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# Inquiry into subclass 457 visas, enterprise migration agreement and regional migration agreement supplementary submission

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## **Legal and Constitutional Affairs References Committee**

**31 May 2013**

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## Executive Summary

1. This supplementary submission provides further information on the:
  - a) amendment to the Law Council of Australia's (the Law Council) submission to the Legal and Constitutional Affairs References Committee's inquiry into the framework and operation of subclass 457 visas, enterprise migration agreements and regional migration agreements;
  - b) structural reasons within the immigration program which have resulted in the increase in 457 visa applications; and
  - c) potential conflict of interest that can arise in some cases when an employer assists a prospective employee with their 457 visa application.
2. To realign the unemployment rate and the number of 457 primary applications being lodged and to reduce the number of 457 visa holders in Australia, the Law Council recommends:
  - a) increasing the period of stay in Australia for holders of Graduate Skilled 485 visas to two years and facilitate nomination pursuant to the Employer Nomination Scheme for holders of 485 visas who have been employed by their nominating employer for at least two years;
  - b) reverting to the former position where 457 visa holders seeking to transition to Employer Nomination Scheme subclass 186 visas were required to have been holders of a 457 visa for two years and working with their nominating employer for at least one year;
  - c) acknowledging that in a tight resourcing environment there would be significant benefits to re-evaluating the role that could be played by the registered migration agent profession.
3. To avoid potential conflicts of interest, the Law Council recommends that:
  - a) there be more definite measures to ensure that the assistance that the Office of the Migration Agents Regulatory Authority (OMARA) provides is accessible by prospective foreign employees sponsored by their employer, and that visa applicants are made aware of their rights to seek independent migration advice;
  - b) the current exemption in sections 280(5B)-280(5C) of the Act be amended to exclude employers providing assistance to prospective employees; and
  - c) Regulation 3 of the Migration Agents Regulations be repealed.
4. In the alternative to the proposal outlined in paragraphs 3b and 3c, the Law Council recommends the Committee consider imposing a positive obligation on employers who have assisted prospective employees obtain a 457 visa, to provide the visa holder with a full copy of the visa approval notification, allow removal of the notification from the workplace, require the employer to keep a copy of records confirming compliance with this obligation, and, like other sponsorship obligations, be subject to sanction for failure to comply with this obligation.
5. To improve transparency in decision making, the Law Council recommends the implementation of stricter guidelines and collation of precedents for case officers' adherence and increased case officer training for a greater transparency in the Department of Immigration and Citizenship's (DIAC) decision making process.

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## Background

6. In May 2013, the Law Council responded to the Senate Standing Committee on Legal and Constitutional Affairs Committee's (the Committee) inquiry into 'the framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements' (the inquiry).<sup>1</sup>
7. This Submission was prepared by members of the Migration Law Committee of the Law Council's International Law Section. The Law Council is the peak national representative body of the Australian legal profession – it represents some 60,000 legal practitioners nationwide. **Attachment A** provides a profile of the Law Council. **Attachment B** provides a profile of the International Law Section.
8. On Thursday 23 May 2013, the Law Council gave evidence at the Legal and Constitutional Affairs References Committee's inquiry into the framework and operation of subclass 457 visas, enterprise migration agreements and regional migration agreements.<sup>2</sup>
9. The Law Council was represented by:
  - a) Ms Anne O'Donoghue, Treasurer, International Law Section (ILS) and Steering Group Member, Migration Law Committee;
  - b) Ms Katie Malyon, Vice-Chair, Migration Law Committee; and
  - c) Mr Rick Gunn, Member, Migration Law Committee.
10. The Law Council noted that it would like to make an amendment to its submission and would provide further details of this amendment to the Committee.
11. Senator Xenophon asked the Law Council why there appears to have been a significant increase of about 20 per cent in 457 visa applications in October 2012, at the same time as a decrease in the number of job vacancies. The Law Council gave evidence that there are a number of structural reasons within the immigration program to explain the increase in 457 visas and its apparent disconnect in job vacancies. Senator Xenophon invited the Law Council to provide further information on these reasons.
12. The Law Council also offered to provide further information to the Committee regarding the issue of conflict of interests that can arise when a legal representative acts for both the employer and the employee. The Law Council's expansion on this issue supplements part (k) *Any Related Matters* of the Law Council's Submission.

## Amendment to the Law Council's Submission

13. Footnote 10 on page 10 of the Law Council's submission should be a reference to immigration policy not a Legislative Instrument.
14. In lieu of the present citation of "Legislative Instrument F2012L01311 12 June 2012" reference should have been made to "Para 46.3 PAM3: Act s.140E - Overview, Criteria for Approval as a Sponsor".
15. Please accept our apologies for this error.

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<sup>1</sup> The Submission is available at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=legcon\\_ctte/457\\_visas/submissions.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/457_visas/submissions.htm).

<sup>2</sup> The Transcript is available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22committees/commsen/32bce467-6476-435c-bcdb-95afcc6d1d65/0000%22>.

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## Structural reasons for the increase in subclass 457 visas

### Reasons for increase in 457 visas

16. As outlined at the Law Council's appearance before the Committee on 23 May 2013, the applications lodged for primary 457 visas has, historically, been closely aligned with the unemployment rate.
17. This is best evidenced by Graph 2 on page 3 of the Submission to the Senate Committee by DIAC.
18. In the seven years from January 2003 to January 2010, it can be seen that once the unemployment rate increases above 5.2% the demand for primary 457 visa drops. Similarly, when the unemployment rate falls below 5.2% the demand for primary 457 visa holders increases. This is exactly what was intended by the program which is demand-driven and responsive to business needs for skilled workers.
19. There is one notable exception to this pattern and that is the spike in June 2007 which is explained by the introduction of English language tests for most trade related occupations from 1 July 2007.
20. However, since February 2010 this historic alignment of the unemployment rate and applications lodged for primary 457 visas diverges. This divergence has resulted in larger numbers of 457 visa holders in Australia relative to previous years. The Law Council is of the opinion that there are four explanations for this divergence resulting in the increased number of 457 visa holders.
21. Firstly, from 8 February 2010 a change in immigration law precluded many Student visa holders from lodging an application for on-shore General Skilled permanent residence visas and forced them to consider sponsored employee 457 visas if they wished to remain in Australia with a view to ultimately acquiring permanent residence through the employer nominated pathway. This resulted in Student visa holders applying directly for 457 visas where, in the past, they would have applied for an on-shore General Skilled Migration visa.
22. Secondly, from February 2010 and arising from the changes to immigration law outlined above, many Student visa holders have remained in Australia after applying for and being granted a Graduate Skilled 485 visa. The Graduate Skilled 485 visa allows overseas students who have completed study in Australia to remain for up to 18 months if their occupation is on the Skilled Occupation List. If they wish to remain in Australia at the end of their 18 months they must apply for another visa - the most common is the 457 visa sponsored by their employer.
23. Thirdly, from 1 July 2012 a change in immigration law required existing 457 visa holders seeking to transition to permanent residence nominated by their current employer to have been employed by their nominating employer not for one year, as was required up to 30 June 2012, but for two years (reg. 5.19(3)(c)(i)(A) of the Migration Regulations 1998). This resulted in a number of existing 457 visa holders having to delay their application for permanent residence and thereby increase the stock of 457 visa holders in Australia.
24. Lastly, since mid 2012 resourcing of DIAC's employer nominated Permanent Entry Sections has impacted adversely on processing times such that processing for fully documented decision-ready applications in respect of Employer Nomination Scheme subclass 186 visas and Regional Sponsored Migration Scheme subclass 187 visas lodged by registered migration agents has increased from 2-4 weeks to 5-10 months. This has resulted in many 457 visa holders continuing to remain in the 457

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visa cohort when, in fact, they could be permanent residents if their fully documented permanent residence visa application had been processed expeditiously. Lawyer migration agents are willing to assist DIAC with the processing of such permanent resident applications by lodging only fully documented decision-ready applications that warrant expeditious processing.

## **Recommendations for alternative visas to be used to supplement the 457 program**

25. The Law Council is of the view that the Committee might consider the following measures as possible ways to not only realign the unemployment rate and 457 primary applications lodged but also to reduce the necessity for reliance on the 457 program.
26. Firstly, the Committee might consider increasing the period of stay in Australia for holders of Graduate Skilled 485 visas to two years and facilitate nomination pursuant to the Employer Nomination Scheme for holders of 485 visas who have been employed by their nominating employer full-time for at least two years. The period of two years full-time employment would need to include time spent as the holder of a 485 visa and any Bridging visa following completion of studies in Australia.
27. This proposal will allow graduates from Australian educational institutions the opportunity to work in Australia for two years without the need for sponsorship by their employer on a 457 visa. It will also afford them and their employer the opportunity to continue their employment on a permanent and on-going basis. Assessment of qualifications should not be a pre-requisite or necessary for this proposed pathway since all holders of 485 visas have completed their studies in Australia.
28. Secondly, the Committee might consider reverting to the former position where 457 visa holders seeking to transition to Employer Nomination Scheme subclass 186 visas were required to have been holders of a 457 visa for two years and working with their nominating employer for at least one year.
29. Thirdly, the Committee might consider acknowledging that in a tight resourcing environment there would be significant benefits to recognising the professionalism of the registered migration agent profession.
30. The Law Council encourages DIAC to re-introduce a genuine priority processing of fully documented decision-ready Employer Nomination Scheme subclass 186 visas and Regional Sponsored Migration Scheme subclass 187 visas lodged by registered migration agents.

## **Conflicts of interest**

31. In Australia, migration advice or migration assistance can only be given by individuals registered with OMARA, unless exempt.
32. Section 280(5B) of the Migration Act 1958 (the Act) permits a nominator to provide immigration assistance to a person they wish to nominate. Section 280(5C) of the Act allows a sponsor to provide immigration assistance to a person to be sponsored. Under Regulation 3 of the Migration Agents Regulations 1998, employers are identified as an exempt person and are allowed to provide migration assistance to its prospective employees.

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33. Many visa applicants are unfamiliar with the immigration and workplace laws of Australia and the operation of this regulation presents a potential conflict of interest for some visa applicants.
  34. The effect of sections 280(5B) – (5C) of the Act and Regulation 3 of the Migration Agents Regulations allow an employer to occupy an intermediary position between their prospective employee and DIAC. This may diminish the employee’s knowledge of, and access to, their rights under Australian immigration and workplace laws.
  35. The Migration Law Committee has encountered numerous instances where sponsored employees have not received copies of DIAC’s approval notification of their 457 visa approval: not only are they unaware of the exact terms of approval of the notification but they are also unaware of the conditions that attach to their visa and of links to the website of the Fair Work Ombudsman for information in relation to their work rights in Australia. This has become evident when a sponsored employee seeks to change employer as the holder of a 457 visa or to apply for permanent residence nominated by a new employer.
  36. The current exemption in sections 280(5B) – 280(5C) of the Act should be amended to exclude employers providing assistance to prospective employees. Regulation 3 of the Migration Agents Regulations should be repealed. These measures are proposed for a number of reasons. Firstly, employers are not adequately versed with the law, policies and procedures in relation to migration and related areas of law. They are also not held accountable under the Code of Conduct regulated by OMARA should they fail to meet professional and ethical standards. Presently, it can be difficult to determine whether employers provide sufficient advice to prospective employees about their rights and obligations under immigration and workplace law, and there is clearly a conflict of interest between an employer advocating for their best interests and those of a prospective employee. Finally, foreign nationals are presently disadvantaged as they are unable to access OMARA's assistance should they be dissatisfied with the services of their RMA.
  37. In the alternative to the proposal outlined in paragraphs 36, the Law Council recommends the Committee consider imposing a positive obligation on employers who have assisted prospective employees obtain a 457 visa, to provide the visa holder with a full copy of the visa approval notification, allow removal of the notification from the workplace, require the employer to keep a copy of records confirming compliance with this obligation, and, like other sponsorship obligations, be subject to sanction for failure to comply with this obligation.

## **Recommendations for avoiding conflicts of interest**

38. The Law Council recommends that:
  - a) there be more definite measures to ensure that the assistance that OMARA provides is accessible by prospective foreign employees, and are encouraged or made aware of their rights to seek independent migration advice;
  - b) the current exemption in sections 280(5B) – 280(5C) of the Act be amended to exclude employers providing assistance to prospective employees; and
  - c) Regulation 3 of the Migration Agents Regulations be repealed.
39. In the alternative to the proposal outlined in paragraphs 38b and 38c, the Law Council recommends the Committee consider imposing a positive obligation on employers who have assisted prospective employees obtain a 457 visa, to provide the visa holder with a full copy of the visa approval notification, allow removal of the notification from the workplace, require the employer to keep a copy of records

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confirming compliance with this obligation, and, like other sponsorship obligations, be subject to sanction for failure to comply with this obligation.

## Improved Transparency in Decision Making

40. The Migration Law Committee has encountered visa applicants whose visa applications were not decided in their favour due to questions about the genuineness of their position with the employer - after the corresponding sponsorship and nomination application by the employer had been approved by DIAC.
41. The Law Council submits that visa applicants are susceptible in these circumstances due to the extent of discretion given to delegates and policies being open to individual interpretation of delegates of the Minister for Immigration. This discretion has, in many circumstances, caused applications of similar merit being determined inconsistently and can contribute to the uncertainty in the application process.
42. The Law Council notes that an approved nomination may indicate that the position associated with the nominated occupation is genuine and that there is little in the evidence before DIAC to indicate that the position with the visa applicant's sponsoring employer is not genuine.
43. This view is supported by the case law.<sup>3</sup>
44. When the case officer has doubts about the genuineness of the position, further investigation should be conducted at the nomination application stage and, if still not satisfied, the nomination should be refused rather than the visa application.
45. It is the experience of some members of the Migration Law Committee that approval of a nomination in a specific occupation may hinder the visa applicant's ability, or makes it difficult for the visa applicant, to be nominated by the same sponsoring company in a different occupation as this will again add to the question of genuineness of position.
46. Furthermore, refusal of the visa may have adverse impact on the applicant's future visa applications, in addition to the visa applicant having to bear financial burden associated with a new visa application.

### **Recommendation for improved transparency in decision making**

47. The Law Council recommends the implementation of stricter guidelines and collation of precedents for case officer's adherence and increased case officer training for a greater transparency in DIAC's decision making process.

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<sup>3</sup> 0900769 [2009] MRTA 2498 (12 October 2009)



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

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

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

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

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

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

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Joe Catanzariti, President
- Mr Michael Colbran QC, President-Elect
- Mr Duncan McConnel, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Ms Leanne Topfer, Executive Member

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

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## **Attachment B: Profile of the International Law Section**

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The International Law Section (ILS) provides a focal point for judges, barristers, solicitors, government lawyers, academic lawyers, corporate lawyers and law students working in Australia and overseas, who are involved in transnational and international law matters, migration and human rights issues.

The ILS runs conferences and seminars, establishes and maintains close links with overseas legal bodies such as the International Bar Association, the Commonwealth Lawyers' Association and LAWASIA, and provides expert advice to the Law Council and its constituent bodies and also to government through its Committees.

Members of the 2013 ILS Executive are:

- Dr Gordon Hughes, Section Chair
- Dr Wolfgang Babeck, Deputy Chair
- Ms Anne O'Donoghue, Treasurer
- Mr Fred Chilton, Executive Member
- Mr John Corcoran, Executive Member
- Mr Glenn Ferguson, Executive Member
- Ms Maria Jockel, Executive Member
- Mr Andrew Percival, Executive Member
- Dr Brett Williams, Executive Member.

The ILS Committees are:

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