

## Chapter 4

### Labour market testing requirements and the use of labour agreements

4.1 The committee heard a range of views about the effectiveness of the current labour market testing arrangements that are required in most instances when employers seek to employ overseas workers on a Temporary Skills Shortage (TSS) visa. The committee also received considerable evidence about the use of the labour agreement stream of the TSS visa.

4.2 This chapter discusses this evidence and examines whether these measures are achieving their intended outcomes.

#### Overview of labour market testing requirements

4.3 Employers seeking to nominate a worker for a TSS visa are required to undertake labour market testing (LMT) to demonstrate that no suitably qualified and experienced Australian is readily available to fill the nominated position.

4.4 The joint submission from the Department of Home Affairs, Department of Jobs and Small Business, and Department of Education and Training (Joint Departmental Submission) explained that, to meet the labour market testing requirement, standard business sponsors must provide evidence when submitting the online nomination application 'to demonstrate that they have tested the local labour market within the four months prior to nominating a skilled overseas worker for a TSS visa, over at least four weeks'.<sup>1</sup> Additional requirements include that:

- advertisements must be in English and specify skill and/or experience requirements;
- the position salary must also be specified in the advertisement for positions with salaries less than AUD \$94,600; and
- LMT must include at least two advertisements using the methods of a national recruitment website, national print media/radio or business website of accredited sponsors.

4.5 A number of these requirements came into effect in August 2018, as a result of successful amendments moved by the Opposition during the passage of the *Migration Amendment (Skilling Australians Fund) Act 2018* through the parliament.<sup>2</sup>

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1 Joint Departmental Submission, *Submission 40*, p. 21.

2 These included the requirements that LMT advertising must: occur within four months prior to nomination; occur for a minimum of four weeks; be targeted in such a way that a significant proportion of relevant Australians would be likely to be informed about the position; and set out any skills or experience requirements that are appropriate to the position. See: Opposition Amendment Sheet 8372, Migration Amendment (Skilling Australians Fund) Bill 2018, at [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r5999](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5999) (accessed 29 March 2019).

4.6 Recruitment practices undertaken by sponsors must also satisfy Australian workplace, equal opportunity and non-discrimination laws:

That is, job vacancies including those lodged on company websites and with labour hire firms, should be available to Australian jobs seekers and should not target applications from persons holding particular visa types or from specific foreign countries.<sup>3</sup>

4.7 The current LMT settings for the TSS visa are outlined in Table 4.1.

**Table 4.1 Labour Market Testing Settings for the TSS visa<sup>4</sup>**

Duration of LMT	<ul style="list-style-type: none"> <li>• Minimum of four weeks</li> <li>• Applications must be accepted for four weeks</li> </ul>
Period of LMT	<ul style="list-style-type: none"> <li>• Four months immediately prior to lodgement</li> <li>• Four months since redundancies</li> </ul>
Method of advertising	<ul style="list-style-type: none"> <li>• At least two advertisements required</li> <li>• Recruitment website with national reach (including LinkedIn recruitment platform)</li> <li>• Business website of accredited sponsors</li> <li>• Print media/radio with national reach</li> </ul>
Information required in the advertisement	<ul style="list-style-type: none"> <li>• Position title/description</li> <li>• Salary/salary range (if lower than \$96,400)</li> <li>• Company/recruitment agency (company name need not be disclosed if using a recruitment agency)</li> <li>• Skills or experience requirements</li> <li>• Must be in English</li> </ul>
Evidence requirements	<ul style="list-style-type: none"> <li>• Copy of advertisements</li> <li>• For positions subject to alternative requirements—a submission explaining why an Australian worker is not available</li> </ul>
Positions subject to alternative requirements	<ul style="list-style-type: none"> <li>• Where a new nomination is required for an existing visa holder because of a change in business structure or pay</li> <li>• Internationally recognised record of exceptional achievement in a profession or field, e.g. sport, academia and research, top-talent chef</li> <li>• Intra-corporate transferees</li> <li>• Positions with annual earnings of \$250,000 or more</li> <li>• Key medical occupations</li> </ul>
Exemption to LMT requirement	<ul style="list-style-type: none"> <li>• Exemption where international trade obligation applies</li> </ul>

3 Joint Departmental Submission, *Submission 40*, p. 21.

4 Joint Departmental Submission, *Submission 40*, Attachment 2.

4.8 As noted above, these current settings are a result of changes implemented in August 2018, designed to strengthen LMT obligations. The Joint Departmental Submission stated that the LMT settings 'are informed by the approach taken by Canada, the United States, the United Kingdom and New Zealand and feedback from stakeholders'. It noted further that the LMT settings 'seek to strike a balance between prioritising Australian workers and recognising industry recruitment practices'.<sup>5</sup>

4.9 The Department of Home Affairs noted that between 1 July 2018 and 28 February 2019, 1952 TSS visa nominations were refused for not meeting the LMT criteria. This represented 39.5 per cent of total nomination refusals in that period, and five per cent of total TSS nomination lodgements in that period.<sup>6</sup>

4.10 Exemptions to the LMT requirements apply in some specific circumstances, namely:

- where LMT would be inconsistent with Australia's international trade obligations under the World Trade Organisation General Agreement on Trade in Services;
- where LMT is precluded under Free Trade Agreements to which Australia is a party; and
- where a TSS visa is applied for under a Minister of Religion Labour Agreement.<sup>7</sup>

4.11 Submitters and witnesses expressed a considerable range of views on the effectiveness of the strengthened labour market testing requirements introduced in August 2018.

### **Arguments in support of maintaining or extending labour market testing**

4.12 Various organisations expressed strong support for the ongoing use of labour market testing arrangements to ensure the integrity of the temporary skilled visa program. For example, the Australian Council of Trade Unions stated:

In our submission, a legal requirement for labour market testing to occur is a logical extension of the principle that the priority should always be to employ Australians first. Without genuine labour market testing, it is entirely unclear how the Government and the community, not to mention affected workers, can be assured that Australian workers are in fact being given priority.

Whether it is young people looking for their first job or older workers looking get back into the workforce or change careers, they deserve an assurance that they will have priority access to local jobs before they can use temporary workers from overseas. That is why the labour market testing requirements currently in place under the TSS visa program are so

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5 Joint Departmental Submission, *Submission 40*, p. 21.

6 Department of Home Affairs, Answers to questions on notice, 8 March 2019 (received 25 March 2019).

7 Joint Departmental Submission, *Submission 40*, p. 21.

important to ensure that employers have a legal obligation to employ Australians first.<sup>8</sup>

4.13 To ensure a genuine skills shortage exists and that TSS workers are not viewed as a cheap alternative workforce to Australian workers, proponents of LMT argued that labour market testing provides some assurance that employers have made 'all reasonable efforts to find a suitably qualified Australian for the position' prior to accessing workers from overseas.<sup>9</sup>

4.14 Stakeholders calling for a further strengthening of labour market testing argued that in some circumstances employers are circumventing the intent of LMT requirements, including by:

- offering unreasonably poor wages and conditions in local advertising in order to access cheaper labour through temporary skilled migrants;
- setting unrealistic and unwarranted skills and experience requirements for vacant positions, with the effect of excluding otherwise suitable Australian applicants;
- failing to develop their own local workforce and then using LMT advertising merely as a 'tick box' exercise, with no real intention of hiring Australian workers; and
- employers not considering applications received by Australian workers during the LMT process.<sup>10</sup>

***Ensuring that there has been a genuine attempt to source local labour***

4.15 The committee heard that the LMT system should be structured to ensure that employers are making genuine attempts to source local labour before resorting to seeking workers on temporary skilled visas.

4.16 The Australasian Meat Industry Employees Union (AMIEU) expressed concern that employers are undertaking labour market testing disingenuously, by offering unreasonably poor wages and conditions in local advertisements in order to access cheaper labour through temporary skilled migrants.<sup>11</sup> For example, employers might inflate their employment standards for local applicants to an artificially high level so they can assert they have attempted but failed to find local labour and there is

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8 Australian Council of Trade Unions, *Submission 11*, p. 14.

9 Australian Council of Trade Unions, *Submission 11*, p. 14.

10 Australian Council of Trade Unions, *Submission 11*, p. 4; Australasian Meat Industry Employees Union, *Submission 17*, pp. 3-4; Mr Ian McLauchlan, Assistant Secretary, Queensland Branch, Australasian Meat Industry Employees Union, *Proof Committee Hansard*, pp. 23-24.

11 The Australasian Meat Industry Employees Union, *Submission 17*, p. 3; Australian Council of Trade Unions, *Submission 11*, pp. 4 and 20-21.

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no independent process to assess whether such rejections were based on genuine concerns.<sup>12</sup> The AMIEU submitted further:

It is not enough to say that there are constant adverts for workers in local agencies or media... Employers should be able to demonstrate to an audit process that the reasons for rejecting applicants [were] based on genuine concerns.<sup>13</sup>

*Case studies where genuine attempts to source local labour have been made*

4.17 The committee heard several case studies of where, in the same industry in a regional area, some businesses had made genuine attempts to source and train local labour and were successfully utilising a local workforce, while other businesses in the same region were relying on temporary skilled visa workers.

4.18 Mr Ian McLauchlan, Assistant Secretary of the AMIEU's Queensland branch, told the committee at its Mackay public hearing that in the meat industry in regional Queensland, some companies have invested sufficiently in local advertising and training to source a domestic labour supply, while other companies who do not make this investment are reliant on temporary skilled workers.<sup>14</sup> Mr McLauchlan gave several case studies, including the following:

In late 2016-17, at a little plant up near Mareeba locals could not get a job. We did a campaign up there and went to the media. We had a meeting on plant and got 225 local applicants that wanted to work, so that blew up the argument that the company was saying that they couldn't get locals. We have now got locals employed in that plant that are spending their money in the local community, and I think there are at the moment about 10 visa workers on that plant.<sup>15</sup>

4.19 Similarly, Mr Jason Lund, Mackay Organiser for the Australian Manufacturing Workers' Union, told the committee of a regional company who, in consultation with the union, had decided to upskill local employees rather than advertising for temporary visa workers to fill those roles.<sup>16</sup>

*Advertising with appropriate wages and conditions*

4.20 The AMIEU argued that wages and conditions should form part of the LMT advertising process, to ensure that advertisements reflect the fair market value of labour when assessing whether a genuine attempt to obtain labour was made. This would mean that advertisements offering default award wages, or offering inflexible or unfriendly work conditions (such as work shifts longer than eight hours per day or

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12 The Australasian Meat Industry Employees Union, *Submission 17*, p. 3.

13 *Submission 17*, p. 3.

14 *Proof Committee Hansard*, 5 March 2019, p. 18.

15 *Proof Committee Hansard*, 5 March 2019, p. 18.

16 *Proof Committee Hansard*, 5 March 2019, p. 32.

constant weekend shifts), could be rejected as a genuine attempt to fill skill shortages if the local market would otherwise demand better wages and conditions.<sup>17</sup>

4.21 Mr Damian Kyloh, Associate Director of Economic and Social Policy for the ACTU, argued that in many instances employers should be addressing recruitment difficulties by offering increased wages and conditions rather than resorting to the skilled visa system. Mr Kyloh cited a study undertaken by academics at the University of Sydney Business School, which surveyed employers using the temporary skilled visa system:

They have actually gone and asked employers who use the TSS visa system: what are your options for and what are your preferences for filling those recruitment difficulties? Less than one per cent said they would actually increase wages to deal with the problem and only 11 per cent said they were prepared to train existing staff. So there is strong empirical evidence which, I think, goes to the fundamental problem of our visa system—that employers are not training existing staff or raising wages to fill where they have recruitment difficulties. The evidence also speaks to the difference between a recruitment difficulty and a genuine skills shortage. Employers, at the moment, where they have a small recruitment difficulty, are going first to the visa system rather than training workers and raising wages. The empirical evidence and the theory behind this says there is really only a genuine skills shortage once you raise wages and then you can still not source the labour. That is not what is happening at the moment, so I think that empirical evidence is really important.<sup>18</sup>

### ***Recommended changes to general LMT requirements***

4.22 The ACTU and other submitters made specific recommendations about how the LMT regime could be strengthened. The ACTU recommended that 'more rigorous evidentiary requirements for labour market testing be incorporated into legislation and associated program guidelines' in order to ensure that the intent of the legislation is achieved and Australian employment opportunities are protected.<sup>19</sup> This could include:

- a mandatory requirement for all jobs to be genuinely advertised as part of labour market testing obligations;
- a crackdown on job advertisements that set unrealistic and unwarranted skills and experience requirements for vacant positions, with the effect of excluding otherwise suitable Australian applicants;
- a ban on job advertisements that target only overseas workers or specified visa class workers to the exclusion of Australian citizens and permanent residents;

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17 The Australasian Meat Industry Employees Union, *Submission 17*, pp. 3–4.

18 Mr Damian Kyloh, Associate Director of Economic and Social Policy, ACTU, *Proof Committee Hansard*, 7 March 2019, p. 5.

19 ACTU, *Submission 11*, p. 29.

- making information and data on the TSS occupations list and the operation of LMT provisions publicly accessible on at least a quarterly basis.<sup>20</sup>

### **Arguments in favour of reducing labour market testing requirements**

4.23 Contrastingly, some submitters and witnesses argued that labour market testing requirements should either be abolished entirely, or curtailed in order to address practical concerns. Concerns raised by these stakeholders included that the current labour market testing requirements:

- create unnecessary red tape for businesses;
- are ineffective in achieving the stated outcome of protecting Australian jobs; and
- are impractical due to the prescriptive restrictions on timeframes for undertaking labour market testing and the way in which it must be conducted.

4.24 The Law Council of Australia described the current LMT requirements as cumbersome, inflexible, and creating a negative impact in certain circumstances.<sup>21</sup>

#### ***Concerns that labour market testing creates unnecessary red tape for business***

4.25 Various submitters raised concerns about the administrative burden placed on businesses from LMT. The Australian Chamber of Commerce and Industry (ACCI) expressed its support for either abolishing LMT for TSS visas, or easing it for high-wage occupations and renewals, and described LMT as an additional layer on top of the 'enormous application costs and ballooning delays' that businesses must navigate. It argued that LMT severely restricts businesses' ability to respond flexibly to their workforce needs.<sup>22</sup>

4.26 The ACCI commented further that the debate about LMT 'has become an ideological battle that ignores the evidence', arguing that it 'adds little value' and significantly increases the red tape burden.<sup>23</sup>

4.27 Dr Gavin Lind, General Manager, Workforce and Innovation, Minerals Council of Australia, told the committee:

Given the high cost of sponsorship, the additional burden of the Skilling Australians Fund levy, resourcing imposts and restrictions on industry in seeking skilled migrants to step into hard-to-fill critical positions, the use of temporary skilled migrants is seen as a last resort to respond to meeting industry skills needs. When industry seeks to employ skilled migrants, that action is undertaken with confidence that all other options have been

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20 Construction, Forestry Maritime Mining and Energy Union, *Submission 38*, p. [2]; Australian Council of Trade Unions, *Submission 11*, pp. 29–30.

21 Law Council of Australia, *Submission 36*, p. 11.

22 Australian Chamber of Commerce and Industry, *Submission 12*, pp. 13–14. See also Tourism Accommodation Australia, *Submission 42*, p. 14; Restaurant and Catering, *Submission 32*, pp. 20–21; Australian Meat Industry Council, *Submission 21*, p. 7.

23 Chamber of Commerce and Industry, *Submission 12*, p. 40.

exhausted. Labour market testing continues to be an unnecessary and ineffective administrative requirement that will become more acute during periods of high demand for skills and really should be abolished.<sup>24</sup>

***Proposals to waive labour market testing requirements in certain circumstances***

4.28 The Minerals Council submitted that if LMT requirements are not abolished entirely, they should be limited to specific industries or concern:

Given the fact that use of the temporary skills visa system clearly responds to economic cycle in our industry, combined with the lack of reported abuses in our sector, there is a clear case for lifting labour market testing requirements in relation to occupations common in our industry. It would be far more appropriate for Government to "manage by exception" in terms of applying labour market testing to "problem" sectors or occupations or dealing with abuses via other means.<sup>25</sup>

4.29 Restaurant & Catering Australia expressed a similar view, recommending that LMT requirements should be waived for TSS visas 'where there is clear and demonstrated shortage across an occupation [or] industry over an extended period of time, such as exists in the hospitality sector'.<sup>26</sup>

*Labour market testing for occupations on the medium to long term skills list*

4.30 Tourism Accommodation Australia (TAA) argued that labour market testing should not be required for occupations that are listed on the Medium and Long Term Skills Shortage List (MLTSSL), as they are occupations for which there is already a well-documented skills shortage:

Given that the composition of occupations on the MLTSSL is based on empirical data demonstrating both prevailing and long-term skills shortages, TAA believes labour market testing is redundant and should not be required for these occupations. If the settings are correctly put in place and data is regularly supplied on shortages, labour market testing should not pose a further delay to equipping the accommodation sector with the workers it needs.<sup>27</sup>

4.31 The Minerals Council agreed with this view, arguing that occupations in the mining sector, requiring both professional and trades skills, are projected to remain in shortages into the medium term. A reversal of the LMT policy would be 'one less obstacle to combatting these skills shortages'.<sup>28</sup>

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24 *Proof Committee Hansard*, 7 March 2019, Perth, p. 12. See also Chamber of Commerce and Industry, Submission 12, p. 40.

25 Minerals Council of Australia, *Submission 3*, pp. 3, 11.

26 Restaurant and Catering, *Submission 32*, p. 21.

27 *Submission 42*, p. 15.

28 Minerals Council of Australia, *Submission 3*, p. 11.

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### *Labour market testing requirements for visa renewals*

4.32 ACCI and other submitters argued that labour market testing should not be required for visa renewals, particularly where visa workers are staying with their current employer; rather, labour market testing should only be required at the time of the initial visa application of the worker.<sup>29</sup>

4.33 The Law Council of Australia, which expressed support for waiving LMT requirements for all visa renewal applications in which the nominee is already employed by the sponsor, stated that in these situations, an employer is expected to test the local labour market before nominating any incumbent TSS visa holder for a further visa. In such a situation, the current policy creates a number of problems, including unnecessary work and expense for the business with no recruitment outcome.<sup>30</sup> The Law Council argued further that advertising in these circumstances exposes a business to claims of false advertising and potential legal action under employment law.<sup>31</sup>

### ***Requirements around the form of advertising required for labour market testing***

4.34 Some submitters expressed concern that the forms of advertising required under the LMT guidelines are overly prescriptive and do not match with how many industries conduct recruitment activities. For example, the Motor Trades Association of Australia submitted:

The issue of labour market testing requirement is a significant concern for MTAA and members and their business constituents as LMT requirements include methodologies that have largely been abandoned by most industries in the automotive sector.

It is the experience of retail motor traders that these forms of recruitment involving formal advertising in print and online do not work for the automotive sector; instead labour is sourced from Group Training Organisations (for apprentices) or through word-of-mouth (for qualified labour). Therefore the LMT used is of little use for automotive employer sponsors and negatively impacts the ability of retail motor traders to undertake the employer nomination process.<sup>32</sup>

4.35 The National Farmers Federation (NFF) argued that the LMT advertising requirements are 'fundamentally flawed' as they fail to provide an accurate representation of local demand for agricultural jobs. It stated that labour market testing is a 'generally onerous process for farmers for little return...especially given

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29 Joint University, *Submission 46*, pp. 4–5; Tourism Accommodation Australia, *Submission 42*, p. 15; Australian Chamber of Commerce and Industry, *Submission 12*, p. 17.

30 The Law Council of Australia noted that if the alternative outcome of LMT identifies a suitable Australian candidate, the visa holder would have a legitimate claim under employment law for unfair dismissal: see Law Council of Australia, *Submission 36*, p. 11.

31 Law Council of Australia, *Submission 36*, p. 11.

32 Motor Trades Association of Australia, *Submission 39*, p. 15. See also: National Farmers Federation, *Submission 13*, p. 14.

labour shortages are a known problem for their industry and arguably shouldn't need to be proven'.<sup>33</sup>

4.36 The Migration Institute of Australia submitted that the requirement for advertisements to have a national reach does not reflect the reality that the Australian workforce is largely immobile, and cannot simply 'pack up families and homes and relocate'.<sup>34</sup> Such advertising requirements are therefore 'unlikely to have any significant impact on reducing the reliance on overseas skilled workers or reducing genuine temporary skilled shortages'.<sup>35</sup>

#### ***Concerns around timeframes required for undertaking labour market testing***

4.37 The committee heard concerns from stakeholders in the higher education, technology and medical research sectors that the maximum time period allowable between completing labour market testing and visa nomination (currently set at four months) is too short.<sup>36</sup>

4.38 These submitters argued that when undertaking recruitment for highly qualified research, academic and professional positions in a competitive global market, lead times associated with recruitment processes are often in the order of six to nine months. In these circumstances, the LMT requirement of having completed advertising process within the preceding four months before lodging a visa nomination is unworkable and can lead to perverse outcomes.<sup>37</sup> Such outcomes have included, for example, universities being forced to re-advertise high level positions due to LMT timeframe requirements, when a successful candidate had already been identified.<sup>38</sup>

4.39 It was recommended by these stakeholders that the required timeframes for LMT advertising be increased to six or nine months, or alternately that LMT requirements be waived for certain high level occupations in these industries.<sup>39</sup>

#### ***Interpretation of changes made to labour market testing requirements in 2017***

4.40 Australian Pork Limited (APL), the national representative body for Australian pork producers, expressed concern that the approach of labour market testing assessors within the Department of Home Affairs has changed since 2017:

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33 National Farmers Federation, *Submission 13*, p. 15.

34 Migration Institute of Australia, *Submission 33*, p. 10.

35 Migration Institute of Australia, *Submission 33*, p. 10.

36 CSL Limited, *Submission 18*, pp. 1, 3; Group of Eight, *Submission 14*, p. [1, 4–5]; Cochlear, *Submission 19*, pp. 3–5.

37 CSL Limited, *Submission 18*; pp. 2–3; Cochlear, *Submission 19*, p. 4; Group of Eight, *Submission 14*, p. 3–4; Joint University, *Submission 46*, pp. 2–12; Law Council of Australia, *Submission 36*, pp. 12–13.

38 Joint University, *Submission 46*, pp. 2–5.

39 CSL Limited, *Submission 18*; pp. 2–3; Cochlear, *Submission 19*, p. 4; Group of Eight, *Submission 14*, p. 3–4; Joint University, *Submission 46*, pp. 2–12; Law Council of Australia, *Submission 36*, pp. 12–13.

Although the changes to the labour market testing (LMT) regime introduced in 2017 were not too extensive or unreasonable on paper, APL members applying for TSS visa nominations have noticed a marked difference in the attitudes of assessing officials.

Arbitrary and subjective judgements on applicants LMT processes are being employed to block access to much-needed skilled workers. For example, one producer was told—even though he had fulfilled all the LMT requirements on the application—the assessor did not feel the producer had carried out the LMT in good faith. The decision was not based on any failure to complete any step of the LMT process, just the assessing official's gut feeling. This is not an isolated experience.<sup>40</sup>

### **Waivers of labour market testing requirements because of international trade agreements**

4.41 As noted earlier in this chapter, exemptions to LMT requirements apply in circumstances where:

- LMT would be inconsistent with Australia's international trade obligations under the World Trade Organisation General Agreement on Trade in Services; or
- LMT is precluded under Free Trade Agreements to which Australia is a party.

4.42 The ACTU argued that the current waivers of labour market testing requirements because of international trade agreements should be abolished because these arrangements create loopholes that undermine local jobs and create a class of vulnerable low paid foreign workers.<sup>41</sup> The ACTU commented specifically on the recently signed Trans-Pacific Partnership (TPP11):

In recent months with the ratification of the TPP11 the Australian Government has yet again entered into a free trade agreement where it has removed the obligation on employers to conduct labour market testing before temporary overseas workers fill Australian jobs. Australian and overseas companies will be able to employ unlimited numbers of workers from 6 additional TPP member countries in hundreds of occupations across nursing, engineering and the trades without any obligation to provide evidence of genuine efforts to first recruit Australian workers. In doing so, Australia has agreed to the worst deal of any TPP country in terms of what it has given up in relation to migration safeguards. The Government should not support an agreement that removes this basic protection in support of Australian jobs.<sup>42</sup>

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40 Australian Pork Limited, *Submission 43*, p. 15.

41 Australian Council of Trade Unions, *Submission 11*, p. 4. See also: Construction, Forestry, Maritime, Mining and Energy Union, *Submission 38*, pp. [7–8]; Electrical Trades Union of Australia, *Submission 49*, p. 13.

42 *Submission 11*, p. 6.

4.43 The Electrical Trades Union (ETU) submitted that free trade agreements create loopholes for skills assessments, as labour movement chapters in free trade agreements exclude foreign workers from the usual visa application processes. This is highlighted by the 'temporary entry of business persons' provisions of trade agreements, which has seen the 'creation of a visa class that avoids any checks and balances relating to skills and specifically exempts the workers from Australian wages and conditions'.<sup>43</sup>

4.44 The ACTU made specific recommendations in this area, as follows:

- Labour market testing should apply to all occupations under the TSS visa program. Existing exemptions because of international trade agreements should be removed.
- There should be no further waivers of labour market testing in trade agreements entered into by Australia. Any review of labour market testing, rules should be the subject of proper consultation with unions and other stakeholders including consultation through a new independent, tripartite Ministerial Advisory Council on Skilled Migration (MACSM).
- Where Australian Governments nevertheless continue to make commitments on the 'movement of natural persons' in free trade agreements that provide exemptions from domestic labour market testing laws, those commitments should not be extended to the category of 'contractual service suppliers' given the expansive meaning given to that term across professional, technical and trade occupations.
- The Migration Regulations should be amended as necessary to make clear that labour market testing applies not only to 'standard business sponsors' under the standard TSS (457) visa program, but applies also to all positions nominated by 'approved sponsors' under any labour agreement, Enterprise Migration Agreement (EMA) or Designated Area Migration Agreement (DAMA).<sup>44</sup>

#### ***Arguments supporting LMT waivers in trade agreements***

4.45 Conversely, ACCI argued that fears over LMT waivers in international trade agreements are unfounded, claiming there is a lack of evidence suggesting any negative impacts.<sup>45</sup> To the contrary, ACCI submitted that available evidence did not support claims that waivers will threaten Australian jobs:

In the year before ChAFTA [China-Australia Free Trade Agreement], there were 3,520 primary applications granted for Chinese workers under the 457-visa program. In 2017–18, only 1,700 Chinese worker applications for temporary skilled visas were granted—less than half. Exemptions from

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43 Electrical Trades Union of Australia, *Submission 49*, p. 11.

44 Australian Council of Trade Unions, *Submission 11*, p. 30.

45 Australian Chamber of Commerce and Industry, *Submission 12*, pp. 16–17. See also: Law Council of Australia, *Submission 36*; Committee for Melbourne, *Submission 35*.

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LMT do not result in hordes of foreigners gaining access to our labour market.<sup>46</sup>

### **Use of labour agreements in the temporary skilled visa system**

4.46 The committee heard a considerable range of evidence on the utilisation of the labour agreement stream of the TSS visa subclass.<sup>47</sup>

4.47 A labour agreement is a formal agreement between an Australian employer and the Australian Government and is used by employers to recruit foreign workers on a permanent or temporary basis. As explained in the Joint Departmental Submission:

[Labour agreements] enable approved Australian businesses facing unique labour shortages with an option to sponsor skilled overseas workers when there is a demonstrated need that cannot be met in the Australian labour market and standard skilled visa programs are not available. ... [The Labour Agreement] program provides an important flexible solution to support Australian businesses where required and where associated risks can be managed—with [labour agreements] considered on a case-by-case basis to maintain the integrity of the program.<sup>48</sup>

4.48 As at 30 September 2018, there were 346 labour agreements in effect, which is an increase from 313 labour agreements in effect at the same point in 2017.<sup>49</sup>

4.49 There are five main types of labour agreements available, as outlined below.

#### *Company-specific agreements*

4.50 Company-specific agreements are developed directly between the Department of Home Affairs and an employer, and are considered where a genuine skills or labour shortage exists for an occupation not covered by an industry labour agreement, or relevant project or designated area migration agreement. The terms are company-specific and considered on a case-by-case basis.<sup>50</sup>

#### *Global talent scheme (GTS)*

4.51 The Joint Departmental Submission stated that agreements under the Global Talent Scheme:

...are for businesses, including Australian start-ups, seeking to fill a small number of niche highly-skilled roles, where their needs cannot be met under existing skilled entry programs. Compared to traditional labour agreements,

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46 Chamber of Commerce and Industry, *Submission 12*, p. 17.

47 In addition to temporary TSS visa workers, labour agreements can also involve the recruitment of permanent migrant workers under the permanent Employer Nomination Scheme (ENS) visa program.

48 Joint Departmental Submission, *Submission 40*, p. 27.

49 Joint Departmental Submission, *Submission 40*, p. 27.

50 Joint Departmental Submission, *Submission 40*, p. 27.

the GTS provides fast processing and flexible concessions for approved participants via an Established Business stream and a start-up stream.<sup>51</sup>

4.52 The Global Talent Scheme was announced in March 2018, and scheduled to commence on 1 July 2018 as a one-year pilot program. However, the advisory panel with the function of assessing applications under the start-up stream was not established until 23 October 2018. At 31 January 2019, only 8 visas had been granted under the established business scheme and no visas had been issued under the start-up stream.<sup>52</sup>

### *Industry agreements*

4.53 Industry agreements provide fixed terms and conditions specific to an industry, and are agreed to by the Minister in consultation with industry stakeholders. Such an agreement is considered if the Department of Home Affairs has received evidence from a number of submissions to support a claim of ongoing labour shortages within the industry. An industry agreement cannot be changed once it is in place. There are currently seven industry agreements: dairy, fishing, meat, minister of religion, on-hire, pork and restaurant (fine dining).<sup>53</sup>

### *Designated area migration agreements (DAMAs)*

4.54 DAMAs are agreements between the Minister for Immigration, Citizenship and Multicultural Affairs and State and Territory Governments or regional bodies to provide a defined geographic region with foreign workers beyond those available via the TSS and ENS visa programs by: allowing variation to standard occupations and skills lists; and allowing negotiable concessions to the standard skilled visa program requirements.<sup>54</sup> These can include, for example, concessions on the level of the Temporary Skilled Migration Income Threshold and English language requirements.

4.55 DAMAs allow for a set maximum number of overseas workers to be nominated each year. The terms of each DAMA are negotiated individually and are 'tailored to the unique economic and labour market conditions of each regional area'.<sup>55</sup>

4.56 Five DAMAs are currently in place:

- The Northern Territory DAMA (where a new DAMA was agreed to in December 2018, following the completion of an initial DAMA in place since 2015).<sup>56</sup>

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51 Joint Departmental Submission, *Submission 40*, p. 27.

52 Department of Home Affairs, *Response to Question taken on Notice No. 285, Supplementary Budget Estimates, Legal and Constitutional Affairs Legislation Committee*, 22 October 2018. See also: Emma, Koehn, 'Global talent scheme fails to issue visas as startups 'crippled'', *Sydney Morning Herald*, 1 March 2019, <https://www.smh.com.au/business/small-business/global-talent-scheme-fails-to-issue-visas-as-startups-crippled-20190301-p51129.html> (accessed 29 March 2019).

53 Joint Departmental Submission, *Submission 40*, p. 27.

54 Joint Departmental Submission, *Submission 40*, p. 28.

55 Joint Departmental Submission, *Submission 40*, p. 28.

- The Greater South Coast region of Victoria DAMA (announced on 10 December 2018).<sup>57</sup>
- The Adelaide City Technology and Innovation Advancement Agreement DAMA (announced on 21 March 2019).<sup>58</sup>
- The Regional South Australia DAMA (announced on 21 March 2019).<sup>59</sup>
- The Kalgoorlie-Boulder DAMA (announced on 21 March 2019).<sup>60</sup>

4.57 The Minister stated in December 2018 that discussions are underway in relation to potential DAMAs with other regions, including the Pilbara region in WA, Cairns in far North Queensland and the Orana region in central NSW.<sup>61</sup>

4.58 Of the five DAMAs currently in place, full details of the agreement are only publicly available in relation to the Northern Territory DAMA.<sup>62</sup>

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56 Joint Departmental Submission, *Submission 40*, p. 28; The Hon David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs, *Media Release*, 'New Migration agreement set to boost NT population', 10 December 2018, available at <https://minister.homeaffairs.gov.au/davidcoleman/Pages/new-migration-agreement-to-boost-nt-population.aspx> (accessed 22 March 2019).

57 Joint Departmental Submission, *Submission 40*, p. 28; The Hon David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs, *Media Release*, 'New agreement to help Victoria's Great South Coast region fill skill gaps', 10 December 2018, <https://minister.homeaffairs.gov.au/davidcoleman/Pages/new-agreement-to-help-victoria-great-south-coast-region.aspx> (accessed 22 March 2019).

58 The Hon David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs, *Media Release*, 'New migration agreements to benefit South Australia', 21 March 2019, <https://minister.homeaffairs.gov.au/davidcoleman/Pages/new-migration-agreements-to-benefit-south-australia.aspx> (accessed 29 March 2019). Under the Adelaide City Technology and Innovation Advancement Agreement DAMA, up to 300 people per year will be able to be sponsored over the five-year agreement, with 60 occupations covered.

59 The Hon David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs, *Media Release*, 'New migration agreements to benefit South Australia', 21 March 2019. Under the Regional South Australia DAMA, up to 750 people per year will be able to be sponsored over the five-year agreement, with 114 occupations covered.

60 The Hon David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs, *Media Release*, 'Kalgoorlie-Boulder Secures DAMA', 21 March 2019, <https://minister.homeaffairs.gov.au/davidcoleman/Pages/kalgoorlie-boulder-secures-dama.aspx> (accessed 29 March 2019). Under the Kalgoorlie-Boulder DAMA, up to 500 people per year will be able to be sponsored over the five-year agreement, with 73 occupations covered.

61 The Hon David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs, *Media Release*, 'New agreement to help Victoria's Great South Coast region fill skill gaps', 10 December 2018.

### *Project agreements*

4.59 Project agreements allow skilled and specialised semi-skilled temporary foreign workers to work on infrastructure or resource development projects where there are genuine skills or labour shortages. They are designed to complement existing Australian Government initiatives to address skill and labour shortages by ensuring that shortages do not create constraints on major projects and jeopardise Australian jobs.<sup>63</sup>

### *General requirements for all labour agreements*

4.60 The Joint Departmental Submission noted employers accessing labour agreement are required 'to provide specific details for each of the occupations sought and the number of positions sought for each location and year' of the proposed agreement. Additionally, labour agreements must:

- identify the relevant skills shortage in the business and why these vacancies cannot be filled by the Australian workers;
- specify the number of skilled workers needed from outside Australia; and
- provide the age, skill and English language requirements that relate to the nominated occupations.<sup>64</sup>

### *Submitter support for labour agreements*

4.61 Some submitters expressed support for the use of labour agreements as a necessary component of the skilled visa system. For example, the NFF commented that these agreements are a 'means of overcoming some of the shortcomings—or rigidities—in the structure of the skilled visa program, in particular where the ANZSCO codes are not reflective of the business's needs'.<sup>65</sup>

4.62 The AMIEU expressed support for the template meat industry labour agreement. It noted that this agreement was developed 'after exhaustive negotiations with the industry', and submitted that it has 'proven effective in managing many issues that had arisen prior to the agreement'.<sup>66</sup>

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62 See: Northern Territory Department of Trade, Business and Innovation, *Northern Territory Designated Area Migration Agreement*, <https://business.nt.gov.au/business/migration-information-for-business/northern-territory-designated-area-migration-agreement> (accessed 29 March 2019). The Department of Home Affairs website does not mention any of the other four current DAMAs on its *Designated area migration agreements* webpage: <https://immi.homeaffairs.gov.au/visas/employing-and-sponsoring-someone/sponsoring-workers/nominating-a-position/labour-agreements/designated-area-migration-agreements> (accessed 29 March 2019).

63 Joint Departmental Submission, *Submission 40*, p. 28.

64 Joint Departmental Submission, *Submission 40*, p. 28.

65 National Farmers Federation, *Submission 13*, p. 17.

66 Australasian Meat Industry Employees Union, *Submission 17*, p. 4.

4.63 Australian Pork Limited commented that the Pork Industry Labour Agreement (PILA) was developed because 'extensive industry-supported training, development, and outreach programs' had not been enough to eliminate long-standing and critical skills gaps in the pig production industry.<sup>67</sup> It noted that the PILA is the 'last-remaining viable pathway for meaningfully addressing skills shortages' in the industry.<sup>68</sup>

*Arrangements for accessing labour agreements*

4.64 Some industry submitters supportive of labour agreements raised concerns that agreements are difficult to access at an administrative and operational level, or contain restrictive conditions. For instance, Australian Pork Limited commented as follows in relation to the PILA:

Only the PILA retains a pathway to permanency, but access to the agreement is being stymied at the operational level. Producers tell us they are having difficulty at all levels of the system, mostly related to unaccountable decision-making that lacks transparency, but also in terms of bearing the cost of increased fees and extended timeframes.

It is as though officials on the working level are being encouraged to obstruct access to the program, even when all formal requirements are being met by applicants. This observation has been reported to APL by producers, migration agents, and colleagues in other agricultural sectors with similar requirements for skilled labour.<sup>69</sup>

4.65 The Australian Meat Industry Council argued that the template meat industry labour agreement 'contains restrictions that limit the capacity to provide long term certainty for both workers and company'.<sup>70</sup>

4.66 The NFF acknowledged that while labour agreements can be an effective means to secure labour, they 'can be costly and time-consuming', and the approval process 'features significant shortcomings'.<sup>71</sup>

4.67 The NFF relayed concerns that the 'template' arrangements for industry labour agreements have taken up to two years to negotiate and implement, requiring substantial commitment of private and public resources. Additionally, requests by employers to access the agreements based on those template arrangements can take more than six months to process:

This delay, during which the farm has to manage without the necessary contingent of skilled staff, has a significant impact on business productivity.<sup>72</sup>

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67 Australian Pork Limited, *Submission 43*, p. 18.

68 *Submission 43*, p. 17.

69 Australian Pork Limited, *Submission 43*, p. 18.

70 *Submission 21*, p. 8.

71 National Farmers Federation, *Submission 13*, p. 17.

72 National Farmers Federation, *Submission 13*, p. 17.

***Submitter and witness concerns about the use of labour agreements***

4.68 Other submitters and witnesses identified problems with the use of labour agreements. For example, the ACTU's submission called for the abolition of all labour agreements, stating:

Labour agreements create pools of exploitable workers. There are currently [346] agreements with thousands of workers employed under them with no evidence employers are taking any steps to train Australian workers in the necessary skills or adequately test the local labour markets.<sup>73</sup>

4.69 Mr Zachary Duncalfe, National Legal Officer for the Australian Workers' Union (AWU), told the committee that labour agreements:

...are subject to abuse by employers, are used far too frequently, and are not subject to anything nearing the level of scrutiny that should be required for agreements that have such significant potential to negatively impact Australian workers in terms of employment opportunities, career progression, training opportunities, and the maintenance of industry terms and conditions of employment.<sup>74</sup>

***Use of labour agreements where there are no genuine skills shortages***

4.70 Some stakeholders argued that labour agreements are being used in cases where there is no genuine skills shortage that could not be filled by Australian workers. Mr Duncalfe of the AWU argued that industry labour agreements

...are the result of employer groups and employers unilaterally determining what job classifications an industry is experiencing a 'shortage' of and the terms and conditions of employment for these classifications. The AWU's experience has been that employers seeking labour agreements are generally only required to take minimal steps to demonstrate the relevant positions have been advertised locally. The net result of such a system is that Australian workers are denied employment and training opportunities in favour of cheaper foreign labour.<sup>75</sup>

4.71 Mr Damian Kyloh of the ACTU raised a specific example where a labour agreement was being used in questionable circumstances:

[W]e've had examples of labour agreements in fast food work....That's work that was typically taken up by young teenage workers. That's what I did for my first job as well. To have a labour agreement to bring in temporary workers to do work in fast food outlets—I question whether there's a genuine high-level skill shortage in fast food outlets.<sup>76</sup>

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73 *Submission 11*, p. 5. See also: Electrical Trades Union of Australia, *Submission 49*, pp. 17–18.

74 *Proof Committee Hansard*, 6 March 2019, Mackay, p. 1.

75 *Proof Committee Hansard*, 6 March 2019, p. 1.

76 *Proof Committee Hansard*, 7 March 2019, p. 8.

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*Excessive discretion in the granting of labour agreements*

4.72 The Law Council of Australia expressed concern at the increasing prevalence of labour agreements in the TSS visa program, noting there has been 'a proliferation of labour agreement types and subtypes over the last few years'.<sup>77</sup> It stated that labour agreements may have utility in some circumstances; however, the labour agreement program should not be used simply as a means of circumventing the usual requirements of the TSS visa.<sup>78</sup>

4.73 The Law Council expressed further concern at the lack of clear boundaries around how labour agreements can be made, due to the fact that these agreements sit outside the Migration Regulations:

The labour agreement regime is an unsatisfactory workaround because the guidelines for approval sit entirely outside the [Migration] Regulations and the outcome is subject to significant Departmental and Ministerial discretion. A regime which is entirely discretionary, non-compellable, and without the TSS regulatory framework is not an appropriate mechanism for careful control of particular industries, occupations or regions.<sup>79</sup>

*Lack of transparency around the granting of labour agreements*

4.74 The committee heard that there is a lack of transparency and accessibility to information about individual company labour agreements. In particular, the committee received evidence that during the process of a company negotiating with the Department of Home Affairs to access a labour agreement, there is only very limited scope for other relevant stakeholders to provide input.

4.75 Commenting on requirements for companies to undertake consultation with other relevant stakeholders when negotiating a labour agreement, the AWU noted that in practice this can be extremely limited, and consist of nothing more than sending a template letter to relevant stakeholders inviting input.<sup>80</sup> In these situations there is no requirement for the business or the Department of Home Affairs to respond to any concerns raised by relevant stakeholders, no opportunities for face-to-face discussions, and no visibility on whether relevant stakeholders' concerns have been addressed.<sup>81</sup>

4.76 Mr Duncalfe of the AWU commented on the lack of communication in several cases where the AWU had been contacted as part of a business's attempts to access a labour agreement:

The AWU is a relevant industrial stakeholder for the purposes of the proforma letter that must be completed and sent by employers seeking

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77 *Submission 36*, p. 18.

78 *Submission 36*, p. 18.

79 *Submission 36*, p. 18.

80 Australian Workers' Union, *Submission 48*, pp. 4–5. See also: Electrical Trades Union, *Submission 49*, pp. 17–18.

81 Australian Workers' Union, *Submission 48*, pp. 4–5; Electrical Trades Union, *Submission 49*, pp. 17–18.

labour agreements. However, we are shut out from all processes, including decisions made by the department... We wish to make the point that we never hear from the Department of Home Affairs, even when we copy them into our responses to employers seeking labour agreements. We do not even get an email that confirms our email has been received by the department. The department does not publish any reasons for their decisions and we are not notified of those decisions being made, even when we have been identified as a relevant industrial stakeholder for that agreement. It is up to us to search on the Department of Home Affairs website to find out if a labour agreement has been granted, and even then the only information that we do receive is the company name and the date of the agreement. We do not receive any information on whether any of our submissions about the labour agreement have been heeded and we do not receive any information about if the terms of the labour agreement have changed since receiving our submissions or if the department has even required any further submissions or amendments.<sup>82</sup>

## **Committee view**

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

4.77 The committee supports the principle of labour market testing (LMT) as a means of ensuring that temporary skilled visas are only being utilised when there is genuine evidence of a skills shortage that cannot be met by local workers.

4.78 The committee is concerned by reports that employers may be circumventing LMT by setting requirements in advertisements for vacant positions that are different for domestic workers compared with visa holders, to deliberately dissuade local applicants from applying. The committee is not convinced, in instances such as these, by arguments that *all* domestic applicants for jobs in particular industries are of low quality or unsuitable for the position.

4.79 Further, given youth unemployment rates around the country and in particular areas, employers should be willing to invest time and resources to skill young Australians, as they have for decades in this country, rather than turning to visa holders so that they are able to avoid this responsibility.

### ***Arguments that LMT is not required in some industries***

4.80 The committee was not convinced by arguments from specific sectors that labour market testing is unnecessary for their industries. Labour market testing provides up-to-date evidence of a skills shortage in a particular industry. Indeed, if undertaken correctly, this body of proof increases the strength of arguments that specific sectors are continuing to experience skills shortages and need to use the skilled visa system to fill vacancies. The committee is also in favour of keeping existing requirements that labour market testing should be required for visa renewals where workers are staying with their current employer. The temporary skilled visa

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82 Mr Zachary Duncalfe, National Legal Officer, Australian Workers' Union, *Proof Committee Hansard*, 6 March 2019, pp. 1–2.

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system is intended to fill *temporary* skills shortages; if these no longer exist, Australian citizens and permanent residents should be prioritised to fill vacancies.

4.81 In some industries and some regions, particularly rural and regional areas, there may indeed be genuine skills shortages. In other cases, however, normal labour market conditions that regulate the market by ensuring that employment conditions are satisfactory for both employers and workers, and wage levels are increased to attract more and better candidates, may be suppressed if employers are not genuinely looking to fill skilled positions with Australian citizens and permanent residents.

*Expense and form of LMT advertisements*

4.82 The committee notes evidence arguing that labour market testing requirements are expensive for employers, particularly small business, and may not be relevant in rural and regional areas, where word of mouth may be more commonly used rather than online or print advertisements. The committee suggests that the Australian Government should undertake further consultation with regional stakeholders about how to implement appropriate labour market testing requirements in these contexts that would help to prevent unscrupulous employers avoid important regulatory measures and ensure Australian workers are given priority.

*Timelines for labour market testing requirements*

4.83 The committee notes concerns from stakeholders in the university, technology and medical research sectors that in high-level recruitment processes in these industries, the maximum time period allowable between completing labour market testing and visa nomination (currently set at four months) is too short. In the view of the committee, the Australian Government should give consideration to extend LMT timeframes in these limited cases, to ensure that Australia's research institutions are not missing out on top-level global talent.

*Need for proof of genuine labour market testing*

4.84 The committee considers that evidentiary proof of proper labour market testing is the best measure to ensure that employers are not trying to avoid normal labour market incentives that would make conditions better for workers, or investing in training Australian workers. As such, the committee recommends that the Australian Government introduce stricter requirements for labour market testing, to promote the overall health of the Australian labour market.

## **Recommendation 8**

**4.85 The committee recommends that the Australian Government introduce more stringent evidentiary requirements for labour market testing to ensure that the intent of labour market testing arrangements is achieved and Australian employment opportunities are protected.**

*Labour market testing exemptions in international trade agreements*

4.86 The committee is concerned about the potential impact of LMT waivers in international trade agreements on Australian workers. The lack of proper controls over the importation of skilled workers in these circumstances could have a significant

negative impact Australian employment conditions and opportunities for Australian workers.

4.87 The committee notes calls from stakeholders that existing exemptions in free trade agreements should be removed, and considers that, at a minimum, the Australian Government should commit to including no labour market testing waivers in future free trade agreements.

### **Recommendation 9**

**4.88 The committee recommends that the Australian Government resolve not to enter into any future free trade agreements that would involve labour market testing waivers.**

#### *Labour agreements*

4.89 The committee recognises that labour agreements may in limited circumstances provide a means to address genuine skills shortages. However, evidence indicates that labour agreements may give rise to exploitation of migrant workers, migrants being favoured as a cheap alternative to an Australian workforce, and employers avoiding investing in jobs and skills training for locals.

4.90 The committee notes concerns raised during the inquiry about the lack of opportunity for meaningful stakeholder engagement during the process of businesses applying to access labour agreements. This is combined with a lack of transparency around how final decisions are taken on company specific labour agreements.

4.91 Given these issues, the committee recommends that the Australian Government review the use and effectiveness of labour agreements issued under the skilled migration program, and make necessary changes to ensure that labour agreements arise because of genuine skills shortages, that all relevant stakeholders are genuinely consulted and that the Department of Home Affairs publish its reasons for entering into or renewing a labour agreement.

### **Recommendation 10**

**4.92 The committee recommends that the Australian Government undertake a review of the use and effectiveness of labour agreements under Australia's skilled migration program, and implement any necessary changes to ensure that:**

- **labour agreements are only entered into where there is publicly demonstrated evidence of a genuine skills shortage that cannot be addressed by the Australian workforce;**
- **all relevant stakeholders are genuinely consulted during the process of finalising labour agreements and provided with appropriate feedback in relation to concerns raised; and**
- **the Department of Home Affairs' reasons for entering into a labour agreement (or a renewal of any labour agreement) are made publicly available.**