

Appendix A

Labour market testing - issues to be clarified
by the immigration department



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1. Exemption based on Australia's international trade obligations

1.1 *International trade obligations*

International trade obligations¹

Section 140GBA applies to standard business sponsors if it would not be inconsistent with Australia's international trade obligations to be required to satisfy the labour market testing condition.

Australia's international trade obligations fall under two categories:

- *World Trade Organisation General Agreement on Trade in Services (WTO GATS) Commitments*
- *Free trade agreements*

1.2 *Exemption based on intra-corporate transferees*

One of the circumstances where labour market testing would not need to occur is²:

"The worker you nominate is a current employee of a business that is an associated entity of your business that is located in an Association of South-East Asian Nations (ASEAN) country (Brunei, Myanmar, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand and Vietnam), Chile, Japan, Korea or New Zealand." (emphasis added)

Specialists as intra-corporate transferees³

Labour market testing is not required if the nominee:

- *Is a current employee of a company that operates in Chile, New Zealand, the Republic of Korea, Japan or any ASEAN nation and*
- *Is being nominated by an associated entity of that business that operates in Australia. (emphasis added)*

1.2.1 *Issue for clarification*

Policy does not clarify whether the employee must have an employment contract with an associated entity of a business located in one of the specified countries or whether the employee would meet the above circumstance if he/she works in a location where the company operates.

It is common for global organisations to send employees on international assignments, where the employee could remain on a home country employment contract, yet work in a different country where the company has operations. The company may not have an established associated entity in the employee's assignment work location. However, the company may merely operate in the assignment country location due to a service or contractual agreement. The use of the word "located" in the information provided on the immigration department's website, conveys a different requirement from the use of the word "operates" in the immigration policy.

¹ PAM3 - MIGRATION REGULATIONS - SCHEDULES > PAM - Sch2 Visa 457 - Temporary Work (Skilled) - Nominations and visa applications > Additional SBS nomination requirement - Labour market testing - 59.1

² Department of Immigration and Border Protection website: <http://www.immi.gov.au/Visas/Pages/457.aspx> - Nominate - Who can nominate - International trade obligations

³ PAM3 - MIGRATION REGULATIONS - SCHEDULES > PAM - Sch2 Visa 457 - Temporary Work (Skilled) - Nominations and visa applications > Additional SBS nomination requirement - Labour market testing - 62.8

1.2.2 *Recommendation*

EY recommends that immigration policy clarify the intention of the international trade obligation and whether an intra-corporate transferee employed by an associated entity located in one of the listed countries, but work in a different country where the business operates would meet this exemption.

1.3 *Exemption based on establishing a business in Australia*

Another circumstance where labour market testing would not need to occur is⁴:

"Your business currently operates in a World Trade Organisation member country and is seeking to establish a business in Australia, where the nominated occupation is listed below as an "Executive or Senior Manager".

(emphasis added)

*Intra-corporate transferees*⁵

"An intra-corporate transferee is an employee of a business that is established in a World Trade organisation member country, or a country with whom Australia has a trade agreement which includes this category of entrant, who is transferred by that business to fill a position in a branch of that business which is lawfully operating in Australia.

Intra-corporate transferees are a broad category of entrant, and can be either an executive, senior manager or specialist..." (emphasis added)

1.3.1 *Issue for clarification*

This scenario provides exemption from labour market testing if a business operates in a World Trade Organisation member country and appoints an executive or senior manager to establish a business in Australia. However, policy seems to limit the intention of the fair trade agreement scenario to intra-corporate transferees transferred to Australia to fill a position in a branch that is lawfully operating in Australia.

There are two main ways to establish a business in Australia:

1. Establishing a branch office by registering the foreign company in Australia, or
2. Establishing a subsidiary.

It is common for foreign companies to consider the option of establishing a business in Australia by way of a branch or subsidiary, taking into account compliance obligations under Australian laws including corporate and tax laws. The legal structure of the business established in Australia should not limit the company's ability to claim exemption from labour market testing under this scenario.

⁴ Department of Immigration and Border Protection website: <http://www.immi.gov.au/Visas/Pages/457.aspx> - Nominate - Who can nominate - International trade obligations

⁵ PAM3 - MIGRATION REGULATIONS - SCHEDULES > PAM - Sch2 Visa 457 - Temporary Work (Skilled) - Nominations and visa applications > Additional SBS nomination requirement - Labour market testing - 62.3

1.3.2 *Recommendation*

EY recommends that immigration policy clarify the intention of the international trade obligation and whether an intra-corporate transferee appointed for a role correlating to an Executive or Senior Manager occupation to establish a business in Australia can fill a position in a branch or newly established subsidiary.

1.4 *Exemption based on having worked at least two years in Australia*

Another circumstance where labour market testing would not need to occur is⁶:

"The worker you nominate is a citizen of a World Trade Organisation member country and has worked for you in Australia on a full-time basis for the last two years"

Specialists with 2 years employment in Australia⁷

"Specialists are persons who have trade, technical or professional skills who have been nominated by either an Australian or overseas business following two years full-time employment in Australia with the same nominating employer. Labour market testing is not required if the nominee is:

- ▶ a citizen of a WTO member country (see section 62.2 WTO member countries) and
- ▶ is nominated by an employer who they have worked for in Australia on a full-time basis for 2 years.

1.4.1 *Issue for clarification*

A nominee (who is a citizen of a World Trade Organisation country) has been working for the sponsoring employer (the end user) in Australia through approved on-hire arrangements for the past two years.

Policy does not clarify whether the employment period with the sponsoring employer, being the end user, can be counted for the purpose of meeting the two year full-time employment requirement that would enable an exemption from the labour market testing requirement.

1.4.2 *Recommendation*

EY recommends additional policy guidance to be provided so that full-time employment is understood to include approved on-hire and subcontract arrangements because the end user benefit from the nominee's work through the indirect employment no less than through a direct employment relationship between the nominee and the sponsoring employer.

1.4.3 *Issue for clarification*

A nominee (who is a citizen of a World Trade Organisation country) has been working for the sponsoring employer in Australia through for the past two years as the holder of a secondary subclass 457 visa or some other visa with permission to work.

⁶ Department of Immigration and Border Protection website: <http://www.immi.gov.au/Visas/Pages/457.aspx> - Nominate - Who can nominate - International trade obligations

⁷ PAM3 - MIGRATION REGULATIONS - SCHEDULES - Sch2 Visa 457 - Temporary Work (Skilled) - Nominations and visa applications - 62.6

Policy does not clarify whether this period of employment will be able to be counted for the purposes of the exemption counted for the purpose of meeting the two year full-time employment requirement that would enable an exemption from the labour market testing requirement even though the nominee has not held a subclass 457 visa as the primary sponsored person with the sponsoring employer.

1.4.4 *Recommendation*

EY recommends additional policy guidance to be provided to confirm that the two year full-time employment period is not contingent upon the nominee holding a primary subclass 457 visa with the sponsoring employer for that two year period; the nominee should be able to have held any visa with appropriate work rights.

1.4.5 *Issue for clarification*

Policy does not clarify whether the calculation in determining the two year full-time employment period is based on consecutive or cumulative time; and how periods of leave (including paid or unpaid parental leave) are dealt with.

1.4.6 *Recommendation*

EY recommends that the two year full-time period should be cumulative over a three year period immediately prior to the nomination application and excludes any period of unpaid leave. This would be consistent with the assessment of two year full-time employment under the Temporary Residence Transition nomination stream of the employer nominated permanent subclass 186 or subclass 187 visa pathways (subparagraph 5.19(3)(c)(i)). Exclusion of unpaid leave, should not apply, if the nominee is a person that holds a subclass 457 visa and is approved for a nominated occupation that permits the visa holder to work in positions other than in the business of the nominator. This is also consistent with the assessment of two year full-time employment under the Temporary Residence Transition nomination stream of the employer nominated permanent subclass 186 or subclass 187 visa pathways (subparagraph 5.19(3)(c)(ii)).

1.4.7 *Issue for clarification*

A nominee is a person holding a subclass 457 visa and is approved for a nominated occupation that permits the nominee to work in positions other than in the business of the nominator.

Policy does not clarify whether time spent working for different businesses can count towards the two year full-time employment.

1.4.8 *Recommendation*

EY recommends that the nominee is a person that holds a subclass 457 (Temporary Work (Skilled)) visa on the basis that the person was identified in a nomination of an occupation mentioned in sub-subparagraph 2.72(10)(d)(iii)(B) or sub-subparagraph 2.72(10)(e)(iii)(B), who are visa holders permitted to work in positions other than in the business of the nominator, the two year full-time employment should include cumulative time spent working with the sponsoring company and other businesses recognised by the visa condition 8107 per subclause 8107(3A), which is consistent with the above mentioned sub-subparagraphs.

2. Labour market testing by way of advertisements

2.1 *Immigration department policies*

Satisfying the labour market testing condition⁸

The labour market testing condition is satisfied if the decision maker is satisfied that:

- ▶ *The sponsor has undertaken labour market testing and*
- ▶ *On the basis of the information and evidence provided in relation to the testing, there is no suitably qualified and experienced Australian citizen, Australian permanent resident or eligible temporary visa holder (see section 59.6 Eligible temporary visa holders) readily available to fill the nominated position.*

Advertising⁹

The information relating to the sponsor's attempts to recruit an Australian worker must include evidence of any advertising (paid or unpaid) of the position, and any similar positions. The advertising may have been undertaken by a third party, provided the third party was commissioned or authorised by the applicant to advertise the position. There is no requirement that the applicant must have placed the advertisement themselves.

If an applicant provides a document containing details of any advertising undertaken relating to the nominated position or similar positions, decision makers may consider this requirement met with no further enquiry unless there are indications that the claims have been falsely given or there are other integrity concerns.

Advertising fees¹⁰

If the applicant has included evidence relating to advertising the nominated position, they must also provide details of the fees and any other expenses paid (or payable) for that advertising.

2.2 *Issue for clarification*

Policy does not clarify where the nominator wishes to rely on evidence of paid advertisement whether the sponsor has to keep a record of individual invoices or itemised invoices showing payment made for the corresponding advertisement for the nominated occupation.

2.3 *Recommendation*

EY recommends that a letter of explanation from the company detailing the payment arrangement they have with the recruitment agency should be sufficient to meet the mandatory disclosure of fees or other expenses paid for the advertisement.

EY's clients have advised that they actively engage recruitment agencies as part of their recruitment drive. However, due to the nature and size of their businesses, they receive monthly invoices from the recruitment agency. The invoice would not necessarily itemise each advertisement placed on behalf of the company, nor specify cost of each advertisement placed. As such these companies would not be able to keep a record of actual fees paid for the advertisement associated with the nominated position.

⁸ PAM3 - MIGRATION REGULATIONS - SCHEDULES - Sch2 Visa 457 - Temporary Work (Skilled) - Nominations and visa applications - 59.5

⁹ PAM3 - MIGRATION REGULATIONS - SCHEDULES - Sch2 Visa 457 - Temporary Work (Skilled) - Nominations and visa applications - 60.2

¹⁰ PAM3 - MIGRATION REGULATIONS - SCHEDULES - Sch2 Visa 457 - Temporary Work (Skilled) - Nominations and visa applications - 60.3

2.4 *Issue for clarification*

Policy does not clarify whether the advertisement should be in the same geographical location as the nominated position.

2.5 *Recommendation*

EY recommends that an advertisement placed in the 12 months prior to nomination application should be accepted, regardless of the specific geographical target audience, provided the target audience covers the geographical location of the nominated position. Section 140GBA and subsections (5) and (6) of the Migration Act 1958, specifies the sponsoring company at minimum must provide two particular information to show attempts to recruit suitably qualified and experienced Australian citizens or permanent residents. Information on the geographical target audience is not mandatory information specified by the legislation.

2.6 *Issue for clarification*

Policy does not clarify whether sponsoring companies are required to keep evidence of labour market testing for a particular period of time, and if so, for how long. Further, policy does not clarify whether monitoring inspectors will request evidence of labour market testing at time of monitoring.

2.7 *Recommendation*

EY recommends that record keeping of labour market testing evidence is a decision for each sponsoring business to the extent that they comply with all Australian legislated record keeping requirements. Section 140GBA of the Migration Act 1958 details the labour market testing condition to be met for a nomination by a standard business sponsor. The legislation does not specify a record keeping requirement for evidence of labour market testing. Subregulation 2.82(3) regarding the sponsorship obligation to keep records, does not list evidence of labour market testing as being a kind of record the sponsor must keep.

3. Nomination only application by same sponsoring company

3.1 *Legislation*

Labour market testing – condition¹¹

Scope

(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.*

3.2 *Issue for clarification*

Policy does not clarify whether a nomination only application would be exempt from the labour market test where an existing subclass 457 visa holder is promoted as a result of natural career progression and the duties of the new role warrants classification as a different occupation.

3.3 *Recommendation*

EY recommends that the nomination application should be exempt from labour market testing if it is a nomination only application by the same sponsoring company but it is nominating a different nominated occupation, due to career progression or promotion in the natural course of the nominee's career development within the sponsoring company. A letter of support confirming the promotion or career progression should be sufficient to warrant the exemption from labour market testing. This is to recognise that organisations have structured career progression or promotion processes and the immigration department should not impose labour market testing on such circumstances.

3.4 *Issue for clarification*

Policy does not clarify whether a nomination only application would be exempt from labour market testing where the new nomination application propose to amend the salary for an existing subclass 457 visa holder, but no change in the nominated occupation.

¹¹ MIGRATION ACT - PART 2 - CONTROL OF ARRIVAL AND PRESENCE OF NON-CITIZENS - Division 3A - Sponsorship - Section 140GBA

3.5 *Recommendation*

EY recommends that the nomination application should be exempt from labour market testing if it is a nomination only application by the same sponsoring company and it is nominating the same nominated occupation, but proposed to amend the salary. This is to recognise change of salary would be assessed under the market salary requirement. Labour market testing should not be required, as the nomination only application does not propose to nominate a different occupation.