21 May 2014

457 Integrity Review Secretariat
Department of Immigration and Border Protection
6 Chan St
BELCONNEN ACT 2617

Email: 457.Integrity.Review@immi.gov.au

Dear Sir/Madam

Independent Review of the 457 Programme – Supplementary Submission

Following consultation with the Panel on 9 May 2014, the Law Council welcomes the opportunity to provide this supplementary submission which addresses issues raised during discussions.

Introduction of a 'Regional Temporary Skilled Migration Income Threshold (TSMIT)'

The Law Council recommends that the DIBP investigate the reinstatement of a 'regional' TSMIT to make it more achievable for rural businesses to sponsor workers in regional areas without being necessarily impeded by issues with meeting the TSMIT and Market Salary Rate requirements.

The current TSMIT of $53,900 plus superannuation is unaffordable for many regional businesses for many occupations, notwithstanding that most skills on the Consolidated Skilled Occupation List (and in particular trades) are in critically short supply in regional areas. The current requirement to show that nominated workers are being paid the 'market salary rate' (which is also at or above TSMIT of $53,900 plus super) within a particular workplace makes it extremely difficult for regional businesses to meet this requirement. For example, a motor mechanic (and in particular a newly qualified mechanic) working in a small country town in regional Victoria is highly unlikely to be earning $54,000 plus superannuation a year. While employers have recourse to the Regional Sponsored Migration Scheme (RSMS) to find skilled labour, the higher English language requirement of 6 in each band in an IELTS test, plus recently amended DIBP policy which requires 2 years of post-qualification work experience even where the nominee has the Certificate 4 qualification required by ANZSCO, has made this an unrealistic option for many visa applicants.

The concept of using local Regional Certifying Boards to confirm skills shortages and appropriate working conditions for visa applications is something with which DIBP is already comfortable. The Law Council suggests utilising the Regional Certifying Boards which are already operational and familiar with skills shortages in their local regions to 'certify' (in the same manner that they currently undertake for RSMS visas) that a proposed nominee is genuinely required, that there is a genuine need for the position, and that the proposed salary is also the Market Salary Rate for a particular position. If DIBP felt that it could not dispense with a TSMIT altogether, then the Law Council suggests that the regional TSMIT could be set by reference to ABS data which accurately determines the disparity between metropolitan and regional salaries generally (say 10-20% less on

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

average) meaning that a 'Regional TSMIT' could be currently set at, for example, $43,120 - $48,510 plus super per annum as opposed to the current $53,900).

Ultimately, the Law Council contends that it is Australian citizens and permanent residents in regional communities that are most affected by the inability of regional businesses to attract and retain skilled workers, particularly in trade occupations. The Law Council notes that there has previously been a regional minimum salary in place, and that this was abolished in September 2009. The identification of what constitutes 'regional' is also very straightforward, as this can be done by reference to similar Gazette Notices which describe current regional areas for RSMS and/or 489 visas.

Removal of Schedule 3 criteria in 457 applications

It is currently a regulatory requirement that 457 visa applicants who apply for their visas while not the holder of a substantive visa must show (among other things) that they 'are not the holder of a substantive visa for reasons beyond their control', as well as 'compelling reasons' for the granting of the visa. These criteria are subjectively assessed by case officers, leading in many cases to refusal of the visa by reason of a particular case officer not finding the stated reasons sufficiently compelling.

It is the Law Council's view that these criteria should be removed from the 457 regulations. Applicants can have little confidence that a particular case officer will find their circumstances to be 'compelling', which can (and does) lead to wildly inconsistent decision making, even in essentially identical factual scenarios.

Perversely, the Schedule 3 criteria only applies when an applicant is onshore either at time of application or time of decision, and so the Schedule 3 criteria can be circumvented altogether by the visa applicant simply departing Australia and waiting (sometimes as short a period as 24 hours) until the application is approved, and then returning as the holder of a 457 visa. This places an unreasonable financial burden on visa applicants, as well as the sponsoring business, which must necessarily be without the visa applicant for the period in which the applicant remains offshore. The negative impact that the applicant's absence will have on the business is sometimes taken into account by case officers as a 'compelling reason' to grant the visa while the applicant is onshore, however the subjectivity of the decision making process means that sponsors and applicants must in effect balance the risk of the visa being refused on Schedule 3 grounds against the cost and inconvenience of the applicant being overseas for an indeterminate period – ie until a decision is made on the application.

It is important to emphasise that the Schedule 3 criteria only operates to determine whether the visa can be granted onshore, not whether it can be granted at all. An applicant may qualify for the grant of the visa in every other regard (and would undoubtedly have the same application approved if they were offshore), however this regulation allows a case officer to refuse the application simply on the basis that they do not find a particular factual matrix to be compelling.

If you have any questions or would like to discuss any of the Law Council's suggestions, please contact the ILS Administrator, Ms Nicole Eveston, on (02) 6246 3753.

Yours sincerely

Martyn Hagan
Secretary-General

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the Constituent Bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who normally serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Attachment B: Profile of the International Law Section

The International Law Section (ILS) provides a focal point for judges, barristers, solicitors, government lawyers, academic lawyers, corporate lawyers and law students working in Australia and overseas, who are involved in transnational and international law matters, migration and human rights issues.

The ILS runs conferences and seminars, establishes and maintains close links with overseas legal bodies such as the International Bar Association, the Commonwealth Lawyers' Association and LAWASIA, and provides expert advice to the Law Council and its constituent bodies and also to government through its Committees.

Members of the 2013-14 ILS Executive are:

- Dr Gordon Hughes, Section Chair
- Dr Wolfgang Babeck, Deputy Chair
- Ms Anne O'Donoghue, Treasurer
- Mr Fred Chilton, Executive Member
- Mr John Corcoran, Executive Member
- Mr Glenn Ferguson, Executive Member
- Ms Maria Jockel, Executive Member
- Mr Andrew Percival, Executive Member
- Dr Brett Williams, Executive Member.

The ILS Committees are:

- The Alternative Dispute Resolution Committee (Ms Mary Walker, Chair)
- The Comparative Law Committee (Dr Wolfgang Babeck and Mr Thomas John, Co-Chairs).
- The Human Rights Committee (Dr Wolfgang Babeck and Mr Glenn Ferguson, Co-Chairs)
- The Migration Law Committee (Mr Erskine Rodan, Chair and Ms Katie Malyon Vice-Chair)
- The Trade & Business Law Committee (Mr Andrew Percival, Chair)