

21 June 2013

Mr Tim Bryant  
Inquiry Secretary  
Standing Committee on Legal and Constitutional Affairs  
P.O. Box 6100  
Parliament House  
Canberra ACT 2600

By email: [LegCon.Sen@aph.gov.au](mailto:LegCon.Sen@aph.gov.au)

Dear Mr Bryant

**INQUIRY INTO THE MIGRATION AMENDMENT (TEMPORARY SPONSORED VISAS) BILL 2013**

The Law Council of Australia welcomes the opportunity to make this submission to the Standing Committee on Legal and Constitutional Affairs' inquiry into the Migration Amendment (Temporary Sponsored Visas) Bill 2013 ("the "Bill").

This Submission was prepared by the International Law Section's Migration Law Committee of the Law Council. The Law Council is the peak national representative body of the Australian legal profession – it represents some 60,000 legal practitioners nationwide. **Attachment A** provides a profile of the Law Council. **Attachment B** provides a profile of the International Law Section.

Australia's Migration Program is a population and skilling programme which underpins Australia's economic prosperity. It focuses on skilled temporary and permanent workers to meet Australia's labour force needs. The employer nomination scheme (Subclass 186 and Subclass 187) (ENS) enables businesses operating in Australia to recruit skilled workers on permanent visas to fill specified highly skilled positions that cannot be filled from the Australian labour market. The temporary work (skilled) visa (Subclass 457) provides for the long-term temporary entry of highly skilled persons sponsored by an Australian or overseas business to meet Australia's skill needs.

The Subclass 457 visa arrangements address skilled labour shortages and allow access to overseas workers when it is demonstrably in Australia's best interests. As stated by the Treasurer in parliament recently, since 2007 Australia has experienced economic growth of 14% as compared to the United Kingdom which has experienced a decline of 4%. Australia has nearly full workforce participation. As a small nation on a vast continent, it does not have the depth and breadth of skilled labour to meet business and industry needs.

The Law Council opposes the Bill because it has been introduced hastily without adequate consultation with stakeholders and whilst the Senate's Legal and Constitutional Affairs Reference Committee is yet to deliver its findings on its May 2013 Inquiry into subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements. The Government appears to be rushing proposed changes through the last Parliamentary session before the September 2013 election without due consideration to the views of stakeholders.

The Law Council submits that the provisions which introduce labour market testing, sponsorship obligations and enforceable undertakings should be carefully considered. It is of particular concern that aspects of the Bill in relation to labour market testing are exempted from the usual Regulatory Impact Statement requirements that are a hallmark of Australia's rule of law.

## **Schedule 2 - Labour Market Testing ("LMT")**

The Bill allows:

- the Minister to decide which occupations are subject to LMT;
- the Minister to determine a different period for which LMT must be undertaken for any given occupation; and,
- inserts broad discretions for whether the Minister is satisfied as to whether those LMT attempts are satisfactory.

The Law Council does not support LMT for 457 visa occupations as this will impose unnecessary burdens and costs on member firms and the clients of immigration lawyers who are registered migration agents when bodies such as the Australian Workplace and Productivity Agency (AWPA), the Department of Education, Employment and Workplace Relations (DEEWR) and relevant employer bodies such as the Law Council have already confirmed the existence of skills shortages by publication of the Skilled Occupations List (SOL) and Consolidated Sponsored Occupations List (CSOL).

Members'<sup>1</sup> feedback is that prescriptive labour market testing, if introduced, would only add another unwelcome and totally unnecessary layer to the process - without solving the issue of the skills shortage. The costs to a business of engaging a 457 visa holder are a sufficient disincentive to users of the program and are the key reason that they would prefer to employ an Australian.

It is worthy of note that many of our many members were practising in the 1990s when LMT was compulsory as part of the company sponsored temporary visa program. It was our experience that those requirements were poorly managed, largely ineffective and honoured more in form than substance. It remains our strong opinion that the current legislative emphasis on market rates and training benchmarks is significantly more effective than reverting to the former LMT requirements. These requirements were considered and abandoned in 2001 after a DIAC review<sup>2</sup> confirmed members' views that LMT was expensive and ineffective.

The Law Council is of the view that the current requirements under the Subclass 457 Visa Program are already sufficiently robust to ensure that the aims of the program are met. In the context of the aims of the Bill it is important to note that the three main steps in the

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<sup>1</sup> Members of the International Law Section's Migration Law Committee of the Law Council.

<sup>2</sup> *In Australia's Interest: A review of the Temporary Residence Program DIAC 2001*

approval process under the Subclass 457 Visa Program are extensive and require:

- Sponsorship application, which is lodged by the company and:
  - it (the company) is actively and lawfully operating the business;
  - the employment of the nominee will benefit Australia;
  - it is able to comply with sponsorship obligations;
  - it will be the direct employer or 'related to' the direct employer of the nominee;
  - there is no adverse information regarding the sponsor;
  - it has a strong record of, or commitment to, employing local labour and non-discriminatory employment practices; and
  - it meets the training benchmark as part of its commitment to the ongoing training of their Australian citizen and permanent resident staff.
  
- Nomination application, which is lodged by the company and meets the following requirements:
  - the position is on the Consolidated Sponsored Occupation List (CSOL);
  - the position meets the minimum skills threshold for that occupation;
  - the base salary meets or exceeds the Temporary Skilled Migration Income Threshold (TSMIT) (currently A\$51,400 gross per annum) in addition to superannuation for a 38-hour week;
  - the terms and conditions of employment are no less favourable than those provided to Australian staff in the same position and at the same workplace ('the Market Salary Rate');
  - the details of the nominee are provided.
  
- Visa application, which is lodged by the person nominated to fill the position, who must:
  - demonstrate they have the requisite skills and experience for that position;
  - be offered employment at the relevant Market Salary Rate (which cannot be below the TSMIT);
  - if necessary, provide evidence that they have vocational English; and
  - if necessary, provide a skill assessment.

As the Subclass 457 Visa Program caters for prescribed occupations in short supply and is demand driven, the Law Council is of the view that there is no basis upon which LMT should be reintroduced.

### **Schedule 3 – Subclass 457 visa conditions**

The Law Council recognises that one of few commendable provisions of the Bill is the proposal to increase the time for a 457 visa holder to remain in Australia following termination of employment from 28 to 90 days. However, the Law Council stresses this provision of the Bill can, and should, be enacted in separate legislation: it should be treated separately from the other provisions of the Bill that the Law Council views as being contrary to Australia's interests and hastily introduced without appropriate stakeholder input.

### **Schedule 5 – Enforceable Undertakings**

This is conceptually a significant and new concept to migration law. As such, the Law Council considers that this should be considered carefully and without haste, after due feedback from stakeholders.

The concept of DIAC being able to use the Courts to force a sponsor to comply with an undertaking (as opposed to punishing them for a failure to do so) is essentially a species of “specific performance”. The fact that a Court Order would be needed to do so gives some comfort: however, concerns remain and relevant stakeholders views should be considered.

### **Schedule 6 – Sponsorship Inspector Powers**

The current Act and Regulations already grant significant powers for inspectors to come onto work sites.

While the Law Council has not seen evidence that the current powers of DIAC inspectors are insufficient or incomplete we welcome the role of Fair Work Ombudsman inspectors in monitoring compliance with a sponsor’s obligations to ensure that 457 visa holders work in their nominated occupation and are paid the market salary. In addition to our comments above in relation to Schedule 3 this is the only other provision of the Bill that, in the opinion of the Law Council can, and should, be enacted in separate legislation.

### **Incompatibility with International Obligations**

Australia is a WTO Member and, as such, it is the Law Council's opinion that the proposed LMT provisions are contrary to our international obligations.

Australia is a signatory to the General Agreement on Tariffs and Trade 1994, which allows for the movement of persons seeking access to the employment market on a temporary basis. Australia’s Revised Services Offer (2006) removed LMT requirements for businesses seeking to recruit skilled workers to meet Australia’s skills needs. Australia is a signatory to a number of bilateral and regional free trade agreements that allow for the movement of persons supplying services without the need for LMT.

The proposed changes impact on start-up operations are also inconsistent with the global nature of business and start-up companies commencing operations in Australia as part of their business expansion.

The International Law Section’s Migration Law Committee would welcome any opportunities to discuss this further. In the first instance please contact the ILS Administrator at [ils@lawcouncil.asn.au](mailto:ils@lawcouncil.asn.au).

Yours sincerely



**Dr Gordon Hughes**  
**Chair, International Law Section**  
**Law Council of Australia**

## Attachment A: Profile of the Law Council of Australia

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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 17 Directors – one from each of the Constituent Bodies and six elected Executives. 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 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 Joe Catanzariti, President
- Mr Michael Colbran QC, President-Elect
- Mr Duncan McConnel, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Ms Leanne Topfer, Executive Member

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

## Attachment B: Profile of the International Law Section

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