

23 November 2015

The Hon Andrew Robb, AO, MP
Minister for Trade and Investment
PO Box 6022
CANBERRA ACT 2600

Sent via email: Andrew.rob主.mp@aph.gov.au

Dear Minister,

Re: Trans Pacific Partnership Agreement

We write to you seeking clarification on the impact of the recently concluded Trans-Pacific Partnership agreement (TPP) on current labour market testing requirements under the *Migration Act 1958*. More specifically we seek a guarantee from you that all workers and all occupations that are currently covered by labour market testing will remain subject to labour market testing once the TPP comes into force.

These are matters of critical importance for our members and for Australian workers. Australian workers deserve a guarantee that they will have first access to Australian jobs, through a labour market testing obligation on employers to provide evidence they have made all genuine efforts to find a suitable Australian worker before they employ a temporary overseas worker. This is particularly important in light of persistently high levels of unemployment and ongoing job losses across the country.

Our consistent position on these matters is that Australia should not be entering into free trade agreements that trade away the right of the Australian Government, and Australian community, to require that labour market testing occurs.

However, our preliminary analysis of the text (please see attachment) of the labour mobility provisions in Chapter 12 and related annexures suggest that, once again, the Australian Government has made a free trade agreement that opens up temporary visa entry to a wide range of skilled workers ('contractual service suppliers') from overseas, without the right to insist on labour market testing before employers fill those positions. At best, the status of labour market testing under the TPP is unclear; hence our request for clarification.

It appears also that Australia has agreed to provide access to a broader range of occupations than it has been able to secure in terms of reciprocal access for Australian workers in the other TPP countries. Again, we seek clarification on this point.

We look forward to your response on these important matters.

Yours Sincerely,

Ged Kearney
President ACTU

Attachment –Trans Pacific Partnership Agreement

Labour Market Testing

The critical question in assessing chapter 12 of the TPP is what it means for Australia's right to impose labour market testing in support of Australian jobs.

As you know, while some 457 visa occupations in high level managerial and professional occupations are already exempt from labour market testing, labour market testing currently applies to a wide range of occupations in the trades, nursing and engineering professions. It is vital that this requirement for labour market testing is not removed as a result of the TPP, as it been already under a number of other free trade agreements Australia has entered into, including CHAFTA.

On our reading of the TPP it is likely that Australia has committed to removing labour market testing.

While the TPP does not have a catch-all, CHAFTA-style provision that expressly prohibits countries from imposing labour market testing, we are concerned for example that Australia's commitments, as outlined in annex 12-A of the TPP, do not identify any conditions or limitations on temporary entry, apart from length of stay.

By contrast, other countries such as New Zealand and Brunei have specified that an economic needs test could or will be applied to the entry of overseas workers. Similarly, Peru reserves its right to impose labour market testing if another country is doing so. Australia has made no such provision in its TPP commitments.

At the other end of the spectrum, Canada has specified that it will not impose 'labour certification tests'. Significantly, Canada will only extend its commitments on temporary entry to those TPP countries that do not reserve their right to impose any type of economic needs test, labour certification tests or numerical restrictions.

The fact that Australia has extended its temporary entry commitments to Canada and is getting reciprocal access from Canada indicates that Australia will not be imposing labour market testing, at least for employers taking on Canadian nationals, and potentially for nationals from other parties to the TPP.

Finally, the explanatory materials from DFAT do not provide any certainty or comfort on these issues. For example, the DFAT materials confirm that Australia's commitments will be implemented through the 457 visa program. It sets out a number of requirements that this entails – the requirement for employers to sponsor the workers, meet market salary rates, and offer conditions required under Australian workplace law and meet minimum qualification requirements – but the requirement for labour market testing is a notable omission.

The DFAT guide also emphasises that Australia will be getting the benefits of reduced barriers and temporary access to other countries without being subject to quotas or economic needs tests. However, it does not make clear what Australia has offered in return. For example, if labour market testing has not been removed, what exactly are the

commitments Australia has made to other countries in terms of ‘reduced barriers to labour mobility’ and ‘preferential temporary access’?

It is arguable then that Australia has agreed to an implied prohibition on labour market testing under the TPP, albeit not an explicit one. This is how Australia has interpreted similarly worded commitments in other trade agreements, notably with South Korea. Our TPP trading partners would reasonably expect the same interpretation to apply.

We also note that in the event Australia has protected labour market testing under the TPP, this would be virtually the only free trade agreement where it has done so; a welcome, albeit surprising, result if that is the case.

The onus is squarely on the Government now to confirm the status of current labour market testing requirements under the terms of the TPP. Unless the Government can provide a guarantee that current labour market testing obligations will not be removed under the TPP, it leaves open the possibility that no labour market testing will be required before Australian jobs can be filled by temporary overseas workers from each of the TPP countries.

If the Government claims that labour market testing will remain, will it end all uncertainty on this issue by guaranteeing this requirement in primary legislation?

Will the Government also guarantee that we will retain the right to conduct labour market testing under any trade agreement with India that is currently being negotiated?

TPP commitments on temporary entry: contractual service suppliers

We also have concerns and questions about the scope of Australia’s labour mobility commitments and what categories of workers they apply to.

Article 12.4 in chapter 12 provides for each party to set out the commitments it makes with regard to temporary entry of business persons and to specify the conditions and limitations for entry and temporary stay for each category of business person it specifies. (We note that the US makes no commitments at all under this chapter; the only TPP country to effectively opt-out of this chapter).

However, despite the title of the chapter having the seemingly benign appearance of dealing simply with the movements of ‘business persons’, the commitments made under the TPP appear to cover the temporary entry of skilled workers in traditional employment relationships.

In the case of Australia, its commitments to grant temporary entry extend beyond business visitors and high-level independent executives and include the category of ‘contractual service suppliers’. This category is defined expansively to include all ‘business persons’ with trade, technical and professional skills. Essentially, this commitment appears to cover temporary entry for all skilled occupations under the 457 visa program (the DFAT

explanatory materials confirm these commitments will be implemented through the 457 visa program).

Australia has offered these temporary entry commitments to the TPP countries that make offers under similarly titled categories.

However, it appears that Australia has been more accommodating than other countries in terms of who these commitments extend to i.e. it opens up temporary entry to the Australian labour market for workers from countries that do not provide equivalent access for Australian workers.

For example, while Australia's commitments on contractual service suppliers cover all trade, technical and professional occupations, most other countries that make commitments under this category define contractual service suppliers much more narrowly (e.g. Chile define it as a business person engaged in a specialised occupation; Japan specify the contractual service supplier must be employed by an overseas company or be in advanced, research positions; Malaysia define it as a specialist/expert who possesses knowledge at an advanced level and confine it to professional services, education and financial services; Vietnam only includes employees of a company with a service contract in Vietnam).

In the case of New Zealand and Canada, they only offer temporary entry to professionals, or professionals and technicians, but Australia has deemed these categories to be equivalent to the category of contractual service suppliers.

In practical terms, this means Australia is offering preferential temporary entry arrangements for tradespersons from across the TPP countries, but Australian tradespersons are not being given similar, reciprocal access.