Law Council
OF AUSTRALIA

Temporary Work Visas & 457 Permanent Residence Options

Department of Immigration and Border Protection

20 June 2017

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

Table of Contents

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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

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

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

Acknowledgement

The Law Council is grateful for the assistance of the Migration Law Committee of the Law Council's Federal Litigation and Dispute Resolution Section and the Law Institute of Victoria, in preparation of this submission.

Introduction

1. The Law Council welcomes the opportunity to provide feedback on the proposed changes to the 457 and Skilled and Employer Sponsored Migration Programme.

2. The Law Council acknowledges the comments made by the Department of Immigration and Border Protection (**DIBP**) at recent stakeholder meetings noting that the decision to introduce changes to the skilled temporary and permanent residence programme without notice was deliberate and intended to avoid large numbers of applications being received in the occupations to be removed or caveated. However, the Law Council submits that this objective could have been achieved by making the changes effective on and after 19 April 2017 to new applications post this date. The retrospective impact of these changes has caused substantial hardship to applicants as well as the economic cost and inconvenience to Australian business sponsors.

3. The submissions below set out the substantial consequences of the retrospective impact of changes giving effect to the removal of 216 occupations, and the addition of caveats to 59 occupations to applications, which were lodged prior to the date of the announcement.

4. The Law Council urges the Government to consider the issues raised by the retrospective impact of the 19 April 2017 changes in formulating appropriate transitional arrangements which should apply to existing 457 holders as the new scheme for permanent residency is introduced in March 2018.

5. The Law Council also urges the Government to consider the uncertainty that has ensued following the announcement of the March 2018 changes for existing 457 visa holders and Australian businesses when determining the timeframe for announcement of transitional arrangements. The Committee submits that the transitional arrangements should be finalised and announced as soon as possible prior to March 2018 to avoid further hardship to existing 457 visa holders and Australian businesses in planning their workforce needs for the future.

6. In respect of the proposed temporary and permanent employer sponsored criteria to be introduced from March 2018, the Law Council notes a number substantial issues arising from the proposed requirements which are detailed in this submission.

MLTSSL and STSOL Occupation Lists

7. The Law Council acknowledges the need to regularly review skilled occupations lists, particularly for the general skilled occupations such as subclass 189 Visas. However, there remains a place for seldom-used niche occupations to be nominated in limited circumstances such as access to an “off-list” nomination process.

8. The Law Council is concerned, for example, that the removal of the occupation of Chief Executive Officer (**CEO**) will inhibit the opportunity for start-up businesses to invest in the Australian market. For example, start-up businesses wanting to hire a subject-matter or management expert from overseas as their CEO will be unable to sponsor that CEO for a 457 Visa or the new Temporary Skill Shortage (**TSS**) Visa if they have not yet reached $1 million turnover threshold.

9. Based on the information provided, the list was compiled by the Department of Employment. There does not appear to be an independent body that determined the list. The list was meant to be released on 1 July 2018 after the review process.

Labour Agreements

10. One consequence of the removal of occupations will be the rise of Labour Agreements for genuine employers. This has arisen for religious organisations sponsoring Ministers of Religion. We urge the Department to appropriately resource this area to cope with the likely increase in applications and also consider whether such agreements on a practical, resource and cost level are the appropriate method for dealing with foreign worker employment.

457 changes effective 19 April 2017

457 19 April – General Points

11. The changes that have been announced are affecting applicants who have a nomination or visa application pending or have lodged as at this date. These changes do not impact those already holding a 457 visa. The changes to skilled occupations lists have included the introduction of the STSOL and the MLTSSL. These new lists have removed/caveated certain occupations which will result (and is resulting in) the refusal of 457 applications.

457 19 April – Specific Points

12. The changes to the STSOL and MLTSSL mean that the skills base for both lists have been varied. The STSOL is directed towards short term skills shortage and the MLTSSL is aimed at 'high value' occupations that will contribute to the Australian economy.

13. The reform to the skilled occupations lists means that where occupations have been removed from the list, applicants will be refused 457 Visas.

14. Caveats have been put into effect which must be met for many nominations. Nominations approved prior to 19 April 2017, but which have pending visa applications as at 19 April 2017 subjected to removal or caveat, will result in a visa refusal.

15. Changes to the grant period of 457 Visas resulting in periods of two years for the STSOL occupations and up to four years for the MLTSSL occupations. Applicants can be nominated for an occupation on the STSOL or MLTSSL list and must satisfy other caveats as part of the nomination process.

16. While significant work appears to have been done by the Commonwealth in relation to the STSOL, the fact that new MLTSSL is simply the previous Skilled Occupation List (SOL) implies to the Law Council that little (if any) considered work had been done on this separate list as at the date of announcement.

457 19 April – Transitional Issues

17. The Law Council notes its concern that consultation with industry associations, stakeholders and sponsored visa applicants did not take place prior to the announcement of the changes on 18 April 2017. This is particularly concerning as changes will have effective application from 19 April 2017 and have retrospective effect on all pending applications.

18. The manner of implementation of the 19 April 2017 changes undertaken by the Government has given rise to a number of notable issues and consequences, listed in summary form as follows:

    (a) Due to the unexpected announcement, with no notice period and retrospective application of the rules on pending nominations and visa applications, employers that have invested in identifying and recruiting suitable skilled labour, have been adversely affected and incurred significant costs unnecessarily. These costs include: recruitment costs; employment costs (such as employees' travel expenses or induction training); legal fees; and time/opportunity costs. Furthermore, if such a person has already employed significant costs of having to refill the position may be incurred. The refund of the application fee of $330 does not nearly fully recover these costs.

    (b) The consequences are particularly notable for sponsors with nominations approved (which effectively entitles the nominee to commence work with the sponsor), where the sponsoring business has set its business plans on the expectation that the Department has accepted that the nominated position is a necessary position to be filled by an overseas worker. The imposition of legislative instrument IMMI 17/040 to approved nominations with removed occupations is not only unfair to the nominee, but also unfair to the Australian sponsor, who has effectively changed their business position in reliance upon the Department's approval and now has to restructure immediately on the basis of the retrospective application of the instrument. The disruption to the sponsor's business is directly caused by the extremely short notice and retrospective application of the law changes.

    (c) The imposition of some of the prescribed caveats on occupations remaining on the MLTSSL/STSOL has significant adverse consequences for sponsoring businesses. Conditions such as the imposition of the exclusions to businesses with annual turnover of less than $1 million on a number of occupations (Notes 5, 10, 18, 9, 16, 23 and 21) for instance does not address the fact that many organisations operating with less than this stipulated turnover would have experienced an equal degree of skills shortage as companies operating at a scope of more than $1 million. The imposition of this caveat on a retrospective basis is particularly unfair on a sponsoring business in instances where the nomination has been approved. The business now has abruptly lost access to their nominee despite the fact that the approved nomination would verify that the Department has in fact acknowledged that the business needs the position filled.

    (d) The imposition of the minimum salary caveat on certain occupations on the MLTSSL/STSOL with a retrospective application has an adverse effect for approved sponsors and nominations affected by these caveats (Notes 10, 18, 9, 23, and 15). The fact that the nominations were approved for affected sponsors indicates that the Department has accepted that the salary offered to the nominee is based on the requisite market rates (this was the regulation that the sponsor had to satisfy prior to the abrupt imposition of IMMI 17/040 on 19 April 2017). For sponsors that offered a salary below a prescribed caveated minimum, they are unfairly excluded unless the business amends the salary to a higher level, which inadvertently raises genuine position concerns. It seems unreasonable that the sponsor, who has previously demonstrated on all grounds that their skill requirements are genuine and that they had offered a suitable salary, consistent with the legal requirements at the time they applied,

is now disadvantaged, regardless of whether or not they choose to adjust the salary in order to meet the new requirements.

(e) Consultation with Department representatives at DIBP stakeholder meetings has indicated to the Law Council that there is uncertainty as to how the definition of certain caveats will apply. For instance, at the DIBP stakeholder meeting conducted on Wednesday 26 April 2017, DIBP representatives were unable to define the meaning of 'direct client transactional interaction on a regular basis' set out under Note 10 and how the assessment of this exclusion would apply for the affected occupations. The lack of clarity of some of the caveats is deeply concerning and should be addressed in future revisions of the occupation list.

(f) The imposition of caveats appears to have a certain degree of arbitrariness and inexplicability in application. For instance, the occupation Marketing Specialist (ANZSCO 225113) is affected by Note 10 which imposes a minimum salary requirement of $65,000, sponsor turnover of $1 million and positions 'not based in front-line retail or predominately in direct client transactions'. The occupation Advertising Specialist (ANZSCO 225111) is affected by Note 20, requiring simply that the nominee needs at least 2 years relevant work experience. The occupation of Market Research Analyst (ANZSCO 225112) was removed entirely from the lists. The discrepancy in caveat application does not appear to have a logical or comprehensible basis, especially considering the occupations are in the same ANZSCO minor group and are largely indistinguishable on a practicable basis. For example, is the instrument suggesting that Advertising Specialists can be applicable for smaller industries with a potentially lower salary, despite having a minimum experience requirement which is not required for Marketing Specialists? Issues like this seem to suggest that the caveats were drafted and imposed with a certain degree of arbitrariness, without regard given to actual industry research or consultation.

(g) It is unclear whether there has been due regard to relevant industry consultation or to the occupations within labour market areas where genuine skills shortages are evident. It was raised during the DIBP stakeholders meeting on 26 April 2017 that many occupations were removed simply because they were not commonly used, rather than that there was an overabundance or sufficiency of local labour for that occupation. Furthermore, the removal of certain occupations appears to be ill-considered. For example, the removal of Importer/Exporter (ANZSCO 133311) – this occupation is dynamic in application with a natural predisposition towards internationally sourced skills. Employers within the industry have reported that for importer or exporter work, especially in terms of liaising and working with industry professionals in certain import/export destination countries (e.g. Turkey), there is a notable lack of skills, familiarity and language skills within the local labour market. Therefore, even if a skills shortage is not immediately evident for importer/exporter positions where certain trading countries are concerned, importer/exporter roles for employers liaising with other countries might experience a notable shortage of local skills. The removal of the occupation appears to have failed to consider the applicability of the role on a practical scale and to have taken into regard the fact that the experience of a skills gap may vary based on the primary targeted country of business activity for the Australian sponsor.

(h) The removal of training and teacher occupations such as Training and Development Professional (ANZSCO 223311) and Vocational Education Teacher (ANZSCO 242211) appear to conflict with the Department of Employment's objective of upskilling local Australians in the workforce. Given the prevalent shortage of skills in certain trades and industry, how would local Australians obtain training without the appropriately skilled trainers and teachers if those teachers are not locally available?

(i) Similarly, the removal of occupations in the scientific fields such as biotechnologist, biochemist, microbiologist, etc, may impede Australia's research and development in science and technology.

(j) The imposition of legislative instrument IMMI 17/040 has certain unintended legal consequences for 457 visa holders. For example, a 457 visa holder who has been offered a new position by a new sponsor in their nominated occupation, and has a nomination which was pending as at 19 April 2017, will be unable to comply with Condition 8107 if the nominated occupation has been removed from the list or the sponsor does not satisfy newly introduced occupation caveats. This person will then face cancellation of their subclass 457 visa due to reasons that are beyond their control. Whereas a 457 visa applicant will simply have a right to appeal their refused application, a visa-holder faces visa cancellation in these circumstances. This is particularly unfair given the potential Public Interest Criteria (namely 4014) implications of potential visa cancellations.

(k) The caveats mean it is now more difficult for employers to determine the suitability of a position and whether it will fall within the relevant nominated occupation. They also appear to be based on internal review as per example below.

> Regarding the position of baker, the second caveat of which the interim guidelines on caveats for the subclass 457 Programme highlights "*[a] caveat is in place for this occupation which excludes any of the following positions…that involve full or partial production of food product for distribution to another location*"[1] appears to exclude any bakery where artisanal breads are made by hand (no pre-mix/mass production) that lacks a retail facility (i.e breads sold to restaurants/cafes or supermarkets – regardless of whether traditional bread making techniques are used or whether breads are hand moulded etc). It appears that the caveat considers that that authentic breads cannot be produced using traditional methods en masse, which is incorrect and also does not reflect the current market.

(l) The imposition of caveats will make the decision-making process more complex and open to inconsistent decisions due to inconsistent interpretations on how to apply the caveats. It will also make it difficult for employers to predict the success of a nomination, making it difficult when recruiting and predicting future staffing requirements.

(m) The STSOL will likely result in constant change in staff and uncertainty about the ability to retain staff. This, in turn, affects the recruitment of Australian workers to support the growth of business. For example, in the hospitality

[1] Department of Immigration and Border Protection, Commonwealth of Australia, *Interim Guidelines on caveats for the subclass 457 Programme* (April 2017) 4.

industry, certainty in employing established cooks long-term allows businesses to use those established cooks train apprentices, and allows greater stability within kitchens, thereby attracting and maintaining clientele and allowing for business growth and stability in employment of other staff (such as wait staff).

(n) In addition to the economic impact, there are other significant impacts on applicants, especially dependent applicants, who may be studying and need to be removed from school and the short time to sort out their affairs in Australia and look for a secure home in their country of origin. This is especially devastating to families.

(o) The changes may have a significant impact on Australia's attractiveness as a destination for international students, if there is no realistic prospect of temporary or permanent residency at the end of the process. It can be expected that many people will be reluctant to come, even temporarily, from overseas if it means that the most they can expect to get is a 4 year visa with no permanent residency pathway.

457 changes effective 1 July 2017

457 1 July– General Points

19. The major changes anticipated for 1 July 2017 include the following:

- a new and revised occupation list for MLTSSL and STSOL based on review from the Department of Employment's 2017-2018 review;
- removal of the English language exemption for salaries over $96,400;
- release of clearer policy for the subclass 457 training requirements; and
- release of policy guidelines requiring the completion of skills assessments for additional occupations.

457 1 July – Specific Points / Transitional Issues

Changes to MLTSSL and STSOL & Caveats on or after 1 July 2017

20. The Law Council suggests that any changes to the MLTSSL and STSOL and caveats only affect applications made on or after 1 July 2017 so as to avoid the issues encountered with the 19 April 2017 changes when they were announced. The 457 regulations should be amended to allow a transitional arrangement for nomination and visa applications lodged before 1 July 2017.

English Language Exemptions

21. Regarding changes to the English language exemptions, clarification is required whether remaining exemptions will continue to operate, including, exemptions based on country of passport (UK, USA, Canada, Ireland, NZ) and 5 years of secondary or tertiary study. Further clarification is required on how the English language requirements will apply to visa applications that are undecided as at 1 July 2017.

22. The Law Council acknowledges that the English language requirements would appear to be in line with current Government policy. However, there should be consideration for exemptions based on the nature of work, occupation and industry. There may be significant impact on existing 457 visa holders, especially CEO's,

senior executives and managers paid above $96,400, who wish to extend their stay after 1 July 2017, who will be unable to meet the English language requirements.

Mandatory Skills Assessment

23. The Law Council supports the requirements to ensure the 457 applicant has the necessary skills to perform the nominated position, and where a skills assessment may be required in certain occupations for occupational health and safety reasons and meeting Australian industry standards. However, there should be exemptions to mandatory skills assessment, where the applicant has already proven their skills and ability to perform the nominated position with their employer. An alternative to obtaining a skills assessment through a designated Trades Recognition Australia Registered Training Organisation provider, the nominating employer should be allowed to provide a declaration attesting to the nominee's skills, which could be based on the employer's workplace requirements, and/or industry requirements. Exemptions based on study in Australia should continue to apply.

24. We also note that there are a range of situations where a skills assessing authority currently is unable or unwilling to conduct a skills assessments. An example of this situation is VETASSESS where the applicant does not hold a tertiary qualification, regardless of the amount and quality of the applicant's employment history in the nominated occupation. This is to be contrasted with other bodies such as the Australian Computer Society and the Australian Institute of Management who are willing to assess an applicant for in the absence of tertiary qualifications.

Mandatory Penal Clearances

25. The Law Council supports the tighter character requirements for 457 visa applicants. However, the Department must take into account the time delays in obtaining the penal clearances and issues in obtaining them from certain countries.

457 changes effective 31 December 2017

457 pre 31 Dec– General Points

26. Further reforms will be made subject to the commencement of new legislation. The collection of Tax File Numbers and sponsor sanctions will be put into place.

457 pre 31 Dec – Specific Points /Transitional Issues

Tax File Number (TFN) Collection

27. Department will commence collection of TFNs of 457 visa holders and date match with ATO of employee salaries paid.

28. The Law Council supports the department's data matching with ATO to prevent exploitation provided it is used for the benefit of visa holders, however, we are concerned about the potential misuse of the TFN in how the information is disclosed on relevant visa application forms. The TFN should only be collected after an application has been approved, and there needs to be privacy controls to ensure no misuse or accessibility to person's private details. The Law Council also notes that due to employees being reliant on employers to meet their pay as you go (**PAYG**) obligations, such access to data should be treated with caution and not used to automatically come to the conclusion that a visa holder is not being employed by their nominating employer because tax documentation has not been filed by the employer.

Publishing Sanctioned Sponsors

29. The Department will commence publication of details relating to sponsor sanctions for failing to meet their sponsorship obligations.

30. The Law Council seeks further clarification of how this is intended to operate. For example, it is not clear from the announcement whether this includes a warning or whether there will be an expiry period.

31. The Law Council Law Council recommends that Departmental sanction decisions ought not to publish the name of the Sponsoring Organisation until the matter is finally determined.

457 and TSS changes effective March 2018

457 March 2018– General Points

32. The abolition of the 457 visa will be executed, and the implementation of the TSS visa will replace the 457 visa. The TSS visa creates two streams (a short term and a medium term) which results in varied occupation/language requirements and renewal prospects.

457 March 2018– Specific Points

33. The changes anticipated for March 2018 include the following:

- All applicants are required to have at least 2 years work experience.
- Labour Market Testing will be mandatory, unless an international obligation applies.
- The Temporary Skilled Migration Income Threshold (TSMIT) and market salary rates must be met.
- Mandatory Penal Clearances must be provided.
- Workforce requirements – including ensuring employers are not actively discriminating against Australian workers.

STSOL List

34. Those on the STSOL can be granted visas up to 2 years, with a single option for renewal. There are no pathways to permanent residency under this stream.

35. Regional concessions and additional occupations for regional Australia will be implemented. The Law Council urges the Government to determine what these concessions will include to allow Australian businesses to plan their workforce needs. At present, the 457 program has no regional concessions or a separate occupation list for regional Australia for 457 Visas so this is welcomed to assist employers to attract employees to regional areas.

36. The English requirement of 5.0 overall with a minimum of 4.5 in each component.

    New GTE requirements will apply.

MLTSSL List

37. MLTSSL holders can be granted for a period up to 4 years, with ongoing options for renewal.

38. Transition to permanent residency (PR) can occur after 3 years on this visa stream. The English requirements will be 5.0 in each band. The difference in English language requirement between the TSS and permanent residence transition stream adds unnecessary complexity to the process of transition from the TSS to PR. The Law Council suggests that English language exemptions for the TSS visa mirror those of the permanent employer sponsored visa for consistency.

39. Regional concessions to be implemented. The Law Council urges the Government to determine what these concessions will include to allow Australian businesses to plan their workforce needs. At present, the 457 program has no regional concessions so this is welcomed to assist employers to attract workers to regional areas. However, it is noted that regional concessions should also be mirrored in the permanent employer sponsored category to allow applicants to transition.

40. A more rigorous training requirement for employers will be required in order to be an approved sponsor. The training requirements will be met by payment of a training levy for each temporary visa holder in the sponsors business.

457 March 2018– Transitional Issues

Introduction of the Training Levy

41. The implementation of the Training Levy program may result in substantial additional training costs for some Australian business and the Law Council urges the Government to confirm at what point existing sponsors will change over to the new training levy payment system, and whether there is the possibility of an amnesty arrangement for Sponsors who have already recently met their training requirements.

42. The Law Council supports a clear criteria for sponsors to meet training expenditure requirements when employing temporary workers in their business and supports an approach that determines the training contribution based on the number of temporary workers in the business. The Law Council encourages the Government to implement transparent processes by which the training levy funds are applied (unlike the Industry Training Funds under the current system).

Two year work experience requirement for TSS visa

43. The two year work requirement is a fundamental change from the current system. It will have the effect of substantially limiting access to temporary employer sponsorship to International Students who are recent graduates and many Working Visa Holiday makers who may have travelled to Australia as part of a gap year following completion of their studies. Australia will lose the benefit of overseas students who have completed Australian qualifications filling labour market shortages and potentially a lesser period may have been appropriate to protect any major economic impact.

44. The Law Council supports clear occupational requirements being implemented in the regulations, with stated exemptions to be included in relevant instruments, rather than copious policy guidelines leaving such important criteria to case officers to interpret

what constitutes work experience for each nominated occupation. In this regard it is noted that comments by senior DIBP officials in Melbourne at Stakeholder Meetings held in Melbourne and Sydney suggested that there would be some flexibility built into this work experience criteria, which is concerning as generally discretion goes toward refusal than grant.

45. In the event two years is considered an appropriate term of experience requirement, it is submitted that clarification as to whether part-time or full-time employment counts and also whether or not the employment needs to be only post qualification or can be during the period prior to completion of the qualification. Consideration also needs to be given as to where a person is relying on equivalent work experience in lieu of a formal qualification will that person need to meet additional work experience. For example, the outcome could be that a person with a Bachelor Degree plus 2 years work could meet the skill requirement or 5 years' experience in lieu of the Bachelor Degree, plus 2 years work experience (total 7 years).

46. A further complication added to this interpretation is where a skills assessment may be required, either mandatorily or requested by case officers, and the assessing authority specifies a "deeming date", which is inconsistent with the work experience requirements listed in Australian New Zealand Standard Classification of Occupations (**ANZSCO**), as outlined above and differs from the two year requirement given Relevant Skill Assessing authorities set their own criteria.

47. The Law Council urges the Government to consider the significant impact of the two year work experience requirement recommends that a clear criteria for all nominated occupations be introduced. Where there are specific occupation groups in relation to which an exemption is warranted (for example, Lecturers who have completed a PHD) the Law Council would suggest that these be included as exceptions to the two year work experience requirement rather than cause uncertainty across this criteria in policy guidelines. Potential impact on the student visa market should also be considered.

STSOL 2 year visa and no pathway to permanent residence

48. If at the end of the 2 + 2 year TSS visa, the employer still does not have local alternatives for the position they have sponsored, they cannot then renew the TSS holder's visa and cannot sponsor them for PR. If they are also unable to locate an Australian person to replace the TSS holder, the Law Council questions how this programme is best serving the needs of Australian business.

49. This issue also highlights the current failures in the MLTSSL where the omission of critical occupations is almost certain to result in overseas talent for senior managerial and highly specialised roles refusing to accept positions in Australia without the possibility of permanent residence being available due to, *inter alia*, the resulting adverse impact upon their spouses and children.

Implications for the program

50. It is noted that since the announcement there have been a number of overseas employees pull out of the program, because they are only eligible for two years assignments in Australia and the longevity of their future in Australia is too insecure for them to re-settle their families from their country of origin to Australia.

51. Australia is less likely to attract the high quality skilled workers whose occupation falls under the short term list just by virtue of the lack of opportunities for them and their

families to move from temporary to permanent residency. By closing off that pathway for such great number of occupations/ applicants in the long term, Australia will be losing out on having skilled migrants who are well informed and ready, willing and able to make the move and have significant contribution to make to the Australian economy and community. These potential migrants will be choosing to stay in their country of origin. In that sense, Australia may fall behind in the competition for talent as these highly skilled people will be opting to stay in other counties such as USA, Canada, UK and New Zealand.

186 and RSMS changes effective 1 July 2017

186/187 1 July– General Points

52. The MLTSSL and the STSOL occupation lists will be reviewed with further occupations to be removed, affecting Subclass 186 Direct Entry applications lodged on or after 1 July 2017.

53. A maximum age requirement of 45 at the time of application will apply to Direct Entry Stream applicants. The age requirements for Temporary Transition Stream applications will remain at 50 years of age.

54. English language requirements for Direct Entry and Temporary Transition Stream will be IELTS 6.0 (or equivalent) in each component.

55. In a 457 agent news publication May 2017 the DIBP stated that a 3 year work experience requirement would also be imposed for all Direct Entry applications from 1 July 2017. It is understood that this information was incorrect, however, the Law Council seeks clarification this will not be introduced on 1 July 2017. This would adversely impact Regional Sponsored Migration Scheme (RSMS) Direct Entry applications if it were introduced.

186/187 1 July – Specific Points

Age Criteria & Existing Exemptions

56. The Law Council seeks clarification whether the age exemptions currently available for Direct Entry applicants will continue to be available after 1 July 2017.

57. The Law Council notes that the maximum age for these visas was increased from 45 to 50 only a few years ago to significant fanfare, from 1 July 2013. We note that the department has not provided any explanation for why it is being considered that this change should now be reversed only 4 years later.

58. The current age exemptions for Direct Entry are detailed in IMMI 15/083 and provide for five categories of age exempted persons. We submit that the existing age exemptions should continue.

59. We further submit that the Government should consider extending Class 1 specified in IMMI 15/083 as a further age exemption, being persons whose earnings will be at least equivalent to the current Australian Tax Office's top individual income tax rate.

English Language Requirements & Existing Exemptions

60. The Law Council seeks clarification whether the English language exemptions currently available for Direct Entry and Temporary Transition applicants will continue to be available after 1 July 2017.

61. The current English language exemption for Direct Entry are provided in IMMI 15/083 and exempt persons whose earnings will be at least equivalent to the current Australian Tax Offices top individual income tax rate ($180,001) from the current English requirement. We submit that the existing English language exemptions should continue.

62. The current English language exemptions for Temporary Transition are also provided in IMMI 15/083 and exempt persons whose earnings will be at least equivalent to the current Australian Tax Offices top individual income tax rate from the current English requirement as well as persons who have completed at least 5 years secondary or tertiary study in English. The Law Council submits that the existing English language exemptions should continue.

186/187 1 July – Transitional Issues

63. The Law Council welcomes the prior notice of these changes and that the changes will only impact applications made on or after 1 July 2017.

186 and RSMS changes effective March 2018

186/187 March 2018– General Points

64. The anticipated changes to come into effect from March 2018 include the following:

    (a) The MLTSSL will apply for Employer Nomination Scheme (**ENS**) and RSMS applications lodged on or after March 2018, with additional occupations available to support regional employers for RSMS.

    (b) Employers must pay the Australian market salary rate and meet the Temporary Skilled Migration Income Threshold.

    (c) Visa Applicants must have worked for the employer for three years to be eligible to apply for permanent residence.

    (d) Visa Applicants must have at least three years' work experience.

    (e) Applicants must be under the age of 45 years at the time of application.

    (f) Payment of a training levy will be required when nominating a visa applicant for permanent residence.

186/187 March 2018– Specific Points

65. The Law Council makes the following comments:

    (a) Where an occupation is moved from the MLTSSL to the STSOL, the visa holder should still be able to transition to permanent residence. This would

require the Regulations to be drafted similar to those in effect for the Temporary Transition stream currently where the permanent residence application is not referable to the occupation list.

(b) The additional occupations available to regional employers should be made available to allow regional employers time to plan as with the MLTSSL.

(c) The Residency requirements to work with the employer for three years before becoming eligible for permanent residence would necessarily mean that an applicant has three years' work experience. However, if it is intended that the three years' work experience requirement is in addition to the three years' employment, this should be made clear. Consider also the appropriateness of granting a person a Temporary Visa based on two years' work experience, but who cannot be granted a Permanent Residence Visa unless they had three years' work experience. The Law Council seeks clarification of these requirements.

(d) The present ENS/RSMS scheme is also based on a two year future offer of employment which has not been announced as being part of the new permanent employer sponsored scheme. This is particularly important in respect of RSMS which presently has cancellation provisions in place where a visa holder does not remain with the employer.

(e) The requirement that applicants must be under the age of 45 years at the time of application will have a substantial impact on employers seeking to fill senior positions and likely impact on the attractiveness of employment in Australia for experienced persons from the age of 41 onwards when they are required to work for the employer for three years before they can apply for permanent residence. For example, where the requirement is for the Visa Applicant to have worked for the employer for three years and they must be under 45 years at the time of application the result will be that employers will find it difficult to recruit persons aged from 42 years onwards.

(f) Given the age requirement of 45 years, and English requirement of IELTS 6.0 (or equivalent), the Law Council suggests that the Government to introduce the same exemptions for both age and English, utilising those currently provided for in IMMI 15/083, including, an age and English exemption for persons whose earnings will be at least equivalent to the current Australian Tax Office's top individual income tax rate. It is further submitted that the age and English language exemptions should be the same for the TSS and ENS/RSMS programs to avoid complexity.

186/187 March 2018– Transitional Issues

66. The Government has announced that existing 457 visa holders will be able to remain in Australia on their current visas. There have been comments made by the Minister as to 'grandfathering' arrangements for existing 457 visa holders but no detail provided. With the number of existing 457 visa holders in Australia estimated to be around 90,000, this has created substantial uncertainty for both 457 visa holders and Australian businesses as to their future employment.

67. The Law Council seeks clarification whether the Government intends to permit persons who held a 457 visa on 19 April 2017 to transition to permanent residence under Subclass 186 Employer Nomination Scheme provisions as in force at that date, after the introduction of new permanent employer sponsored requirements in March

2018. It notes also that in the 2017-2018 Budget announcements significant revenue will be derived through the training levy and this has been calculated by existing numbers of previous applications. The economic impact on this calculation if such applicants are not eligible to apply could be significant, as it is difficult to envisage that numbers will remain the same over the four year period for which this was calculated, without transitional arrangements given the changes and also removal of significant number of occupations.

Applications lodged pre March 2018 not finally determined as at March 2018

68. The Law Council recognise that changes to new 457 visas from 18 April 2017 is a prerogative of Government and affects the labour market in the short and medium term. However, safeguarding transitional arrangements to access permanent residence for existing 457 holders is vital to ensure long term stability, skill formation and linkages for employers and the Australian labour market. There will doubtlessly be many employers and employees entering into bona fide employment arrangements predicated on the 2 step process of 457 and then transitioning to permanent residence. This was a policy announced by Minister Evans nearly 10 years ago, and had been supported by Treasury financial data as a positive for the economy.

69. While the announcements allow employers and employees to make decisions on future contracts it is unreasonable for the announced changes to have retrospective operation.

Operation of TRT for 457 visa holders as at 18 April 2017 to apply till 2022

70. The Law Council position is that all 457 visa holders as at 18 April 2017 should be eligible to be sponsored by their existing employers for 186/187 in the Temporary Resident Transition (**TRT**) stream under the TRT stream visa provisions in place as at 18 April 2017. There may need to be some variation of the nomination requirements to ensure integrity such as training, TSMIT and 3 year position post grant. Existing holders should have the capacity to seek 186/187 in the TRT stream as:

    - applicants may be stranded on 457 visas;
    - applicants may hold 457 visas for longer than the Government may prefer;
    - employers may have contractual obligations entered into in good faith based on the employment and immigration laws in place; and
    - employees may have made reasonable long term plans including property.

71. The age provisions for the TRT stream should be preserved at 50 for persons holding 457 visas (and bridging visas between successive 457 visas) as at 18 April 2017. There will be significant disadvantage to 457 holders over 45 and under 50, who will not be able to meet the March 2018 deadline.

Exemption – Age - 4 year High Income Threshold Applicants

72. The Law Council position is that the 4 year High Income Threshold provisions should remain in place for holders of 457 visas as at 18 April 2017 accessing existing 186/187 visas before and after March 2018.

Conclusion

73. The Law Council understand the importance of encouraging the employment of Australian workers within the Australian labour market and fully supports expenditure on re-skilling and training of Australians, particularly youth, to combat youth unemployment. However, the associated economic uncertainty in a visa program that is subject to unpredictable change is not beneficial to the economy and the loss of current overseas workers to the Australian labour market in positions that cannot be readily filled could have a negative impact on businesses and also future employment of Australian workers.

Contact

74. The Law Council would welcome the opportunity to discuss the submission further. Please contact Mr David Prince, Chair, Migration Law Committee at david@kplaw.com.au in the first instance.