overseas worker, the sponsor must certify that it is suitably skilled and that the qualifications and experience of the visa holder are equivalent to what would be required of an Australian employed in that 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 such as paying for health insurance, flights to and from Australia, and agent fees for finding the worker. These additional costs of sponsorship can amount to $60,000 per person.
>
> 457 visas are not a low cost option to avoid the costs of employing Australian residents. It would be unsound to proceed on any other basis than that employer's hire foreign workers only as a last resort. This in-built mechanism makes it unnecessary to incorporate further labour market testing into the visa application process.
>
> Furthermore, labour market testing – insisting that employers show evidence of having recruited locally would be debilitating for employers urgently seeking to fill a position, and who are familiar with the challenges of the local employment market. Employers seek foreign workers when they urgently need skills that are not otherwise accessible to them.
>
> Labour market testing would also be fraught with bureaucratic and administrative problems, as DIAC case officers would also have to assess the additional information provided, thereby increasing DIAC workload and inflating processing times for 457 visas. To take this a step further and be absolutely clear, deliberately inflating process times as a disincentive to using 457 visas would be: very poor governance indeed, a rank waste of public resources; and would ill serve the interests of the Australian economy and job opportunities.[28]

1.85 Coalition Senators believe that the introduction of stringent LMT ignores the reality that it is in the employer's best interests, to conduct their own labour market testing and assess the availability of local skills prior to seeking to utilise the 457 visa process.

1.86 In her oral evidence to this Inquiry Ms Caroline Lambert, Director of Employment, Education and Training from ACCI stated:

> …we do not believe that the government or the unions or the department are in the best position to determine how the labour market should be tested.

28 Australian Mines and Metals Association, Submission to the 457 Inquiry, *Submission 22*, p. 7.

> Businesses need to respond to their own circumstances in regions, in industries and across the economy, depending on their own circumstances and the urgency they may have for filling a job.
>
> Having a departmental person or the government or anyone else say that there is only one size fits all approach to labour market testing is strongly putting barriers of regulation that the economy and these businesses do not need.
>
> Certainly, we would urge the Senate and we would urge the parliament not to support this bill without rigorous further evidence and a regulatory impact statement.[29]

1.87 Coalition Senators note the evidence from various submitters to the 457 Inquiry that Australian businesses overwhelmingly prefer to hire Australians.

1.88 Consult Australia submitted that as it more economical and less complicated to fill skills requirements from the local workforce, employers unsurprisingly conduct their own LMT, in the first instance.

1.89 Consult Australia's submission to the 457 Inquiry stated that employers consistently advise that they prefer to recruit locally available staff rather than having to seek out temporary skilled migrants:

> The cost of employing a temporary skilled migrant is much larger than the cost of recruiting locally, especially in terms of the cost of the process and the cost of relocating a new employee and their family to Australia. Temporary skilled migrants require more support to settle into Australian business practices, and their families require support to ensure their experience is a positive one and they do not return home early.
>
> This demonstrates that labour market testing is a normal procedure for employers in the built environment consulting sector. Placing new requirements on employers to document and report on labour market testing is not required, and will end up as unnecessary regulation.[30]

1.90 Consult Australia's evidence was supported by the submission of Hamilton's Migration Law to the 457 Inquiry, which stated:

> …labour market testing is already conducted by employers with a range of means…Employers are entitled to determine how best to recruit to fill a vacancy given the workforce available in their particular area. The statutory form of labour market testing has already been rejected as a feature of the 457 regime as it was seen to be incompatible with the purpose of the program which is to flexibly and quickly fill short-term vacancies.[31]

1.91 The evidence of the Australian Industry Group to the 457 Inquiry also supported an employer's preference to recruit locally available staff:

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29 *Committee Hansard*, 21 June 2013, p. 10.

30 Consult Australia, Submission to the 457 Inquiry, *Submission 3*, p. 6.

31 Hamilton's Migration Law, Submission to the 457 Inquiry, *Submission 15*, pp 3-4.

> Sourcing skilled labour via 457 visas attracts a significant premium over hiring locally and this ensures that in the vast majority of cases employers will only go down the 457 path when they have exhausted local options. In this way, employers themselves test the market thoroughly before choosing to hire through the 457 program. The visas are also available only for skills which are demonstrated to be in demand. Stringent testing will simply add more unnecessary bureaucracy...Delays caused by such testing could prevent a business from meeting urgent commercial needs.[32]

Evidence against the introduction of stringent labour market testing

1.92 Coalition Senators note that the Committee majority report for this Inquiry acknowledges that there was significant opposition to the introduction of a LMT condition for the subclass 457 visa program.

1.93 Coalition Senators note that both the 457 Inquiry and this Inquiry received strong and credible evidence that the introduction of stringent LMT will reverse the balance of minimal administrative burden, which is vital to the success of the 457 visa program, and reduce the ability of an employer to access skilled labour in an efficient and economical manner.

1.94 In its submission to the 457 Inquiry, the Chamber of Commerce and Industry Queensland stated its belief that LMT is ineffective, time consuming and of little value to small and medium employers.[33]

1.95 The Business Council of Australia (BCA) strongly recommended against the introduction of LMT as an onerous requirement that would impose additional, unnecessary regulatory costs on industry, and would be impractical in most cases. Footnote

1.96 BCA noted that LMT introduces complex and costly process without providing any demonstrated benefits:

> Businesses overwhelmingly prefer to hire Australians first. It is cheaper and faster to fill skills requirements from the permanent local workforce. Employers are taking on additional costs of hiring, training and relocating overseas when applying for 457 visas – it is in their commercial interest to have already assessed whether there might be Australian workers available to fill the roles.
>
> There is next to nothing to be gained from mandatory labour market testing. Labour market testing would only add more cost and delay to employers and curtail business activity.
>
> Furthermore, the introduction of labour testing could be inconsistent with Australia's commitments under World Trade Organization and free trade

32 Australian Industry Group, Submission to the 457 Inquiry, *Submission 16*, p. 4.

33 Chamber of Commerce and Industry Queensland, Submission to the 457 Inquiry, *Submission 13*, p. 7.

> agreements, as noted in the government response to the report of the Joint Standing Committee on Migration in 2009.[34]

1.97 The BCA in its submission to this Inquiry stated:

> The most damaging initiative in the Bill is a return to labour market testing, which was abandoned following a major 2001 departmental review that found it was costly, ineffective and inferior to the system we have today (see the report titled *In Australia's Interest: A Review of the Temporary Residence Program*).[35]

1.98 The evidence of the ANU College of Law to this Inquiry was that the introduction of stringent LMT within the application processes for the 457 visa program would be inefficient and ineffective.

> We believe that the 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. [36]

1.99 ACCI in its submission to the 457 Inquiry submitted that the introduction of stringent LMT requirements could cause significant time delays and would only slow down access to skilled overseas workers under what is supposed to be a fast, flexible visa solution to skilled labour shortages.[37]

1.100 ACCI in its submission to this Inquiry states:

> …detailed labour market testing will add to cost, time and the overall red-tape burden incurred by businesses seeking to secure skilled labour. Of most significant concern to ACCI is the lack of a Regulatory Impact Statement examining the impact of the proposed Bill on businesses seeking to secure skilled labour.
>
> The introduction of stringent labour market testing requirements could cause significant time delays that may see regional areas not having access to health professionals due to the time impost of conducting detailed labour market analysis.
>
> The Legislation acknowledges that labour market testing creates time delays. Section 140GBB of the bill includes an exemption to the Labour Market Testing requirement in the event of a natural disaster in order to assist disaster relief or recovery. In his second reading of the Bill, the Minister stated that: *This exemption will give the government flexibility to respond to situations of national or state emergency and would facilitate the speedy entry of overseas skilled workers without the delay caused by requiring a sponsor to undertake labour market testing.*

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34 Business Council of Australia, Submission to the 457 Inquiry, *Submission 18*, p. 10.

35 Business Council of Australia, *Submission 14*, p. 3.

36 Migration Program, Legal Workshop ANU College of Law, *Submission 19*, p. 1.

37 Australian Chamber of Commerce and Industry, Submission to the 457 Inquiry, *Submission 21*, p. 10.

> This admission in the Bill that Labour Market Testing adds delays contradicts the 'timely access' policy rationale of the 457 visa program.[38]

Failure of government to provide a Regulation Impact Statement (RIS)

1.101 There can be no doubt that one of the most concerning aspects of this Bill is the failure by the Government to produce a RIS in relation to Schedule 2, as is required under Government policy guidelines.

1.102 The requirement for a RIS is set out on the Office of Best Practice (OBPR) website, which states:

> A Regulation Impact Statement (RIS) is required, under the Australian Government's requirements, when a regulatory proposal is likely to have an impact on business or the not-for-profit sector, unless that impact is of a minor or machinery nature and does not substantially alter existing arrangements.[39]

1.103 The OPBR was consulted by the Government on this and advised that a RIS was required for the amendments contained in Schedule 2 to the Bill to determine the effects of the LMT provisions.

1.104 Despite this advice, DIAC sought a waiver from this requirement from the Prime Minister.

1.105 At the hearing for this Inquiry evidence was given that the following process was followed in relation to the RIS.[40]

1.106 On 14 May 2013, the OBPR advised the Department that in relation to Schedule 2 of the Bill, which contains the LMT provisions, a RIS was required. The Department then advised the OBPR that it would not be able to fulfil the request in the short time frame given that the Bill was to be tabled on 29 May 2013.

1.107 On 22 May 2013 Minister O'Connor wrote to the Prime Minister and asked that an exemption be given to the requirement to provide a RIS.

1.108 The Department, on notice, provided evidence that Minister O'Connor gave the following reasons for seeking an exemption from undertaking a RIS, relating to the introduction of LMT:

> Given the exceptional circumstances relating to the urgency of the reforms to the Temporary Sponsored Work Visa Program; the need to realign the program to be used only where a genuine skills shortage exists; and the

38 Australian Chamber of Commerce and Industry, *Submission 10*, pp 2-3.

39 Department of Finance and Deregulation website, 'Australian Government RIS', http://www.finance.gov.au/obpr/ris/gov-ris.html (accessed 19 June 2013).

40 Mr David Wilden, Department of Immigration and Citizenship, *Committee Hansard*, 21 June 2013, p. 32.

> critical timeframe to finalise the Bill for introduction into Parliament, I am seeking your approval to exempt the LMT measure from the RIS process.[41]

1.109 On 27 May the Prime Minister granted that exemption.

1.110 Despite calls from stakeholders and the Coalition to publically state what the cited "exceptional circumstances" are for the granting of the exemption from the RIS, both the Minister and the Prime Minister have refused to provide an explanation.

1.111 This failure to observe administrative guidelines appears to be for crass political reasons and reflects badly on both Minister O'Connor and the Prime Minister.

1.112 Coalition Senators have significant concerns regarding the failure of the Government to provide a RIS in relation to Schedule 2 of the Bill given the cogent evidence of the likely detrimental impact these provisions will have on business.

1.113 The Government was advised of the concerns of business and industry in relation to the detrimental impacts of the Bill in the 'Open letter to members of the Federal Parliament regarding the Migration Amendment (Temporary Sponsored Visas) Bill 2013' (17 June 2013).

1.114 The letter was from the Migration Council of Australia and signed by: Innes Willox, Chief Executive Officer of the Australian Industry Group; Jennifer Westacott, Chief Executive of the Business Council of Australia; and Carla Wilshire, Chief Executive Officer of the Migration Council Australia.

1.115 An extract from the text of the letter setting out the concerns of business and industry is as follows:

> We are writing to ask for your support in opposing the Migration Amendment (Temporary Sponsored Visas) Bill 2013 in full when it is introduced into the parliament this week.
>
> We are greatly concerned by the lack of supporting evidence, damaging rhetoric and poor process associated with the proposed changes to the 457 visa scheme, along with the considerable risks posed for investment, job creation and economic growth. Furthermore, there has been minimal consultation with industry about these changes. The legislation risks undermining the capacity to fill identified skills gaps in a timely way without a proper assessment of whether there is a genuine problem to be solved. What is so concerning is that the government is seeking to rush these changes through the final session of parliament before the election without subjecting its claims about alleged scheme abuses and inadequacies to the rigor of its own Regulatory Impact Statement (RIS) process.
>
> The RIS exemption for the new labour market testing requirements in the Bill cites 'exceptional circumstances'. It is unclear what these circumstances are, given that the minister's department has provided no hard evidence of a systemic problem with the scheme. The government's primary argument for a systemic problem rests on a misleading interpretation of an ambiguous

41 Department of Immigration and Citizenship, answer to question on notice, received 21 June 2013.

> survey finding in a recent Migration Council Australia report. This is not an adequate foundation for introducing costly new regulation.
>
> A Regulatory Impact Statement, with full consultation with industry, is the appropriate way to assess whether a problem exists with the 457 visa scheme and the costs and benefits of solving any purported problems through specific actions, including regulation.
>
> Unwarranted additional regulation of the 457 visa scheme risks penalising all employers and their employees, and undermining investment, skills transfer and development and broader job creation, to address a relatively small number of instances that may be better dealt with through other means.[42]

1.116 The very serious concerns raised in this letter were supported by evidence from a number of other submissions to this Inquiry.

1.117 The Migration Institute of Australia in its submission to this Inquiry stated:

> The MIA is concerned that there has been no proper examination of the *regulatory impact the proposed changes will impose on Australian business and industry, together with impacts on labour market efficiency and business productivity from the reintroduction of labour market testing in particular.*
>
> …
>
> It is in the matter of labour market testing where the greatest impact may be on Australian businesses and industry, and yet there has been no examination of that because the Prime Minister has granted an exemption.[43]

1.118 AMMA in its submission stated that:

> …the most damaging proposal in the bill – the reintroduction of LMT – was **not** a recommendation made by [the Ministerial Advisory Council on Skilled Migration (MACSM)]. AMMA was particularly surprised to see LMT in the bill given concerns raised in the 2008 Deegan Review that this would compromise Australia's international trade obligations.[44]

1.119 AMMA also finds that LMT would be operationally debilitating for employers urgently seeking to fill skilled positions:

> Such an outcome would directly detract from the policy rationale of the 457 program: providing timely access to skilled workers in occupations where identified shortages exist.[45]

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42 A copy of this letter is available at: http://www.aigroup.com.au/portal/site/aig/template.FRAME/mediacentre/?url=http%3A%2F%2Fwww.aigroup.com.au%2Fportal%2Fbinary%2Fcom.epicentric.contentmanagement.servlet.ContentDeliveryServlet%2FLIVE_CONTENT%2FMedia%252520Releases%2F2013%2FJune%2FJoint%252520457%252520letter.pdf (accessed 24 June 2013).

43 Migration Institute of Australia, *Submission 20*, p. 1, emphasis in original.

44 Australian Mines and Metals Association, *Submission 9*, p. 2, emphasis in original.

45 Australian Mines and Metals Association, *Submission 9*, p. 5.

1.120 AMMA also finds that the reintroduction of LMT some 12 years after it was scrapped would a radical and regressive measure insensitive to the needs of employers and the economy and states that the LMT requirement is not only strongly opposed by industry and employers, but also the Migration Institute of Australia, the independent Migration Council of Australia and the Law Council of Australia. It was **not** recommended by the Government's very own Advisory Council on Skilled Migration.

1.121 In oral evidence to this Inquiry many witnesses stated that the introduction of this bill and in particular the LMT requirements would have a detrimental impact on job creation in Australia:

> **Mr Pryor:** Yes. That is our view of the potential costs and risks of introducing this new scheme. There will be some element of a barrier being erected towards job creation in the economy. A distribution of that will depend on the different sectors and businesses themselves, but that is our view: there is a potentially significant cost and risk to job creation in the scheme.[46]
>
> **Mr Melville:** The most common thing I hear from companies that get involved in this area is: 'I know that I can't find these people. I know from the local community I'm working in that they're not there'. It might be a company in a remote area of Australia or even somewhere like Ipswich. They know that there aren't people with those skills there, and saying to them that they have got to get on to a process where they advertise these positions that they know are not there and adding to their cost of employment even further is just unnecessary…
>
> Companies have been under pressure from all sorts of things like the global financial crisis and increasing energy costs. You cannot just say that this is only a small cost. It is a small cost, but it is another small cost on top of a lot of other costs that have been going up. When you talk to our member global companies, their head offices look at Australia and ask, 'Why should we do business there?' They look at the workplace relations laws and, although the dollar has come off, they look at the cost of the high dollar, but they also look at employment costs…[47]
>
> **Ms Wilshire:** I think that there is both a short-run risk to job creation and a long-term risk. The short-run risk, which has been articulated by both AAG and BCA in their evidence, is that it could change the calculus of the investments by individuals. The long-term risk is that reducing the value of the program will impact on competitiveness and the six-month framework associated with the mooted labour market testing would mean we would lag behind global trends in innovation and process improvements. In a sense it would disconnect us. One of the long-term risks to job creation is that without the flow of skilled people into Australia we risk becoming a backwater in the global economy.[48]

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46 Mr Simon Pryor, Business Council of Australia, *Committee Hansard*, 21 June 2013, p. 11.

47 Mr Anthony Melville, Australian Industry Group, *Committee Hansard*, 21 June 2013, p. 11.

48 Ms Carla Wilshire, Migration Council of Australia, *Committee Hansard*, 21 June 2013, p. 11.

> **Ms Lambert:** I certainly think that they would be deterred from using the program if you look at the proposed legislation holistically as well as, in particular, the labour market testing. Deterrence in regulation is everywhere across the economy, and further regulation just exacerbates that frustration that business has in dealing with these issues.
>
> I think the other important thing about the labour market testing proposed is that the flexibility and responsiveness is just eliminated from the scheme. That frustration will be enormous, and so the choices for many small businesses could be that they could close. So not only are we lacking the job creation opportunities we are actually potentially forcing some businesses to close because of their inability to use what is currently a flexible and responsive scheme because of the labour market testing—again, that one-size-fits-all approach to labour market testing.[49]
>
> **Mr Bolton:**…having an uncertain labour supply would certainly be a very good reason for a business not to even tender for contracts. As we see, there are huge resources contracts still going ahead across the country; there have been a few that have been shelved, but there are still a lot in the pipeline. Australian businesses faced with the prospect of an uncertain labour supply, faced with the prospect of potentially waiting for six months before they can ensure that they have the people to do the job would be a very significant barrier and, indeed, a reason for them not to even tender.
>
> On the impacts on businesses not directly related to contracting, the possibility of a hospital being without a medical registrar for six months, the possibility of a telco being without a system engineer for six months, or the possibility of a restaurant being without a chef for six months would mean that that business is not able to do its business. That would possibly send some businesses to the wall.[50]

Coalition Senator's conclusions

1.122 The OBPR has advised the Government that a RIS is required in relation to Schedule 2 of the Bill.

1.123 The Government failed to comply with this requirement.

1.124 The failure by the Government to provide a RIS in relation to Schedule 2 of the Bill means that the Parliament is debating this proposed legislation without information before it relating to the potential cost impact on employers and in particular the flow-on effects to jobs in Australia as a result of the LMT provisions.

1.125 Due to the very serious nature of the concerns that have been raised in relation to the Government's failure to provide a RIS and the considerable risks posed by this Bill for investment, job creation and economic growth in Australia, Coalition Senators

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49 Ms Jenny Lambert, Australian Chamber of Commerce and Industry, *Committee Hansard*, 21 June 2013, p. 12.

50 Mr Stephen Bolton, Australian Chamber of Commerce and Industry, *Committee Hansard*, 21 June 2013, p. 12.

believe that this Bill should be immediately withdrawn until a RIS with full consultation with industry has been undertaken.

Minister O'Connor's misrepresentations on what LMT is

1.126 On 21 June 2013, the same day as the Inquiry into this bill, Minister O'Connor misrepresented what LMT actually is.

1.127 Minister O'Connor in response to a question asked of him at the Skilled Migration National Employer Conference in Melbourne told attendees the LMT provisions in his Government's 457 bill amounted to:

> …putting an ad in the paper. That's it. There is no other undertaking required from the employer.

1.128 Under questioning from Senator Cash at the Inquiry, the Department contradicted Minister O'Connor and confirmed that the Department is yet to determine how the LMT provisions will work. DIAC also said that Minister O'Connor's statement was not provided by the Department.

> **Senator CASH:**...What would the department do if they asked a business for evidence of labour market testing and the business responded, as per Minister O'Connor's statement, 'I put an ad in the paper'? Is that sufficient?
>
> **Mr Wilden:** The way the [labour market testing] is going to work is yet to be determined in great detail…we have not looked at the micro level…
>
> **Senator CASH:**…[Y]ou do not know that yet, because as per your own evidence, you have not yet looked at the micro detail[?]
>
> **Mr Wilden:** We have not looked at the micro detail…
>
> **Senator CASH:**...[U]pon what basis does Minister O'Connor make that statement?
>
> **Mr Wilden:** I cannot speak to why the minister would have made that statement. I was not aware of the statement and it was not prepared by this office.[51]

1.129 Coalition Senators are gravely concerned that Minister O'Connor has yet again deliberately manufactured false claims in relation to a bill for which he is responsible for.

1.130 Minister O'Connor has already had to admit that in relation to his claim that there have been in excess of 10,000 cases of abuse in the 457 program he had made this number up and that his allegations were not based on any authoritative statistics or other probative evidence.

1.131 Minister O'Connor has now again been caught out deliberately providing misleading information in relation to the 457 visa program.

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51 *Committee Hansard*, 21 June 2013, p. 28, emphasis added.

1.132 Based on:

(a) the fact that Minister O'Connor had to admit that his claim that there has been in excess of 10,000 cases of abuse in the 457 program was false; and

(b) the fact that Minister O'Connor has now been caught out again deliberately manufacturing false claims in relation to LMT;

Coalition Senators conclude that the statement made by Minister O'Connor at the Skilled Migration National Employer Conference in Melbourne were politically motivated, incorrect and designed to deliberately mislead stakeholders in relation to what LMT is.

Coalition Senators' conclusions on Labour Market Testing

1.133 Coalition Senators note that the 457 visa program is only accessible to those employers with a strong record of, or a demonstrated commitment to, employing local labour and, also, a demonstrated financial commitment to training Australian workers

1.134 Coalition Senators also note the compelling evidence from industry groups and labour market experts who have argued against the introduction of stringent LMT as part of the 457 visa application process.

1.135 Coalition Senators agree that the introduction of stringent LMT will undermine the rationale and purpose of the 457 visa program, which is intended to facilitate the rapid filling of employment positions during temporary skill shortages.

1.136 The ability to rapidly fill vacancies with a skilled overseas worker is an important feature in the overall success of the 457 visa program.

1.137 Coalition Senators believe the proposed regime for LMT will be cumbersome to implement and difficult to monitor, and will increase the burden of costs, regulation, obligations, compliance and enforcement on employers seeking to sponsor workers on 457 visas.

1.138 Based on the evidence provided to the Inquiry, and the false statements of Minister O'Connor and the spurious evidence of the CFMEU and TWU regarding abuse of the 457 visa program, Coalition Senators have formed the view that the re-introduction of LMT is politically motivated and is being used as a vehicle to frustrate and discourage business from utilising the benefits that underpin the 457 visa regime.

1.139 Coalition Senators do not support the introduction of LMT.

Conclusions – Coalition Senators

1.140 Coalition Senators are concerned that the passage of the Bill is being progressed by the Government with indecent haste and without appropriate consultation with affected parties.

1.141 Coalition Senators believe that this Bill if passed will add significantly to the burden of costs, regulation, compliance and enforcement on employer sponsors using the 457 visa program.

1.142 The failure by the Government to follow the advice of its own OPBR and provide a RIS in relation to the amendments contained in Schedule 2 to the Bill and the Prime Minister's actions in granting of an exemption without any explanation as to why she did this, confirms Coalition's Senators belief that this Bill is the culmination of a deliberate union and Government campaign to discredit and undermine the 457 via programme and demonise foreign workers.

1.143 Coalition Senators also conclude based on the evidence provided to the Inquiry that:

(a) the failure by the Prime Minister to comply with a FoI request in relation to her employee Mr John McTernan and

(b) the fact that the extremely damaging statements made by Minister O'Connor, the CFMEU and the TWU alleging widespread rorting of the 457 visa program are not supported by their own evidence or any other authoritative statistics or sources; and

(c) Minister O'Connor's misleading information to the Skilled Migration National Employer Conference in Melbourne in relation to what LMT is

confirms that this Bill is politically motivated and designed to undermine the 457 visa program.

1.144 This Bill is confirmation of the excessive power, control and influence that the union movement has over the Gillard Labor Government.

1.145 Coalition Senators believe that this bill based on the evidence provided to the 457 Inquiry does not represent good public policy and is not a bill that has been drafted in Australia's national interest.

1.146 Coalition Senators recommend that the Government delay the passage of this Bill 2013 to allow a RIS assessment, proper consultation with relevant parties in relation to the Bill and in particular its impact on business and industry.

1.147 The Bill is flawed and should not be proceeded with in its current form and should be withdrawn.

Senator Gary Humphries **Senator Sue Boyce**

Deputy Chair

Senator Michaelia Cash

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Community Services and Health Industry Skills Council
2	Australian Motor Industry Federation
3	Australian Human Rights Commission
4	Migration Council Australia
5	Chamber of Commerce and Industry Western Australia
6	Consult Australia
7	Master Builders Australia
8	The University of Adelaide Law School
9	Australian Mines and Metals Association
10	Australian Chamber of Commerce and Industry
11	Australian Hotels Association
12	Australian Industry Group
13	Restaurant and Catering
14	Business Council of Australia
15	Australian Council of Trade Unions
16	Fragomen
17	Department of Resources, Energy and Tourism

18 Department of Immigration and Citizenship

19 ANU College of Law, Migration Law Program

20 Migration Institute of Australia

21 Recruitment and Consulting Services Association

22 Dr Joo-Cheong Tham

23 Australian Nursing Federation

24 Law Council of Australia

ADDITIONAL INFORMATION RECEIVED

1 Additional Information provided by Business Council of Australia on 21 June 2013

2 Additional Information provided by Transport Workers' Union on 21 June 2013

3 Additional Information provided by Finance Sector Union of Australia on 21 June 2013

4 Additional Information provided by Australian Manufacturing Workers' Union on 21 June 2013

5 Additional Information provided by Maritime Union of Australia on 21 June 2013

6 Additional Information provided by Australian Workers' Union on 21 June 2013

7 Additional Information provided by Communications Electrical Plumbing Union on 21 June 2013

8 Additional Information provided by Association of Professional Engineers, Scientists and Managers Australia on 21 June 2013

9 Additional Information provided by Construction Forestry Mining and Energy Union on 21 June 2013

10 Response to a question on notice provided by the Department of Immigration and Citizenship on 21 June 2013

11 Response to a question on notice provided by the Construction Forestry Mining and Energy Union on 21 June 2013

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, 21 June 2013

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

CHAN, Ms Angela, National and NSW/ACT President and Chair, Skills Policy and Procedures Committee, Migration Institute of Australia

CULLY, Mr Peter, Acting Group Manager, Workplace Relations Policy Group, Department of Education, Employment and Workplace Relations

KINNAIRD, Mr Bob, Director, National Research, Construction, Forestry, Mining and Energy Union

LAMBERT, Ms Jenny, Director, Employment, Education and Training, Australian Chamber of Commerce and Industry

MADDEN, Ms Shannon, Acting Branch Manager, Migration, COAG and Evidence Branch, Social Policy and Economic Strategy Group, Department of Education, Employment and Workplace Relations

MELVILLE, Mr Anthony, Director, Public Affairs and Government Relations, Australian Industry Group

NOONAN, Mr Dave, National Secretary, Construction, Forestry, Mining and Energy Union

PARCELL, Mr Wayne, PSM, Director, Migration Institute of Australia

PRYOR, Mr Simon, Director, Policy, Business Council of Australia

RICHARDS, Mr Oliver, Assistant Secretary, Economic Policy Branch, Economics Division, Department of the Prime Minister and Cabinet

SHIPSTONE, Mr Tim, Industrial Officer, Australian Council of Trade Unions

WILDEN Mr David, Acting First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship

WILSHIRE, Ms Carla, Chief Executive Officer, Migration Council of Australia