

27 October 2016

Committee Secretary
Joint Standing Committee on Treaties
PO Box 6021
Parliament House
Canberra ACT 2600

By email: jsct@aph.gov.au

Chapter 12 (Temporary Entry For Business Persons) Of The Trans-Pacific Partnership Agreement And Labour Market Testing Sentiment

Thank you for the opportunity for Immigration Solutions to provide assistance to the Committee's inquiries by providing a submission regarding the Trans-Pacific Partnership Agreement (TPP).

Introduction

We understand that the Trans-Pacific Partnership Agreement has been introduced with the aim of enabling the international movement of skilled business persons to facilitate trade and investment opportunities in the Asia Pacific region.

This submission will seek to address the following matters:

- The implementation and execution of the Trans-Pacific Partnership Agreement in the context of Australia's Subclass 457 – Temporary Work (Skilled) Visa
- An examination of existing Labour Market Testing and the effect of the Trans-Pacific Partnership Agreement on the Subclass 457 requirements
- Report on the efficacy of the current Labour Market Testing requirements and recommendations for reformation in achieving outcomes

Information about the Trans-Pacific Partnership Agreement

The Trans-Pacific Partnership Agreement (TPP) is a regional free trade agreement promising a plethora of positive outcomes that take steps towards the goal of open trade and regional integration. The TPP is focused on economic and job growth, innovation and productivity and raised living standards through the promotion of transparency and good governance.

The TPP is able to coexist with current Free Trade Agreements (FTAs). The TPP will facilitate the creation of new opportunities and benefits for Australian businesses, workers and consumers, seeking to eliminate barriers of trade, including tariffs, on goods, services and investments.

The Implementation and Execution of the Trans-Pacific Partnership Agreement in the Context of Australia's Subclass 457 – Temporary Work (Skilled) Visa

Chapter 12 of the Trans-Pacific Partnership Agreement (TPP) addresses the temporary entry requirements for business persons who are permanent resident of a party to the agreement. Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, and Vietnam are all parties to the TPP.

As the TPP aims to facilitate the international movement of skilled business persons, international mobility outcomes would be undoubtedly beneficial to Australia, despite potentially increasing competition for employment opportunities in Australia. Skilled business persons from countries that are party to the TPP will enter Australia through the existing visa network via the Temporary Work (subclass 457) visa program. This visa subclass will be opened to Intra-Corporate Transferees, Contractual Suppliers and Independent Executives, all with expressed lengths of stay ranging from 12 months to 4 years.

The Subclass 457 visa has been designed to enable approved standard business sponsors to employ and nominate suitable skilled foreign workers to address labour shortages where they are otherwise unable to find suitably skilled Australian Citizens, Permanent Residents and eligible current temporary visa holders.

This visa subclass comprises of a three stage process: sponsorship, nomination and visa

- The Sponsorship stage – a business must first apply to become Standard Business Sponsors before they are able to nominate suitable candidates for Subclass 457 visas. This stage will require that the business is a viable business lawfully operating in Australia, and that there is no adverse information in relation to the business. Most importantly, this stage will require that the suitable training benchmark requirements are met.
- The nomination stage would require that the suitable visa candidate is nominated in an occupation as per the Department of Immigration's occupation list. This is where a sponsor may be required to demonstrate that Labour Market Testing (LMT) has been completed. In this regard, persons from countries that are party to the TPP may be exempt from the Labour Market Testing requirements, which were reintroduced in 2013 to ensure the

providence of employment opportunities to local Australian citizens and permanent residents.

- The visa application stage is the only one completed by the applicant and they must show that they meet all the relevant criteria set out by the Department of Immigration and Border Protection.

The Temporary (subclass 457) Visa is often seen as the first step to citizenship in Australia and similar to all subclass 457 visa holders, as applicants will become eligible to submit an application for a permanent resident visa under the Subclass 186 Transitional Stream, subject to applicants being able to satisfy Department of Immigration requirements.

Considering the potential outcomes flowing from a successful Subclass 457 visa grant, it is important to consider the overlap between the TPP scope and the nuance surrounding the existing Subclass 457 Labour Market Testing requirement.

**An Examination of Existing Labour Market Testing and the Effect of the Trans-Pacific Partnership Agreement on the Subclass 457 Requirements **

To satisfy the LMT requirement, approved business sponsors only need to provide evidence of advertising the position in Australia, which can be paid or unpaid, within the last 12 months. If the approved business sponsor has made redundancies within the last 12 months, then the evidence of advertising needs to have been within 4 months of the nomination.

There are currently three exemptions to the LMT including

- Skill and Occupational Exemption – the Australian and New Zealand Standard Classification of Occupations (ANZSCO) categorises occupations into 5 skill levels. Skill Levels 1 and 2 are exempt from LMT. Skill Level 1 occupations have a level of skill commensurate with a bachelor's degree or higher qualification (Australian Qualifications Framework (AQF); at least five years' relevant experience may substitute for a formal qualification. Skill Level 2 occupations have a level of skill commensurate with at least AQF Associate Degree, Advanced Diploma or Diploma; at least three years' relevant experience may substitute for a formal qualification. LMT is a requirement for most engineering and nursing occupations, as well as all occupations at the Australian and New Zealand Standard Classification of Occupations (ANZSCO) Skill Level 3 or below.¹
- The Disaster exemption is initiated when a major disaster occurs in Australia. The disaster must have had a significant impact on individuals within Australia and the exemption can only be granted by the Minister. The intention of this exemption is to assist in disaster relief or recovery.

¹ *Labour Market Testing in Practice* (27 February 2014) HC Online <<http://www.hcamag.com/hr-business-review/migration/labour-market-testing-in-practice-183607.aspx>>.

- International Trade Agreement Exemption is granted if LMT will conflict with Australia's international trade obligations. Australia's current trade obligations include the Australia-New Zealand Closer Economic Relations Trade Agreement, the Marrakesh Agreement and Free Trade Agreements with Singapore, Thailand, United States, Chile, ASEAN, New Zealand, Malaysia and Korea.²

The proposed Trans-Pacific Partnership Agreement in this regard, would function as an expansion of the LMT exemptions under Australia's trade obligations. The matter to be contended would be if Labour Market Testing is still placing the intended restrictions on approved business sponsors to exhaust the Australian labour market prior to looking overseas. If otherwise, we must then consider if there should be an evaluation of the current 457 program in relation to whether the initial LMT intention of solely 'filling skill shortages' or if Australia is moving away from demand driven migration to a more global employment outlook.

Report on the Efficacy of the Labour Market Testing Requirements and Recommendations for Reformation in Achieving Outcomes

The current implementation of LMT appears to be a token effort to uphold the intention of the current 457 visa program via the application of criteria that can be easily circumvented by business sponsors who wish to employ overseas workers. Combined with the implementation of the TPP which would considerably expand the number of countries exempt from LMT, could it be said that LMT is still serving its purpose?

An independent review of the 457 program was published in 2014 that recognises the need to protect and prioritise Australian workers, however, the article also highlighted that an 'appropriate regulatory approach that achieves this is challenging'.³ If LMT is in place to ensure that businesses are genuine in their search for appropriate Australia workers, there needs to be criteria in place to reflect the desired intention, that is not easily circumvented and that can be regulated. An article by Joanna Howe suggests an effective execution of LMT would require completion by an independent body and not employer-conducted. As the Subclass 457 visa program is reliant on employer demand, the ability to circumvent the criteria is exacerbated by LMT provisions, which 'allows employers to attest their need for temporary migrant workers rather than relying on a more independent verification of this need'.⁴ To assist in an independent assessment of the Australian labour market, a narrowing and frequent assessment of the Consolidated Sponsored Occupations List (CSOL) needs to occur to ensure that occupations on the list would accurately reflect the fluid skills shortages in Australia. If the tightening of criteria and assessment of LMT cannot be achieved, LMT should be removed from the criteria of the 457 visa on the bases that it is

² *Migration Act 1958* (Cth) sub-s 140GBA(2) .

³ John Asarias et al, 'Robust New Foundations: A Streamlined, Transparent and Responsive System for the 457 Programme: An Independent Review into Integrity in the Subclass 457 Programme' (2014).

⁴ Joanna Howe, 'Is the Net Cast Too Wide? An Assessment of Whether the Regulatory Design of the 457 Visa Meets Australia's Skill Needs' (2013) 41 *Federal Law Review* 445, 445.

ineffective, and imposes unnecessary time and cost burdens on Australian businesses genuinely seeking to sponsor overseas workers.

It may therefore be necessary for a complete reform of the subclass 457 visa. Shifting the intention from solely addressing labour shortages in Australia towards encouraging the intake of highly skilled foreign workers would in fact assist Australian businesses in the development and upskill of current employees. An article in the *International Journal of Organisational Analysis* suggests that skilled migration is essential to address the ageing workforce and skill shortages arising in Australia and that there is a growth in global competition in recruiting skilled migrants. If skilled migration is considered a high priority, Australia then needs to consider if criteria such as LMT is an added obstacle for Australian businesses that want to sponsor skilled migrants. Skilled migration would address the issues of our ageing workforce and skill shortages, and along with it, contribute positive economic effects in Australia, wherein ‘migrants pay taxes and contribute to the Australian economy through their consumption of housing, goods, and services but make little use of government-provided benefits in health and education services because they are not eligible for them.’⁵ With the introduction of programs such as the TPP that encourage and facilitate the movement of skilled workers, skilled Australians may be enticed to engage in job opportunities overseas. In this instance, Australia’s focus may need to shift to the recruitment of highly skilled migrants and retention of Australian workers. This would align Australia with the present international climate in conjunction with the TPP focus of skilled business persons supporting trade, investment and facilitation of cross-border integration. If a reform were to occur, Australia may also need to review the use of labour agreements that would allow foreign workers to obtain a 457 visa for lower skilled position to ensure that employers use and train Australians for select positions.

Conclusion

The introduction of the Trans-Pacific Partnership agreements highlights the need for change of the current 457 visa process. The futile application of LMT under the Temporary Work (subclass 457) visa program combined with the widening scope of current exemptions from LMT under the TPP, renders the existing model ineffective. Even though TPP member countries will not be effected by LMT, the expansion of the countries that are exempt from LMT is now too broad to effectively apply the intentions of the 457 program. This submission proposed that there are two viable options for consideration; the elimination of LMT or the reform of the 457 program.

The current model for LMT is ineffective and does not achieve its purpose. For those who are required to complete LMT, it creates another hurdle for business that genuinely need foreign workers to address skill shortages and is currently so loosely regulated that it is easily circumvented by those who simply choose to look overseas. Upon the introduction of the TPP, the number of countries that will have exemptions from completing LMT will be extensive, thus effecting Australian business who genuinely require skilled migration to fill position from

⁵ Siew-Ean Khoo et al, ‘A Global Labour Market: Factors Motivating the Sponsorship and Temporary Migration of Skilled Workers to Australia’ (2007) 41(2) *International Migration Review* 480, 485.

countries not exempt from LMT. The elimination of Labour Market testing would provide a more equal application process for all Australian businesses looking to engage skilled migrants.

If LMT is going to remain obligatory to provide a symbolic effect to assess genuine skill shortages in Australia, a review of the Temporary Work (subclass 457) visa program is required. A review may determine the need to move away from the traditional demand driven 457 program to a more global employment outlook. This would align the goals of the TPP with the 457 program and focus on the migration of highly skilled persons to Australia. In turn this would assist in the development of Australian businesses, the upskilling of Australian employees and the facilitation of trade. A review would also provide streamlined immigration for skilled business persons beyond the TPP, while providing a fair, transparent and regulated policy to reflect the up-to-date intentions of temporary immigration in Australia.

Prepared by Anne O'Donoghue, Principle Lawyer at Immigration Solutions Lawyers.
Assisted by Janice Siew Jan Chan, Solicitor and Registered Migration Agent and Rachel Miller, Research Assistant.