



29 October 2014

Skilled Visa Review and Deregulation Taskforce (4N275)
Department of Immigration and Border Protection
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Dear Taskforce

SKILLED MIGRATION AND 400 SERIES VISA PROGRAMMES DISCUSSION PAPER

The Law Council of Australia is pleased to provide comments on the Skilled Migration and 400 Series Visa Programmes Discussion Paper. This submission was prepared for the Law Council by the Migration Law Committee of the International Law Section of the Law Council.

Please contact the International Law Section administrator Ms Jacintha Victor John, at ils@lawcouncil.asn.au if the Law Council can provide any further information.

Yours sincerely

A handwritten signature in black ink, appearing to read "M Hagan".

MARTYN HAGAN
SECRETARY-GENERAL

Skilled Migration and 400 Series Visa
Programmes Discussion Paper

Department of Immigration and Border Protection

29 October 2014

Skilled Migration and 400 Series Visa Programmes Discussion Paper

1. The Law Council welcomes the opportunity to make a submission on the Review of the Skilled Migration and 400 Series Visa Programmes (the Review).
2. While the legal community welcome the Government's intention to reduce unnecessary administrative burdens that inhibit economic growth, the Law Council considers such initiatives should be introduced on a practical basis through flexible and innovative visa offerings which reflect the evolution of the concepts of "worker" and "work".
3. The Law Council acknowledges that the Review recognises the interconnected nature and range of the Australian visa program, which includes over 140 individual visa subclasses. Indeed, the discussion paper, notes that "This review will result in the most far reaching transformation of the skilled migration and 400 series visa programmes in the last 20 years and will establish a visa framework that will support Australia's skilled migration needs for the next 20 years."
4. It is noted that over the past 5 years there have been significant regulatory changes to the following areas of the visa program:
 - (a) The subclass 400 series of visas;
 - (b) The subclass 600 series of visitor/tourist visas;
 - (c) The business skills categories (provision and permanent);
 - (d) The "points test" visa subclasses (subclass 189/190 visa subclasses);
 - (e) The employment sponsored subclass 457 and subclass 186/187 visa subclasses
5. The range of issues raised in the discussion paper is extensive and consideration should be given to undertaking more than one review to ensure all issues are comprehensively considered.
6. For example, the discussion paper identifies three broad categories of short-term migration: business, and investment migration, and skilled work. It is suggested that each of these broad categories would be deserving of a separate discussion paper, with the work from each of those reviews being considered by an overarching process.
7. While this submission will focus only on aspects of the skilled migration and 400 series visa programmes, the Law Council would welcome the opportunity to make further submissions on specific aspects of the skilled migration programme, if the opportunity arises.

Age Threshold

8. The Law Council supports the concept of recognising that people are living and consequently working longer and that there is a need to consider the age threshold both in particular occupations and/or visa applications. For example, a person over 50 years may not be eligible to apply under the direct entry ENS 186 scheme. This category of applicant may include, for example, talented CEOs or engineers who are able to continue to make a sustained economic contribution to Australia or even choose to settle in Australia for the rest of their working career, or retirement. However, they would need to have been sponsored on a 457 visa for at least 4 years

before applying for permanent residence, thereby making other countries a far more attractive option for relocation. A further example of age threshold is the General Skilled Migration programme, which has an age limit of 50 for all occupations on the Skilled Occupation List (SOL) with no exception.

9. It is suggested a more nuanced response is needed on the age factor for employment based visas, with the current discretion for age waiver being too limited.
10. Changes would also seem to be necessary to the Points Test used for Skilled Migration (namely Subclass 189, 190 and 489), for it to remain globally competitive and attract candidates who are highly skilled. There is no reason why equal points should not be awarded for someone between the ages of 25-39 rather than the current system which awards less point from 33-39, despite the fact that this age group has many years to contribute to the work force and are likely to have a number of years of experience.

Occupation Lists

11. The Law Council notes that the SOL was significantly reduced following a review of the Skilled Migration Programme. However, it has failed to be sufficiently responsive to employer's needs and very few changes have occurred. Occupations which are in demand should be included in both the SOL and Consolidated Sponsored Occupations List (CSOL) to allow visa applicants to apply for migration or employers to sponsor applicants through a more simplified process than the Labour Agreement process. An example is the aged care industry which is currently suffering an acute shortage of qualified Australian workers. Aged care workers are not included on either the SOL or the CSOL and as such aged care facilities are required to use the Labour Agreement process to obtain such staff.¹ An alternate suggestion of having a list of occupations excluded from, rather than included in, the Skilled Migration Programme may also be viable, however more thought may be needed into how this would work in practice.

The Law Council does not believe the process of State or Territory nominations for the subclass 190 visa has been effective. Anecdotally, it is understood such visa holders do not routinely remain in the nominating State or Territory for reasonable periods, thereby undermining the policy intent of that provision.

Business and Investment Categories

12. The Law Council is concerned that the current provisional business and investment visa categories (subclasses 132, 188, 888, 890-893) are too complicated or the Department does not have the resources to properly manage this program in its current form.
13. While the need to balance competing factors in this programme is accepted, the complicated nature of the provisional visa process, in particular leads to excessive processing times and unrealistic demands that:
 - (a) significantly reduces the practical utility of this programme; and
 - (b) inhibits the policy objectives which underpin the programme.
14. It is the view of the Law Council that the provisional visa should be simpler and quicker to obtain than a permanent visa. If the primary regulatory oversight fell on the permanent visa, the current processing burden would be reversed..

¹ <http://www.minister.immi.gov.au/media/mc/2014/mc216835.htm>

15. It is the view of the Law Council that a significant review of this programme is warranted.

Subclass 457/ENS visas

16. The employer-sponsored subclass 186/187 visa subclasses were completely rewritten on 1 July 2012.
17. While some of the changes were welcomed (such as increasing the maximum age from 45 to 50), poor legislative drafting of these visa subclasses and Reg 5.19 of the *Migration Regulations 1994* has resulted in a range of confusion and (presumably) unintended consequences.
18. These problems have included, *inter alia*:
- (a) inflexibility to accommodate growth and development in a position over the 2-year period in which the subclass 457 visa holder commonly progresses to the permanent subclass 186/187 visa; as well as,
 - (b) the ability of a parent company to move sponsored staff members around a corporate group without jeopardising the visa holder's ability to successfully apply for the permanent visa in the future.

Skills assessing authorities

19. The requirement of a favourable skills assessment is relevant for a range of visa subclasses including subclasses 457, 485, 186, 187, 189 and 190.
20. However, the Law Council has significant concerns with inconsistencies and differing standards applied by a number of skills assessing authorities. For example, the current practice of many skills assessing authorities, requiring different skill levels for the same occupation depending upon the visa subclass being applied for, is without any legal or practical justification. An applicant should be held to either meet the Australian standard for the occupation or that they do not. To suggest that a different, higher standard is needed in a permanent visa category as opposed to a temporary visa category when the same person is doing the same job, is without foundation.

Subclass 400 visa

21. On 23 March 2013, the Government introduced the temporary work (short stay activity) visa (subclass 400).
22. The highly skilled work stream of this subclass was created in recognition that short term or intermittent work assignments were becoming increasingly common and necessary, particularly for multinational companies.
23. This stream, which specifically permits short term highly skilled work, was initially welcomed in that it removed the uncertainty businesses faced when using the previous subclass 456 visa (and its electronic counterparts).
24. However, the subclass 400 visa does not necessarily provide a solution for types of work that do not easily fit into the legal requirements for the visa. The 21st century has seen the growth of the knowledge worker and associated non-traditional roles, which are not necessarily consistent with the key requirement that the Subclass 400 visa be used only for "non-ongoing work". Non-ongoing is defined, in part, as work likely to be completed within a continuous period of 3 months or less.

25. Applying for more than one Subclass 400 visa is not permitted unless the non-completion of duties during the first visa grant period was due to unforeseen and compelling circumstances, and there is an urgent need for the applicant to return.²
26. The example given in the relevant policy is the "installation of factory equipment which has not been completed on time due to unforeseen and uncontrollable delays in the delivery of key equipment components".³
27. This use of such a traditional work project as the example may indicate that the Department of Immigration and Border Protection (DIBP) might not have contemplated unusual or complex work projects requiring numerous trips to Australia. This could mean specialised work on an ongoing project, a group of inter-related projects or the one project at different stages. An example would be an IT or Engineering consultancy which requires a mobile workforce for projects spanning multiple locations.
28. The relevant policy specifically instructs case officers to scrutinise "applicants that have entered Australia on numerous occasions, particularly where stays have been over longer durations"⁴ to ensure the work is not ongoing.
29. Intermittent work meets the "non-ongoing" definition in very limited circumstances (to be determined on a case by case basis) and visa holders cannot exceed a total stay in Australia of more than 3 months in any 12 month period.⁵
30. The 457 visa is offered as the only alternative to the Subclass 400. However, this is not suitable for those workers who may form a company's ever moving "mobile workforce", moving from one country to another to apply specialised skills and knowledge to meet short term business needs.
31. There is also a policy expectation that persons sponsored for a subclass 457 visa will work in Australia for the duration of their visa and substantial periods of time spent outside Australia are not usually permitted (unless, for example, absences from Australia are a requirement of the role). If the absence is permitted (for example, in the case of a fly in/fly out role), it is still expected that the visa holder remains employed by the sponsor and continues to work in the nominated position.
32. One solution to this issue would be to extend the visa validity period of the Subclass 400 visa in certain circumstances to allow multiple trips of a limited duration over a period of time (for example, a one year visa validity period with a stay of 6 weeks only on each entry). The DIBP could require applications to be thoroughly documented for such situations in order to ensure the visa is not being improperly used as a substitute for the 457 visa. Supporting documentation could include a "Private Ruling" obtained by the business from the DIBP (similar to those provided by the Australian Tax Office) on the basis that such workers are at the core of their business offering.
33. Attachment A provides a profile of the Law Council of Australia. Attachment B provides a profile of the International Law Section.

² PAM3: Sch2Visa400 - Temporary Work (Short Stay Activity) GA-400 - MAIN APPLICANT.

³ PAM3: Sch2Visa400 - Temporary Work (Short Stay Activity)

⁴ PAM3: Sch2Visa400 - Temporary Work (Short Stay Activity)

⁵ PAM3: Sch2Visa400 - Temporary Work (Short Stay Activity)

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 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 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 2014 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).

The Immigration Lawyers Association of Australasia (ILAA) was established in 2003. The ILAA joined the Law Council as part of the International Law Section (ILS) in 2005. In 2012, the ILAA changed its name to the Migration Law Committee.

The Migration Law Committee:

- provides specialist advice to government through the Law Council on substantive migration law issues;
- attends stakeholder meetings with the Department of Immigration and Citizenship;
- provides Continuing Professional Development (CPD) accreditation under the Office of the Migration Agents Registration Authority (OMARA) scheme for lawyer Migration Agents
- provides network opportunities for Australian lawyers in the field of migration law.