Submission to the Senate Standing Committee on Legal and Constitutional Affairs

Migration Amendment (Temporary Sponsored Visas) Bill 2013

By the Australian Mines & Metals Association (AMMA)

June 2013

AMMA is Australia's national resource industry employer group, a unified voice driving effective workforce outcomes. Having actively served resource employers for 95 years, AMMA's membership covers employers in every allied sector of this diverse and rapidly evolving industry.

Our members include companies directly and indirectly employing more than half a million working Australians in mining, hydrocarbons, maritime, exploration, energy, transport, construction, smelting and refining, as well as suppliers to these industries.

AMMA works with its strong network of likeminded companies and resource industry experts to achieve significant workforce outcomes for the entire resource industry.

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Contents

INTRODUCTION

1. The *Migration Amendment (Temporary Sponsored Visas Bill) 2013:*

   a. Comes before the Parliament in its final days, and has been progressed in exceptional and undue haste.

   b. Has been progressed without proper review and process (e.g. no regulatory impact statement).

   c. Has been prepared without the direct engagement of the government's chosen policy advisory council on skilled migration.

   d. Seeks to significantly regress a major area of public policy affecting Australia's labour market and economy.

   e. Potentially risks harm to Australia's international reputation on migration and discrimination issues.

   f. Is divisive and highly contested between competing interests in this area.

   g. Is at odds with the overwhelming weight of submissions to a recent Parliamentary inquiry on the 457 visa system, including from independent bodies such as the migration council.

   h. Would undermine partisan policy engagement and construction on skilled migration.

2. This adds up to a situation in which the Parliament should not be drawn into legislating in undue haste, should properly examine the pros and cons of the proposition being brought before it, and should on the basis of evidence and due consideration, reject passage of the *Migration Amendment (Temporary Sponsored Visas Bill) 2013,* and direct the current or future Minister for Immigration to better consult and more rigorously develop policy on this issue.

3. The bill is set to clearly undermine the capacity of employers to fill identified skills gaps in a timely and operationally essential manner: the very policy rationale of the 457 visa scheme. The resource industry is a small user of skilled migrants but when engaged they are often vital to safety, maintenance and project delivery.

4. Timeliness and responsiveness is pivotal for our industry, and is directly threatened by the current legislative proposals.

5. The government has characterised the 457 visa program as being "out of control" and prone to systemic abuse. A figure of 10,000 "rorts" was conjectured by the Minister.

6. No evidence has been provided to substantiate these claims, and in fact independent evidence contradicts them.

7. The Chairman of the Ministerial Advisory Council on Skilled Migration (MACSM) and former unionist Michael Easson – in citing a Migration Council report –

observed that issues within the 457 program were occurring "*within the margin of what could be expected in a major program*".

8. Statistics from the Immigration Department show that last financial year less than 1% of the 22,450 sponsors using the 457 program were either fined, sanctioned or prosecuted.

9. There is no evidence of misuse that should trigger a substantial change to the system.

Key Problems with the Bill

10. The most damaging proposal in the bill – the reintroduction of Labour Market Testing (LMT) – was **not** a recommendation made by MACSM. AMMA was particularly surprised to see LMT in the bill given concerns raised in the 2008 Deegan Review that this would compromise Australia's international trade obligations.

11. LMT – the assessment of job ads, attendance at job expos and details of their success in advance of a visa application being made – would be debilitating for employers urgently seeking to fill skilled positions.

12. Those familiar with the 457 visa program will recall that LMT was abandoned following a major 2001 departmental review that found it costly, ineffective and inferior to today's system. Nothing has occurred that should send us backwards on this issue, or reverse this earlier review conclusion and evolution of the system.

13. Employers already face a high regulatory bar to access skilled migrants.

14. Training benchmarks must be met, market rates and conditions provided for, sponsorship costs incurred, relevant qualifications demonstrated and compliance records kept. It is typically $15,000 (though potentially up to $60,000) more expensive – and a much lengthier process – to hire a skilled migrant than a local.

15. These in-built mechanisms render LMT, and its onerous requirements, absolutely unnecessary.

16. In the Minister's Second Reading Speech he indicated that LMT would be targeted at jobs in trades and technicians categories. The government has not explained why it is targeting these occupations which remain in acute shortage, particularly in remote areas.

17. The bill appears to confer upon the Minister express power to determine which occupations which are and are not exempt, without proper consultation.

18. We have seen in the past 6 months a level of politicisation of this issue that makes this a very poor idea, and no minister should ever be asked to embark on a continuous second guessing of the Australian labour market, particularly not at the instigation of quasi-xenophobic trade union agitation.

19. The bill also enshrines a number of existing and new sponsorship obligations into the Migration Act. Many of these – including the recovery of costs and the restriction of on-hire arrangements – have not been properly explained or assessed and risk imposing costly red tape on all employers.

20. This would be regulation of a very significant and complex area with undue haste.

21. While strengthened enforcement mechanisms are generally welcome, a ten-fold increase in the number of sponsor inspectors able to enter worksites (with or without permission) is disproportionate to the marginal problem at hand. Combined with the recent doubling of the visa application fee, and the establishment of a dedicated 457 visa hotline to 'dob in' employers, the bill appears to be politically driven, and an attempt to punish employers attempting to access scare skills in an increasingly global labour markets.

How the Senate Should Proceed

22. The bill should be rejected.

23. Not only has insufficient evidence been provided to support the changes but the reintroduction of LMT would be a radical and regressive measure that undermines the policy intent of the 457 visa program. This bill is a dangerous move towards a less welcoming, smaller Australia, withdrawn from engagement with our region and the world, and distrusted by overseas communities seeking temporary labour emigration.

24. A Regulatory Impact Statement (RIS), with full consultation with industry, is the appropriate way to assess whether any problem exists with the 457 visa scheme and the costs and benefits of solving any purported problems through specific actions, including regulation.

25. It would be unwise, irresponsible and hasty to proceed on any other basis. A concurrent Senate inquiry into the operation of the 457 visa program – which received submissions from employers, unions, academics and government agencies – is also yet to even report its findings.

26. Why would the drafting of any amendments not have benefited from the views and conclusions of this Committee in its earlier commenced inquiry?

27. Rhetoric around skilled migration needs to be abated in order to facilitate a sensible discussion that can lead to changes that are evolutionary, not overly burdensome on sponsoring employers and reflective of shared concerns between industry, unions, government and the broader community.

28. The resource industry has no objection to cooperatively tying down any regulatory loose ends through reasonable changes to ensure the 457 visa system operates effectively.

29. Far from increasing confidence in the subclass 457 visa scheme, the bill will in fact hamstring the 457 visa program.

30. Given the small but critical role played by temporary skilled migrants to the resource industry, AMMA is gravely concerned that the $350 billion of investment under consideration in Australia – and the subsequent job creation for Australians – will be jeopardised if the bill proceeds.

31. The bill threatens to contribute to the further delay or cancellation of job creating resource investments in Australia.

SCHEDULE 2 – LABOUR MARKET TESTING (LMT)

Introduction

32. Schedule 2 of the bill requires employers to undertake and document Labour Market Testing (LMT) for specific subclass 457 nominated occupations.

33. To satisfy the LMT requirement under Section 140GBA, employers must demonstrate how they have sought a suitable qualified Australian citizen or permanent resident prior to lodging an application for a 457 visa.

34. The LMT requirement would be satisfied if the employer provides evidence of attempts to recruit locally such as:

    a. Details of advertising commissioned by the employer.

    b. Participation at relevant job fairs/expos.

    c. Details of fees and other expenses paid in the course of recruitment.

    d. Details of the results of such attempts, including positions filled.

LMT will hamstring the 457 visa program

35. The Labour Market Testing requirement is unworkable, impractical and will likely lead to a blowout in processing times and costs for 457 visas.

36. LMT in the 457 visa program was abandoned in 2001 following a major departmental review that found it costly, ineffective and inferior to today's system (appropriate salary thresholds and identification by government agencies of skilled occupations with shortages).

37. Specific stakeholder consultation reported in the 2001 review included that:

> *...labour market testing is an expensive and time-consuming imposition on employers who know their segment of the Australian labour market and would not seek an overseas employee if a suitable Australian was available for the position – recruiting from overseas involves considerable expense, delays and involves the employer in potentially costly financial obligations in relation to the temporary resident. The requirement to undertake labour market testing can delay overseas recruitment by up to six weeks*[1].

38. LMT would be operationally debilitating for employers urgently seeking to fill skilled positions. Such an outcome would directly detract from the policy rationale of the 457 program: providing timely access to skilled workers in occupations where identified shortages exist.

39. The reintroduction of LMT some 12 years after it was scrapped – during which time the labour market has become more global – would a radical and regressive measure insensitive to the needs of employers and the economy.

[1] In Australia's Interests: A Review of the Temporary Residence Program, Chapter 5 - Economic Stream - Temporary Business Entry - Long Stay, p122

40. Not only employers, but the Immigration Department itself would face bureaucratic and administrative problems in dealing with the LMT requirement. Case officers would have to assess significant amounts of additional information, increasing their workload and inflating processing times. A typical visa application already requires the sourcing, lodging, assessing and approval of between 10-12 different documents totalling up to 50 pages of paperwork.

41. The LMT requirement is not only strongly opposed by industry and employers, but also the Migration Institute of Australia, the independent Migration Council of Australia and the Law Council of Australia. It was **not** recommended by the Government's very own Advisory Council on Skilled Migration.

The Minister has admitted that LMT will lead to delays

42. The Minister himself has acknowledged that the LMT requirement will lead to delays for employers urgently seeking skills.

43. Section 140GBB of the bill includes an exemption to the Labour Market Testing requirement in the event of a natural disaster in order to assist disaster relief. In his Second Reading Speech the Minister stated that:

> *This exemption will give the government flexibility to respond to situations of national or state emergency and would facilitate the speedy entry of overseas skilled workers without the delay caused by requiring a sponsor to undertake labour market testing.*

44. The Minister has given his game away and admitted that LMT will lead to delayed accessed to skilled migrants. This again contradicts the 'timely access' purpose of the 457 program. It also goes against Recommendation 4.1 of the National Resource Sector Employment Taskforce (NRSET) report (authored by current Resources Minister Gary Gray AO) which called for the processing of 457 visas to be streamlined and for processing times to be improved.

Enhanced powers to the Minister

45. Section 140GBC of the bill provides for the Minister, by way of legislative instrument, to make exemptions from the LMT requirement for certain occupations within Skill Levels 1 and 2.

46. Managers, Professionals and certain Technicians are Skill level 1 and 2 occupations, while Trades occupations are generally Skill level 3. Given that trade and technical roles are estimated to comprise 40% of all 457 visa applications – and they remain in acute shortages – AMMA is particularly disappointed that the government has not explained why it is targeting these occupations.

47. In his second reading of the Bill, the Minister stated that:

> *I intend to make a legislative instrument to exempt most, but not all, Skill Level 1 occupations.*

48. No indication was provided by the Minister as to which occupations would receive LMT exemption within Skill level 1 and no criteria for assessment was provided.

49. AMMA is concerned that the Minister would have the power to ultimately arbitrate on the removal of exempt occupations, regardless of skills level or experience, without the requirement for consultation with industry. This would create uncertainty amongst employers as the list for exempt occupations could be a fluid listing, prone to frequent change and not adequately communicated.

Commercial sensitivities

50. Evidence expected from employers to satisfy the labour market testing requirements as set out in Section 140GBA(6) includes:

    a. Details of fees and other expenses paid in the course of recruitment.

    b. Details of the results of such attempts, including positions filled.

51. AMMA is concerned that in providing financial, transactional and recruitment information to the government, employers may face the possibility of breaching commercial-in-confidence and even privacy obligations.

52. It is regulatory overreach to expect employers to provide copies of their transactions and reports on the relative success of their recruitment functions to the Immigration Department for assessment.

The current tests are adequate

53. The 457 visa program is already Employers already face a high regulatory bar to access skilled migrants.

54. Before a position in a business can be filled with a temporary skilled migrant, the sponsor must certify that it the position is suitably skilled and that the qualifications and experience of the visa holder are equivalent to what would be required of an Australian employed in that approved occupation. Market rates and conditions that would be paid to an Australian in the same job in the same workplace must also be provided.

55. Sponsors incur additional costs for employing workers on 457 visas including application fees (recently double from $455 to $900), health insurance, language testing, flights to and from Australia, and agent fees for finding the worker. These additional costs make it typically $15,000 (though up to $60,000) more expensive to hire a skilled migrant than a local, in addition to the much lengthier process required. These in-built mechanisms render the onerous documentation and bureaucracy associated with LMT redundant.

56. 457 visas are not a low cost option to avoid the costs of employing Australian residents. The average 457 visa holder earns $140,000 in the mining industry, well above the industry average. We urge the committee in the strongest possible terms to be vigilant against being led into error in this regard.

SCHEDULE 4 – SPONSORSHIP OBLIGATIONS

Introduction

57. Schedule 4 of the bill seeks to enshrine in the *Migration Act 1958* a range of existing and new sponsorship obligations.

Duplication of existing obligations

58. The bill proposes to enshrine existing sponsorship obligations into the Migration Act, including the obligation to:

    a. Ensure market rates are paid to skilled migrants, s140HA(1)(a).

    b. Keep information and provide it to the Department, s140HA(1)(d).

    c. Cooperate with inspectors, s140HA(1)(f).

59. No cogent reason has been provided to duplicate these existing sponsorship obligations into the Migration Act.

60. The *Worker Protection Act 2008* took effect following the Deegan Review introduced a sponsorship framework to ensure that the working conditions of sponsored visa holders meet Australian standards. This piece of law already requires market rates to be paid to skilled migrants to ensure that Australian workers are not disadvantaged.

61. The existing *Migration Regulations* set out the obligation for employers to provide records, thereby allowing the Department to request records and information from sponsors (Regulation 2.83). The obligation for sponsors to keep certain records is a straightforward process set out in Regulation 2.82.

Introduction of new obligations

62. The bill proposes to enshrine into the Migration Act new sponsorship obligations that have not been the subject of proper consultation. These include:

    a. Sponsors to not transfer or recover certain costs from visa holders, s140HA(1)(h).

    b. The restriction of on-hire arrangements, s140HA(1)(g).

63. Insufficient detail has been provided in relation to these two proposals and their impact. In his second reading of the Bill, the Minister stated that the "details of these new obligations will be spelt out in the *Migration Regulations* proposed to commence on 1 July 2013." This is not acceptable. If government cannot tell Parliament and stakeholders the effect of its proposals, those proposals should not be accepted.

64. These new, untested and untried obligations should not be enshrined into the Act until a full Regulatory Impact Statement has been conducted.

SCHEDULE 5 – ENFORCEABLE UNDERTAKINGS

Introduction

65. Schedule 5 of the bill provides for enforceable undertakings as an additional enforcement option where a sponsor has failed to satisfy a sponsorship obligation. Enforceable undertakings are promises enforceable in court which would be agreed between the Minister and a sponsor.

A word of caution

66. Enforceable undertakings are a welcome alternative to barring a sponsor or cancelling a sponsor's approval. It should be remembered in this context that barring an employer from access to the 457 visa program has the potential to cripple their business by excluding their access to temporary skilled migrants when local workers cannot be found. This is a significant incentive for employers to maintain ongoing compliance with the program.

67. However, section 140RA(1)(a)(6) of the bill also allows the Minister to publish enforceable undertakings on the Immigration Department's website. While transparency is an admirable goal, caution is required to ensure this measure is not used or perceived to be a 'name-and-shame' mechanism. Commercial-in-confidence considerations may also apply.

SCHEDULE 6 – INSPECTOR POWERS

68. Schedule 6 of the bill provides the legal authority for inspectors of the Fair Work Ombudsman to be inspectors under the Migration Act.

69. The Immigration Department currently has 32 active inspectors appointed under the Migration Act to monitor compliance with sponsorship obligations. Inspectors have certain investigative powers and can conduct site visits with or without notice. Over 800 site visits were conducted last financial year.

70. An expansion of these powers to 300 Fair Work inspectors will increase **ten-fold** the total number of sponsor inspectors with the ability to conduct site visits.

A word of caution

71. AMMA is generally supportive of increased monitoring of the overall program and has, in previous submissions and hearings stated that many of the issues the Government is seeking to address through tighter legislation could easily have been addressed through a more efficient, effective and better resourced compliance regime.

72. However, with the backdrop of unfounded claims of widespread rorting and political rhetoric that indicates a systemic aversion to skilled migration, requiring Fair Work Inspectors to conduct inspections may have the outward appearance of a heavy handed approach that has the potential to cause unnecessary alarm amongst sponsoring businesses.

73. For example, the recent announcement of a dedicated 457 visa 'hotline' to allow the public to 'dob in' rogue employers is a curious initiative in light of the fact that an immigration dob-in hotline – able to hear complaints on any immigration abuse (including but not limited to the 457 visa program) – is already in operation.

74. AMMA believes that Immigration Department, as the responsible entity for overseeing the scheme and the expert body on temporary skilled migration compliance matters, should be appropriately resourced to maintain an effective compliance and monitoring regime. Other strategies such as further information-sharing between various state and federal agencies should also be considered.

75. AMMA also recalls that Australia has ratified the International Labour Organisation's (ILO) *Labour Inspection Convention, 1947* (C81), and has an ongoing treaty obligation to give effect to its terms in domestic law and practice. Australia clearly does this through federal and state labour inspection regimes.

76. However, concerns have been expressed in recent years by the ILO's Conference Committee on the Application of Standards that tasking labour inspectors with other inspectorial responsibilities may detract from their effectiveness in undertaking their core labour inspectorial functions and therefore be inconsistent with a country meeting its treaty obligations under C81.