



Law Council
OF AUSTRALIA

Review of Australia's business, investment and talent visas

Department of Immigration and Border Protection

7 August 2017

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

About the Law Council of Australia.....	3
Acknowledgement	4
Introduction.....	5
Responses to consultation questions.....	5
Conclusion	12

About 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 Law Firms Australia, 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 Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 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 members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

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

Acknowledgement

This submission has been prepared by the Law Institute of Victoria, on behalf of the Law Council of Australia.

The Law Council acknowledges the assistance of the Law Institute of Victoria, the National Human Rights Committee and the Migration Law Committee of the Federal Litigation and Dispute Resolution Section in the preparation of this submission.

Introduction

1. The Law Council thanks the Department of Immigration and Border Protection for the opportunity to provide a submission in response to its *Review of Australia's business, investment and talent visas*.
2. Responses to the questions posed by the consultation are below.

Responses to consultation questions

1. What kind of people does Australia and should Australia aim to attract through its business, investment and talent visa programmes?

3. It is important for Australia to attract people with a genuine interest in expanding their current business operations from overseas to Australia, as well as business people who wish to establish a new business in Australia. Contributions and participation within the Australian community is also attractive.
4. Australia should also aim to attract high net worth business people who wish to make substantial capital injections or investments in local Australian projects that focus on employment and developing infrastructure. These are people who will contribute to Australia's economic growth.
5. In the Talent Visa programme the programme should be targeted to attracting talent from a various cross-section of fields that can contribute to the Australian community and society in both economic and social terms. This could include people who may have a national reputation within Australia without necessarily having an international reputation to allow for a greater source of talent to be selected through this visa programme.

2. Are the objectives of Australia's business, investment and talent visa programmes aligned with what Australia needs?

6. Australia needs business people with skills and experience to boost economic growth. The current program does not necessary achieve this and there should be a focus on what the visa applicant intends to invest or undertake during the period of their visa.
7. The eligibility criteria of the 5 streams of the subclass 188, and the subclass 132, "Significant business history visa" focus on previous business or investment history and does not focus on the business or investment intentions in Australia. Applicants are required to demonstrate how they have established or managed their Australian businesses or investments once they reach the permanent stage. However, the long waiting period for permanent residency (generally at least 2 years for the Business Innovation stream and 4 years for the Investor and Significant Investor streams) creates great uncertainty for applicants, and may discourage them from applying for these visas at the initial provisional stage. As a result, Australia may be missing out the high net worth business people particularly in technology and IT development where a person's previous business background may be less relevant but the idea or concept they have may be perfect for setting up operations in Australia. It also does not provide for future forecasting as to what the person intends to do upon arrival in Australia.
8. The focus of this program should be directed towards the current needs of Australia and what local businesses need. At the same time, the visa programmes need to be

flexible and be able to be adjusted to reflect the changing times in the business environment.

9. This could be achieved in a number of different ways:
 - a) Ensuring the business skills visas are streamlined and flexible based on business or industry needs. This may include removing limitations on residency requirements for applicants who continue to run their overseas businesses if the two activities comprise related or integrated business operations. This will encourage more business applicants to consider setting up an Australian base if their overseas travel is not restricted.
 - b) Allowing for flexibility for business people who have innovative and new technological products and services to use Business visas to start up their business in Australia which may include a reduction in the criteria relating to previous business history.
 - c) Allowing Senior Managers to be included in the eligibility criteria for the Business Innovation stream, in recognition of their management experience that will help drive businesses.
 - d) Including visa streams based on local industry sector needs, or local business needs, especially in regional areas. Local Australian businesses could submit calls for investment opportunities to the relevant State or Territory Government.
 - e) Expanding the types of designated investments under the Investor stream, beyond that of Government Bonds.
10. In relation to the Distinguished Talent visa, currently it is limited to only applicants who have an International reputation. Given the changes recently in the 457 Visa Australia is at risk at losing well established temporary residents who have a National Reputation and will offer both social and economic benefit to Australia but due to various reasons may not be able to access current visas programs (for example because they are over 45). Changing this category to include the ability to nominate persons who have a National reputation within Australia would be of great benefit.

3. How well do the current programmes enable Australia to target and attract the best business migrants, entrepreneurs, investors and talented individuals who will make a valuable contribution to Australia?

11. The eligibility for the Business Innovation and Investor streams is dictated by the business points test. The weighting of the points currently has too strong a focus on previous ownership interests and some irrelevant considerations, such as age, English and qualifications.
12. The strict interpretation of legally defined terms such as 'Ownership Interest', 'Main Business' and 'Qualifying Business' means there are a significant number of highly talented business people who are ineligible. They may not satisfy the requirements because they do not hold a substantial "ownership interest" to meet the definition of "main business" or the investments do not fall within the definition of "eligible investments".
13. The definition of certain terms, such as "ownership interest" and "eligible investments" should be reviewed and expanded in light of current business trends. Other forms of ownership interest, such as trust structures, and other forms of investment, such as derivatives, could be considered in new definitions. Expanding the eligibility criteria

would attract more skilled business owners and investors, and would enable them to make a valuable contribution to Australia.

4. How would you construct business, investment and talent-based migration programmes to attract the highest quality business people, entrepreneurs, investors and people with distinguished talents to Australia?

14. The program should be restructured in order to address the needs of the local economy and local businesses, particularly, those in regional areas. It should also be attractive enough to entice an overseas business person or investor to make contributions to local projects and investments, while allowing them an opportunity to take up permanent residency.
15. The programme should be divided the into the following streams to achieve these aims:
 - a) **Business Owner** – this would not require State or Territory government involvement and would present a larger scope for business structures and senior managers to establish a form of business in Australia.
 - b) **State or Territory Government nominated visas** – State or Territory governments would be able to nominate business people who would conduct specific business or investment activities that are considered advantageous to the State or Territory.
 - c) **Investor** – direct investment towards local projects or State Government needs.
 - d) **Entrepreneurs and Distinguished talent** – the entrepreneur part of this visa should be focussed on highly skilled business people or entrepreneurs who bring new ideas and concepts to Australia. The Distinguished talent visa should be encouraging those who can bring both social and/or economic benefit to Australia across a range of fields.

5. What are the pros and cons of setting age limits for business, investment and talent visas?

16. Having an age limit imposes a restriction on people over the age of 55 who may possess the appropriate skills and experience but will not qualify for the visa. An age restriction is not needed in these categories if such a person is going to bring economic or social benefit to Australia.
17. Therefore, that age should not be a determinative factor in the business innovation, investor and talent streams.

6. Should business, investment and talent visa applicants be required to demonstrate English language skills? Why or Why not?

18. If a certain level of English is required for these visas, then there is likely to be a significant reduction in the number of applicants applying for the visa, hence the usefulness of the visa may be limited.
19. Based on the experience of our members, many of the applicants from the main countries utilising the program, such as China or Vietnam, likely to be excluded if they are required to satisfy a minimum English language requirement. Business across the world is now conducted across languages. The proposed English-language

requirement may make Australia less competitive in attracting talented individuals to work and set up businesses in Australia.

20. Generally English language skills should be required only where they are strictly necessary owing to the type of business being conducted in Australia. The same can be said for the distinguished talent visa where a person's level of English may not be relevant (for example an IT specialist or other technical specialist).

7. What impact does and should State and Territory government nomination have on selecting business and investment migrants? Why?

21. The current program relies completely on State and Territory government nomination (except for the Premium investor stream, which relies on Austrade). This arrangement reduces the flexibility of business arrangements for visa applicants.
22. Business people wanting to invest or conduct a particular type of business may not be able to do so, because of the State or Territory government's policy or guidelines that may differ from the legislated visa requirements. Some States impose restrictions on extended overseas travel and, therefore, some business applicants may decide not to proceed with the visa because they will have difficulties satisfying State or Territory Government guidelines to obtain a nomination.
23. As suggested above, the program could be amended to replicate the former 2003 business skills program under which certain visas did not require State or Territory Government involvement. This would allow more flexibility for business people to contribute to Australia's needs.
24. A State or Territory Government nomination visa stream could be introduced to allow local businesses or industry sectors to submit a call for investments through the relevant State or Territory Government to allow for direct investment into local businesses or local projects.

8. How effective is the innovation points test at selecting innovative business and investments migrants?

25. The innovation and investor points test should be reviewed.
26. The age limits that are current imposed are far too restrictive and prevent highly skilled business applicants from applying. More points should be awarded for the over 33 category and that no limitation is placed on over 55 applicants. The large majority of people with a high net worth and business skills often fall above the 55 age limitation.
27. The English language points could be restructured to include applicants who have a level of competent English.
28. The focus on points awarded for qualifications has not been effective, as many business people do not hold formal qualifications. The extra points for specific fields of study is often irrelevant to the business history of the person. Highly skilled business people without formal qualifications can fail to gain 5 to 10 points which can inhibit their eligibility for the visa.
29. Although the business experience points section is effective in recognising an applicant's business experience, the requirement to own the business as a "main business" excludes highly skilled senior managers who do not have substantial ownership interest to meet the legal definitions of "Main business". Many business owners have gained their experience from managing several successful businesses,

and they may not have necessarily had substantial ownership throughout the whole period of time.

9. What are the pros and cons of the following visas?

a) *Significant Business History stream of the Business Talent (Subclass 132) visa*

Pros

- Immediate permanent visa
- No points test

Cons

- Subject to monitoring and cancellation under s134
- These considerations for cancellation should be updated in order to reflect business operations
- Processing time is too long
- Applicants are often discouraged from making investments due to the lengthy time frame
- State Governments' policies do not align with visa requirements

b) *Venture Capital Entrepreneur stream of the Business Talent (Subclass 132) visa*

Pros

- Immediate permanent visa
- No age or points test

Cons

- Difficult to obtain funding from a venture capital fund and very little take up in the visa

c) *The Business Innovation stream of the Business Innovation and Investment (subclasses 188 and 888) visa (and the associated extension stream)*

Pros

- The two stage process is effective
- Genuine business owners apply

Cons

- Does not include experienced senior managers
- Points test
- State or Territory Government nomination conditions are too restrictive

- Little focus on what the Applicant is going to achieve during their temporary visa

d) *The Entrepreneur stream of the Business Innovation and Investment (subclasses 188 and 888) visa*

Pros

- Attracts entrepreneurs

Cons

- Difficult to obtain funding
- Where a provisional visa is granted, there can often be great uncertainty at the permanent stage

e) *The Investor stream of the Business Innovation and Investment (subclasses 188 and 888) visa*

Pros

- Investments are held in Government bonds

Cons

- Provisional stage and permanent stage requirements do not align
- Choice of designate investments are limited to Government Bonds only
- Return on investment is low

f) *The Significant Investor stream of the Business Innovation and Investment (subclasses 188 and 888) visa (and the associated extension stream)*

Pros

- No limit on age
- No limit on English language

Cons

- Choice of Complying investments is not flexible
- Post 1 July 2015, regulation 5.19C is inflexible
- Complying investments are left to direction of the fund's manager
- No control over investment of funds
- SIV Applicants deterred by \$500,000 required into Venture Capital component which can be considered high risk

g) *The Premium Investor stream of the Business Innovation and Investment (subclasses 188 and 888) visa*

Pros

- Permanent residency after 12 months

Cons

- Limited success of visa and in fact currently closed due to the review
- No clear guidelines by Austrade and the Austrade website needs further development in promoting this visa

h) The Investor Retirement (subclass 405) visa

Pros

- Investment in government bonds further drives the economy

Cons

- There is no pathway to permanent residency
- Applicant needs to have own savings and income to support themselves

i) The Distinguished Talent (subclasses 124 and 858) visa

Pros

- Permanent residency available
- Allows Australia to pick up the smartest and brightest talent
- No English language criteria

Cons

- Requires international recognition
- Concerns as to how they are assessed and over reliance on inaccurate internet searching by delegates
- Requires endorsement from national recognised authority or person
- Limitation of being recognised internationally depending on the profession
- Limited professional recognitions in certain fields
- Room to grow this visa

Conclusion

30. It is important to ensure that Australia's business, investment and talent visas programme is aimed at attracting genuine business people. However, it is also important to retain these business people after they have received their permanent residency. This ensures that the business will continue to run and achieve the objectives of the visa program.
31. The Distinguished Talent visa is currently underutilised and could be significantly revamped to encourage a broader spectrum of the brightest and smartest people to contribute to Australian society. A pathway for those who have already contributed to Australia and have a national reputation in Australia would be one way of improving this visa.
32. According to the experience of our members, business applicants want the security of having an official status in Australia and to be able to leave and return to Australia when they can, even after obtaining permanent residency. It is very common for successful business people to be traveling overseas for extended periods of time. However, the current Resident Return Visas inhibit business people from conducting business overseas (which may be the parent company of an Australian subsidiary), thereby impacting on businesses located in Australia.
33. The proposed amendments to Australian citizenship requirements in the Australian Citizenship Legislation Amendment (Strengthening the Requirement for Australian Citizenship and Other Measures) Bill 2017, if passed, will mean that business people may have issues satisfying certain requirements including English language and may have to consider closing down their Australian businesses and moving to another country which would allow them to migrate more easily.
34. In order for Australia to be competitive in the global market, the business skills programme needs to be reviewed to keep up to date with the evolving nature of business trends. Any future enacting legislation should not limit or hinder the business skills visa programme and talent programme.