Treaties Committee

Inquiry: Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China

July 2015

Submission by the Migration Council Australia

The Migration Council Australia (MCA) is an independent, non-partisan, not-for-profit body established to enhance the productive benefits of Australia's migration and humanitarian programs. The MCA welcomes the opportunity to comment on the components of the Chinese-Australian Free Trade Agreement (ChAFTA) that relate to immigration policy. These include:

- Chapter 10: The Movement of Natural Persons
- The Side Letter on Skills Assessment and Licensing
- The Memorandum of Understanding on an Investor Facilitation Agreement.
- The Memorandum of Understanding on a Work and Holiday Visa arrangement.

This submission is made in the context of significant community concern over the elements of ChAFTA that relate to labour mobility. It is our contention that many such concerns relate to the technical nature of migration related FTA provisions and a lack of understanding of the existing regulatory framework.

The MCA notes that migration related clauses have become a standardised element of free-trade agreements, reflecting the nexus of linkages between the movement of people and the flow of trade. Such clauses do not seek to prioritise migrants over Australian workers in the labour market, rather the emphasis is on cultural connections and skills transfer.

While the MCA has sought further clarification on several matters, there does not appear to be clauses in ChAFTA Chapter 10, the side letter on skills assessment and licensing or either Memorandum of Understanding that will prioritise potential Chinese migrants workers over Australian workers in the labour market. The following sections outline our understanding of the context and effect of the immigration related provisions.

Chapter 10: The Movement of Natural Persons

This section removes the requirement to labour market test under the 457 visa program where Chinese citizens are being sponsored. The clauses contained in ChAFTA are similar to previous Free Trade Agreements and the clauses do not allow employers to sponsor unskilled workers or those who cannot speak English. Importantly, ChAFTA does not affect the promotion of Australian residents as a priority in the labour market as the requirement to provide

market salary rates remains central for all future 457 visas granted to Chinese citizens.

The specific provision in ChAFTA precluding labour market testing reads:

Article 10.4.3: “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.”

This is very similar conceptually to the Japanese-Australian Free Trade Agreement:

Annex 10.1.2: “For the categories of specific commitments in Part 1 of this Annex Australia shall not impose or maintain any limitations on the total number of visas to be granted to natural persons in the form of numerical quotas or the requirement of an economic needs test.”

The Migration Council Australia understands these clauses do not constitute a broad change to Australian immigration law.

Rather, these clauses prevent the act of labour market testing being mandated for employers who sponsor Chinese (or Japanese) citizens without preventing current and/or future governments from changing program settings for the 457 visa program.

For example, removing occupations from the Consolidated Sponsored Occupation List or increasing the Temporary Skilled Migration Income Threshold would both be possible and do not constitute an ‘economic needs test’ or ‘other procedure of similar effect’ as defined under ChAFTA. For example, the Ministerial Advisory Council on Skilled Migration is currently undertaking a review of the Consolidated Sponsored Occupation List. This is occurring with the Japanese-Australian Free Trade Agreement and Annex 10.1.2 already in place.

More broadly, labour market testing was abolished in 2001. This followed a determination that such the regulation was ineffective at meeting its intended goal. Malicious employers could easily sidestep such regulation while the majority of employers who acted in good faith were burdened with administration proving the job advertisement requirement.

In 2009, sweeping changes to the 457 visa program were introduced. At the heart of these changes were pricing mechanisms that made hiring an employee on a 457 visa more expensive than an Australian. These reforms did not include a mandated labour market test. Rather the focus was on developing more effective methods to prioritise Australians over migrant workers.

When labour market testing was reintroduced in 2013, most occupations remained exempt. Occupations now included for labour market testing are mostly trades-based as well as nurses and some engineering occupations.

ChAFTA will remove the requirement for employers to produce a job advertisement where Chinese citizens are being sponsored on a 457 visa. Employers remain lawfully required to pay market salary rates and pay above a minimum salary threshold. Workers in these positions are required to show a proficient level of English and hold the relevant skills and/or qualifications. Employers will not be able to hire in positions that are not designated as eligible occupations.

From our analysis the likely effect of ChAFTA on the 457 visa program will be small and positive. As at September 2014, there were 6245 Chinese citizens on primary 457 visa holders in Australia. Of these, the Migration Council estimate about 1,150 would have been subject to labour market testing as they fall into non-exempt occupations. These migrants represent approximately one per cent of the 457 visa program.

To reiterate, Chinese citizens on 457 visas under ChAFTA will still require English proficiency and sponsorship under standard terms and conditions of the 457 visa program, including market salary rates and a wage threshold. In effect, those elements of the 457 regulatory framework that have been shown to be most effective in preventing employers from preferencing overseas workers will still apply.

It should be noted that the Migration Council Australia has previously recommended labour market testing for skill level 1 to 3 occupations in the 457 visa program be abolished completely. This was also recommended by the independent review into the 457 visa program, led by Mr. John Azarias in 2014.

The Side Letter on Skills Assessment and Licensing

This section removes a mandatory skills assessment for Chinese citizens applying for a 457 visa in certain occupations.

All 457 visa applicants are required to demonstrate both a “genuine intention” to perform the job they are sponsored for and present “the skills and experience” necessary to perform the job. The provisions in ChAFTA will not remove these requirements.

There are a number of methods to satisfy these requirements. The main method is submitting certified copies of relevant qualifications, previous licences and/or an employment history, including references. An alternative method is a mandatory skills assessment conducted by a registered training organisation on behalf of Trades Recognition Australia.

In the “Side Letter on Skills Assessment and Licensing” the Australian government commits to removing current mandatory skills assessment for a

limited number of occupations where Chinese citizens applying for the 457 visa.

Instead, future visa applicants will be required to satisfy their genuine intention and previous skills and experience in a manner deemed fit by the visa processing officer, likely by providing certified copies of relevant qualifications and/or past experience. This is in line with the vast majority of visa applicants under the 457 visa program.

The Migration Council Australia supports the removal of mandatory skills assessment for Chinese applicants of 457 visas. Mandatory skills assessments are based on the premise that the Australian government has concerns about the standards of formal qualifications from certain countries. The full list of countries whose citizens are subject to these assessments is: Brazil, China (including Hong Kong and Macau), Fiji, India, Papua New Guinea, Philippines, South Africa, Thailand, Vietnam, Zimbabwe.

Removing this obligation signals Chinese qualifications will be treated in the same manner as other countries, such as the United Kingdom, recognising the continuous improvement in the Chinese formal education sector and the growth in the maturity of the Chinese labour market.

The Memorandum of Understanding on an Investor Facilitation Agreement

This section establishes a framework for investors in projects valued over $150 million to negotiate concessions from the standard 457 visa program. Importantly, while the MoU was signed alongside ChAFTA it is wholly distinct from the formal trade agreement. The MoU relies completely on existing legislation and regulation. Further, the IFA process rests on ministerial discretion and the MoU does not compel the Minister for Immigration to sign such an agreement that is not in the national interest.

The Migration Council Australia sees no legislative barriers to an Investor Facilitation Agreement (IFA) being signed prior to ChAFTA passing the Parliament. Therefore the IFA should not be conflated with the formal text of ChAFTA given they are separate documents.

The Migration Act lays out broad powers for the Minister. One of these powers is the ability to sign contracts with individual companies, establishing concessions from the standard 457 visa program based on need. This is designed to ensure, after other options have been exhausted, employers in need can hire migrants in semi-skilled occupations to maintain and facilitate economic activity. Examples include agreements for seasonal ski work, regional meat processing factories and the resource sector.

IFAs will be established via these contracts, known as labour agreements. Any government has the ability to identify a set of circumstances where labour agreements are required and what concessions will be agreed to. Ministerial discretion is the key procedural element of labour agreements and the IFA appears to rest on similar powers (MoU Clause 4).

The key section of the MoU is clause four:

> "The areas which will be subject to negotiation between DIBP and the project company in respect of the eligible project will include:
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> (a) the occupations covered by the IFA project agreement;
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> (b) English language proficiency requirements;
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> (c) qualifications and experience requirements; and,
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> (d) calculation of the terms and conditions of the Temporary Skilled Migration Income Threshold (TSMIT)."

Subsection 4(a) is limited to Skill Level 1-4 occupations under the Australian New Zealand Standard Classification of Occupations (ANZSCO). This means unskilled Skill Level 5 occupations are not subject to inclusion in future IFAs.

This is the skill level equivalent of compulsory secondary education or an AQF Certificate 1. This ensures existing Australians and migrants in the labour market in skill level 5 occupations or those seeking work in such occupations, such as those who have not attended or completed higher education, will be exclusively eligible for any relevant employment on an IFA-certified project.

Subsection 4(a) is based on previous policy conventions established by multiple governments. Many labour agreements provide the pathway for employers to hire 457 visa holders in skill level 4 occupations not available under the standard 457 visa program. This is neither new nor noteworthy. For example, a new occupation – the 'Skilled Meat Worker' – was created for abattoirs in regional Australia and is based on a skill level 4 AQF standard.

Subsection 4(b) and 4(c) are similar. For example, many labour agreements have outlined a concession on English language proficiency for 457 visa holders. This concession is determined through negotiation and allows the Minister for Immigration the discretion to grant a concession or enforce standard visa program requirements.

Subsection 4(d) is the most important as it relates to wages. The Migration Council Australia firmly supports the regulation of market salary rates to determine the wages of 457 visa holders. Market salary rates ensure employers cannot undercut existing wages in the labour market.

The Migration Council Australia does not support a lower salary threshold however consideration should be provided as to how an employer may meet the threshold, in terms of an employment package worth $53,900 (the current salary threshold). Our understanding of subsection 4(d) is that the 'terms and

conditions' would include the threshold itself. Clarification of this point would assist the public in better understanding the detail of the MoU.

Further, the Migration Council Australia requests that the government clarify whether labour market testing can occur for an IFA or whether this is precluded given Chapter 10 of ChAFTA as labour market testing is not referenced in the MoU. Standard labour agreements normally call for some type of economic needs evidence.

The Migration Council understands Chapter 10 of ChAFTA relates solely to the standard 457 visa program (skill level 1-3 occupations) and does not extend to potential skill level 4 occupations to be included in an IFA.

The first sentence of clause five, "The project company may be asked to provide additional information by DIBP in respect of its requests for concessions in the above areas", infers that additional information may be requested by the government, including on matters such as labour demand and economic need.

While the Migration Council Australia advocates the abolition of labour market testing for the standard skill level 1 to 3 occupations in the 457 visa program, there is merit to the argument that skill level 4 occupations should be preceded by a requirement to demonstrate the need for labour in some form. This is as semi-skilled and unskilled work is more precarious and has traditionally not been seen as the domain of immigration policy.

To reiterate, an IFA could be signed tomorrow if due diligence had occurred. Any investor – regardless of the country of origin - for any project can approach the Minister for Immigration with a proposal for a labour agreement seeking concessions on the 457 visa program. The key point in relation to the IFA is that ministerial discretion still remains. The MCA understands that the MoU does not compel the Minister to sign a contract that is not in our national interests.

The MoU for Investor Facilitation Agreements rests on existing legislation and regulations and importantly, all direct employers under the IFA will "be required to comply with applicable Australian laws, including minimum wage, workplace law, work safety law and relevant Australian licensing, regulation and certification standards."

The Memorandum of Understanding on a Work and Holiday Visa arrangement

This section establishes an agreement for up to 5000 eligible Chinese citizens to obtain a Work and Holiday visa (subclass 462) each year.

The Migration Council Australia supports the intention of this agreement, as the expansion in the number of eligible countries is positive for Australia's immigration framework. This agreement is particularly encouraging as Chinese citizens are one of the largest groups of migrants to Australia yet did not previously have access to this pathway.

However it appears there is a lack of reciprocity for Australian citizens to 'work and holiday' in China. This is a disappointing given traditionally these agreements are reciprocal in nature. It would be lamentable if this MoU established a precedent extended to future negotiations.

Finally, the Migration Council Australia notes there are concerns about the Work and Holiday and Working Holiday programs as they relate to the labour market, particularly in rural areas. Supporting the establishment of a new Work and Holiday visa arrangement does not imply the current policy framework for subclass 417 and 462 visas is not in need of further regulation. The Migration Council Australia recommends the primacy of cultural exchange, not labour market considerations, remain at the core of the both visa categories, including for future Chinese participants.

Conclusion

The Migration Council Australia does not believe migrants should be prioritised over Australian workers. It is our belief the clauses of ChAFTA and associated documents do not place migrants above Australian workers in the labour market. In particular, the formal text of ChAFTA appears consistent with previously signed Free Trade Agreements.

Importantly, ChAFTA relies on existing visa pathways to meet Australia's obligations. The 457 visa program will meet the bulk of these obligations and this program contains well established mechanisms, such as a price signal, to ensure Australian wages and conditions are not undermined by temporary migrants. The price signal includes the provision of market salary rates and the temporary sponsored migrant salary threshold.

There are parts of visa programs such as the 457 visa program and the work and holiday program that should be considered and subject to change. However this is a distinct debate from the Chinese-Australian Free Trade Agreement.

All visa applications for Chinese citizens will remain subject to standard regulation under the Migration Act, whether this be market salary rates, the temporary sponsored migrant income threshold, English language proficiency requirements or eligibility criteria for work and holiday visas.

Further, when participating in the Australian labour market, all Chinese citizens on either a subclass 457 or 462 visa will remain subject to the Fair Work Act and all other relevant domestic legislation governing the labour market.