Law Council
OF AUSTRALIA

Submission on Framework and operation of 457 visas, Enterprise Migration Agreements and Regional Migration Agreements

Senate Legal and Constitutional Affairs Committee

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Executive Summary

This submission responds to an Inquiry by the Senate's Legal and Constitutional Committee that aims to obtain stakeholder views on a range of specific issues relating to the:

> *Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements.*

The terms of reference of the inquiry are wide ranging and explore a number of issues which have been the subject of heated debate from both sides of politics and business since mid-February 2013 in the lead-up to the 14 September 2013 Federal election.

This submission responds to each of the topics outlined in the terms of reference of the inquiry in relation to 457 visas. It concludes that the following issues are worthy of comment:

- overall, the uncapped demand-driven 457 visa program is working well in Australia's interests to meet temporary skills shortages;
- training benchmarks required to be met by sponsors in the 457 visa program are, in fact, resulting in many employers facilitating formal training of staff to meet their sponsorship obligations;
- there is no need to introduce labour market testing of occupations to be filled by 457 visa holders;
- the Consolidated Sponsored Occupation List (CSOL) should be settled by the Australian Workforce and Productivity Agency (AWPA) and separated from a list of occupations for Occupational Trainee and State/Territory sponsored visa purposes;
- there is a need to address the potential vulnerability of some 457 visa holders - a number of measures are suggested to consider in relation to both raising 457 visa holders' awareness of their work rights and sanctions for rogue employers;
- ability of employers to lodge 457 visa applications on behalf of prospective employees and the potential conflict of interests this presents; and
- failure by the Department of Immigration and Citizenship (DIAC) to comply with the Government's best practice regulation requirements in relation to the changes announced by the Minister for Immigration and Citizenship, Brendan O'Connor on 23 February 2013.

This submission recognises that following an extensive review of the 457 visa program by Industrial Relations Commissioner Barbara Deegan and subsequent overhaul of the program from 14 September 2009, the Government is in the process of considering refinements to the program to ensure that it continues to serve Australia well and that the workplace rights of 457 visa holders are appropriately protected. The Law Council of Australia agrees there is some room for improvement but that the recent politicisation of this visa program has been unhelpful.

The Law Council of Australia (Law Council) takes this opportunity to acknowledge that DIAC has made considerable efforts to work with business and stakeholders by, amongst other initiatives, placing Industry Outreach Officers with employer associations and through engaging with stakeholders at its Client Reference Group forum across the country. These efforts are commended.

Introduction

1. This submission responds to the Senate's Legal and Constitutional Committee's inquiry announced on 20 March 2013 into the:

   Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements, including:

   (a) their effectiveness in filling areas of identified skill shortages and the extent to which they may result in a decline in Australia's national training effort, with particular reference to apprenticeship commencements;

   (b) their accessibility and the criteria against which applications are assessed, including whether stringent labour market testing can or should be applied to the application process;

   (c) the process of listing occupations on the Consolidated Sponsored Occupations List, and the monitoring of such processes and the adequacy or otherwise of departmental oversight and enforcement of agreements and undertakings entered into by sponsors;

   (d) the process of granting such visas and the monitoring of these processes, including the transparency and rigour of the processes;

   (e) the adequacy of the tests that apply to the granting of these visas and their impact on local employment opportunities;

   (f) the economic benefits of such agreements and the economic and social impact of such agreements;

   (g) whether better long-term forecasting of workforce needs, and the associated skills training required, would reduce the extent of the current reliance on such visas;

   (h) the capacity of the system to ensure the enforcement of workplace rights, including occupational health and safety laws and workers' compensation rights;

   (i) the role of employment agencies involved in on-hiring subclass 457 visa holders and the contractual obligations placed on subclass 457 visa holders;

   (j) the impact of the recent changes announced by the Government on the above points; and;

   (k) any related matters.[1]

2. This submission has been prepared by the International Law Section's Migration Law Committee of the Law Council. The Committee is made up of experienced senior legal practitioners who are also registered migration agents working in the area of immigration law. The submission writing process was led by primary author Katie Malyon.[2] Others who provided comment included Erskine Rodan,[3] David Prince[4] and Rick Gunn.[5]

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[1] http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/index.htm
[2] Katie Malyon B.A. LL.B.(Hons), Notary Public, Executive Director, Ernst & Young, Vice Chair Migration Law Committee, Law Council of Australia
[3] Erskine Rodan, LL.B. Accredited Specialist Immigration Law, Principal, Erskin Rodan and Associates, Chair Migration Law Committee, Law Council of Australia
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(a) Effectiveness of 457 visas, Enterprise Migration Agreements ("EMAs") and Regional Migration Agreements ("RMAs") in filling areas of identified skill shortages and the extent to which the 457 visa program may result in a decline in Australia's national training effort, with particular reference to apprenticeship commencements

Effectiveness in filling skill shortages

3. The Law Council itself does not sponsor any staff on 457 visas.

4. However, many of our member organisations who are law firms are active sponsors. Typically, law firms sponsor highly skilled foreign lawyers to assist with advice to clients involved in cross-jurisdictional matters and matters involving foreign investment in Australia, mergers and acquisitions, insurance law and intellectual property, to name but a few. Additionally, the legal profession has recently seen a number of overseas firms either set up offices in Australia or merge with Australian firms. This has prompted the need to sponsor not only foreign lawyers to work on global client matters but also high level experienced management staff.

5. Many rural firms are also looking to the 457 visa program to solve the extreme shortage of solicitors working in the remote areas.[6] In addition, the 457 visa is used by faculties of law at Australian universities to sponsor foreign law lecturers.

6. The legal profession sees the 457 visa as vital to enabling the profession to continue to serve our global clients as well as offering invaluable training and mentoring opportunities to local members of the profession. We also see the 457 visa program as vital to rejuvenating the profession in regional and remote areas of Australia.

7. For clients of immigration law practices, the 457 visa program is a vital to means of solving temporary skills shortages. Business can rely on the demand driven program to access sponsored workers who can meet an immediate need for skills. And, for large projects requiring major investment, business has the confidence of knowing that it can access skills required, when needed, to confidently plan for the future.

8. In summary, the 457 visa program is effective in delivering much needed skills.

Impact on national training efforts

9. Far from the 457 visa program leading to a decline in Australia's national training efforts it is, in the view of the Law Council, strongly encouraging that training.

10. Many professions such as law and the migration advice profession require on-going professional development for annual registration and licensing purposes. In addition, some professional associations require their members to complete prescribed on-going professional development activities to maintain their membership. Since the Training Guarantee Levy was discontinued by the Howard Government in 1996, the training benchmarks required to be met by sponsors of foreign workers holding 457 visas are the only Government regulated program requiring employers to pay for their Australian staff's training. As a result, training

[6] See the Law Council of Australia's submission to Skills Australia 9.12.2011 http://www.awpa.gov.au/our-work/labour-market-information/skilled-occupation-list/Documents/LawCouncilAustralia.pdf

provided by sponsors in the 457 visa program is stimulating Australia's national training efforts.

11. It is a requirement for approval as a sponsor of foreign workers of 457 visa holders that the business has met one of two prescribed benchmarks for training Australian citizens and permanent residents: reg. 2.59 of the *Migration Regulations 1994* (the Regulations). The current gazetted benchmarks[7] require an applicant for sponsorship approval to have demonstrated that the business has spent (note, past tense) at least 1% of gross payroll training its Australian employees (Training Benchmark B) or, in the alternative, paid at least 2% of payroll to an industry training fund (Training Benchmark A). Where there is no industry training fund operating, the applicant for sponsorship approval can, under immigration policy, meet Training Benchmark A by evidencing the required 2% has been paid to a recognised scholarship fund at a University or TAFE related to the applicant's business. Businesses operating for less than 12 months need to provide an auditable plan to meet one of the two benchmarks.

12. As a direct consequence of the requirement that an applicant seeking sponsorship approval must have a prescribed demonstrated commitment to training its staff businesses are now spending more on formal training programs than they otherwise would spend. This is evident by the fact that many businesses approaching immigration lawyers for the first time to sponsor a foreign worker need to resort to Training Benchmark A as they have not met Training Benchmark B in the last 12 months. If desperate to fill a vacancy with a foreign worker because they cannot find a local to fill the role, businesses accept the need to meet Training Benchmark A.

13. In addition, throughout the course of the sponsorship approval this commitment to training must be maintained. One of the binding obligations of an approved sponsor is the obligation to notify DIAC if there is any change to the training requirement of the business.[8] In addition, failure to meet this on-going obligation can lead to sanctions for a sponsor including administrative sanctions such as cancellation of sponsorship approval or pecuniary penalties.[9]

14. Sponsors are permitted under policy to change which training benchmark they choose to meet during the course of the sponsorship. In practice, it is common for new sponsors to move from Training Benchmark A to Training Benchmark B evidencing a more focused and targeted effort to train employees of the business. But for the need for sponsor to maintain their commitment to training such professional growth of employees may have been denied.

15. Under policy, expenditure that counts towards Training Benchmark B includes:

- paying for a formal course of study or funding a scholarship for Australian employees or for TAFE or University students, as part of the organisational training strategy;
- paying external providers to deliver training to Australian employees;
- employing apprentices, trainees or recent graduates on an ongoing basis [in "numbers proportionate to the size of the business" - DIAC has yet to indicate what numbers are considered acceptable]. All wages paid to apprentices and trainees can be included in the calculation: however, in the case of graduates, policy does not consider that these positions are "wholly training positions" because, even though they may be participating in graduate training programs,

[7] Legislative Instrument F2012L01311 12 June 2012.
[8] Regulation 2.84 of the Regulations.
[9] Section 140L of the Migration Act 1958 (the "Act") and regulation 2.89 of the Regulations.

they generally perform the "full duties associated with the position". For many employers, particularly those in professional services such as law firms, this is not the case - see para 18 below for further details;

- employing a person (such as a Learning and Development Manager) who, as a key part of their job, trains Australian employees. Often this requires an estimation of the time devoted by a generalist HR practitioner to induction and other on-the-job training;
- paying for costs associated with training such as travel and logistics costs where the costs are "reasonable and necessary". To be considered reasonable, these costs should represent a minor proportion of the total training expenditure. This can include facility or equipment hire, printing of training material and travel costs including domestic flights (but, seemingly not accommodation) to training venues or conferences where the training course is not available in the location where the employees are usually resident and, the recent welcome addition of international travel (again, no accommodation) where a high profile training course is attended by senior staff; and,
- on-the-job training which occurs as part of a formal, structured course with identified learning outcomes that contribute to upgrading employees skills. Formal assessment is not an essential requirement of on-the-job training. However, key steps in the learning development of the employee as part of any on-the-job courses should be identified.

16. Expenditure that cannot count towards this Training Benchmark B includes either training that is only undertaken by persons who are principals in the business (or family members), or training that relates to a very low skill level having regard to the characteristics and size of the business.
17. The prescriptive nature of Training Benchmark B outlined above fails to take into account many key aspects of how businesses train their staff. It does not, for example, recognise the value of principals of a business undertaking training except training that is also undertaken by their staff. Consider the following example: a solicitor director of an incorporated legal practice undertakes Continuing Legal Education (CLE) along with staff. The cost of attending this CLE can be included in the firm's training benchmark for DIAC purposes but not if the same principal was to undertake management training, such as an MBA, with a view to better manage the firm. It is the Law Council's view that the cost of such training should be recognised by DIAC.
18. Further, there is very limited recognition of the importance of on-the-job training. Many industry sectors including professional services, such as law, rely heavily on this vital and proven method of upskilling employees. For example, in relation to a legal practice, once admitted to practise in New South Wales, new solicitors are issued with a Practising Certificate which requires them to work under the (unstructured) supervision of a principal of the practice for a minimum of at least twoyears. In addition, ten hours of CLE seminar attendance is required each year to renew a Practising Certificate: but, with some training providers offering 10 point blitz sessions at $300 per session, the 1% value of the training expense could see Training Benchmark B met if the solicitor was earning merely $30,000 p.a. The point about this example is that on-the-job training matters - even though it may not be readily quantifiable, it should nonetheless be recognised by DIAC.
19. The challenge for many employers seeking to sponsor foreign workers to fill vacancies therefore is that whilst they provide training to staff through on-the-job/ internal training, this may not satisfy DIAC's requirements. Accordingly, some small or start-up companies, who genuinely have a commitment to training which

is underpinned by in-house training initiatives, may not be granted sponsor status simply because they do not meet the direct cost training expenditure benchmarks. The impact of this is that these businesses cannot access the overseas talent and skills they need though the 457 visa program.

20. A more equitable approach would be to include the opportunity costs of providing on-the-job training in the assessment of a business' commitment to meet Training Benchmark B as it is a genuine cost (albeit an indirect cost) incurred by employers. We note that such an approach has been acceptable to DIAC in past years prior to the current formulation of the 2 training benchmarks.

21. With the exception of wages paid to apprentices and trainees the current benchmarks do not take account of the wages paid to staff whilst they undertake the training or other opportunity costs (that is, the indirect costs) to a business of providing internal and on-the-job training. The only exception in policy relates to wages paid to a relief teacher who fills a position when other teachers are required to undertake training "during the course of a school term".[10] This exception should be recognised for all businesses. Again, we note that such an approach has been acceptable to DIAC in past years prior to the current formulation of the 2 training benchmarks.

22. The training benchmarks are a clumsy fit in the sense that different industries train differently - hospitality, for example, relies heavily on extensive on-the-job training with very little formal external training. However, the benchmarks compel an employer to meet Training Benchmark B or donate to an industry fund, TAFE or University to meet Training Benchmark A. In either case, there is a net benefit to Australian trainees.

23. Members of the Law Council report that some clients needing to sponsor skilled foreign nationals because of a skills shortage will embrace structured training for the first time. By way of example, a restaurant in the inner west of Sydney has recently put on an apprentice for the first time in over seven years so that the business can sponsor an award winning Italian chef.

24. In summary, the Law Council considers that the 457 visa program is responsible for helping drive the national skills program and that some recognition should be given to on-the-job training as well as training undertaken by business owners where it is relevant to the business.

Apprenticeships

25. In relation to the impact of the 457 visa program on apprenticeships, it is noteworthy that the average salary of 457 visa holders is $83,000.[11] The positions sponsored are predominately highly skilled managers, professionals and tradespeople. Vacancies filled by foreign workers cannot be filled by apprentices: however, skills transfer from skilled foreign workers to apprentices occurs in the workplace.

26. This is particularly relevant in those industry sectors which traditionally engage apprentices but which are also experiencing significant ageing of the workforce.

[10] Legislative Instrument F2012L01311 12 June 2012.
[11] http://www.immi.gov.au/media/statistics/pdf/457-state-territory-summay-report-mar13.pdf

(b) The accessibility of 457 visas, EMAs and RMAs and the criteria against which applications are assessed including whether stringent labour market testing can or should be applied

27. Australian law firms prefer to source staff locally. Member firms advertise positions locally, use recruitment agents and regularly attend career fairs at Universities around Australia to attract graduates. However, the need in Australia for lawyers with foreign law experience as well as the need in rural and remote areas for young members to the profession, requires access to the uncapped, demand-driven 457 visa program.

28. The Law Council does not support labour market testing for 457 visa occupations as this will impose unnecessary burdens and costs on member firms when bodies such as AWPA, the Department of Education, Employment and Workplace Relations (DEEWR) and relevant employer bodies such as the Law Council have already confirmed the existence of skills shortages by publication of the Skilled Occupations List (SOL) and CSOL.[12]

29. There are significant cost incentives for hiring and training Australian employees in preference to a foreign worker. Such costs include the costs for the business to locate a prospective skilled foreign worker overseas and relocate them here if they are not already in Australia, costs associated with obtaining necessary DIAC approvals, assimilation to an Australian workplace, health insurance and, at the end of the engagement, the cost of repatriating the sponsored employee and family back to their home country. In addition, many corporate clients offer significant relocation assistance packages such as short term accommodation whilst the family sources suitable accommodation, as well as assistance with payment of school fees, where relevant. Not uncommon are annual trips to the home country for the sponsored employee and family. Furthermore, the compliance related costs in relation to meeting sponsorship obligations are a deterrent to engaging a foreign worker.

30. It is the Law Council's view that Australian employers seek to fill vacancies with locals first - the costs of on-boarding a foreign worker as well as the on-going sponsorship obligations make engaging a 457 visa holder a last resort. A common refrain from small to medium enterprises is that if an Australian is able to do the job advertised they would employ them first. The regulatory requirements involved for such a business to undertake the steps to become a sponsor are overwhelming for some and act as a deterrent. This means that they continue to struggle to fill vacant roles.

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

    It is worthy of note that many of our many members were practising in the 1990s when labour market testing was compulsory as part of the company sponsored temporary visa program. It was our experience that those requirements were poorly managed, largely ineffective and honoured more in form than substance. It remains our opinion that the current legislative emphasis on market rates and training benchmarks is significantly more effective than the prior labour market

[12] Legislative Instrument F2013L00547 19 March 2013

testing regime from the 1990s.

(c) The process of listing occupations on the Consolidated Sponsored Occupations List, and the monitoring of such processes and the adequacy or otherwise of departmental oversight and enforcement of agreements and undertakings entered into by sponsors

Listing occupations on the CSOL

32. Occupations which can be sponsored for 457 visa purposes are set out in a single gazetted list of occupations that combines both the SOL and the CSOL.[13] Currently, there are approximately 192 occupations on the SOL and another 461 occupations on the CSOL. The CSOL also lists occupations that can be sponsored for Employer Nominated permanent residence visa applications as well as Occupational Trainee visas and State/Territory Sponsored temporary residence visas.

33. The SOL is compiled by AWPA - it contains those occupations that are widely recognised to be in short supply and include such occupations as health professionals, engineers, lawyers and certain trades. AWPA analyses a range of evidence when updating the SOL. Evidence is also gathered from industry and key stakeholders: comprehensive submissions from industry stakeholders are available from APWA's website. As well, a variety of indicators and information is considered to make determinations about relevant occupations to include in the SOL.

34. By comparison, DIAC policy notes the CSOL covers a range of managerial, professional, technical and trade occupations and that "occupations may be periodically added to or removed from the list"[14] in consultation with DEEWR, AWPA and/or other relevant organisations.

35. The Law Council of Australia recommends consideration be given to separating the 457 visa and Employer Nominated permanent residence visa occupation list from a list of occupations for Occupational Trainee visa and State/Territory Sponsored purposes. This would avoid the inclusion of occupations such as a Flight Attendant on the CSOL, the occupation expressly cited by Senator Xenophon as one of the reasons that he called for this enquiry.[15]

Monitoring of sponsor obligations

36. Monitoring of sponsors to date by DIAC has confirmed that, contrary to the Prime Minister's assertion that the 457 visa program is "out of control"[16] and the Minister for Immigration's statement that the program is subject to "rorts"[17] with up to "10,000"[18] cases of abuse, DIAC's monitoring confirms this is not the case.

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[13] Legislative Instrument F2013L00547 19 March 2013
[14] Para 15.2 PAM3: Div5.3/reg5.19 - Approval of nominated positions (employer nomination)
[15] http://www.nickxenophon.com.au/article/media-release-new-inquiry-into-457-visa-rules
[16] Prime Minister Julia Gillard http://www.nickxenophon.com.au/article/media-release-new-inquiry-into-457-visa-rules
[17] Minister for Immigration and Citizenship Brendan O'Connor http://www.theaustralian.com.au/national-affairs/immigration/brendan-oconnor-inflames-row-over-unfair-457-visas/story-fn9hm1gu-1226594340752
[18] Minister for Immigration and Citizenship Brendan O'Connor http://www.theaustralian.com.au/national-affairs/immigration/brendan-oconnor-steps-up-crackdown-on-457-visa-rorting/story-fn9hm1gu-1226631197510 "

37. In the last two years, DIAC has increased its monitoring activities and increased sanctions. With additional funding for the 457 monitoring program announced in the May 2011 Federal Budget, increased compliance activity occurred in FY 2011-12. In the 12 months to 30 June 2012, DIAC reported the following monitoring activities:[19]

Activity	**FY 2010 - 11**	**FY 2011 - 12**
Active sponsors	18,500	22,450
Monitoring commenced	2,091	1,754
Site visits conducted	814	856
Warning letter issued	453	449
Sanction imposed (bar and/or cancelled)	140	125
Infringement Notice issued	9	49
Prosecutions	0	1

38. Approximately 450 sponsors have received Warning Notices in each of the last 2 years.[20] The 125 sponsors sanctioned in FY 2011-12 was 11% lower than the previous financial year. However, 49 Infringement Notices were issued to a value of $219,120 - up from a low of $36,000 in the previous financial year in respect of 9 Infringement Notices[21] - this represents a 600% increase over the previous year's fines. The 9 months to 31 March 2013 has seen 56 Infringement Notices issued with fines totalling $230,000, the highest being for $9,900.[22] In broad terms, Infringement Notices have been served on standard business sponsors for failure to produce records or documents requested by a DIAC Inspector and for failure to satisfy the following sponsorship obligations:

- notify DIAC when certain events occur;
- keep records as required under the sponsorship obligations; and,
- ensure sponsored persons work only in the most recently approved nominated occupation.

39. With less than 0.03% of sponsors sanctioned, issued with an Infringement Notice or prosecuted in FY 2011-12, there is no evidence that the 457 visa program is out of control or subject to rorting. Any isolated incidents of failure to meet sponsorship obligations, provide false or misleading documentation as part of an application or other breach of immigration law, should be sanctioned appropriately.

40. Prosecutions against sponsors who have failed their sponsorship obligations have also been initiated. Two applications for civil penalties have been filed with the

[19] DIAC *Annual Repor*t 2011 - 2012, p. 86
[20] A Warning Notice constitutes "adverse information" about the business within the meaning of reg. 2.57(3) which may be taken into account when a new sponsorship application or a new nomination is lodged. This gives the business an opportunity to demonstrate it has put in place remedial actions and make submissions that it is reasonable for DIAC to disregard the adverse information.
[21] Email from DIAC Sponsor Monitoring and Promotion Policy Section 18 October 2012
[22] DIAC Victoria Client Reference Group meeting April 2013

Federal Magistrates Court of Australia. The first case involved a sponsor recovering costs from 457 visa holders. DIAC withdrew the application and imposed alternative penalties after the sponsor agreed to reimburse all monies owed to visa holders. The second case involved underpayment of visa holders. Sahan Enterprises Pty Ltd was found by the Federal Magistrates Court[23] of having failed to meet two of its obligations as a sponsor: the obligation to pay equivalent terms and conditions, and the obligation to keep appropriate records. As a result the Court issued a pecuniary penalty of $35,000 and $1,000 in court costs. Federal Magistrate Whelan placed weight on the "vulnerability" of the sponsored persons.[24]

41. In addition to being subject to the usual sanctions regime, parties the subject of a Labour Agreement may find their contract with the Government is terminated. On 15 February 2012, the Minister issued a Press Release announcing the first ever termination of a Labour Agreement. The on-hire company had breached the terms of their contract by employing its 457 visa holders on a casual basis, underpaying them and providing false and misleading information to DIAC.[25]

42. Clearly, DIAC has been actively monitoring compliance with the obligations imposed on sponsors.

43. Following the Deegan Review, the Act was amended to include the legislative framework for DIAC to share information with other Commonwealth, State/Territory Government agencies including the Australian Taxation Office, Fair Work Commission and the Fair Work Ombudsman (FWO). DIAC has since entered into a number of Memoranda of Understanding with State/Territory Governments' occupational health and safety bodies, such as WorkCover NSW.

44. In a welcome development, the Government announced on 18 March 2013 that to strengthen official efforts to monitor and enforce compliance with 457 visa conditions, to ensure foreign workers are employed in their approved nominated occupation and are receiving the market salary FWO Inspectors will be employed to monitor these key aspects of employers's compliance with the 457 visa program. This means the current 34 Immigration Inspectors will be supplemented by 300 FWO Inspectors - a near tenfold increase - who have specialist expertise in ensuring compliance with national workplace relations law and that all workers in Australia, including foreign workers, receive their correct wage and entitlements.

45. That the FWO should have a role in enforcing 457 visa holders' rights is not new. The proven effectiveness of the predecessor of the FWO, the former Workplace Ombudsman office, led to a proposed amplification of the agency's powers in relation to sponsorship obligations under the Act. When the *Migration Legislation Amendment (Worker Protection) Bill 2009* was debated in Parliament following the Deegan Review, the Government proposed to invest Fair Work Inspectors appointed under the *Workplace Relations Act 1996* with expanded powers to police compliance under migration legislation. It was envisaged that these Inspectors would simultaneously review compliance with both workplace relations and immigration law. This did not occur then but, thankfully, is about to be implemented now.

46. A key opportunity in relation to cross referral of matters for investigation arises from matters considered should include the Courts and Fair Work Commission. To date, the Fair Work Commission Australia has demonstrated its willingness to

[23] Minister for Immigration v Sahan Enterprises Pty Ltd *[2012] FMCA 619 (28 June 2012)*
[24] Ibid [51]
[25] Press Release *First Ever Termination of a Labour Agreement* 15 February 2012 http://www.minister.immi.gov.au/media/cb/2012/cb182584.htm

use its referral powers in just 2 cases. In *Krishnakanth v Saai Bose Pty Limited* [2010] FWA 4578, Deputy President Sams directed that the transcript of his decision in the matter of Mr Krishnakanth's application for unfair dismissal remedy be forwarded to both the FWO and DIAC. Allegations of falsification of skills assessment criteria for obtaining a skills recognition from Trades Recognition Australia in anticipation of an application for permanent residence, demands by the sponsor for large sums of money (in this case, $4,000) in return for skills assessment references and falsifying time and wages records.[26]

47. DIAC has no policy to formally monitor decisions of the Fair Work Commission. This should be encouraged to ensure there is no adverse information in relation to a sponsor and thereby ensure compliance with sponsorship obligations.

48. Sound management of the 457 visa program requires that any information sharing or referral of matters for investigation by another Commonwealth or State/Territory agency be appropriately recorded in the DIAC's Annual Reports, as well as those of the agency affected. Only then will business and the public have confidence in the integrity of the 457 program.

(d) The process of granting such visas and the monitoring of these processes, including the transparency and rigour of the processes

49. Decisions on client applications are typically taking one to four weeks for fully documented decision-ready applications. Law firms' clients are comfortable with this timeframe.

50. However, we are also aware that resourcing of the Labour Agreement Section in DIAC's Canberra office is leading to unacceptably long delays of six to eight months after allocation to a case officer, which can take an additional one to two months. Given these delays, some clients' projects have been put on hold and work has had to be turned away - to the detriment of the Australian economy.

51. In our view, it is imperative that DIAC appropriately resource all its visa processing sections so that business and the economy are not adversely affected.

52. It would appear that some training of DIAC case officers in business operations would be helpful to avoid the situation outlined by the Minister for Immigration and Citizenship in Parliament where he noted that a role for a Human Resource Manager had been approved for a single pizza shop.[27] It is commonly recognised that a business does not need a Human Resource Manager until there are 60 – 70 staff. Approval of such a nomination brings the 457 visa program into disrepute and highlights a need for training of DIAC staff.

(e) The adequacy of the tests that apply to the granting of these visas and their impact on local employment opportunities

53. As indicated in paragraphs 27-31 above, it is our view that existing labour market testing and the disincentives, particularly the additional costs of employing foreign workers on 457 visas, mean that efforts are made to source locals first.

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[26] *Krishnakanth v Saai Bose Pty Limited* [20110] FWA 4578 [69]
[27] Minister O'Connor, House of Representatives Hansard 14 March 2013 p. 59

(f) The economic benefits of such agreements and the economic and social impact of such agreements

54. The uncapped demand-driven 457 visa program allows employers to fill vacancies with foreign workers when the skills are not readily available in Australia. With the majority of 457 visa holders transitioning to a permanent residence[28] the program serves as a valuable opportunity for employers to determine the suitability of a sponsored employee to transition to a permanent employee: it also affords the 457 visa holder the opportunity to determine if the sponsored employment is suitable for them. This allows both the employer and employee the valuable experience of working together to determine the cultural fit of the engagement.

55. Without the ability of employers to sponsor foreign workers it has been recognised that many business, including our public hospitals, would cease to function. The Premier of New South Wales has, for example, noted that the NSW Health Department engages 2,800 foreigners on 457 visas and that these individuals ensure the continued functioning of the State's hospitals: without them the health system in NSW would "simply collapse".[29] This is echoed by numerous industry bodies especially when considering the demographics of particular industries. It is not proposed to provide details of such industries as they are expected to make submissions on this topic to the Committee.

(g) Whether better long-term forecasting of workforce needs, and the associated skills training required, would reduce the extent of the current reliance on such visas

56. The Government has set up AWPA specifically to assist with medium to long-term forecasting of workforce needs. Introduction in July 2012 of DIAC's *SkillSelect* to facilitate on-line lodgement of intending General Skilled Migrant's Expression of Interest has allowed much quicker processing of targeted unsponsored permanent residence applications. However, it is the Law Council's view that the short term needs of business are best managed by the demand-driven 457 program.

57. Since 1 July 2012, persons on 457 visas must now wait for at least two years to transition to permanent residence nominated by their employer - unless they have their skills assessed by a relevant assessing authority and have at least three years relevant experience, they earn more than $180,000 p.a. or they work in a narrow range of occupations such as a University academic, senior scientific researcher or Minister of Religion. The Law Council recommends the re-introduction of the pre-1 July 2012 requirement of employment with the nominating employer for one year <u>only</u> as the holder of a 457 visa to enable transition to an Employer Nominated permanent residence. One year affords both parties the opportunity to determine the mutual fit and would see the number of 457 visa holders in Australia drop thereby reducing the extent of reliance on such visas. This assumes that DIAC can resource the employer nominated permanent entry section so that applications can be expeditiously processed.

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[28] http://www.immi.gov.au/media/statistics/pdf/457-state-territory-summay-report-mar13.pdf
[29]http://www.theaustralian.com.au/national-affairs/alp-states-embrace-457-visas/story-fn59niix-1226612873399

(h) The capacity of the system to ensure the enforcement of workplace rights, including occupational health and safety laws and workers' compensation rights

58. The monitoring and enforcement of foreign workers' entitlements will be greatly enhanced following the recently announced appointment of FWO Inspectors to undertake these tasks.

The vulnerability of foreign workers

59. While the FWO and DIAC have made commendable progress in championing the rights and entitlements of foreign workers more could be done.

60. The pre-14 September 2009 sponsored employee law and policy saw a number of significant issues arise in practice. The literal interpretation of old visa Condition 8107 attaching to all 457 visas that required a sponsored person to not stop working for their sponsor together with the undertaking given by sponsors to ensure all primary sponsored persons were paid the prescribed Minimum Salary Level directly conflicted with workplace law - and, in many instances, plain common sense. This arose in the context of workers compensation law,[30] access to LWOP,[31] maternity leave entitlements[32] and deductions from wages at the employee's written direction for rent, accommodation and health insurance.[33]

61. With the statutory obligation of sponsors to now offer sponsored foreign workers terms and conditions that are no less favourable than those that are, or would be, offered to Australian citizens or permanent residents, these issues have now disappeared. Sponsored employees now access the same entitlements as other workers in Australia such as:

- undertake work at a lower level of duties if necessary to comply with OH&S requirements following a workplace injury - although this may, under policy, require a new nomination if the lower level work is for a period of more than two months;[34]
- take LWOP - although there is policy on the need for a formal application and a sponsor's approval in writing to the request. Under policy, periods of leave longer than 12 months may, however, trigger visa cancellation;[35]

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[30] For example, in *Rahhal v Minister for Immigration & Anor (No.2) [2008] FMCA 935* FM Scarlett affirmed a MRT decision to cancel Mr Rahhal's 457 visa arsing, in part, due to his undertaking different duties as part of a workers' compensation rehabilitation program

[31] *L L Baker v Flight Centre Limited [2007] AIRC 281.* Sponsor Flight Centre Limited terminated the employment of a 457 visa holder, Ms Baker, on the basis that the company would not be able to meet the MSL requirements after being informed by Ms Baker she was unable to return to full-time work due to an injury needing surgery and wanted to take LWOP to recover. Ms Baker filed an application under s.643 of the *Workplace Relations Act 1996* claiming termination of her employment was harsh, unjust or unreasonable. Although dismissed on the technical ground of the applicant filing out of time, Commissioner Lawson considered the discretionary factors for allowing an extension of time to file and took into account, amongst others, "the prejudice likely to fall on (Flight Centre) should its position as a sponsor for business visas be compromised by its unintended failure to meet the minimum sponsorship obligations" [para 21]

[32] Although the NES and some industrial awards allow for up to 12 months unpaid maternity leave (the NES allows an employee to request an extension for a further 12 month of parental leave), a sponsor's old undertaking to pay the MSL and an employee's obligation in old Condition 8107 to not stop working for the sponsor - as interpreted in DIAC policy - meant that new mothers seeking extended unpaid maternity leave ran the risk of having their 457 visa cancelled. DIAC policy permitted unpaid leave for no more than 3 months, although the MSL for the year still had to be met. Often, the solution involved an affected 457 visa holder either approaching their partner's employer to request sponsorship as a secondary visa holder by that entity (in which case, the new mother was not burdened with Condition 8107) or leave Australia for the duration of the pregnancy and birth thereby avoiding the need for the employer to pay the MSL until a return to work was possible

[33] *Austal Ships Pty Ltd v. King & Anor* [2009] HCA Trans 192 (12 August 2009). DIAC's sanction of barring the sponsor for a year was ultimately resolved in the company's favour by the Minister for Immigration.

[34] PAM3 Sch8/8107 para 7.1

[35] PAM3 Sch8/8107 para 11

- access full maternity leave entitlements; and,
- work part time.[36]

62. Thankfully, the 14 September 2009 changes brought to an end the dual industrial relations system that had developed under the old 457 visa scheme - one for Australian workers and another for sponsored employee 457 visa holders. Newly sponsored workers must now be paid market rates and engaged on terms no less favourable. This has seen an end to the use of foreign labour to undercut Australian workers and ensures that sponsored employees are able to access entitlements previously denied to them, such as market rates of pay and maternity leave.

63. The reality is that some foreign workers on 457 visas are vulnerable. Holding a visa is, of itself, not an indication of being vulnerable. In *Alcantara & Anor v Buildpower Pty Ltd (No. 2)* [2010] FMCA 763 FM Lucev stated that "merely because" an employee has a 457 visa, is from overseas and "relies upon the goodwill of an employer to remain in Australia … is not sufficient to categorise an employee as 'vulnerable'[37] More is required.

64. Vulnerability may arise because of many factors including English language ability, unfamiliarity with the Australian workplace law or a sense of feeling tied to work with a sponsoring employer despite the 14 September 2009 changes permitting a foreign worker to change employer following approval of a new nomination.

65. 457 visa holders have been recognised as vulnerable to inappropriate conduct by employers due to the potential for visa holders to be returned to their home countries if their employment relationship ceases.[38] After termination of employment 457 visa holders have 28 days in which to regularise their visa status in Australia - or leave. Employers who summarily dismiss 457 visa holders need to take account of this issue to avoid an unfair dismissal claim.[39]

66. Clearly, the issue of vulnerable foreign workers needs to be tackled on two fronts: first, education and, second, serious consequences for abuse of foreign workers. Education needs to target not just employers but also employees.

    It is worthy of note that under the Regulations many of the occupations which appear in the past to have been subject to vulnerability due to lack of English (such as the trade occupations) now require formally proven English language ability. We understand that this legislative change was implemented to address this perceived weakness in the prior provisions.

<u>The FWO and 457 visa holders</u>

67. The FWO has taken its education mandate seriously in respect of 457 visa holders. In addition to working with DIAC to produce the publication *457 Visa Holders - Your Rights at Work*, the FWO provides a publication on its website *Foreign workers rights fact sheet* as well as free interpreter services and translations into 27 different languages. In 2011, the FWO launched 14 *YouTube*

[36] There is nothing in law or policy that requires the position be full-time
[37] *Alcantara & Anor v Buildpower Pty Ltd (No. 2)* [2010] FMCA 763 [21]
[38] *Jones v Hanssen Pty Ltd* [2008] FMCA 291 [5]. *Fair Work Ombudsman v Taj Palace Tandoori Indian Restaurant Pty Ltd* & Anor [2012] FMCA 258 (30 March 2012)
[39] *Webster v Mercury Colleges Pty Limited* [2011] FWA 1807 [45]; *Paternella v Electroboard Solutions Pty Limited* [2011] FWA 3323 [96]

videos to assist foreign workers understand their rights.[40] The videos are presented by native speakers of Mandarin, Cantonese, Indonesian, Serbian, Arabic, Dari, Farsi, Khmer, Korean, Spanish, Vietnamese, Thai and Turkish.

68. The Law Council recommends that foreign workers be proactively made aware of their rights and entitlements under Australian workplace law. In addition to the current inclusion of a link to *Immigration facts for all overseas workers* in sponsored visa approval notifications, consideration should be given to requiring employers who sponsor foreign employees to be subject to a new obligation to communicate information in relation to worker rights to their prospective employees. The obligation could arise either under the Act, the Regulations or the *Fair Work Act 2009* and require the sponsor to provide a copy of the DIAC/FWO publication *457 Visa Holders - Your Rights at Work* with a prospective employee's contract of employment in the same way that employers are required to provide any prospective employee with a copy of the *Fair Work Information Statement.*

69. Simple practical measures that DIAC and the FWO could explore include passport size multilingual information leaflets distributed on arrival in Australia, advertisements in local foreign language newspapers and, funds permitting, a TV and radio ad campaign blitz over a short period, perhaps linked to the launch of legislation later this year of the new employer sanctions legislation in relation to employment of illegal workers following recommendations of the Howells Review.[41]

70. Unlike the FWO, DIAC does not name and shame businesses the subject of sanctions. Apart from migration professionals who deal with Notices of Intention to Take Action and Warning Letters as part of their practice the only way the public finds out a business has been sanctioned is when the decision is challenged in the Migration Review Tribunal or the Federal Circuit Court. The Law Council recommends consideration be given to publicly naming on DIAC's website those sponsors who have been prosecuted [or issued with Infringement Notices], as does the FWO.

71. Another way of reducing vulnerability could involve empowering 457 visa holders by removing their reliance on unions[42] or the FWO to conduct investigations or bring action on their behalf. This may be addressed through the introduction of a visa that provides affected foreign workers with the ability to remain in Australia to pursue their legal rights against sponsors. A model for such a visa may include a Bridging E visa, with work rights.

72. Anecdotal evidence suggests that merely raising a complaint of underpayment or breach of other employment rights can sometimes lead to termination - for 457 visa holders this results in cancellation of their visa under s.116 of the Act and the need to leave Australia unless a new sponsor can be found within 28 days. The result can be harsh, not just for the primary sponsored employee but also for family members. A case in point is the MRT decision in Ms Bian's application for review of her 457 visa cancellation involving her former employer Shanghai Garden Chinese Restaurant. Ms Bian sought review of cancellation of her 457 visa because she had instituted proceedings at the FWO in relation, inter alia, to her unfair dismissal, underpayment and absence of annual leave. She also pointed to the fact that she had a daughter completing Year 12. The Tribunal

[40] www.youtube.com/fairworkgovau
[41] *Migration Amendment (Reform of Employer Sanctions) Act* 2013
[42] See, for example, *Australian Licensed Aircraft Engineers Association v International Aviations Services Assistance Pty Ltd* [2011] FCA 333

noted the FWO had confirmed it would progress "a full investigation of her allegations".[43] Ms Bian's 457 visa cancellation was affirmed by the Tribunal.

73. It should be noted that the FWO has been proactive in pursuing sponsors who have breached workplace laws in respect of sponsored employees. In a high profile case, the Federal Court in *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 3) [2011] FCA 579* imposed a $123,000 fine on an employer that had exploited fiv workers whom it brought to Australia on 457 visas and fined a director of the company a further $24,600. Perth based Kentwood Industries required the workers to pay the equivalent of four months wages in advance to it (or its China-based recruitment agent) for organising their visas and to work 10-11 hours a day for 6-7 days a week. It paid the workers, who could not speak English, less than $3 an hour, leading to an underpayment of $242,000.

74. McKerracher J. found the company had committed 14 contraventions of the *Workplace Relations Act*. His honour commented:

> *"Given the vulnerability of Subclass 457 visa migrant workers in the Australian community, general deterrence is particularly important.*
>
> *When utilising a Commonwealth Government scheme designed to assist employers with obtaining labour resources, employers should abide by other Commonwealth laws regulating the use of that labour. Failure by employers to comply with Commonwealth workplace laws in relation to migrant workers can result not only in exploitation of vulnerable workers, but can also give the non-compliant employer an unfair comparative advantage against competing Australian businesses and workers operating lawfully".*[44]

75. Workplace Relations Minister Senator Chris Evans welcomed the fine saying: "This penalty sends a very clear message to all employers seeking to exploit foreign workers. This Government will not tolerate companies which break the law and undermine the wages and conditions of Australian workers".[45]

76. The Law Council expects the Government to appropriately resource the FWO, not only in its existing duties, but also in relation to new ones it is taking in relation to enforcing the market salary and work entitlements of 457 visa holders.

(i) The role of employment agencies involved in on-hiring subclass 457 visa holders and the contractual obligations placed on subclass 457 visa holders

On-hire

77. The Law Council has no comment in relation to this topic apart from the obvious fact that on-hire agencies fill a vital role in the Australian economy. This is, sadly, not fully appreciated by DIAC and the Minister for Immigration and Citizenship as evidenced by the fact that it takes six to nine months to negotiate a new Labour Agreement for an on-hire business. This unacceptably long processing time has not changed in the last three years and appears to be tolerated by DIAC and the Minister.

[43] 1001499 [2010] MRTA 1541 (30 June 2010) [40]
[44] *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 3)* [2011] FCA 579 [37] - [38]
[45] Press Release *Record fine sends clear message to unscrupulous employers* 31 May 2011
http://www.ministers.deewr.gov.au/evans/record-fine-sends-clear-message-unscrupulous-employers

78. Many businesses, both small and large, private as well as public, do not or cannot meet the criteria for approval as a sponsor: some do not want to take on the obligations of a sponsor or cannot employ staff on a permanent basis because of statutory restrictions. For these businesses, using an on-hire agency to facilitate the entry of skilled foreign workers is essential. Processing of on-hire Labour Agreements should be afforded no less favourable processing when compared with standard business sponsorship program.

Contracts

79. The Law Council supports all 457 visa holder being employed on a contract of employment. For persons employed locally this would be an Australian contract of employment that complies with Australian workplace law and includes a copy of the Fair Work Information Statement.

80. For those 457 visa holders who are intra-company assignees working in Australia on 457 visas sponsored by their overseas employer's associated entity, it is considered appropriate that such workers should have their overseas employment contract supplemented by a letter setting out the terms of the assignment to Australia and attaching a copy of the Fair Work Information.

(j) The impact of the recent changes announced by the Government on the above points

81. There is strong evidence that the 457 visa program is working as it should be. For example, grant numbers for 457 visas appear to have been declining since July 2012 as Australia’s unemployment figures have been increasing. Further, only 125 sponsors were sanctioned in FY 2011–12 representing an 11% reduction in sanctions issued compared to the previous financial year.[46] It is our view that sponsors who are compliant with program requirements and who use the program to benefit the Australian economy should not be adversely impacted by inappropriate behaviour by a very small number of sponsors.

82. DIAC’s website and announcements by the Minister for Immigration and Citizenship indicate that the following measures will be introduced with effect from 1 July 2013:

    (a) *introducing a requirement for the nominated position to be a genuine vacancy within the business. Discretion will be introduced to allow DIAC to consider further information if there are concerns the position may have been created specifically to secure a 457 visa without consideration of whether there is an appropriately skilled Australian available*

    Please refer to our comments above at paragraphs 27-31 in relation to the importance of avoiding the need to labour market test. This applies in all 457 visa applications but especially in relation to intra-company transfers where a 457 visa holder has proprietary knowledge having worked with associated entities overseas.

    (b) *introducing a provision to allow the DIAC to take action against sponsors who engage in discriminatory recruitment practices*

    The Law Council supports this measure.

[46] DIAC *Annual Report* 2011 - 2012, p. 86

(c) *strengthening the market salary rate requirements to provide discretion to consider comparative salary data for the local labour market when deciding whether a nominated position provides equitable remuneration arrangements*

The Law Council notes measures to test this are already in place and merely need to be exercised. Members of the Law Council who assist clients with Nomination applications in the 457 visa program never lodge an application without market salary data in support of their clients' applications.

(d) *the market salary exemption threshold will be increased from $180,000 to $250,000 to ensure that higher paid salary workers are not able to be undercut through the employment of overseas labour at a cheaper rate*

The Law Council has seen no evidence that this is necessary.

(e) *strengthening the English language requirements by removing exemptions for applicants from non-English speaking backgrounds who are nominated with a salary less than $92,000 and requiring applicants who were exempt from the English language requirement when granted a visa to continue to be exempt from, or to meet the English language requirement when changing employers*

The Law Council has seen no evidence that this is necessary.

(f) *aligning the definition of English language with the permanent employer sponsored program*

The Law Council has seen no evidence that this is necessary.

(g) *strengthening the requirement for sponsors to train Australians by introducing an ongoing and binding requirement to meet training requirements for the duration of their approved sponsorship*

The Law Council notes measures to test this are already in place and merely need to be exercised.

(h) *strengthening the existing obligation regarding recovery of costs to ensure that sponsors are solely responsible for certain costs*

The Law Council supports of this measure. However, visa applicants should be able to engage their preferred immigration lawyer, should they wish to do so, rather than be obliged to use the employer's migration lawyer.

(i) *clarifying that 457 workers may not be engaged in unintended employment relationships by requiring workers to be engaged on an employment contract (as opposed to a business contract for services) and not on-hired to an unrelated entity unless they are sponsored under a labour agreement, or in an exempt occupation.*

The Law Council supports this measure

(j) *FWO Inspector be given power to enforce market salary and other work rights entitlements*

The Law Council supports this proposal. See above paragraphs 67 76.

(k) *Information sharing with the Australian Taxation Office ("ATO") the names, addresses and other details of, amongst others, 457 visa holders*

This initiative is supported by Law Council of Australia.

(k) Any related matters

83. The Law Council believes the following matters are worthy of consideration by the Committee:

Repeal of s.280(5B), 280(5C) of the Act and 3C of the Migration Agents Regulations

84. Sections 280(5B) and 280(5C) of the Act as well as reg. 3C of the *Migration Agents Regulations 1998* provide an exemption from the requirement in s.280(1) of the Act that immigration assistance is only provided by a Registered Migration Agent (RMA): it allows employers to provide immigration assistance to prospective foreign employees. Law Council members have encountered numerous instances where sponsored employees have not been provided with a contract of employment nor received copies of DIAC's approval notification of their 457 visa. 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 FWO's website for information in relation to their work rights in Australia. This has come to light when a sponsored employee seeks to change employer as the holder of a 457 visa or to be nominated for permanent residence by a new employer.

85. The current exemption in reg. 3 of the *Migration Agents Regulations 1998* should, in our view, be repealed for a number of reasons:

- employers are not required to be knowledgeable about migration law, policy or processes. They are not bound by a Code of Conduct. Unlike RMAs, delinquent employers who provide immigration assistance to prospective foreign workers do not face sanctions from the Office of the Migration Agents Registration Authority (O'MARA) for failing to meet adequate professional advice and/or ethical standards;
- foreign nationals receiving immigration assistance from their employer are unable to access the assistance that O'MARA provides disaffected clients of RMAs. This includes the ability to access dispute resolution procedures; and,
- under the current regime where employers are exempt from the need to be registered to give immigration advice it is difficult to determine whether employers are providing sufficient information to prospective employees about their rights under immigration law and workplace law.

86. Clearly, the exemption for employers to provide prospective foreign workers with immigration assistance presents a conflict of interest.

Failure by DIAC to comply with best practice regulation requirements

87. The Law Council notes that the Office of Best Practice Regulation (OBPR) has found that DIAC did not comply with the Government's best practice regulation requirements in relation to the changes announced on 23 February 2013.[47]

88. OBPR found that the necessary Regulatory Impact Statement was required for changes proposed by the Minister relating to the requirement for employers to demonstrate that they are not nominating positions where a genuine shortage does not exist, raising the English language requirements for certain positions and strengthening the enforceability of existing training requirements for businesses that use the program.

89. This omission is unfortunate as the legal community looks to Government to be a model of best practice.

[47] http://ris.finance.gov.au/2013/03/15/non-compliance-requirements-subclass-457-visa/

Attachment A: Profile of 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 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.