Law Council
OF AUSTRALIA

Federal Litigation and Dispute Resolution Section

3 March 2021

Committee Secretary
Joint Standing Committee on Migration
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: migration@aph.gov.au

Dear Colleague

Inquiry into Australia's skilled migration program

The Law Council's Federal Litigation and Dispute Resolution Section welcomes the opportunity to provide a submission in relation to the Joint Standing Committee on Migration's *Inquiry into Australia's skilled migration program* (**the Inquiry**). This submission has been prepared by the Section's Migration Law Committee (**the Committee**) and addresses item 1(a) of the Inquiry's terms of reference.

Executive Summary

In line with the intended objectives of the skilled migration program, the Committee recommends an immediate temporary adjustment to allow skilled visa applicants to lodge further onshore applications, despite being barred by section 48 of the *Migration Act 1958* (Cth) (**the Act**) from making such applications.

The Australian Government has already made welcome changes to "assist certain visa applicants and holders adversely affected by COVID-19 and to support the attraction of Global Talent to Australia"[1] by way of the *Migration Amendment (2021 Measures No. 1) Regulations 2021* (Cth), which took effect on 27 February 2021.

The changes proposed by the Committee complement the above COVID-19 pandemic measures. They will allow employers with a legitimate need for skilled workers to achieve business continuity and State/Territory governments to address their own skills shortages. The proposed measures are in line with the intention of section 48 of the Act, to prevent persons from remaining indefinitely in Australia by lodging successive visa applications. The changes would only allow skilled persons to lodge a valid application where either a Delegate of the Minister for Home Affairs has already approved the position as being genuine, or a State/Territory has identified the applicant through its own screening mechanisms.

[1] Explanatory Statement to the *Migration Amendment (2021 Measures No. 1) Regulations 2021 (Cth).*

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The adjustment would require a simple amendment to Regulation 2.12 of the *Migration Regulations 1994* (Cth) (**the Regulations**) with a sunsetting clause or reference to a "concession period".

Background

Skilled visa applicants in Australia who have been refused a visa and have applied for merits or judicial review are barred from further visa applications in Australia (with few exceptions) and must depart the migration zone to be able to lodge a further valid application. This leaves thousands of applicants with skills in demand or employers wishing to sponsor them with no option of regularising their visa status and choosing the most appropriate pathway.

Examples of persons who fall within this situation are:

- **Person A**, a skilled mining technician, who has been refused an employer sponsored visa because his previous sponsor has shut down and a new business wishes to sponsor him;

- **Person B**, a civil draftsperson who was refused a further student visa, applied for merits review, finished their course in the interim and obtained sufficient work experience during the review process to now be eligible for Temporary Skills Shortage (**TSS**) visa sponsored by an Engineering company.

- **Person C**, a 485 applicant (post qualifications stream) who made an error by failing to provide evidence of applying for an Australian Federal Police (**AFP**) check or uploading a valid English Test score (which was less than 3 years old). For example:

  A skilled IOT Engineer who failed to apply for an AFP check at the time of lodgement of her 485 has now applied for judicial review to enable her to continue working in Australia as an IOT Engineer. Because of section 48 she cannot apply for an onshore student visa for a Graduate Diploma and also cannot travel offshore because of the COVID-19 pandemic; and

- **Person D**, a skilled nurse who has applied for merits review of a refused partner visa at the Administrative Appeals Tribunal and whose relationship has not irreconcilably broken down, but who now has enough points to be invited to apply for a general skilled migration visa.

In particular, Person D is significantly affected by State/Territory migration policy which is directly related to section 48 of the Act. Several State and Territory Governments are writing to applicants asking those who are "section 48 affected" to withdraw their State/Territory nomination applications or to show that they are no longer affected by the section 48 bar.

For instance, the West Australian Department of Training and Workforce Development issues the following template letter:

> *Due to the COVID-19 pandemic and the continuing uncertainty surrounding the closure of Australia's international borders, the Department of Training and Workforce Development has reviewed applications submitted for the State Nominated Migration Program (SNMP).*

Unfortunately, as this applicant is impacted by the Department of Home Affairs section 48 bar, which requires them to lodge their visa application outside Australia, the application for State nomination is unable to be processed given current circumstances and will be withdrawn with the application fee refunded.

We understand this outcome will be disappointing for you.

If the applicant is no longer impacted by the section 48 bar and currently resides in Australia, please provide evidence to Migration Services by 30 December 2020.

If you are unable to provide evidence that the applicant is not subject to the section 48 bar and that they currently reside in Australia, the withdrawal of the application will be finalised and the application fee of $200.00 will be refunded to the credit card on which the payment was made. Please advise Migration Services if the credit card details have changed.

Policy objectives of the skilled migration program

The Committee is concerned that the section 48 bar creates statistical anomalies. For example, onshore applicants are either already working in their positions as holders of bridging visas and/or would be invited to apply for skilled visas, but for their inability to freely travel to lodge offshore applications. Those with realistic skilled visa options are being counted as bridging visa holders, when they should already be counted towards the skilled migration program figures.

Moreover, the Committee considers that the current approach is illogical; if a State/Territory Government wishes to nominate a skilled visa applicant, section 48 should not be an impediment to meeting the skilled migration program targets during a pandemic and beyond. Applicants cannot simply decide to leave Australia and reapply; they are immediately disqualified from most State/Territory nominations once offshore.

Applicants are then left with no choice but to continue their existing pathway to ensure they can remain in Australia. This causes unnecessary strain on the merits and judicial review system, with a higher risk of vexatious litigation to enable a further stay. Exceptions to the section 48 bar will mean applicants can regularise their migration status in line with the skilled visa system, instead of relying on the onshore appeals processes.

When the overarching government message is to avoid any international travel, it seems illogical to ask a sponsoring employer to send a skilled employee overseas with no immediate right to return, when a skilled visa option can be achieved by allowing the applicant to lodge onshore. The proposed exceptions to the section 48 bar would ensure business continuity and achieves the aim of reducing movement in and out of Australia.

Similar existing framework – exceptions to "no further stay"

A similar exception for skilled visas already exists within the "No further stay" framework, where subregulations 2.05(4AA) – (5A) of the Regulations allow onshore visa applications to be made despite condition 8503 and 8534 (No further stay) being attached to a person's current visa.

These exceptions include business visas, skilled visas, TSS/482 visas and regional employer sponsored visas. Applications for these visas are considered automatic waivers of conditions 8503 and 8534.

The Australian Government's policy rationale for waiving the condition is as follows:

These applicants are chosen from the SkillSelect database and, if relevant, invited to apply for a visa on the basis of having skills and attributes needed by the Australian economy. Therefore previous "no further application" conditions should be waived to facilitate their visa application and entry to the Australian labour market.[2]

The Committee notes that these exceptions have been in place long before the pandemic and achieve the same policy objective as is being recommended for this purpose.

Simple regulatory amendment

As noted above, the adjustment would require a simple change to regulation 2.12 of the Regulations, with a sunsetting clause or prescribed "concession period" to include the following classes of visa:

- **General Skilled Migration visas** (these visas can be applied for by invitation only);
- **Skilled Work Regional (Provisional) (Class PS)** - subclass 491 visa where the applicant is nominated by a State or Territory Government;
- **Temporary Skills Shortage (Class GK)** - subclass 482 visa where there is a valid approved nomination under section 140GB of the Act;
- **Employer Nomination (Permanent) (Class EN)** - subclass 186 where a nomination under regulation 5.19 of the Regulations in relation to the position has been approved;
- **Regional Employer Nomination (Permanent) (Class RN)** - subclass 187 visa where a nomination under regulation 5.19 of the Regulations in relation to the position has been approved;
- **Skilled Employer Sponsored Regional (Provisional) (Class PE) -** subclass 494, where there is a valid approved nomination under section 140GB of the Act;
- **Business Skills - Business Talent (Permanent) (Class EA) visa** (these visas can be applied for by invitation only); and
- **Business Skills (Provisional) (Class EB)** (these visas can be applied for by invitation only).

Recommendation

The Committee strongly recommends the above immediate adjustment to: assist the proper implementation of Australia's skilled migration program; ensure business and employment continuity; and take away the burden of applications at the Administrative Appeals Tribunal and in the courts.

[2] *Procedures Advice Manual - [Div 2.1] Classes, criteria, conditions etc[Div2.1/reg 2.05] reg 2.05 - Conditions applicable to visas - Waiver of "no further application" conditions*

Thank you once again for the opportunity to comment on Australia's skilled Migration Program. For further comment or clarification on any of the matters raised in this submission, please contact Valerie Pereira, Deputy Chair of the Committee at valerie@dagamapereira.com.au or on (03) 9428 1198.

Yours sincerely

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