Inquiry into the *Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012 [Provisions]*

Senate Education, Employment and Workplace Relations Committee

ACTU submission

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Table of Contents

Introduction

1. The ACTU welcomes the opportunity to make a submission to the Senate Committee Inquiry into the *Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012 [Provisions]* ("the bill").

2. The ACTU strongly supports the need for greater scrutiny and oversight of Enterprise Migration Agreements (EMAs). This is imperative if the Government's stated objective of maximising jobs and training opportunities for Australians on major resource construction projects is to be achieved.

3. As it currently stands, the DIAC guidelines that underpin the use of EMAs do not provide a sufficient level of confidence that this will in fact be the case, notwithstanding the Government's welcome decision to establish the online Resources Sector Jobs Board that is now in operation.

4. In this submission, we seek to assist the Committee by providing an overview of the ACTU policy position in relation to EMAs, as well as Regional Migration Agreements (RMAs) and DIAC labour agreements.

5. This submission is made by the ACTU together with its affiliated unions who have a direct interest in and coverage of workers in the resources sector, namely the Australian Manufacturing Workers Union (AMWU), The Association of Professional Engineers, Scientists and Managers, Australia (APESMA), The Australian Workers' Union (AWU), the Communication, Electrical and Plumbing Union (CEPU), the Construction Forestry Mining and Energy Union (CFMEU), and the Maritime Union of Australia (MUA).

The union position on EMAs

6. First, for the information of the Committee, it is worth briefly tracing some of the background to EMAs and the consistent position that unions have adopted in response to them and questions of skilled migration generally.

7. The EMA concept was first developed through the National Resources Sector Employment Taskforce (NRSET). The NRSET report was released in July 2010 with a recommendation to introduce and promote the use of EMAs for 'mega resource projects'. Right from the outset, the ACTU and national construction unions have made clear they would not support EMAs unless they contained strong protections for workers.

8. Despite the Government's intention to nevertheless proceed with EMAs, unions have made repeated representations and submissions to highlight our concerns with EMAs and identify the specific protections and conditions the Government would need to put in place to make EMAs acceptable and workable. These include:

- effective labour market testing;
- the establishment of a public online Jobs Board for the resources sector;
- robust and enforceable training obligations;
- independent skills assessment for all temporary overseas workers;
- preference for local workers over 457 visa holders in redundancy situations;
- stronger compliance monitoring;
- far more robust information and evidentiary requirements on EMA proponents;
- a tripartite oversight mechanism; and
- public transparency of EMAs

9. The submission that follows provides further detail on each of these matters.

10. As we have emphasised throughout, 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, but we recognise there will be a role for some level of temporary migration to meet current and future skill needs in the resources sector, including through EMAs. However, there needs to be a proper, rigorous process for managing this and ensuring the integrity of the EMA framework.

11. We believe that opportunities to work, and develop skills, in the resources sector should always be given first to local workers, and policy settings need to ensure that this goal is achieved in practice.

12. As the ACTU Congress Policy states, unions will not support the making of EMAs unless satisfied that every effort has first been made to fill positions locally, that concrete measures are in place to employ and train locally in future, and the employment of 457 visa workers will not undercut the wages and conditions of Australian workers.

Labour market testing

13. The starting point for unions with EMAs is that Australian workers (citizens and permanent residents) must have enforceable first rights to all jobs on major resource projects.

14. For this to happen, EMAs must be underpinned by a genuine labour market testing regime. This means that if major project owners and employers covered by EMAs wish to make use of 457 visa labour and other forms of temporary migration they should first have to demonstrate they have made every possible effort to employ locally to fill vacancies. This should include measures such as:

- advertising vacancies locally and nationally at genuine market rates, including mandatory use of the resources sector Jobs Board as outlined below;

- offering relocation assistance measures where required; and

- providing information on specific measures undertaken to employ groups who are currently disadvantaged or under-represented in the workforce such as indigenous workers, women, unemployed local job-seekers, recently retrenched workers, and older workers - all groups the NRSET report identified as a priority - and why the 457 visa positions sought under the EMA cannot be filled by increasing the participation of these groups.

15. Where project owners and employers seek to use 457 visa labour, they should be required to demonstrate why local recruitment efforts identified in paragraph 14 have not been successful in meeting their skill needs.

16. Under the current EMA guidelines, there is no requirement for such labour market testing to occur for any position under an EMA, despite a general requirement for project owners to demonstrate their commitment to ongoing local recruitment efforts.

17. In relation to semi-skilled occupations under an EMA, there is a requirement in the guidelines for a limited form of 'labour market analysis'. In practice, this can amount to a report commissioned by a consultant that makes a general case that skill shortages exist in the relevant semi-skilled occupations. It falls well short of a requirement for evidence that the local labour market has been actively tested.

18. In the case of skilled occupations available under the standard 457 visa program there is no requirement for any form of labour market testing or analysis. This exempts from proper scrutiny a wide range of professional and trade occupations that are required on major resource projects.

19. Furthermore, there is no labour market testing, or even labour market analysis, required at all under the EMA guidelines for subsequent labour agreements that direct employers make under the umbrella of an EMA. The main stated rationale for this has been that it will allow labour agreements to be finalised 'off the shelf', streamlining the process and reducing the time involved in negotiating labour agreements.

20. In our view, this approach completely misplaces what the policy priorities should be. Rather than an emphasis on fast-tracking the process, the priority should be to ensure that available work goes first to Australian workers. For this to happen, it is vital that all individual labour agreements be properly labour market tested to ensure that skill shortages exist at the time that positions are actually being filled, and not just when the EMA is made at the start of a project.

21. Given that EMAs can run for up to five years, it is inconceivable that this would not be a requirement. It is obvious that labour market conditions could change during the duration of an EMA and this should be taken into account. During the term of an EMA, there would also be the time and opportunity for necessary training to take place to allow positions to be filled locally and this should also be taken into account in assessing the need for 457 visa labour as proposed by individual labour agreements.

22. In our submission, there is a need for clear requirements on the types of labour market testing measures that need to be taken in filling EMA positions locally before resorting to the use of 457 visa labour. The examples given above should be adopted for this purpose. It should also be clear that these requirements should apply to all sub-contractors and employers under an EMA.

23. Labour market testing requirements should be explicitly included in the EMA guidelines, at the very least, or legislated for as proposed in the Bill before the Committee. For the further information of the committee, a consolidation definition of what is meant by labour market testing is provided at appendix 1.

Resources Sector Jobs Board

24. The ACTU congratulates the Government on the positive development of a public online Jobs Board that now advertises resources sector jobs around Australia and enables workers interested in working in the resources sector to lodge their relevant details. This is an initiative that unions have strongly advocated for. Unions will continue to work constructively with Government to address initial operational shortcomings that have been identified since the Jobs Board went 'live' in June 2012.

25. Provided it is properly established, the Jobs Board can form an integral part of an effective labour market testing regime as outlined above, and help ensure that the Government, unions and the broader community can have confidence in the EMA process and that Australian workers are being given first opportunity to fill Australian jobs.

26. For it to be effective, it must be a mandatory, contractual requirement of any EMA that all jobs are advertised on the Jobs Board before the engagement of any 457 visa workers can be considered. Further, it should be mandatory to advertise on the Jobs Board before any EMA is entered into in the first place and companies must demonstrate that they have utilised the Jobs Board before any EMA is approved.

27. The mandatory requirement on EMA proponents and employers to use the Jobs Board should be explicitly included in the EMA guidelines at the very least, or legislated for as proposed in the Bill before the Committee.

28. The commitment the Government has made to ensure mandatory use of the Jobs Board under EMAs must also be reflected in the exact terms of the deed of agreement between the Government and EMA project owners such as Roy Hill.

29. Further, we note that the mandatory use of the Jobs Board should be in addition to a requirement that EMA proponents and employers use industry or occupational-specific custom and practice as part of their domestic recruitment efforts.

30. Unions also emphasise that the operation of the Jobs Board needs to be monitored to ensure it operates in accordance with the government's stated objectives. To that end, unions recommend the establishment of an independent body to oversee the operation of the Jobs Board, including an opportunity for individual complaints, to ensure it is transparent, accountable and is delivering on jobs and training opportunities for local workers.

Opportunities for recently retrenched workers

31. The Bill before the Committee identifies recently retrenched workers as a priority in efforts to maximise Australian employment and training opportunities.

32. On this point, it is important for the Committee to note there is a significant body of skilled workers recently made redundant, many of whom either have transferable skills or have a skills set which could readily be supplemented with training in order to meet the job requirements on many of these resource projects.

33. For example, our submission notes that 130,000 jobs have been lost in manufacturing since 2008, based on ABS figures, although it's unclear just how many of these have dropped out of the labour force entirely. This includes a number of high profile cases of large scale job losses, including:

- Bluescope – Announced 1400 jobs to go after closing its export arm in August 2011.

- Qantas – Has been significantly reducing its workforce. Has cut 5000 jobs in the last 4 years, with 3300 announced in 2012.

- Kurri Kurri Smelter – 600 jobs in 2012.

- Caltex Kurnell Refinery – 700 jobs to go as refinery is converted to an import facility in 2014.

34. On top of this, we have seen recent announcements by Fortescue and other mining proponents about closures, mothballing and reductions in capacity.

35. These are all highly skilled, well trained workers. Before EMAs can be granted, it is imperative that these workers be given the opportunity to work on major resource construction projects unless there is evidence to show these workers have been redeployed successfully in other sectors of the economy. The Jobs Board will form an important part of this evidentiary burden.

Training obligations

36. A priority issue for unions is to ensure that there is a 'training dividend' from the use of EMA and temporary migration that will reduce the reliance on overseas labour in future. To this end, EMAs must contain strong training benchmarks that are rigorously enforced and which apply to both the project owner and individual companies and sub-contractors.

37. A particular focus will be the training plan that is presented to unions by EMA proponents. The EMA training plan must demonstrate clearly how the project will reduce reliance on overseas labour by targeting training at those occupations in short supply, including specific, quantifiable commitments to the employment of apprentices and trainees in those occupations where skill shortages are identified. There should also be evidence of investment in economic and social programs that will support the workforce and local communities.

38. Unions support the positive features of the Training Plan currently required of the project owner as a condition of EMA approval, namely that the training must:

- be focused in areas of 'known or anticipated shortages' (i.e. in occupations where 457 visa labour is being sought);
- reduce reliance on foreign labour 'over time';
- be commensurate with the size of the project (i.e. the more 457 visas that are used, the greater the training requirements); and

- be enforced through the contracting model and measured and monitored.

39. However, there are problems with the current approach if the skilled worker component under an EMA continues to be uncapped. This means that if an EMA is approved for say 200 skilled workers and the detailed Training Plan is designed around this number, provisions must be in place to secure enforceable revisions of this Plan if the project (under an uncapped skilled component) actually takes in 500 skilled workers.

40. In relation to training benchmarks for individual sub-contractors under an EMA, the current EMA guidelines provide that the two standard training benchmarks for the 457 visa program apply i.e. either 2% of payroll (of their project workforce) to a relevant industry training fund or 1% on training for their Australian employees.

41. In our submission, a change is required in the definition of 'the project workforce' for 457 sponsors in construction generally, for the purpose of calculating the payroll base for 457 training benchmarks.

42. Currently this definition is limited to only 'direct employees' of the sponsor and excludes independent contractors engaged on a project. But this definition is not appropriate for construction due to the different structure of the workforce. For example:

- In the construction industry, only 54% of the total workforce is classified as employees compared to 84% in all other Australian industries (ABS FOES data 2009);

- 35% of the total workforce are classified as independent contractors by the ABS, compared to only 7% in all other Australian industries; and

- up to 46% of independent contractors in construction are likely to be sham contractors, i.e. effectively working as employees (Source: CFMEU Report on Sham Contracting, Race to the Bottom, March 2011).

43. Accordingly, the payroll base for 457 training benchmark purposes for EMAs and construction sponsors in the 457 program generally should be changed to the total labour costs on the project.

44. This would be consistent with State legislation raising training levies for the construction industry. These are usually levied on the total project cost (labour plus materials), in part to recognise the widespread use of contracting in the building and construction industry.

45. The ACTU also reiterates its call for the Government to finalise an improved set of training benchmarks that would apply to the standard 457 visa business program and to EMAs (and RMAs). These new benchmarks were first considered by the Government's own Skilled Migration Consultative Panel in 2009 and are yet to be finalised.

Independent skills assessments

46. Unions are very concerned that the skills and qualifications of 457 visa holders and other temporary visa holders are not formally assessed by an independent body against the AQF occupational requirements and other relevant Australian endorsed standards (except in the case of 457 visa applicants from 'at risk' countries'). Currently, 457 visa holders need only satisfy their sponsor that they have the skills required.

47. In our submission, the mandatory skills assessment that applies to all permanent GSM applicants should be the standard applied consistently to all visa types. An independent and transparent process for both skilled and semi skilled temporary migrants is essential to ensure that qualifications gained overseas and held by temporary overseas workers meet the contemporary requirements of Australian qualifications and licensing arrangements.

Preference for local workers in redundancy situations

48. The unions' position is that in redundancy situations there should be an express preference for Australian workers to retain their jobs over temporary 457 visa workers.

49. The 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.

50. This principle should be reflected in the public guidelines for EMAs in the resources sector or in the type of legislation proposed in the Bill before the Committee.

More robust information and evidentiary requirements on EMA proponents

51. The ACTU submits that the information and evidentiary requirements on EMA proponents must be strengthened, whether that is done through the existing EMA guidelines or through legislation.

52. A fundamental problem under the current guidelines is that skilled workers under EMAs are excluded from any proper assessment and scrutiny by unions that cover these occupations. For example, there is no requirement in the EMA consultation process to provide unions with any information on the number and occupations of skilled workers being sought, their wages and conditions, or any evidence to demonstrate there are in fact shortages in those skilled occupations and what recruitment efforts have been made to fill them.

53. This information is critical for a rigorous and transparent process in determining the need for skilled overseas workers. Without information on all workers and occupations nominated under an EMA, it is not a genuine consultation on the overall skill needs of a major resource project. This will only undermine community confidence in the EMA process as project owners and sub-contractors under EMAs can bring in overseas workers with impunity.

54. The Government's stated reason for this is that this information will not be required because skilled workers will be subject to the standard 457 program requirements. However, the project owner in an EMA is not like a standard business sponsor in the 457 program. A more relevant point of comparison is with a labour agreement, and under existing DIAC policy all labour hire companies must provide unions with information on the skilled workers they want in any labour agreement. This same requirement should apply to EMAs.

55. In our submission, mandatory stakeholder consultation for EMAs should include, as a minimum, the following matters:

- The number of 457 visa workers required in each occupation over each of the years covered by the proposed agreement, both skilled and semi-skilled;

- the specific entity or entities who will be the direct employer of the 457 workers, i.e. the names of all subcontractors in the case of EMAs;

- the wages and conditions the 457 visa workers will receive and the proposed industrial instrument;

- how the proposed wages and conditions compare to the wages and conditions of the equivalent Australian workers and the market rate for the industry or occupation;

- the evidence on which it is claimed that, over the proposed 5 year life of the EMA, the nominated occupations, and the number of positions for each occupation, will be required, and the evidence for the claim that these positions cannot be filled by Australian citizens and residents, including evidence of recent and ongoing recruitment efforts; and

- all elements of the proposed project Training plan, and other social inclusion initiatives.

Stronger compliance monitoring

56. 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.

57. At recent Senate estimates hearings (*Hansard*, Legal and Constitutional Affairs Legislation Committee, Senate Estimates, 22 May 2012, p. 68), DIAC stated:

"At the moment we have around 37 inspectors across Australia and, for this program – 2011-12 until 30 April - we have done 861 site visits, which have been conducted to assess sponsor compliance with the sponsorship obligations."

58. To put these numbers in perspective, that is 37 inspectors to monitor more than 22 000 employers (sponsors). With only 861 employers receiving a site visit, that is less than 4% of all 457 employers being actively monitored. This is all happening while 457 visa numbers continue to grow, based on DIAC figures. For example, the total number of 457 visa workers in Australia at 31 March 2012 was at an all-time high of 88 590, an increase in comparison with 12 months ago.

59. Effective monitoring and compliance is even more important now if the Government continues to push the migration program into more vulnerable, lower-skilled occupations as they are doing with EMAs, and also RMAs. As a case in point, the majority of the 1500 plus overseas worker nominations approved under the Roy Hill EMA are in semi-skilled occupations. Yet at the same time, in the same Senate estimates hearing DIAC stated that EMA monitoring will be covered "within the existing number of inspectors and resources"(*Hansard*, Legal and Constitutional Affairs Legislation Committee, Senate Estimates, 22 May 2012, p. 69).

60. While we acknowledge the tight fiscal circumstances the Government is operating under, this comes down to a question of priorities. For example, in the 2011 budget, the Government found an additional $10m for faster processing of 457 visas, but couldn't find any additional money for compliance monitoring. Clearly in our view, this funding would be much better directed at improving compliance activity.

61. To provide additional support for 457 visa workers under EMAs, our submission is that, at the very least:

- There should be a new sponsor obligation to inform every 457 visa-holder in writing of the rates of pay and terms and conditions of employment under which they are engaged; and .

- All 457 visa workers should be provided with a hard copy version of their worker rights under Australian workplace and immigration laws, outlining particularly the role of the DIAC, FWO and unions in pursuing underpayment claims.

Tripartite oversight mechanism

62. Unions reiterate their call for a tripartite consultative body to approve and monitor each individual EMA. This would help provide much-needed transparency, accountability, and confidence in the EMA process.

63. Unions welcome the establishment of a dedicated caucus committee - the "Spreading the Benefits of the Resources Boom Committee" – and look forward to the positive role it could play in providing necessary oversight of EMAs, the Resources Sector Jobs Board and other related issues. We note that Ministers will be required to give regular reports to the committee and provide practical assistance to the committee if and when required.

64. As submitted above, unions also support the establishment of an independent body to oversee the operation of the Jobs Board, including a mechanism to handle individual complaints.

Public transparency of final deed of agreement on EMAs

65. Unions support the proposal in the Bill for the tabling of an EMA in Parliament as soon as practicable after it is made.

Off-shore coverage

66. Any consideration of the EMA framework must take account of off-shore coverage issues, given that a number of major oil and gas construction projects would fall within the EMA threshold requirements. The use of the Migration Act and other legislation to bypass the normal visa requirements should be addressed.

67. A key concern of unions in this area relates to the gaps in coverage in the Migration Act 1958 as confirmed in the Federal Court judgment of 22 May 2012 in the Allseas case. The Court found in that matter that certain vessels involved in offshore oil and gas construction projects are not 'resources installations' within the meaning of the Migration Act i.e. those vessels are not within the Migration Zone. This means that guest labour on those vessels do not require a work visa even while engaged in work on an Australian oil and gas project.

68. The effect of this decision, unless those gaps in the Migration Act exposed by the Allseas Federal Court judgment are rectified, is that resource owners and their contractors will have a green light for the unfettered use of guest labour in all aspects of the offshore oil and gas industry that falls outside the Migration Zone. This will remain the case even if future amendments to the Fair Work Act, requiring compliance with the 10 National Employment Standards and award rates are introduced. Payment of "market" rates or EBA rates cannot be enforced unless the Government requires workers to hold a 457 work visa. Only then can it require the sponsor to pay market or EBA rates.

69. The priority for unions is to ensure that all Australian jobs and industries are regulated under migration law. To this end, the Migration Act should be reviewed and amended to ensure that no part of Australian territory is excluded from the effect of the Migration Act, and all workers, including offshore marine construction workers and migrants are covered by one transparent and accountable system.

Regional Migration Agreements

70. Our submission notes that amendments have been proposed to broaden the scope of the bill to regulate all types of work agreements, including Regional Migration Agreements (RMAs).

71. As a position of principle, the ACTU submits that the same conditions and scrutiny applied to EMAs should apply equally to RMAs. This is reflected in the recently endorsed ACTU Congress Policy on Skilled Migration. This includes the establishment of online Jobs Boards for regions where RMAs are utilised, and a mandatory requirement for all employers under an RMA to use that Jobs Board.

72. As with EMAs, a key feature of RMAs that concerns unions is that they will give employers access to less skilled occupations not available under the standard 457 visa program.

Labour agreements

73. Similarly, the Bill proposes that other forms of work agreements, such as DIAC labour agreements, be included in the scope of the Bill.

74. The ACTU strongly supports the need for improved mechanisms for scrutiny and oversight of labour agreements, particularly if they are to be used as a backdoor route by major resource construction projects wishing to access overseas labour but wanting to avoid the current EMA consultation process.

75. The ACTU believes that the labour agreement process requires comprehensive reform. It is seriously deficient both in terms of a process for consultation and the range of matters on which labour agreement proponents are required to consult on. This means there can be no confidence on the part of unions, the Government or the wider community that employers and labour hire companies wishing to source 457 visa workers under a labour agreement are first doing all they can to employ and train the local workforce.

76. As part of a current DIAC review (yet to finalised) of the stakeholder consultation process for labour agreements, the ACTU has identified the following matters to be included as formal consultation requirements under the labour agreement program:

- the number and occupations of temporary skilled overseas workers to be sponsored over each of the years covered by the proposed agreement and the specific roles they will perform;
- the award/agreement classification and job titles of the workers;
- the specific locations in which the workers will be employed;
- the specific entity or entities who will be the direct employer of the workers;
- the specific locations in which the workers will be employed;

- the wages and conditions the visa workers will receive and the proposed industrial instrument that will cover them;

- how the proposed wages and conditions compare to the wages and conditions of the equivalent Australian workers and the market rate for the industry or occupation;

- a commitment from the company to exhaust all avenues for sourcing appropriate local labour workers, including the use of industry managed databases of unemployed workers where they exist, with evidence to demonstrate the nominated occupations, and the number of positions for each occupation, will in fact be required, and the evidence 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;

- specific commitments by the company directed at addressing the skills shortage through training in the occupations for which temporary overseas workers are sought;

- a workforce profile which shows the proportion of overseas workers to Australian workers;

- information on the process for settling the 457 visa workers in Australia, including assistance with accommodation, visa costs and expenses, including an undertaking by the company to comply with applicable ILO conventions which apply to temporary overseas workers; and

- a commitment to notify the ACTU and relevant affiliates before employing temporary overseas workers and to provide relevant unions with access to the workers within the first month of their employment to ensure compliance with labour agreement obligations.

- Measures to allow for ongoing testing of skills demand during the term of the labour agreement to ensure that local opportunity is not displaced.

Appendix 1

What is meant by labour market testing?

Labour market testing (LMT) for resources sector jobs reflects the principle that Australian workers have primary rights to Australian jobs, a principle endorsed in the 2011 ALP National Conference Platform and the 2012 ACTU Congress policy on skilled migration.

LMT means establishing a legal obligation on employers to demonstrate that they have tried to recruit Australian resident workers for the job vacancy on the open market though designated means and have not been able to find a suitably qualified Australian resident worker.

'Designated means' of recruitment includes advertising the job vacancy for at least 4 weeks on the Resources Sector Jobs Board (the Jobs Board) and using industry or occupational-specific recruitment custom and practice such as the longstanding maritime industry employment databases referenced in Enterprise Bargaining Agreements.

Before any application to recruit foreign workers is considered by the Department of Immigration and Citizenship (DIAC), employers will provide evidence of their efforts to recruit Australian resident workers to the Department and to the tripartite committee set up to oversee the project. This evidence will include information on the number of Australian resident workers who applied for the vacancy and the reasons these workers were assessed by the employer as not suitable for the position.

Australian resident workers who applied for the vacancy and were considered not suitable by the employer shall have a legally enforceable right of appeal against that assessment to an independent complaints body before the employer's application to fill the vacancy with a temporary foreign worker can proceed.

> 'Australian resident workers' means Australian citizens and Australian permanent residents and New Zealand citizens holding a valid Australian temporary visa.