



**Law Council**  
OF AUSTRALIA

# **Migration Amendment (Strengthening Sponsorship and Nomination Processes) Bill 2024**

**Senate Legal and Constitutional Affairs Legislation Committee**

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## Table of contents

<b>About the Law Council of Australia .....</b>	<b>3</b>
<b>Acknowledgements .....</b>	<b>4</b>
<b>Executive summary .....</b>	<b>5</b>
<b>Commentary.....</b>	<b>6</b>
Background—previous relevant Law Council positions .....	6
List of approved sponsors .....	7
Labour market testing .....	10
Income thresholds and indexation .....	11
Other aspects of the Bill .....	12

## About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes 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 its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

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

Through this representation, the Law Council acts on behalf of more than 104,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2024 are:

- Mr Greg McIntyre SC, President
- Ms Juliana Warner, President-elect
- Ms Tania Wolff, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Mr Lachlan Molesworth, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is [www.lawcouncil.au](http://www.lawcouncil.au).

## Acknowledgements

The Law Council is grateful to the Migration Law Committee of its Federal Dispute Resolution Section and the Law Institute of Victoria for their input into this submission.

## Executive summary

1. The Law Council thanks the Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) for the opportunity to comment on the Migration Amendment (Strengthening Sponsorship and Nomination Processes) Bill 2024 (**Bill**).
2. The Bill seeks to amend the *Migration Act 1958* (Cth) to legislate income threshold requirements for skilled workers, and to introduce a public register of approved sponsors in the name of transparency and accessibility.
3. The Law Council acknowledges that the Bill is the next step in the Australian Government's implementation of its 2023 Migration Strategy.<sup>1</sup> The Law Council generally welcomes the appropriate adjustment of income thresholds and allowing more time for Labour Market Testing (**LMT**).
4. However, some aspects of the Bill have raised concerns among the legal profession. The main points about the Bill that the Law Council's migration law experts wish to emphasise are:
  - The proposed publicly available sponsor register (section 140GE) raises several serious issues (detailed below) and is **not supported**.
  - While the revised income thresholds to replace the Temporary Skilled Migration Income Threshold (**TSMIT**) are most likely necessary, it would make more sense in terms of flexibility to be able to adjust them by regulation, rather than enshrine them in legislation. The indexation proposal and basis for their calculation are also questionable as set out below.
  - The extension of the LMT period from four to six months is welcome, although the Law Council made a number of additional recommendations with respect to LMT in 2023 that have not been taken up by Government. We encourage this Committee to consider adopting those recommendations.
  - The interaction between the 'essential skills' mentioned in the Explanatory Memorandum to this Bill and lists such as the Core Skills Occupation List (**CSOL**—currently being revised by Jobs and Skills Australia (**JSA**))—is unclear. The Law Council indicated in a recent submission to JSA that it does not support such occupation lists, as explained below.
5. The Law Council looks forward to engaging with the Committee in formulating recommendations to improve the Bill.

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<sup>1</sup> Department of Home Affairs, *Migration Strategy*: <<https://immi.homeaffairs.gov.au/what-we-do/migration-strategy>>.

## Commentary

### Background—previous relevant Law Council positions

6. The Law Council made a comprehensive submission on skilled migration to the Joint Standing Committee on Migration in March 2023.<sup>2</sup> In that submission, we made recommendations with respect to the Employer Sponsored visa program that are relevant to the present Bill, including that:
  - Skilled occupation lists should be abolished in favour of permitting employers to determine their occupation needs.<sup>3</sup>
  - The TSMIT should not be increased and, ideally, should be abolished. Instead, there should be a requirement that the salary offered by the employer be the greater of the average market salary rate for the occupation or the award.
  - Any reform to the Skilled Migration Program (the **Program**) should be founded on the design principle that the Program should service skills and workforce shortages, even in occupations below the average median wage for an Australian worker.
  - Ideally, the Skilled Migration Program should be sufficiently flexible to service this demand without the need for an 'Essential Skills Visa' based on a pre-determination of compelling need. However, in the event that the TSMIT is raised, the Law Council would support the introduction of an Essential Skills Visa as an exception to the TSMIT.<sup>4</sup>
  - LMT should be retained, subject to the recommended changes to the process and additional exemptions as set out under the heading [Labour market testing](#) below.
7. The Law Council further observed in its March 2023 submission that, although we do not have an agreed position on industry or labour agreements, 'an employer sponsored visa program without status skilled occupation lists may result in a reduced need for them'.<sup>5</sup>
8. In terms of preventing exploitation, our previous submission called for a holistic approach that:
  - (a) reduces the incentives for exploitation that arise by tying a visa applicant to a single employer in order to stay on a pathway to permanent residency;
  - (b) supports workers to make complaints about unscrupulous employers and providing visa certainty while they seek a new employer; and
  - (c) enforces the offences for migrant worker exploitation which already exist.
9. The present Bill's primary measure against exploitation appears to be a public list of approved sponsors, which does not support these goals directly. We do not support this measure, as discussed further below.

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<sup>2</sup> Law Council, *Migration, Pathway to Nation Building* (31 March 2023):

<<https://lawcouncil.au/resources/submissions/migration-pathway-to-nation-building>>.

<sup>3</sup> *Ibid*, 18.

<sup>4</sup> *Ibid*, 22.

<sup>5</sup> *Ibid*, 23.

## List of approved sponsors

10. Proposed section 140GE—entitled *Publishing information about approved work sponsors*—would enable the Department of Home Affairs (**Department**) to create a ‘register of approved standard business sponsors and accredited sponsors who have nominated skilled workers for entry into Australia, including the sponsor’s business name, postcode and Australian Business Number, the number of individuals nominated under the sponsorship approval process and the occupations of the nominated workers’.<sup>6</sup> The intention behind this measure is to address worker exploitation as identified in the Australian Government’s 2023 Review of the Migration System (**Migration Review**) and set out in the Migration Strategy.<sup>7</sup>
11. This information may appear useful and provide a certain measure of transparency, as well as an opportunity for workers to confirm the legitimacy of an employer. However, the requirements for becoming a Standard Business Sponsor (**SBS**) are minimal, and it is straightforward for employers to become SBSs when they decide to sponsor someone. The fact that a business is already an SBS provides very little information to a potential sponsored worker about whether a business is actually likely to sponsor them, or be a trustworthy employer.
12. Further, it could deter some employers from sponsoring individuals given the number and occupations of those they have sponsored would be made publicly available, as well as the sponsor’s business name, which may include personal information where they are sole traders or have incorporated their personal name into the business name.<sup>8</sup> This could have significant privacy implications that would impact both large and small companies (as well as sole traders). Putting such information in the public domain also raises the potential for abuse (including pursuit of anti-immigration sentiments) by a range of actors who might wish to use it against the employers involved, regardless of the good intentions behind the register.
13. The Statement of Compatibility with Human Rights (**Statement of Compatibility**) claims that any limitation on the right to privacy resulting from this measure would be reasonable, necessary and proportionate.<sup>9</sup> Given the privacy impacts described above, the Law Council disagrees with this conclusion. For the reasons above, we do not consider the register (and corresponding privacy implications) to be ‘necessary’ to achieve the policy objective of addressing worker exploitation. The Statement of Compatibility further claims that such a register would ‘promote productivity-enhancing worker mobility’.<sup>10</sup> Rather, we anticipate that employers may hesitate to become sponsors due to the risks of abuse outlined in this section.
14. If the purpose of the register in proposed section 140GE is to give subclass 482 (Temporary Skill Shortage) visa holders access to those who sponsor employees, then there appears to be a conflict with the underlying purpose of the Employer Sponsored program—to help employers attract people to fill positions that cannot be filled in the Australian labour market. Such a change would also call into question the rationale for LMT.

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<sup>6</sup> Explanatory Memorandum, [49].

<sup>7</sup> See *Migration Strategy*, 34-35.

<sup>8</sup> Explanatory Memorandum, 18.

<sup>9</sup> Explanatory Memorandum, 18.

<sup>10</sup> *Ibid.*

15. Stakeholders have raised a number of questions and concerns about the practicalities of the proposed public register:
- (a) If sole trader listings incorporate the traders' names, would they want this information public? Might this deter them from applying?
  - (b) How easy would the register be to keep up to date on a practical level? If the register were on the Department's website, would the website need to be continually updated? There have been, on occasion, lags with the sponsorship monitoring on the website when decisions have been overturned by the AAT, for example. Does the Department have the resources to manage such a register properly?
  - (c) Would the register be searchable by any of the proposed fields (business name, ABN, postcode, occupations)?
  - (d) If employers acting as sponsors were included on this new register, would the information be removed when a sponsorship ceases, and until new sponsorship is approved (or they are sanctioned)?
  - (e) The register would publicly reveal which companies are approved employer sponsors, which could result a significant number of unsolicited job applications from migrants seeking sponsored employment or from recruiters seeking clients. Has the Department considered the potential effects of encouraging further applications to existing sponsor employers, who may or may not be seeking to hire more staff?
  - (f) Has the Government considered broader unintended uses of the register which may occur, such as the attempted soliciting of new business amongst listed entities by external parties, or the targeting of businesses for being sponsors?
  - (g) A visa holder may be sponsored by a company but technically work for an associated entity, which could complicate the use of information on the register.
  - (h) Further to the privacy concerns discussed above, the proposed register raises personal data concerns, particularly for smaller organisations. This is because, even if personal identifiers are not included in the list, if an entity has only a few positions and employees, it may be obvious who is a sponsored worker.
  - (i) It is conceivable that seeing, from the register, that a certain employer sponsors a large number of migrant workers could discourage domestic job applications in some circumstances.
  - (j) The register may reveal commercially sensitive information that is unfavourable to an entity. For example, if a business is tendering for work and relying on foreign workers to fill certain positions, they may be viewed unfavourably during a tender process.
  - (k) Similarly, information from the register could be scraped by private entities and sold as a mailing list to marketing companies, or taken by scammers. Scams formulated on the basis of the register may be highly credible to targets because they would include details the person may not realise are publicly



available, and/or because they may appear to come from the Department or other government agencies regarding sponsorship.

- (l) Information published about approved employer sponsors could be misused by disgruntled former employees as an avenue to submit complaints, which could create a range of issues for the sponsor, with one potential result being that they cease to participate in sponsorship.
  - (m) Maintaining the register would be administratively burdensome; it would require the need for consistent oversight and management to ensure that information provided is up-to-date and accurate. This burden would be borne not only by the Department (as discussed above), but also by sponsors. In some circumstances, the additional administrative burden could prove untenable for sponsors—for example, where a sponsored employee is working for an associated entity of an approved employer sponsor, regular communications with the approved employer sponsor would be required to provide updates regarding the status of each sponsored employee.
16. Some legal practitioners expressed doubts that potential applicants would even access such a register, unless specifically advised to do so. This might depend on the Department’s planned public communication plan.
  17. The Law Council notes for context that the Australian Border Force already maintains a Register of sanctioned sponsors on its website.<sup>11</sup> In addition, potential applicants are already able to determine whether employers are approved **SBS** by asking the Department or the employer to provide their SBS approval. The availability of these existing resources reduces the need for the proposed register.
  18. If a public sponsorship register is created, it might be acceptable if inclusion on the register for employers were voluntary.
  19. If, despite the Law Council’s recommendation, proposed 140GE is retained, access to the list should be by request to the Department only, to ensure that the information is only accessible to those who are not likely to abuse it.
  20. In addition, paragraph 140GE(2)(f), which concerns the publication of ‘the kinds of occupations covered by nominations made by the approved work sponsor under subsection 140GB(1)’, should be removed due to the additional privacy concerns it raises.

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<sup>11</sup> ABF, *Register of sanctioned sponsors*: <<https://www.abf.gov.au/about-us/what-we-do/sponsor-sanctions/register-of-sanctioned-sponsors>>.

### Recommendations

- **Proposed section 140GE should be removed from the Bill.**
- **Alternatively, if a register of sponsors is to be made publicly available, sponsors should only be listed on an opt-in basis.**
- **If, despite the recommendations above, proposed 140GE is retained, access should be available only on request, so that the Department can screen out those who do not have a valid reason for using the data contained in the register.**
- **In addition, paragraph 140GE(2)(f), which concerns the publication of ‘the kinds of occupations covered by nominations made by the approved work sponsor under subsection 140GB(1)’, should be removed.**

## Labour market testing

21. The proposed extension from four to six months’ labour market testing in section 140GBA is useful in that it will give applicants sufficient time to prepare their applications.
22. In its comprehensive March 2023 skilled migration submission, the Law Council set out the following recommended changes to the LMT process and recommended additional exemptions:<sup>12</sup>
  - (a) The LMT process should be made more flexible by allowing:
    - (i) advertising to be conducted for a period longer than four months before the nomination application;
    - (ii) evidence of LMT to be a time of nomination decision requirement; and
    - (iii) greater flexibility in the modes and number of advertisements;
  - (b) LMT should not be required when:
    - (i) the nominee is already employed by the sponsor on a different visa, or the same visa and the visa holder is renewing their existing visa;
    - (ii) the redundancies are a different role classified under the same ANZSCO code when the sponsor can demonstrate the redundancy is not relevant to the particular nominated position;
    - (iii) when JSA has identified the occupation to which the position relates has been identified as subject to skills and workforce shortages; or
    - (iv) when the position will be paid over \$100,000, or is offered by an accredited sponsor.
23. The Law Council would like to see more of these recommendations taken up, and the passage of this Bill represents an appropriate opportunity.

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<sup>12</sup> Law Council, *Migration, Pathway to Nation Building* (31 March 2023), [100]-[113].

### Recommendations

- **This Bill would be a good opportunity to make LMT more flexible. In addition to extending the relevant period by two months, it should provide that LMT is not required when:**
  - **the nominee is already employed by the sponsor on a different visa, or the same visa and the visa holder is renewing their existing visa;**
  - **redundancies are a different role classified under the same ANZSCO code when the sponsor can demonstrate the redundancy is not relevant to the particular nominated position;**
  - **JSA has identified that the occupation to which the position relates has been identified as subject to skills and workforce shortages; or**
  - **the position will be paid over \$100,000, or is offered by an accredited sponsor.**

### Income thresholds and indexation

24. The TSMIT is to be replaced by the Core Skills Income Threshold (**CSIT**) and a new Specialist Skills Income Threshold (**SSIT**) for more specialised roles.<sup>13</sup>
25. The Law Council understands that these threshold changes reflect the Government's 2023 Migration Strategy. However, we are concerned that setting out the new thresholds of \$73,150 (CSIT) and \$135,000 (SSIT) in the Bill (see proposed subsection 140GB(2A)) will make this aspect of the visa scheme unduly rigid. It will be difficult to make changes if the market requires them, due to the need to have any further amendment drafted and passed through Parliament before coming into force.
26. The indexation of these thresholds (proposed section 140GD) may also be problematic in that:
  - both applicants and employers will need to keep track of continual changes in the relevant amounts;
  - the continual increases could deter employers from using the system, and
  - the Average Weekly Ordinary Time Earnings (**AWOTE**) constitutes a relatively high amount as a basis for the calculation in proposed subsection 140GD(3).<sup>14</sup>
27. It would be preferable for the income thresholds (CSIT and SSIT) to be included in a legislative instrument, allowing the Government to adjust them to respond to the market with relative expediency. We do not believe that this would affect the goals of clear messaging and stronger enforcement, which is said to underpin this reform in the Explanatory Memorandum.<sup>15</sup>
28. In addition, we note that it is vital that changes to income thresholds are clearly communicated well in advance to legal practitioners (and the broader public), not

<sup>13</sup> Explanatory Memorandum, 2 (*General Outline*).

<sup>14</sup> On the latest available data, for the period of 1 May 2023 – 31 October 2023 – AWOTE represents a weekly salary of \$1888.80, equating to an annual salary of \$98,217.60 (seasonally adjusted)—see Australian Bureau of Statistics, *Average Weekly Earnings, Australia*: <<https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/average-weekly-earnings-australia/latest-release>>.

<sup>15</sup> Explanatory Memorandum, [46]-[47].

just migration agents as stated in the Explanatory Memorandum.<sup>16</sup> This is necessary to ensure lawyers can accurately advise their clients.

#### Recommendations

- **The CSIT and SSIT should be prescribed by legislative instrument, rather than included in the Bill.**
- **The Department should be required to give advance notice to legal practitioners (in addition to migration agents, employees and employers) of any threshold changes.**
- **Consideration should be given to whether annual indexation of the thresholds is appropriate, given the likely implications set out above.**

### Other aspects of the Bill

29. The concept of 'essential skills' is referred to in the Explanatory Memorandum<sup>17</sup> but not defined in the Bill. In that context, the proposed subsection 140GB(5) simply refers to 'different kinds of occupations [that] may be prescribed' by regulation.
30. It would be useful to clarify in the Explanatory Memorandum how these prescribed skills relate to the CSOL that was recently the subject of a consultation by JSA. The Law Council's submission to that consultation recommended abolishing CSOL and replacing them with a simple skill level classification system.<sup>18</sup>
31. JSA's own submission to this inquiry does not appear to shed any light on this issue, other than to state that the agency intends to 'provide advice on a new Core Skills Occupation List (CSOL) for the Core Skills Pathway of the [Skills in Demand] SID visa'.<sup>19</sup>
32. The Bill, in proposed subparagraphs 140GB(2)(c) and (d), as well as subsection 140GB(2A), refers to 'proposed occupations' of a 'prescribed kind'. Prescription of occupations for the purposes of these sections is covered (though not explained) in proposed paragraph 140GB(5)(b). The Explanatory Memorandum refers to 'highly skilled migrants' in this context.<sup>20</sup> It is unclear whether these prescribed occupations refer to occupation lists, or may be otherwise prescribed. This should be clarified.

#### Recommendations

- **The CSOL should be abandoned in favour of a skill level classification system.**
- **The relationship between skilled occupation lists and the Bill should be clarified in the Explanatory Memorandum.**

<sup>16</sup> Explanatory Memorandum, [46].

<sup>17</sup> Explanatory Memorandum, 3 (General Outline).

<sup>18</sup> Law Council, *Draft Core Skills Occupation List (CSOL)*, Submission to Jobs and Skills Australia, 4 June 2024: <<https://lawcouncil.au/resources/submissions/draft-core-skills-occupation-list-csol>>, [5].

<sup>19</sup> Inquiry into the Migration Amendment (Strengthening Sponsorship and Nomination Processes) Bill 2024 [Provisions], *Submissions*:

<[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/StrengtheningSponsorship/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/StrengtheningSponsorship/Submissions)>, (Submission #1), 1.

<sup>20</sup> Explanatory Memorandum, [13].