



Law Council
OF AUSTRALIA

Migration Amendment (Skilling Australians Fund) Bill 2017 and Migration (Skilling Australians Fund) Charges Bill 2017

Senate Education and Employment Legislation Committee

22 December 2017

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of Migration Law Committee of the Federal Litigation and Dispute Resolution Section and the Law Institute of Victoria in preparation of this submission.

Introduction

1. The Law Council welcomes the opportunity to provide comments to the Senate Education and Employment Legislation Committee's inquiry into the Migration Amendment (Skilling Australians Fund) Bill 2017 (**the Migration Amendment Bill**) and the Migration (Skilling Australians Fund) Charges Bill 2017 (**the Migration Charges Bill**).
2. Although the Law Council is broadly supportive of these Bills, further clarification as to the scope and operation of certain measures should be provided.

Skilling Australians Fund Levy

3. Employers seeking to nominate an overseas worker must meet several requirements before gaining approval. One such requirement is to provide a financial contribution to the training of Australian workers. The Law Council supports a more simplified way of meeting this requirement.
4. At present, this requirement is satisfied by meeting one of two 'training benchmarks'. These benchmarks are:
 - (a) Payment to an industry training fund of at least 2% of payroll; or
 - (b) Expenditure of at least 1% of payroll on training employees.
5. The Migration Charges Bill replaces these training benchmarks. It imposes the Nomination Training Contribution Charge, referred to as the Skilling Australians Fund Levy (**the Levy**). The Levy is payable under new section 140ZM of the *Migration Act 1958* (Cth) (**Migration Act**). The Levy is expected to generate revenue of \$1.2 billion over the forward estimates period.¹ This revenue will be used to provide training opportunities through the Fund.
6. The Migration Charges Bill provides the amount of payment of the Levy. The amounts are: \$8,000 for a nomination relating to a temporary visa; and \$5,500 for a nomination relating to a permanent visa. The Explanatory Memorandum to the Migration Charges Bill notes that these amounts 'are approximately ten per cent above the highest nomination training contribution charge proposed to be prescribed in the Migration Regulations, being \$7,200 and \$5,000 for temporary and permanent visas respectively'.² The Migration Charges Bill provides that the Levy must not exceed these charge limits.³
7. The Law Council supports the insertion of these limits within the Migration Charges Bill because, as is noted in the Explanatory Memorandum,⁴ they provide flexibility for the government to make increases to the Levy in the future whilst providing certainty for businesses as to the limited scope for a potential increase.
8. The Levy is comparable to the United Kingdom's Immigration Skills Charge.⁵ This charge is paid by employers for every overseas worker that is hired. However, refunds

¹ Federal Budget 2017-18, *Budget Measures* (Budget Paper No 2) 16 <<http://www.budget.gov.au/2017-18/content/bp2/download/bp2.pdf>>.

² Explanatory Memorandum, Migration (Skilling Australians Fund) Charges Bill 2017 5.

³ Migration (Skilling Australians Fund) Charges Bill 2017 s 8(3).

⁴ Explanatory Memorandum, Migration (Skilling Australians Fund) Charges Bill 2017 5.

⁵ See *Immigration Skills Charge Regulations 2017* (UK).

of the charge are permitted for additional reasons beyond those outlined in the Migration Amendment Bill. These include:

- if the applicant is successful, but does not come to work for the sponsor;
 - if the applicant gets less time on their visa than originally sponsored for;
 - if the applicant changes to another sponsor; and,
 - if the applicant leaves their job before the end date on their certificate of sponsorship.⁶
9. The Law Council recommends that consideration be given to whether the additional reasons for refunding the charge in the UK should also be incorporated within the proposed Australian system.
10. The Law Council also recommends that consideration be given to whether these additional reasons for refunding all or part of the charge should also be incorporated within the Bill:
- a sponsor that has paid a training contribution charge upfront for the full visa period is entitled to a refund for the balance of any unused portion of the visa period granted; and
 - a sponsor that is taking over the sponsorship of a visa holder is only liable for the balance of any unused portion of the visa period granted.
11. The Law Council is concerned that the Bill does not provide sufficient clarity to ensure that:
- it is clear when the fee is payable and that in the event a sponsorship and/or nomination is not approved the nominator will be entitled to a full refund if the fee is required to be paid before either of these events occur;
 - a sponsor that has paid a training contribution charge upfront for the full visa period is entitled to a refund for the balance of any unused portion of the visa period granted; and
 - a sponsor that is taking over the sponsorship of a visa holder is only liable for the balance of any unused portion of the visa period granted.
12. For example, if the holder of a visa granted with a 48-month validity period moves to a different employer sponsor after 24 months:
- the first sponsor, which would have paid 48 months' worth of training levy at the time of the nomination application, should be refunded 24 months of training levy; and
 - the second sponsor should be liable to pay only 24 months of training levy.
13. To give another example, if a 24-month visa is approved for a person who, six months after visa approval, decides not to take up the assignment to Australia, the sponsor should be entitled to a refund for 18 months' worth of training levy, being the balance

⁶ The Home Office (UK), *Tiers 2 and 5: guidance for sponsors* (May 2017) 19-20
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/616206/Tier_25_guidance_05-2017.pdf>.

of the visa period between the month the Department is notified of the failure to commence and the cessation date of the visa.

14. Further clarity on the respective liabilities of sponsors in this way will also ensure that the Department is not able to 'double-dip' by charging both the first and any subsequent sponsor a training contribution charge based on the full visa validity period.
15. The Law Council welcomes the funding of training opportunities for Australian citizens and permanent residents and submits that the Levy is an appropriate replacement to the 'training benchmarks' for the collection of revenue for the Fund. However, the Law Council is concerned that, should the number of skilled migrants decrease due to the Levy, so too would funding. If less funding for training and vocational education is provided to Australian and permanent residents, the demand for overseas labour may increase. Therefore, the Law Council suggests that the Levy should not provide the only source of revenue for the Fund.
16. The Law Council also submits that the Explanatory Memorandum to the Migration Amendment Bill should clarify whether business sponsors will need to pay the Levy for any of the worker's dependents, such as spouses and children. Further, the Explanatory Memorandum should clarify whether the Bill prevents business sponsors from 'passing on' the Levy to applicants.

Training Benchmark B Opt-in

17. Although the Law Council supports removal of training benchmark A, it is suggested that training benchmark B should remain an option, with business able to opt in to the new Skilling Australians Fund if they don't wish to be considered for training benchmark B.
18. The proposed new system prejudices businesses that are already meeting the training benchmark - especially companies that making considerable efforts to train Australian citizens or permanent residents through apprenticeships, courses for staff, etc. Businesses that choose to meet the current 1% of payroll training benchmark should not be 'double hit' with a significant additional expense (the Levy) which does not offer the business any additional value and does not recognise the contribution the business has already made through its training program. Furthermore, the Levy may act as disincentive for many businesses to continue apprenticeships and structured external training for staff.

Labour market testing

19. The Law Council supports the proposed changes to the labour market testing (**LMT**) requirements. These changes relate to the way LMT must be undertaken by a standard business sponsor seeking to nominate a foreign worker for a prescribed visa. Specifically, they allow the Minister to determine, by legislative instrument, the following:
 - the way LMT of a nominated position must be undertaken; and,
 - the kinds of evidence of LMT that must accompany a nomination.

20. The purpose of these changes is to ensure that the Australian labour market has been properly tested before nominating an overseas worker.⁷
21. This amendment builds on the *Migration Amendment (Temporary Sponsored Visas) Act 2013* (Cth). This Act provides that LMT is satisfied if the Minister is satisfied that the nomination is accompanied by evidence in relation to LMT. Under subsection 5, evidence must include information about the sponsor's attempt to recruit suitably qualified and experienced Australian citizens or permanent residents. Subsection 6 provides that this information must include any advertising of the position.
22. In his second reading speech on the Migration Amendment Bill, the Minister outlined the evidence that must accompany the nomination.⁸ It includes:
- the way a job advertisement be written;
 - the method of advertisement;
 - the period the advertisement occurs in; and
 - the length of time the advertisement must run for.⁹
23. These types of evidence are similar to those required by comparable jurisdictions including New Zealand, the United Kingdom and Canada.

New Zealand

24. In New Zealand before an 'Essential Skills' visa is granted to a sponsored worker the Department of Immigration must be satisfied that the employer has made a genuine attempt to recruit New Zealand citizens or permanent residents.¹⁰ An application may be denied in cases where an employer has not provided key evidentiary proof of LMT. This includes evidence of advertising. Specifically:
- that jobs have not been advertised for an appropriate length of time;
 - that jobs were advertised in a way that no New Zealander would apply for the job (for example: in a foreign language; seeking requirements that are excessive; the pay rate mentioned in the advertisement is lower than the rate offered to a migrant worker; or the location listed in the advertisement is different to the location in the Employment Agreement); and
 - where no evidence regarding the outcome of the advertising is provided.¹¹

United Kingdom

25. In the United Kingdom, there are stricter requirements as to the way advertising must be carried out than those proposed in the Bill. The Resident Labour Market Testing (**RLMT**) requirements include that the advertisement be posted in two places (for certain jobs, one of places must be the government's *JobCentre* website) which are suitable for the job in question and provide information regarding the job title, main

⁷ Explanatory Memorandum, Migration Amendment (Skilling Australians Fund) Bill 2017 11.

⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 October 2017, 11031 (Peter Dutton).

⁹ Ibid 11034.

¹⁰ Immigration New Zealand, *Immigration Instructions Operational Manual* (August 2017) WK3.10.1 <<https://www.immigration.govt.nz/opsmanual/66935.htm>>.

¹¹ Ibid WK3.10.5.

duties and responsibilities, the location, the salary package or range, the necessary skills and qualifications, and the closing date for applications.¹² Advertisements must also be available for a total of 28 days.¹³

26. The introduction of prescribed requirements resolved the ambiguity around the requirements to demonstrate that there was no settled person available for the role. This enhanced the efficiency of the programme for both employers and the UK Border Agency, as well as assisting employers with understanding and complying with their obligations.
27. Since its introduction there have been a number of adjustments to the RLMT requirements in response to the systemic problems that universal RLMT created. The RLMT criteria were eased for certain high income and research positions following recognition that such positions are sufficiently specialised that a more targeted approach to recruitment would not impact the integrity of a RLMT regime. The exemption for high value inward investment posts (discussed below) was introduced in recognition that labour market conditions are not relevant to the establishment in the UK of a new business presence by an overseas company which creates new jobs.
28. There are a number of exemptions that apply to RLMT which are relevant for comparative purposes:¹⁴
 - Intra-corporate transferees: global mobility movements (from source countries outside the EU) are accommodated through the separate Tier 2 (Intra-Corporate Transfer) stream. No labour market testing requirements apply to appointments that meet the definition of intra-corporate transfer by presenting evidence that the visa applicant is already employed in an overseas office of the corporation. Notably for comparative purposes, this facilitative approach to international trade in services is more generous than the UK's commitments relating to the movement of natural persons under the General Agreement on Trade in Services (**GATS**).
 - Shortage occupations: No RLMT is required where the person is nominated in an occupation on a list analogous to the Australian Medium and Long Term Strategic Skills List; or a post-graduate doctor or dentist undertaking specialty training.
 - High profile and high income: Positions with an annual salary exceeding £73,900 are exempt from the requirement to advertise on the government's *JobCentre* website, but must still be advertised in two of the prescribed ways. Positions with an annual salary exceeding £159,600 are exempt from the RLMT requirement altogether. Appointments which trigger stock exchange disclosure obligations are exempt from the need to advertise on *JobCentre* but a copy of the formal published announcement must be retained.
 - Renewals: No RLMT is required if the visa applicant is already working for the same employer in the same occupation, or is an academic returning from a period of academic leave.
 - Research positions: RLMT is not required where the migrant is being appointed to a post-doctoral research fellowship. For jobs requiring PhD-level skills,

¹² The Home Office (UK), *Tiers 2 and 5: guidance for sponsors* (May 2017) 122 [28.19]-[28.20]
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/616206/Tier_25_guidance_05-2017.pdf>

¹³ *Ibid* 121 [28.18].

¹⁴ *Ibid* 118 [28.3]-[28.17].

employers are allowed to recruit the most suitable person for the job, even if they are a migrant candidate.

- High value inward investment posts: These are analogous to positions nominated by an Overseas Business Sponsor to establish a new business presence in Australia. No RLMT is required in these circumstances if the company was registered in the UK less than three years prior and the business presence involves capital expenditure of at least £27 million or the creation of at least 21 new jobs in the UK.
- International students and graduates: No RLMT is required where the migrant candidate has completed a degree or teaching qualification in the UK, or is the holder of a Graduate Entrepreneur or Post-Study Work visa.

29. In the view of the Law Council the current settings of RLMT in the United Kingdom are sensible and adaptable to the Australian context. They provide a sound model for the implementation of universal labour market testing in Australia which:

- provides clear guidance and expectations;
- allows considered exceptions where reasonable; and
- forms the foundations of a robust compliance and integrity framework while allowing the visa application process itself to remain relatively light-touch.

30. The various iterations that RLMT has gone through over the last five years also provides an opportunity for Australia to take advantage of the lessons learnt from implementation of requirements that could easily become impediments to business and trade.

Canada

31. The Law Council recommends that consideration be given to whether there should be a new exemption for refugee claimants, similar to the exemption in Canada. In Canada, work permits may be issued to refugee claimants under section 206 of the *Immigration and Refugee Protection Regulations*. Refugee claimants must demonstrate that they cannot otherwise support themselves, but are otherwise eligible for open work permits.¹⁵

Compatibility with human rights

32. As the Explanatory Memorandum to the Migration Amendment Bill notes, the proposed changes to LMT may have a discriminatory effect.¹⁶ In allowing employers to only nominate a foreign worker if a suitable Australian worker has not been found, subject to exemptions, the LMT framework engages the right to non-discrimination.

33. Non-discrimination is a key feature of the principle of equality. This principle ensures that individuals are not denied their rights because of certain factors, including national or social origin.¹⁷ The right to non-discrimination is entrenched within several

¹⁵ *Immigration and Refugee Protection Regulations*, SOR/2002-227), s 206

¹⁶ Explanatory Memorandum, Migration Amendment (Skilling Australians Fund) Bill 2017 23-4.

¹⁷ *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976), art 2(1).

international frameworks to which Australia is party. This includes the International Covenant on Civil and Political Rights (**ICCPR**).¹⁸

34. However, the right to non-discrimination is derogable. Further, it may be necessary to treat people differently to achieve equality. Differential treatment does not always amount to prohibited discrimination if the criteria for the differentiation is reasonable, objective, and achieves a purpose deemed legitimate under the ICCPR.¹⁹
35. The Law Council is satisfied that the proposed changes to LMT do not equate to unreasonable differentiation, nor are they in conflict with the principle of equality.

¹⁸ Ibid.

¹⁹ Human Rights Committee, *General Comment No. 18: Non-Discrimination*, 37th sess, UN Doc CCPR/C/GC/18 (10 November 1989), [13].