

31 May 2013

BY ELECTRONIC SUBMISSION

Senate Legal and Constitutional Affairs Committee
Australian Parliament House
Canberra ACT 2600

Thank you for the opportunity to respond to questions asked on notice during the Senate Legal and Constitutional Affairs Committee hearing on 23 May 2013. Our responses are provided below.

Question 1 – Senator Xenophon – p. 53 of Hansard: “Your perspective on the United States legislation and whether there are any lessons to learn here would be very useful.”

Please find attached:

1. materials providing Fragomen’s perspective on the United States legislation; and
2. documents from the Administration and the United States Senate providing the framework and additional detail regarding the proposed legislation.

Question 2 – Senator Xenophon – p. 52 of Hansard: Do you think there could be a special category or a fast-track category for intra-company employees rather than the case where people come into a company de novo, if you like? On notice, could you give us some technical details on that?

The ability of businesses with multinational operations to be able to transfer key personnel when required to meet operational demands, and as part of a broader business strategy is a key component of international trade, investment and business generally.

A 457 visa stream which facilitates efficient intra-company transfers for multinational businesses is essential to supporting effective international trade and investment as it:

- ensures Australia remains an active player in the global economy;
- demonstrates that Australia is “open for business and investment”;
- reflects Australia’s commitments under various international agreements;

- is consistent with the practice in other developed economies
- is of economic benefit to Australia and Australians;
- creates job opportunities for Australians in Australia;
- creates job opportunities for Australians overseas; and
- contributes to reversing the impact of highly skilled Australians working overseas for extended periods.

By not embracing an intra-company transfer stream, this becomes a further area where Australia is starting to appear to be not as competitive as other jurisdictions in the “global race for talent”. In addition, the current subclass 457 program encompasses an unworkably large range of occupations and roles with the result that there are features of the program that are not consistent with best practice for the facilitation of the movement of intra-company transferees into Australia.

In our view a stream designed to facilitate the efficient entry of intra-company transferees should have reduced evidentiary requirements at visa application stage, allowing for faster processing. These minimal requirements at visa application stage can be counterbalanced by carefully crafted sponsorship eligibility criteria, and through pre-approval of occupations and other aspects of the roles in Australia at the sponsorship application stage.

The addition of a new dedicated stream for ‘Intra-Company Transfer Sponsors’ would fit well within the current regulatory framework and require minimal regulatory change. It is important that any ‘Intra-Company Transfer Sponsor’ stream dovetails with the standard 457 visa program to ensure that:

- multinationals that qualify for recognition as an Intra-Company Transfer sponsor are not excluded from separately qualifying as a Standard Business Sponsor in the 457 visa program; and
- smaller companies that are not able to qualify as an Intra-Company Transfer sponsor are able to access intra-company transfers through the standard 457 visa program.

Considerations

In establishing a streamlined processing system for intra-company transfers, consideration needs to be given to the following issues:

1. the nature of the businesses able to access a streamlined visa process;
2. how streamlined visa processing may be achieved; and
3. how these changes can be incorporated into the existing regulatory framework.

All these matters need to be considered against the overwhelming objective of not undermining the integrity of the 457 visa program.

These considerations are discussed in more detail below.

INTRA-COMPANY TRANSFER SPONSOR CATEGORY

The establishment of a separate 'intra-company transfer' class of sponsor could:

- limit access to this stream through carefully constructed sponsorship eligibility criteria; and
- negate the need for the nomination application step, by 'pre-approving' occupations and terms and conditions of employment at the sponsorship stage.

Eligibility Criteria

Sponsors wishing to access a streamlined intra-company transfer program should be required to satisfy criteria which better reflect the value to Australia of their presence here, and which differ from the current requirements of standard 457 sponsorship.

The current 457 sponsorship criteria focus on the use of the program to fill short term skill shortages in the Australian economy. However, this is not the only reason that companies utilise the current subclass 457 visa program. As we and others have demonstrated, multinational companies routinely assign key staff and executives to their operations around the world in the normal course of conducting their business. From Australia's perspective these companies, large and small, bring significant value to Australia beyond the direct benefit of employing Australians here. Firstly, the operation of multinational businesses on our shores leads to the introduction of new technology, products and services not previously available in Australia. In addition to the value of innovation *per se*, this results in skills and knowledge transfer into the Australian economy and workforce, and increased collaboration of our best and brightest with global industry leaders.

Secondly, the presence of multinational companies provides Australians with opportunities for overseas assignments as intra-company transferees themselves – this is the reciprocal benefit of the free trade in services that Australian governments have negotiated. Australians returning from overseas assignment bring with them enhanced knowledge and experience that is transferred to the Australian workforce.

Thirdly, the presence of one multinational company in Australia attracts another. Many Australians wishing to work at the top of their field currently need to work overseas in order to do so. Reversing this 'brain drain' can only be achieved by the development of Australia as a centre of knowledge, innovation and excellence. Any market economy with aspirations to

become a regional or global centre must welcome and facilitate the operation of global companies.

In this context, sponsorship criteria for intra-company transferee sponsors should focus on ensuring that users of this program have the characteristics of a multinational operation. Considerations may include:

- the number of countries in which the business operates. For example, in other countries with such programs there is a requirement that the business has a presence in the destination country, plus the sending country, plus at least one other country;
- the amount of global revenue of the corporate group; or
- the number of employees globally.

The specific criteria for sponsorship could determine the way in which these types of considerations interact to limit access to the stream to businesses with the characteristics desired. The considerations above could be calibrated against each other or used as alternative criteria to allow a holistic assessment of the 'multinational' aspect of the business.

'Front-end loading' of nomination criteria

The current nomination application criteria primarily address the following:

- the position and its ANZSCO categorisation; and
- market salary rate.

In our view, these policy objectives could be met by a system which allows DIAC to pre-approve occupations and salary banding as part of the sponsorship application.

Occupations

Consideration should be given to the types of occupations that may be sponsored through a streamlined intra-company transfer system. Any such system needs to balance facilitation of the movement of skilled staff, and regulation of the entry into the Australian labour market of individual occupations.

Suggestion has been made that a facilitated intra-company transfer stream could be limited in its scope to ANZSCO groups 1 -3, incorporating managers/ executives, professionals/ specialists, and technicians. In our view, restricting the available occupations in this way does not account for the specialised proprietary knowledge that an intra-company transferee carries with them. In an intra-company context, 'skilled' does not necessarily

correlate with a particular ANZSCO level or tier of qualification. It is conceivable that a large multinational business may wish to assign staff to Australia in occupations outside ANZSCO groups 1 – 3 due to the particular industry, and/or the specialised proprietary knowledge required in their Australian operations, and/or the staff rotation programs that operate within that business. In that context, the ANZSCO dictionary is a rather blunt instrument: restricting the stream to particular ANZSCO levels may arbitrarily limit the program, without consideration of the wider intentions of an intra-company transfer scheme to allow businesses to move their staff across international borders according to operational need.

For these reasons, consideration should be given to limiting the occupations available to *each individual sponsor* that wishes to use a streamlined intra-company transfer scheme, rather than use of an occupations list of general application to all. This could be achieved with an occupation ‘pre-approval’ process as part of the sponsorship application. Sponsors could be asked to nominate in their sponsorship application the particular occupation categories they wish to use through this stream. Once those occupations are ‘pre-approved’, the sponsor would be restricted to using the intra-company transfer stream only for those occupations. Sponsorship by that business of any other occupation, including an intra-company transfer, would need to be done through the standard 457 visa application process.

Market Salary

Intra-company transfers are intended to be temporary assignments, typically of 1 – 4 years’ duration. Transferees assigned to Australia may remain on the payroll of the business in their home country or may be placed on the payroll of the Australian entity.

Multinational businesses invariably employ sophisticated payroll and remuneration systems in order to ensure consistency of pay grades across multiple jurisdictions. For larger multinational sponsors, DIAC generally accepts as evidence of market salary rate an indication of where a nominated position sits within a business’ salary bands.

Consideration should be given to whether this criterion could be moved to the sponsorship application stage, by requiring businesses to provide internal salary band information for each of the occupations requested as part of the sponsorship application. At visa application stage, the applicant would confirm the particular pay grade on the internal salary bands.

Incorporation into Existing Regulatory Framework

The current definition of ‘approved sponsor’ is found in Regulation 2.58 of the *Migration Regulations 1994*. The definition lists 14 different classes of sponsor. The regulations following then enumerate the criteria for each of the 14 sponsor classes in turn, each

tailored to the specific type of visa being sponsored. Businesses are able to apply and qualify separately for approval as different classes of sponsor. For example, a business may qualify as a Standard Business Sponsor able to sponsor 457 visas, and separately qualify as an Occupational Trainee Sponsor able to sponsor Training Visas.

An additional category of sponsor – an ‘Intra-Company Transfer Sponsor’ – could easily be incorporated into this existing regulatory framework, and set out the criteria and requirements discussed above:

- the criteria by which a business qualifies for access to this stream;
- the evidentiary requirements relating to internal salary bands;
- a requirement mandating sponsors to nominate the specific occupations they wish to use the stream for; and
- the criteria for ‘pre-approval’ of those occupations by DIAC.

By incorporating ‘Intra-Company Transfer’ sponsors into the existing regulatory framework, businesses would be able to apply for approval as an Intra-Company Transfer Sponsor in addition to being a Standard Business Sponsor.

STREAMLINED VISA APPLICATION PROCESS

When business needs to make an intra-company transfer, it invariably needs to happen quickly. Approval of the business against the criteria discussed above, and pre-approval of certain occupations and salary levels, should mean that the visa application process can be fast, streamlined, and with low documentary requirements.

No Nomination Application

Pre-approval of occupations and salary levels would negate the need for a nomination application. This would remove an additional cost from the process, in addition to the time involved in preparing, lodging and processing a nomination application.

Visa Eligibility Criteria

Consideration should be given to the criteria for visa approval and evidentiary requirements in an intra-company transfer context. The business assigning the person to Australia will have already passed the sponsorship approval process, and considered the person’s skills and English proficiency to be suitable to their operational needs. Criteria for visas in this stream could be designed to focus on ensuring that the applicant can genuinely be considered an intra-company transferee.

We suggest that intra-company transferee applicants should be required to have been employed for a minimum period in a branch of the sponsor's business overseas. A requirement of 12 months' completed service would satisfy the requirements of GATS and current Free Trade Agreements, and reflects current practice in Japan, the United Kingdom, and the United States.

In the United Kingdom visa applicants are required to provide the following evidence of service:

- payslips for the service period claimed, and
- evidence of having received the funds (i.e. bank statement showing transfer, tax return listing the employer's name, etc).

The requirement for third party confirmation of employment makes it more difficult for employers to claim that a person is an intra-company transferee by backdating employment documentation. In our view this would be a sensible measure in ensuring the integrity of the stream.

Visa Processing

The establishment of a dedicated team at DIAC for the processing of applications in the intra-company transfer stream would facilitate faster processing by allowing DIAC case officers to become familiar with the businesses using the stream, and the positions and salary bands they use. This would also allow case officers to easily identify circumstances which do not appear to fit the intentions of the program.

Incorporation into Existing Regulatory Framework

The current criteria for grant of a 457 visa contain two streams – Standard Business Sponsorship and Labour Agreements. The two streams contain differing eligibility requirements to suit the specific stream. For example, criteria for a visa application under the Standard Business Sponsorship Stream include the following requirements:

- a nomination application naming the applicant has been approved;
- the nomination was made by an approved Standard Business Sponsor;
- the nomination application nominates a particular occupation;
- the position is in the business of the sponsor or an associated entity of the sponsor;
- and
- skills and English language requirements.

It would be relatively straightforward for an additional 'Intra-Company Transferee' stream to be added to the 457 visa regulations. Based on the discussions above, the criteria may not

require a nomination application to have been made, but instead include requirements such as the following:

- the person is employed by an Intra-Company Transfer Sponsor;
- the person has a minimum level of service overseas with that Sponsor; and
- the visa application specifies the pre-approved occupation and salary band that the transferee will occupy.

OTHER ISSUES FOR CONSIDERATION

Briefly, other issues for consideration in the design of an Intra-Company Transfer stream may include the following:

- how internal processes at DIAC may be improved to expedite processing of medical examination results (perhaps these could be requested after entry with appropriate undertakings from the sponsor to meet any costs);
- what length of stay would be suitable in the context of a transfer that is intended to be temporary (two years might be considered sufficient for most intra-company transfer roles);
- whether and how a stay could be extended beyond the original assignment if desired;
- whether and how transferees could transition to permanent residency, and whether some additional criteria could apply at permanent residency stage in recognition that intra-company transfers should be viewed primarily as temporary assignments as part of a multinational company's normal business operations and part of the individual's career path within the company's operations.

We are pleased to have had the opportunity to provide this additional material to the Committee.

Yours sincerely

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