Law Council
OF AUSTRALIA

Inquiry into Australia's skilled migration program

Joint Standing Committee on Migration

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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 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to the Law Institute of Victoria (**LIV**), and to its Migration Law Committee of the Federal Litigation and Dispute Resolution Section, for their assistance with the preparation of this submission.

Introduction

1. The Law Council welcomes the opportunity to provide a further submission to the Joint Standing Committee on Migration (**the Committee**) in relation to its Inquiry into Australia's skilled migration program (**the Inquiry**).

2. This submission follows the earlier submission of 3 March 2021 provided by the Law Council's Federal Litigation and Dispute Resolution Section (**the Section**), led by the Section's Migration Law Committee, to the Committee regarding the Inquiry, and addressing item 1(a) of the Inquiry's Terms of Reference (**TOR**).

3. The current submission addresses the remainder of the Inquiry's TOR as set out below.

> 2. *Australia's international competitiveness in attracting entrepreneurs, venture capital, startups, and the best and brightest skilled migrants with cutting edge skills;*
> 3. *Skills lists and the extent to which they are meeting the needs of industries and businesses and keeping pace with Australia's job landscape;*
> 4. *The administrative requirements for Australian businesses seeking to sponsor skilled migrants, including requirements to prioritise job opportunities for Australians and job creation;*
> 5. *The costs of sponsorship to businesses seeking to sponsor skilled migrants;*
> 6. *The complexity of Australia's skilled migration program including the number of visa classes under the program and their requirements, safeguards and pathways; and*
> 7. *Any other related matters.*

4. It includes detailed recommendations under each of these TOR below.

Terms of Reference:

TOR 2. Australia's international competitiveness in attracting entrepreneurs, venture capital, start-ups, and the best and brightest skilled migrants with cutting edge skills

5. To attract global talent, Australia needs a clearer, simpler and more certain pathway from temporary residence to permanent residence. Waiting for three years to move from the employer sponsored Temporary Skill Shortage (**TSS**) visa to the employer sponsored Employer Nomination Scheme (**ENS**) visa, with occupation lists potentially changing and impacting the pathway to permanent residence, dissuades talented individuals from considering a move to Australia.

6. The Global Talent Independent program is an excellent initiative in attracting the best and the brightest, particularly in emerging and uniquely specialised occupations that may not be classified in Australian and New Zealand Standard Classification of Occupations (**ANZSCO**), or where there is no clear alignment with an ANZSCO classification. However, the program lacks certainty. There are no policy guidelines that guide decision-makers and visa applicants on what profile or skills-set the Australian Government is looking for in the priority sectors of 'Resources, Agri-food and AgTech, Energy, Health industries, Digitech, Education'[1] etc.

[1] Australian Government Department of Home Affairs, 'Visas for Innovation', online information.

7. In addition, there is a concern that the Global Talent Independent program could become a de-facto employer nominated visa because of the limitations of the current ANZSCO classifications and their impact on pathways to permanent residence. Reliance on outdated ANZSCO classifications for the TSS and ENS programs is a serious issue that needs to be addressed as a matter of priority.

8. It is also worth noting that the United States, United Kingdom, Canada and New Zealand are also competing for the same global talent and have Global Talent programs of their own. Their programs outlined below appear to be as flexible as Australia's Global Talent Independent program. To give Australia a competitive edge, it is recommended that consideration be given to removing or reducing the requirement of the applicant needing to earn a salary equivalent to or higher than the Fair Work High income threshold.

9. As a point of comparison, the following sets out key features of other Global Talent programs.

    - In the **United States** (**US),** the Employment-Based Immigration-1 (**EB-1**) visa grants permanent residence to extraordinary ability/outstanding professor/multinational executives. The visa applicant must be able to demonstrate extraordinary ability in sciences, arts, education, business or athletics through sustained national or international acclaim. No offer of employment is required, but the applicant must provide evidence that he or she is entering the US to work in his or her area of expertise.

    - The **United Kingdom** (**UK**) Global Talent Visa is available to individuals who have successfully applied for an endorsement (from the Arts Council England, the Royal Society, UK Research and Innovation, Royal Academy of Engineering, the British Academy or other endorsing body) to prove that they are leaders or potential leaders in academia or research, arts and culture, or digital technology. The visa allows a stay of up to five years but can be extended and holders can apply for permanent residence after three years.

    - **Canada** has two Global Talent streams. Category A is available to employers hiring an individual with unique and specialised talent. The annual base salary must be at least $80,000 (CA) or equivalent to the prevailing wage for the occupation if it is higher. The visa applicant must have advanced knowledge of the industry and an advanced degree in an area of specialisation of interest to the employer, and/or a minimum of five years of experience in the field of specialized experience. In Category B, employers can hire highly-skilled foreign workers to fill positions in in-demand occupations found on the Global Talent Occupations List. Employers hiring foreign nationals under this stream must develop a Labour Market Benefits Plan that demonstrates their commitment to activities that will have lasting, positive impacts on the Canadian labour market.

    - **New Zealand** (**NZ**) has three programs – two employer-sponsored and one for individuals. The employer sponsored programs have two Talent Streams. The Talent (Arts, Culture, Sports) work visa is for those with exceptional talent in a field of art, sport or culture. It requires the support of a New Zealand organisation which is recognised for its excellence in the applicant's field of talent, and a sponsor. After being actively engaged in the field in New Zealand for two years, the visa applicant may be eligible for permanent residence. The second stream is the Talent (Accredited Employer) visa. It is for foreign

nationals with a skill needed by a New Zealand accredited employer. The visa is for a 30 month duration but after two years, the visa holder can apply for permanent residence. Visa applicants must have a job offer with an accredited employer for full time work with a minimum base salary of $79,560 (NZ) per year.

- New Zealand also has a Global Impact visa which is a non-employer sponsored visa and provides entrepreneurs and investors with a three-year visa. After three years, the visa holder can qualify for permanent residency. There are several stages to the application process: (1) submit an application; (2) acceptance into the Edmund Hillary Fellowship (**EHF**), which sponsors individuals for this visa type; and then (3) application for a Global Impact Visa. The visa holder can work in any employment, including self-employment, in any location in New Zealand but must demonstrate that he or she has $36,000 (NZ) to support himself or herself, and his or her family, for the first year of the visa period.

10. Specific improvements which may improve Australia's Global Talent Independent program, in addition to those above, include:

    (a) Expressions of Interest (**EOIs**):

        (i) the EOI should generate a record of the form and a EOI number – so that it can be tracked. This is line with the other Independent skilled visas sub-classes.

        (ii) Schedule 2 of the Migration Regulations 1994 (Cth) (**the Migration Regulations**) should require a valid EOI approval at the time of applying for the visa – to allow only individuals who have a EOI approval to proceed with the GTI visa.

        (iii) once pre-approved under the EOI, delegates should be prevented from revisiting the merits of the case, except in the case of suspected bogus document and/or incorrect information provided with the EOI – this is because an assessment is done at the EOI stage.

    (b) As per Directions 89,[2] the present order of processing should be revised. In particular, an application with a letter of offer as a priority 1 application should be deleted because it lacks checks and balances to monitor whether grant holders take up the offer. For offshore applicants, this is especially so in light of the new directions that applicants do not have to make a first entry within 12 months of the visa grant but within the five year validity of the visa.[3]

Recommendations

The Law Council recommends that:

- **to attract global talent, Australia needs a clearer, simpler and more certain pathway from temporary residence to permanent residence.**
- **In this context, consideration should be given to:**

[2] Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Cth), Direction no. 89; Order of Consideration – Subclass 858 and Subclass 124 visas under s 499 (17 December 2020).
[3] Ibid.

- **the barriers posed by lengthy periods required to transfer from the employer sponsored Temporary Skill Shortage (TSS) visa to the employer sponsored Employer Nomination Scheme (ENS) visa;**

- **occupation lists potentially changing and impacting the pathway to permanent residence; and**

- **for the Global Talent Independent program:**

  - **the Expression of Interest (EOI) should generate a record of the form and a EOI number;**

  - **Schedule 2 of the Migration Regulations should require a valid EOI approval at the time of applying for the visa;**

  - **once pre-approved under the EOI, delegates should be prevented from revisiting the merits of the case, except in the case of suspected bogus document and/or incorrect information provided with the EOI;**

  - **reliance on outdated ANZSCO classifications for the TSS and ENS programs should be addressed to discourage existing applicants from lodging applications under the Global Talent Independent program;**

  - **the present order of processing should be revised. In particular, an application with a letter of offer as a priority 1 application should be deleted; and**

  - **the requirement of the applicant needing to earn a salary equivalent to or higher than the Fair Work High income threshold be removed or reduced to $125,000 (excluding super).**

TOR 3 - Skills lists and the extent to which they are meeting the needs of industries and businesses and keeping pace with Australia's job landscape

11. The Law Council notes that the current skills lists have not changed for several years. They are overlaid by labour market testing, retrospective, and accordingly not meeting business needs as they are not accurately predicting occupations with skills shortages. They are not keeping up with the changing landscape.

12. The Law Council submits that the methodology used to place and remove occupations on the skills lists does not include measures which identify emerging and uniquely specialised occupations; notably in occupations that are not in the ANZSCO. For example, the digital revolution has created jobs for highly skilled workers in entirely new occupations and industries such as 'Big Data' architects, digital marketing specialists, and data scientists – all these occupations that did not exist five years ago.

13. The current methodology utilises conventional best practices using traditional statistical data sources. It does not include use of emerging analytical methods from the field of cognitive computing and artificial intelligence that has the ability to

capture new and niche skill sets well before they become detectable through conventional labour market studies. Inability to sponsor overseas workers in these specialised fields means that Australian businesses are potentially missing out on the opportunity to recruit overseas talent, due to the fact that the ANZSCO dictionary is itself now an outdated (and static) document.

14. In the circumstances, the Law Council endorses all the recommendations made by the Committee for Economic Development of Australia (**CEDA**) in its 2019 *Effects of temporary migration - shaping Australia's society and economy* report[4] (**CEDA Temporary Migration Report)**, and its 2021 *A good match: optimising Australia's permanent skilled migration* report[5] (**CEDA Permanent Migration Report**) as follows:

CEDA Temporary Migration Report

Recommendation 1:

The Federal Government should strengthen identification of skill shortages and eligible occupations for skilled visas in the skilled occupation list to increase confidence in the process by:

- Being more transparent about the data and methods used in assessing whether occupations are included on skilled occupation lists.
- Immediately reviewing the ANZSCO codes to ensure they align with current and emerging labour trends, particularly the impact of technology.
- Establishing an independent committee, like the Migration Advisory Committee in the UK, to undertake analysis, consultation and advice on the formulation of skilled occupation lists.

Recommendation 2:

The Federal Government should remove the requirement for labour market testing once the skills shortage list process has been strengthened.

Recommendation 3:

The Federal Government should immediately introduce a dedicated, streamlined path for intra-company transfers of employees to Australia.

Recommendation 4:

The Federal Government should improve the operation of the Skilling Australia Fund Levy by:

- Aligning the use of the Skilling Australia Fund Levy to training initiatives that alleviate the skill shortages driving skilled migration.

[4] Committee for Economic Development of Australia (**CEDA**), *Effects of Temporary Migration: Shaping Australia's society and economy* report (2019), available online.
[5] CEDA, *A good match: optimising Australia's permanent skilled migration* report (2021), available online.

- Changing the point of levy collection from the visa nomination stage to the visa approval stage so that employers do not incur the levy if a visa nomination is refused.

Recommendation 5:

The Federal Treasurer should task the Productivity Commission with undertaking a review of the Temporary Skill Shortage visa program every three to five years to guide future changes to policy settings.

CEDA Permanent Migration Report

Recommendation 1:
Establish a new government-regulated online skills-matching jobs platform.

Recommendation 2:
Comprehensively update the ANZSCO to ensure that migrants with vital and cutting-edge skills can migrate to Australia.

Recommendation 3:

More transparency from the Federal Government about the data and methods they use to assess what occupations are in demand and included on the skilled occupation lists.

Recommendation 4:

Reduce the Newly Arrived Resident's Waiting Period for unemployment benefits back from four years to six months.

Recommendation

The Law Council recommends that the Committee have close regard to CEDA's recommendations made in its:

- **2019 Effects of temporary migration - shaping Australia's society and economy report;[6] and**
- **2021 A good match: optimising Australia's permanent skilled migration report.**[7]

TOR 4: The administrative requirements for Australian businesses seeking to sponsor skilled migrants, including requirements to prioritise job opportunities for Australians and job creation.

15. The Law Council considers that the nomination and visa requirements under the TSS (subclass 482) visa scheme are, as currently drafted, overly expensive and onerous for employers seeking to urgently fill skill shortages. Several specific issues are discussed below.

[6] Committee for Economic Development of Australia (**CEDA**), *Effects of Temporary Migration: Shaping Australia's society and economy* report (2019), available online.
[7] CEDA, *A good match: optimising Australia's permanent skilled migration* report (2021), available online.

Temporary Skills Shortage (subclass 482) - Schedule 1 requirements

16. Under the Migration Regulations, the Schedule 1 requirements (namely, the requirements for making a valid application) for the TSS (subclass 482) visa require the applicant to understand and correctly answer complex questions, including:

    (i) is the applicant required to provide a skills assessment from a relevant skills assessing authority, or is an exemption applicable (sub-clause 1240(3)(g)); and

    (ii) is the applicant eligible for an International Trade Obligations (**ITO**) exemption to the requirement that the applicant be offshore for a third TSS (subclass 482) visa application in the Short Term stream, in circumstances where the last TSS visa application in the Short Term stream was lodged onshore (sub-clause 1240(3)(b)).

17. The Law Council suggests that these issues are unsuitable for inclusion in Schedule 1 as they require the applicant to review and correctly construe multiple legislative instruments. If the applicant makes an error (which may occur), he or she may inadvertently lodge an invalid application, and, as a result, become an unlawful non-citizen or become affected by section 48 bar under the *Migration Act 1958* (Cth) (**the Migration Act**). The Law Council further considers that the skills assessment requirement is sufficiently dealt with in Schedule 2 of the Migration Regulations at subclauses 482.212(3)-(4), and does not need to be replicated in Schedule 1.

18. As for the ITO exemptions referred to at sub-clause 1240(3)(g), the Law Council considers that in the absence of clear Procedures Advice Manual 3 (**PAM 3**) guidelines summarising the Department of Home Affairs' (**the Department's**) view as to when ITO exemptions would be applicable in these circumstances (the substance of which should be published on the Department's website for easy access), this requirement is opaque.

19. The Law Council suggests that expecting applicants (or their representative) to read and construe international trade agreements between Australia and other nations is unrealistic and notes that the Department's published information on ITO exemptions only covers the way that they apply in the context of Labour Market Testing. The Law Council advocates that at a minimum, the Department publish clear guidelines (eg, in PAM3) setting out the Department's views on ITO obligations as they relate to sub-clause 1240(3)(b) of Schedule 1.

Caveats

20. Consideration should be given to improving the drafting of caveats (also called inapplicability conditions). Their inclusion on the skill lists for the ENS as well as the TSS visa scheme may also give rise to a lack of certainty for applicants seeking to transition to permanent residence.

21. For example, if the size of an accounting firm changes or turnover drops significantly, an accountant may lose his or her path to permanent residence if the caveat was met at time of grant of the TSS visa, but not at time of application of the ENS visa. By this time, the applicant has already worked for three years in the role and has significantly invested in this pathway.

22. Potential confusion for representatives, applicants and delegates could be avoided by ensuring that caveats (or inapplicability conditions) do not contain double negatives in their drafting. One recent example of this issue, which was submitted

to the LIV, involved a solicitor seeking written clarification from the Department as to the correct interpretation of a caveat, noting that an apparent plain reading of the legislative instrument was contradicted by the Department's explanation of that caveat on its website. The solicitor then lodged a nomination in reliance on the advice provided in writing by the Department, enclosing that advice for the delegate's review, and still received a refusal decision by a delegate taking the contrary view.

23. It should also be noted that there can be significant uncertainty regarding the Department's likely interpretation in circumstances where a caveat or some other area of its policy is ambiguous or unclear. In these situations, resolution of these issues often comes down to the decision of a delegate at the time of decision, which is an unsatisfactory position in circumstances where employers and applicants are paying many thousands of dollars in Skilling Australians Fund (**SAF**) levy and Visa Application Charges (**VAC**) fees.

24. In the hospitality industry, caveats are increasingly unsuited to the changing nature of that sector, in light of the COVID-19 pandemic. Restaurants and cafes have increased or created, for the first time, takeaway or delivery services to maintain turnover during the pandemic and sustained lockdowns, particularly in Victoria. Lockdowns also forced restaurants to limit or confine their service or to change or limit menus to survive in increasingly tough conditions subject to government restrictions. As the industry begins to recover from the pandemic, the ongoing inclusion of these caveats (without any PAM3 guidelines directing delegates and employers how they will be interpreted in the post-pandemic space) creates uncertainty for businesses and applicants hoping to access the TSS or ENS visa schemes.

Condition 8607

25. Condition 8607 requires an applicant to obtain a new visa, as well as a new nomination, if changing occupations, even if working for the same employer. The Law Council considers that this is overly onerous and disincentivises businesses from moving visa holders into higher and more suitable roles given the increased cost and risk associated with further nomination and visa applications.

26. A new visa application requires reassessment of all criteria including health, skill, and work experience and, given the likely operation of the subsequent temporary visa application fee in these circumstances, may include (especially for a family) a very high set of visa application fees. These high fees for a temporary visa function as a disincentive for applicants to move roles or companies when opportunities arise.

27. Additionally, a visa applicant who is changing occupation risks having that subsequent visa application refused, on the basis that they do not possess two out of the last five years of relevant work experience. This is because, by definition, they must have been working in their nominated occupation prior to lodging the new visa application. Particularly where the same employer is looking to move a visa holder into a new occupation, this seems an undesirable outcome given that the employer would only be proposing the visa holder for the new position on the basis that they were satisfied that the visa holder has the suitable skills and experience for the other role.

28. A further issue with condition 8607 (and the equivalent condition for the subclass 457 visa) is that there is no flexibility for trial periods of employment before an employer commits considerable resources into sponsoring a foreign worker. Visa

holders who lose their job are given 60 days to find a new sponsor, but they cannot perform any work for that sponsor until there is an approved nomination in place. This incentivises employers to employ foreign workers on other visas such as graduate or working holiday visas rather than utilising the existing TSS-holder population and leads to unnecessary cancellation of TSS visas in circumstances where there is a genuine shortage that the holder has the ability to fill.

29. The Law Council recommends that the condition be altered to allow for at least a one-week trial period with a new employer without breaching the visa condition. This supports the intention of the TSS programme as it will facilitate the ability of employers to employ workers where they have a position that cannot be filled locally and the worker already holds a TSS visa.

Two year work experience requirement

30. The Law Council is concerned that the two year full time work experience requirement is too onerous for many onshore applicants to meet. Further, as a result, Australian businesses are adversely affected by an inability to sponsor overseas workers in situations where they are also unable to find suitably skilled local workers to perform the same tasks.

31. The 457/TSS program has altered from the previous requirement that no experience was needed at all[8] to the current requirement, where two years of full time work experience in the last five years is required. This two year requirement disproportionately affects student visa holders. The '40 hours per fortnight' work limitation on these students, plus the fact that the work needs to be completed at a skilled (ie post qualification) level, means that it can exceptionally difficult for students to accrue the necessary work experience. This is the case even if they hold an 18-month (or indeed two year) subclass 485 Graduate Skilled visa after completing their studies. Frequently this results in visa holders enrolling in additional courses in which they have no real interest, and remaining in this scenario in the hope that an opportunity of work which is appropriate to meet the requirement arises.

32. The Law Council recommends that the work experience requirement for the TSS visa should be reduced to one year of full time work.

Small business owners in regional areas

33. Many visa holders settle in regional areas and start their own businesses while holding a temporary visa such as a graduate visa. These visa holders build up client bases, create jobs for Australians, provide work for subcontractors and stimulate local economies. However, there are very few options for small business owners to remain in the country and continue to provide economic benefits to their regions. This has been recognised by the South Australian and Queensland Governments, which have both created pathways for small business owners to obtain state nominated visas.

34. The Law Council recommends that existing policy be altered to facilitate such business owners being sponsored by their businesses through the subclass 494 programme. Positions would still be subject to the existing assessment for

[8] In that applicants only needed to have the relevant qualification for the position and no work experience.

genuineness,[9] which would prevent any misuse of the system by those who are not contributing to the local economy.

Recommendations

The Law Council recommends that:

- **sub-clauses 1240(3)(g) and 1240(3)(b) of the Schedule 1 requirements in the Migration Regulations be deleted;**
- **the Department publish clear guidelines (eg, in PAM3) setting out the Department's views on ITO obligations as they relate to sub-clause 1240(3)(b) of Schedule 1;**
- **the existing caveats or inapplicability conditions for the ENS as well as the TSS visa scheme be redrafted to ensure greater certainty for applicants seeking to transition to permanent residence;**
- **condition 8607 be reviewed to: avoid requiring an applicant to obtain a new visa if changing occupations, as well as a new nomination, if working for the same employer; and allow for greater flexibility of trial periods of employment;**
- **the TSS work experience requirement be reduced to one year of full time work;**
- **existing policy be amended to facilitate visa holders in regional areas who start their own small business while holding certain temporary visas being sponsored through the subclass 494 program, subject to genuineness assessments.**

TOR 5. The costs of sponsorship to businesses seeking to sponsor skilled migrants

Skilling Australians Fund Levy

35. The Law Council considers that the costs of sponsorship to businesses are too high. Currently, the SAF levy functions as an additional tax on businesses, rather than any kind of investment in their own workforce.

36. For small businesses hoping to sponsor an applicant for a four year period, the levy of $4,800 can be prohibitive when added to sponsorship and nomination fees and visa application fees (and, often, migration agent or solicitor professional costs). Section 56 or 57 notices[10] in respect of nomination applications could be utilised more frequently to assist small businesses. These notices serve to ensure that all appropriate information is taken into account and clear refusal decisions result. Where decisions appear to be arbitrary or unclear, small businesses must then grapple with the loss of the SAF levy and further payment of the same levy if they decide to relodge the nomination application and try again. Alternatively, they are faced with likelihood of a two and a half year wait at the Administrative Appeals Tribunal (**AAT**) if they decide to appeal the decision.

37. The Law Council suggests that the list of circumstances in which nominators are entitled to a refund at regulation 2.73AA should be significantly expanded to include

[9] That is, for a subclass 474 visa, there is a requirement that the position associated with the nominated occupation is genuine; and the visa applicant's intention to perform the occupation is genuine.
[10] Eg, seeking further information in relation to a visa application, or providing information to an applicant which would be the reason for an adverse decision)

the nomination being refused on any basis set out in regulation 2.72 of the Migration Regulations, or if the labour market testing condition is not satisfied.

38. There is no apparent rationale for keeping these funds – particularly up to $7,200.00 under the TSS program or $5,000.00 under the ENS program for businesses making $10 million turnover per annum – if the nomination is refused on any number of the bases set out in the Migration Regulations. Many of these bases would only involve an innocent or inadvertent mistake by the nominator in failing to provide sufficient evidence or information addressing a particular criterion. Extraordinarily long lead times in the AAT often mean that a business prefers to lodge a new nomination, rather than review a refusal decision with a view to filling the skills shortage in a timely way. However, for businesses in those cases to be required to forfeit such high fees and simply re-pay them in full immediately – often after receiving a nomination refusal decision which lacks clarity – undermines the program's objectives and reception.

39. In the alternative, the Law Council suggests that the SAF levy be converted to a tax-deductible expense for businesses. Under the former 'Training Benchmarks' requirements for Sponsors, businesses were at least deriving a benefit from either providing training for their Australian citizen staff, or making a tax-deductible donation to an Australian education provider. The Law Council does not advocate the return of the Training Benchmark program, which was difficult for many small sponsors to administer, often leading to nomination refusals. However, it submits that it is not unreasonable to expect that businesses derive some benefit from the payment of the SAF levy given all of the costs associated with sponsoring an overseas worker. Australian businesses should not be financially penalised for having to resort to sponsoring overseas workers to fill skills shortages that the Australian labour market is unable to fill.

40. In addition, the Law Council suggests that the necessary legislative amendments be made to facilitate the ability for sponsors to 'attach' a new nomination application to a pending visa application in circumstances where a TSS nomination is refused.[11] The inability to do this under the TSS regulations[12] leads to unfortunate outcomes for visa applicants who face refusal of their visas (and potentially falling foul of section 48 of the Migration Act) in circumstances that are outside their control.

Temporary Skilled Migration Income Threshold

41. Before any nomination for a temporary or provisional employer-sponsored visa can be approved, the nominator must demonstrate that the position will be paid at least the amount of the Temporary Skilled Migration Income Threshold (**TSMIT**) and that the market salary for the position is at least the TSMIT. The TSMIT is currently set at $53,900.

42. This amount may be appropriate for major cities in Australia but has been imposed as a blanket requirement across the country. The only way to vary the requirement is to negotiate a Labour Agreement with the government. The fact that many Designated Area Migration Agreements (**DAMAs**) include concessions to TSMIT indicates that TSMIT is not an appropriate minimum salary figure in regional Australia. For many regional businesses, the requirement to pay a base salary equal to TSMIT in order to sponsor a person on a temporary or provisional work visa

[11] As was previously the case under the 457 nomination regulations.
[12] Where each visa application must be associated with an individual nomination application.

prevents them from being able to sponsor workers and fill skill gaps, unless they are able to access a DAMA.

43. The Law Council recommends that a separate income threshold be determined to apply to positions in regional locations, or alternatively that TSMIT be abolished and that salary is evaluated based only on the market salary for the region for that position.

Recommendations

The Law Council recommends that:

- **with respect to the SAF levy:**
  - **the list of circumstances in which nominators are entitled to a refund at regulation 2.73AA of the Migration Regulations should be significantly expanded to include the nomination being refused on any basis set out in regulation 2.72, or if the labour market testing condition is not satisfied;**
  - **in the alternative, the SAF levy be converted to a tax-deductible expense for businesses; and**
  - **the necessary legislative amendments be made to facilitate the ability for sponsors to 'attach' a new nomination application to a pending visa application in circumstances where a TSS nomination is refused; and**
- **with respect to the Temporary Skilled Migration Income Threshold (TSMT), a separate income threshold be determined to apply to positions in regional locations, or alternatively that TSMIT be abolished and that salary is evaluated based only on the market salary for the region for that position.**

TOR 6: The complexity of Australia's skilled migration program including the number of visa classes under the program and their requirements, safeguards and pathways.

44. The current Australia's skilled migration program contains eight visa categories and 13 visa subclasses, including:

Category	Visa	Who is it for
Employer sponsored	Employer Nomination Scheme (subclass 186)	Individuals who are nominated by employers.
Skilled independent	Skilled independent visa (subclass 189)	Individuals who are invited to apply for this visa based on their Expression of Interest (EOI) score (the Points tested stream), as well as eligible New Zealand citizens (the New Zealand stream).
Regional	Regional Sponsored Migration Scheme (subclass 187)	Individuals who are sponsored by regional employers.
	Skilled Work Regional (Provisional) visa (subclass 491)	Individuals who are either nominated by an Australian state or territory government agency or sponsored by an eligible relative to live, work and study in regional Australia.
	Skilled Employer Sponsored Regional (provisional) visa (subclass 494)	Individuals who are sponsored by regional employers.
	Individuals who are sponsored by regional employers.	Individuals who have lived and worked in regional Australia for at least 2 years on an eligible visa and who wish to apply for permanent residence.
State and Territory Nominated	Skilled Nominated visa (subclass 190)	Individuals who are nominated by an Australian state or territory government agency.
Business Innovation and Investment Program	Business Talent (Permanent) visa (subclass 132)*	Individuals who have a demonstrated history of success or talent in innovation, investment and business and are able to make a significant contribution to the national innovation system and the Australian economy.
	Business Innovation and Investment (provisional) visa (subclass 188)	Individuals who are nominated by an Australian state or territory government agency.
	Business Innovation and Investment (permanent) visa (subclass 888)	Individuals who have a demonstrated history of success or talent in innovation, investment and business and are able to make a significant contribution to the national innovation system and the Australian economy.
Global Talent Program	The program is not confined to a specific visa subclass, however, the primary visa pathway used for new applicants is the Distinguished Talent visa. Individuals highly skilled in one of	The program is not confined to a specific visa subclass, however, the primary visa pathway used for new applicants is the Distinguished Talent visa. Individuals highly skilled in one of the target sectors. Currently these are

	the target sectors. Currently these are Resources; Agri-food and AgTech; Energy; Health industries; Defence, advanced manufacturing and space; Circular economy; Digitech; Infrastructure	Resources; Agri-food and AgTech; Energy; Health industries; Defence, advanced manufacturing and space; Circular economy; Digitech; Infrastructure
Distinguished talent	Distinguished Talent visa (subclass 858)	Individuals who have an internationally recognised record of exceptional and outstanding achievement in a profession, a sport, the arts, or academia and research.
Temporary Work	Temporary Work (Skilled) (subclass 457) and Temporary Skill Shortage visa (subclass 482)	Individuals with suitable skills and experience who have been nominated by an employer to work in an occupation that is listed on one of the skilled occupation lists.

** This visa will be closed to new applications from 1 July 2021.*
(source: Sub 16 – Department of Home Affairs, dated 16 February 2021).

Complexity due to each skilled visa having its own skilled occupation list

45. Except for the Business Innovation and Investment Program, each visa category and their respective visa subclasses has their own occupation list, which are listed below:

Category	Visa	Occupation list
Employer sponsored	Employer Nomination Scheme (subclass 186)	LIN 19/049 - subclass 186 visa TRT stream; LIN 19/048 - subclass 186 TRT stream.
Skilled independent	Skilled independent visa (subclass 189)	LIN 19/051
Regional	Regional Sponsored Migration Scheme (subclass 187)	LIN 19/047
	Skilled Work Regional (Provisional) visa (subclass 491)	LIN 19/051
	Skilled Employer Sponsored Regional (provisional) visa (subclass 494)	LIN 19/219
State and Territory Nominated	Skilled Nominated visa (subclass 190)	LIN 19/051
Global Talent Program	The program is not confined to a specific visa subclass, however, the primary visa pathway used for new applicants is the Distinguished	

	Talent visa. Individuals highly skilled in one of the target sectors. Currently these are Resources; Agri-food and AgTech; Energy; Health industries; Defence, advanced manufacturing and space; Circular economy; Digitech; Infrastructure	
Distinguish talent	Distinguished Talent visa (subclass 858)	
Temporary Work	Temporary Work (Skilled) (subclass 457) and Temporary Skill Shortage visa (subclass 482)	LIN 19/048

46. There are several major occupation lists as listed above.

47. In addition, each State and Territory publishes their own skilled occupation lists for subclass 189, 190 and 491 visas.

48. Further, there are now seven DAMAs allowing sponsorship of workers for subclass 482, 494 and 186 visas in specified regions of Australia, each with its own list of skilled occupations.

49. This is a total of 21 different lists of skilled occupations, with more on the way as further DAMAs are negotiated.

50. The Law Council recommends introducing one occupation list which is applicable across all skilled visa categories and which contains the following types of occupations:

    (i) Priority migration skilled occupations – applicable to the 189, 190, 482, 186, 491 and 494 visa subclasses.

    (ii) Medium and long term strategic skilled occupations – applicable to the 189, 190, 482, 186, 491 and 494 visa subclasses.

    (iii) Short term skilled occupations – applicable to 482 short stay stream and 190 visa subclasses.

    (iv) Regional skilled occupations – applicable to 482, 491, 494 and 186 visa subclasses.

51. A single occupation list would bring clarity and certainty to visa applicants and professionals practising migration law. It would make Australia more competitive globally in providing certainty to applicants who come on temporary work visas who may then decide to settle in Australia. It will also greatly reduce confusion that may arise between the skilled occupation list under migration law and each State/Territory's own occupation list for 190 and 491 visa nominations.

52. The Department should retain flexibility by regularly reviewing and adjusting skilled occupations in the above four categories (noted in paragraph 50 above) to meet the changing demand of the Australia labour market.

Recommendations

The Law Council recommends introducing one occupation list which is applicable across all skilled visa categories and which contains the following types of occupations:

- **priority migration skilled occupations – applicable to the 189, 190, 482, 186, 491 and 494 visa subclasses;**
- **medium and long term strategic skilled occupations – applicable to the 189, 190, 482, 186, 491 and 494 visa subclasses;**
- **short term skilled occupations – applicable to 482 short stay stream and 190 visa subclasses; and**
- **regional skilled occupations – applicable to 482, 491, 494 and 186 visa subclasses.**

TOR 7: Other related matters

Lifting of the Section 48 Bar for workers with approved nominations

53. The Law Council reiterates the recommendation in the Section's previous submission[13] to the Inquiry that workers with approved nominations should be permitted to lodge visa applications from within Australia despite having had a refused visa since their last entry to Australia.[14]

Member of Family Unit definition- sub-regulation 1.12(2)(b)(iii)

54. With respect to the definition of Member of Family Unit **(MoFU**), sub-regulation 1.12(2)(b)(iii) of the Migration Regulations stipulates that a child over 23 years old can no longer be a MoFU of the child's family head unless the child is wholly or substantially reliant on the family head for financial support because the child is incapacitated for work due to the total or partial loss of the child's bodily or mental functions.[15]

55. Most visas' secondary criteria require children included in an application as secondary applicants to meet MoFU at both times of application and decision. This brings uncertainty and unfairness to applicants whose children are over 20 and yet financially dependent on their parents at the time of application. Further, if an application is refused by the Department and the main applicant seeks merits review, even if the AAT remits or sets aside the refusal decision, the applicant's children may have turned 23 years old and would, unfortunately, miss out the visa approval.

56. Long processing times make the application of sub-regulation 1.12(2)(b)(iii) problematic. For example, onshore partner visas take up to 28 months and business skilled visas (subclass 188) take over two years. Uncertainty and unfairness as a result of applying sub-regulation 1.12(2)(b)(iii) at the time of decision appear more evident.

57. Further, the situation may arise where the migration law allows a family head to include his/her child in the application but later disqualifies the child only because of

[13] Legal Practice Section of the Law Council of Australia, Inquiry into Australia's skilled migration program, submission to the Joint Standing Committee on Migration, 3 March 2021.
[14] Ibid.
[15] Migration Regulations, reg 1.05A(1b).

the child turning 23 years old, due to lengthy processing times and through no fault of the family head and the child. In this respect, applying sub-regulation 1.12(2)(b)(iii) at the time of decision forces the separation of migration families and may contribute to their mental or physical harm.

58. The benefits of streamlining the MoFU definition may include reduced costs of decision making and greater consistency. It is also arguable that this age group not only strengthen the family bonds but pose wider economic benefits for Australia. By arriving at a relatively young age, their English language skills will be higher, they may be more highly educated and have a higher level of labour force participation, with the effect of providing an overall greater gain to the Australian Government through contributing greater tax revenue over a longer period while drawing lesser government-funded services. In short, this would seem to pose a 'win-win' outcome.

59. The Law Council recommends that the application of sub-regulation 1.12(2)(b)(iii) application should be limited to at the time of application only. At the time of decision, provided that the child is still financially dependent on the family head, the child should be considered as meeting the definition of MoFU.

Member of Family Unit definition - sub-regulation 1.12(5) (subclass 888 visa with Covid-19 concessions)

60. The Migration Amendment (Covid-19 Concessions) Regulations 2020 (Cth) (**the Covid-19 Concessions Regulations**) were introduced on 17 September 2020. Amongst a number of concessions introduced under these regulations, primary holders of a subclass 188 visa and their spouse are able to apply for the subclass 888 visa, despite the fact that their 188 visas expired during the Covid-19 Concession Period.

61. However, the Covid-19 Concessions Regulations do not make any amendments to sub-regulation 1.12(5) and as a result, children who held a 188 visa which expired during the Covid-19 Concession Period are unable to be included in their parents' application for a 888 visa made under the Covid-19 Concession Regulations.

62. The purpose of sub-regulation 1.12(5) is to allow children who obtained a 188 visa as dependants in their parents' 188 visa applications to be included in their parents' 888 visa application, notwithstanding them being over 23 years and no longer financially dependent on their parents. The Departmental policy states that:

> *The special provisions in regulation 1.12(5) recognise that for some visas an old visa may be held over a lengthy period of time but the intention is that once a person satisfies the requirements as a MoFU, the person may continue their stay in Australia as a MoFU. For instance, if the old visa is a provisional visa granted for up to 4 years the person may progress to a relevant permanent visa as a member of the family unit after the provisional period has passed, even though the person may no longer be able to satisfy regulation 1.12(2).*[16]

[16] Department of Home Affairs, PAM3, s5G - Relationships and family members - Dependent family members.

63. It is therefore surprising that the Covid-19 Concessions Regulations make no amendments to sub-regulation 1.12(5). This would appear to undermine the Department's policy and good intentions as outlined above.

64. If the primary holder of a 188 visa and his or her spouse/partner/de facto partner can lodge a 888 visa application despite that his or her 188 visa expired during the Covid-19 Concession Period, sub-regulation 1.12(5) should be amended to allow their children to be included in their parents' 888 visa applications, despite that the children's 188 visas also expired during the Covid-19 Concession Period. Such amendments are consistent with the Department's policy in this regard.

65. On the basis of the above, the Law Council recommends that sub-regulation 1.12(5) (in particular, item 4) be amended to allow children who are over 23, and whose subclass 188 visa[17] expired during the Covid-19 Concession Period, to be included in the family's head's application for a subclass 888 visa.[18]

Amnesty to undocumented workers

66. It is estimated that there may be up to 100,000 undocumented workers in Australia.[19] There is currently a shortage of agricultural workers estimated at about 26,000.[20] There needs to be some 'pull factor' for people to come forward. Short term temporary visa options will not be effective. A long-term option or a pathway to permanent residency such as a subclass 491 to 191 pathway is required.

Employer Nomination Scheme

67. The ENS visa (subclass 186) is one of the best performing visa subclasses within the migration program to the Australian economy, in particular the Temporary residence transition for reasons including:

- filling valuable niches at the specific employer level;
- providing productivity gains through skills formation to the Australian community;
- high income households than many other permanent visas making stronger contributions to aggregate demand;
- having the highest contribution per capita in taxation revenue of any visa subclass; and
- leading to lower demand for government services through the qualifying period for accessing government-funded services.

68. This subclass therefore should be one where those who already in Australia that qualify for permanent residence should be encouraged to stay and continue their contributions.

69. The Law Council therefore suggests that the transitional pathway established in March 2018 for Temporary Work (subclass 457) visa holders who held or had

[17] ie, Business Skills (Provisional) (Class EB) Visa.
[18] ie, Business Skilled (Permanent) (Class EC) Visa.
[19] Nick Bonyhady, 'Calls to change visa rules as undocumented workers risk missing out on vaccinations', *Sydney Morning Herald*, (online), 22 March 2021; see also National Agricultural Workforce Strategy Learning to excel National Agricultural Labour Advisory Committee December 2020, 190.
[20] Ausveg, 'EY report demonstrates 26,000 worker shortage that will cripple fruit and vegetable industries' online media release, 30 September 2020.

applied for a subclass 457 visa that was subsequently granted as at 18 April 2017 via the ENS should be extended to a wider cohort and for a longer period.

70. As currently drafted, these applicants, who can access 'grandfathering' provisions allowing them to transition to permanent residence accessing a series of concessions under the ENS, must apply for their permanent residence under the ENS (subclass 186) visa scheme before 18 March 2022.[21] As at that date, the concessions are no longer available as the relevant legislative instrument containing the concessions is repealed. The COVID-19 pandemic has caused pressures on employers and the wider economy, and therefore greater flexibility should be accorded to transitional cohort of applicants.

71. Applicants who have sought merits and/or judicial review of subclass 457 visa applications which they applied for before 18 March 2017 are still being granted subclass 457 visas in 2021 following remittals from the Federal Circuit Court or from the AAT. These applicants will not have time from date of grant of their visas to accumulate two years of work experience in their nominated role to meet the criteria under the Temporary Residence Transition stream of the ENS by 18 March 2022. They may (depending on their individual circumstances and whether they needed to rely on concessions) therefore lose their pathway to permanent residence.

72. These long delays in the merits and judicial review processes do not appear to have been contemplated in the drafting of the legislative instrument *Migration (IMMI/18052: Specified Persons and Periods of Time for Regulation 5.19) Instrument 2018* (**IMMI 18/052**). Rather, the intention of the concessional provisions was to allow applicants who had applied for their subclass 457 visa as at 18 April 2017 to access permanent residence under the previous provisions without being subject to the vast legislative amendments introduced in March 2018, to 'ensure that they (were) not disadvantaged'.[22] This cohort of applicants is now divided into those who were fortunate to be granted their visas at primary level quickly, and thus apply for their ENS (subclass 186) visas while accessing the concessional provisions in IMMI 18/052 before 18 March 2022, and those who were refused and had to seek review, with a visa grant date after 18 March 2020.

73. There is no logical basis to deny the latter cohort the same access to the concessions that were made available to the first cohort. Indeed, the latter cohort has been exposed to additional costs in challenging ultra vires or incorrect decisions in the Federal Circuit Court or the AAT and the unfairness of a denial of access to permanent residence is exacerbated given the delays and costs incurred in those processes.

74. The Law Council recommends that the operation of the concession provisions set out in IMMI 18/052 be extended to 18 March 2024.

Protections for temporary visa holders who experience workplace abuse

75. The current work sponsorship framework prevents a nomination from being approved if there is 'adverse information' about the employer, unless the Minister considers it reasonable to disregard the adverse information. This information may

[21] The *Migration (IMMI/18052: Specified Persons and Periods of Time for Regulation 5.19) Instrument 2018* sets out the definition of a 'specified person'. This is a person specified for sub-regulation 5.19(5)(a)(iii) of the Migration Regulations, being a person who: on 18 April 2017, either held a subclass 457 visa; or was an applicant for a subclass 457 visa that was subsequently granted. This instrument will be repealed on 18 March 2022.

[22] See Explanatory Statement, Migration Legislative Amendment (TSS visa and Complementary Reforms) Regulations 2018.

include, but is not limited to, information about breaches of workplace legislation or sponsorship obligations. Standard business sponsors may also be barred from sponsoring further employees as a result of such breaches.

76. While the intention of these provisions in punishing employers who do the wrong thing is laudable, the practical effect of the provisions is that they punish temporary visa holders for the actions of their employers. Subclass 482 visa holders are unable to report their employers for breaches of workplace law as their employer will then not be able to sponsor them for permanent residency. They are prevented from leaving the position as they will then only have 60 days to find a new position before their visa is liable for cancellation.

77. As an example, a man is sponsored as a chef in a restaurant on a subclass 482 visa. He works for his employer for three years and lodges a subclass 186 visa application. While the visa is processing, he becomes aware that his employer has not been paying superannuation to the other workers in the restaurant. If he reports his employer, then his subclass 186 visa will be refused due to this adverse information. His co-workers are also aware that if they report the problem, their colleague's permanent visa will be refused. This creates a culture of silence around workplace issues. Even after the man's visa is granted, if there are any other subclass 482 holders employed by the employer he may not wish to jeopardise their chance of obtaining a permanent visa by reporting the employer at that point.

78. The Law Council recommends the creation of a visa framework for workers who are subject to grossly unfair work practices, where specific offences or penalties and threshold findings have been made or applied under existing laws by regulatory bodies such as the Fair Work Commission or industrial courts. This would entitle applicants to a visa despite no longer working for the employer.

79. Subclass 482 visa holders are uniquely vulnerable to workplace exploitation under the current system as they are strongly disincentivised from reporting any problems. Allowing a pathway for them to obtain a permanent visa, if their employer is found by an independent body to have committed serious violations of workplace legislation, will encourage reporting of unfair dismissal, discrimination, cashback schemes and unpaid wages as well as discourage exploitative conditions. This will benefit all workers, including Australian citizens and permanent residents who may stay silent about adverse conditions for fear of their co-workers being forced to leave the country.

Recommendations

The Law Council recommends that:

- **workers with approved nominations should be permitted to lodge visa applications from within Australia despite having had a refused visa since their last entry to Australia;**
- **the application of sub-regulation 1.12(2)(b)(iii) application should be limited to at the time of application only. At the time of decision, provided that the child is still financially dependent on the family head, the child should be considered as meeting the definition of Member of Family Unit;**
- **sub-regulation 1.12(5) be amended to allow a children who are over 23 and whose subclass 188 visa expired during the Covid-19 Concession Period to be included in the family's head's application for a subclass 888 visa;**

- **the situation of undocumented workers be addressed including through a 'pull factor' of a long-term pathway to permanent residency, such as a subclass 491 to 191 visa pathway;**
- **the transitional pathway established in March 2018 for Temporary Work (subclass 457) visa holders who held or had applied for a subclass 457 visa that was subsequently granted as at 18 April 2017 via the ENS should be extended to a wider cohort and for a longer period;**
- **the operation of the concession provisions set out in IMMI 18/052 be extended to 18 March 2024; and**
- **subclass 482 visa holders should be allowed a pathway to obtain a permanent visa if their employer is found by an independent body to have committed serious violations of workplace legislation.**