

ACTU SUBMISSION

Senate Inquiry into the temporary work visa program

1 May 2015

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Introduction

The ACTU welcomes the opportunity to make a submission to this Inquiry into the temporary work visa program and the impact it has on both Australian and temporary overseas workers and their families.

The ACTU is the peak body for Australian unions, made up of 46 affiliated unions. We represent almost 2 million working Australians and their families.

Australian unions have had long-standing and well-documented concerns with the operation of the temporary 457 visa program, but it is clear to us that the problems extend to a range of other temporary visa types where overseas workers can find themselves in vulnerable situations. We therefore welcome the fact the Inquiry encompasses all temporary work visa types.

There are currently more than 1.8 million temporary visa holders in Australia, including New Zealanders, and up to 1.3 million of these visa holders have work rights. This equates to around 10% of the total Australian labour force of over 12.4 million.

At a time when unemployment remain stubbornly above 6% and youth unemployment is more than double that, the Australian community needs to have confidence that such a large and growing temporary work visa program is not having adverse impacts on employment and training opportunities for Australians, particularly young people.

Equally, the community needs to be assured that employers and others are not exploiting vulnerable temporary overseas workers who are unaware of their rights or not in a position where they feel able to exercise those rights.

Unfortunately, the evidence available from our affiliated unions and other sources is that both Australian and overseas workers are being disadvantaged and exploited on a regular basis under the current policy and program settings that govern temporary work visas.

This has been happening far too often and for far too long for it to be dismissed as a few isolated cases in an otherwise well-functioning program. It is time now for a fundamental reassessment of a skilled migration program that places such emphasis on temporary and employer-sponsored forms of migration without due recognition of the inherent flaws and dangers in doing so.

In the submission that follows, we set out a package of recommendations to help address these issues and ensure that the temporary work visa program, to the extent that it is required, operates in the best interests of all workers. In support of this position, we first outline the overall ACTU position on skilled migration matters, and provide some background information on the nature and dimensions of the temporary work visa program. The submission then addresses each of the individual terms of reference.

The ACTU endorses and refers the Committee to the submissions of our affiliated unions.

Key recommendations

Key points

There are currently more than 1.8 million temporary visa holders in Australia, including New Zealanders, and up to 1.3 million of these visa holders have work rights. This equates to around 10% of the total Australian labour force of over 12.4 million.

At the same time there are close to 800 000 Australians out of work. Youth unemployment is 13.7%.

The temporary work visa program is virtually uncapped and has been growing in size for a number of years, without any regard for the state of the labour market in Australia.

In December 2007 there were around 840 000 temporary work visa holders in Australia, about 7% of the total labour force of 11 million at the time. If both the labour force and the number of temporary work visa holders continued to increase at the same rate over the next 5 years as they did between 2007-2014, then by 2020 there would be close to 2 million temporary work visa holders in Australia, and they would make up around 14% of the total labour force.

This compares to the current permanent migration intake of 128 550 which is determined and capped on an annual basis.

Meanwhile, disturbing cases of exploitation and mistreatment of temporary work visa holders continue to be reported. This has been happening far too often and for far too long. These cases cannot continue to be dismissed as isolated cases in an otherwise well-functioning system. They point to the systematic, inherent problem of relying so heavily on a temporary work visa program where vulnerable workers are dependent on their employer for their ongoing visa status, and, in many cases, their desire for permanent residency.

It is time for a fundamental review and reassessment of the temporary work visa program in the interests of all workers - Australian citizens and permanent residents, and temporary overseas workers. This is also important for the Australian community as a whole and for Australia's international reputation as a fair and safe place for overseas nationals to work, as well as for all those employers who are doing the right thing in employing and training Australians, and where they do have a genuine requirement to use overseas workers, treating those workers well and in accordance with their legal entitlements.

We commend the following package of recommendations for the Committee's consideration.

Key Recommendations

- 1. Recalibrating the balance of the skilled migration program toward permanent, independent migration**
 - The current weighting of Australia's skilled migration program towards temporary and employer-sponsored pathways should be re-evaluated, with greater emphasis given to the permanent, independent stream as the 'mainstay' of the skilled migration program.

2. Improved Labour market testing

- That the Committee recommend more rigorous evidentiary requirements for labour market testing to be incorporated into legislation and associated program guidelines to ensure the intent of the legislation is achieved and Australian employment opportunities are protected. This should include:
 - A mandatory requirement for all jobs to be advertised as part of labour market testing obligations;
 - The introduction of minimum requirements for mandatory job ads, similar to the UK Resident Labour Market Test;
 - A requirement that jobs be advertised for a minimum of four weeks;
 - A requirement that labour market testing has been conducted no more than 4 months before the nomination of a 457 visa worker;
 - A ban on job advertisements that target only overseas workers or specified visa class workers to the exclusion of Australian citizens and permanent residents;
 - A crackdown on job ads that set unrealistic and unwarranted skills and experience requirements for vacant positions, with the effect of excluding otherwise suitable Australian applicants; and
 - The Minister to use the provision at s.140GBA (5) (b) (iii) of the *Migration Act 1958* to specify other types of evidence that should be provided as part of labour market testing, including evidence of relocation assistance offered to successful applicants, and evidence of specific measures to employ those disadvantaged or under-represented in the workforce, such as indigenous workers, the unemployed and recently retrenched workers, and older workers.
- Labour market testing should apply to all occupations under the 457 visa program. Existing exemptions on the basis of skill level and occupation should be removed.
- Where Governments nevertheless intend to make exemptions from labour market testing, unions and other stakeholders should be consulted before any decisions are made on such exemptions, including consultation through the Ministerial Advisory Council on Skilled Migration (MACSM). Any proposal for exemption should be accompanied by an explanation as to how the exemption would be consistent with the central purposes of the 457 visa scheme as set out in s140AA of the Migration Act.
- The Australian Government should not enter into any free trade agreements that trade away the right of the Australian Government and the Australian community to require that labour market testing occur and Australian workers are given first right to Australian jobs.

- 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 be amended as necessary to make clear that labour market testing applies not only to ‘standard business sponsors’ under the standard 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).
- The current sponsorship obligation ‘to keep records’ be expanded to specifically include records of labour market testing undertaken.
- In the interests of transparency and community confidence in the 457 visa program, the Department of Immigration and Border Protection (DIBP) make information and data on the operation of the labour market testing provisions publically available on at least a quarterly basis. The type of information that should be provided is detailed at Appendix 1. Provision of such information and discussion of labour market testing should be a standing agenda item for the Ministerial Advisory Council on Skilled Migration.

3. Improved training benchmarks

- That training benchmarks for the 457 visa program be informed by clear objectives. The following objectives are recommended:
 - To ensure that employers who have a genuine need to sponsor and overseas workers to fill skill shortages are also training the future workforce, reducing their need to rely on temporary overseas workers in future.
 - To increase training through trade apprenticeships, traineeships and graduate degrees in the specific occupations allegedly in short supply i.e. the occupations in which 457 visa workers are being approved on the basis that no qualified Australian workers are available.
 - To ensure that the 457 sponsor approval criteria are sufficiently robust to screen out would-be sponsors who do not meet best practice Australian standards for apprenticeship and graduate training.
 - To increase the cost of accessing 457 visa workers relative to the cost of training Australian workers, especially young people in entry-level positions.
- Consistent with these objectives, introduce more robust training obligations on employers who use the 457 visa program, including:

- A requirement on sponsoring employers to be training and employing apprentices/trainees/graduates in the same occupations where they are using 457 visa workers.
- Where four or more 457 visa workers are sponsored by the employer in trade and technical occupations, apprentices must represent at least 25% of the sponsor's trade workforce.
- Smaller employers with fewer than four 457 visa workers and who are not able to commit to directly training an apprentice should be required to train an apprentice through an industry group scheme on a ratio of one to one for the time they seek to engage a 457 visa worker.
- Where employers are sponsoring 457 visa workers in professional and managerial occupations, recent Australian higher education graduates with less than 12 months' paid work experience should represent at least 15% of the sponsor's managerial and professional workforce.
- A requirement on sponsors of 457 visa workers to make payments into a dedicated training fund that is linked to broader training objectives. This concept is similar to that recommended by the Azarias review, but must be based on a more meaningful contribution. A contribution of \$4000, which is based on the standard incentive payment an employer would have received if they had employed an apprentice through to completion, is a recommended benchmark contribution amount.
- Abolishing the existing, ineffective training benchmarks tied to payment of 1% and 2% of payroll.
- The DIBP be responsible for ensuring information on the domestic training effort of sponsoring employers under the 457 visa program is collected and made publically available. The type of information that should be provided is set out under term of reference (2).

4. Tripartite oversight

- Guaranteeing an ongoing legislated role for the Ministerial Advisory Council for Skilled Migration in providing effective tripartite oversight of, and input into, all elements of the skilled migration program. A representative cross-section of unions must be represented on MACSM.

5. Market rates

- The obligation to pay genuine market must be retained and enforced rigorously. The salary threshold at which exemptions from the requirement apply should be set at \$250 000 per annum indexed.

6. Compliance and enforcement

- Responsibility for compliance and monitoring should be transferred from the Department of Immigration and Border Protection to the Fair Work Ombudsman.
- A stronger focus on initial entry into the 457 visa program through the sponsorship approval process to ensure scrutiny is applied up-front rather than having to rely on sanctions once the damage has been done to workers.
- Necessary resources be directed to establishing a process for fast-tracking or expediting investigations of claims of exploitation of temporary overseas workers.
- Removing the occupation of Project and Program Administrator from the list of eligible occupations under the standard 457 visa program.
- When integrity concerns arise in relation to particular occupations, as they have again with Program and Project Administrators, that DIBP suspend further processing of visa nominations for that occupation until the matter is investigated and resolved.
- Improved information-sharing arrangements between government agencies to bolster monitoring and compliance under the program. Details of all such arrangements and the outcomes of such arrangements should be made publically available.

7. Protection against exploitation

- That it be made unlawful for any person (employer or agent) to solicit payment by any means in return for visa outcomes.
- That it be made unlawful to use the inducement of permanent residency or any other visa outcome as a contractual incentive.
- Immediate reintroduction of indexation for the Temporary Skilled Migration Income Threshold.
- A licensing system be established to regulate labour hire agencies who engage temporary overseas workers.

8. Whistle-blower protections

- Provide whistle blower protections for Australian and temporary overseas workers who speak out to expose exploitation and rorting under the temporary work visa program

9. Better information for temporary work visa holders

- Introduce a new sponsorship obligation requiring employers to advise 457 visa workers in writing of their specific pay and conditions of employment, as well as

their rights and responsibilities under immigration and workplace law. There should ongoing tripartite input into the development of such materials.

10. English language standards

- The Government reverse its decision to lower English language standards for the 457 visa program.

11. Fair access to entitlements in cases of insolvency

- Amending the *Fair Entitlements Guarantee Act 2012* to ensure temporary visa holders have equal access to their entitlements in cases where employers become insolvent.

12. Fair access to public services and settlement support

- Federal and state governments to conduct a stocktake of public services and programs, including access to health, education, and settlement support, that are available to temporary work visa holders and compare this to the services available to Australian citizens and permanent residents. Instances of differential access should be removed, unless governments can make a compelling and transparent case to retain such differential access.

13. Preference in cases of redundancy

- That there be an express position reflected in relevant legislation and program requirements that Australian workers have preference to retain their jobs in redundancy situations over temporary visa workers.

14. Pathways to permanent residency

- Recognising the legitimate desire of many temporary work visa holders to obtain permanent residency, the focus should be on new pathways to permanent residency that reduce or remove the scope for exploitation that exists when temporary overseas workers are dependent on a single, sponsoring employer. This should include:
 - Priority access for 457 visa holders to independent, permanent migration channels.
 - Reducing from two years to 12 months the qualifying period that is required with a sponsoring employer to make the transition from a 457 visa to a permanent employer-sponsored residency.

15. Transparency

- Establish a public register of all sponsoring employers under the 457 visa program similar to the register that applies for sponsored skilled migration streams in the UK.

16. Working holiday visa program

- The DIBP conduct a public assessment and review of the potential impact the additional labour supply from this visa program has on employment opportunities, as well as wages and conditions, for Australian citizens, particularly on young Australians in lower-skilled parts of the labour market. The review should be conducted with the oversight of the Ministerial Advisory Council for Skilled Migration.
- Governments should have the option of imposing quotas or capping working holiday visa numbers and exercise that option where labour market conditions require it. Given the current state of the labour market, now is such a time for a cap to be imposed. An annual quota for the visa should be determined based on advice from the tripartite Ministerial Advisory Council for Skilled Migration and taking into account the labour market conditions for young Australians.
- The DIBP provide consolidated and publically available information on the working patterns of working holiday visa holders. This should include the number of working holiday visa holders that do exercise their work rights, the duration of their employment, the number of employers they work for, their rates of pay, and the locations, industries, and occupations they work in. If this information is not currently able to be produced, then DIBP should report to the Ministerial Advisory Council for Skilled Migration on how this data can be collected.
- Job ads that advertise only for working holiday visa holders or that use the inducement of a second working holiday visa be banned.
- The second year working holiday visa be abandoned altogether.
- Remodel the work rights attached to the working holiday visa so that it operates as a genuine holiday visa with some work rights attached, rather than a visa which in practice allows visa holders to work for the entire duration of their stay in Australia.

17. Temporary graduate visa

- The work rights of foreign students staying in Australia on a temporary 485 visa after they have finished their studies should be restricted to work in the industry or occupation that is relevant to the study they undertook, and to occupations which are in shortage.
- Labour market testing obligations be extended to the 485 visa program to ensure that Australian university graduates have the primary right to jobs for which they are qualified.

18. Student visa holders

- The DIBP provide consolidated and publically available information on the working patterns of student visa holders. This should include the number of student visa holders that do exercise their work rights, the hours they work each week, the duration of their employment, the number of employers they work for, their rates of pay, and the locations, industries, and occupations they work in. It should also include an assessment of the impact of student visa work rights on employment opportunities for Australian residents, particularly in unskilled and semi-skilled positions.
- If this information is not currently able to be produced, then DIBP should report to the Ministerial Advisory Council for Skilled Migration on how this data can be collected from the visa holder and/or their employers.
- A limit of 40 hours work a fortnight for student visa holders be retained as an appropriate upper limit on time that should be spent at work by a genuine student undertaking a full-time course of study.
- DIBP to confirm publicly how often it uncovers breaches of the 40 hour per fortnight limit and what action has been taken in these cases.

19. DAMAs/EMAs/labour agreements

- In light of current adverse labour market conditions, the DIBP and Government should provide evidence to demonstrate if there is an ongoing case for DAMAs and EMAs to be available at all.
- If EMAs and DAMAs nevertheless remain available, they must be subject to rigorous scrutiny and oversight as set out under term of reference (8), including:
 - Clear guidelines to ensure that the agreements are not used to fill general labour shortages with semi-skilled and unskilled labour.
 - Tripartite oversight through the Ministerial Advisory Council for Skilled Migration.
 - Additional labour market testing requirements including the establishment and mandatory use of an online Jobs Board that lists job vacancies for all specific occupations contemplated for the agreement.
 - Development of a detailed training plan as a condition of approval.
 - Supporting overseas workers under the agreement with settlement services and English language training.
 - Stronger compliance monitoring including mandatory site visits.
 - Improved mandatory stakeholder consultation requirements.

Background and context

ACTU position on the skilled migration program

The ACTU and affiliated unions have had a long and significant interest in the skilled migration program, particularly those parts of the program where temporary visa holders with work rights are involved.

Unions have often represented qualified Australian workers whose primary rights to skilled jobs have been ignored by employers preferring to use temporary overseas workers, as well as representing temporary visa workers whose livelihoods have been threatened by employers and agents who have taken unfair advantage of them.

It has often been the temporary 457 visa program that has captured the attention in these cases, but many of the same issues apply across a range of temporary visa types, including working holiday visas and student visas. Later sections of the submission detail many of the cases of exploitation that have been reported.

Our interest in temporary work visas, and the debate that surrounds them, has always been driven by three key, interrelated, priorities.

The first is to maximise jobs and training opportunities for Australians - that is, citizens and permanent residents of Australia, regardless of their background and country of origin - and ensure they have the first right to access Australian jobs.

The second is to ensure that the overseas workers who are employed under temporary visas are treated well, that they receive their full and proper entitlements, and they are safe in the workplace - and if this does not happen, they are able to seek a remedy just as Australian workers can do, including by accessing the benefits of union membership and representation.

The third is to ensure that employers are not able to take the easy option and employ temporary overseas workers, without first investing in training and undertaking genuine testing of the local labour market. This is also about ensuring those employers who do the right thing are not undercut by those employers who exploit and abuse the temporary work visa program and the workers under it.

As we have emphasised throughout this debate, Australian unions strongly support a diverse, non-discriminatory skilled migration program. Our clear preference is that this occurs primarily through permanent migration where workers enter Australia independently. At the same time, we recognise there may be a role for some level of temporary migration to meet critical short-term skill needs. However, there needs to be a proper, rigorous process for managing this and ensuring there are genuine skill shortages and Australian workers are not missing out on jobs and training opportunities.

Above all, this requires that labour market testing form a central part of the regulatory framework for the 457 visa program, if not other temporary visa types. It is simply untenable to have a situation where employers are able to employ temporary overseas workers without any obligation to first employ Australians; yet this was the situation that prevailed from 2001

right up until 2013 when a new legal obligation to conduct labour market testing was passed by the Australian Parliament.

At the same time, vigorous safeguards need to be in place to protect the interests of overseas workers on temporary visas. These workers are often vulnerable to exploitation by virtue of being dependent on their employer for their ongoing prospects in Australia, including, in many cases, their desire for sponsorship and permanent residency.

Overview of the temporary visa workforce in Australia

Quick facts

- The latest figures as of 31 December 2014 show there were 1.864 million temporary visa holders in Australia. Up to 1.3 million of these visa holders have work rights. This equates to around 10% of the total Australian labour force of over 12.4 million.
- The various types of temporary visa holders with work rights includes:
 - 623 440 New Zealand visa holders
 - 303 170 student visa holders
 - 167 910 temporary 457 visa holders
 - 160 940 working holiday maker visa holders
 - 19 510 temporary graduate visa holders
- Unlike the permanent migration program, there is virtually no cap on numbers for any of these various temporary visa types - even when unemployment rises - and, except for the 457 visa program, there is no labour market testing or restrictions on the type of occupations the visa holders can work in (i.e. they can work in low-skilled occupations).
- Increasingly, workers on these other temporary visa types are seeing this as a route to a 457 visa and, ultimately, permanent residency:
 - Over 50 per cent of applications for 457 visas now come from people already in the country, many already working for the employer sponsoring them.
 - 67 per cent of the onshore visa grants, and 34 per cent of all 457 visa grants, were made to persons on Working Holiday visas, student visas or Temporary Graduate visas.

Much of the debate over temporary migration focuses on the temporary 457 visa program. The latest figures¹ show that as at 31 December 2014 there were 90 040 primary 457 visa holders in Australia (note the December total is up to 20 000 lower than at other times of the year because many workers go back to their home country for holidays). Including the secondary visa holders (i.e. spouses of the primary 457 visa holder), there were 167 910 temporary 457 visa holders in Australia.

¹ Subclass 457 quarterly report quarter ending at 31 December 2014, Department of Immigration and Border Protection, Australian Government.

However, the number of 457 visa holders in Australia represents only a small proportion (around 10 per cent) of the overall population of temporary residents in Australia at any one point in time. The vast majority of these temporary residents have work rights.

As the most recent figures from the Department of Immigration and Border Protection (DIBP) in table 1 show², there were more than 1.8 million temporary residents in Australia, including New Zealanders, as at 31 December 2014.

With the main exception of visitor visa holders (whose numbers increase dramatically over the summer holiday period that is captured by the December quarter figures), most of these visa holders are able to work in Australia - i.e. up to 1.3 million or more temporary visa holders have work rights. This equates to around 10% of the total Australian labour force of nearly 12.5 million. By comparison, the current annual planned intake of skilled migrants under the permanent migrant program is 128 550.³

Even if the large number of New Zealanders are taken out of the calculations, this still leaves somewhere in the order of 700 000 to 800 000 temporary overseas workers in Australia at any one time.

A recent OECD report also showed that a further 62 700 people whose temporary visas had expired or been cancelled were living in Australia.⁴ This is consistent with the findings of the 2011 Howell review into 'illegal' work in Australia that there were at least 50 000 and possibly in excess of 100 000 overseas nationals working in Australia without valid work rights.⁵

Table 1 Temporary visa holders in Australia at 31 December 2014 by visa category

Visa Category	Total number of visa holders
Visitor visa holders	468 480
Student visa holders	303 170
Temporary skilled (457) visa holders	167 910
Working holiday maker visa holders	160 940
Bridging visa holders	89 980
Other temporary visa holders	31 300
Temporary graduate (485) visa holders	19 510
New Zealand (subclass 444) visa holders	623 440
TOTAL	1 864 730

Source: Temporary entrants and New Zealand citizens in Australia as at 31 December 2014, Department of Immigration and Border Protection, Australian Government

It is important to note that, unlike the permanent migration program, the number of temporary visa holders is not capped in any way to take account of the state of the Australian labour market, with the exception of the small-scale Work and Holiday (462) visa program. Under current settings, the numbers can continue increasing, even as unemployment and youth unemployment rises.

² Temporary entrants and New Zealand citizens in Australia as at 31 December 2014, Department of Immigration and Border Protection, Australian Government

³ <https://www.immi.gov.au/media/statistics/statistical-info/visa-grants/migrant.htm>

⁴ Whyte, S., "Indian citizens head immigration queue for Australia", Sydney Morning Herald online, 6 December 2014

⁵ Howells, S., *Report of the 2010 Review of the Migration Amendment (Employer Sanctions) Act 2007*, Commonwealth of Australia, 2011.

With the exception of the 457 visa program, there is no labour market testing or restrictions on the type of occupations the temporary visa holders can work in i.e. they can work in lower-skilled parts of the labour market.

The suggestion that Australian immigration policy is based on 'managed migration' appears increasingly hollow in this light. While it may be true for the permanent migration program, it is clearly not for the temporary migration program.

The number of temporary overseas workers has been increasing for some time in total and across a number of visa types. For example, the DIBP reports on temporary entrants show:

- There are over 230 000 more temporary residents in Australia now than there were three years ago, an increase of 14.3%.
- Over a period of 7 years from 2007-14, the numbers increased by around 600 000 – almost 50%.
- The number of working holiday makers currently in Australia is 160 940. This is an increase of around 60% since mid-2010, when there were just on 100 000.

A further important issue to note is that there is now effectively a 'pipeline' of various temporary visa types feeding overseas workers into the 457 visa program and then onto permanent residency. This is evident in the increasing trend for 457 visa applications to originate from persons already 'onshore' in Australia on other visa types. Almost 50% of visa applications and visa grants under the 457 visa program now come from people already in the country, with many already likely to be working for the employer sponsoring them.

The report of the 457 review panel⁶ found that in the 11 months to 31 May 2014, 67 per cent of the onshore visa grants, and 34 per cent of all 457 visa grants were made to persons on Working Holiday visas, student visas or Temporary Graduate 485 visas. The table below reproduced from the panel report shows the large rises over the past decade in the both the number and the proportion of 457 visas granted onshore to former students and working holiday makers.

⁶ Robust New Foundations: A Streamlined, Transparent and Responsive System for the 457 Programme, An Independent Review into Integrity in the subclass 457 visa Programme, September 2014

Table 2 Subclass 457 Primary visa granted by client location between 1 July and 31 May 2014 by last visa held (visa category)

Financial Year of Visa Grant	457 Visa	Student Visa	Temp Grad Visa	Temp Resident Visa	Working Holiday Maker Visa	Visitor Visa	Other Visas	Not-Known	Onshore Total	Offshore Total
2001-02	3 824	499		150	2 090	4 139	6	205	10 913	5 787
2002-03	4 742	510		292	2 255	3 981	7	346	12 133	6 540
2003-04	5 029	596		366	2 466	3 866	10	161	12 494	7 607
2004-05	5 243	836		330	2 585	3 657	2	99	12 752	11 649
2005-06	6 092	1 377		1 035	2 768	3 846	10	104	15 232	20 997
2006-07	8 114	1 785		979	2 547	4 087	14	37	17 563	25 555
2007-08	10 121	2 341		915	4 059	4 676	14	27	22 153	33 643
2008-09	10 065	2 490	1	647	3 993	3 745	7	17	20 965	27 411
2009-10	6 042	1 984	26	302	3 620	3 174	90	32	15 270	18 491
2010-11	5 915	2 900	176	250	5 711	3 988	186	68	19 194	27 463
2011-12	6 880	5 953	642	383	8 734	4 762	249	117	27 720	38 180
2012-13	6 532	9 512	2 243	304	9 523	4 012	198	199	32 523	33 758
2013 to 31 May 2014	4 813	7 355	2 454	465	6 228	2 399	145	168	24 027	22 624

Source: Department of Immigration and Border Protection, 2014 (BE7451.11)
 Note 1: Figures are subject to variation
 Note 2: Exclude visa granted under a Labour Agreement and Independent Executives
 Note 3: Unknown represents the number of subclass 457 visa granted where the system shows the application is onshore and there is an unmatched previous visa grant
 Note 4: Data prior 1 July 2001 is in summarised format and the link to previous visa grant is not available

Many of these 457 visa workers then go onto employer-sponsored permanent residency. Figures in the Panel report show that in the 11 months to 31 May 2014, 61% of employer-nominated PR visas went to former 457 visa holders, who as the table above shows often started on other temporary visa types. In an increasing number of cases, student visa holders, temporary graduate visa holders, and working holiday visa holders go directly to an employer-sponsored PR visa. Table 3 from the Panel report below shows these trends over the past decade.

Table 3 Migration programme outcome 2004-2005 to 2013-2014 – Employer Nominated only by last substantive

Location	Change of Status	2004-2005	2005-2006	2006-2007	2007-2008	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013 to 31 May 2014
Offshore	Total	2 596	3 223	3 591	4 926	5 228	5 265	5 284	8 726	11 362	7 472
Onshore	No visa indicated	1 375	1 059	573	432	710	734	932	1 205	2 987	2 417
	Other	1 023	871	820	842	1 097	937	844	773	743	968
	SC - 417	143	121	114	135	248	493	771	1 014	972	801
	SC - 457	6 910	8 764	10 674	16 550	29 485	32 597	33 850	30 366	25 294	27 782
	SC - 485					6	135	306	859	2 276	3 734
	Student	301	425	479	632	1 049	687	2 190	3 443	3 906	2 369
	Visitor	676	763	334	245	203	139	168	168	200	271
	Onshore Total	10 428	12 003	12 994	18 836	32 798	35 722	39 061	37 828	36 378	38 342
Employer Nominated Total	13 024	15 226	16 585	23 762	38 026	40 987	44 345	46 554	47 740	45 814	

Note: Last substantive is applicable only to persons onshore at time of Employer Nominated Permanent Resident Visa grant

Appendix 2 contains brief descriptions of the various categories of temporary visas, as provided by the Department of Immigration and Border Protection.

A further point to be raised here that we will return to later in the submission is that there is little, if any, further information available on the profile of temporary visa holders, with the exception of information on 457 visa workers. The total number of workers on temporary visas such as students and working holiday makers is presented above, but there is nothing readily accessible on the occupations, industries or locations those workers work in, the hours they work, and the duration of their employment. Given the size of the temporary visa workforce and its potential impact on employment opportunities for Australian citizens and permanent residents, this data gap needs to be rectified.

The shift away from permanent, independent migration

The size of the temporary visa workforce must also be viewed in the context of the changing balance of the overall skilled migration program away from permanent migration.

Permanent migration has very much been the basis for the success story of immigration in Australia over a number of decades. As is well known, the Australian labour market absorbed large numbers of immigrants from the end of the Second World War onward, and these formed the basis for a major expansion in the manufacturing sector as well as large-scale construction projects, such as the Snowy Mountains hydro-electricity scheme.⁷ The distinctive feature of this program of immigration, in contrast to the European experience of

⁷ Jock Collins 1988, *Migrant hands in a distant land: Australia's post-war immigration*, Leichhardt: Pluto Press

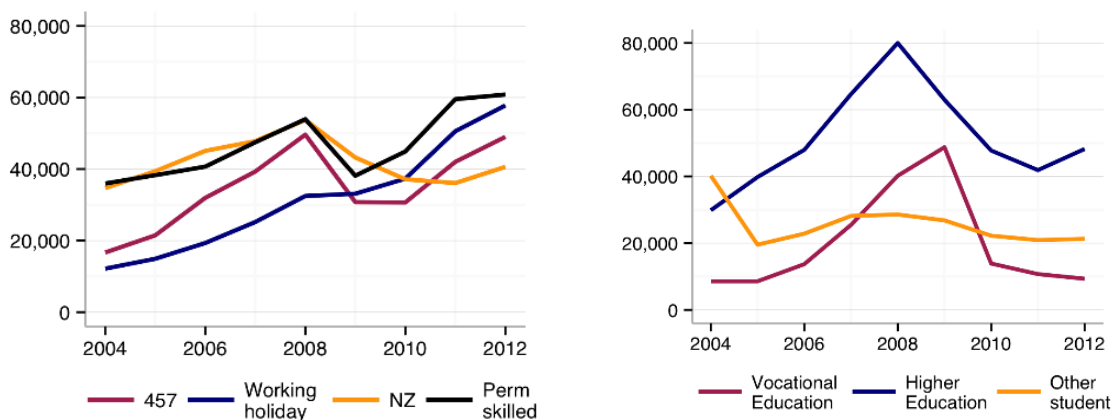
'guest workers', was permanent settlement.⁸ In other words, these immigrants became Australian citizens and their families were raised in Australia.

As a consequence, the occupational trajectories of second-generation immigrants have shown marked differences to those of their parents, with the scenario of the children of factory workers becoming professionals not being uncommon. In terms of the macro-economy, immigration to Australia since the 1940s has generally been regarded as positive because it increases aggregate demand and it lowers the age profile of the workforce.

However, as the Department itself has noted in a recent discussion paper,⁹ in more recent years the focus has shifted markedly, with 'demand-driven' employer-sponsored migration increasingly holding sway under successive governments of both persuasions. The bulk of Australia's migrant workforce now comes from employer-sponsored and temporary migration, with a large component of 'guest workers' now in the Australian labour market in the form of visitors on temporary visas with work rights.

As we outlined above, this has included specific skills-based visas (457s), working holiday visas, student visas, and New Zealand citizen visas, with full working rights (though limited social security entitlements). The growth of these categories since the early 2000s has been dramatic: the first two categories each now almost match permanent skilled arrivals in terms of their magnitude and together far exceed permanent arrivals. (see Figure 1 left panel). The rise in student visas (see right panel) has been remarkable, as was the sudden drop when various restrictions were imposed to prevent rorting and the use of these visas as a backdoor into permanent residency.

Figure 1: Immigration arrivals with work rights attached



Source: ABS.Stat <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3412.02013-14?OpenDocument>

⁸ Stephen Castles and Godula Kosack 1985, *Immigrant workers and class structure in Western Europe*, Second edition, New York: Oxford University Press

⁹ Discussion paper: Reviewing the Skilled Migration and 400 Series Visa Programmes, Department of Immigration and Border Protection, Australian Government, September 2014, p. 7.

In our submission, this trend towards temporary and employer-sponsored migration is effectively outsourcing decisions about our national migration intake to employers and their short-term needs, over the national interest and a long-term vision for Australia's economy and society. As the ACTU submitted to the current DIBP review of the skilled migration program, this shift should not be blindly accepted as some inevitable, inexorable trend that must continue. Instead, it should be subject to critical questioning and debate within the Australian community.

Unions continue to have concerns with a skilled migration program that relies excessively on employer-sponsored migration. This is a concern that applies particularly to the temporary, employer-sponsored 457 visa program, but it applies also to the permanent, employer-sponsored programs; the Employer Nomination Scheme (ENS) and the Regional Sponsored Migration Scheme (RSMS). This concern plays out in different ways.

At the individual level, employer-sponsored visas where workers are dependent on their employer for their ongoing visa status increase the risk for exploitation as workers are less prepared to speak out if they are underpaid, denied their entitlements, or otherwise treated poorly. For example, this is one of the continuing objections that unions have to the permanent RSMS visa because it virtually bonds the visa holder to the same employer for two years. If the visa holder leaves the employer within 2 years, the Department can cancel the visa. Regardless of how often the Department exercises its discretion to cancel the visa, the fact that it has the power to do so leaves a cloud hanging over those visa holders.

The now well-worn pathway from a temporary 457 visa to a permanent employer-sponsored visa ¹⁰, as outlined above, creates the same kind of problems in that temporary overseas workers with the goal of employer-sponsored permanent residency have their future prospects tied to a single employer. Under visa rule changes effective from 1 July 2012, 457 visa workers must stay with their 457 sponsor for a minimum period of 2 years before becoming eligible for an employer-sponsored permanent residency visa with that employer.

Again, this makes them much more susceptible to exploitation and far less prepared to report problems of poor treatment in the workplace for fear of jeopardising that goal. This was a core problem identified back during the Deegan review in 2008 and was also acknowledged in the recent report by the 457 review panel.

By contrast, the DIPB, in a recent discussion paper as part of their ongoing skilled migration review, appears to see employer-sponsorship only in a positive light, citing the benefits for the visa holder of guaranteed employment and arguing that it serves to protect the rights of employees and decreases the likelihood of exploitation. There is no recognition of the many problems associated with employer-sponsorship and dependence on a sponsoring employer that are played out on a regular basis. This includes a number of recent reported cases of

¹⁰ Figures in the recent report of the 457 visa review panel show that in the 11 months to 31 May 2014, 61% of employer-nominated visas went to former 457 visa holders.

visa holders and visa applicants being forced to pay their sponsors large sums of money in return for promises of future employment and sponsorship.

At a broader level, the concern referred to above is that the trend to 'demand-driven', employer-sponsored and temporary work visa programs effectively outsources decisions over an ever-increasing part of the migration intake to employers.

The risk here is that the migration program will increasingly be responding to what the DIBP discussion paper itself described as employers' 'immediate business needs', rather than being structured in a rational and coherent way that allows for longer-term skill needs of the Australian workforce and economy to be addressed.

The increasing shift to a more 'demand driven' skilled migration program, appears to rest on an assumption that the short term interests of employers are consistent with, and reflect, the long term interests of the Australian economy and of the migrant workers themselves. This is not necessarily the case. As Professor Sue Richardson has observed, "*it is in the employers' interests to have more of a given skill available at all times: they do not consider the personal and social costs of oversupply of specific skills.*"¹¹

The OECD has also emphasised the risks associated with an excessive reliance on employer preferences:

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

This demonstrates again the need for all forms of employer-sponsored migration to be underpinned by rigorous labour market testing, monitored and enforced by the Department with tripartite oversight.

¹¹ As cited in Phil Lewis, *The Labour Market, Skills Demand and Skills Formation*, Occasional Paper 6/2008, Skills Australia and The Academy of the Social Sciences in Australia, Canberra 2008, 4.

¹² OECD, *International Migration Outlook 2009*, 134.

The growing trend towards temporary and employer-sponsored migration, rather than permanent, independent, migration represents a major shift in how the migration program has traditionally operated, and it has occurred without any real debate. The ACTU position and our recommendation to the Committee is that the current weighting of Australia's skilled migration program towards employer-sponsored pathways should be re-evaluated, with greater emphasis given to the permanent, independent stream as the 'mainstay' of the skilled migration program.

Our preference for permanent over temporary migration recognises that permanent migrants provide a more stable source of skilled workers with a greater stake in Australia's future and in integrating into all aspects of Australian community life. With permanent residency, migrants have a secure visa status. This makes them less susceptible (though not immune) to exploitation and less likely to generate negative impacts on other Australian workers in terms of wages, employment conditions and job and training opportunities.

Our preference for independent over employer-sponsored migration recognises the risks outlined above that are inherent in employer-sponsored visas where workers are tied to their sponsoring employer.

Terms of reference (1) - The impact of Australia's temporary work visa programs on the Australian labour market

The impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders, with particular reference to:

1. the wages, conditions, safety and entitlements of Australian workers and temporary work visa holders, including:
 - a. whether the programs 'carve out' groups of employees from Australian labour and safety laws and, if so, to what extent this threatens the integrity of such laws,
 - b. the employment opportunities for Australians, including:
 - i. the effectiveness of the labour market testing provisions (the provisions) of the *Migration Act 1958* in protecting employment opportunities for Australian citizens and permanent residents, and
 - ii. whether the provisions need to be strengthened to improve the protection of employment opportunities for Australian citizens and permanent residents and, if so, how this could be achieved,
 - c. the adequacy of publicly available information about the operation of the provisions, and
 - d. the nature of current exemptions from the provisions and what effect these exemptions have on the reach and coverage of labour market testing obligations and laws regarding wages, conditions and entitlements of Australian workers and temporary work visa holders.

Under this term of reference, our submission focuses on the operation of labour market testing under the temporary 457 visa program and ways the current provisions can be improved to support and protect employment opportunities for Australian citizens and permanent residents.

We also consider the employment impact of other temporary visa types, such as working holiday and student visas. Ostensibly, the potential employment impact of the 457 visa program is dealt with by the fact that labour market testing obligations ensure that Australians are given the first opportunity to fill Australian jobs before overseas workers can be engaged. No such brake is put on the engagement of workers on those other temporary visa types and visa trends can often bear no connection to what is actually happening in the labour market. The impact of these visa types (and information on their operation) needs to be assessed far more rigorously and transparently than is currently the case and mechanisms such as visa caps need to be considered to ensure they reflect the state of the labour market.

Rationale for labour market testing

In our submission, one of the fundamental principles underpinning the skilled migration program must be that Australian workers – citizens and permanent residents – have the first right and opportunity to access Australian jobs.

If public statements on the subject are taken at face value, there appears to be universal support for this principle across the party political spectrum, and from unions, employers and community groups.

If that principle is accepted, then it follows, in our submission, that there needs to be a mechanism, a process, to ensure that this is actually occurring in practice. A requirement for labour market testing provides such a mechanism, ensuring there is independent assessment and verification of whether employers wishing to employ overseas workers have first made all reasonable efforts to find a suitably qualified Australian for the position and were not able to find one.

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.

Rigorous labour market testing is more important than ever with unemployment continuing to hover above 6% - the highest levels in over a decade - with 764 500 Australians currently unemployed and looking for work. Of particular concern is youth unemployment, which is more than double that, just below 14% in the latest monthly ABS figures. This equates to 287 000 young people out of work.¹³ Over the past 12 months or more there have been a string of announcements of major job losses across the country and skill shortages are at 'historic lows' according to the Government's own departmental advice. There are generally large fields of applicants for skilled jobs and employers continue to recruit skilled workers with little difficulty.¹⁴

If we look just at the two main broad occupational groups where the majority of 457 visa workers are used - ANZSCO level 2 Professionals and ANZSCO level 3 Technicians and Trades Workers - there are currently around 350 000 Australians in those occupations who are either unemployed or underemployed.

For example, there are currently 27 400 trades and technician workers in Australia on 457 visas, yet there are 63 300 Australian trades and technician workers out of work and a further 102 700 looking for more work than they currently have. Similarly, there are currently 38 001 professionals employed on 457 visas while at the same time there are currently 62 600 professionals unemployed and further 142 400 who are under-employed.¹⁵

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 457 visa program are so important to ensure that employers have a legal obligation to employ Australians first.

The arguments against labour market testing from employer representatives are tired and predictable and do not stand up to scrutiny. They include assertions that the laws are too onerous and impose a burden on employers, that employers will always look to employ

¹³ ABS Labour Force, 6202.0

¹⁴ Department of Employment, Skill Shortages Australia 2014

¹⁵ ABS Labour Force Detailed, Quarterly, cat 6291.0.55.003, table 18 and 19; Subclass 457 quarterly report, quarter ending at 31 December 2014, Department of Immigration and Border Protection, Australian Government.

Australians first, and that the 457 visa program simply responds to labour market changes. Appendix 3 sets out the material we presented to the 457 review panel on why such arguments should be rejected.

The current provisions for labour market testing

Unions therefore welcomed and strongly supported the passage of legislation in the previous Parliament that introduced new provisions for labour market testing through the *Migration Amendment (Temporary Sponsored Visa) Act 2013*.

While the system introduced has its limitations, and we outline further below particular aspects that could be improved or made more effective, it does mean that employers seeking to use 457 visa workers now have a legal obligation, at least for those occupations which are subject to labour market testing, to look locally first and demonstrate to the satisfaction of the Minister that they have sought to employ Australian workers and no suitably qualified and experienced Australian is readily available to fill the position. This requires employers to provide evidence of their recruitment attempts, such as job ads and participation in job and career expos, and detail the results of such recruitment efforts.

Under the legislation, employers wanting to use the program are also required to advise if any Australians have been made redundant or retrenched in the relevant occupation in the four months prior to 457 visa workers being sought and this will be a relevant consideration for the Minister in deciding whether to approve a 457 visa nomination. In addition, labour market testing must be taken after any retrenchments and redundancies have occurred.

With the Government recently committing to retain labour market testing, against the protests of employer groups and the recommendation of its 457 review panel to abolish it, attention should now be turned to ensuring the labour market testing is as effective and rigorous as possible in protecting employment opportunities for Australian citizens and permanent residents.

Effectiveness of the current labour market testing provisions

In terms of the effectiveness of the current labour market testing provisions in protecting employment opportunities for Australians, the anecdotal evidence and experience from our affiliated unions has been mixed.

Some of our affiliated unions did report early signs that labour market testing was having a positive practical effect. For example, AIMPE, the union representing marine power engineers, report that since labour market testing came into operation, shipping owners are putting more effort into training local staff, rather than going down the route of the 457 visa program. The AMWU (Queensland Branch) have found that local workers who have previously missed out on job opportunities are now being given a chance.

However, other affiliates report that since labour market testing came into effect, Australian workers have continued to miss out on job opportunities. Nursing graduates for example continue to be knocked back, while hundreds of nurses are employed from overseas. In Tasmania, 60% of nursing graduates could not find a job in 2013-14, while in Queensland only 600 out of 2500 graduates managed to find work during that time.

Unions have also found an increase in cases where employers have sought to circumvent the labour market testing requirements by advertising for qualifications and experience well above what is genuinely required. The additional requirements have the affect of excluding many otherwise suitable Australian applicants for the position, which is subsequently filled by a 457 visa worker.

There also continues to be evidence of local job advertisements on sites such as Gumtree that do not even make the pretence of considering Australian workers, but instead advertise directly for 457 visa workers.¹⁶ Such advertisements only serve to underline the critical importance of a rigorous system of labour market testing.

More definitive conclusions on the effectiveness of the current provisions are hampered by the fact that DIPB and the Government have made little, if any, public information available in terms of how labour market testing is working. Disappointingly, as we observe below, the report of the 457 visa review panel did nothing to fill this gap.

To help rectify this, at appendix 1 we set out the type of information that should be provided and made freely available by the Department on its website on a quarterly basis, in the same way it reports on 457 visa program trends. This information should be provided in the interests of openness and transparency and to enable more informed assessment of these important provisions.

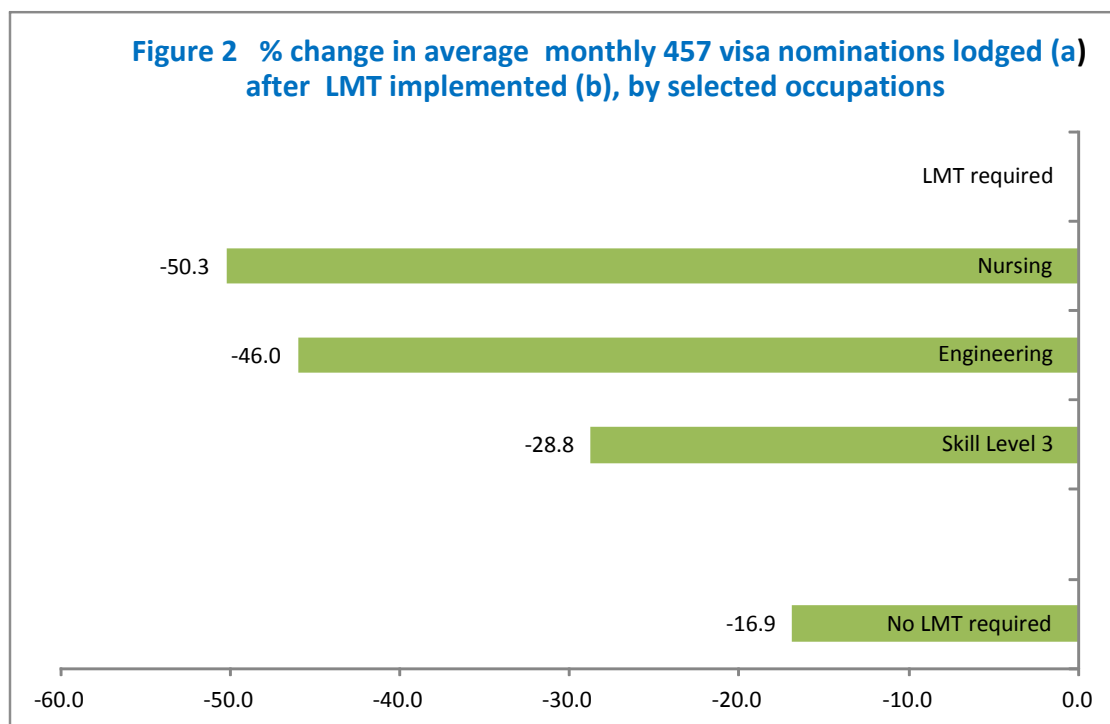
However, from the information that unions have been able to obtain on labour market testing, there are signs that labour market testing is operating as intended.

Labour market testing was introduced by the previous government and came into operation on 23 November 2013 to cover Nursing, Engineering and Skill level 3 occupations (trades and technician workers) – representing just 22% of all 457 visa grants, on our current calculations.¹⁷

Data made available to unions on the operation of labour market testing to 30 September 2014 shows that it is having a significant effect on those occupations it covers. This is evidenced by a much larger decline in 457 visa nominations by employers in occupations covered by labour market testing, compared to average monthly numbers in the occupations exempted from labour market testing. Nominations for non-LMT occupations have fallen by 17% whereas LMT occupations have fallen by 50% in Nursing, 46% in Engineering and 29% in Skill level 3 occupations (see Figure 2). The non-approval rate for 457 visa nominations in occupations covered by labour market testing also increased substantially once employers had to undertake labour market testing.

¹⁶ <http://m.theage.com.au/victoria/unions-claim-discrimination-in-job-ads-seeking-migrants-on-temporary-visas-20150115-12r0ev.html>

¹⁷ The proportion of grants covered by labour market testing can fluctuate based on the profile of nominations received and as new exemptions are made.



Source: DIBP unpublished data, June and November 2014, (BE7406 and BE7826).

(a) By 'Standard Business Sponsors' only. Excludes 457 sponsors not required to LMT, eg in 'labour agreements'.

(b) The period 23 November 2013 to 30 September 2014 (10.27 months) compared to the period 1 July 2012 to 22 November 2013 (16.73 months).

Based on these findings, if labour market testing had been applied to the occupations not currently covered by LMT, then there would have been an estimated 6,500 additional jobs available to local workers over that period.¹⁸

Evidence from the 457 visa review panel

Despite the Department having this data set out above, and the 457 review Panel having the resources of the Department at its disposal, none of this information was made available in the report of the 457 review Panel. Nor did the Panel report provide any other analysis or examination of how labour market testing has operated in practice since it came into operation in late 2013.

Instead the Panel rejected labour market testing based on little more than employer assertions and complaints about the alleged cost and regulatory burden of conducting labour market testing, and an argument that there are already sufficient market and regulatory safeguards in place. The report presented no evidence as to exactly what this burden is or what those existing safeguards are.

¹⁸ CFMEU analysis: see 'Latest 457 visa data - local workers miss out on 6,500 jobs', media release 11 December 2014.

The Panel acknowledged the importance of having a mechanism to prove a position cannot be filled by a local worker; a reassurance that a suitable worker in Australia was not available. However, it failed to explain how this can be achieved by removing an obligation on employers to show evidence of domestic recruitment efforts before they use 457 visa workers i.e. labour market testing.

The alternative offered by the Panel was a more rigorous eligible occupation list for the program, developed on a tripartite basis and confined to skilled occupations in shortage. The ACTU supports the development of such a list through a tripartite Ministerial Advisory Council for Skilled Migration, but it is still no substitute for each individual employer having to test the market. An employer should not be relieved of that obligation just because an occupation might be identified as being in shortage nationally.

The panel argued there was no strong evidence in support of the effectiveness of LMT since it was introduced. However, elsewhere in its report, the Panel said the 2013 reforms (of which LMT was a big part) have worked in reducing the number of 457 visa grants in occupations covered by LMT. The Panel report also failed to take into account the analysis above showing that the decline in visa nominations has been much larger for occupations subject to labour market testing.

The report argued the LMT provisions are easily manipulated and circumvented and do not prevent employers from engaging overseas workers. Rather than seeing this as a reason to strengthen the current LMT provisions, as our submission argued, the Panel used this as justification for abolishing the provisions altogether.

Saying the current provisions are subject to manipulation is not a reason to discard them. It means they should be strengthened. Clearly, there are weaknesses in the current labour market testing scheme that need to be addressed for it to work more effectively. We turn now to how this could be done.

Weaknesses in the current labour market testing regime

The 2013 legislative changes made a good first step in recognising the principle of labour market testing. However, the labour market testing provisions need to be strengthened and their scope widened to cover more skilled occupations. The implementation and enforcement of the legislation is also critical for it to be an effective protection of the rights of Australian workers to Australian jobs for which they are qualified.

Guidelines introduced in November 2013 for the 'sensible implementation' of the labour market testing provisions were a first attempt by the Government to water down as far as possible any requirements placed on employers to conduct labour market testing in a rigorous and effective fashion. The details announced by the Government included:

- There will be no specified mandatory period for conducting labour market testing – the ACTU argues it should be conducted for at least four weeks for it to constitute a meaningful attempt to recruit Australian workers.
- The timeframe in which labour market testing will be valid for will be 12 months – the ACTU submits this period should be no longer than 4 months. In a dynamic labour market where economic conditions can and do change, labour market testing

conducted up to a year before isn't necessarily a reliable indication of whether local labour is available today. For example, labour market testing done in August 2008 before the GFC hit could not have been considered relevant six months later in February 2009. A legislative instrument was subsequently issued by Senator Cash confirming 12 months was the specified period.¹⁹

- There will be no specified minimum content for the job ads that are required as part of labour market testing or even that the job ads are in the English language – the ACTU had argued for basic mandatory information in job ads such as the job title, main duties and responsibilities, location, relevant industrial instrument, necessary skills, qualifications and experience, and the salary and conditions.
- There are no requirements in terms of the mode of advertising. Potentially, an employer could meet their obligations with a single ad on Facebook or their own website, with no advertising in national or local newspapers, industry and trade magazines, the Resources Sector Jobs Board where applicable, or other job sites such as Seek.

The announcement of such diluted requirements was of considerable concern, as they could only serve to encourage employers looking for ways to circumvent the spirit and intent of the legislation.

As it stands, the legislation requires employers to demonstrate there is no Australian readily available to perform the work (s140GB(7)) and for the Minister to be satisfied that a suitably qualified Australian citizen or permanent resident is not readily available to fill that position (s140GB3).

It is for the Department and the Government to explain how these requirements in the legislation could be satisfied by the mere placement of a single job ad on Facebook up to 12 months before the position is being filled, as the guidelines suggest can be done.

Faced with this early attempt by the Government to neuter the intent of the legislation administratively, much depends in practice on how rigorously the Department continues to probe the recruitment efforts of employers who claim they are unable to find Australian citizens or permanent residents to fill available positions.

Again, unfortunately there is little evidence from the Department itself as to how it conducts labour market testing and the 457 review panel failed to conduct any assessment of this, preferring instead to defer to the views of employer groups. We believe the Senate Inquiry has the opportunity to fill this vacuum, and we welcome evidence from the Department in this respect.

The Government has also determined by way of legislative instrument a number of exemptions from labour market testing based on its assertion of international trade obligations.²⁰ Furthermore, all skill level 1 and 2 occupations (Managers and Professionals) are exempt from labour market testing with the exception of 'protected' nursing and

¹⁹ IMMI 13/136 – Specified period in which labour market testing must be undertaken

<http://www.comlaw.gov.au/Details/F2013L01953>

²⁰ IMMI 14/107 - Determination of International Trade Obligations relating to Labour Market Testing

<http://www.comlaw.gov.au/Details/F2014L01510>

engineering occupations.²¹ The result, we estimate in table 4, is that just 22% of 457 visas granted are currently now subject to labour market testing. This figure could fall as low as just 15% of all 457 visa grants being subject to labour market testing, if and when free trade agreements with China and then India are finalised and come into force. We discuss the nature and extent of these exemptions further below.

Table 4: Coverage of labour market testing provisions based on current and likely future exemptions

457 visa grants	2013-14	2014-15 (to 31 December 2014)
Total grants	51 939	25 533
Grants covered by LMT occupational exemptions	38 199 (73.6%)	19 627 (76.8%)
(plus) Grants in LMT occupations that are covered by FTA exemptions (eg. Thailand, Chile, South Korea, Japan)	585 (1.1%)	275 (1.1%)
Total grants exempt from labour market testing	38 784 (74.7%)	19 902 (77.9%)
Total grants covered by Labour market testing	13 155 (25.3%)	5 631 (22%)
(minus) Grants in LMT occupations from China and India	4159	1774
Total grants covered by Labour market testing if China and India FTAs have LMT exemptions	8 996 (17.3%)	3857 (15.1%)

Source: DIBP subclass 457 visa quarterly pivot tables

Against that background of shortcomings with the current framework for labour market testing, we now turn to a discussion of the key elements and improvements required to ensure an effective labour market testing regime. These relate primarily to improving the evidentiary requirements and robustness of the labour market testing provisions, and to improving the coverage and reach of the provisions so that all occupations are subject to labour market testing.

²¹ IMMI 13/137 – Specification of Occupations Exempt from Labour Market Testing
<http://www.comlaw.gov.au/Details/F2013L01952>

Improved evidentiary requirements for labour market testing

Under the legislation, the evidence of labour market testing must include information about the sponsor's attempts to recruit suitably qualified and experienced Australian citizens to the position. This must include details of any advertising of the position that was undertaken and fees and other expenses paid for that advertising.

The evidence may also include other information such as participation in job and career expos, and the details of such recruitment efforts and any positions filled as a result. The sponsor also has the option of providing other evidence such as expressions of support from relevant government authorities, and any relevant labour market research released in the previous 4 months (but a failure to provide such additional evidence or information cannot be counted against the sponsor). The Minister may also specify other types of evidence that may be provided, by way of legislative instrument.

This all means that 457 sponsors lodging visa nominations in occupations subject to labour market testing are not even required, at the bare minimum, to show evidence they have advertised the nominated position. If sponsors do advertise they must provide evidence of that, but they could also choose to conduct other unspecified recruitment efforts.

At the very least then, there should be a clear, mandatory obligation on sponsors to have advertised the nominated position.

However, by itself, the mere placement of a job ad will not give effect to the definition of labour market testing in the legislation that requires employers to demonstrate there is no Australian readily available to perform the work (s140GBA (7)); nor would it, of itself, enable the Minister to be satisfied that a suitably qualified Australian citizen or permanent resident is not readily available to fill that position (s140GBA (3)).

Moreover, even if the mere placement of a job ad was somehow considered sufficient to meet the labour market testing condition under the Act, this would only encourage those employers referred to earlier who wish to circumvent the intent of the legislation.

This highlights the importance of identifying some minimum requirements to help ensure job ads are genuinely seeking to attract local applicants before nominations are made for 457 visa workers.

Therefore, to give proper effect to the legislation, we identify the following areas that require further attention and clarification in terms of evidentiary requirements for labour market testing.

Content of job ads

The legislation does not specify any details concerning the nature and content of job ads to be used as evidence of labour market testing.

In our submission, the minimum requirements for mandatory job ads should include the following details (similar to the UK Resident Labour Market Test):²²

- The job title
- Main duties and responsibilities of the job
- The location
- Necessary skills, qualifications and experience
- Salary and conditions, including genuine market rates²³
- The relevant industrial instrument that will cover the work
- The closing date for applications

Employers could add to these requirements if they wished.

At the same time, there should also be an explicit prohibition on job advertisements that target temporary visa workers, whether they are aimed at 457 visa workers, or other temporary visa types. As a scan of job sites such as Gum Tree demonstrates, such advertisements have become all too common.²⁴

Advertising channels

In our submission, as a minimum, the requirement should be to advertise vacancies locally and nationally at genuine market rates. The mode and mechanism of advertising should be consistent with accepted industry standards, but should generally be a combination of online advertising (eg. Seek), industry and trade magazines, and regional and national newspapers. It should require mandatory advertising on the Resources Sector Jobs Board for jobs in that sector, and use of other industry or occupational-specific recruitment custom and practice, as appropriate (eg. the maritime industry employment database).

Results of job advertising

Evidence of a job ad that contains meaningful information and is distributed in a way that reaches the widest possible pool of potential applicants is a good starting point to indicate that genuine labour market testing has taken place.

However, to fulfil the requirements of the legislation, we have consistently argued that it is imperative that job advertising is also supported by information on what the results of that advertising were (eg. the number of applications received, the number of applicants hired, and reasons why unsuccessful applicants were not considered suitable).

²² <http://workpermit.com.uk/tier-2-visa-resident-labour-market-test.htm>)

²³ Using the definition of market rates now adopted in the Migration Regulations, based on market rates in the geographic region and not just the rate at the individual workplace.

²⁴ See for example http://www.jobseeker.com.au/job/Boilermaker-a0d34a19d609cf37c476a623bd58322e?from_url=http%3A%2F%2Fwww.jobseeker.com.au%2Fj_mobile%3Fgclid%3DCM2Eq5is_cACFVgkvQodGlsAlw%26I%3DAustralia%26p%3D6%26q%3D457%2BVisa%2BSponsorship%26surl%3D0&sp=serp&sr=58;http://au.indeed.com/m/viewjob?jk=ef4d6d979b9942b4&from=ja

Under the legislation as it stands, provision of such information is not a mandatory obligation (it can be provided on a discretionary basis), but at the least, it should be required as a matter of policy in the DIAC Policy Administration Manual. We also note that this is the very sort of information that currently must be provided by those wishing to sponsor workers under a 457 visa Labour Agreement.²⁵

On this point, we do note that the guidelines issued by the Government in November 2013 require employers to provide information about all advertising or other recruitment efforts including where and when the advertising took place, and the geographic target audience. Employers must also provide information about the results of that advertising, including the number of applications received, the number of applicants hired and the general reasons why the other candidates were unsuccessful. This is one positive development. We note also that prospective sponsors are requested to complete a domestic recruitment summary table as evidence of their recruitment activities and attach it to their nomination.

These requirements should be further strengthened by providing that the current sponsorship obligation 'to keep records' includes records of labour market testing undertaken, including job ads, applications received, and interview records, so DIBP can verify this information.

The Department and Minister must also have the ability to ask questions of prospective sponsors and delve deeper into their efforts to recruit locally, particularly in circumstances where employers are repeatedly claiming they cannot find local Australian workers. For instance, in practical terms, a situation where an employer has put an ad in the paper and simply indicates that no applications were received or no suitable Australian applicants were available should not of itself be sufficient to meet the labour market testing condition and would require further investigation to test the genuineness of those local recruitment efforts.

For example, one issue often encountered by the ACTU and affiliated unions during consultation over labour agreement proposals is job ads stipulating a requirement for up to 15 years' experience in the industry. Unions will accept such requirements if there are genuine safety and quality issues demanding that level of experience for a position. However, the concern is where requirements for a position are fixed at an artificially high level, thereby (or with the specific intent of) precluding Australian workers who could more than adequately perform the role.

As it is, the reference in the legislation to 'suitably qualified and experienced' Australian workers has the potential to allow employers to discriminate against young Australians, by specifying unwarranted experience requirements for positions. In other more blatant examples designed to exclude local applicants, unions have reported job ads for workers of one particular national group only (eg "40 Irish power linesmen"), as well as job ads targeting workers on particular visa types.

Finally, in our submission, the Minister should also use the provision at s140GBA (5) (b) (iii) of the Migration Act to determine other types of evidence that may be provided. This should include evidence of relocation assistance offered to successful applicants, and evidence of specific measures to employ those currently disadvantaged or under-represented in the

²⁵ DIAC discussion paper, Implementation of Labour Market Testing in the standard Temporary Work (Skilled) (subclass 457 visa program), p. 4; and see <http://migrationblog.immi.gov.au/files/2013/08/STANDARD-Labour-Agreement-information-booklet-Aug-2013.pdf>, p. 9

workforce, such as indigenous workers, women, the unemployed and recently retrenched workers, and older workers.

When and how long should labour market testing be conducted

Our position is that labour market testing should be conducted for a period of at least four weeks for it to constitute a meaningful attempt to recruit Australian workers. This period of advertising should take place within the four months prior to the nomination being made. As noted earlier, labour market testing conducted up to 12 months ago cannot be considered a reliable enough indicator of whether local labour is available at the time when a nomination is lodged.

If the Government was serious about effective labour market testing, they would adopt these recommendations for strengthening the current provisions, as outlined above. If they fail to do so, their recent decision to retain labour market testing is a hollow one.

Improving coverage of the labour market testing provisions

The robustness of the labour market testing provisions in terms of the evidentiary requirements on sponsoring employers is one matter to be addressed. The other critical issue is the coverage and reach of those provisions.

As a matter of principle, the ACTU considers that labour market testing should be applied to all occupations and positions under the 457 visa program. However, as it stands the legislation provides for a number of potential exemptions to the labour market testing provisions.

As noted above, the impact of these exemptions thus far is that the vast majority of visa nominations are not even covered by the labour market testing requirements. This number will only further increase if the Government continues to create exemptions on the grounds of free trade agreements obligations.

Set out below are several aspects of the new laws where attention is required to ensure that coverage of labour market testing is as broad as possible.

Skill and occupational exemptions

It is our strong view that labour market testing should apply to all occupations and the discretionary power under the legislation for the Minister to exempt certain occupations should not be exercised. Labour market testing exemptions should be the exception, not the rule.

A key reason for this is because in skill level 1 and 2 occupations (typically Managers and Professionals) a high proportion of 457 visas are being granted onshore to foreign nationals already in Australia, many working for their 457 sponsor on another temporary visa, and nearly half of all 457 visas in these occupations are also going to persons under the age of 30.

The rationale that is often put for labour market testing exemptions for such positions is that those who are in the ranks of the unemployed in Australia would not be filling these type of high-level, specialised positions that overseas workers are needed for. Even if that was the case, it is not much to ask that labour market testing be required to verify that this is in fact the case, rather than relying simply on the 'say-so' of the employer. This is important to protect the rights of Australian workers to jobs and for community confidence in the program.

The fact is though that Australians at all skill levels can and do find themselves out of work. ABS figures show for example that there are currently 62 600 professionals unemployed and a further 142 400 who are unemployed – that is 205 000 Australian workers who are classified as professionals and who are looking for work or who want more work than they currently have.²⁶ Labour market testing is essential to ensure that these highly skilled workers have access to available jobs.

It should also be noted that skill shortages in professional occupations are currently at all-time lows.²⁷

The absence of labour market testing also puts recent Australian graduates in professional fields at a considerable disadvantage. To take the example of accountants, they currently have one of the lowest graduate employment rates at 73%.²⁸ Yet DIBP figures show they are consistently ranked in the top 15 occupations in terms of the total number of 457 visa grants (530 new visas granted to accountants in the past six months) and for the total number of 457 visa holders in Australia. As of 31 December 2014 there were 1 730 accountants in Australia on 457 visas. All those positions were filled without any requirement for labour market testing.

A further, related concern is that having labour market testing exemptions for higher skill level positions is at odds with other aspects of Government policy which seek to encourage Australian specialisation where scale and comparative advantage provides a competitive edge. Australian expertise in offshore oil and gas development is one such area.

The development of home grown specialist skills in niche markets where we have comparative advantage is in the national interest, and can help ensure that Australia can compete in an international marketplace.

Consistent with the above, we recommend that the Government reverse existing labour market testing exemptions based on occupation and skill levels. If the Government is considering any exemptions in future, unions and other stakeholders should be consulted before any decisions are made on such exemptions, including consultation through the Ministerial Advisory Council on Skilled Migration (MACSM). Any proposal for exemption should be accompanied by an explanation as to how the exemption would be consistent with the central purposes of the 457 visa scheme as set out in s140AA of the Migration Act.

In our submission, the scope for exemptions, if any, should be confined to highly paid, executive level positions at ANZSCO level 1. For this purpose, we recommend an indexed salary threshold of \$250,000 per annum as an appropriate threshold for that purpose, consistent with the previous salary threshold for exemptions to the 'market rates' obligations.

²⁶ ABS Labour Force, Australia, Detailed, Quarterly, cat. 6291.0.55.003, Table 18 and 19.

²⁷ Department of Employment, Skill Shortages Australia 2014

²⁸ http://www.graduatecareers.com.au/wp-content/uploads/2014/12/GCA_GradStats_2014.pdf

Exemptions based on free trade agreements

The Act provides the Minister with the power to decide that the labour market testing condition does not apply if it would be inconsistent with any international trade obligations as determined by the Minister in a legislative instrument.

The first legislative instrument of this type was issued by the Assistant Minister in November 2013 when the labour market testing provisions came into operation. It established a host of exemptions based on the terms of the free trade agreements in force at the time. DIBP currently provides the following summary of the exemptions that apply under that original legislative instrument of November 2013:²⁹

“International trade obligations

LMT will not need to occur where it would conflict with Australia’s international trade obligations, in any of the following circumstances:

- *The worker you nominate is a citizen of Chile or Thailand, or is a Citizen/Permanent Resident of New Zealand.*
- *The worker you nominate is a current employee of a business that is an associated entity of your business that is located in an Association of South-East Asian Nations (ASEAN) country (Brunei, Myanmar, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand and Vietnam), Chile or New Zealand.*
- *The worker you nominate is a current employee of an associated entity of your business who operates in a country that is a member of the World Trade Organisation, where the nominated occupation is listed below as an “Executive or Senior Manager” and the nominee will be responsible for the entire or a substantial part of your company’s operations in Australia.*
- *Your business currently operates in a World Trade Organisation member country and is seeking to establish a business in Australia, where the nominated occupation is listed below as an “Executive or Senior Manager”.*
- *The worker you nominate is a citizen of a World Trade Organisation member country and has worked for you in Australia on a full-time basis for the last two years.*

This is a much broader list of exemptions for reasons of international trade obligations than was first indicated by the Department in its discussion paper on labour market testing prior to the September 2013 election.

The legislative instrument of November 2013 was replaced in November 2014 and updated to reflect the terms of the Korean Free Trade Agreement, which provided for further exemptions from labour market testing, including the broad category of ‘contractual service

²⁹ DIBP, Temporary Work (Skilled) (subclass 457) visa, p. 25. <http://www.immi.gov.au/forms/Documents/1154.pdf>

suppliers'.³⁰ A separate legislative instrument was issued to reflect the terms of the FTA with Japan and the broad exemptions it also provided from labour market testing.³¹

One of the challenges with these labour market testing exemptions in practice will be to guard against attempts to manipulate the classification of workers so they fall into the exempted categories eg. mid-level employees 'dressed up' as executives and senior managers under the intra-corporate transferee's category.

Of more fundamental concern is the growing number of free trade agreements that have restrictions on labour market testing that go beyond high level executives and intra-corporate transferees and extend to skilled trades workers and professionals. For example, in the case of the Chile and Thailand FTAs, which contain extra commitments from Australia to exempt the category of 'contractual service suppliers', DIBP explanatory materials confirm the advice given to the ACTU that Australian businesses are exempted from the requirement to labour market test for any employee, regardless of occupation or skill level, who holds a passport for Chile and Thailand. It appears the same broad exemption now applies to nationals from Korea and Japan as well.

This still leaves the FTA with China. Late last year Australia and China announced the conclusion of negotiations for a Free Trade Agreement (CHAFTA). There are still a number of elements of the treaty-making process to be concluded before the agreement enters into force and the full text of the agreement is yet to be made available, but it appears again that the scope of labour market testing exemptions will be extensive.

The labour mobility provisions in CHAFTA are intended to '*improve temporary entry access within the context of each country's immigration and employment frameworks*'.³²

When pressed, the Government has tried to argue this means labour market testing will still apply to workers from China, but on the limited information available this is far from clear and it appears likely CHAFTA will allow for labour market testing to be bypassed for most, if not all, Chinese workers.

This is what has already happened, for example, with the Chile and Thailand Free Trade Agreements, a point which the Government has already conceded. Astoundingly, in the case of the Korean deal, Australia has given up labour market testing in regard to Korean workers coming to Australia, while Korea was able to insist on retaining its own labour market testing for Australian workers going to Korea. The report of the Senate Foreign Affairs, Defence and Trade References Committee into the Korean FTA on the agreement picked up this very point and recommended the Australian Government seek to renegotiate with Korea to preserve the right to labour market testing, noting that Korea retains this right.³³ It is instructive that the Australian Government in its response to the Senate Committee report did not even try to defend or explain the imbalance in outcomes and merely presented it as a result of the negotiations.

³⁰ IMMI 14/107 - Determination of International Trade Obligations relating to Labour Market Testing

<http://www.comlaw.gov.au/Details/F2014L01510>

³¹ IMMI 14/113 - Japan Australian Economic Partnership Agreement Determination 2014

<http://www.comlaw.gov.au/Details/F2014L01676>

³² <http://dfat.gov.au/trade/agreements/chafta/fact-sheets/Pages/fact-sheet-movement-of-natural-persons.aspx>

³³ Australian Government response to the Senate Foreign Affairs, Defence and Trade References Committee report: Korea-Australia Free Trade Agreement.

Under CHAFTA, Australia will provide guaranteed access to 'contractual service suppliers' from China to work for up to four years. Specific provision is made for entry of up to 1800 workers a year in each of the following four occupations: Chinese chefs, martial arts coaches, mandarin tutors, and Chinese medicine practitioners. However, the category of 'contractual service suppliers' can potentially include any workers with trade, technical and professional skills. The full text of the agreement is needed to assess exactly how broad this category will be. The Government needs to be far clearer and more forthcoming as to the implications of the agreements.

In addition, Chinese-owned companies undertaking projects in Australia will be able to bring in Chinese workers for projects worth \$150 million or more under new labour agreements called Investment Facilitation Arrangements (IFAs) which allow for 'increased labour flexibilities'.

The Government says IFAs will be similar to the resource sector Enterprise Migration Agreements (EMAs). If this is the case, there are a number of adverse implications. The current EMA guidelines, established under Labor in 2012, do not require labour market testing. It would mean for example that Chinese companies could bring in lower-skilled workers in occupations not available under the standard 457 visa program. It would also allow them to seek concessions to English Language standards.

The proposed IFAs have a much lower threshold to access than EMAs. EMAs were set up for projects worth more than \$2 billion with more than 1500 workers but IFAs could be accessed for projects worth just \$150million and above.

Finally, the agreement also provides for 5000 work and holiday visas to be granted to Chinese nationals.

Our position in relation to free trade agreements and labour market testing is clear. There is no objection to overseas workers being used provided there is genuine, verifiable evidence through labour market testing that the employer has not been able to find a suitable, qualified Australian to do the job. However, we cannot support this fundamental obligation on employers to support Australian jobs first simply being waived as part of the cost of pushing through a free trade agreement.

In our submission, the Australian Government should not be entering into any free trade agreements that trade away the right of the Australian Government and the Australian community to require that labour market testing occurs and Australian workers are given first right to Australian jobs. Trade agreements should not be used for the purpose of widening exemptions to labour market testing.

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.

Application of labour market testing to sponsors under labour agreements, Enterprise Migration Agreements and Designated Area Migration Agreements

It should be made clear that labour market testing under the legislation applies not only to nominations by 'standard business sponsors' under the standard 457 visa program, but it also applies to positions nominated by 'approved sponsors' under any labour agreement, Enterprise Migration Agreements (EMAs) or Designated Area Migration Agreements (DAMAs – formerly Regional Migration Agreements (RMAs)) that are entered into in future, including semi-skilled occupations not available under the standard 457 program.

This requires an amendment to Regulations under the Migration Act, specifically to Regulation 2.72AA –Labour Market Testing to specify that all approved sponsors are a 'prescribed class' of sponsors for the purpose of the labour market testing provisions.

The current provisions in the respective EMA and RMA guidelines are based more on the vague notion of 'labour market analysis', and fall well short of the labour market testing requirements in the Act.

Application of labour market testing to existing on-shore 457 visa holders and other temporary visa holders

It is important to note again that the typical view the general community may have of the 457 visa program – an employer bringing in a worker directly from overseas – is often not the reality. As outlined earlier in the submission, around 50% of 457 visas are granted on-shore in Australia. This can apply to cases where an existing 457 visa holder changes employers or extends their sponsorship with their current employer (eg. from 4 to 8 years) and a new nomination is required. More often it is the case that the person in question is on another visa type, such as a working holiday or student visa, and they make the transition to a 457 visa. It should be made very clear that labour market testing applies and will be enforced equally in all such circumstances.

Mandatory data collection items and reporting systems for labour market testing

As noted numerous times already, a full assessment of the new labour market testing provisions is difficult without information and data on their operation thus far. To enable this assessment, and in the interests of transparency and ongoing community confidence in the program, DIBP should make information and data on the operation of labour market testing under the Act publicly available on at least a quarterly basis, in the same way it provides information on 457 visa program trends. This should include information on the types of evidence of labour market testing that sponsors are providing, and information on the number of nominations that have been rejected because of inadequate labour market testing. The data should be capable of disaggregation by industry, ANZSCO occupation, and location.

At appendix one, we set out in more detail some of the key data items that are essential for stakeholders to make a better informed assessment of how the labour market testing provisions are operating in practice.

Provision of such information and discussion of labour market testing should be a standing agenda item for the Ministerial Advisory Council on Skilled Migration.

The impact of other temporary work visas on employment opportunities

A more rigorous system of labour market testing for the 457 visa system with much more comprehensive, if not universal, coverage of all visa nominations and occupations would go a long way towards addressing concerns about the potential impact on employment opportunities for Australian citizens and permanent residents from that program and increasing community confidence and support for it.

However, as noted above, the 457 visa program forms only one part of the temporary visa workforce in Australia. This leaves a variety of other temporary visa types where overseas workers are vying for both skilled and unskilled jobs in the labour market without even the checks and balances that apply to the 457 visa program.

The numbers presented earlier in the submission show that there are currently more than 1.2 million temporary visa holders in Australia, most of whom have work rights. This does not include a further 625 000 New Zealand visa holders who have unlimited work rights.

This is at a time when ABS figures show there are only around 150 000 job vacancies across the country and there are almost 800 000 unemployed Australians.³⁴

From 2011-13, recent arrivals to Australia filled roughly the same number of jobs as the net number of new jobs created in Australia over that period, according to research from Monash University's Centre for Population and Urban Research.³⁵

We also note that through the course of 2014 unemployment increased from 5.9 to 6.1% and a further 40 000 Australians found themselves unemployed. At the same time, the total number of temporary visa holders, excluding New Zealanders, increased by almost 45 000 or 3.7%.³⁶

As table 5 shows, the number of temporary visa holders continues to increase each year. Since December 2011, numbers have increased by almost 200 000.

³⁴ ABS Labour Force, 6202.0 (seasonal)

³⁵ Birrell, B., & Healy, E., "The impact of recent immigration on the Australian workforce", Centre for Population and Urban Research, February 2013; <http://www.smh.com.au/federal-politics/political-news/call-for-migration-riot-crackdown-as-data-reveals-foreign-workers-snare-net-job-growth-20140807-3d9ma.html>

³⁶ Temporary entrants and New Zealand citizens in Australia as at 31 December 2014, Department of Immigration and Border Protection, Australian Government, p. 3.

Table 5: Number of temporary visa holders in Australia as at 31 December 2011, 2012, 2013, 2014

Temporary visa category	2011	2012	2013	2014
Student visa holders	254 700	242 210	257 780	303 170
Working holiday makers	134 840	162 480	178 980	160 940
457 visas	128 690	157 110	169 070	167 910
Temporary graduate visa	21 910	38 210	24 660	19 510
Visitors	368 050	401 940	444 140	468 480
Others	135 930	128 350	121 920	121 280
Total	1 044 130	1 130 290	1 196 560	1 241 290

Source: Temporary entrants and New Zealand citizens in Australia (various quarterly reports), Department of Immigration and Border Protection, Australian Government.

To be clear, our argument is not that these visa types, such as student visas and working holiday visas, do not have a legitimate place within the migration program, or that each and every worker on these visas is taking a job that could be filled by an Australian citizen or permanent resident. However, in the absence of labour market testing, which ideally would be required for all temporary work visas – not just the sponsored 457 visa program – there at least needs to be some consideration and assessment of the impact these uncapped visa types are having on the labour market. At present, it appears that no such assessment is made by DIBP and visa numbers can continue increasing regardless of the state of the labour market, and without any countervailing policy measures being put in place.

Below we explore further some of the key features of the main temporary visa types, other than 457 visas, and what measures can be put in place to ensure they are not having an adverse impact on employment opportunities for Australian workers.

Working holiday visas

The Working Holiday (subclass 417) is a one year visa available to 18-30 year olds who wish to holiday and work in Australia. There is also a much less widely used Work and Holiday visa (subclass 462). We focus here primarily on the 417 visa.

The impression promoted by DIBP, reinforced again its current review of the skilled migration program, is that the working holiday visa is primarily about travel and cultural exchange supplemented by some incidental short-term work. The former Minister Scott Morrison clearly adopted the same view of it, stating “*The WHM program is not a work visa and undertaking work is an optional part of a WHM’s stay*”.³⁷

This fails in our view to recognise the reality of how these visas are used in practice, and viewed by those who use them.

³⁷ <http://www.abc.net.au/news/2013-11-26/actu-working-holiday-visa-re-think/5117852>

For many young people, particularly for those from recession-hit countries with high youth unemployment, it is likely that finding work is the primary purpose of their visit to Australia. In fact, DIBP appear to concede this point, despite its stated position that the 417 visa is not a work visa, when it attributed a recent slight tapering off of working holiday visa grants from the record numbers in 2012-13 to improving economic conditions in some partner countries - an acknowledgement that working holiday visa numbers are a reflection of people coming here to find work they can not find in their home country.³⁸

Unions report that labour hire agencies using this visa are now so well organised they are recruiting in the countries of origin of the working holiday makers and have them lined up with permanent full time work before they even enter Australia. The figures provided earlier also show the extent to which working holiday makers make the transition to other visas, including, ultimately, permanent residency.

Working holiday visa holders can lawfully work in Australia from the date of their arrival to the date of their departure non-stop and full-time. The visa currently applies to any type of work, and is not subject to any sponsorship or skill requirements, such as labour market testing, and the visa numbers are uncapped.

The sole work restriction is that the visa holder can only work in Australia for up to six months with each employer. This is known as visa condition 8457. It would appear that very low priority is given to monitoring and enforcing compliance with this condition. Despite more than one million working holiday visas being granted in the past 7 years, not one single employer to our knowledge has been prosecuted for employing working holiday makers beyond this six month period.

In 2013-14, a total of 229 378 working holiday 417 visas were granted to young people from overseas (along with, a further 10 214 subclass 462 Work and Holiday visas). As a point of comparison, at the same time youth unemployment is currently 13.9%, with almost 290 000 young Australians aged 15-24 looking for work.

The working holiday visa program has grown substantially over the past decade.

The total number of working visa holders in Australia – currently 160 940 – is now equivalent to around 7.7% of the total Australian labour force aged 15-24. These figures have more than doubled since mid-2007 when working holiday visa holders numbered 74 450 and were 3.7% of the Australian workforce aged 15-24. There are over 50 000 more working holiday visas granted each year now than there were four years ago.³⁹

Since mid 2010, the number of working holiday visas have increased from around 100 000 to 160 000. As a point of comparison, youth unemployment has gone from 11.6% to 13.7% in the same period.

In presenting numbers such as this, our submission is not that young overseas travelers be denied the chance to work in Australia under a visa of this type. Nor do we seek to argue that the abolition of the working holiday maker program would immediately solve youth

³⁸ in Working Holiday Maker visa programme report, Department of Immigration and Border Protection, Australian Government, 30 June 2014, p. 7.

³⁹ Working Holiday Maker visa programme report, Department of Immigration and Border Protection, Australian Government, 30 June 2014, p. 17.

unemployment. However, it is concerning that a visa program of this size continues to operate without any public assessment and review of the potential impact this additional and growing labour supply has on employment opportunities and employment conditions for Australian citizens and permanent residents, particularly on young Australians in lower-skilled parts of the labour market.

In this submission, we call for the DIBP to conduct such an assessment with oversight from the tripartite Ministerial Advisory Council for Skilled Migration.

More and better data on the program is required to assist stakeholders and policy-makers with such an assessment. To this end, the DIBP should also provide consolidated and publically available information on the working patterns of working holiday visa holders. This should include the number of working holiday visa holders that do exercise their work rights, the duration of their employment, the number of employers they work for, their rates of pay, and the locations, industries, and occupations they work in.

If this information is not currently able to be produced, then DIBP should report to the Ministerial Advisory Council for Skilled Migration on how this data can be collected.

We recommend further that the working rights attached to the visa be reviewed and remodelled so that it operates as genuine holiday visa with some work rights attached, rather than a visa which in practice allows visa holders to work for the entire duration of their stay in Australia.

Governments should also have the option of imposing quotas or capping working holiday visa numbers where labour market conditions require it, as they do in other countries such as Canada.⁴⁰ Given the current state of the labour market, unions recommend that now is such a time for a cap to be imposed in order to put a limit on further growth in the working holiday program, and that an annual quota be determined based on advice from the tripartite Ministerial Advisory Council for Skilled Migration and taking into account the labour market conditions for young Australians. We note that section 85 of the *Migration Act 1958* already gives the Minister the power to cap or limit the number of visas which can be granted each year in a particular sub-class.

The critical point is that it should be the labour market conditions in Australia that are the determining factor for working holiday visa numbers in Australia, not the labour market in the partner countries, as appears to be more the case at present.

In examining the working holiday visa, a very important feature to note is that visa holders are able to apply for a second year visa if they undertake 88 days specified work in a designated regional area during the course of the first year of their initial visa in industries such as agriculture, forestry and fishing. Incredibly, the policy from DIBP has been that this 88 days' work can be either paid or unpaid.

⁴⁰ See for example, <http://www.cic.gc.ca/english/work/iec/>

DIBP reports⁴¹ show there were 45 950 second year visas granted in 2013-14, an 18.2% increase on the previous financial year. This means that around one in four Working Holiday visa holders are now being granted a second year visa. The vast majority (90%) are doing work in agriculture to acquire eligibility for the second year visa, with smaller numbers doing work in construction and mining.

The number of second working holiday visa grants has grown rapidly since the program commenced in late 2005. There were just 2 962 second year visa grants in 2005-06, compared with 45 950 grants in 2013-14. From 2010-11 to 2013-14 the number doubled. The second working holiday visa now constitutes 20% of the overall working holiday program by 30 June 2014. This compares with just a 3.3% share of overall working holiday visa holders in Australia as at 30 June 2006.

These trends illustrate the strong desire of working holiday makers to gain ongoing work and prolong their stay in Australia. As we detail later in the submission, this has created its own set of problems and is tied to cases of exploitation and mistreatment of overseas workers under this visa. Reports that unions receive are that employers are basing their whole business model around using the labour of working holiday makers, in some cases for free or by paying them well below Australian award standards. An upcoming Four Corners program is expected to shed further light on the extent of the exploitation. A scan through job sites such as *Gumtree* uncovers numerous examples of job advertisements directly targeted at overseas workers, enticing them with the lure of a second working holiday visa, with Australian workers not even being considered in some cases.⁴²

Our recommendation on this point is first that there be an explicit ban on job ads that advertise only for working holiday visa holders or that use the inducement of a second working holiday visa.

However, the Committee should go further than this. Our recommendation is that the second year working holiday visa should be abandoned altogether. It serves no useful purpose in our view and has only led to problems of abuse and exploitation of unwitting and/or desperate backpackers.

We also recommend the establishment of a licensing system for labour hire agencies that are so heavily involved with this visa program. A potential model is the Gangmasters Licensing Authority that operates in the UK with the broad support of a coalition of unions, supermarkets and industry operators to improve rights at work, reduce tax evasion, and weed out the worst labour hire companies.⁴³

Student visa holders

The student visa program in fact comprises eight different types of student visas, depending on the type and level of study. The majority of student visas are for higher education and also VET courses. The visas generally include a condition that allows students to work for 40 hours per fortnight during their course and for unlimited hours during course breaks.

⁴¹ Working Holiday Maker visa programme report, Australian Government, Department of Immigration and Border Protection, 30 June 2014, p. 17.

⁴² See for example <http://au.indeed.com/m/viewjob?jk=ef4d6d979b9942b4&from=ja>

⁴³ See <http://touchstoneblog.org.uk/2013/04/a-weak-gla-will-strengthen-rogue-gangmasters/>

As at 31 December 2014, there were 303, 170 student visa holders in Australia, an increase of 17.6% when compared with 257 780 students as of 31 December 2013. As with 457 visas, the recorded student numbers are generally lower in the December quarter each year.

In terms of visa grants, there were 292 060 student visas granted in 2013-14, an increase of 12.6% from the previous year. The number of visas granted increased for the third consecutive year.⁴⁴

Large numbers of student visa holders also move onto to other temporary and also permanent visa types. In 2013-14, there were a total of 122 334 visas granted where the person last held a student visa. This includes over 15 000 (13% of all visas granted where the person last held a student visa) who moved straight to a 457 visa, a noticeable increase from the 5 274 (4%) who made the same transition in 2010-11.⁴⁵ Nearly 3 000 moved to a working holiday maker visa and over 20 000 went to a temporary graduate 485 visa.

As with the working holiday visa, the operation of the student visa program means there is a large potential additional source of labour supply available to employers, including in lower-skilled parts of the labour market. Yet there is no public assessment that we are aware of from DIBP which considers the potential impact on employment opportunities for Australian workers, particularly in those lower-skilled sections of the labour market. Furthermore, despite a series of useful and regular reports from DIBP cited above that show the total number of visa holders and visas being granted, there is a paucity of detailed information on the work that is actually done by student visa holders.

At present, there appears to be no data on the occupations and industries that student visa holders work in and the hours they work, aside from anecdotal information that suggests employment is concentrated in the hospitality and service industries.

The lack of data is not surprising given there appears to be no obligation on the visa holder or the employers of student visa holders to report this information to DIBP. This Inquiry should examine ways information on work performed could be collected by DIBP from the visa holder themselves and/or their employers.

Again, we are not against a strong and vibrant international student program, but in our view the large numbers of additional workers involved demand some greater degree of scrutiny of its employment impacts.

Accordingly, our submission recommends that the DIBP provide consolidated and publically available information on the working patterns of student visa holders. This should include the number of student visa holders that do exercise their work rights, the hours they work each week, the duration of their employment, the number of employers they work for, their rates of pay, and the locations, industries, and occupations they work in. It should also include an assessment of the impact of student visa work rights on employment opportunities for Australian citizens and permanent residents, particularly in unskilled and semi-skilled positions.

⁴⁴ Student visa and Temporary Graduate visa programme trends 2006-07 to 2013-14, Australian Government, Department of Immigration and Border Protection, p. 18

⁴⁵ op. cit., p. 48

If this information is not currently able to be produced, then DIBP should report to the Ministerial Advisory Council for Skilled Migration on how this data can be collected from the visa holder and/or their employers.

In terms of visa conditions and work rights, we support the current limit of 40 hours work a fortnight for student visa holders as an appropriate upper limit on time that should be spent at work by a genuine student undertaking a full-time course of study. This recognises that the focus of the student visa as the name suggests should be on study, with work rights to provide supplementary income only. Appropriate financial threshold requirements for the student visa must be in place to ensure overseas students are not dependent on having to work to support themselves while studying.

The ACTU would also be interested to confirm how often DIBP uncovers breaches of the 40 hour limit and what action has been taken in these cases. Our information suggests that reported breaches are very low, but this is likely to be no indication of the true extent of the problem. Again, anecdotally, our experience would suggest that breaches of the limit would often involve cases of exploitation where a visa holder is not paid in full, or not paid at all, for the time they work in excess of 40 hours because unscrupulous employers take advantage of the fact that the additional hours are in breach of their visa conditions and the visa holder is not in a position to raise a complaint. This scenario can arise both in the case of a genuine student working additional hours on top of their study commitments, and in those cases where the student visa is essentially a sham for illegal work to take place.

Temporary graduate 485 visa

The 485 visa is designed for those who have finished their course of study and are looking to stay in Australia and gain practical work experience. There are two streams: one for students who have graduated with a qualification relating to an occupation on the Skilled Occupation List; the other relating more specifically to higher education qualifications.

There are currently 19 510 temporary graduate visa holders in Australia as at 31 December 2014, with 22 867 visas granted in the 2013-14 financial year. The numbers under this visa have fallen from the peaks of recent years as changes introduced to tighten the progression from study to permanent residency have flowed through.

The critical point of concern with this visa remains that there are no restrictions on the type of work a Temporary Graduate visa holder can do. Temporary Graduate visa holders may work or study in any field, regardless of their study and qualifications.

This seems to be at odds with the apparent purpose of the visa to augment the study a person has completed with a period of practical work experience, and only serves to raise concerns about potential employment impacts in lower skilled sections of the labour market.

We are also concerned about the potential impact this visa can have on job opportunities for recent Australian graduates. The latest figures show that only 68.1% of new bachelor degree graduates seeking full-time work were in full-time jobs in 2014, down from 76.1% in 2012.⁴⁶

Our recommendation is that the work rights of foreign students staying in Australia on a temporary 485 visa after they have finished their studies should be restricted to work in the

⁴⁶ GCA, *GradStats*, various issues.

industry or occupation that is relevant to the study they undertook, where that occupation is in shortage.

We recommend further that labour market testing obligations be extended to the 485 visa program to ensure that Australian university graduates have the primary right to jobs for which they are qualified.

Entertainment 420 visa

While the current regulatory framework that governs the various temporary work visa types discussed above falls short of what is required to support Australian employment opportunities, we would like to highlight examples where current arrangements work well. A case in point is the Entertainment (subclass 420) visa. This visa class has worked effectively since 1992. It serves to ensure that employment opportunities for Australians in the entertainment industry are maximised while also enabling Australian audiences have access to a wide range of the world's arts and cultural output. In respect of film and television productions, it distinguishes between those in receipt of government subsidy and those independently financed. By ensuring opportunities for Australians on government subsidised productions, it has assisted in fostering the internationally recognised careers of actors who are now household names alongside world class directors and technicians. This visa class forms part of a matrix of government support to Australia's entertainment industries that has received bipartisan support for more than twenty years.

The requirement to pay market rates

A final issue we wish to raise under this term of reference in relation to the 457 visa program is the importance of a requirement to pay genuine market rates to 457 visa holders i.e. the rate an equivalent Australian worker in that occupation or industry and geographic region would receive. This obligation is fundamental in ensuring fair treatment for overseas workers and protecting the employment and training opportunities for Australian workers. We say more about this obligation under term of reference (3) but the point we make here concerns the salary threshold above which there is an exemption from the requirement to pay market rates to 457 visa workers.

The Government has accepted the recommendation of its 457 review visa panel to lower the salary threshold at which the exemption from the market rates requirement applies from \$250 000 back to \$180 000. The Labor Government had increased the threshold from \$180 000 to \$250 000 with its 2013 reforms.

The panel report provided no reason for recommending this change. The report simply says there was no substantial evidence provided to it that supported the need for the threshold to be at \$250 000. This was not surprising given the Panel never sought our views on this and there was no suggestion they were considering such a recommendation.

Unions oppose the lowering of the market rates threshold back to \$180 000. The increase in the threshold to \$250 000 recognised that remuneration for some non-executive positions (eg Ship Captains) can fall between \$180 000 and \$250 000. Under the previous threshold, employers could exploit this by employing 457 visa workers on \$180 000, thereby undercutting Australian workers and Australian wage standards in those positions.

Unions report there has been an immediate impact as a result of this change with the loss of local jobs in the maritime sector and a reduced incentive to train locally if overseas workers can be employed at lower rates.

Terms of reference (2) - The impact of Australia's temporary work visa programs on training and skills development

2. The impact of Australia's temporary work visa programs on training and skills development in Australia, including:
 - i. the adequacy of current obligations on 457 visa sponsoring employers to provide training opportunities for Australian citizens and permanent residents,
 - ii. how these obligations could be strengthened and improved,
 - iii. the effect on the skills base of the permanent Australian workforce.

The adequacy of current training obligations

The ACTU and affiliated unions have long argued for more effective training obligations to be placed on employers who wish to access the 457 visa program.

A robust, enforceable obligation on employers wanting to use the 457 visa program to conduct labour market testing must be matched by a similar obligation on sponsoring employers to be training Australian workers and taking on recent Australian graduates so that any genuine need for overseas workers now is reduced over time.

This is a critical issue for the integrity of the program and community confidence in it.

As already noted, the latest figures show that only 68.1% of new bachelor degree graduates seeking full-time work were in full-time jobs in 2014, down from 76.1% in 2012. This is the lowest in the history of the series, which began in the early 1970s.⁴⁷ In Western Australia, the results of a recent survey found just 53.1% of graduates were in full-time employment compared with 68.5 % in 2011.⁴⁸

In terms of apprenticeships, there is considerable anecdotal evidence that points to large unmet demand for apprenticeships with many more people seeking an apprenticeship than there are apprenticeships being offered. There are difficulties in putting a precise number on this, but a reasonable estimate can be made on the basis of earlier research from Group Training Australia that indicated there were around 3.75 applicants for each available apprenticeship. If this ratio was applied to the total 82 900 apprenticeship commencements in 2014, this indicates up to 230 000 potential apprentice candidates missed out over the course of the year.⁴⁹ Some of those candidates may go on subsequently to get an apprenticeship elsewhere but this still points to a large untapped pool of future skilled tradespersons.

⁴⁷ GCA, *GradStats*, various issues.

⁴⁸ <http://www.perthnow.com.au/news/western-australia/wa-mining-slump-hits-home-for-perth-university-students-seeking-full-time-work/story-fnhocxo3-1227299845251>

⁴⁹ Apprentices and Trainees Early Trend Estimates December quarter 2014, NCVER; Group Training Australia, *The Positive Recruitment Cycle*, 2008, p. 5.

Yet, at present, sponsoring employers are placed under no obligation to employ and train Australian apprentices, trainees or graduates in the same occupations where they are using 457 visa workers. Nor is there any data collected on the number of Australian apprentices, trainees or graduates that are being trained by those employers that sponsor 457 visa workers.

This means the Government and the community have no idea if employers currently relying on using overseas labour are in fact making any effort to reduce this reliance over time and meet their future workforce needs by training and employing Australian apprentice, trainees and graduates. This is despite the stated position from successive governments that skilled migration should complement domestic training and should not be used as a substitute for training Australian workers and apprentices.

At present, sponsors can meet their training obligations by either:

- Paying the equivalent of at least two per cent of total payroll expenditure to an industry training fund; or
- Paying the equivalent of at least one per cent of total payroll expenditure on the training of Australian workers and permanent residents employed by the business.

In our submission, these training benchmarks have been ineffectual. They have not been properly enforced and they have failed to put the onus on employers to invest in the up-skilling of their Australian workforce in the occupations where they are using 457 visa workers.

It is simply not acceptable in our view for an employer to use the 457 visa program to sponsor a skilled overseas tradesperson, for example, while making no effort to employ Australian apprentices in those same occupations.

A further problem has been that sponsors engaging large numbers of 457s, or who are repeat and serial users of the 457 visa program in the same occupation, are only required to meet the same training benchmark as a sponsor with just a single 457 visa worker. For many, the current benchmarks are simply an administrative hurdle to jump over by demonstrating a 'spend' level, which many would have done anyway. There is no concept of training additional skilled workers.

Unions also report that the existing benchmarks have been subject to rorting and manipulation. This includes cases of sponsors artificially minimising their payroll base (for the calculation of 1% or 2% payroll) by setting up a separate company that employs only 457s or 457s plus one or two Australians. Sponsors with 'associated entities' have also been able to artificially minimise their payroll base by nominating as the 457 sponsor the low-payroll entity but actually employing the 457 visa workers throughout the 'associated entities' with much larger payrolls.

This view of the current training benchmarks was endorsed by the recent review of the 457 visa program which recommended they be abolished.

The impact on the national skills base

Recent comments from Fairfax economic commentator Ross Gittins suggest the key flaw with the 457 visa program (as well as the availability of temporary overseas labour on other visa types) is the negative impact it can have on employer's commitment to training:

“To me the main drawback is not so much that employers may not try hard enough to find local workers to fill jobs, or that the availability of this external supply may limit to some extent the rise in skilled wages, but that it reduces employers' incentive to go to the bother of training young workers.”⁵⁰

For example, this was a key issue highlighted by the 2010 report of the National Resources Sector Employment Taskforce. The NRSET report⁵¹ found that ready access to temporary migration, along with the capacity to offer high wages and 'poach', had allowed resources companies to meet their skill needs with little thought to investment in skills development.

The NRSET report cited NCVER research⁵² that the resource sector trained just 3.6% of Australia's apprentices, despite employing 5.6% of the nation's tradespeople. In response to this, the recommendation from NRSET, supported by Government, was that the resources sector needed to significantly increase the number of apprentices it employs, given that it currently employs considerably fewer than would be expected given its share of trade employment.

As we note above, it is not possible to determine what individual sponsors of 457 visa workers are doing to train Australians because this data is not even collected. However, the macro-evidence that is available suggests the use and availability of 457 visa labour can and has had a negative impact on the national training effort, particularly in terms of apprenticeship training.

This problem emerged most markedly during the very period where 457 visa numbers were growing most rapidly.

For example, in Western Australia, amid the resources boom and continuing talk of skill shortages, there was no growth at all in apprenticeship and traineeship commencements in 2011.⁵³ Tellingly, over the same period, 457 visa numbers in the trades in Western Australia grew exponentially, as table 6 below shows.

⁵⁰ Gittins, R., 'Kiwis show the way as workers keep greying', Sydney Morning Herald, 21-22 February 2015, pp6-7 (Business).

⁵¹ Resourcing the Future: National Resources Sector Employment Taskforce Report, July 2010

⁵² in Resourcing the Future: National Resources Sector Employment Taskforce, Technical Paper, pp. 37-38

⁵³ 2011 December quarter, Apprentices and Trainees, Australian vocational education and training statistics, NCVER, 2012, p. 4

**Table 6: 457 visa numbers in the trades in Western Australia 2010-2012
Program year 2010 – 2011 at 30 June 2011**

Nominated Occupation	2009-10	2010-11	Change from 09 - 10
Technicians and Trades Workers	1600	3140	96.2
Sponsor Industry	2009-10	2010-11	Change from 09 - 10
Construction	1220	2420	99.2%
Electricity, Gas, Water and Waste Services	160	200	25.2
Mining	1580	2200	39.3

Program year 2011 – 2012 at 30 June 2012

Nominated Occupation	2010-11	2011-12	Change from 10 - 11
Technicians and Trades Workers	3140	6380	103.3
Sponsor Industry	2010-11	2011-12	Change from 10 - 11
Construction	2420	4100	68.9
Electricity, Gas, Water and Waste Services	200	350	71.6
Mining	2200	3630	64.9

Source: Compiled from various DIAC Subclass 457 State/Territory Summary reports

A similar picture emerged at a national level. For example, nationally, NCVET figures show the number of people commencing apprenticeships in trade occupations fell by 5.9% in 2011 and had been on the decline since September 2010,⁵⁴ yet visa grants for trades and technicians increased by 65% in 2010-11 and more than doubled in 2011-12.⁵⁵

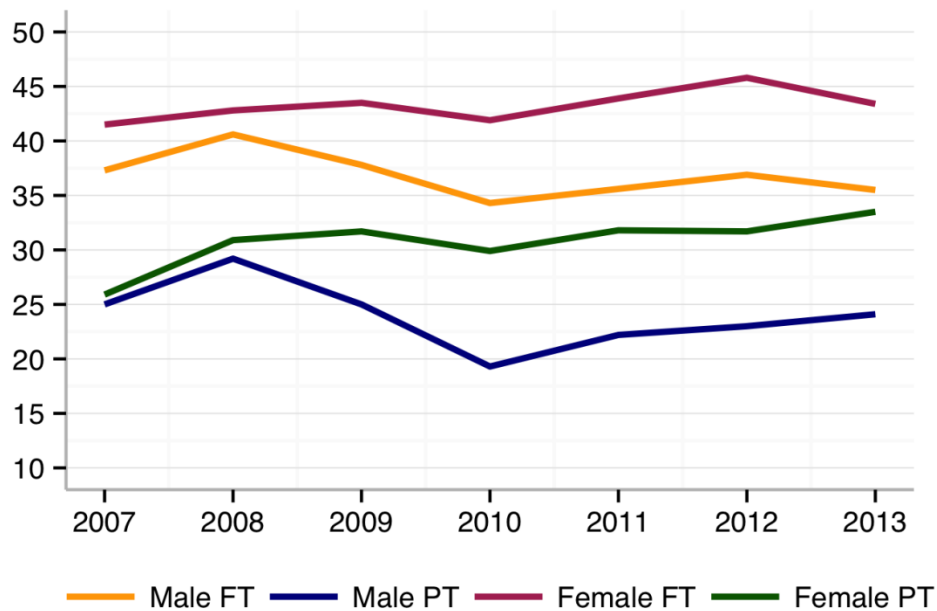
This is not to suggest that the availability of temporary overseas labour is the sole contributing factor to a deteriorating record on the skills formation front. The historical infrastructure for skills formation in Australia has been steadily dismantled over the last two decades. On the one hand we have seen a proliferation of private training colleges as a contestable training market has been set up, and public training providers have lost funding and resources. On the other hand, many of the large public utilities or enterprises which once provided the core of the skilled blue-collar workforce have been privatised and have radically decreased their training commitment. The demise of the large in-house training facilities, particularly in former public utilities like Telecom, Qantas, various Electricity Commissions and Water Boards, has left a serious vacuum when it comes to blue-collar skills formation. There has been long-term funding neglect of the VET sector in particular, and in the 2014 budget the Government cut a total of \$2 billion from skills programs.

⁵⁴ Australian vocational education and training statistics, Apprentices and Trainees, Annual 2011, NCVET, 2012, p. 5; NCVET, News and Events, Fewer Trainees start, apprentices continue to slow, 18 May 2012; NCVET, News and Events, Apprentice and trainee December quarter 2011 statistics released, 5 June 2012

⁵⁵ Annual subclass 457 State/Territory Summary Reports 2010-11 and 2011-12

Problems with skills formation have been around for some time, and were well documented in the early 2000s.⁵⁶ More recent data suggests no improvements have taken place and that the provision of work-related education and training in Australian workplaces remains very modest. A minority of workers undertake any work-related education or training over the course of a year, even when they are employed full-time. For male full-timers the percentage is in the mid 30s while for female full-timers it is in the mid 40s (Figure 3). For the part-time workforce, the figures drop to the low 20s among the men and hover in the low 30s for women. The increasing tendency of employers to turn to part-time employment over the last decade suggests we are seeing a net decline in the overall employer training effort. Figure 3 also suggests an overall decline in male participation in training since 2008, among both full-time and part-time employees.

Figure 3: Work-related education or training by hours status, Australia 2007–2013



Y axis is the percentage of employees who undertook training during the previous 12 months. Source: HILDA Release 13.

The point we make here is that the Government should be using all the levers it can to encourage greater commitment and investment from employers to training their own workforce and developing the skills that their business then benefits from.

⁵⁶ Watson, I (et al), *Fragmented Futures: New Challenges in Working Life*, Sydney: Federation Press, 2003.

To address these issues under the 457 visa program, unions support stronger training obligations and benchmarks tied to the use of skilled migration, so that employers who have a genuine need to sponsor and bring in overseas workers to fill skill shortages are also training the future workforce, reducing their need to rely on temporary overseas workers in future.

Unless there a sharper focus on training in the specific skills and occupations of 457 visa workers allegedly in shortage, the 'shortages' will never end and employers will simply churn through an endless supply of 457 visa workers.

This is not consistent with the objectives of the 457 visa program as a temporary skilled visa program to alleviate temporary skilled shortages.

This was a concept well-articulated in the 2008 Deegan report, as set out below, but is still yet to be acted upon:

Employers seeking to benefit by bringing overseas workers to Australia should be required to make some tangible commitment to the training of Australians in the skills sought. The commitment could be commensurate with the level of overseas labour employed but should also have a real connection to training in the appropriate area of skill. Large employers could be required to hire a percentage of apprentices or new graduates. This, at least, might ensure that Australian graduates were not passed over for employment opportunities because they lacked relevant work experience and because it is more cost effective to employ experienced employees from outside Australia. Small employers could participate in industry-wide training schemes or contribute to scholarship or training funds in appropriate areas.

The menu of training options devised should be such that sponsors of temporary skilled labour could demonstrate that their use of that labour would not contribute to the de-skilling of Australians in the skill area being sourced.⁵⁷

New strengthened and improved training obligations

With a growing consensus that the existing training benchmarks are inadequate and should be abolished, attention should now focus on what a new set of training obligations should look like.

To start with, the training benchmarks should be focused on a set of clear objectives. We propose the following four objectives:

1. To ensure that employers who have a genuine need to sponsor and overseas workers to fill skill shortages are also training the future workforce, reducing their need to rely on temporary overseas workers in future.
2. To increase employment and training through trade apprenticeships, traineeships and graduate degrees in the specific occupations allegedly in short supply i.e. the occupations in which 457 visa workers are being approved on the basis that no qualified Australian workers are available.

⁵⁷ Visa subclass 457 integrity review, Final Report, October 2008, p.42.

3. To ensure that the 457 sponsor approval criteria are sufficiently robust to screen out would-be sponsors who do not meet best practice Australian standards for apprenticeship and graduate training.
4. To increase the cost of accessing 457 visa workers relative to the cost of training Australian workers, especially young people in entry-level positions.

Consistent with these objectives, we outline and recommend below a set of more robust training obligations on employers who use the 457 visa program.

First, we note that the 457 review panel has recommended a new national training fund be established that sponsors would be required to make an annual contribution to, based on the number of 457 visa holders sponsored and with the contribution scaled according to size of the business. The fund would be dedicated to domestic training initiatives, including training for critical skills gaps in sectors like IT and nursing that are big users of 457s and for disadvantaged target groups.

The proposed contribution is \$800 per visa holder for a large business, and \$400 for a small business.

The basic concept of a contribution to a training fund for each 457 visa worker employed has some merit and is not dissimilar to the training proposal which unions put to the panel. However, the proposed contribution rate falls far short of what is required and is actually a step backwards from the current 1% payroll requirement.

For example, at present a small business with a payroll of \$1 million and one 457 visa holder would need to contribute \$10 000. Under the panel's proposal, the same company would need to engage twenty five 457 visa holders before making the same type of contribution to training in Australia.

If it is designed properly with a meaningful contribution amount from the employer, the proposed training fund could form part of the response in conjunction with other measures. However the first priority should be an obligation on sponsoring employers to be employing and training Australians – whether they be apprentices, trainees or graduates - in the same occupations where they are seeking to use 457 visa workers, so that they reduce their reliance on overseas workers and develop the future skills base.

In relation to trade and technical occupations, our proposal is that sponsors and prospective sponsors of 457 visa tradespersons must demonstrate that Australian apprentices represent at least 25% of the sponsor's total trade workforce (including the 457 visa tradespersons)

A requirement for the sponsor to have four or more tradespersons in total (including the 457 visa tradespersons) would apply as the threshold for the 25% obligation to kick in, as this is the point where at least one Australian apprentice at the sponsor's workplace would be needed.

The 25%, or 'one in four', ratio is proposed as an appropriate benchmark for Australian industry *best practice* in terms of apprentice training.

We note that previous proposals for training benchmarks developed through the bureaucracy have proposed a requirement for apprentices to represent at least 15% of the sponsor's trade workforce. However, the figure of 15% is not Australian industry *best practice* or even *good practice*.

The national industry average for the apprentice and trainees to tradesperson ratio is around 12% i.e. for every 100 tradesperson employed there are around 12 apprentices/trainees, across all industries and all employers.⁵⁸ However, this fails to take account of the fact that the total number of tradespersons employed includes tradespersons working for employers *with* apprentices and those working for employers *employing no apprentices*. A figure of 12% is therefore simply current practice among both good and bad practice employers.

The Australian industry 'good practice' or 'best practice' percentage figure should be the total number of apprentices and trainees as a percentage of those tradespersons working for employers with apprentices – i.e. excluding tradespersons working for employers employing no apprentices.

We do not know exactly what this good practice figure is but it is likely to be much higher than 12 or 15%. As table 7 shows, a large 2011 NCVET survey of 7 500 employers found that the proportion of employers employing apprentices in the main trades-employing sectors ranged from 62% in Construction to 22% in Accommodation and Food Services.

Assuming that across-the-board around 50% of employers of tradespersons do employ apprentices/trainees, and also that these employers have 50% of the employed trades workforce, and taking into account the all-industry apprentice training rate of 12%, then these apprentices will in fact represent 24% of the employed trades workforce in those employers *with* apprentices.

Table 7 Percentage of employers with/without apprentices/trainees, by industry 2011

Industry ANZSIC	Employers (%)		Total
	With Apprentices	With NO Apprentices	
	%	%	%
Mining	29.3	70.7	100
Manufacturing	36.7	63.3	100
Electricity, gas and water services	39.5	60.5	100
Construction	61.7	38.3	100
Accommodation and food services	21.5	78.5	100
Public administration and safety	24.5	75.5	100
ALL industries (a)	29.0	71.0	100

Source: NCVET Survey of Employer Use and Views of the VET System (SEUV, 2011).

(a) Includes additional industries not shown in table.

⁵⁸ 2013 Annual Apprentices and Trainees, NCVET, p. 13

A ratio of Australian apprentices equal to 25% of the trades workforce has also been the standard in many collective agreements and major projects in the past.

If this standard of 25% was applied to the current 457 visa tradespersons workforce of 27 790 as at December 2014, the expected training dividend would be almost 7000 new apprentices and trainees.

Clearly, a percentage-based benchmark does not work for sponsors with only a very small trades workforce or employing no Australian tradesperson at all.

For smaller employers with fewer than four tradespersons, there should be an obligation to contribute to training Australian apprentices in other specified practical ways. For those not in a position to commit to directly training an apprentice, this could include a requirement to train at least one Australian apprentice through a group training scheme for the time they seek to engage a 457 visa worker, or pay the apprentice contribution charge outlined below.

Sponsor obligation to contribute to training Australian apprentices

We propose a complementary training obligation, alongside the direct engagement of apprentices as outlined above, for sponsors of 457 tradespersons to pay a charge of \$4000 for each 457 visa tradesperson employed. This money would then be paid to an approved industry training fund, group training company or the Commonwealth (where no relevant fund or training company exists) and earmarked specifically for training Australian apprentices in the trades in which 457 visa workers are employed.

The amount of \$4000 is the same as the standard incentive payment the employer would have received if they had actually trained an Australian apprentice. That total amount comprises a commencement incentive for taking on a new apprentice of \$1500 and a further incentive payment on completion of the apprenticeship of \$2500.

This means that if 457 visa sponsors actually employ a new apprentice, they will be entitled to a payment from the Commonwealth for this same amount. This provides an incentive to take on Australian apprentices as the net cost to the sponsor will be zero if they do so.

The \$4,000 is only a fraction of the total costs associated with apprentice training which include for example the cost of off-the-job training delivery by State/Territory TAFEs and other providers. In our experience, these costs can amount to around \$14,000 to \$16,000.

This proposal is administratively simple, easy for employers to understand with potentially low or zero compliance cost – if new apprentices are trained.

The current number of 457 tradespersons (ANZSCO Skill Level 3) was more than 27 000 as at 31 December 2014. If this proposed 'Australian apprentices training obligation' had been in place for each of those workers, almost \$110 million extra would have been available to help fund training for new Australian apprentices, excluding the incentive payments refunded to employers who actually hired new apprentices and took them through to completion.

The proposals above have been developed in relation to trades occupations but they could be applied equally to occupations at ANZSCO 1 and 2 and the 457 program generally.

For example, we propose that where employers are sponsoring 457 visa workers in professional and managerial occupations, recent Australian higher education graduates with less than 12 months' paid work experience should represent at least 15% of the sponsor's managerial and professional workforce.

We also recommend \$4000 as a benchmark contribution amount that could be applied to a national training fund of the sort envisaged by the 457 visa review panel to cover all occupations under the program.

Employers should also be asked for additional evidence of efforts to upskill their workforce. For example, the previous Government established a National Workforce Development Fund (NWDF) which enables individual enterprises to enter into a co-funding arrangement with government to support skills development for new staff and upskill existing workers. Employers wanting to source 457 visa labour could reasonably be asked what they have done to access funding from the NWDF, or the Government's new Industry Skills Fund, or any work they have done with their relevant Industry Skills Council or state industry training body on local training initiatives.

In addition to introducing more effective and relevant training benchmarks, it is essential that a program for monitoring and enforcing these requirements be established.

Better information on the training effort of sponsoring employers

These new training benchmarks should be underpinned by concrete data on the domestic training effort by 457 visa sponsors in the occupations where 457 visa workers are being sought. It remains a glaring hole in the governance and transparency of the program that there continues to be no information available on, say, how many apprentices are being trained by sponsors who are employing 457 visa workers or whether the number of apprentices being trained by these sponsors is increasing or decreasing over time.

As outlined above, if the standard of 25% was applied to the current 457 tradespersons workforce of 27 790, the expected number of apprentices and trainees across those workplaces would be almost 7000 – but this information is not available.

Without this information, it is simply not possible to verify if there is in fact any training dividend at all from the 457 visa program. Taking the example of 457 visa sponsors in the trades occupations, examples of the type of baseline data that should be gathered and made available include:

- The number of employers currently sponsoring skilled tradespersons (ANZSCO level 3) on 457 visas.
- The number of apprentices and trainees employed directly by these 457 sponsors, in total and by sponsor industry and state/territory.
- The trades in which those apprentices are being trained, including the number of apprentices in the same trade classifications in which the 457 visa workers are employed.
- whether the apprentice and trainee numbers in each category have increased, decreased, or have not changed since approval of the employer as a sponsor.

- details of any other substantive action taken by the sponsor to increase apprentice and trainee training in each category (other than directly employing apprentices) eg. participation in group training schemes as the host employer, cadetships and the results of such action.

This is information that should be captured so the public can know what efforts are being made by employers of 457 visa labour to employ apprentices and give Australians every opportunity to fill these jobs in future. This information could be included on the public register of all 457 visa sponsoring employers that we recommend be established.

Along with more rigorous labour market testing, these measures on the training front will help ensure that employers are not able to take the easy option and go down the 457 visa route, without first investing in training and undertaking genuine local recruitment efforts.

Terms of reference (3) Exploitation and mistreatment of temporary visa holders

3. **Whether temporary work visa holders receive the same wages, conditions, safety and other entitlements as their Australian counterparts or in accordance with the law, including:**
 - a. **the extent of any exploitation and mistreatment of temporary work visa holders, such as sham contracting or debt bondage with exorbitant interest rate payments,**
 - b. **the role of recruitment agents, and**
 - c. **the adequacy of information provided to temporary work visa holders on their rights and obligations in their workplace and community, and how it can be improved.**

There are two issues here. The first concerns cases where temporary visa holders are discriminated against and are not entitled, at law or by some other regulatory means, to receive the same workplace entitlements as their Australian counterparts (in the next section we deal also with examples outside the workplace where visa holders may be discriminated against in the provision of public services). That is, the regulatory framework itself directly discriminates against overseas visa holders.

The second, more widespread issue, is where the visa holders are entitled to the same provisions under law as Australian citizens and permanent residents, but they are exploited and mistreated in a way that is due largely to their vulnerable status as temporary overseas workers and they are clearly not paid what they are owed, are badly treated, or in some other way don't receive their proper entitlements. There is also then the further issue of the adequacy of information that is available to temporary work visa holders on their rights and obligations.

Cases of direct discrimination and less favourable treatment

Improvements in the regulatory framework over time, often driven by concerted advocacy from unions and others, means there are fewer examples of direct and blatant discrimination at law against temporary overseas workers in terms of their work-based entitlements.

For example, when the Coalition was last in Government, one of the most striking and fundamental issues of concern with the way the 457 visa program was then set up was quite simply that temporary workers could be paid less than local workers and it was perfectly legal to do so. The only obligation employers had to meet was a single minimum salary level benchmark, with no regard given for what workers in the same occupation, workplace and region were earning. In regional areas, a further 10% discount was applied on the wage benchmark that employers had to meet.

This capacity to pay below market rates served as an incentive to use temporary overseas labour and suppress Australian wages, a point conceded by then Minister Vanstone.⁵⁹ As labour migration expert Martin Ruhs has noted:

⁵⁹ Shaw, M., "Guest workers cut wages: Vanstone", *The Age*, 8 June 2006.

*“managing the demand for labour is the first critical step in developing sound policies on temporary foreign workers...employers will always have a need for foreign workers if by employing them they can lower their costs”.*⁶⁰

The ACTU and other individual unions made submissions over a number of years to address this issue and remove the opportunity for temporary workers to be exploited in a way that would have the effect of driving down local wages and conditions. Our consistent position was that temporary overseas workers should be paid at the market rate – the ‘going rate’ - for workers undertaking the same or similar work.

It was the Labor Government who took the first steps to rectify this situation with the requirement in the 2008 Worker Protection legislation for 457 visa workers to be paid no less than the equivalent Australian worker at their workplace.

This provision was an obvious and welcomed improvement to the 457 program. However, it still fell short of a properly fair and effective ‘equivalent Australian worker’ requirement based on a true industry or occupational market rate, not merely the ‘site’ rate in place at that individual business.

The problem with using only the site rate as the benchmark for the ‘equivalent Australian worker’ was apparent from the records of applications lodged for 457 visas at the time. A number of applications contained nominated base salaries for trades-level occupations that were clearly undercutting genuine market rates. This meant that the existence of skill shortages used to justify the use of 457 visas could be a case of employers unwilling to pay market rates, rather than a genuine recruitment issue caused by skills shortages.

It was with the integrity reforms introduced in 2013 that an obligation to pay genuine market rates was finally introduced, thereby giving proper affect to the principle that employers must pay 457 visa workers fairly and not use them to undercut Australian wages and conditions.

Under the current ‘market rates’ obligation, temporary overseas workers must be entitled to receive the same wages and conditions as the equivalent Australian worker in the same geographic area.

This obligation must be retained and enforced rigorously. Any attempt to weaken this protection will disadvantage both Australian workers and overseas workers.

One ongoing example of direct legal discrimination that we highlight for the Committee concerns equal access to statutory entitlements for workers in cases of business insolvency. At present only Australian citizens and permanent residents and citizens of New Zealand on special category visas are eligible for entitlement payments under the *Fair Entitlements Guarantee Act 2012* in the event that their employer becomes insolvent and has not made appropriate provision for their workers. Temporary overseas workers under the 457 visa program do not share this entitlement. There is no valid or publically stated reason we are aware of to explain why eligibility is not extended at least to workers under the 457 visa program, if not all temporary work visa holders.

⁶⁰ Ruhs, M., (2006), The potential of temporary migration programmes in future international migration policy. *International Labour Review*, vol. 145, issue 1-2. pp. 7-36.

We note with approval that the Senate Legal and Constitutional Affairs Committee, in its June 2013 report into the 457 visa program, recommended that access to this scheme be extended to 457 visa holders and the Government Senators in their dissenting report also supported such an extension.⁶¹ However, the current Government did not accept this recommendation in their response to that report.

In its submission to the Government's 2014 review of the 457 visa program, the ACTU also recommended a legislative amendment to address this issue but the review panel did not take up this recommendation in its final report to Government.

We again urge the Committee to recommend an amendment to the *Fair Entitlements Guarantee Act* to ensure 457 visa workers have equal access to their entitlements in cases where employers become insolvent.

Exploitation and mistreatment of temporary work visa holders

The more widespread problem across the temporary work visa program is that overseas workers continue to be denied their entitlements at work and are subjected to exploitation and mistreatment in the workplace on a regularly occurring basis.

This remains the most serious blight on the temporary migration visa program.

Just in the first months of 2015, reported cases of roting and exploitation have included:

- young international students from non-English speaking backgrounds being paid as little as \$8 an hour, just half the legal minimum wage, at a Melbourne franchise of Gloria Jean Coffees;⁶²
- exploitation of working holiday makers in the farm sector including cases of underpayment, provision of substandard accommodation, debt bondage, and employers demanding payment by employees in return for visa extensions;⁶³
- employers who advertise jobs targeted only at 457 or working holiday visa holders, with Australian workers not even given a look in;⁶⁴
- Chinese and Filipino workers on temporary 457 and short-term 400 visas at the Bomaderry ethanol plant in NSW and other locations being paid little or nothing for three months, and living in squalid conditions;⁶⁵
- 11 Filipino lift mechanics on 457 visas not being paid by their employer for 6 weeks.⁶⁶

⁶¹ The Senate: Legal and Constitutional Affairs References Committee, Framework and Operation of subclass 457 visas, enterprise migration agreements and regional migration agreements, June 2013, pp.122-123.

⁶² Toscano, N., "Coffee franchise fined for under-paying casual staff", The Age, p. 10, 2 February 2015

⁶³ FWO Media release, 5 January 2015, "Growers, hostels, labour-hire contractors cautioned over backpacker, seasonal worker entitlements"

⁶⁴ <http://au.indeed.com/m/viewjob?jk=ef4d6d979b9942b4&from=ja>

⁶⁵ Hannan, E., "Imported welders, electricians go months without wages, Australian Financial Review, 20 April 2015, p. 6.

⁶⁶ Toscano, N., & Donnelly, B., "Unpaid workers forced to sleep in office: union", The Saturday Age, 21 March 2015

The ACTU continues to receive disturbing reports of cases of exploitation and mistreatment, roting and 'non-compliance' across all temporary work visa types. Generally, these involve either or both exploitation of temporary visa workers or Australian workers being overlooked by employers.

These reports have come from a variety of sources including through the ACTU's confidential 457 visa hotline, from affiliated unions of the ACTU, and through our relationships with other community organisations such as Migrante Australia, who advocate on behalf of Filipino workers in Australia.

The types of cases of roting and exploitation reported to the ACTU include:

- Temporary visa workers being engaged where skilled and qualified Australian workers were available to do the work, as well as cases where Australian workers have been made redundant while temporary visa workers are kept on;
- Serious under-payment of temporary overseas workers;
- Provision of sub-standard accommodation;
- Excessive working hours;
- Workplace bullying;
- Debt bondage, with exorbitant charges and interest payments on loans for 457 visa holders to be placed in jobs;
- Employers offering to sponsor workers for permanent residency for fees of up to \$50 000;
- Salary deductions to pay for migration agent fees on the promise of getting permanent residency
- Threats from employers to not join a union, including contracts that 457 visa workers have been forced to sign stipulating they can be sacked for 'engaging in trade union activities';
- Attempts by employers to recover costs such as accommodation, food, and visa processing fees;
- 457 visa workers nominated to work in skilled occupations and then being required by their employer to perform unskilled work on a regular or permanent basis;
- A number of cases where overseas workers have uprooted themselves to come to Australia only to find after a short time (or immediately in some cases) the job is no longer there; and

- workers brought to Australia on the promise of getting a 457 visa after a period of English language training but forced to return home as the job never materialised and they were left with large debts for the training and the agent's fees.

A recurring theme with these cases is the vulnerable situation the temporary visa holders were in, whether that was influenced by their desire to stay in Australia or achieve permanent residency, the fear of retribution if they spoke out, their lack of knowledge of their workplace rights, their poor English, the spectre of a debt hanging over them, or a combination of all these factors. In many cases, it is their direct employer who is taking advantage of them, but in others it is an agent of some description based in Australia or the home country of the visa holder. In some cases, employers and agents are acting together in organised scams which are more akin to labour trafficking and even slavery. In all cases, workers are left disillusioned with their experience of working in Australia.

We are also aware of many other cases that have received attention through media investigations and through cases pursued by enforcement authorities, such as the current investigation by the FWO into the 417 visa program.

In many cases it is unions who have exposed these rip-offs and assisted the affected workers. For example, with the recent case in Bomaderry and Narrabri not only did the CFMEU ensure the workers were paid the correct wages, it assisted them to chase back payments. It brought the Narrabri workers to Sydney after they were evicted by their employer and accommodated them until they found jobs to support themselves.

Appendix four provides further summaries of a selection of cases of exploitation and mistreatment reported to the ACTU, and other cases that have been reported publically, spanning a range of temporary visa types and locations across the country.

These are serious cases that demand serious attention. That they keep occurring all too regularly should be of great alarm to governments and policy-makers.

However, there is a tendency on the part of the current Government when a collection of individual cases are presented to inquiries such as this, to simply pass them off as isolated cases which do not present evidence of any wider, systematic problem.

This in effect was the finding of the review into the 457 review program which the Government was all too happy to adopt.

There are a number of problems with this 'head in the sand' approach.

To start with, it begs the question of how many cases of exploitation are required before the Government will acknowledge there are inherent problems with the temporary work visa program. Is it 10, is it 20, is it 100, is it 1000 or more? At what point is enough, enough?

For example, in the vocational training sector, the Government, to its credit, has eventually come around to acknowledging the extent of rorting and exploitation of vulnerable students by private training providers and third party brokers. Its response in that case is not sufficient in our view to address the underlying problems of a market-driven training model, but it has at least responded to the multitude of cases coming forward.

At what point, will the Government acknowledge and respond to a similar litany of problems with the temporary work visa program?

It should also be emphasised that individual cases of exploitation and mistreatment that come to public attention only ever represent the tip of the iceberg, a point that was well made in the 2008 Deegan report.⁶⁷

As the ACTU knows from experience with calls to our own 457 visa hotline, temporary visa workers in both white collar and blue collar occupations are often very reluctant to go to DIBP or have the ACTU contact the Department on their behalf, for fear of losing their visa and being deported.

Again, in large part, this comes down to the inherent nature of the 457 program as an employer sponsored visa, and also the generally precarious position many temporary visa holders find themselves in, including cases where they have large debts hanging over them.

As the 2013 Migration Council of Australia report showed, about half (48%) of all 457 visa holders surveyed indicated the reason for applying was to live in Australia or become a permanent resident, and 71% intended to apply to become permanent residents after their visas expired.⁶⁸ This desire for permanent residency is perfectly understandable on the part of those visa holders, but it also makes them more susceptible to exploitation and reluctant to make any complaint that may put their employment at risk. It is a vicious circle where the fact that they are unlikely to report any exploitation that occurs makes them all the more likely to be exploited in the first place.

Visa holders will also be very reluctant to report problems when they themselves are in breach of their visa conditions; for example student visa holders being underpaid for hours they are working in excess of their limit of 40 hours per fortnight.

Even so, notwithstanding the understandable reluctance of individual visa holders to come forward to report their own cases of poor treatment at the hands of employers or agents, there is still considerable evidence of non-compliance, poor treatment and exploitation on a large scale.

For example, the monitoring efforts of the FWO have produced new evidence of rorting and widespread problems with the 457 visa scheme, as set in an internal monitoring report that was obtained under FOI by the Transport Workers' Union and reported in the media in late 2014. The first of these reports covered the period between 18 September 2013 and 30 June 2014. Of the more than 1800 sponsors the FWO investigated, around half of those involved 457 visa workers on reported salaries below the legal wage floor for the program – the TSMIT – which is currently set (and frozen) at \$53,900 per annum.

Of those 1800 cases investigated and referred to the DIBP for further action, FWO identified more than 300 workers (16%) either being underpaid, or not doing the job they were meant to be doing under the visa, or both.

⁶⁷ Visa subclass 457 integrity review, Final Report, October 2008, p. 23.

⁶⁸ Op. cit., pp. 69, 71.

The examples included:

- A visa holder who was nominated as a customer service manager was found to be actually working as a cleaner for \$28,000 a year - \$25,000 below the TSMIT of \$53,900 a year.
- A registered nurse receiving just \$43,368 per annum; \$10 000 below the TSMIT.
- Electricians being engaged on salaries as low as \$40,000, well below the TSMIT, not to mention well below market rates for that occupation.
- Chefs and cooks brought in promised salaries of more than \$50,000 only being paid \$30,000 – more than \$20,000 below the TSMIT.
- A mechanical engineering technician found to be actually working as a construction rigger on \$42 576 per annum, \$10 000 below the TSMIT.
- A cabinetmaker who was actually working as a warehouse assistant.
- Visa holders nominated as chefs, cooks, café and restaurant managers, or retail managers actually working as kitchen hands, wait staff, bottle shop attendants or casual delivery drivers, occupations that are not even on the list of eligible occupations for the 457 visa program.

Not even the priesthood is immune from the problems of the 457 visa program. The FWO report identified underpayment concerns in two cases where priests from overseas countries were engaged on 457 visas with a nominated salary of \$72 000, but once in Australia they apparently took a pay cut of \$16 000, with their actual salary found to be \$56 000.

These findings were from a report that looked at less than 2% of the total of 108,000 plus 457 visa holders in Australia at the time. If these findings were applied to the whole program, it would equate to around 18,000 visa holders who were not being not paid what they should have been paid, were not working in the occupation they were meant to be working in, or both.

We note that DIBP has made the point that the FWO referrals are not findings of fact and are subject to further investigation and audit by the DIBP. DIBP has indicated in material obtained under FOI (and in responses by the Minister to questions on notice) that 73% of referrals from DIBP were finalised by DIBP as satisfactory, and suggested that this supports a conclusion that there is no widespread rorting of the program. However, it is not clear to us if the 73% satisfaction rate from DIBP covered all FWO referrals (both those FWO found prima facie concerns with and those they did not) or only those FWO had prima facie concerns with. In any event, it is concerning that this conclusion is reached when on the DIBP's own findings there are still 27% of cases which could not be finalised as 'satisfactory'.

It is also incumbent on DIBP to explain any discrepancy between the results from FWO and the DIBP findings. If FWO has made a (preliminary) finding, presumably on the basis of evidence available to it, that a worker is not being paid what they should be paid or working in a lower-skilled job, how then has DIBP come to a different conclusion? Does DIBP give

sponsors time to comply and to rectify any transgressions? An explanation for this is important for community confidence in the integrity of the monitoring and enforcement framework.

Beyond the 457 visa program, the FWO advise that one in 10 complaints reported to it now come from temporary work visa holders. While this now reflects roughly the representation of temporary overseas workers across the workforce, the fact it is that high is concerning considering it is probably an understatement of the problem given the difficulty that many temporary visa workers have in reporting cases to government authorities.

The FWO is now receiving more complaints from overseas visa-holders working in Australia than ever before. Between 2011-12 and 2013-14, complaints from visa holders to the FWO increased by 165 per cent from 909 to 2625. Complaints from 457 visa holders increased 157 per cent from 157 to 404 and complaints from 417 visa holders were up 382 percent from 216 to 1 042. In total, in the last three years, the FWO has dealt with 5 633 complaints from visa holders.⁶⁹

Evidence of non-compliance, poor treatment and exploitation also emerged from the survey findings in a 2013 report by the Migration Council of Australia (MCA). These include:

- 2% of visa holders responding to the survey were paid well below threshold figures (i.e. earning less than \$40 000 per annum compared to the then TSMIT of \$51 400 per annum) and 5% did not feel their employer was meeting their obligations. Extrapolating this finding based on the total number of primary visa holders currently in Australia at the time (108, 807 as at 30 April 2013), the MCA report indicated that 5, 443 visa holders were not receiving their full and proper entitlements i.e. 5, 443 individual breaches of the 457 visa program. There was also a further 6% (6, 528 visa holders) who did not know if the employer was meeting their obligations.⁷⁰

It is important to note that the 2% of visa holders identified by the MCA report represents only the proportion of workers being extremely and grossly underpaid, not the total percentage of 457 visa workers being underpaid the wages actually required by Immigration regulations (i.e. the 457 visa market salary rate at the time), which would be a much larger figure.

- 7% of visa holders (or 7, 616 individual 457 visa holders) said their working conditions were not equal to Australian colleagues. For those visa holders of non-English speaking background, this figure was higher again at 8.6%.⁷¹
- 25% of respondents did not know how much they were paid or refused to say; no other question in the survey elicited this type of response.⁷²

⁶⁹ James, N., "FWO specialist team assists overseas workers", Mosaic, Summer 2014

⁷⁰ Migration Council of Australia, More than temporary: Australia's 457 visa program, p. 74.

⁷¹ Op cit., p. 72.

⁷² Op cit., p. 14.

Further comments on the 457 review panel findings on this issue and the argument that widespread rorting is not evident

Predictably, the 457 review panel report found that claims of widespread rorting of the program are not substantiated. It based this view on the department's advice that *'the level of non-compliance by sponsors can be measured only by examining the outcomes of the department's monitoring of sponsors.'* There are a number of obvious shortcomings to the approach taken by the panel on this issue, including:

- Relying only on what the Department uncovers ignores the Department's questionable record on this front, given the insufficient resources that have been dedicated to monitoring and compliance, and the reluctance to take action when warranted.
- The Panel fails to appreciate that reported cases are only ever the 'tip of the iceberg' – a fact acknowledged by the 2008 Deegan report – as it is difficult for vulnerable workers fearful of losing their visa to bring their cases forward.
- The Panel fails to acknowledge the significant number of cases of exploitation presented to it by unions, as well as other independent survey results from sponsoring employers themselves that indicate the extent of rorting (as cited above).
- The Panel failed to take into account evidence from FWO monitoring - some of which is in the report and more which has come to light through the FOI claim by the TWU - that shows, for example, that up to 40% of 457 visa workers were underpaid, not performing the job they were supposed to do or no longer employed by the person who sponsored their entry into Australia.
- Even some of the evidence cited by the Panel in its report hardly gives the program a clean bill of health eg. around 25% of monitoring outcomes since 2006 were not satisfactory i.e. where the department is satisfied no sponsorship obligations have been failed. In 2014, it reported more than 40% of monitoring outcomes have not been 'satisfactory' and 26% have resulted in sanctions or cancellation of sponsorship. Elsewhere in the report is evidence of rorting from cases dealt with by the FWO and the FWC but these were not taken into account either.

Better information for temporary work visa holders

It is essential that temporary work visa holders receive timely and relevant information on their rights under immigration and workplace laws. Various resources have been developed for this purpose from both DIBP and the FWO but the critical point is that information must be provided directly to the visa holder when they are granted their visa and when they commence employment. The onus should not be on the visa holder themselves to find this information and navigate their way through the DIBP website, as currently seems to be the case.

In the case of the 457 visa program which has an existing sponsorship framework in place, there should be a new, specific sponsor obligation to inform every 457 visa holder in writing of their rates of pay and terms and conditions of employment, and their rights and responsibilities under immigration and workplace law. This should include information on the

role of the DIBP, the FWO and unions in pursuing underpayment claims and other breaches of sponsorship obligations. Information should be provided to visa holders in all relevant languages.

The critical point is that the information should be provided directly to the 457 visa workers and confirm their actual pay and conditions. It should not just be a letter that directs them to general workplace information on a website.

We note that the Senate Inquiry into the *Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012* recommended a sponsorship obligation of this type be introduced.⁷³

There should be ongoing, tripartite input into the development of appropriate explanatory materials for temporary visa holders.

Better pathways to permanent residency

We note however that providing information to visa holders, while important, is no panacea for the problems of exploitation and mistreatment outlined under this term of reference. As we have discussed, the problem often is that even if visa holders are aware of their rights they are reluctant to exercise them.

More attention and resources directed to monitoring, compliance and enforcement is part of the required response, as we discuss under term of reference (5). We also recommend that practices such as requiring payment in return for sponsorship, that can led to terrible situations of debt bondage, be expressly prohibited by law.

Even more fundamentally, there is a need to address the inherent flaw of the 457 visa program and other temporary visa types whereby workers are dependent on their employers for the future prospects in Australia and, often, their desire for permanent residency.

Earlier in the submission we highlighted the extent to which temporary visa holders – whether that be 457 visa holders, working holiday visa holders, student visa holders etc. – move through to permanent residency. The fact that a large number of temporary migrants have this goal is perfectly understandable on their part and we recognise that achieving permanent residency helps put these workers on a much more secure footing. However, it is undeniable that this lure of permanent residency has played a part in many of the cases of exploitation of temporary visa workers in Australia. As noted above, this has been a key point made by the two major reviews of the 457 visa program in recent times; the 2008 Deegan Report and the 2014 Azarias report.

In our submission, there are two ways this should be tackled.

⁷³ The Senate: Education, Employment and Workplace Relations Legislation Committee, *Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012 [Provisions]*, Commonwealth of Australia, March 2013.

First, there needs to be a serious debate as to why Australia now has a skilled migration program that relies so heavily on temporary and/or employer-sponsored migration, which is largely uncapped. As discussed above, our view is that the program should be recalibrated with a stronger focus on permanent, independent migration. Robust labour market testing is critical so that employer-sponsored migration (whether permanent or temporary) occurs only when employers have shown they have thoroughly tested the labour market and not been able to find a suitable Australian worker for the job. Where necessary, caps should be placed on temporary forms of migration such as working holiday visas where labour market conditions require it.

Second, greater support should be given to options for temporary workers to move towards permanent residency that do not involve such dependence on a single sponsoring employer and the development of a bonded labour type situation.

We note the 457 visa review panel considered this issue in its recent report to Government. One of its recommendations was to retain the current requirement for a 457 visa holder to work for at least two years to be able to transition to employer-sponsored residency but allow for mobility between employers by reducing the qualifying period with the sponsoring employer to one year. It is important that any such transition to permanent residency is underpinned by a rigorous process of labour market testing to ensure that the labour market conditions used to justify the granting of the original temporary visa are still valid.

The ACTU also supports the idea of giving 457 visa workers priority access to independent permanent migration as a way to reduce the problems caused by dependence on a sponsoring employer. The suggestion by the Panel to increase the points earned for time worked in Australia could be one way to do that.

Developing pathways to permanent residency that are less prone to workers being exploited is, in our submission, far preferable to the idea that is sometimes raised of having hard time limits on temporary visas with no avenue at all to permanent residency. Our concern is that this only serves to further entrench people on temporary visas as second class guest workers bonded to their employer with no other options. However, it should be clear that while permanent residency may be the ultimate outcome in some cases, facilitating that pathway is not the purpose of temporary visas like 457s.

Terms of reference (4) Access to public services

4 Whether temporary work visa holders have access to the same benefits and entitlements available to Australian citizens and permanent residents, and whether any differences are justified and consistent with international conventions relating to migrant workers.

A key issue reported to the ACTU and unions in discussions with migrant community groups is that even when temporary visa holders are treated well in the workplace and receive their full and proper entitlements, they can be often be treated as second-class citizens in terms of access to public services.

We gave the example earlier of temporary visa holders who are denied access to the statutory Fair Entitlements Guarantee scheme in cases where the employer goes bust and has not made provision for entitlements that are owed to workers.

More broadly, there is the issue of access to public services, such as health, education and settlement services. For example, temporary work visa holders pay tax in Australia but are not entitled to Medicare. 457 visa holders are required to make provisions for their own health insurance. In relation to education, we understand that temporary visa holders in some jurisdictions are required to pay a fee for their children to attend a state school. In some jurisdictions, this fee can be as much as \$14 000, although the information on the respective Department of Education websites is not always entirely clear on what arrangements and exemptions apply. We understand that temporary visa holders also do not have access to the same settlement services as permanent arrivals to Australia. Unemployment benefits are also not available to temporary work visa holders for at least two years.

In the case of 457 visa holders, the reduced or restricted access to such entitlements and services is compounded by the fact that the Government has failed to index the legal wage floor for the 457 visa program – the Temporary Skilled Migration Income Threshold (TSMIT) - since it came to office.

The TSMIT was introduced as part of the previous Government's 2009 integrity reforms. The TSMIT is currently \$53 900 per annum. From 2009-2013 it was indexed annually against average weekly ordinary time earnings for full-time employees, but the current Government has chosen to not increase it since coming to office. The panel that reviewed the 457 visa program in 2014 then recommended that it be frozen at its current level for a further two years, a recommendation the Government has accepted.

The TSMIT is designed to ensure all Subclass 457 visa holders have sufficient income to independently provide for themselves in Australia (as well as ensuring the 457 visa program does not extend into the very lowest-paid sections of the labour market). It helps ensure that subclass 457 visa holders do not impose undue costs on the Australian community or find themselves in circumstances which may put pressure on them to breach their visa conditions. This is particularly important given these workers do not have access to a range of government support available to Australian citizens and permanent residents, such as Medicare.

It is essential in our view that that the TSMIT be retained at its current level with annual indexation. Employers must not be able to sponsor overseas workers who will be paid less than the TSMIT. Unions reject ongoing calls from employer groups like Restaurant and Catering Australia for the TSMIT to be lowered to enable lower skilled occupations to be filled through the 457 visa program.⁷⁴

This is an issue that requires further investigation. We recommend that federal and state governments conduct a stocktake of public services and programs, including access to health, education, and settlement support, that are available to temporary work visa holders and their families and compare this to the services available to Australian citizens and permanent residents. Instances of differential access should be removed, unless governments can make a compelling public case to retain such differential access.

Preference for 457 visa workers in redundancy situations

We point that there is one case where in our view preferential treatment for Australian citizens and permanent residents is justified. Over the years there have been a number of examples of Australian citizens and permanent residents being made redundant while 457 visa holders doing the same work in the same workplace have remained in employment.

The legislation now provides at least some recognition that this is an issue, with the requirement for any recent redundancies and retrenchments to be factored into the labour market testing process.

In our submission, there should also be an express position reflected in legislation and program requirements that Australian workers have preference to retain their jobs in redundancy situations over temporary 457 visa workers.

The clear logic to this is that the 457 visa program is designed to provide temporary overseas workers to fill skill shortages when the employer cannot find sufficient workers from the domestic labour market; if workers are having to be made redundant the employer is clearly no longer finding it difficult to find enough workers to perform the work and therefore the 457 visa workers are no longer required and they should be the first to go, with all entitlements owing to them.

⁷⁴ Bitu, N., Call for visas to serve up chefs, The Australian, 7 April 2014, p.2.

Terms of reference (5) Monitoring and enforcement

5. **The adequacy of the monitoring and enforcement of the temporary work visa programs and their integrity, including:**
 - a. **the wages, conditions and entitlements of temporary work visa holders, and**
 - b. **cases of 457 visa fraud, such as workers performing duties outside or below the job classification of the visa.**

Our submission set out above the number of cases of exploitation that continue to occur under a range of temporary work visas.

The fact these cases have been occurring for such a period of time is one of the critical issues facing this inquiry.

For this issue to be seriously addressed, we submit there needs to be a fundamental rethink of the continuing emphasis that is placed on temporary migration as the 'mainstay' of the skilled migration program. Our submission is that without such a change, these problems remain almost inevitable unfortunately as long as employers continue to have access to a large uncapped pool of temporary overseas workers often in vulnerable situations who do not have a good understanding of their workplace rights and/or do not see themselves in a position to exercise them.

That said, there is certainly scope to at least reduce the likelihood for exploitation with better monitoring and enforcement from the regulatory authorities. The ACTU and unions have been raising serious concerns for some time about the lack of effective monitoring and compliance of the 457 visa program overall and other temporary visa types.

It strains credulity in some cases for example that at the time of preparing this submission not one single employer has employed a working holiday visa maker beyond the six month limit with the one employer; or that there has been just one case under the 457 visa program that has justified the use of civil penalty provisions against a 457 visa sponsor since the provisions were inserted in the Act in 2009.

This submission has already addressed deficiencies in the regulatory framework that if addressed would help improve compliance, but generally it would appear the Department has the range of sanctions to enforce compliance with the program.

The experience of our affiliated unions is that the problem lies more with the lack of resources directed to compliance activity and the preparedness of the Department itself to take necessary and timely action against non-compliance, and when it does take action, to publicise that action widely and penalise and name employers appropriately so that it has a general deterrent affect.

The paltry resources dedicated to monitoring and compliance has been a perennial problem. For example, based on the Department's own figures, only about 4% of all sponsoring employers ever receive a site visit from Migration inspectors.

This created problems even when cases of non-compliance were reported to it. For example, the ACTU was advised in 2013 that there were just two inspectors to cover the whole of the Northern Territory. This led to a situation where a matter that was reported to DIBP involving alleged under-payment of 457 visa workers at McArthur River Mine was still not complete 3 months after it was reported due to the remoteness of the site and a lack of resources.

The ACTU and unions therefore welcomed the addition of 300 Fair Work Inspectors as part of the changes to the 457 visa program introduced by the previous Government in 2013. As a result, Fair Work Inspectors now have all the compliance powers conferred on inspectors by the Migration Act, with a particular focus on whether visa holders are being paid correctly and if they are performing the work they were meant to be doing under the terms of their visa. The monitoring efforts of the FWO have already produced new evidence of roting and widespread problems with the 457 visa scheme, as set in an internal monitoring report discussed earlier in the submission.

In our submission, there are various other avenues that require attention in order to improve the effectiveness of the monitoring and enforcement of the temporary work visa programs.

One recommendation is for 457 visa compliance and monitoring to be shifted from DIPB to the FWO Work Ombudsman. One of the main reasons for this is the inherent conflict with DIBP administering the 457 visa program legislation and regulations, approving sponsors and visas, but then also performing the role of regulator. In our submission, the role of regulator should be separated and FWO is the appropriate workplace regulator. The FWO already has experience in dealing with workplaces with migrant workers, including temporary visa workers, and, as discussed, since the 2013 legislative changes Fair Work Inspectors may now exercise all the compliance powers conferred on inspectors by the Migration Act.

We also submit that better information sharing between government agencies would be extremely helpful in improving the overall monitoring and compliance effort. For example, it can enable the matching of tax records from the Australian Tax Office with nominated salaries under the 457 visa program, it can help with information on the training record of 457 visa sponsors from state Training Authorities, it can facilitate access to industrial relations, OHS and workers' compensation data from relevant authorities. Importantly, it can mean that when potential immigration breaches are detected by other agencies they can be referred to DIBP for further action. We support the recommendations of the 457 review panel in this respect.

Our experience has been that attempts by the Department to finalise such information sharing arrangements with other agencies have been long and drawn-out, and it is not readily apparent whether and how many such arrangements have been formally entered into and how effective they have been. It is concerning to have reports that MOUs that have been struck previously between DIBP and OHS regulators in Victoria, New South Wales and Queensland to exchange information including the names of all 457 visa holders, the businesses employing them, and details of workplace injuries or deaths have been shelved.⁷⁵

In the interests of transparency, DIBP should make public all formal and informal arrangements it has with other agencies and the nature and outcomes of those arrangements, now and into the future. Any unfinalised arrangements should be completed as soon as possible.

⁷⁵ Toscano, N., "Scheme to help protect 457 visa workers from injuries quietly shelved", The Age, 27 October 2014

Unions also call for more effort into scrutiny of employers at the point of initial entry into the 457 visa program through the sponsorship approval process. With careful scrutiny, this process provides an upfront opportunity to stop bad employers using the program rather than having to rely on sanctions after the fact once the damage has been done to workers.

In our submission, the ability of employers to access the program, whether the standard 457 visa program or via labour agreements, should be subject to rigorous scrutiny of their record of compliance with relevant industrial relations, OHS, migration and taxation laws. Adverse information on a business in relation to their record in these areas should preclude them from accessing the program. For example, the Fair Work Ombudsman regularly provides details of workers being underpaid or not receiving other entitlements owing to them. Companies found to have underpaid their workers should not then be able to turn around and seek to bring in overseas workers when they have a record of not even paying minimum wages to their existing staff.

This is also a critical issue in relation to existing sponsors under the 457 visa program. In cases, where FWO takes action and recovers unpaid wages of 457 and temporary visa workers, it is often not clear what corresponding action if any, DIBP then takes to cancel the employer's sponsorship approval or otherwise sanction the employer for breaches of sponsor obligations.

There is unfortunately a recurring theme of monitoring and enforcement action either not being taken when it should, action taking too long, action taken being insufficient, or action that is taken not being publicised appropriately.

To take some examples:

- In August 2014, the Fairfax papers reported serious allegations of fraud in both the permanent and the temporary 457 visa migration programs that had gone uninvestigated and there was an immediate announcement that DIBP would conduct an internal review into the allegations ⁷⁶ – as far as we are aware, there is no public record of what action the Department has since taken to investigate those specific allegations, and what is the current status of those investigations
- On 1 October 2014 the Assistant Minister announced a national campaign to investigate allegations of unauthorized payment to visa sponsors in return for visas – as far as we are aware, there is no public record of the current status or outcome of those investigations, or what specific action has been taken as a result of those investigations. ⁷⁷
- As revealed by Fairfax media, the federal Government has issued new licenses in the past six months to migration agents previously identified by the Immigration Department as having bribed employers to obtain fake work references for visa applicants.⁷⁸

⁷⁶ http://www.canberratimes.com.au/federal-politics/political-news/visa-fraud-suspects-fled-after-wiring-1m-overseas-20140807-3dbmu.html?utm_source=PoliticOz&utm_campaign=c3f4fcedd7-PoliticOZ_8_August_2014&utm_medium=email&utm_term=0_673b6b002d-c3f4fcedd7-302936309

⁷⁷ <http://sbs.com.au/news/article/2014/10/08/claims-forced-payments-457-sponsorship>, 9 October 2014

⁷⁸ McKenzie, N., & Baker, R., Visa fraud suspects fled after wiring \$1m overseas, Canberra Times online, 4 September 2014

These problems are not just confined to DIBP. For example, in the recent case of the Chinese and Filipino workers exploited by their employer Chia Tung, the finding from the FWO that they will receive \$873 000 in backpay was welcome, but given the extent of the abuses the mere recovery of wages was not enough in our view.

As the CFMEU National Secretary Michael O'Connor put it:

"A prosecution from FWO would act as a deterrent to others who think that paying workers \$15 a day, forcing them to live in offices and shipping containers and docking their wages for migration fees is a good idea".⁷⁹

Again, there is the question of what further action DIBP will take in a case like this. Too often it appears to us that even when the FWO takes action, the DIBP fails to take further action available to it, at least none which is disclosed publically. In this clear cut case of abuse and exploitation, surely Chia Tung must be barred from any further sponsorship of 457 visa workers.

A further issue highlighted by that particular case is the involvement of overseas-based migration agents involved in docking workers' wages and the fact that DIBP has no jurisdiction over them.

The timeliness of investigations is another critical issue with very practical implications. The experience of our affiliated unions is that temporary visa workers often leave the country and leave behind any claim they had regarding underpayment or other forms of exploitation. Employers and agencies underpay these workers in the knowledge that their chances of being called to account are negligible given the time it takes for action to be taken, if at all. In this submission, we recommend that necessary resources be directed to establishing a process for fast-tracking or expediting investigations of claims of exploitation of temporary overseas workers.

We also recommend again that a licensing system be established to regulate labour hire providers in sectors where there is evidence of abuse of temporary overseas workers, as is occurring under the working holiday 417 visa.

Finally, it should also be recognised that many cases of exploitation only come to light through those workers prepared to speak out publically or alert the authorities, often at great risk to their own employment situation. It is vital that whistle blower protections be provided for both Australian and temporary overseas workers who speak out to expose exploitation and rorting under the temporary work visa program.

Workers performing duties outside or below the job classification of the visa

This term of reference refers specifically to cases of 457 visa fraud where workers are performing outside or below the job classification of the visa. This is an issue which has been identified by the FWO in its monitoring reports on the 457 visa program and in our experience, it is often a sign that a worker is being exploited.

There is a recent case of this occurring which demonstrates the broader concern we have about inadequate monitoring and enforcement over a long period of time.

⁷⁹ CFMEU Media release, "Companies found abusing overseas workers must be held accountable", 21 April 2015

The recent case involves the contractor Murphy Pipe and Civil and allegations it was nominating workers as project co-ordinators and contract administrators who were then actually working as riggers, labourers, storepersons, and machine operators, lower-skilled jobs that would not be available under the standard 457 visa program.⁸⁰ It has since been reported that DIBP conducted raids on Murphy Pipe and Civil in February this year, but it is not known where the investigation is currently at.

It may be that this time appropriate action will be taken, but there are a number of concerning aspects to the DIBP's overall approach to this particular example of visa fraud. The reports are that whistleblowers first started making these allegations to the Department three years ago, and yet it has taken until now for action to be taken.

A major concern is that this issue should have already been raising alarm bells for the Department by the time that allegations were first surfacing in relation to Murphy Pipe and Civil.

Unions had already been raising concerns for some time about the practice of employers nominating the occupation of Program or Project Administrator but actually employing the visa holders in lower skilled occupations that are not available under the standard 457 visa program, very different work to what employers claimed the visa-holders would be doing on their visa nomination forms.

In one tragic example in June 2011, Shaun McBride, an Irish national on a 457 visa in WA, was killed in a workplace accident working as a scaffolder - despite having been nominated and approved to work as a project administrator.⁸¹

It should be recorded that unions first brought these matters to the attention of the Department in February 2012 when made aware that the deceased Irish 457 scaffolder had in fact been nominated as a 'Program administrator'. While the Department did take steps to examine and investigate the issue, it also continued to grant record numbers of 457 visas in the suspect occupation.

Throughout the period from 2009-10 to 2012-13, Program and Project administrator featured heavily in the top 5 occupations, if not the top occupation, for the total number of 457 visa grants, with visa grants for project administrators growing at a much faster rate than 457 visa grants overall.

We suggest that this growth cannot be attributed to a corresponding growth in genuine demand for project administrators. Rather, as often happens in the migration field, it became known as a loophole that employers can exploit if they are wanting to bring in lower skilled workers without proper scrutiny.

In some cases, employers have been quite open and brazen about their rorting of the visa system in this way.

For example, Mr Karsten Gustera the strategy and developments director of a mining services group that services clients such as Rio Tinto and Chevron was quoted in 2012

⁸⁰ McKenzie, N & Baker, R., "Irish workers 'waltz in on infrastructure rort", Australian Financial Review. 12 August 2014."

⁸¹ Phil Hickey, "Dampier scaffolding victim was Irishman Shaun McBride", *PerthNow*, 6 June 2011.

suggesting that many large remote onshore mining operations could soon be maintained by temporary overseas crews rather than a permanent workforce. He went on to say:

*"They're disguised as specialists, but in reality they're basically doing the maintenance activities."*⁸²

It appears that only after the previous Government introduced some integrity checks for this occupation in 2013 have Program and Project administrators dropped off the top list of occupations for visa grants, but it still remains high among the top 15 occupations for total number of 457 visa holders currently in Australia.

We recommend that given the history of rorting of the Program and Project Administrator, this occupation should be removed from the list of eligible occupations for the 457 visa program. For those employers who have a genuine need for overseas workers in project administrator type positions or specialist managers, there are other suitable and more specific skilled occupations on the occupation list for the 457 visa program.

Our further recommendation is that when integrity concerns of this sort arise in future in relation to particular occupations, as they have again with Program and Project Administrators, that DIBP suspend processing of visa nominations for that occupation until the matter is investigated and resolved.

⁸² Christian, K., "Miners gearing up for influx of foreign workers Offshore staff reality, Townsville Bulletin, 13 October 2012, p. 50.

Terms of reference (6) English language requirements

6. The role and effect of English language requirements in limited and temporary work visa programs.

The ACTU and affiliated unions strongly support the importance of strong English language standards for overseas workers under the 457 visa program.

Threshold English language requirements are critical in a number of ways:

- In ensuring good OHS in the workplace.
- In reducing the potential for exploitation.
- In understanding rights and responsibilities at work.
- In enabling effective performance at work.
- In enabling overseas workers to pass on their skills to fellow workers.
- In improving employability and mobility.
- In enabling participation in the community in which temporary work visa holders live and work.

A common characteristic of many of the serious cases of exploitation outlined in this submission are the poor English language skills of the temporary visa workers involved, and the vulnerable situation this left them in. This has been illustrated in a number of recent cases.

For example, in the case of the cook employed on a 457 visa in conditions found to be akin to slavery, the judge found:

“a man who was functionally illiterate, spoke virtually no English and had no contacts in the Australian community, [who] was brought from India to work 12 hours per day, seven days per week in the [employer’s] restaurant. Over 16 months, [the cook] was not paid, beyond the small foreign exchange transfers sent to his wife [\$6,958], and received no leave. He slept in a storeroom in the restaurant, washing with a bucket.

In the recently concluded case of international students being paid as little as \$8 hour, it was also noted that they had poor English skills.

The Filipino workers at the centre of the Chia Tung case who were paid just \$9 an hour after thousands of dollars were deducted unlawfully from their wages also spoke no English.

We also bring to the Committee’s attention the stark fact that all but one of the 12 reported work-related deaths of 457 visa workers occurred before 2009 when lower English language standards were in place. All except one of those deaths were workers from countries where English is not the first language.

The absence of strong English language can have a very serious and practical impact on not only the health and welfare of the overseas workers themselves, but also on their co-workers, clients, customers or patients as the case may be.

For example, in one case an international nursing student, one month into his employment, fed an elderly patient a cup of dishwashing liquid instead of medication because of his inability to read the label.

After being terminated from his employment, the regulatory authority ordered him to complete the test (IELTS) to prove his English skills. He tried and failed six times.⁸³

For all these reasons, the ACTU supports the current minimum English language requirement of IELTS 5 (basic vocational English) across all four language areas. This is already a bare minimum standard. We do not support concessions being available that would lower this requirement or allow it to be waived.

It is worth noting the IELTS 5 standard is described as '*partial command of the language, coping with overall meaning in most situations, though makes many mistakes. They are able to handle basic communication in their own field.*' Below that you have IELTS 4 '*a limited user with frequent problems in misunderstanding and expression*'.

If anything, the question should be why the higher standard of IELTS 6 required for the permanent General Skilled Migration stream does not also apply to the 457 visa program.

In addition, we note that for skilled professions such as nursing and midwifery, the English language standard that is set by the registration authority must be met. In the case of nursery and midwifery, this requirement is an IELTS score of 7.0. There must not be any concessions on the English language standards required for these skilled professions.

Unions are all too aware that English language requirements are often targeted by employers keen for deregulation and 'increased flexibility' under the 457 visa program. However, there is no clear rationale advanced for why exactly English language standards should be lowered, and it appears only to be a way to promote easier access to an even larger pool of less skilled overseas workers.

Restaurant and Catering Australia have gone so far as to state that English language requirements should simply be removed altogether as 'kitchen staff did not need to speak English'.⁸⁴ This would leave those employees tied more than ever to their sponsoring employer, with very limited capacity to find alternative employment if the need arose, as the example above from the restaurant industry shows all too well.

The 457 review panel in its treatment of this issue acknowledged that English language requirements are an important part of the 457 visa program for all the reasons we identified above.

Yet they then went on to recommend that the current English language requirement of vocational English (IELTS 5) in each of the four test areas of reading, writing, listening and speaking, be reduced to an average of IELTS 5, with greater flexibility for employers to seek even lower requirements for certain occupations on a case by case basis, or under Labour Agreements, EMAs or DAMAs.

⁸³ <http://www.news.com.au/national/nsw-act-nurse-washed-up-patient-was-fed-det>

⁸⁴ Bitá, N., Call for visas to serve up chefs, The Australian, 7 April 2014, p. 2.

There was no real explanation or argument provided for why in the end they decided to recommend a lower standard, apart from the fact that employers thought the current requirements were too high. The report cites the stock standard employer complaints that the current standard is too onerous for most workers, slows down the process and imposes additional costs.

The Government has duly indicated it would accept the Panel recommendation for lower English language standards

We recommend that this position be reversed and the existing English language standard be retained.

We note that there has been a departmental practice of considering concessions to English language standards where the implementation of stronger OHS measures can be demonstrated. This was reportedly the approach adopted with changes to the meat industry labour agreement in 2014. In our submission, this only begs the question of why English language requirements would be reduced if OHS was a genuine concern.

Appropriate English language standards and stringent OHS measures should go hand in hand; it shouldn't be an either/or proposition. The type of measures that would presumably be required in support of an English language concession – such as multi-lingual information on rights and responsibilities (including where to go for assistance and the right to join a union) - should be required at all times and not just when concessions are being sought.

English language standards are there for the reasons identified above and the current requirements should not be watered down in their scope or reach.

Terms of reference (7) Designated area migration agreements, Enterprise migration agreements, labour agreements

7. Whether the provisions and concessions made for designated area migration agreements (DAMAs), enterprise migration agreements (EMAs), and labour agreements affect the integrity of the 457 visa program, or affect any other matter covered in these terms of reference.

Unions have made a number of submissions in recent years to the Department, the previous government and now the current government to highlight our concerns with DAMAs, EMAs and labour agreements, and identify the specific protections and conditions that would need to be in place to make them acceptable and workable. These include the matters addressed already in this submission such as:

- Effective labour market testing
- Robust and enforceable training obligations, linked to training in the same occupations where 457 visa workers are being sought
- A tripartite oversight mechanism
- Meaningful consultation requirements, with far more robust information and evidentiary requirements on proponents of EMAs and DAMAs
- Stronger compliance monitoring
- Public transparency of EMAs and DAMAs.

The reason for our concerns is the fact that such agreements have been designed with the specific purpose of allowing 'concessions' not available under the standard 457 visa program i.e. lower standards, whether that be reducing the English language requirement, allowing for a lower TSMIT, or moving the program into lower-skilled occupations. All of these concessions affect the integrity of the 457 visa program and increase the potential for exploitation. This points to the need for even greater scrutiny of such agreements, if any do in fact proceed in future (at this point in time there is still no EMA or DAMA actually in place).

Below we expand on some of these concerns, but first a key threshold question remains in our view as to whether there is any need or justification for EMAs and DAMAs to be available at all.

Is there still a need for EMAs and DAMAs?

EMAs and DAMAs were originally predicated on the idea of a booming resources sector, particularly in resources sector construction projects and the effect this was then having in luring workers away from other industries in regional Australia, resulting in growing skills and labour shortages in the regions.

However, it is generally accepted the boom period for the resources and resources construction sector is now over. Our affiliates and their members who have lost jobs in the sector over the past 12 months or more have first-hand experience of this.

The Australian Workforce and Productivity Agency in late 2013 released its third annual report into the skill needs of the resources sector. It found that the skill shortages predicted

for the resources sector in recent years had eased considerably and the proportion of occupations in shortage is at its lowest level since 2007.

In terms of future projections it found that as the resources sector transitioned from the construction phase to the operations phase, the requirements for skilled trades workers in particular would be substantially reduced. On the most likely scenario, AWPA projections indicate that employment in resources project construction would peak at 83 324 workers in 2014 and fall off dramatically to 7 708 workers by 2018.⁸⁵

We also note again that the Roy Hill iron ore project in the Pilbara, which was given in-principle support for the first EMA in 2012 requiring more than 1500 overseas workers on concessional 457 visas (i.e. on top of standard 457 visa workers) has now indicated it can meet its workforce needs locally. This was backed by evidence from DIBP in a Senate estimates hearing that no EMAs were being sought because projects could meet their workforce needs using Australian workers.⁸⁶

Beyond the resources sector, over the past 12 months or more there have been a string of announcements of major job losses across the country. This includes closures and future job losses at Qantas, Holden, Toyota, Alcoa, Forge, BP and Sensis, and the related impact on the supply chains linked to those major companies as well as the local and regional communities.

As we have already noted, unemployment and youth unemployment remain around their highest levels in more than a decade. Youth unemployment is even higher in certain pockets and regions of the country, as a 2014 report from the Brotherhood of St Laurence highlighted.⁸⁷ For example, youth unemployment in West and North West Tasmania was 21%, Cairns 20%, Northern Adelaide 19.7%, and Hume (including the Goulburn Valley and Wodonga) 17.5%.

Additionally, there are examples of an excess of graduates in some skilled occupations not being able to obtain employment following completion of their qualifications, for example, nursing and midwifery.

In light of all these developments, the Department and Minister should provide a public analysis that addresses the change in economic and employment circumstances since EMAs and DAMAs (previously Regional Migration Agreements) were first conceived, and provide evidence (if any) to justify that there is a genuine need for these agreements in 2015 and beyond. For example, Geelong has previously been mooted as a location for a DAMA. This would be clearly unacceptable now given the major job losses, current and ongoing, from major employers in that region.

⁸⁵ Resources sector skills needs 2013, Australian Workforce and Productivity Agency, Australian Government, p. 14.

⁸⁶ Senate Estimates Hearing, Legal and Constitutional Affairs Committee, Proof Committee Hansard, 27 May 2014, pp. 90-91.

⁸⁷ Australian Youth Unemployment 2014: Snapshot; Brotherhood of St Laurence.

Unions consider that such an analysis would conclude on the evidence there is no longer any need for EMAs or DAMAs, now or in the foreseeable future. However, in the event they are proceeded with, they must be subject to rigorous scrutiny and oversight. As the 2012 ACTU Congress Policy states, unions will not support the making of such agreements unless satisfied that every effort has first been made to fill positions with Australian workers, that concrete measures are in place to employ and train Australians in future, and the employment of 457 visa workers will not undercut the wages and conditions of Australian workers. We make the following further comments on EMAs and DAMAs in relation to the guidelines that cover their operation. The final point on stakeholder consultation requirements applies also to labour agreements.

The purpose of DAMAs and EMAs and associated eligibility requirements

The guidelines need to be clear that EMAs and DAMAs are not a means of giving employers access to temporary overseas workers on 457 visas in order to fill general labour shortages with non-specialised semi-skilled occupations or unskilled labour.

Their purpose should be explicitly limited to skilled and specialised semi-skilled occupations. In the case of DAMAs which are based around a designated area, it should be clear that DAMAs are intended only for high-growth, low unemployment regions with evidence required to support this, such as low regional unemployment rates compared to the national average.

It should be very clear that DAMAs are not designed to be a low wage, low skill program. Yet draft guidelines issued for comment last year by the Department dangled the carrot of concessions to the TSMIT, and the possibility of access to overseas workers in low-skilled occupations which require only a short time to train a local worker. These sorts of provisions only serve to confirm a view that the main purpose of DAMAs is to provide a mechanism for employers to avoid obligations under the standard 457 visa program. Unions continue to register our strongest opposition to any push to use EMAs and DAMAs to expand the skilled migration program into lower skilled occupations.

Approval processes

The criteria for approval as a DAMA or EMA sponsor must be far more rigorous than the current criteria for approval as 457 standard business sponsor or a sponsor under a labour agreement.

The current criteria for 457 sponsor approval simply involve passing the so-called 'no adverse information test'. A stronger test is required for DAMA and EMA sponsors, because of the much greater level of risk involved, and must involve a form of 'positive vetting' of the employer by an independent or tripartite authority. We strongly suggest access to 457 visa workers under DAMAs and EMAs should be limited only to 'best practice' employers, not simply those who can pass the 'no adverse information test'.

In relation to DAMAs, one of our concerns with the draft guidelines issued last year was a proposed new position of Designated Area Representative. The draft guidelines placed considerable responsibility on the Designated Area Representative to ensure employers seeking access to a DAMA are 'of good standing' and able to meet their sponsorship obligations. The Designated Area Representative's endorsement would then be the basis for the department's recommendation to the Minister to approve a labour agreement for an employer under a DAMA. Their ongoing responsibilities would include reporting annually to

the Department and responsibility for requesting updates on any breaches of sponsorship obligations.

Given, the extent of their responsibilities, it was of major concern to the ACTU that the grounds for appointment as a Designated Area Representative are vague and general at best. It is unclear on what basis the person or body would be appointed, what their powers will be, and what right of redress any person, will have against the misuse of their powers. The impression left was the Department was outsourcing many of its responsibilities for approval and monitoring processes and would simply act as a rubber stamp for recommendations made by the Designated Area Representative in relation to DAMAs and the employers who have access to them.

The introduction of any such position under a DAMA should only proceed with clearly defined roles and responsibilities, with their conduct and decisions subject to regular auditing, and with mechanisms to prevent conflicts of interest where potential designated area representatives also run migration and recruitment services and/or represent employers who are wanting to access overseas workers under the DAMA.

Tripartite oversight

There should be tripartite oversight, monitoring and advice on EMAs and DAMAs through the Ministerial Advisory Council for Skilled Migration (MACSM). This would help provide much-needed transparency, accountability and confidence in the DAMA process.

Labour market testing

The starting point for unions with EMAs and DAMAs, as with all aspects of the 457 visa program, is that Australian workers (citizens and permanent residents) must have the primary right to all jobs for which they are qualified.

The labour market testing obligations under the Act must apply to each individual position that is filled by a 457 visa holder under an EMA or DAMA, with the improvements to the current framework we recommended earlier in the submission.

The guidelines for EMAs and DAMAs should also place additional requirements on the DAMA/EMA proponent as well as the employers under the agreement, where these are not already required. This should include:

- Prior to submitting any application for an EMA/DAMA, establish an online Jobs Board on which employers can list job vacancies for all specific occupations contemplated for the EMA/DAMA and Australian job seekers can register for these vacancies.
- Provide evidence on the number of Australian job seekers registered by occupation, the number who applied for positions, and the reasons why any Australian applicants were assessed as unsuitable.
- Provide evidence of the wages and conditions offered to Australian workers for these vacancies, relative to industry standards in the region and nationally.

- Provide evidence of the financial assistance offered by employers in the region to assist Australia workers and their families relocate to jobs in the area, relative to claimed costs of recruiting workers who are not Australian residents.

It should be a mandatory contractual requirement of an EMA/DAMA that the proponent and all participating employers use the Jobs Board on an ongoing basis, and prior to the engagement of any 457 visa worker, to advertise vacant positions and allow job seekers to apply for and/or express their interest in available positions.

This would form part of a rigorous labour market testing process for DAMAs and EMAs and help ensure that Government, unions, and the broader community, particularly in the affected regions, can have confidence that Australian workers are being given first opportunity to fill Australian jobs.

Training obligations

A priority issue for unions is to ensure that there is a training dividend from the use of any DAMAs, EMAs and temporary migration generally. This means that employers who want to use overseas workers must show they are investing in training Australians and thereby reducing their future reliance on overseas labour. To this end, DAMAs must contain strong training benchmarks that are rigorously enforced.

EMA and DAMAs must be required to have a detailed training plan as a condition of approval. Training under such a plan should:

- be focused in areas of 'known or anticipated shortages' (i.e. in occupations where 457 visa labour is being sought under the DAMA);
- provide training opportunities for long-term residents in the region, especially Indigenous Australians;
- reduce reliance on temporary overseas labour 'over time';
- be commensurate with the size and scope of the EMA/DAMA (i.e. the more 457 visas that are used, the greater the training requirements); and
- be enforced through contractual obligations under the DAMA and be measured and monitored.

Supporting overseas workers

Unions strongly endorse a requirement for EMAs and DAMAs to provide overseas workers and their families with information and support to assist with settling into the local community. We also support a focus on ensuring there are sufficient infrastructure and community services to support the proposed overseas workers.

As well as basic information on local services and community activities, the ACTU submits there should be other forms of assistance such as a requirement for ongoing English language training to be included in the terms of an EMA/DAMA, with the onus placed on the proponent to make those services available and/or fund the training. Employers engaging 457 visa workers should also have an obligation to contribute financially to the cost of

additional infrastructure required to support increased number of workers in the designated area.

Unions previously worked with the Department to develop material for an induction video for workers covered by EMAs, outlining their workplace rights and responsibilities. Similar material should be updated and developed on a tripartite basis for workers under DAMAs.

Stronger compliance monitoring

In our submission, EMA/DAMAs should be targeted for extra monitoring and compliance efforts, given their likely coverage of more vulnerable, lower-skilled workers where concessions are granted to sponsoring employers. Monitoring should include a mandatory up-front site visit of employers under a DAMA and follow-up audits or site visits as required.

Consideration could also be given to allocating DIBP Outreach Officers to DAMAs so that workers can access them as a resource.

English language requirements

Consistent with the arguments in the earlier section, unions do not support the availability of concessions for the standard of English language required under DAMAs and EMAs.

Any further lowering of the English language standard is fraught with great difficulty, particularly if it applies to any lower-skilled workers, who already are in a potentially more vulnerable situation. Given the additional vulnerability of these workers, a higher standard of English should be required, not less. Lower English language standards for 457 visa workers in dangerous occupations will also increase the OHS risk to unacceptable levels.

The suggestion of lower English standards would also be inconsistent with the requirement to support overseas workers under EMAs and DAMAs, including the appropriate settlement into the area in which they will live and protecting them from exploitation. Language skills are a fundamental requirement for the prevention of exploitation.

If the Government nonetheless proceeds down this path, the employer should also be required to demonstrate that they have tried to recruit workers with the standard 457 minimum English language skills and were unable to do so. Such workers should only be employed if there is a thorough examination of their proposed workplace and the limited English ability of the workers (s) does not place them at an additional risk.

Mandatory stakeholder consultation requirements for EMAs, DAMAs and labour agreements

The mandatory stakeholder consultation requirements that currently apply to labour agreements, and which are proposed for any future EMAs and DAMAs, remain manifestly inadequate, both in terms of a process for consultation and also the limited range of matters on which proponents are required to consult on.

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

This information is critical to ensure a rigorous and transparent process for determining the need for temporary overseas workers under the agreement. Without this information, it is not a genuine consultation and it will only undermine community confidence in the program.

To ensure that unions and other stakeholders can make an informed assessment of labour agreement proposals and any future EMA or DAMA proposals, the information and evidentiary requirements the proponent has to provide must be strengthened to include, as a minimum, the following matters:

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

In short, unions and other stakeholders should have access to the same information that the proponent is required to provide to the Department in support of their proposal. This is necessary to enable an informed assessment to be made.

In terms of the consultation process for labour agreements, for example, unions have a period of 21 days to respond to the request for comment on the proposal. However, to ensure there is a two-way process of meaningful consultation, the guidelines should also provide for face-to-face meetings to be held if requested and an obligation on the proponent to respond reasonably to requests from unions for additional information and/or clarification.

To their credit, some labour agreement proponents do engage with unions in a meaningful way and have had no difficulties in providing additional evidence and information that is requested, but this is in spite of the formal requirements under the labour agreement program rather than because of them.

If unions have particular evidence to suggest that more could be done to employ locally, such as the fact they have members who are currently unemployed and who could perform the work in the nominated occupations, this evidence is also presented to the proponents. Unions are always happy to work with employers to help fill positions locally and this has happened on a number of occasions.

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

We also note that once unions have been consulted on a labour agreement request that is usually the last they hear of it. There is no record of whether a labour agreement is ultimately entered into with the Government, if it is modified at all from the original request, or if the application to DIAC is withdrawn or rejected.

To rectify this, we propose that DIAC and/or the labour agreement proponent be required to notify and advise all stakeholders that were consulted as to the outcome of the labour agreement application.

DIAC should also be required to maintain an online public register of current labour agreements in operation, as well any future EMAs and DAMAs.

Terms of reference (8) Relationship between the temporary 457 visa and other temporary work visas

8. The relationship between the temporary 457 visa and other temporary visa types with work rights attached to them.

As noted at the outset, we welcome the broad scope of this inquiry. While there have been a number of previous reviews and inquiries into the 457 visa program, this is the first inquiry that has taken a holistic view across the range of various temporary visa types, including students and working- holiday makers.

In the first part of the submission, we provided an overview of the size and nature of the temporary visa workforce as a whole and its different component parts, their growth over time, and the fact that it is virtually uncapped without any regard for labour market conditions in Australia. We refer the Committee again to that material.

We also showed the extent to which overseas workers move from visa to visa, often in pursuit of their end goal of permanent residency in Australia, and refer the Committee again to that material as well.

This movement between temporary visa types, and also permanent visas, is a critical point for the Committee to consider in its deliberations. In our submission, it leads to many of the problems under the program as employers and agents take advantage of often vulnerable workers who are focused on their desire for permanent residency and doing what is required to get to the next step - to get work as a 417 visa holder, to get the second year working holiday visa, to get a 457 visa, to get PR sponsorship. It also means that employers have ready access to a large alternative source of labour comprising overseas workers who are already on-shore in Australia on one temporary visa type or another.

The ACTU position on these issues is shaped by two key priorities, where work rights are involved.

One is to ensure that the visa holders themselves are treated well and afforded all their relevant rights at work, and two that the work rights of visa holders do not impact adversely on the training and employment opportunities available for Australian citizens and residents.

Given the problems created by this reliance on temporary visa work holders, many of whom are moving between different visa types, we emphasise again the importance of a strong compliance and enforcement regime, as well as good education on workplace rights and responsibilities, to support and protect the position of vulnerable temporary overseas workers.

Again, however, we also make the point that this Inquiry provides the opportunity to start a more fundamental rethink and reassessment of the whole balance of the skilled migration program. At one level, this could involve better pathways to permanent residency so that a worker on a temporary work visa is not so dependent on their current employer for sponsorship for permanent residency. It should also in our view involve a recalibration of the whole program, with priority given to permanent, independent migration.

Term of reference (9) Any related matters

Proposed new short-term mobility visa

On a related matter, we also draw the Committee's attention to the proposal for a new 12 month short-term mobility visa recently put forward as part of the Department's current review of the skilled migration program. The proposal touches upon a number of the matters raised in this submission.

In our submission, this proposal appears to be nothing more than a thinly veiled attempt to allow employers to bypass the current sponsorship and legislative obligations that would otherwise apply to them under the 457 visa program. It would mean access to a new 12 month temporary work visa that would have no labour market testing requirements attached to it, no English language proficiency requirements, no skills assessments, apparently no sponsorship approval by DIBP of individual employers, no legally enforceable sponsorship obligations, and no requirement to pay market rates. This proposal may align with the 'wish list' of certain employers, but it is not in the interest of Australian or overseas workers.

The new visa would be a substantial departure from current visa arrangements. At present, the Temporary Work (Short Stay Activity) visa (subclass 400) already provides for short-term, highly specialised, non-ongoing work of up to three months (or up to 6 months in limited circumstances). Temporary skilled work that does not fall under this short-term visa class would generally be captured by the subclass 457 visa. The 457 visa program, despite its flaws, at least contains some basic protections and safeguards such as sponsorship approval processes, sponsorship obligations, and limited labour market testing for some occupations.

By contrast, the proposed new short-term mobility visa would allow entry to overseas workers for up to 12 months (as opposed to three months at present under the subclass 400 visa). As a result, it would cover a large group of sponsors and visa applicants, many of whom would most likely fall under the 457 visa program at present. The bare minimum health, character and security requirements would be the only visa criteria to be satisfied for those working under this proposed new visa.

It appears also that access to the new visa could be opened up so that it applies not only to 'highly specialised' work, but to any form of 'intermittent work' of up to 12 months duration. One likely result is that some employers would incorporate this visa option into their business model and keep churning through overseas workers on 12 month cycles, unimpeded by any 'irritants' such as labour market testing.

Clearly, it is intended that labour market testing requirements would not apply to this proposed visa. The proposal as it stands suggests a Genuine Temporary Entry (GTE) requirement would be used as an integrity tool and ensure the primacy of Australian workers. No further detail is provided on how the GTE requirement would apply. However, based on the GTE requirement as it applies to the student visa program, this would only act to ensure the visa applicant has a genuine intention to come to Australia temporarily for the stated purpose of the visa. It would do nothing to ensure the primacy of Australian workers.

There is no discussion in the current proposal of any monitoring or enforcement arrangements that would apply to the proposed visa. The visa operates largely on the basis of an employer endorsing and inviting the applicant to take up the position. For placements of longer than 3 months an undertaking is required detailing salary and conditions of employment, but an attestation of this sort appears to fall well short of an enforceable market rates requirement as applies under the 457 visa program.

In summary then, what is being proposed is a move away from the current subclass 400 visa that provides for a genuinely short-term visa of three months duration for highly specialised work. In its place would be a longer 12 month visa with potentially much broader coverage, and with no labour market testing or other integrity requirements. However, despite the major changes and reduced protections being proposed with this new short-term mobility visa, there has been no attempt to explain the operation of the existing subclass 400 visa or make any case for change to those current arrangements.

In support of the proposal, the Department has provided no data whatsoever on the current numbers of subclass 400 visa holders in Australia, visa grants and trends to indicate the demand for this visa, no information on the skill level or occupations of those granted this visa, no information on what checks (if any) the Department undertakes to ensure that the work done on this visa is indeed 'highly specialised' and unable to be done by Australian workers, and how adequate that current system of checking is.

Similarly, there have been no projections of the expected number of 400 visas under the deregulated version it is proposing, nor the number of employers. Likewise, no evidence at all is provided of the existing level of abuse of this visa such as by employers engaging so-called 'highly specialised' overseas workers on 400 visas but employing them as semi-skilled or unskilled workers, and underpaying and otherwise exploiting them.

For example, the Department has not made reference to any cases brought to the courts by the FWO involving underpayment and abuse of 456 visa workers (the precursor to 400 visas). In one such case, the FWO alleged two Fijian men on 456 visas worked eight hours a day, seven days a week at the Port Adelaide docks for a 'living-away-from-home allowance' of \$100 a day.⁸⁸ We also note the recent case involving exploitation of workers at Bomaderry and Narribri included workers on subclass 400 visas.

In fact, it is not surprising that data on the operation of the 400 visa (and its predecessor, the 456 visa and electronic versions thereof) has not been provided. It is not clear whether the department even collects this data on the 400 visa, which it now proposes to expand. The department has previously claimed that because employers of 400 visa holders have no sponsorship relationship with the department, there is nothing resembling the data collection system that exists for the 457 visa. Following the Bomaderry case, the Department has confirmed there is no investigations unit for 400 visas. .

It is anticipated the argument from its proponents would be that the proposed new visa is designed for 'highly specialised work', involving for example, international intra-company transfers. However, as discussed above, it is not at all clear the visa would be confined in this way. If the 456 visa is any guide, the 400 visa will be available for work in all occupations at

⁸⁸ See for example, FWO, "Fijian workers allegedly underpaid \$25,000 whilst working at Port Adelaide docks", media release 25 July 2012. <http://www.fairwork.gov.au/about-us/news-and-media-releases/2012-media-releases/july-2012/25072012-devine-prosecution>

trade level and above – and possibly even sub-trade occupations. It is also significant that the term ‘specialists’ is used in Free Trade Agreements to mean ‘trade, technical or professional work’

While the DIBP discussion paper supporting the proposal suggests that visas of less than three months would only be for ‘highly specialised work’, the paper then refers more expansively to ‘highly specialised and intermittent work’ for visas of longer than 3 months and up to 12 months. The paper also proposes that the potential scope of the visa be explored and the obvious concern is that the push will be to widen the scope of the visa as far as possible.

We also make the observation that the 457 visa was originally conceived and operated on much the same basis - as a tailored, specialist visa restricted to certain high-level occupations - before it too expanded into a far wider range of occupations.

In any case, even if the visa was properly confined to highly specialised work (as commonly understood) this does not diminish the importance of labour market testing. Labour market testing is a principle and practice that should apply equally to all workers and all work, regardless of skill levels and degree of specialisation. Suitably qualified Australians should not be denied the opportunity to perform work that would be captured under this visa.

Whether the position is white collar or blue collar, high income or low income, the same principle applies i.e. an employer wanting to engage a skilled temporary overseas worker must show they have first tried to find a suitably qualified Australian worker and were not able to do so. Again, this is more important than ever with unemployment at record highs.

For example, in relation to intra-company transfers which are identified for the short-term mobility visa, does the government believe that an international company wanting to rotate its young graduate employees through a 12-month job in its Australian branch should be entitled to do so, regardless of how many young Australian graduates are qualified to do the work and unable to find a full-time job?

Proponents of this proposed visa also seek to argue that those who are unemployed would not be filling the type of specialist jobs that might be subject to the short-term mobility visa. Even if that was the case, it is not much to ask that labour market testing be required to verify that is in fact the case, rather than relying simply on the ‘say-so’ of the employer. This is important to protect the rights of Australian workers to jobs and for community confidence in the program.

The fact is though that Australians at all skill levels can and do find themselves out of work. ABS figures show for example that there are currently 62 600 professionals unemployed and a further 142 400 who are under-employed – that is 205 000 Australian workers who are classified as professionals and who are looking for work or who want more work than they currently have.⁸⁹ There are a further 63 300 unemployed trades and technician workers and 102 700 who are under-employed. Labour market testing is essential to ensure that these highly skilled workers have access to available jobs.

A further, related concern is that a visa designed for ‘highly specialised’ work is at odds with other aspects of Government policy which seek to encourage Australian specialisation where

⁸⁹ ABS Labour Force, Australia, Detailed, Quarterly, cat. 6291.0.55.003, Table 18 and 19.

scale and comparative advantage provides a competitive edge. Australian expertise in offshore oil and gas development is one such area.

The development of home grown specialist skills in niche markets where we have comparative advantage is in the national interest, and can help ensure that Australia can compete in an international marketplace. Unions operating in the offshore sector have accepted that overseas workers with specialist skills should be able to be imported on a temporary basis in certain circumstances, however the long lead times for commencement of offshore projects and the recurring nature of the requirement for specialist skills like heavy lift crane operators on pipe laying vessels, which have been required on the Bayu Undan project, the Gorgon project and now the Ichthys project, provides ample opportunity for Australian nationals to be trained up for these specialist roles.

For all of the reasons identified above, we urge the Government to not proceed with this proposal for a 12 month short-term mobility visa.

Appendix 1

Proposed minimum quarterly reporting requirements for DIBP on the operation of the labour market testing provisions

The number of 457 visa applications the Department has received during the reporting period.

The number of these applications that were subject to the labour market testing provisions.

The number of applications that were deemed exempt from the labour market testing requirement.

A breakdown of the reasons why those applications were deemed exempt eg. international trade obligations (including a further breakdown by the relevant free trade obligation eg Thai citizen, Korean citizen, Chilean citizen), skill and occupation-level exemptions, other exemptions.

How many applications in total were rejected or discontinued? How many were granted? How many are still to be determined?

How many applications were rejected because they failed to satisfy the labour market testing requirements?

How does the overall rejection rate compare to the rejection rate in the period before the labour market testing provisions came into operation?

Of those applications where it was determined that the labour market testing requirements had been met, what were the most frequently reported explanations (top 5?) for how a sponsor determined that there were no suitable qualified and experienced Australian citizens available to fill the position? What type of evidence of local recruitment efforts was provided?

Of those applications where it was determined that the labour market testing requirements had not been met, on what basis did the Department make that determination? What type of evidence of local recruitment efforts did it receive from the applicant?

Notes

The information above should be provided in total numbers as well as a breakdown for ANZSCO skill level 3 occupations, for nursing occupations, and for engineering occupations (i.e. the main broad occupational groups that are covered by labour market testing), and by state, industry, age, and offshore or onshore status.

The above information should be presented in a way whereby it can be compared with the results of previous quarters, with a total cumulative result since labour market testing came into operation in November 2013, and with the results before labour market testing provisions came into operation in November 2013.

The information should be made freely available on the department website.

Appendix 2

Overview of temporary visa types ⁹⁰

The number of temporary entrants and New Zealand citizens physically present in Australia is estimated every three months by identifying those persons who have entered Australia on temporary visas or as New Zealand citizens, and who have neither left Australia nor been granted permanent residence. The number of temporary entrants are broken down by the following categories:

Visitor visa holders

Non-permanent entrants to Australia whose visa is for tourism, short stay business, visiting relatives or medical treatment.

Student visa holders

Overseas students who undertake full-time study in registered courses, with rights to work up to 40 hours per fortnight.

Working holiday maker visa holders

Young adults aged 18-30 from countries with reciprocal bilateral agreements with Australia to holiday and work in Australia for up to a year, either on the subclass 417 Working Holiday visa or the subclass 462 Work and Holiday visa. Visa holders are allowed to work in Australia for up to six months with each employer.

Temporary skilled visa holders

Temporary Work (Skilled) subclass 457 visa holders mostly recruited by Australian companies whose visa is valid for up to four years.

Temporary graduate visa holders

Overseas students who wish to remain in Australia for up to 18 months to gain skilled work experience or improve their English language skills. For post-graduate students the visa can be granted for up to four years.

Bridging visa holders

Non-citizens who are provided with lawful status while they have business with the government or the courts regarding immigration matters;

Other temporary visa holders

Include holders of other temporary visas such as New Zealand Citizen Family Relationships (non-New Zealand citizens who are family members of a New Zealand citizen), social/cultural (Entertainment, Sport, Visiting Academic, Religious Worker, etc), international relations (Diplomatic, Exchange, Domestic Worker, etc), training (Occupational Trainee and Professional Development), Student Guardian and transit visas;

New Zealand visa holders

New Zealand citizens granted a Special Category Visa (subclass 444) on arrival in Australia.

⁹⁰ Drawn largely from Temporary entrants and New Zealand citizens in Australia, Department of Immigration and Border Protection, Australian Government

Appendix 3

The arguments to remove labour market testing and why they should be rejected (an extract from the April 2014 ACTU submission to the 457 visa review panel).

The labour market testing laws are too onerous and a burden on employers

This has been the stock-standard response of those who oppose labour market testing. However, it is never made clear by those making this argument exactly what the massive burden is in expecting that employers will have first made attempts to recruit locally and that they can provide evidence of those local recruitment efforts. In fact, if an employer was genuine about sourcing Australian workers first, you would expect this was already occurring as a matter of course.

In our submission, the current regulatory framework for labour market testing could hardly be described as onerous. There are few mandatory requirements placed on employers. Furthermore, the Government has, regrettably, already sought to water down the requirements that are in place. The majority of 457 visa occupations are not even covered by the labour market testing laws by virtue of various exemptions in place.

It should also be remembered that the 457 visa program is not, and should not, be designed to provide an unfettered right for employers to take on temporary overseas workers. Even during periods when the program has been very poorly regulated, access to the 457 visa program has always, at least in theory, been subject to certain conditions and obligations, including an overriding tenet of the program that it is there only to fill skill shortages that cannot first be filled by Australian workers. In that sense, the labour market testing laws simply give practical (and long overdue) effect to what has always been an understood principle underpinning the program endorsed by both sides of politics.

Even if the Panel concluded that the labour market testing laws imposed some burden on employers, this would have to be weighed against the need to meet a fundamental tenet of the program to protect employment opportunities of Australians.

Employers will always look to employ Australians first

Another argument often heard against labour market testing is that employers will of course always look to employ Australians first, particularly considering that it is more expensive to bring in a 457 visa worker from overseas than a local worker of the same skills and experience. Why then would an employer employ from overseas except as a last resort, the argument goes.

This was an argument used by the now Prime Minister during the 2013 election campaign when he said:

... because an employer has got to bring the person to the country and look after them initially it's far more expensive to employ a 457 visa holder than it is to employ a local. It's never advantageous, where there are available locals, to use a 457 visa holder instead. ⁹¹

In our submission, it is simply naïve to assume and blindly accept this argument that all employers will always want to employ locally first, including because it is more expensive to hire a 457 worker from overseas. It plays to what is a common misperception that employers, having exhausted all local options, are then having to comb the world to find a suitable overseas worker, when in fact the overseas worker is often on their doorstep and may already be in their employ.

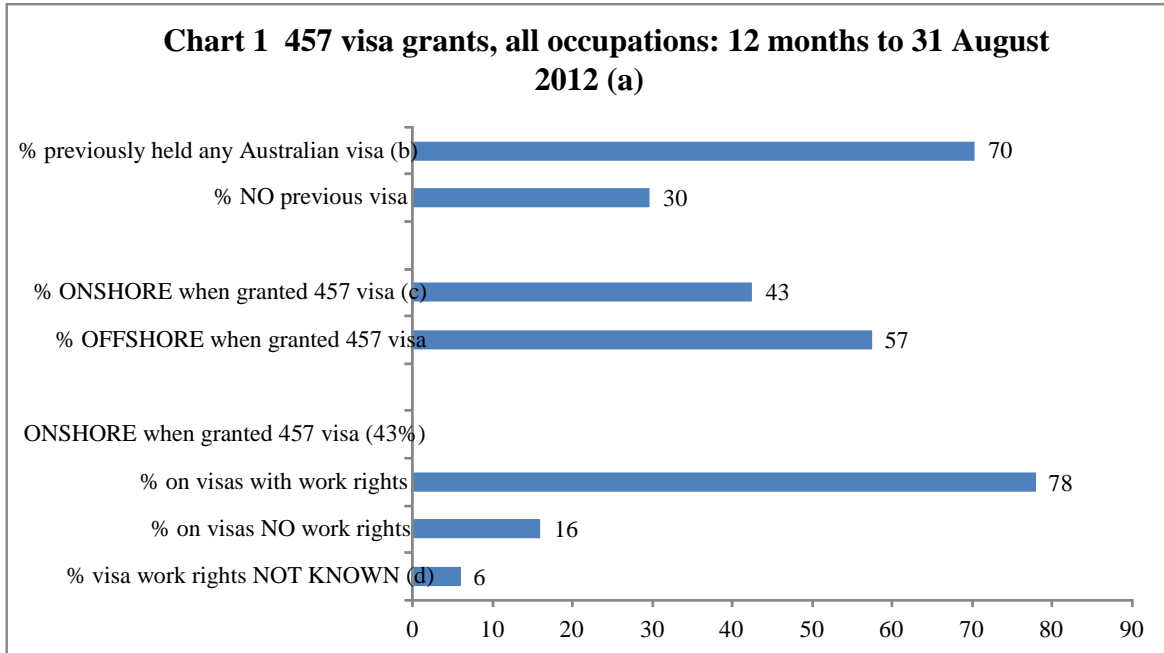
For this reason, it is not only naïve but factually incorrect to continue asserting that it is considerably more expensive to engage workers from overseas. In fact, with close to half of all 457 visa grants being granted onshore to workers already in Australia, and many already working for the 457 sponsor on other visa types (eg. a working holiday 417 visa), the extra costs to hire the overseas worker over an Australian citizen or permanent resident are often negligible.

As data from DIAC reproduced below in chart 1 shows, in the 12 months to 31 August 2012:

- 70% of all 457 visa grants went to foreign nationals who had previously held an Australian visa, many of whom would have worked for or established a relationship with their 457 sponsor;
- 43% of all 457 visa grants went to foreign nationals in Australia at the time of their visa grant, again many already working for the 457 sponsor.⁹²

⁹¹ Tony Abbott, transcript of press conference, 19 August 2013.

⁹² DIAC unpublished data.

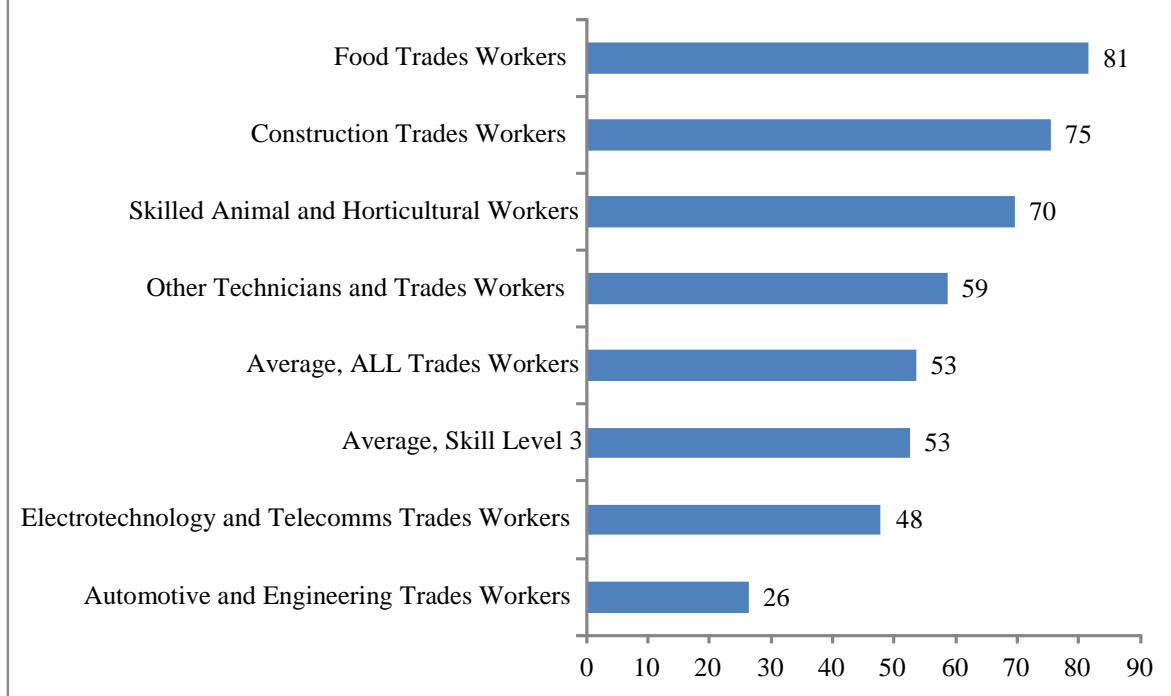


Source: DIBP published and unpublished data

- (a) More recent data requested, but DIBP has not provided.
- (b) High proportion will have established relationship with Australian-based employers.
- (c) High proportion will be employed by 457 sponsor at time of 457 visa nomination.
- (d) Includes some with work rights (eg 485 visas) and some with no work rights.

These trends are even starker in some occupational trade groups. For example, as chart two shows, in food trades and construction trades over 75% of all 457 visas go to foreign nationals already in Australia at the time of the visa grant, many already working for their 457 sponsor on other temporary visas, particularly student visas and working holiday visas.

Chart 2 Onshore 457 primary visas as % of all 457 primary visas granted, by occupation trade group: 2012 (a)



Source: DIAC unpublished data.

(a) Reference period is 12 months to 31 August 2012.

More recent figures show this trend to onshore visa grants increasing. In 2012-13, almost half of all visa grants were being granted onshore. Out of a total of 68 480 primary visa grants in 2012-13, 33 440 or 48.8% were granted on-shore. While off-shore visa grants were 12.2 % lower compared with the previous year, onshore grants were 17.8% higher.⁹³

The latest figures show more than half of all visa grants are now granted onshore. Out of a total of 27 330 primary visa grants in 2013-14 to December 2013, 13 300 were granted offshore, while 14 030 were granted onshore (51.3%).⁹⁴

DIAC (now DIBP) has acknowledged that the availability of a large pool of temporary visa holders in Australia, many seeking 457 visas, has changed the environment. As a senior DIAC official told a Senate Inquiry into 457 visas on 27 May 2013:

“Most of the Deegan reforms were implemented in 2008-09. Since then, we have had a change in the environment – economic changes, changes in terms of the number of visa holders and those under other temporary visas in the country who have an opportunity to apply for a 457 visa. At the time

⁹³ DIAC Subclass 457 State Territory summary report, 2012-13 to 30 June 2013, p. 1

⁹⁴ DIAC Subclass 457 State Territory summary report, 2013-14 to 31 December 2013, p. 1

when we had the 2008-09 changes implemented, we did not have this many temporary visa holders on other visas in the country. Our temporary visa program report, which was just released, shows that we have a very large number of temporary visa holders on other visas in the country and they are all eligible to apply for 457 visas if they find an employer who will sponsor them. This is where we have seen the largest growth, when the labour market is softening, in the onshore applications.”⁹⁵

On the latest figures as at 31 December 2013, there are now over 1.1 million temporary visa holders in Australia, the vast majority with work rights attached to their visa. Including New Zealand visa holders, the total number of temporary entrants is over 1.8 million. These numbers include not only the almost 200 000 subclass 457 visa workers and their spouses, but a range of other visa types which are becoming increasingly prevalent.⁹⁶

For example, the number of working holiday visa holders is on the increase. The number of working holiday makers in Australia on 31 December 2013 was 178 980, the highest number on record and an increase of over 16 000, or 10.2%, compared with just 12 months ago. The number of working holiday makers has increased by 50% since 2010. Many working holiday makers from countries hit by recession are now here primarily to work, not holiday.

The increasingly easy access to temporary visa workers already in Australia demonstrates why rigorous labour market testing laws are even more important to protect Australian employment opportunities. In such cases, the employment of the overseas worker will appeal to some employers as the easy option, particularly where the worker is already employed in the workplace as if often the case and is keen to obtain an employer-sponsored permanent residence visa. It is especially important that labour market testing requirements are applied and enforced effectively in those circumstances.

The oft-stated argument that employers will always seek to employ Australians first is also not borne out by survey evidence in a report by the Migration Council of Australia in 2013. The findings in that report include:

- 15% of sponsoring employers surveyed said they did not find it difficult to hire or employ workers from the local labour market, yet they still employed workers under the 457 visa program – this finding suggests that some employers may be admitting they are not complying with a fundamental tenet of the 457 program that 457 visa workers should be engaged only where there is a genuine skill shortage that cannot be filled locally.

⁹⁵ Mr Kruno Kukoc, DIAC, Hansard p.71, 27 May 2013,

⁹⁶ Temporary entrants and New Zealand Citizens in Australia as at 31 December 2013, Department of Immigration and Border Protection, Australian Government, p.3

- Only 1.1% of employers said they would 'increase salary' for the job if they cannot find someone who matches their preferred job specifications, while 33.5% said they would seek overseas workers - this indicates to us that many employers are not willing to pay genuine market rates to attract and retain employees and prefer to take the easy option of obtaining 457 visa workers.
- 26% of 457 visa employers said they found their 457 visa workers because the workers themselves approach the employer - this means that those employers incurred none of the search and recruitment costs that many claim make 457 visa workers more expensive than Australian workers.
- Around 20% of employers surveyed cited the benefits of sponsoring 457 visa workers being 'increased loyalty' and 'great control of employees' - this points to concerns that unions have continually raised about some employers favouring the use of 457 visa workers over Australian citizens and permanent residents because it gives them a more compliant workforce.⁹⁷

We also refer the Panel to the report of the Senate Committee for Education, Employment and Workplace Relations⁹⁸, inquiring into proposed Greens' legislation to govern EMAs, which found further evidence some companies in the resources sector were turning away qualified Australian workers and hiring overseas workers. This is also the direct experience of many individual workers who have made their own submissions to this review.

Finally, we note that even with labour market testing in place and a requirement under the law, it is still the case some employers will be looking for ways to circumvent the spirit and intent of the legislation.

For example, in the days that followed the introduction of the new laws, migration experts were already pointing out there were ways around labour market testing as advertisements can be written in an incomprehensible manner, making it difficult for people to respond in the first place.⁹⁹

This reflects the experience with labour market testing in the US and Canada where there have been reports of employers going through the motions of posting jobs while ignoring skilled locals who applied. In one reported case in the US, migration lawyers were captured on film coaching companies on how to advertise locally but find no one. One stated:

⁹⁷ Migration Council of Australia, *More than temporary: Australia's 457 visa program*, pp. 76-78, 80.

⁹⁸ The Senate Education, Employment and Workplace Relations Legislation Committee, Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012, March 2013.
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=eet_ctte/completed_inquiries/2010-13/enterprise_migration_agreements/report/index.htm

⁹⁹ <http://www.australiaforum.com/information/jobs/457-visa-labour-market-testing-expected-to-be-introduced-in-november.html>

“ Our goal is clearly not to find a qualified and interested US worker and, you know, that in a sense that sounds funny but it's what we're trying to do here.”
100

The program is responsive to labour market changes

A further, related argument used against labour market testing is that the 457 visa program is demand-driven and therefore simply responds to changes in labour demand. Essentially, the argument is that the program can manage itself without labour market testing being required because 457 visa numbers go up when the labour market tightens and skill shortages increase, and then go down when unemployment rises and skill shortages ease. This was a line of argument repeated by the new Minister soon after assuming office:

“ The programme is flexible and responds to the economic cycle in line with employer demand.” ¹⁰¹

However, the evidence shows the program hasn't operated in the way that its proponents have claimed, with 457 visa numbers continuing to grow in recent years while the labour market has softened and jobs have been lost i.e. the program numbers have been going in the opposite direction to the general labour market.

For example, the close relationship between 457 visa applications and the ANZ Bank Job Ads series was previously cited as evidence that the 457 visa program was truly responsive to changes in labour demand. However, the relationship collapsed from 2011-12 onwards with 457 visa numbers going in the opposite direction to job advertising and other labour market indicators. ¹⁰²

For example, in the financial year 2011-12, the number of 457 primary visa applications lodged was 33.4% higher than the same period the previous program year and the number of 457 visa holders jumped 26.4% from 72 050 to 91 050. Yet, at the same time, total job advertisements fell 9% over the year, and the number of people out of work increased by almost 40 000 as unemployment went from 4.9% up to 5.2%.

In 2012-13, job ads fell 19% over the year and as at June 2013 were close to 30% below their most recent peak at the end of 2010 and just 8% higher than the lowest level reached during the Global Financial Crisis. Unemployment increased again reaching 5.7% by June 2013 with a further 77 000 people out of work compared to the same period 12 months before. Meanwhile, over the same period 457 visa applications increased by 13.5% and the number of 457 visa holders increased 18.6% from 91 050 to 107 970.

¹⁰⁰ <http://www.abc.net.au/7.30/content/2013/s3786315.htm>

¹⁰¹ Scott Morrison, Address to the Migration Institute of Australia National Conference, Canberra, 21 October 2013.

¹⁰² Annual subclass 457 State/Territory Summary Reports 2011-12 and 2012-13; ANZ Job Ads Series July 2012 and July 2013; ABS Labour Force, cat. 6202.0, seasonally adjusted.

In our submission, this provides clear evidence the program wasn't working as intended or as its proponents claimed, and why labour market testing needed to be introduced.

A similar picture of 457 visa numbers outstripping general employment growth emerges at an industry level. For example, in the construction industry, in the 12 months to February 2013, while Australian construction industry employment grew by only 1.1%¹⁰³, the number of 457 visa holders working in the industry actually increased by 25% (or 2,020 workers) to 14,080.¹⁰⁴

The 457 visa trends for the accommodation and food services sector are also instructive, particularly for the occupation of cooks. Even now as the growth of 457 visa grants have eventually begun to fall in overall terms, the number of visas granted for cooks and the broader accommodation and food services sector continue to increase. The latest DIBP figures from 31 December 2013 show:

- The largest occupation for primary 457 visa grants in 2013-14 to 31 December 2013 was cooks. Cooks represented 5.7% of all visa grants, up from 4% for the same period the year before.
- 1,550 457 visas were granted for cooks in the six months to December 2013, an increase of 7.2% on the same period the year before.
- As at 31 December 2013, there were 5, 460 457 visa holders in Australia working as cooks.
- Total visa grants for accommodation and food services (of which cooks make up close to half) increased by 10.5% in the six months to December 2013 while they decreased in all other sectors and by 23.9% overall.

The continued prominence of cooks as the top occupation for 457 visa grants follows exponential growth in previous years. Visa grants for cooks in 2012-13 increased 94.8% and a whopping 189% in 2011-12.¹⁰⁵

Similarly large growth occurred across the accommodation and food services sector as a whole, with 457 visa grants increasing by 137% in 2011-12 and a further 85% in 2012-13.¹⁰⁶

Meanwhile, various labour market data for cooks and the accommodation and food services sector show:¹⁰⁷

¹⁰³ ABS Labour Force Survey detailed quarterly, February 2013 (trend basis)

¹⁰⁴ DIAC Subclass 457 State/Territory reports.

¹⁰⁵ Annual subclass 457 State/Territory Summary Reports 2011-12 and 2012-13; Subclass 457 quarterly report: quarter ending at 31 December 2013.

¹⁰⁶ Annual subclass 457 State/Territory Summary Reports 2011-12 and 2012-13.

- An occupational unemployment rate for cooks of 3.5 per cent, compared with 3.3 per cent for all Trades.
- Negative employment growth of 4.7 per cent over the five years to November 2013, compared with an increase of 2.4 per cent for all Trades.
- A decline in advertised vacancies of 5.3 per cent over the year to November 2013.
- A decline in median full-time weekly earnings of 1.7 per cent, to \$400 less per week than the benchmark for all Trades (\$680 a week compared with \$1080)
- The Australian Government Job Outlook site indicating only moderate employment growth for cooks in coming years.
- During the period of massive growth in 457 visa grants, employment in the accommodation and food services sector overall fell nearly 14 000 or 1.8% from May 2011 to May 2012 and grew just 4.3% (in comparison to visa growth of 85%) from May 2012 to May 2013. Total employment fell again by 4.1% from May 2013 to November 2013 as total visa grants in the sector continued to increase.

These broader trends match the anecdotal experience of our affiliated unions who report that they have unemployed members on their 'out of work' registers while 457 visa numbers in the same occupations have continued to grow. There continue to be cases reported such as that at Werribee in outer Melbourne in 2013 where 457 visa workers were literally flown in over the top of local unemployed skilled workers to work on a City West Water project.

Against all this evidence, labour market testing is a sensible, appropriate, and necessary measure to ensure that, before temporary migrant workers can be employed, there is evidence that employers have made all reasonable efforts to employ Australian workers and that Australian workers are not being displaced. Our experience when consulting with labour agreement proponents under the 457 visa program suggests that when presented with some form of external scrutiny, an employer's professed need for 457 labour is often not pressed any further.

¹⁰⁷ unpublished ABS data, sourced from the Australian Workforce and Productivity Agency and online vacancy data from the Department of Employment; Australian Government Job Outlook site <http://joboutlook.gov.au/occupation.aspx?search=alpha&tab=prospects&cluster=&code=8511>; ABS Labour Force, cat. No. 6291.0.55.003, Detailed, Quarterly, February 2014, Table 4.

Appendix 4

Reported examples cases of exploitation and roting under the 457 visa program and other temporary visa types

Recent reports of exploitation of overseas workers

- 41 Chinese and Filipino workers (13 and 28 respectively) were employed under 457 visas and short-term temporary 400 visas as welders, electricians and metal fabricators. The Chinese workers were paid no wages at all for three months and were forced to survive on a \$15 a day food allowance. They were working six days a week for 9 to 11 hours a day. The Filipino workers were paid just \$9 an hour with their pay deducted by \$250 a week for accommodation, and other unlawful pay deductions for visa processing, insurance, food and flights. The workers were housed in cramped and degrading accommodation, almost 30 workers living in one five bedroom house. The workers were working at the ethanol plant in Bomaderry, NSW, and other sites in Manildra and Narribri owned by the Manildra Group. The workers were supplied to Manildra through a Taiwanese company called Chia Tung Development Corporation and a recruitment agent, Yangwha. The CFMEU referred the matters to the Minister for Immigration, following a tip-off from non-visa workers at the plant that was pursued by CFMEU organisers. Following an investigation by the FWO, Chia Tung was ordered to back pay the workers a total of \$873 000, but no prosecution was launched by the FWO. DIBP has no jurisdiction over Yangwha which recruited the workers in the Philippines, despite the agent having a presence in Australia.¹⁰⁸
- 11 Filipino lift mechanics on 457 visas were not paid for six weeks at Schneider Elevators. The workers were recruited by an agent in Manila and the first commenced work in August 2014. Upon commencement, the workers were paid a \$30 per hour flat rate, with no additional payments for overtime worked. Amounts were deducted from their pay without authorisation - in some cases allegedly as much as \$1,000 per pay - for the cost of their visa, flights, red card, and commission payments to the agent in Manila. At the beginning of February 2015, payments to the workers ceased altogether. Three of the workers arrived in Australia around this time and allege they have never been paid. At this time, the eleven Filipino workers commenced sleeping on the floor of Schneider's office in South Melbourne. This arrangement appears to have persisted for six weeks until the workers contacted the unions. Attempts to recover entitlements are ongoing.¹⁰⁹
- Claims of forced payments in return for sponsorship, up to \$50-70 000, and an increase in complaints about businesses making promises about training or employment opportunities with the goal of getting a visa to stay in Australia. In response, the Government launched a campaign and said it would conduct an

¹⁰⁸ Mitchell, T., & Graham, C., "National Disgrace: CFMEU forces Govt to investigate \$4 an hour foreign workers", New Matilda, 30 January 2015; Edwards, M., "Foreign Workers successfully claim back over \$400 000 after being drastically underpaid by Chia Tung", Yahoo!, 13 March 2015; Hannan, E., "Imported welders, electricians go months without wages, Australian Financial Review, p. 6, 20 April 2015.

¹⁰⁹ Toscano, N., & Donnelly, B., "Unpaid workers forced to sleep in office: union", The Saturday Age, 21 March 2015; <http://www.sbs.com.au/news/article/2015/03/20/vic-457-workers-lived-office>

investigation of up to 100 sponsor allegations initially.¹¹⁰ The ANMF is also aware of recent examples of a residential aged care employer in Victoria charging a fee for a 457 visa sponsorship and many thousands of dollars for the employer to sponsor temporary migrant nurses for permanent residence.

- Reports that Murphy Pipe and Civil repeatedly misled the Immigration Department to help dozens of Irish workers fraudulently obtain visas to work on the Queensland Curtis LNG project and Western Australia's Sino Iron project. The Immigration Department reportedly failed to investigate the fraud, despite being contacted by whistleblowers over the past three years. The fraud involved workers being nominated to work as project co-ordinators and contract administrators but who were actually working as riggers, labourers, and machine operators - lower-skilled jobs that would not be available under the standard 457 visa program and where there are plenty of Australians qualified and able to perform those roles. "It was about getting a compliant workforce" one source said. In February 2015, Fairfax media reported raids on Murphy Pipe and Civil but it is not known where the investigation currently is at.¹¹¹
- Reports of labour-hire operators who allegedly charge backpackers \$450 to find them jobs and then pays them as little as 60 cents an hour to work on local farms, while charging up to \$150 a week for backpackers to stay in sub-standard houses and caravans.¹¹²
- Reports from working holiday makers of working their entire '88 day' requirement with not a single day off and all for no pay. Rather than performing farm work they signed up for such as herding cattle, helping with horses and repairing fences, the backpackers spent the majority of their time cleaning the house and babysitting and caring for the six children, for free. They were provided with food and board but the supply of food was often not replenished and with the nearest supermarket 10 kilometres away, they were left to take oranges off orange trees and eggs from the chicken coop. The backpackers felt intimidated by their hosts and did not feel they were in any position to complain given the number of other backpackers looking for work. The complained to the FWO about the conditions and lack of payment, but they were told there was no written agreement that payment would be given.
- 30 Filipino welders working for 52 days straight on a fly-in, fly-out roster on Chevron's Gorgon LNG project, twice as long as the standard 26 days on/nine days off roster worked by other staff. As the AMWU WA State Secretary observed: "*At the time we couldn't understand why CB&I would hire Filipino welders when there were plenty of qualified Australians able to do the job, but it is starting to look like they wanted a workforce they could work into the ground.*"¹¹³
- Four cases in the poultry industry where unions have found evidence of exploitation of temporary overseas workers. The cases involve underpayments, failure to pay loadings and penalty rates, workers renting crowded accommodation, allegations of

¹¹⁰ <http://sbs.com.au/news/article/2014/10/08/claims-forced-payments-457-sponsorship>), 9 October 2014

¹¹¹ McKenzie, N & Baker, R., "Irish workers 'waltz in on infrastructure roort", Australian Financial Review. 12 August 2014."; McKenzie, N., & Baker, R., "Large-scale visa fraud investigated", The Age, 5 February 2015, p. 2.

¹¹² FWO Media release, "Growers, hostels, labour-hire contractors cautioned over backpacker, seasonal worker entitlements", 5 January 2015

¹¹³ Law, P., "Filipino workers on a 52 day FIFO roster at Chevron's \$54 billion Gorgon LNG project, PerthNow, 9 November 2014

sexual harassment and intimidation, excessively long working hours, and restricting access to union representatives.

- The case of Andrie, a recent Food Technologist Graduate from Ukraine, coming to Australia on the 416 Cultural Exchange visa program with a local placement agency. Andrie paid a fee of USD\$9,000 to an outsourcing company in Ukraine. This included airfares, the agency fees (approximately \$4900 and a \$1000 bond), and the Ukrainian company's commission.

Following basic induction training with the placement agency, Andrie was offered employment on a dairy farm in Victoria. He had to pay for the cost of airfares and travel from Queensland. The job was classified at the Level 1 rate (FHL1)- Unskilled Labour, well below the skilled classification he should have been paid at given his previous experience. On arrival he was told he would be expected to work overtime at the base rate with no penalties for public holidays, including Christmas Day, or overtime loading. He could take it or leave it. There was no contract or formal agreement other than an undisclosed contract between the agency and the employer.

Fortnightly salary deductions of \$280.00 were made for accommodation and shared use of a vehicle. Accommodation was in a caravan located inside the farm's tool shed, with poor ventilation and adjacent to chemicals, and fuel storage. Andrie was considered to be an excellent worker and often worked unsupervised.

After Andrie accidentally damaged a farm gate while driving a tractor, the farmer tried to impose a \$120 fine for the estimated costs of the gate damage and repair. When he refused to pay, Andrie was told he could leave and that his visa would be cancelled and his \$1,000 bond payment would not be returned. Andrie was subsequently told there was no more work for him and his replacement worker was arriving the following week. VisitOz initially informed him that as he was sacked, his bond would not be refunded. It was only following further complaints that the agency agreed to refund his bond in full on April 5, 2015. The Fair Work Ombudsman is currently investigating this matter.

- Three women were recruited by a recruitment agency across two countries in South East Asia to work as beauty therapists at a reputable, high class day spa in Sydney. They were advised their flights, visa, sponsorship and accommodation would be organised for them, and they would be sponsored on a 457 visa. They were shown an Employment Contract specifying the hours and wages they were expected to receive, in line with Australian employment laws and minimum wages.

Upon arriving in Australia, the women were collected from the airport and transferred to their apartment block accommodation. They were chaperoned by the employer's friend to the bank to set up a bank account in their name to which their pay could be deposited. The bank card and password were sent to the business address, and were never received by the employees. It was later discovered the employer used this account to deposit what the staff were meant to be paid, and then would withdraw it a few days later. When arriving in Australia, their original contract was torn up in front of them and they were told, "this is your new contract". Their passports were taken and withheld from them in a safe at the business.

Upon commencing work, the employees were forced to work 6-7 days a week, sometimes up to 10 to 12 hours a day. Their employer discriminated against them, depriving them of the same breaks, pay, and conditions as the Australian workers in the spa. They were requested to sign fraudulent tax returns stating that they had been paid according to minimum wage and for their tax returns to be paid into the employer's bank account. When they refused to sign this, they were threatened with deportation and advised that they would be "blacklisted - never to travel overseas to work again". They were told that if they returned home, they would each have to pay a minimum of \$6000 to cover the cost of bringing them to Australia in the first place. Verbal abuse and humiliation was common from the management to the employees.

The Salvation Army Trafficking and Slavery Safe House was able to assist the three women to lodge Fair Work Claims, to make a formal complaint at the Department of Immigration Sponsor Monitoring Unit, to advise their banks of fraudulent behaviour and to lodge a complaint with the Australian Taxation Office. Each of these women were able to recover all costs owed to them by their employer. The women did not want to talk to the Australian Federal Police about their case despite this being offered to them a number of times. All three women were able to remain in Australia, two of whom found new sponsors and continued to work in their industry.

Reports of Australian workers missing out

- In the NSW township of Boggabri local mine workers were made redundant while overseas workers on 457 temporary visas kept their jobs. Boggabri Coal operator Downer EDI retrenched 106 local workers – 66 production workers and 40 maintenance tradesmen – but retained eight employees from Papua New Guinea. The company described them as “specialist diesel fitters” with skills that could not be found in the Australian workforce. ABC television’s 7.30 program obtained a company skills chart which confirmed that *“Most of the sacked tradesmen have multiple qualifications. The PNG workers are listed as having next to none.”* Downer EDI was forced to cancel plans to bring in another 360 mine workers from overseas, including bulldozer operators, excavator operators, shot firers and tyre fitters. Three workers took the case to the Fair Work Commission and won back their job.
- US based renewable energy company First Solar was engaged by AGL to install 1.3 million solar panels in Nyngan, New South Wales. Various sub-contracting arrangements were in place for the construction phase of the project, headed by the WBHO Australia/Probuild joint venture. The workers were told by management in October 2013 that there would be work until April 2015.

A number of serious safety issues arose on site, relating to asbestos, defective machinery, and a failure to implement proper policies in relation to heat stress and the infestation of snakes in work areas. Major industrial breaches also occurred including failure to pay travel allowance and meet rest time and living away from home requirements. The Australian workers who legitimately pursued improvements to safety and work rights through their union, the CFMEU, subsequently found themselves made redundant just after Christmas 2014 following the disputation (which did lead to improvements and backpay through the Fair Work Commission) when the joint venture finalised its contracts with a number of labour hire entities.

Meanwhile, the joint venture maintained its subcontract with a company known as Liscon that sourced its workforce via 457 visa workers from Ireland. In September 2014, the Liscon workforce amounted to around 6 employees on site; by Christmas 2014, as Australian workers were being let go, there were 30 Liscon employees on site, all 457 visa holders. There was minimal employment from the local Nyngan, Dubbo, Cobar, and Warren townships and no Aboriginal participation plan had been put in place to upskill indigenous youth.

- Half of all teaching graduates – about 8000 people - had not found permanent employment four months after completing their education training in 2014, while FWO investigations show childcare centres and some specialist schools are importing teachers.¹¹⁴
- A job advertisement for an Immigration advisor for the mooted East-West link in Melbourne to lodge all 457 visa applications on a project that was being trumpeted at the time for the local economic benefits it would provide.¹¹⁵
- The over-use of 417 visa workers in the meat industry without sufficient efforts to fill positions with local workers - Don KR Castlemaine at Bendigo has been cited as one example.¹¹⁶
- Examples of job ads that target positions for overseas workers already in Australia, with the lure of various migration outcomes, whether 457 visa sponsorship with permanent residency to follow, or second year sponsorship for working holiday makers. Such ads can be found on a regular basis, but we refer here to just two for purposes of illustration.¹¹⁷ Both ads clearly target overseas workers on specified visa classes and show no sign that the employer is interested in even considering Australian workers.
 - As well as not advertising for local workers, the first ad contains an advertised salary that is the bare minimum under the 457 visa program and would appear to be below market rates for a qualified welder/boilermaker with at least five years experience, even allowing for the regional NSW location. This sort of ad underlines the need for robust labour market testing. It also illustrates the point we make that many 457 visa workers are already onshore and employers do not have to bear the extra costs of overseas recruitment they so often claim.
 - The second ad reproduced below is clearly targeted at working holiday makers wanting a second year visa, with no look-in for Australian workers. The employer is not even intending to pay the successful applicants award wages it would seem, instead offering free accommodation and free food. If the worker foregoes the free food, they can instead be paid \$150 a week which is for a 36 hour week, six days a week.

¹¹⁴ Aston, H., "Foreign teachers on 457 visas worsen graduate glut", The Age, 21 October 2014

¹¹⁵ Milman, O., "457 visa worker plan for Melbourne's East West Link outrages unions", theguardian, 8 October 2014.

¹¹⁶ "Holmes, A., "Visa use 'rampant'", Bendigo Advertiser, 2 February 2015, p. 5.

¹¹⁷ See for example http://www.jobseeker.com.au/job/Boilermaker-a0d34a19d609cf37c476a623bd58322e?from_url=http%3A%2F%2Fwww.jobseeker.com.au%2Fj_mobile%3Fgclid%3DCM2Eq5is_cACFVgkvOodGlsAlw%26l%3DAustralia%26p%3D6%26q%3D457%2BVisa%2BSponsorship%26surl%3D0&sp=serp&sr=58;http://au.indeed.com/m/viewjob?jk=ef4d6d979b9942b4&from=ja.

Example of Job ad on Gumtree targeted at second year working holiday visa

2 Pickers needed ASAP

Boundary Bend VIC 3599

This job posting is no longer available on Gumtree AU.

[2 Pickers needed ASAP jobs in Boundary Bend VIC 3599](#)

Woofing positions available

We are looking for 2 energetic hard working people who need their second year visa.

Located across the road from the great Murray river where plenty of fishing and relaxing on the sand bar can be done.

We farm 7 acres of squash and need help for the season

Duties will include -

Weeding
Irrigation
Picking
Washing
Packing

There will be 6 hrs per day 6 days per week no work Sunday

In return you will get accomodation provided in a caravan park next door to the farm for free, You will also get free food dinner, sandwiches for lunch and cereal for breakfast or you can choose to get \$150 per person per week towards your own food and you look after your selves

This Work will qualify you for a second year visa .

We require people for a 3-4 month period starting asap

Contact *****4722 + click to reveal

Location- boundary bend Victoria

Gumtree AU - 30+ days ago

- In 2014, the AWU ran a campaign asking for expressions of interest from local Tully workers given the decision by the Tully mill to bring in workers from overseas and extend the contracts of working holiday visa holders.¹¹⁸
- A company seeking a 457 labour agreement to employ 20 forklift drivers on 457 visas, for an occupation which does not require long lead-in training times at a time of high unemployment.

Further reported cases where action has been taken through the courts

- A young Chinese worker on a 457 visa who spoke little English was underpaid more than \$10 000 in wages and annual leave entitlements by an employer in the IT sector, Extradoss Solutions. FWO prosecuted the employer and back pay was ordered.¹¹⁹

¹¹⁸ McKillop, C., "Union fights plan to extend sugar mill backpackers", ABC Rural online, 6 December 2013.

¹¹⁹ "Penalty for failing to pay Chinese worker", FWO media release, 16 April 2014.

- A shocking case of ‘grotesque abuse, akin to slavery’ under the 457 visa program where an illiterate cook was brought from India and forced to work 12 hours a day, seven days a week for 16 months. The cook, Dulo Ram, had his passport taken when he arrived in Australia, and was told he could not leave Australia until he repaid a \$7000 debt. Mr Ram lived in the restaurant storeroom and washed in the kitchen using buckets of hot water. The employer threatened action against him and his family back in India if he did not do as he was told. The judge ordered nearly \$200 000 in back pay. The judge said the case raise questions about the integrity of the 457 visa program, with the FWO and Immigration Department having failed to take necessary action against the employer. The judge observed that the notion that the employer could not find an Indian chef in Australia was ‘risible’¹²⁰
- International students at Gloria Jean Coffees franchise being paid as little as \$8 an hour.¹²¹
- 417 visa holders – 11 from South Korea, 1 from Iran – not paid at all for 11 days work as trolley collectors, including weekend, evening and overtime shifts. The workers spoke little English. It was the third time the company had been penalised for exploiting trolley collectors.¹²²
- A Chef from China on a 457 visa who was underpaid \$86, 118 at a Tasmanian take-away restaurant, receiving no overtime for four years despite being required to work 60 hours a week. The employer provided false time and wages records to Fair Work Inspectors. The judge found the chef was a ‘vulnerable person’ who was ‘highly reliant on the respondents to remain in Australia’.¹²³

Earlier case studies of roting and exploitation under 457 visas

Cases reported to the ACTU 457 visa confidential hotline

- A bakery in South Australia employing 457 visa holders on a 21 day roster working 12 hours a day with no breaks, and not paying them for public holidays. Baking students and cooks looking for sponsorship to get permanent residency were put on as delivery drivers. One worker reported: “When I was signing my contract for my job my boss asked me if I belong to a union. When I asked my boss why, he said ‘*I don’t want any union representatives working into my workplace*’. If they find out I joined a union I will be sacked.” The employer has asked workers for \$50 000 in return for PR sponsorship.

¹²⁰ RAM v D&D Indian Fine Food Pty Ltd & Anor [2015] FCCA 389 (27 March 2015), reported in Workplace Express, 30 March 2015

¹²¹ Toscano, N., “Coffee franchise fined for under-paying casual staff”, The Age, p. 10, 2 February 2015

¹²² FWO media release, “Court imposes \$190 000 penalties over exploitation of overseas trolley collectors”, 6 January 2015.

¹²³ FWO media release, “\$100 000 penalty follows ‘particularly disturbing behaviour’ involving vulnerable Chinese chef”, 9 January 2015.

- Diesel mechanics from PNG who had up to \$10 000 in salary deductions to pay a migration agent for their original 457 visa and on the promise of a PR visa sponsorship which has not eventuated.
- A farm outside a Victorian regional centre where 15-20 subclass 457 visa workers are living in very cramped accommodation, working long hours and rarely leaving the site. The caller said there are OHS issues related to the use of chemicals and many of the workers are presenting at a local medical centre with various health problems.
- A cheese factory outside Melbourne where workers are working about 100 hours a week, not only in cheese production but are then directed to perform security work as well.
- An establishment in Melbourne where about 40% of workers are on 457 visas. The workers understood they were being employed as Thai Masseurs, but once here have been told if they do not have sex with clients they will be sacked.
- A surveyor from Greece on a 457 visa who feels threatened with the loss of his job if he raises issues in the workplace, including the question of a pay rise he had verbal agreement on some time back. Many of his 457 visa colleagues are sacked if they raise issues, often just as they return from a period of annual leave. There is a climate of fear as if you lose your job you have to find another one or leave the country. The employer has been getting rid of 457 visa people who have been there for a while on higher wages and bringing new batches of 457 visa people on lower wages
- Reports of a team of Belgian 457 visa workers working on a dredging project in WA being paid about one third of their Australian counterparts.
- A 457 visa holder from Ireland who was put off work by their employer for no apparent reason. The employer is trying to recover the costs of the visa. The employee had agreed to pay \$1500 upfront to cover the employer's costs of obtaining the 457 visa (a cost the employer is not otherwise allowed to recover). The visa holder didn't speak up because of fear of losing their job, with only 28 days (prior to the 2013 amendments that increased the period to 90 days) to find a new employer or face deportation.
- A 457 visa holder who was an OHS advisor and made repeated complaints about asbestos and legionella bacteria, and enquiries about his own pay and conditions in the weeks immediately leading up to his suspension and dismissal. The visa holder had not been paid any super the whole time he was working and had recently been making enquiries about his entitlements and Australian payroll/tax status which were not in line with his visa conditions. His son was also working for the company, earning around \$10 an hour in an administrative role. Apparently none of the UK employees

on site were being paid properly and many of them were on visitor visas without work rights, rather than 457 visas.

- A construction site in South Melbourne, which relies heavily on 457 visas, where the workers are not wearing goggles or masks and the scaffolding is unsafe.
- A case in Werribee where 457 visa workers were flown in over the top of local unemployed skilled workers to work on a City West Water project. There were subsequent complaints to the ACTU 457 hotline that workers were working 70-80 hours a week with no overtime.
- A child care manager engaged under a 457 visa to manage a child care centre arrived in Australia to be told the centre had closed down. The worker was told by the employer that she would instead be managing a family day care operation out of the house she was also required to live in. The employer made automatic salary deductions for her rent without her genuine consent. The visa holder was required to advertise for her own pupils, otherwise there would be no job. The visa holder also reports receiving threatening emails from the employer.
- There have also been several other cases reported to the hotline where visa holders have arrived in Australia to find the job is no longer available after they have uprooted themselves from their home country and gone to considerable expense to move to Australia.

Other previous cases reported to the ACTU

- A migration agency represented to a Filipino worker that his wage in Australia would be \$51 000 per annum. Once he arrived, the owner of the agency coerced the worker to accept half pay from the employer with threats that if he did not accept the offer he would be sent home. Despite being employed as skilled workers, the workers were actually used as labourers. When they complained of the breach of agreement, they were told to like it or leave. The employment contract stipulated they could not join a union. The worker did not want to be identified in a claim against the agency because it is Filipino-owned and he is worried they may retaliate against his family in the Philippines.
- Filipino workers entering into loan contracts for payment of migration agent fees of \$13 620 with interest rate charges of 47.9%, paid in weekly instalments for over a year. In the words of one worker: *"We signed for a loan contract in the amount of \$13 620 Australian dollars. If we refuse to sign the contract, we won't be able to reach...Australia...We've got no choice but to signed it"* The workers signed a contract in the Philippines that included a purported prohibition on trade union activities.¹²⁴

¹²⁴ See for example, McKenzie, N., and Schneiders, B. "Visa scheme robbing foreigners in debt bondage", The Age, p. 4, 6 June 2013; <http://www.theage.com.au/national/big-visa-debts-cripple-filipino-workers-dreams-of-a-better-life-20130628-2p2wj.html>

- A case involving 21 Chinese nurses recruited by an immigration agent based in China to come to Australia on a temporary training visa, with the promise of work in the residential aged care sector and a 457 visa after completing a three-month English language program. Each nurse entered into a contract and paid an initial \$12,000 for training fees, agent fees and other expenses. Following their training in Tennant Creek, none were offered jobs or were able to get a 457 visa. When their original 442 visa expired, the migration agent organised three month tourist visas, and offered the prospect of employment in a nursing home in Adelaide. Several nurses took up the offer and moved to Adelaide at their own cost, where they found that there was no job, just another training centre with a \$7,000 fee attached. Other nurses were offered employment by a migration agent in Perth which turned out to be the same deal; more training and costs but no job. After this about half the nurses returned to China and around 10 remained in Tennant Creek. They had no job, no money, visas which were soon to expire and many were unable to pay for their flight home. A number of businesses in Tennant Creek ran raffles and other fund-raising activities in order to buy their return air tickets and, in the meantime, the nurses were housed and fed by the generosity of the people of Tennant Creek.
- A 457 visa holder, a father of three, employed for painting and sandblasting, who was made to clean the office toilets, his employer's house, cut the employer's son's lawns and scrape mud out of cow feed lots. He would also turn up for work only to be sent home without notice because he "wasn't needed that day". He said the employer yelled abuse at him and he often felt frightened to go to work.
- Another case of exploitation involved an engineer who was brought over and worked, without training, as a tube bender on machinery that was old and unfamiliar. He experienced bullying and was on the receiving end of life-threatening pranks by his foreman.
- A case involving several 457 visa workers on a construction site who rejected a backdated enterprise bargaining agreement pay increase because they were 'happy' with their current situation. This decision was linked clearly to their overwhelming desire to get Permanent Residency sponsorship from their employer. In pursuing this goal, they were being denied their proper entitlements and making themselves more attractive to unscrupulous employers looking to cut costs. This then had the added effect of undermining the position of existing Australian workers and job seekers.
- Cases where Australian citizens/permanent residents have been made redundant while 457 visa holders performing that work have remained in employment. The example in Boggabri is reported above. Another example involved members of the Aircraft Licensed Engineers employed at Tullamarine airport who were made redundant while 457 visa holders performing the same or similar work were retained. The ACTU has also received reports that financial institutions have been making IT

workers redundant, then outsourcing the jobs overseas. They then hire people back on 457 visas after saying they cannot get Australians with the right skills.

- The practice of employers nominating overseas workers in generalist occupations such as 'project administrators' under the 457 visa program but then employing them in semi-skilled occupations such as scaffolders which are not available under the standard 457 program. In one tragic case, an Irish national, Shaun McBride, was killed working as a scaffolder on a construction site in WA despite having been nominated to perform work as a project administrator.¹²⁵
- Reports of 457 visa workers from Korea being forced to work regular unpaid overtime on building sites in Canberra and wait up to six weeks for payment. One of the workers sponsored to work as a painter had just finished his accounting degree and said he had never worked in the trade.¹²⁶
- A case uncovered by the AMWU, where 12 diesel fitters engaged by a Spanish company on 457 visas at McArthur River mine in the Northern Territory were being paid about half of what local on-site tradespeople employed by local labour hire firms were being paid. There are reports that 457 visa workers who questioned the company were sacked instantly then put on a plane and sent home within 48 hours.¹²⁷
- In IT, cases have been reported where overseas workers are here on 457 visas or other visa types to learn the job so that the work can then be outsourced to those same workers back in their home country, at the expense of Australian jobs. Similar examples have been reported in the manufacturing sector.
- A group of Filipino workers who were engaged by an employer under the 457 visa program to work as skilled welders and sheet metal workers, yet once on site did nothing more than labouring work day after day; a flagrant misuse and abuse under the program.
- A Filipino worker who found his salary reduced by half almost two months into his job and felt he had no choice but to accept as he did not want to be out of work. The worker still received the same wage in his bank account but was forced to withdraw half of it and give the money directly to the employer. The worker has been diagnosed with depression and anxiety as a result of the bullying he has been subjected to by his employer.

¹²⁵ <http://www.news.com.au/top-stories/dampier-scaffolding-victim-was-irishman-shaun-mcbride/story-e6firfkp9-1226070079101>; <http://www.irishecho.com.au/2011/06/06/donegalman-killed-in-wa-work-accident/10354>

¹²⁶ [Towell, N., Late Pay and Long Hours, Workers Say, The Canberra Times, 26 March 2013, p. 8.](#)

¹²⁷ [Callick, R., The Australian, 8 April 2013, p. 4.](#)

- A case in the shipping industry where overseas workers signed off an enterprise bargaining agreement before they left their home country, the Phillipines, and that agreement was then used to lock down the rates of Australian crew who were yet to be engaged. Unions oppose such a practice as it subject potentially hundreds of future workers to conditions agreed by a small number of employees. It is even more egregious when 457 visa workers are used in this way, as they are even less likely to either be aware of their rights or willing to assert them.

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