Law Council
OF AUSTRALIA

Federal Litigation and Dispute Resolution Section

22 January 2020

Department of Home Affairs
6 Chan Street
BELCONNEN ACT 2617

By email: migration.policy@homeaffairs.gov.au

Dear Sir/Madam

Australia's 2020-21 Migration Program

1. The Migration Law Committee of the Law Council of Australia's Federal Litigation and Dispute Resolution Section (**the Committee**) appreciates the opportunity to make submissions in relation to Australia's 2020-21 Migration Program (**the Program**), and in response to the Discussion Paper published by the Department of Home Affairs (**the Department**).[1] It also welcomes the opportunity for continued dialogue with the Department on policy and procedural issues relating to the Program, and it remains highly supportive of the regular bilateral policy meetings which take place between the Committee and the Department.

Overall Program Composition

2. The Committee considers that the overall numbers of the Program may need to be revisited in light of several issues that have arisen since the figure was set for 2019-2020.

3. From an economic perspective, reducing Australia's migrant intake may not be wise in light of current low levels of economic growth. During the Global Financial Crisis, numbers were maintained at a high level to ensure consumer spending which thereby creates jobs.

4. The Committee considers that certain adjustments may also be required regarding the composition of the Program.

5. The Committee supports allowing an increase in the family migration component in terms of visa numbers. The current backlog in processing partner visas is a major issue and, in the Committee's experience, these delays can cause significant hardship. This is true of families which bear the emotional and financial burdens of living across two countries. It is also true in situations where a parent may be forced to live separately from their child in circumstances of an otherwise harmonious and genuine family unit. Spousal separation while awaiting the processing of visas

[1] Department of Home Affairs, 'Planning Australia's 2020-21 Migration Program', (Discussion paper, December 2019), https://www.homeaffairs.gov.au/reports-and-publications/submissions-and-discussion-papers/australia-2020-21-migration-program.

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effectively stalls people's lives, including by delaying opportunities to start families and potentially jeopardising fertility. Spousal separation at times causes distress, mental health issues and may result in divorces and the breakdown of family units. It should be noted that part of the partner visa program is onshore and is already counted in terms of net migration figures.

6. The recent bushfire crisis, which has been immense in its scale and intensity, has had profound impacts on many regional areas. The Committee understands that considerable infrastructure work is needed to repair the damage. Consideration should be given to placing all associated trades on the Medium Long-term Skills Shortage List (**MLTSSL**). To further encourage migrants to these bushfire-affected regions, and regional Australia generally, the Committee considers there is an argument for reducing the work experience requirements of the subclass 494 visa, as well as its English language requirements. This may also mean looking at increasing the period of the subclass 485 visa for vocational education and training (**VET**) sector applicants who complete a trade course in a regional area from 18 months to two years to allow them time to gain the necessary work experience for further options.
7. The Committee supports a robust subclass 189 Independent Skilled Migration program for non-regional areas as it acts as an incentive to migrate to Australia. The numbers within the overall program have been significantly cut in this subclass, which may limit the ability of major cities to attract migrants with desirable qualifications, skills or experience. It also offers no incentive to migrants to move to cities (which still require migrants, particularly in occupations on the MLTSSL). A robust subclass 189 Independent Skilled Migration program would also provide an incentive for studying in Australia in occupations where there are skills shortages, by giving options to those who meet the requirements for migration. This is not endorsing a pathway from student visa to migration but, rather, allowing those who may meet the skilled migration requirements through the subclass 485 visa pathway ultimately to be considered for a subclass 189 visa. Allocations to certain occupations could, for example, be increased for the purposes of subclass 189 visa consideration.
8. To attract applicants to regional areas, and mindful of the comments above, consideration should be given to whether skill assessments for the subclass 494 visa are necessary. In addition, consideration should be given to reducing the required period of employment (which is currently set at three years).
9. The reductions in program numbers implemented in 2019 have not reduced numbers of applicants and, consequently, have led to increased processing or waiting times for pending cases and extended requirements for temporary visas. This increases the resource requirements for the Department in the ongoing management of those cases.
10. The Committee supports the global talent visa, but it is not certain that numbers of applicants will be high, given the level of global competition to attract persons who may fall within this cohort. As such, further options need to be considered to make Australia attractive to migrants, particularly following global coverage of the bushfires. The Department should review and address potential barriers to the uptake of his visa, to ensure that Australia is best positioned to attract world class applicants.

11. The Committee considers that sustaining and increasing population growth in Australia generally, not just to regional Australia, allows for economic growth. Whilst regional migration is supported and there need to be incentives to support regional settlement, its view is that continued attraction of migrants to major cities in Australia is also necessary.

Family Visa Stream

Balancing family categories

12. The Committee submits that family stream migration should be increased. This should include parent visas, noting that even contributory parents are currently waiting in excess of five years to receive a visa. The Discussion Paper's guiding question '[w]hat should the balance between family categories be in order to best meet the needs of Australians?'[2] implies that the interests of Australians may be best served by the increase of certain components of the family stream at the expense of other components. The Committee does not accept that premise.
13. Australians' needs are best met by allowing close family members to join them in Australia with minimal delays. As such, the overall family stream should be increased.
14. The temporary parent visa is in effect a temporary fix, and may create significant social problems in 10 years when elderly parents start reaching the end of their allowed time and their Australian children (and grandchildren) have to cope with them having to return to a home country they have not lived in for a decade. This will lead to significant resources departing overseas from Australia, as well as emotional hardship to Australian families. Many temporary parent applicants will not be eligible for contributory parent visas.
15. The Committee supports increasing the number of places available for carer visas, given the advantage they provide to those receiving care, namely Australian citizens including children with disability or long-term health problems.

Partner visas

16. The Committee has concerns regarding the long waiting time for partner visas. Some partner visas may take three to four years to process.
17. As mentioned above, delays in partner visa processing put enormous strain on families, including children, when separated or even when in Australia, due to visa uncertainty. Such delays may lead to the breakdown of family units, prevent partners from having children, and force people to take on more work to support a partner overseas (effectively running two households). Isolation and emotional hardship often result.
18. Families are the essential fabric of our society, yet separating partners due to such delays damages that fabric. Family separation causes a lot of unintended and

[2] Department of Home Affairs, 'Planning Australia's 2020-21 Migration Program', (Discussion paper, December 2019), 4, Question 2.

unnecessary social, psychological and financial consequences for Australians and their partners.

19. Australia is also part of a global society. Australian citizens seek employment overseas and the long wait for partner visas prevents them from returning to Australia with their partners and families. Like Australia, international companies commonly attract the best 'Aussie' talent and when that talent wishes to return to Australia, it is natural they want to bring their partner. Delays in processing may discourage expatriate Australians from returning, consequently also denying Australia the benefit of the experience and skills offered by those individuals.
20. To reduce these impacts, the Committee recommends that the Department consider triaging applications and expediting decision-ready and low-risk applications.

Skilled visas

21. The Committee considers that the points test in its current form is not working well enough to attract the 'best and the brightest' to Australia.
22. The test is also now skewed to allow single applicants to receive more points than those with a partner who may not have competent English, despite the fact that families have high rates of integration into Australia.
23. It also currently allows very few applicants to be selected unless they are state-sponsored. The selection pass mark leads to low numbers being selected, which means those who have qualifications and experience in occupations where there are skills shortages, such as teaching, may nevertheless simply not be selected. Only certain occupations allow points where an applicant cannot work a full professional year, and points are in many cases not included in recognition of a job offer, although this is often required by the states and territories for subclass 491 or 190 visa holders.
24. Certain occupations allow for the professional year, as mentioned above, which permits international students to complete 45 weeks of training (legislation prescribes one year). Out of the 45 weeks, the international students complete 13 weeks of onsite work experience (on a voluntary basis). For this they gain five extra points. In contrast, an applicant seeking to come to Australia from a prestigious overseas university, for example in the USA or India specialising in IT, would need to show at least two years full-time experience to meet the skill assessment criteria and would gain no points for work experience already completed.
25. The Committee considers that points should be awarded for such experience—which contributes to the building of relevant skills—and those who have gained significant paid work experience overseas should be considered on an equal footing with those who have completed the professional year.
26. In addition, consideration should be given to auditing 'professional year' work experience. This may help to ensure the given experience meets the desired purpose and that applicants are not being exploited.
27. The Committee considers that the points test should be reviewed in addition to, and possibly separately from the planning of the Program, to ensure it meets its objectives.

This may also be a fitting time to review the process used by skill assessment bodies.

Regional balancing of allocations

28. The Committee has no objection in principle to balancing migration numbers towards regional, state-sponsored and/or employer-sponsored allocations. However, there are very high barriers for subclass 494 visas applicants which mean that numbers are likely to be low. The purpose of balancing regions is undermined if people are not going to apply for the visas where high caps are allocated. Regional visas need to be made more attractive.
29. The Committee recommends that the requirement for skills assessment for the subclass 494 visa be removed. Departmental data indicates that applications for the subclass 187 visa fell significantly when the three-year experience requirement was introduced. There is no reason to introduce further barriers for this visa. Further, the requirement for skills assessment for the subclass 494 visa effectively undermines the intention that this visa should be processed quickly; processing times for most types of skills assessments are between three to five months and requirements usually differ from Australian and New Zealand Standard Classification of Occupation requirements for the given occupation. Regional employers want to be able to bring people in quickly, however this process acts as a barrier before the application can even be lodged. The level of work experience required for the subclass 494 visa at three years is also too high.
30. Alternatively, if the Australian Government's view remains that skills assessments are necessary, the Committee suggests making this a 'time of decision' rather than 'time of application' criterion. Doing so would ensure that applicants are not affected by protracted third party processing times. The Committee also recommends skills assessment exemptions for those having obtained their relevant qualifications in Australia (similar to the subclass 187 visa program).
31. The Committee agrees that exemptions should be in place for the threshold income for compelling and compassionate circumstances (eg, those affected by the bushfires).
32. To further incentivise regional visas, another option may be to increase from 15 to 25 the number of points allocated for nomination for the subclass 491 visa. This may help to expand the eligibility pool.
33. Further consideration should be given to the income level set for the subclass 191 visa, as discussed below.

Global Talent Independent Program

34. In November 2019, the Australian Government launched the Global Talent Independent (**GTI**) program. This offers a streamlined, priority visa pathway for highly skilled and talented individuals to live and work permanently in Australia. The GTI program has been developed in recognition of the need for Australia to compete for the best and brightest migrants from around the world.

35. Under the GTI program, the Government is seeking to identify and proactively recruit up to 5,000 highly skilled individuals each year in select growth industries. The objective of the program is to help further develop these industries and facilitate the transfer of skills. The Committee commends this initiative and submits that the allocation of 5,000 places should continue or be expanded in the 2020-2021 Program.

Employment trial periods

36. Employment trial periods should be considered for the holders of subclass 457, 482 and 494 visas who have ceased employment with their sponsor. Employees have 60 or 90 days in which to find a new sponsor. A one-week paid trial period would allow smooth transitions, ensuring employers who participate in trials are not in breach of immigration laws, and encouraging visa holders to report a change of circumstance. This would simply require a change to conditions 8607, 8107 and 8579 or an amendment to policy.

Self-sponsorship

37. Specific policy could be developed to facilitate so-called 'self-sponsorship' for subclass 494 visas to encourage entrepreneurship in regional areas. There are many examples of applicants who successfully start businesses which go on to employ Australian workers. While they currently do not meet business skills criteria, these businesses contribute to regional areas' productivity and growth. The Committee notes that some states, such as such as Queensland and Tasmania, are supportive of this through their state sponsorship skilled program.

Framework to respond to unfair work practices

38. The Committee calls for the creation of a new framework of visa rights for workers who are subject to grossly unfair work practices.[3] This could be similar to the family violence legislation for partner visas. Access to such a pathway could follow findings of specific offences or penalties or threshold findings by regulatory bodies such as the Fair Work Ombudsman, Fair Work or the Federal Circuit Court, entitling applicants to a visa despite no longer working for the employer. This would encourage reporting of unfair dismissal, discrimination, cashback schemes and unpaid wages as well as discourage exploitative conditions. Currently, fears regarding negative migration consequences have a dampening effect on pursuing labour-related remedies in cases of labour exploitation, which erodes employment practices and labour standards.

[3] Related to this call, the Law Council has also previously recommended that arrangements not to take migration action against exploited persons should not be contingent upon those persons assist law enforcement or the Fair Work Ombudsman, and that any action taken against any person lacking work entitlements with their visa should be mindful of any trafficking issues relevant to the person. See: Law Council of Australia, *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017*, (Submission to the Senate Standing Education and Employment Legislation Committee, 20 April 2017), 11, https://www.lawcouncil.asn.au/docs/153f7fa0-4734-e711-93fb-005056be13b5/3271%20-%20Fair%20Work%20Amendment%20(Protecting%20Vulnerable%20Workers).pdf.

Measure of effectiveness

39. The best measure of effectiveness of a permanent skilled visa program is arguably how many permanent migrants remain in their skilled occupation after settling in Australia. The Committee suggests that the Department should capture this information. Applicants for citizenship are asked their occupation; however, the question is not mandatory. The Committee questions whether the information that is compiled is analysed with regard to the effectiveness of the skilled migration program.

Threshold income for permanent residence

40. The three-year temporary skilled migration income threshold (**TSMIT**) for subclass 491 visa holders to move to the subclass 191 Permanent Residence Skilled Regional visa is currently a taxable income of $53,900. The Australian Taxation Office definition of taxable income is gross income minus business deductions.
41. The Committee submits that consideration should be given to providing income concessions for regional areas.
42. The current framework offers little incentive for people to move regionally, especially in regions which are affected by bushfires or drought. It will be difficult where businesses need people regionally but cannot meet these salary expectations. For example, a country hotel might be devastated by a lack of tourism following fire or drought events and, despite needing a chef, be unable to offer wages comparable with standard city rates. In such situations, care may be needed to reflect the actual salary levels available in given regions, including where affected by particular environmental or economic factors (such as in Tasmania, where generally wage rates are lower and expenses can also be lower). Regional areas have different economic environments and needs, and the current income level set does not reflect these differences.
43. When considering the origins of the commencement of TSMIT, it should be noted that 'since its introduction, TSMIT was indexed annually based on Average Weekly Earnings … published by the ABS to keep pace with the cost of living.'[4] The 2016 review of the TSMIT offers little discussion about regional concession except, other than in reference to Labour Agreements.[5] The TSMIT may not be the answer for setting wages in a regional area for migration purposes.
44. Using an average weekly earnings methodology fails to take into account that in many regional areas wages and living standard expenses are lower.

Conclusion

45. The Committee would be happy to provide further input or expertise on any of the matters raised in this submission, should that be of assistance.

[4] John Azarias, *Review of the Temporary Skilled Migration Income Threshold (TSMIT): The Future of TSMIT within a Robust 457 programme* (Report, 30 May 2016), 20, https://www.homeaffairs.gov.au/reports-and-pubs/files/tsmit_review_report.pdf.
[5] Ibid 21.

46. Thank you again for the opportunity to comment. Please contact Mr Mike Clayton, Senior Policy Lawyer, on (02) 6246 3755 or at mike.clayton@lawcouncil.asn.au in the first instance if you require further information or clarification.

Yours faithfully

John Cattle
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