

Submission

By



To the

Department of Labour

On the

Immigration Act Review

22 June 2006

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**IMMIGRATION ACT REVIEW
SUBMISSION BY BUSINESS NEW ZEALAND
22 JUNE 2006**

1. INTRODUCTION

- 1.1 Business New Zealand recognizes that New Zealand's immigration policy has made, and will continue to make, a huge contribution to our growth as a country. In the framework we have developed to identify the "Seven Pillars of Economic Growth", immigration policy makes a significant contribution to the Skills and Productivity Pillar. ¹ Employers have rated Skills and Productivity as the most important of the seven policy areas. ²
- 1.2 In that same survey of over 1,000 employers, the majority of respondents (82.2%) thought there should be a target for net migration of skilled and talented migrants with good English language skills. Our member organizations continue to stress the importance of migrants having good English language skills.
- 1.3 Immigrants bring skills, expertise, new perspectives and vibrancy to New Zealand's society and economy. Encouraging skilled people from overseas to work here is an effective method of mitigating the skill shortages currently acting as the major brake on business. ³
- 1.4 This review of the Immigration Act is timely. Immigration policy has traditionally been a difficult policy area with Ministers and the Department having to balance a number of competing pressures. Employers (and many other groups) have in recent years expressed frustration at a number of aspects of New Zealand's immigration regime.
- 1.5 Employers rated the Immigration Service in 2005 at just over three out of five in terms of helpfulness. This placed the Service at 12th out of the 16 public service organizations ranked last year. This was a significant improvement as the Immigration Service was rated the least helpful by the same survey in 2004. The negative comments from respondents tended to focus on the lack of clear answers or assistance from the Service. ⁴
- 1.6 Business New Zealand welcomes the Minister's stated desire for an immigration system which is "*responsive to New Zealand's labour market needs with the flexibility to allow for future changes.*" That is closely aligned with business expectations.

¹ "Seven Pillars of Growth", Business New Zealand, June 2005

² "Election Survey Results", Business New Zealand, July 2005

³ "Skills Perspectives", Business New Zealand, February 2006

⁴ "Compliance Cost Survey", Business New Zealand – KPMG, September 2005

- 1.7 The discussion paper correctly notes that the review is occurring at a time where there is greater competition for skills, talent and labour globally. This trend – which we believe will continue and intensify – makes it vital that New Zealand’s immigration policy strikes the right balance.
- 1.8 Business New Zealand welcomes the opportunity to comment on the review of the Immigration Act. We believe the voice of business has to be heard and incorporated into the reshaped Act. The issues of key interest to our members relate primarily to skilled migration and the treatment of employers
- 1.9 This submission is structured into six parts mostly addressing a key section of the discussion document. Answers to a number of “key questions” are provided but must be read in conjunction with the full Business New Zealand comments on the particular section as a number of caveats are included.
- 1.10 The structure of the submission is as follows:
- Summary of Recommendations
 - Part A) 4.1 Establish a single, integrated visa framework
 - Part B) 5.1 Delegation of power to make individual immigration decisions
 - Part C) 5.3 Additional tools for effective decision-making
 - Part D) 10.2 Dealing with people unlawfully in New Zealand
 - Part E) 13 The role of Third Parties
 - Part F) General comments
- 1.11 While the submission structure reflects the order of the review documents, Business New Zealand considers the most important sections of the review as they relate to business to be:
- Part C) 5.3 Additional tools for effective decision-making – in particular, the ability for employers to make or to contribute to immigration decisions.
 - Part E) 13 The role of third parties – in particular, the legislative provisions relating to employer benefits and responsibilities.
- 1.12 Business New Zealand also wishes to flag our interest in being consulted on the consequent changes to immigration regulations and particularly the policy settings which will flow on from this review.
- 1.12 Further information about Business New Zealand is available in Appendix A and on our website – www.businessnz.org.nz

2. SUMMARY OF RECOMMENDATIONS

2.1 Business New Zealand makes the following **recommendations** that:

- (a) New Zealand should move to a simpler, more integrated visa and permit system which uses the single term “visa” and continues to allow for exceptions to the standard requirements.
- (b) The Minister retains the same level of direct responsibility and accountability for positive exceptions to residence policy and that direct appeals to the Minister should gain no advantage over appeals lodged through the proper channels.
- (c) Employers be enabled to make (or at least contribute to) some immigration decisions under an accreditation and accountability system to be developed by the Department of Labour in consultation with the business community.
- (d) As part of the consultation process to develop the accreditation and accountability system, consideration be given to allowing appropriate industry or employer groups to be accredited on behalf of small businesses who otherwise will not be able to access the system.
- (e) The Minister and officials should continue to have discretionary powers to grant permits to people in New Zealand unlawfully – particularly those in gainful employment – and that a system of automatic permit extension be introduced when applications are being considered.
- (f) Legislative authority be developed so that third parties can check the eligibility of persons for public services.
- (g) The benefits and responsibilities of being a sponsor be better outlined and enforced but that a system of immigration sanctions and immigration bonds not be imposed.
- (h) The responsibilities for employers be treated under the revised Immigration Act in a manner consistent with the responsibilities of other third parties so that employers are not unduly singled out.
- (i) The current reasonable excuse of having sighted a tax code declaration be maintained and the legislation not be amended to increase the obligations and penalties on employers further.

- (j) Minor amendments be made to the legislation to clarify carrier obligations but those amendments not include an instant fines regime.
- (k) We acknowledge if New Zealand genuinely wants to attract quality migrants there are broader issues beyond immigration legislation and policy which will need to be addressed.

Part A) 4.1 Establish a single, integrated visa framework

- 3.1 Paragraph 104 of the discussion paper correctly notes that the current system of the exemptions regime is complex. Certainly, feedback from Business New Zealand members indicate that many employers find the immigration system to be difficult and often frustrating to deal with (though many of their issues are at more of a policy or operational level and hence outside the scope of this review).⁵
- 3.2 Business New Zealand believes that the proposal in paragraph 127 of the review document to reduce the number of types of visa will indeed simplify the immigration process for applicants and third parties (including employers).
- 3.3 Such a move would represent an improvement on the current system. While changing to a more integrated system would have some initial costs (as flagged in paragraph 128), a simplified system should actually be cheaper to run over time. Business New Zealand does not believe the Department should proceed on the presumption that costs will necessarily increase.

4.1 Key questions

1 Should the single term “visa” be used for all travel, entry and stay authorization granted to non-citizens?

Business New Zealand: Yes.

2. Should the system continue to allow for exceptions to the standard requirement to have authorisation to travel to, and remain in New Zealand?

Business New Zealand: Yes

Recommendation: That New Zealand should move to a simpler, more integrated visa and permit system which uses the single term “visa” and continues to allow for exceptions to the standard requirements.

⁵ “Compliance Cost Survey”, Business New Zealand – KPMG, September 2005

Part B) 5.1 Delegation of power to make individual immigration decisions

- 4.1 As the review document notes in paragraph 141, decision making is a core function provided for in the Immigration Act.
- 4.2 In relation to the issue of Ministerial decision making, Business New Zealand supports Option A - retention of the status quo.
- 4.3 While the level of ministerial involvement in New Zealand is comparatively high, we consider that it is at an appropriate level for a country of this size. Using the principles identified in paragraph 142 (particularly that decisions be made by the right people and follow transparent, efficient process), we consider it desirable that the Minister keeps the same level of direct responsibility and accountability for decisions as is currently the case.
- 4.4 Business New Zealand does not consider that direct appeals to the Minister should receive any special treatment. Appellants should not be penalized for following the proper process.

5.1 Key questions

1 Should the power to make positive exceptions to residence policy be delegable to selected senior immigration officials?

Business New Zealand: No

Recommendation: That the Minister retains the same level of direct responsibility and accountability for positive exceptions to residence policy and that direct appeals to the Minister should gain no advantage over appeals lodged through the proper channels.

Part C) 5.3 Additional tools for effective decision-making

- 5.1 As noted in 1.11 of this submission, Business New Zealand considers section 5.3 of the discussion document to be one of the key sections of interest to employers.
- 5.2 The section on electronic decision making, while not of direct relevance to employers, appears to make the case that the revised Act should at least provide for decisions to potentially be made electronically in the future. This would seem a sensible policy making decision.
- 5.3 Of far greater direct interest to employers is the proposal in paragraph 226 that employers be able to make some immigration decisions - or at least to contribute more directly to some immigration decisions.
- 5.4 Business New Zealand supports wholeheartedly the development of this proposal. Employers could choose to participate and in return would have to meet accreditation and accountability requirements.
- 5.5 We believe many businesses would enthusiastically join such a scheme. Indeed, organizations such as the Employers and Manufacturers Association (Northern) have been calling for something similar for a number of years.⁶
- 5.6 Clearly, as noted in 241, a policy of involving employers in decision making is not currently developed. Business New Zealand is prepared to work with the Department of Labour to develop the accreditation scheme envisaged in paragraph 242. A great deal of work will have to be done to ensure this process is robust. Work will also have to be done to ensure the system is not overly bureaucratic or a compliance exercise. Costs to employers will have to be kept to minimum if a high level of employer support is to be expected.
- 5.7 Critically, this accreditation system can not just be employers doing checks or administration previously done by the NZIS. Employers need to have a meaningful input into decisions – and the resulting responsibility for them too.
- 5.8 It seems likely that even the best designed accreditation system will be of limited utility for small businesses which will frequently lack the capacity and expertise to gain full accreditation.

⁶ “Skills Perspectives”, Business New Zealand, February 2006

- 5.9 Business New Zealand submits that as part of the development of a robust accreditation scheme (see 5.6 and 5.7 above) serious consideration be given to a scheme where appropriate employer or industry organizations – working perhaps in partnership with the Regional Economic Development Agencies – is able to act on behalf of small employers. It is our understanding that a scheme along similar lines was run by the New Plymouth District Council through Venture Taranaki.
- 5.10 In our opinion, paragraph 244 overstates the risk involved with allowing third party input into decisions. It is hard to see how one or two poor decisions could impact on the “*wider New Zealand national interest*”. We would be hopeful that a system could be devised to pick up any mistakes quickly and see them dealt with both by Government and the business community.
- 5.10 Business New Zealand would also specifically reject the conclusion of the Human Rights Commission that “*delegating responsibility for decision making to non-State actors raises significant concerns about ensuring the application of human rights criteria.*”⁷ We do not accept that involvement from third parties in decision making will necessarily impact adversely on migrant’s human rights providing a robust system is developed.
- 5.11 Indeed, we note that the bulk of the Human Rights Commission publication (“Human Rights Issues in the Review of the Immigration Act”) is spent detailing how the Government is not adequately addressing human rights issues currently. The State actor – it would seem – has no monopoly on ensuring the application of human rights criteria. Employers should not be excluded from involvement in decision making based on these arguments.

⁷ “Human Rights Issues in the Review of the Immigration Act”, Human Rights Commission, May 2006

5.3 Key questions

1 Should legislation provide for decisions to be made electronically in the future?

Business New Zealand: Yes.

2. Should legislation enable some decisions to be made by third parties such as employers and education providers?

Business New Zealand: Yes.

Recommendation: That employers be enabled to make (or at least contribute to) some immigration decisions under an accreditation and accountability system to be developed by the Department of Labour in consultation with the business community.

Recommendation: That as part of the consultation process to develop the accreditation and accountability system, consideration be given to allowing appropriate industry or employer groups to be accredited on behalf of small businesses who otherwise will not be able to access the system.

Part D) 10.2 Dealing with people unlawfully in New Zealand

- 6.1 Paragraph 711 makes the salient point that in 2004/05 up to 4,000 people with work permits may have genuinely forgotten to renew their permits but benefited from the discretionary powers under the Act and were allowed to remain in the country.
- 6.2 In the experiences of many businesses, these people are often well-settled, strong contributors to the economy and society and it is appropriate that some discretion and flexibility is shown to them.
- 6.3 In general, when dealing with people unlawfully in New Zealand who are working, Business New Zealand would support their applications being considered on merit and with more discretion regarding timing issues or technical breaches. A solid work history should count strongly in the applicants favour.
- 6.4 Of the options presented in the review paper, we would support Option B - Status quo plus permit extensions for people who are lawfully in New Zealand when they lodge their application.
- 6.5 We note the risks outlined in paragraph 742. It is important that the system should be designed so that late applications and frivolous applications are not encouraged or rewarded.

10.2 Key questions

1 Do you agree that the Minister of Immigration and delegated officials should continue to be able to grant permits to people in New Zealand unlawfully?

Business New Zealand: Yes.

2. Should permit extensions be introduced for people whose permits expire while their application for a further permit is being considered?

Business New Zealand: Yes – subject to the comments above.

Recommendation: That the Minister and officials should continue to have discretionary powers to grant permits to people in New Zealand unlawfully – particularly those in gainful employment – and that a system of automatic permit extension be introduced for when applications are being considered.

Part E) 13 The role of Third Parties

7.1 Business New Zealand considers ensuring that publicly funded services are only accessed for free by those eligible is central to ensuring the responsible use of taxpayers' money.

7.1.1 We therefore support the proposal to include legislative authority to check immigration status to assess eligibility for publicly funded services.

13.1 Key questions

1 Do you agree that there should be legislative authority to disclose immigration status information to third parties that need to know in order to determine eligibility for public services?

Business New Zealand: Yes.

Recommendation: That legislative authority be developed so that third parties can check the eligibility of persons for public services.

7.2 Paragraph 989 identifies the benefits of allowing employers to act as sponsors. The current legislation limiting sponsorship to natural persons seems needlessly restrictive. Firms should be allowed to be sponsors – as indeed should the Royal New Zealand Ballet and New Zealand Symphony Orchestra.

7.2.1 Business New Zealand is not convinced that paragraphs 990-996 really make a compelling case for change. Of the options provided, Option A (Provide a stronger legislative basis for sponsorship) is preferred as it is less intrusive.

7.2.3 While we support sponsors living up to their responsibilities (particularly when they sponsor people who are essentially unemployable when they arrive), bonds are a clumsy and inefficient way of doing so. They largely presume guilt ahead of the fact and are essentially deadweight costs on good sponsors. They are also likely to deter some sponsors. The paper itself notes the compliance costs involved in paragraph 1015.

7.2.4 Surely the current system must have some ability to prevent those who have a record of breaking their sponsorship responsibilities from becoming a sponsor again. Our understanding is that this can happen through relatively informal means currently.⁸ This seems preferable to the legislative approach in Option B.

⁸ Response to a question at the Stakeholders Dialogue Meeting on the Review of the Immigration Act, Wellington, 12 June 2006

13.2 Key questions

1 Should the legislation provide a stronger basis for sponsorship benefits and responsibilities as outlined?

Business New Zealand: Yes.

2. Should there be specific immigration consequences for failing to meet sponsor obligations as outlined?

Business New Zealand: No - certainly not immigration bonds.

Recommendation: That the benefits and responsibilities of being a sponsor be better outlined and enforced but that a system of immigration sanctions and immigration bonds not be imposed.

7.3 Section 13.3 of the discussion paper deals with employers. As noted in 1.11 of this submission, this section is of particular interest to our members.

7.3.1 Business New Zealand is anxious to ensure businesses are not burdened with additional responsibilities and penalties over and above other third parties simply because they are employers.

7.3.2 It is important to remember that, even with the best intentions, an employer may have less influence over a migrants actions than a family member or individual sponsor.

7.3.3 We would have some concerns that the paper is proposing significant changes to the punitive regime for employers based largely on the Department's inability to obtain any strict liability prosecutions (as acknowledged in 1023).

7.3.4 Business New Zealand would contend that the "reasonable excuse" defence is reasonable and should continue. If an employer can demonstrate that they have taken reasonable steps to determine the legal status of a potential employee, then they should be subjected to a lesser penalty regime if it is subsequently proved the employee was not eligible to work.

7.3.4 Paragraph 1025 notes there is a "high threshold for exploitation offence." We would counter that a high threshold of evidence is entirely appropriate for an offence carrying a sentence of up to seven years in jail. Currently, the exploitation offence carries a higher level of penalty than kidnapping a child, assault with a weapon, grievous bodily harm, being an accessory after the fact to murder or assaulting a police officer.

- 7.3.5 Seven years in jail is also considerably higher than other jurisdictions such as Australia, Canada and the UK where the maximum prison sentence is 2 years.
- 7.3.6 Business New Zealand sees no justification in the review paper's assertion (1025) that there is a risk of *"signaling that employers' obligations to foreign workers are less than those owed to New Zealand citizens and residents."*
- 7.3.7 Again, the case against the status quo appears light and in this instance we would support no change to the status quo.
- 7.3.8 If forced to choose between the options provided in the paper, Business New Zealand would reluctantly favour Option A (stronger legislative basis for employer responsibilities) and would strongly oppose Option B (Introduce employer obligation to check employee status and remove tax code declaration reasonable excuse).
- 7.3.9 Under Option A, we would further oppose the use of a "legislative reminder" as proposed in 1031. Other Acts of Parliament do not use such a device. It is not proposed to use such a device in any other part of the revised Immigration Act. Such a reminder targeted solely at employers would be redundant at best, insulting at worst.
- 7.3.10 We would also question the need to include the specific provisions outlined in paragraphs 1034 and 1035 into legislation. This does not seem to be proposed for other third parties (such as sponsors or education providers) and appears to run counter to the flexibility desired just two paragraphs earlier in 1032. It would seem more appropriate to put these requirements into regulations or policy. At the very least, employers should be treated consistently with other third parties.
- 7.3.11 Under this review, employers seem to be singled out for particular attention when they already face the most punitive regime for third parties covered by Immigration Act. The review does not seem acknowledge the vital role played by employers in the skilled migration process (given that such migrants must have a job offer) and instead seems more focused on the compliance and penalty regimes.
- 7.3.12 If the Government is concerned with the fraudulent use of Tax Code Declarations then a useful first step would be to begin prosecuting those who willfully misuse them. The legal provisions are in place already but they are almost never used. Such a move would target those making the false statement – not the employers who have accepted documentation in good faith..

13.3 Key questions

1 Should immigration legislation provide a stronger basis for employer responsibilities?

Business New Zealand: No – the case for change has not been established.

2. Should employers be legally obliged to positively check that a prospective employee is entitled to work for that employer?

Business New Zealand: The current situation is adequate.

3. Should the current “reasonable excuse” of having sighted a tax code declaration be removed as a strict liability offence for employers, who would be required to positively check a prospective employee’s entitlement to work in New Zealand?

Business New Zealand: No.

4. How could legislation support the obligation on employers not to employ unlawful workers?

Business New Zealand: The legislation already obliges employers not to employ unlawful workers. Further legislation would seem redundant.

Recommendation: That the responsibilities for employers be treated under the revised Immigration Act in a manner consistent with the responsibilities of other third parties so that employers are not unduly singled out.

Recommendation: That the current reasonable excuse of having sighted a tax code declaration be maintained and the legislation not be amended to increase the obligations and penalties on employers further.

7.4 Section 13.5 relates to carrier benefits and responsibilities.

7.4.1 Business New Zealand believes that while carriers do have a number of obligations, border control remains a core central government responsibility. Carriers should make every reasonable effort to ensure the people they are carrying meet the requirements but there are a number of checks (including immigration checks) which remain outside of their control. Increasing their liability in the form of instant fines is unlikely to address the issues.

7.4.2 Business New Zealand would support Option A (Status quo with minor amendments to the legislation) only.

13.5 Key questions

1 Do you agree that the proposed minor amendments be made to the legislation to clarify carrier obligations?

Business New Zealand: Yes.

2. Should the legislation provide for an instant fines regime, to address non-compliance by carriers with their obligations?

Business New Zealand: No.

Recommendation: That minor amendments be made to the legislation to clarify carrier obligations but those amendments not include an instant fines regime.

Part F) General Comments

- 8.1 This submission has largely been limited to issues directly affecting business. On the remainder of the review, Business New Zealand supports the efforts to reform the appeals and removal process which is currently undermining confidence in the integrity of the system.
- 8.2 As indicated earlier in the submission (1.12 and 3.1), many of the employer concerns relate to the regulatory and particularly policy settings used by the Government. Business New Zealand and its member organizations would be eager to have greater involvement in these areas as they are subsequently revised as part of the process outlined in paragraphs 6 and 7 of the discussion paper.
- 8.3 It is also important for the Government in general to provide greater high level guidance about what it considers the ultimate aim and purpose of immigration to be. This would provide the strategic direction which can then be administrated through the Act and the associated framework. Much of this review is concerned only with process and administration. The review seems to lack any of the visionary changes incorporated in the 1987 immigration reforms.
- 8.4 Once that direction is established, the framework needs to be simple, transparent and as stable as possible. Changing the rules frequently undermines migrant confidence and makes it harder to attract quality people to New Zealand.
- 8.5 Finally, if New Zealand genuinely wants to attract quality migrants there are issues beyond the immigration legislation and policy which need to be addressed. Business New Zealand has set out much of its thinking on the policy changes required to make us a vibrant, growing country with a rising standard of living in our “Perspectives” series of publications.⁹
- 8.6 The changes proposed in these documents would make New Zealand a more attractive place to live and work for migrants, citizens and residents.

Recommendation: That we acknowledge if New Zealand genuinely wants to attract quality migrants there are broader issues beyond immigration legislation and policy which will need to be addressed.

⁹ “Tax Perspectives”, “Skills Perspectives”, “Productivity Perspectives”, “Manufacturing Perspectives”, Business New Zealand, 2005-06

APPENDIX 1

BACKGROUND INFORMATION ON BUSINESS NEW ZEALAND

Encompassing four regional business organisations (Employers' and Manufacturers' Association (Northern), Employers' and Manufacturers' Association (Central), Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), Business New Zealand is New Zealand's largest business advocacy body.

Together with its 60 member Affiliated Industries Group (AIG) which comprises most of New Zealand's national industry associations, Business New Zealand is able to tap into 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 New Zealand contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.

Business New Zealand's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). An increase in GDP of at least 4% per capita per year is required to achieve this goal in the medium term.

The health of the economy also determines the ability of a nation to deliver on the social and environmental outcomes desired by all. First class social services and a clean and healthy environment are possible only in prosperous, first world economies.