Submission

By

To the

Transport and Industrial Relations Select Committee

On the

Immigration Bill 2007

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SUBMISSION BY BUSINESS NEW ZEALAND[1] ON THE IMMIGRATION BILL 2007
OCTOBER 2007

1. INTRODUCTION

1.1. Business New Zealand welcomes the opportunity to comment on the Immigration Bill 2007 [hereafter referred to as 'the Bill'].

1.2. Immigration plays a pivotal role in supporting economic growth by:

a) Growing the nation's labour force and consumer markets;
b) Offsetting skills and labour shortages; and
c) Promoting technology transfer, by bringing in new skills, knowledge and experiences into New Zealand firms.

1.3. All three contributions are likely to take on greater importance, as New Zealand's labour market ages and international competition for skills and talent increase. We therefore endorse moves to modernise New Zealand's immigration legislation and support the broad thrust of the Bill.

1.4. We do, however, have concerns with the changes to employer obligations proposed in the Bill [section 313] which we consider are disproportionate, compliance-heavy and may create resentment in the workplace. We are also concerned that the lack of clear and fixed rules about employers' obligations and defences in section 313(3) will make compliance with the law difficult and costly for businesses. This submission therefore focuses on these aspects of the Bill.

1.5. Business New Zealand requests the opportunity to be heard by the Select Committee in due course. Please contact Nicholas Green (04 496 6566; ngreen@businessnz.org.nz) to organise a suitable time.

2. SUMMARY OF RECOMMENDATIONS

2.1. Business New Zealand **recommends** that:

a) section 313(3) be reworked to more clearly state what employer obligations and defences are, along the lines of section 39 of the current Immigration Act.

Such an amended section 313(3) might look like this:

"It is a defence to a charge under subsection (1)(b) that the employer did not know that the person was not entitled to do the

[1] Background information about Business New Zealand is attached as Appendix 1

work; and took reasonable steps and due diligence to ascertain whether the person was entitled to do the work.

An employer is deemed for the purposes of this section to have taken reasonable steps and due diligence if the employer holds:

(a) a tax file number [or tax code] *statement issued by the Inland Revenue Department that states the person is entitled at the time of employment under the Immigration Act to undertake employment in the employer's service; or*
(b) any other documentation that has been deemed to be suitable identification for the purposes of this section by the Department."

b) the Government be invited to instruct the Inland Revenue Department, Department of Labour/Immigration Service and any other relevant agencies to establish processes for data-sharing, so that official tax code or file number statements can also provide immigration status information to employers.

3. COMMENT

3.1. Under the current Immigration Act, employers have a reasonable excuse against a charge of allowing "*a person who is not entitled under this Act to undertake employment in the employer's services to undertake that employment*" where "*the employer concerned did not know that the person was not entitled to undertake that employment and holds a tax code declaration –*

a) *that states that the person is entitled under the Immigration Act 1987 to undertake employment in the employer's service; and*

b) *that was signed by the person before or when that employment began.*"

3.2. Section 313(3) of the new Bill retains employer ignorance as part of the defence against charges of hiring people without an entitlement to work, but replaces the holding of a tax code declaration with a generic requirement on employers to take "*reasonable precautions*" and exercise "*due diligence to ascertain whether the person was entitled to do the work.*"

3.3. It is understandable and entirely appropriate that Government should seek to minimise the number of people working illegally in the community. However, as with all enforcement mechanisms, it is important that policy responses:

- are proportionate to the problem; and

- do not create undue negative consequences;

3.4. We are concerned that the proposed new employer obligations outlined in the Bill may not meet either of these standards, and that the lack of a clear definition of "reasonable precautions" or "due diligence" in the law may create a significant level of uncertainty and risk for employers.

Proportionality

3.5. Although the Bill is designed very much as a framework law, with the ultimate detail of regulations left to Ministers to determine, the parameters of the new employer obligations are clear from the 'Employers' section of the 'Business compliance cost statement' in the Bill:

"In the fruit-picking industry, a recruitment or contracting agency could include a check box about entitlement to work on registration forms and request proof of that status from a prospective employee. They could hold that proof on file.

Where an employee presented a resume with details of continuous educational qualifications and previous employment in New Zealand, an employer could check qualifications and references, and keep a record of this on file.

Retaining a copy of a New Zealand birth certificate, passport, or citizenship paper would generally be evidence of reasonable steps to establish a person was a citizen."

3.6. While the compliance cost statement casts these new obligations as "responsive to a range of different employment scenarios", the underlying requirement for all these scenarios appears to be that employers should:

- ask most or all employees – foreign or not – to provide evidence of their entitlement to work in New Zealand; and
- store that evidence for inspection by Immigration/Labour Department officers.

3.7. In our discussions with the Labour Department, officials have characterised seeking evidence of work entitlement from all potential employees as 'best practice' for all firms, but expected behaviour for 'higher-risk' industries, which would likely include:

- Manufacturing
- Accommodation, cafes and restaurants

- Horticulture;
- Viticulture;
- Hospitality;
- The sex industry;
- Domestic cleaning services; and
- Agriculture, forestry and fisheries.

3.8. Given that:

- In July 2007, the manufacturing sector employed 266,700 people;
- Agriculture, forestry and fisheries employed 151,200 in the same period; and
- Statistics New Zealand's Linked Employer-Employee Dataset identified 98,930 filled jobs in the accommodation, cafes and restaurant sector in March 2006,

something in the vicinity of 500,000 employees (and their employers) could be affected by the new immigration requirements – approximately 25% of the total workforce. Yet at no point in the debate around these new employer obligations has there been a clear and defendable statement of the scale of illegal employment in New Zealand.

3.9. In discussions with Business New Zealand, officials have claimed that "up to 242,000" people "could potentially be working in breach of permit conditions". Given that there are around 2.14 million people currently in employment, this would suggest that 1 in 9 members of the labour force are working illegally. This figure seems improbable. When pushed, officials acknowledge they can only confirm that around 15,000 people are definitely working unlawfully – less than 1% of the labour market. The costs of the proposed new employer obligations therefore seem significantly disproportionate.

3.10. Moreover, given that the Labour Department/Immigration Service has a very limited inspection capacity, most employers are unlikely to ever have the records of their employees' work entitlement checked. The time, space and hassle involved in copying and storing employees' records will therefore be an unnecessary cost for most firms.

Undue negative consequences

3.11. The Bill's 'Statement of net benefit of the proposal' notes that:

"There is a risk that removing the sighting of an IR 330 form as a reasonable excuse for employers could increase discrimination against persons who employers think may be non-citizens."

3.12. This is certainly a plausible outcome, as employers will have to grapple with the question of how to identify "non-citizens" or illegal workers in an environment where 1 in 5 people of working age were born offshore (1 in 3 in Auckland). New Zealand is now very much a polyglot country where the possession of an obviously foreign accent is not evidence of a lack of entitlement to engage in paid employment.

3.13. What is also possible is that employers, seeking to avoid charges of discrimination, will ask all potential employees – foreign or not – for evidence of their entitlement to work. This is likely to create anger from New Zealand citizens or permanent residents who have every entitlement to work and who are likely to deeply resent the implication that they do not. Asking all potential employees would simply involve returning to a former situation where, to avoid breaching the Human Rights Act and denying employment on the basis of a subjective judgement, the then Employers' Federation advised employers to do just that.

3.14. The situation is further complicated by the fact that many citizens or residents who are entitled to work will not have on hand the paperwork required to demonstrate that entitlement. Moreover, if employers were to seek evidence in the form of a birth certificate, that might, in some circumstances, open them up to charges of age discrimination.

3.15. Employers will effectively be caught between a rock and a hard place. If they try to minimise disruption by selectively asking for evidence of entitlement to work, they risk charges of discrimination. But if they decide to play it safe by asking all employees for evidence of work entitlements, they risk angering new or current staff.

4. ALTERNATIVE APPROACHES

4.1. Our preference would be that the law remains as clear and specific as possible about employers' obligations and defences rather than shift to a rather vague framework model, under which the "goalposts" can be shifted at any point. Clear and fixed rules:

- provide greater security for employers and officials;
- reduce unnecessary costs;
- are more likely to be understood by employers; and hence
- should lead to greater compliance with the law.

4.2. Business NZ acknowledges that the current use of tax code declarations as a "reasonable excuse" may not be optimal, as the declarations do not always provide up-to-date information on an individual's work entitlement. But basing immigration requirements upon the tax code was an elegant policy response, in that it leveraged

off an existing compliance process rather than inventing a new one. The proposed new DoL/Immigration Service computer database, which employers could log into to check a prospective employee's status, is less helpful, as it adds an additional layer to the employment process.

4.3. Moreover, the Immigration Service database would only ever be a partial 'solution' to the problem, in that it will only include the details of foreign nationals, not New Zealand citizens. New Zealanders from non-traditional backgrounds are likely to still face requests to prove their entitlement to work from employers who want to avoid the risk of prosecution. This (quite rational) behaviour by employers would run counter to the broader social goals of inclusion and respect for diversity.

4.4. Instead of reverting to a blank slate, we think there is potential to resolve many of the issues regarding illegal employment through better inter-agency cooperation. For example, the IRD and Immigration Service could share information, so that the formal tax code or tax file number statement prepared for an individual by Inland Revenue also lists their work entitlement status.

4.5. Use of such a tax code/file system would allow employers to confirm the work entitlement of potential employees in an unobtrusive and non-confrontational manner, thereby avoiding unnecessary tensions and hurt feelings. To ensure that the information provided to employers by prospective employees was current, the tax code/file number statement could also list when it was printed by IRD. Alternatively, an on-line service could be provided to enable employers to check an employee's details against their tax code/file number.

4.6. We note that the current provisions in the Immigration Act which allow employers to use tax code declarations as a 'reasonable excuse' were in fact introduced by Parliament's Foreign Affairs, Defence and Trade Select Committee (FADTC) in 2002, in response to criticisms that the changes to immigration law proposed in the Transnational Organised Crime Bill placed "an unrealistic and costly compliance burden on employers."[2] In our view, the 2007 Bill creates a similar burden and the broad approach introduced by FADTC in 2002 would – with suitable modification and inter-agency cooperation – continue to provide the best solution.

4.7. Business New Zealand **recommends** therefore that section 313(3) be reworked:

- to more clearly state what employer obligations and defences are;

[2] Hon Phil Goff, second reading of the Transnational Organised Crime Bill, 30 May 2002.

- along the lines of section 39 of the current Immigration Act.

4.8. Such an amended section 313(3) might look like this:

"It is a defence to a charge under subsection (1)(b) that the employer did not know that the person was not entitled to do the work and took reasonable steps and due diligence to ascertain whether the person was entitled to do the work.

An employer is deemed for the purposes of this section to have taken reasonable steps and due diligence if the employer holds:

(a) a tax file number [or tax code] *statement issued by the Inland Revenue Department that states the person is entitled at the time of employment under the Immigration Act to undertake employment in the employer's service; or*
(b) any other documentation that has been deemed to be suitable identification for the purposes of this section by the Department."

4.9. This approach would provide both clarity to employers, and flexibility for officials to introduce new forms of evidence as necessary (e.g. if and when the proposed database for employers is introduced).

4.10. We also recommend that the Government be invited to instruct the Inland Revenue Department, Department of Labour/Immigration Service and any other relevant agencies to establish processes for data-sharing, so that official tax code or file number statements can also provide immigration status information.

APPENDIX 1

BACKGROUND INFORMATION ON BUSINESS NEW ZEALAND

Business New Zealand is New Zealand's largest business advocacy organisation.

Through its four founding member organisations – EMA Northern, EMA Central, Canterbury Employers' Chamber of Commerce and the Otago-Southland Employers' Association – and 67 affiliated trade and industry associations, Business NZ represents the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, Business NZ contributes to Governmental and tripartite working parties and international bodies including the International Labour Organisation, the International Organisation of Employers and the Business and Industry Advisory Council to the Organisation for Economic Cooperation and Development.