

Committee Secretary
Senate Education and Employment References Committee
By email: eec.sen@aph.gov.au

12 January 2016

Dear Secretary,

Second supplementary submission to the inquiry of the Senate Education and Employment References Committee into 'The impact of Australia's temporary work visa programs on the Australian labour market and on temporary work visa holders'

This submission deals with the question of whether international trade agreements to which Australia is a party prohibit the imposition of a labour market testing condition under the Temporary Work (Skilled) Visa program (Subclass 457) ('457 visa program'). It focuses in particular on the Trans-Pacific Partnership Agreement ('TPP'). While the TPP has yet to be ratified by Australia (and other TPP countries), this submission will proceed on the basis that this agreement will come into force.

It makes three key points:

- 1) The TPP does not prohibit the imposition of a labour market testing condition under the 457 visa program;
- 2) There is no power under section 140GBA of the *Migration Act 1958* (Cth) to remove the labour market testing condition of the 457 visa program on the basis of the TPP; and
- 3) The lawfulness of removing the labour market testing condition of the 457 visa program on the basis of the ASEAN-Australia-New Zealand Free Trade Agreement, the Australia-Chile Free Trade Agreement and the Korea-Australia Free Trade Agreement is seriously doubtful.

1) The TPP does not prohibit the imposition of a labour market testing condition under the 457 visa program

Two chapters of the TPP are of relevance here - Chapter 10: Cross-Border Trade in Services and Chapter 12: Temporary Entry of Business Persons. Neither prohibits Australia from imposing a labour market testing condition under the 457 visa program.

Chapter 10: Cross-Border Trade in Services

Article 10.1 provides the following definitions:

cross-border trade in services or **cross-border supply of services** means the supply of a service:

- (a) from the territory of a Party into the territory of another Party;

(b) in the territory of a Party to a person of another Party; or

(c) by a national of a Party in the territory of another Party,

but does not include the supply of a service in the territory of a Party by a covered investment.

...

service supplier of a Party means a person of a Party that seeks to supply or supplies a service.

These definitions mean that Chapter 10 extends to workers under the 457 visa program as they are clearly providing a service; and are engaged in 'cross-border trade in services' ('cross-border supply of services') given that they satisfy sub-clause (c) of the relevant definitions.

Article 10.5(a), in turn, provides as following:

Article 10.5: Market Access

No Party shall adopt or maintain, either on the basis of a regional subdivision or on the basis of its entire territory, measures that:

(a) impose limitations on:

(i) the number of service suppliers, whether in the form of numerical quotas, monopolies, exclusive service suppliers or *the requirement of an economic needs test*;

...

(iv) the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or *the requirement of an economic needs test*.

On its face, the italicized words would appear to prohibit Australia from imposing a labour market testing condition under the 457 visa program (and not just for nationals of TPP signatories).

Chapter 10, however, operates on the basis of a 'negative' list in that the obligations under the chapter apply *unless* non-conforming measures are specified under Article 10.7. Article 10.7(2) provides that:

Article 10.3 (National Treatment), Article 10.4 (Most-Favoured-Nation Treatment), Article 10.5 (Market Access) and Article 10.6 (Local Presence) shall not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors or activities, as set out by that Party in its Schedule to Annex II

In its Schedule to Annex II, Australia has made the following reservation:

Sector:	All
Obligations concerned:	Market access
Description:	<u>Cross-Border Trade in Services</u>

Australia reserves the right to adopt or maintain any measure with respect to the supply of a service by the presence of natural persons, subject to the provisions of Chapter 12 (Temporary Entry for Business Persons), that is not inconsistent with Australia's obligations under Article XVI of the General Agreement on Trade in Services (GATS).

This reservation means that Article 10.4 does not apply to the 457 visa program.

Chapter 12: Temporary Entry of Business Persons

Chapter 12 applies to workers under the 457 visa program because they are 'business persons'. Article 12.1 broadly defines this phrase:

business person means:

(a) a natural person who has the nationality of a Party according to Annex 1-A (Party-Specific Definitions), or

(b) a permanent resident of a Party that, prior to the date of entry into force of this Agreement, has made a notification consistent with Article XXVIII(k)(ii)(2) of GATS that that Party accords substantially the same treatment to its permanent residents as it does to its nationals,¹

who is engaged in trade in goods, the supply of services or the conduct of investment activities;

In contrast with Chapter 10, Chapter 12 adopts a 'positive' list approach in that TPP parties have to specify what commitments they are making (rather than reserving areas from broader obligations). These commitments are specified under Article 12.4 which provides as follows:

Article 12.4: Grant of Temporary Entry

1. Each Party shall set out in Annex 12-A the commitments it makes with regard to temporary entry of business persons, which shall specify the conditions and limitations for entry and temporary stay, including length of stay, for each category of business persons specified by that Party.

2. A Party shall grant temporary entry or extension of temporary stay to business persons of another Party to the extent provided for in those

commitments made pursuant to paragraph 1, provided that those business persons:

- (a) follow the granting Party's prescribed application procedures for the relevant immigration formality; and
- (b) meet all relevant eligibility requirements for temporary entry or extension of temporary stay.

Three points should be noted in relation to Article 12.4. First, no obligations are imposed by Article 12.4 apart from commitments made in Annex 12-A. Second, Article 12.4(2)(b) makes clear that - apart from commitments made in Annex 12-A - relevant eligibility requirements apply to the temporary entry of 'business persons'. Third, Article 12.4 does not prohibit economic needs test like labour market testing or quotas in relation to commitments made in Annex 12-A. This is contrast with Article 10.4(3) of the China-Australia Free Trade Agreement (ChAFTA) which states that:

In respect of the specific commitments on temporary entry in this Chapter, unless otherwise specified in Annex 10-A, neither Party shall:

- (a) impose or maintain any limitations on the total number of visas to be granted to natural persons of the other Party; or
- (b) require labour market testing, economic needs testing or other procedures of similar effect as a condition for temporary entry.

Attached to this submission is Australia's Schedule of Commitments for Temporary Entry for Business Persons - *this schedule does not stipulate a commitment to exempt nationals of TPP signatories from a labour market testing condition.*

On the contrary, the commitments in relation to contractual service suppliers, independent executives and intra-corporate transferees which would take effect through 457 visa program state that '(e)ntry and temporary stay of business persons is subject to employer sponsorship' - the labour market testing condition under the 457 visa program is provided under section 140GBA of the *Migration Act 1958* (Cth) which is a provision of Division 3A of (Sponsorship).

- 2) *There is no power under section 140GBA of the Migration Act 1958 (Cth) to remove the labour market testing condition of the 457 visa program on the basis of the TPP*

Section 140GBA of the *Migration Act 1958* (Cth) – which imposes the labour market condition under the 457 visa program – states that:

(1) This section applies to a nomination by an approved sponsor, under [section 140GB](#), if:

(a) the approved sponsor is in a class of sponsors prescribed by the regulations; and

(b) the sponsor nominates:

(i) a proposed occupation for the purposes of paragraph 140GB(1)(b); and

(ii) a particular position, associated with the nominated occupation, that is to be filled by a visa holder, or applicant or proposed applicant for a visa, identified in the nomination; and

(c) it would not be inconsistent with any international trade *obligation* of Australia determined under subsection (2) to require the sponsor to satisfy the labour market testing condition in this section, in relation to the nominated position.

(2) For the purposes of paragraph (1)(c), the Minister may, by legislative instrument, determine (as an international trade *obligation* of Australia) an *obligation* of Australia under international law that relates to international trade, including such an *obligation* that arises under any agreement between Australia and another country, or other countries.

As the italicized words indicate, the power of the Immigration Minister to remove the labour market testing condition of the 457 visa program in relation to international trade agreements can only be exercised when there is an *obligation* under such agreements to which Australia is a party. The power pursuant to section 140GBA(2) is *not* enlivened by the TPP as the TPP does not give rise to any obligation to remove the labour market testing condition.

3) *The lawfulness of removing the labour market testing condition of the 457 visa program on the basis of the ASEAN-Australia-New Zealand Free Trade Agreement, the Australia-Chile Free Trade Agreement and the Korea-Australia Free Trade Agreement is seriously doubtful*

The labour market testing condition of the 457 visa program has been removed on the basis of the following international trade agreements:

- ChAFTA;
- Japan-Australia Economic Partnership Agreement;
- Thailand-Australia Free Trade Agreement;
- ASEAN-Australia-New Zealand Free Trade Agreement;
- Australia-Chile Free Trade Agreement; and
- Korea-Australia Free Trade Agreement.¹

The lawfulness of such removal in relation to the first three agreements seems reasonably clear. As noted earlier with ChAFTA, Article 10.4(3) of that agreement prohibits the application of quotas and economic needs test to commitments made under the agreement. A similar situation applies under the Japan-Australia Economic Partnership Agreement through Annex 10(2) of that agreement. With the Thailand-Australia Free Trade Agreement, Chapter 10 – Movement of Natural Persons, Annex 8 specifically prohibits labour market testing.

By comparison, prohibitions of this nature are not found with the last three agreements. This means that there is no obligation under these agreements that would enliven the power to remove the labour market testing condition on the basis of international trade agreements pursuant to section 140GBA of the *Migration Act 1958* (Cth). The lawfulness of removing the labour market testing condition on the basis of these three agreements is, therefore, highly doubtful.

Chapter 9: Movement of Natural Persons of the ASEAN-Australia-New Zealand Free Trade Agreement adopts a 'positive' list approach with Parties to the agreement making specific commitments in Annex 4. The commitments made by Australia in Annex A do not extend to removing the labour market testing condition under the 457 visa program. On the contrary, Page 9 of Annex 4 provides in relation to 'Contractual Service Suppliers' that:

Labour market testing may be required for some occupations, to the extent that this is not inconsistent with Australia's commitments under the WTO and other international trade agreements to which it is a party as at entry into force of this Agreement.

Similarly, Chapter 13 – Temporary Entry for Business Persons of the Australia-Chile Free Trade Agreement adopts a 'positive' list approach to the grant to temporary entry with specific commitments made in Annex 13-A – the commitments made by

¹ See <https://www.border.gov.au/Trav/Visa-1/457-> (accessed on 11 January 2016); *Determination of International Trade Obligations Relating to Labour Market Testing*, IMMI 14/107 (made on 6 November 2014); *Determination of International Trade Obligations Relating to Labour Market Testing*, IMMI 15/149 (made on 4 December 2015).

Australia in this annex do not extend to removing the labour market testing condition under the 457 visa program.

The position under the Korea-Australia Free Trade Agreement is more ambiguous than the two previously discussed agreements. Chapter 10: Movement of Natural Persons adopts a 'positive' list approach with specific commitments made in Annex 10-A. These commitments are subject to the obligation imposed by Article 10.3(3) which states:

Neither Party shall impose or maintain any limitations on the total number of visas to be granted to natural persons of the other Party under this Chapter, unless otherwise specified in [Annex 10-A](#).³⁴

Footnote 34 elaborates that:

For greater certainty, for Australia the term 'limitations' includes numerical quotas or the requirement of an economic needs test.

At first glance, Article 10.3(3) together with footnote 34 would suggest that a prohibition against labour market testing under the 457 visa program. The general obligation in Article 10.3(3), however, does not apply if 'otherwise specified in Annex 10-A'.

In fact, Paragraph 1 of Section A: Australia's Specific Commitments, Annex 10-A preserves the ability of Australia to impose a labour market testing condition under the 457 visa program:

Australia requires a natural person of Korea seeking temporary entry to its territory under the provisions of this Chapter and this Annex to obtain appropriate immigration formalities prior to entry. *Grant of temporary entry in accordance with this Annex is contingent on meeting eligibility requirements contained within Australia's migration law and regulations, as applicable at the time of an application for grant of temporary entry. Eligibility requirements for grant of temporary entry in accordance with paragraphs 5 through 11 include, but are not limited to, employer nomination and occupation requirements.* (italics added).

The italicized words make clear that Australia's commitments in this context are subject to the application of 'eligibility requirements contained within Australia's migration law and regulations' including 'employer nomination and occupation requirements'. The labour market testing condition under the 457 visa program is clearly an employer nomination requirement. As such, the Korea-Australia Free Trade Agreement does not prohibit the imposition of this condition.

I hope this supplementary submission has been of assistance to the inquiry.

Thank you.

Yours sincerely,

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AUSTRALIA'S SCHEDULE OF COMMITMENTS FOR TEMPORARY ENTRY FOR BUSINESS PERSONS

1 The following sets out Australia's commitments in accordance with Article 12.4 (Grant of Temporary Entry) in respect of the temporary entry of business persons.

Description of Category	Conditions and Limitations (including length of stay)
<p>A. Business Visitors Australia extends its commitments under this category to each Party that has made commitments under any of the following headings:</p> <ul style="list-style-type: none"> · "Business Visitors" · "Short term Business Visitors" · "Service Sales Persons". 	
<p><u>Definition:</u> Business visitors comprise:</p> <p>(a) Business persons seeking to travel to Australia for business purposes, including for investment purposes, whose remuneration and financial support for the duration of the visit must be derived from sources outside Australia and who must not engage in making direct sales to the general public or in supplying goods or services themselves; and</p> <p>(b) Service sellers, being business persons who are not based in Australia and whose remuneration and financial support for the duration of the visit must be derived from sources outside Australia, and who are sales representatives of a service supplier, seeking temporary entry for the purpose of negotiating for the sale of services or entering into agreements to sell services for that service supplier.</p>	<p>(a) Entry is for periods of stay up to a maximum of three months.</p> <p>(b) Entry is for an initial stay of six months and up to a maximum of 12 months.</p>

Description of Category	Conditions and Limitations (including length of stay)
<p>B. Installers and servicers</p> <p>Australia extends its commitments under this category to each Party that has either made commitments:</p> <p>(a) under any of the following headings:</p> <ul style="list-style-type: none">· “Installers/servicers”· “Installers and servicers”, or; <p>(b) elsewhere in its schedule of specific commitments on the temporary entry of business persons to install and service machinery or equipment as a condition of purchase under contract of the said machinery or equipment.</p>	
<p><u>Definition:</u></p> <p>A business person who is an installer or servicer of machinery and/or equipment, where such installation and/or servicing by the supplying enterprise is a condition of purchase under contract of the said machinery or equipment, and who must not perform services which are not related to the service activity which is the subject of the contract.</p>	<p>Entry is for periods of stay up to a maximum of three months.</p>

C. Contractual Service Suppliers

(Including independent professionals and specialists)

Australia extends its commitments under this category to each Party that has made commitments under any of the following headings:

- “Contractual Service Suppliers”
- “Independent Professionals”
- “Professionals”
- “Professionals and technicians”
- “Professionals and technician-professionals”.

In accordance with, and subject to, Australia's laws and regulations, Australia shall, upon application, grant the right of entry and temporary stay, movement and work to the accompanying spouse and/or dependants of a business person that is granted temporary entry or an extension of temporary stay under these commitments.

Definition:

Business persons with trade, technical or professional skills and experience who are assessed as having the necessary qualifications, skills and work experience accepted as meeting the domestic standard in Australia for their nominated occupation, and who are:

- (a) employees of an enterprise of a Party that has concluded a contract for the supply of a service within Australia and that does not have a commercial presence within Australia; or
- (b) engaged by an enterprise lawfully and actively operating in Australia in order to supply a service under a contract within Australia.

Entry and temporary stay of business persons is subject to employer sponsorship. Full details of employer sponsorship requirements, including the list of eligible occupations for sponsorship, are available on the website of the Australian government department responsible for immigration matters (as at entry into force, the address of that website was www.border.gov.au). Sponsorship requirements, including eligible occupations, may change from time to time.

Entry of business persons is for periods of stay up to 12 months, with the possibility of further stay.

Entry and temporary stay of spouses and dependants is for the same period as the business persons concerned.

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D. Independent Executives

Australia extends its commitments under this category to each Party that has made commitments for the entry and temporary stay of a business person for at least up to a maximum of twelve months under any of the following headings:

- "Independent Executives"
- "Other Personnel"
- "Persons Responsible for Setting Up a Commercial Presence"
- "Investors".

In accordance with, and subject to, Australia's laws and regulations, Australia shall, upon application, grant the right of entry and temporary stay, movement and work to the accompanying spouse and/or dependants of a business person that is granted temporary entry or an extension of temporary stay under these commitments.

Definition:

Business persons whose work responsibilities match the description set out below and who intend, or are responsible for, the establishment in Australia of a new branch or subsidiary of an enterprise which has its head of operations in the territory of another Party and which has no other representative, branch or subsidiary in Australia. Independent executives will be responsible for the entire or a substantial part of the enterprise's operations in Australia, receiving general supervision or direction principally from higher level executives, the board of directors or stockholders of the enterprise, including directing the enterprise or a department or subdivision of it; supervising and controlling the work of other supervisory, professional or managerial employees; and having the authority to establish goals and policies of the department or subdivision of the enterprise.

Entry and temporary stay of business persons is subject to employer sponsorship. Full details of employer sponsorship requirements, including the list of eligible occupations for sponsorship, are available on the website of the Australian government department responsible for immigration matters (as at entry into force, the address of that website was www.border.gov.au). Sponsorship requirements, including eligible occupations, may change from time to time.

Entry of business persons is for periods of stay up to a maximum of two years.

Entry and temporary stay of spouses and dependants is for the same period as the business persons concerned.

<p>E. Intra-Corporate Transferees</p> <p>Australia extends its commitments under this category to each Party that has made commitments under the heading of “Intra-Corporate Transferees”.</p> <p>In accordance with, and subject to, Australia’s laws and regulations, Australia shall, upon application, grant the right of entry and temporary stay, movement and work to the accompanying spouse and/or dependants of a business person that is granted temporary entry or an extension of temporary stay under these commitments.</p>	
<p><u>Definition:</u> A business person employed by an enterprise of another Party established and lawfully and actively operating in Australia, who is transferred to fill a position in the parent, branch, subsidiary or affiliate of that enterprise in Australia, and who is:</p> <p>(a) an executive or a senior manager, who is a business person responsible for the entire or a substantial part of the operations of the enterprise in Australia, receiving general supervision or direction principally from higher-level executives, the board of directors or stockholders of the enterprise, including directing the enterprise or a department or subdivision of it; supervising and controlling the work of other supervisory, professional or managerial employees; and having the authority to establish goals and policies of the department or subdivision of the enterprise; or</p> <p>(b) a specialist, who is a business person with advanced trade, technical or professional skills and experience who is assessed as having the necessary qualifications, or alternative</p>	<p>Entry and temporary stay of business persons is subject to employer sponsorship. Full details of employer sponsorship requirements, including the list of eligible occupations for sponsorship, are available on the website of the Australian government department responsible for immigration matters (as at entry into force, the address of that website was www.border.gov.au). Sponsorship requirements, including eligible occupations, may change from time to time.</p> <p>(a) Entry for executives and senior managers is for a period of stay up to four years, with the possibility of further stay.</p> <p>(b) Entry for specialists is for a period of stay up to two years, with the possibility of further stay.</p> <p>Entry and temporary stay of spouses and dependants is for the same period as the business persons concerned.</p>

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<p>credentials accepted as meeting Australia's domestic standards for the relevant occupation, and who must have been employed by the employer for not less than two years immediately preceding the date of the application for temporary entry.</p>	
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