Business Council of Australia

Submission to the Department of Immigration and Citizenship on the Implementation of Labour Market Testing in the Standard Temporary Work (Skilled) (subclass 457) Visa Program

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The Business Council of Australia (BCA) brings together the chief executives of more than 100 of Australia's leading companies, whose vision is for Australia to be the best place in the world in which to live, learn, work and do business.

About this submission

The Business Council of Australia is responding to an invitation to comment on the implementation of a new labour market testing regime for 457 visa applications, following a recent amendment to the Migration Act 1958. The BCA welcomes this opportunity to comment and notes that this represents a marked shift in practice to the regrettable lack of consultation that occurred throughout the development phase of the policy. The BCA's preference is for the next government to abandon the reintroduction of labour market testing. Failing that, we urge that any new obligations on businesses and visa holders under the labour market testing policy are made simple and clear and are imposed at least cost as laid out in the submission below.

Recommendations

Reiterating our earlier advice to government, the BCA's primary recommendation is for the Minister for Immigration in the next government to immediately initiate the repeal of new section 140GB of the Migration Act 1958 which introduces labour market testing for 457 visas.

Failing that occurring, we make the following recommendations on the proposed approach to implementation of the labour market testing policy by the department:

- The Minister for Immigration in the next government should act immediately to introduce a legislative instrument that will provide exemptions for labour market testing for Skill level 1 and Skill level 2 occupations, as is allowed for in the Act and was intended by the previous minister.
- The onus on employers to provide evidence of compliance with labour market testing – and by extension the level of evidence required by the minister to be satisfied that a 'genuine attempt' has been made to test the local labour market – should be no more than the requirements stipulated in the Act. This means employers should be required to do *no more than* provide evidence that advertising has taken place within the required period (i.e. within the four months preceding the application, as we understand the timeframe). Any references in the guidance material to other possible sources of evidence being provided are, in effect, superfluous and unnecessary.
- The policy guidance materials should be very clear on the requirement for companies to provide information on redundancies and retrenchments in the previous four months and how the government intends for this information to be used. This information should only be used as a test of whether labour market testing is required and on its own should not rule out an application for a 457 visa.
- The policy guidance material should clearly state the occupations which are exempt from labour market testing as well as any specific occupations that are 'protected' under the legislation. For instance, it should clearly list the specific occupations that are included or excluded under the 'protected' occupations of 'engineering' and 'nursing'.
- The department's discussion paper will need to be revised in a number of areas if that paper is to be used as the basis for any official guidance material (see below).

Background

Before commenting on its implementation we want to make clear that the BCA opposes the government's policy of introducing labour market testing because:

- it is costly, ineffective and inferior to the current system (as determined by an independent review in 2001)
- it is not linked to a clearly defined problem
- the former minister was unable to substantiate claims of systemic abuse of the scheme nor excessive growth in its take up
- it is being introduced following a poor policy process that involved overblown rhetoric, deeply inadequate consultation, no Regulatory Impact Statement and no proper assessment of its costs and benefits.

It is principally in the interests of Australian employers to hire locally first because it is cheaper and easier to do so. However, the 457 visa scheme is very important for Australia's economy as it allows employers to access foreign skilled labour on a temporary basis when skills shortages exist that can't be filled locally. As such it should remain highly responsive to the needs of the economy, uncapped and demand driven.

To ensure that 457 visas are allocated for genuine skills shortages there are multiple safeguards in the policy including sponsorship obligations to hire and train Australian workers, requirements to pay market salary rates and occupation eligibility restrictions under the skilled occupation list, among others.

In the 'rare' cases where scheme abuses occur, improved enforcement should be the preferred tool for dealing with those problems, not costly new labour market testing that adds to the regulatory burden on all employers.

Our primary view therefore is that labour market testing is unnecessary, costly and ineffective and should not be pursued without further proper assessment. We recommend that the minister in the next government should initiate the repeal of the new sections under 140GB of the Migration Act 1958 that will impose labour market testing.

The next minister should also announce a review of the process behind the introduction of this policy and recommend steps that will ensure the lack of consultation and the failure to undertake a Regulatory Impact Statement are not repeated. Future governments should commit to a transparent and evidence based approach to skilled migration policy development and fully consult with all relevant stakeholders.

We do welcome however, this invitation from the department to comment on the proposed approach to implementing labour market testing – which is the subject of this consultation process – as poor implementation of this flawed policy would pile even more unnecessary costs on the economy.

We urge that any new obligations on businesses and visa holders under the new labour market testing policy are made simple and clear and are imposed at least cost. At a time when Australia needs to lift its competitiveness we should be making the 457 visa scheme more flexible and to lower cost to employers and employees – not erecting costly new regulatory barriers.

Our specific comments and recommendations are provided below.

BCA comment on the implementation of labour market testing

The Minister for Immigration in the next government should act immediately to introduce a legislative instrument that will provide exemptions for labour market testing for Skill level 1 and Skill level 2 occupations, as is allowed for in the Act. Failure to implement the legislative instrument would mean that labour market testing will be applied to all occupations, when this was never the intention of the previous Minister for Immigration. The previous minister said that 'around 40 per

cent of the program – primarily at [lower] skill levels two and three, will be subject to labour market testing'.[1]

Exhibit 1: Evidence of labour market testing

5) For the purposes of subparagraph (3)(b)(i), the evidence in relation to the labour market testing:

(a) must include information about the approved sponsor's attempts to recruit suitably qualified and experienced Australian citizens or Australian permanent residents to the position and any other similar positions (see also subsection (6)); and

(b) may also include other evidence, such as:

(i) copies of, or references to, any research released in the previous 4 months relating to labour market trends generally and in relation to the nominated occupation; or

(ii) expressions of support from Commonwealth, State and Territory government authorities with responsibility for employment matters; or

(iii) any other type of evidence determined by the Minister, by legislative instrument, for this subparagraph.

(6) For the purposes of paragraph (5)(a), the information mentioned:

(a) must include details of:

(i) any advertising (paid or unpaid) of the position, and any similar positions, commissioned or authorised by the approved sponsor; and

(ii) fees and other expenses paid (or payable) for that advertising; and

(b) may also include other information, such as:

(i) information about the approved sponsor's participation in relevant job and career expositions; or

(ii) details of any other fees and expenses paid (or payable) for any recruitment attempts mentioned in paragraph (5)(a) (including any participation mentioned in subparagraph (i) of this paragraph); or

(iii) details of the results of such recruitment attempts, including details of any positions filled as a result.

(6A) If the approved sponsor elects to provide other evidence and information as mentioned in paragraphs (5)(b) and (6)(b), the Minister may take that evidence and information into account. But if the approved sponsor elects not to provide such other evidence or information, the Minister is not to treat the nomination less favourably merely because of that fact.

Source: Migration Amendment (Temporary Sponsored Visas) Bill 2013, Section 140GBA

The onus on employers to demonstrate compliance with labour market testing should be no more than to provide evidence that job advertising has taken place within the required period (four months before the application). It is clearly the intent of section 140GBA, subsections 5 and 6 (see Exhibit 1) that no additional information is required. This should be unambiguous in any official guidance documentation. Furthermore, the provision of evidence of advertising alone should be sufficient for satisfying the minister that a genuine attempt to test the labour market has occurred.

1. B. O'Connor MP, 'Mandatory 457 Tests for 40pc of Employers', *The Australian Financial Review*,12 June 2013.

Again this is quite clearly stated in the Act where it says that if the approved sponsor elects not to provide additional information then 'the Minister is not to treat the nomination less favourably merely because of that fact'. Comments made by the then Minister for Immigration when introducing these laws strongly support this interpretation of the Act. The former minister said on national television 'we need to be light touch and I think a job ad would be something that would be a reasonable thing to do and the Department would be satisfied that there's been an effort to look for local skills'. The previous minister also reportedly said that applicants should 'just put an ad in the paper'.[2]

Further clarity is needed on the requirement for 457 visa applicants to provide information on redundancies and retrenchments in the previous four months, in two areas.

- First, on whether information on redundancies and retrenchments should be provided for all roles in the business or only those roles for which the business is applying for 457 visa workers (in our view the latter should be the case).
- Second, clarification is needed on how this information will be used by the minister in assessing the application. This is not clear in the discussion paper nor was the purpose of this information provision made clear when it was inserted in the legislation late in the legislative process. Our interpretation of the Act is simply that the information on whether redundancies or retrenchments have occurred is needed to ensure that labour market testing (which, as above, is simply evidence of job advertising) occurs sometime after those redundancies and retrenchments take place (see subsection 4A). Taken together this information should be sufficient to satisfy the minister that the labour market testing condition is satisfied under section 3d. It would be of concern if information on redundancies and retrenchments were to be used to determine the outcome of an application in any other way. The reasons for retrenchments and redundancies taking place can be varied and complex. It would be inappropriate for governments to undermine legitimate business decision making around workforce management by unduly linking those decisions to the withholding of access to the 457 visa scheme.

Further detail is needed on the specific occupations that are exempt from labour market testing and on the specific occupations that are protected under the legislation, i.e. the specific occupations included or excluded under the 'protected' occupations of 'engineering' and 'nursing'.

There are several sections of text in the department's discussion paper that we recommend be revised if that paper is to be used as the basis for any official guidance material:

- All references to a 'legislative instrument' should provide the name of the instrument and a link to where the information can be easily accessed online, with that information provided in very clear and simple language.
- On page 3 there is a reference to 'types of evidence' in relation to labour market testing. As discussed above there is only one type of evidence that 'must' be provided in the Act – that is, evidence of the role being advertised – so it is misleading to refer to 'types' of evidence in the plural.
- Given the Act clearly states that other evidence is not required, or in other words that the nomination will not be treated less favourably if the approved sponsor chooses not to provide additional evidence or information, then there is no need to list the other possible sources of information at the top of page 4 (second paragraph). Listing these possible other sources of evidence overcomplicates the guidance material and could confuse applicants. This text should be deleted.
- The final paragraph of page 4 also spreads confusion on what is required of applicants. The final sentence should clearly state that applicants are only required to provide evidence of advertising.

2. B. O'Connor MP, 'Death of soldier, 457 visas, asylum seekers, leadership', Interview with Barrie Cassidy, Insiders, ABC, 23 June 2013. See also article published on the Migration Alliance website on 21 June 2013 regarding the Skilled Migration National Employer Conference, viewed 29 August 2013, <www.migrationalliance.com.au>.

- The sentence at the top of page 4 on redundancies and retrenchments is ambiguous and needs to be clear as to whether the information is to be provided for all occupations in the business or only occupations for which 457 visas are being sought.
- The comment in the final paragraph on page 4 that 'most sponsors will not be adversely affected by labour market testing' is incorrect. Labour market testing will add cost, time delays and uncertainty for 457 visa applicants for no discernible benefit. Instead we assume the Department means to say that most sponsors 'application outcomes' will not be adversely affected, which begs the question as to why this additional red tape is being imposed on employers in the first place.

Conclusion

The BCA recommends that the next government does not proceed with implementing labour market testing requirements for 457 visa applications. Failing that we urge that any new obligations on businesses and visa holders under the labour market testing policy are made simple and clear and are imposed at least cost, in accordance with our recommendations in this submission.

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