

RECEIVED  
19 FEB 2007

Submission No. 55  
Date Received

BY: mg

SUBMISSION BY  
MEDIA, ENTERTAINMENT & ARTS ALLIANCE  
TO  
JOINT STANDING COMMITTEE ON MIGRATION  
REGARDING  
INQUIRY INTO ELIGIBILITY REQUIREMENTS AND MONITORING,  
ENFORCEMENT AND REPORTING ARRANGEMENTS FOR  
TEMPORARY BUSINESS VISAS

FEBRUARY 2007



**The Media, Entertainment & Arts Alliance**

The Media, Entertainment & Arts Alliance (Alliance) is the industrial and professional organisation representing the people who work in Australia's media and entertainment industries. Its membership includes journalists, artists, photographers, performers, symphony orchestra musicians and film, television and performing arts technicians.

The Media, Entertainment & Arts Alliance welcomes the opportunity to make a submission to the Joint Standing Committee on Migration's Inquiry into eligibility requirements and monitoring, enforcement and reporting arrangements for temporary business visas.

The Joint Standing Committee is to:

1. inquire into the adequacy of the current eligibility requirements (including English language proficiency) and the effectiveness of monitoring, enforcement and reporting arrangements for temporary business visas, particularly Temporary Business (Long Stay) 457 visas and Labour Agreements; and
2. identify areas where procedures can be improved.

The Alliance wishes to make comment on both the Business (Long Stay) 457 visa for employer sponsored skilled workers and the Business (Short Stay) 456 and 459 visas, and the Business Visitor (Long Validity) (ETA) 956 visa and the Business Visitor (Short Validity) (ETA) 977 visa, sometimes collectively referred to as business visitor visas.

The Alliance is concerned about abuse of business visitor visas, particularly the Business (Short Validity) (ETA) 977 visa and concerned that, whereas the Business (Long Stay) 457 visa was designed to address skills shortages, labour market testing is not required and, over time, it has become another means by which people are able to migrate to Australia permanently.

#### **Business visitor visas**

There are four business visitor visas: visa subclasses 456, 459, 956 and 977. Two are available electronically – as electronic travel authorities (ETAs) – namely, the 956 and the 977.

- Business (Short Stay) Visa (Subclass 456)

The 456 visa “allows business people to make a short business visit to Australia for up to three months. Business activities may include a conference, negotiation or exploratory business visit, but do not include acting, musical performances or commercial film making.”<sup>1</sup>

- Sponsored Business Visitor (Short Stay) Visa (Subclass 459)

The 459 visa “allows a business person who has an approved sponsor in Australia, to make a short business visit to Australia for up to three months. Business activities may include a conference, negotiation or exploratory business visit, but do not include acting, musical performances or commercial film making.”<sup>2</sup>

- Business Visitor (Long Validity) (ETA) Visa (Subclass 956)

This visa “is designed for business people who make regular short business visits to Australia for up to three months at a time. Business activities may include conferences, negotiation or exploratory business visits, but do not include acting, musical performances or commercial film making. This ETA may be granted for the life of your passport.”<sup>3</sup> Internet applications are not available.

---

<sup>1</sup> Business (Short Stay) Visa (Subclass 456), Department of Immigration and Citizenship, see online at <http://www.immi.gov.au/skilled/business/456/index.htm>

<sup>2</sup> Sponsored Business Visitor (Short Stay) Visa (Subclass 459), Department of Immigration and Citizenship, see online at <http://www.immi.gov.au/skilled/business/459/index.htm>

<sup>3</sup> Business Visitor (Long Validity) (ETA) Visa (Subclass 956), Department of Immigration and Citizenship, see online at <http://www.immi.gov.au/skilled/business/459/index.htm>

- Business (Short Validity) (ETA) Visa (Subclass 977)

This visa allows “the holder to travel to Australia as often as they need within the specified period (not to exceed 12 months) from the date the ETA was granted.”<sup>4</sup> Application can be made on the internet and a visa application fee does not apply.

Persons in the film, television and entertainment industry travelling to Australia on business visitor visas typically do so to undertake location surveys, audition performers, establish whether Australia is an appropriate location to mount a production and so on.

As the Department of Immigration and Citizenship (DIAC) makes clear, business visitor visas are not available for commercial filmmaking purposes. The relevant visa for commercial filmmaking purposes is the Entertainment Visa (Subclass 420) for all filmmaking purposes other than for offshore financed documentaries and television commercials that will never screen in Australia, for which purposes the Media and Film Staff Visa (Subclass 423) may be used.

However, the Alliance is aware that business visitor visas are being used when the visa applicants are engaged in commercial filmmaking in Australia by some overseas film and television production companies, particularly those that produce documentaries, when they should appropriately be travelling on a 420 or 423 visa.

The 423 visa is utilised by persons representing “an overseas news organisation as a journalist, correspondent or reporter”.<sup>5</sup>

It can also be utilised by a person seeking “to make a documentary program or a commercial that is exclusively for overseas use, and the Minister is satisfied that: (a) there is no suitable person in Australia who is capable of doing, and available to do, the work envisaged for the applicant”<sup>6</sup>.

It is not difficult to ascertain whether a commercial will screen in Australia. Many are filmed in another language – commonly produced in Australia for the Japanese or Korean market. Many are for products not sold in Australia – banks, confectionary, pharmaceuticals, tobacco products and so on. However, as the review of the temporary residence program (2000-2002) observed, with the advent of the internet it is likely that commercials principally designed for an overseas market will increasingly become available in Australia.

In the case of documentaries, most filmed in Australia are produced in English. Documentaries are produced with a different financing model to that of commercials. Having raised the necessary finance, a documentary producer will seek to recoup the budget of the program and to make a profit. Thus, a documentary producer will endeavour to sell their program into as many markets as possible. Whilst some documentaries filmed in Australia are filmed in a language other than English, many can still find a market in Australia – in particular, wildlife and travel documentaries with voice overs rather than on screen presenters are easily dubbed into English. Further, with the burgeoning of delivery platforms currently gathering pace, it is likely that Australians will have access to more overseas programming in the future be it programs streamed live on the internet, available on demand on the internet or by some other form of delivery platform such as mobile telephony.

For that reason, DIAC requires documentary filmmakers to travel to Australia either on a 423 visa if the applicant can genuinely demonstrate that there is no likelihood of the program ever being released in Australia, but more usually, for the reasons outlined above, on a 420 Entertainment visa.

Notwithstanding the above, until approximately five years ago, documentary filmmakers rarely travelled to Australia on either 420 or 423 visas. To the best of the Alliance’s knowledge it seems that most documentary filmmakers were travelling to Australia either on business visitor visas or on tourist visas. The introduction of the ETA system in 1996 is likely to have exacerbated the situation.

---

<sup>4</sup> The Electronic Travel Authority, Fact Sheet No. 55, Department of Immigration and Citizenship, see online at <http://www.immi.gov.au/media/fact-sheets/55eta.htm>

<sup>5</sup> See Clause 423.222(2) of Schedule 2 of the Migration Regulations.

<sup>6</sup> See Clause 423.222(3) of Schedule 2 of the Migration Regulations.

The utilisation of inappropriate visas was not confined to small businesses. Business visitor visas were utilised by all the major international production companies and television broadcasters sending documentary crews to Australia.

The Alliance worked closely with DIAC for years. DIAC worked closely with the High Commissions and embassies in the countries of most concern. Over the past five years, the situation has improved considerably and today the Alliance considers it is now likely that the majority of documentary crews from the United Kingdom are travelling to Australia on 420 visas.

Some inroads have been made in Europe but there remains a long way to go with, for instance, French and German crews usually come to Australia on inappropriate visas. A growing number of American producers have recently – and especially in the past year – been travelling on 420 visas but it seems certain those applications represent only a minority of the American crews travelling to Australia. Japanese wildlife documentary productions are a regular occurrence – none travel to Australia on 420 visas.

The Alliance is aware of innumerable instances of overseas crews being in Australia not travelling on 420 visas. When it is possible to secure sufficient information to alert DIAC it is still rarely possible for any action to be taken. Because documentaries are filmed across Australia, and often in remote areas at great distances from capital cities, it is often difficult for DIAC to respond in a timely manner when the Alliance becomes aware of crews being in the country.

Australia has some of the most talented and internationally renowned documentary filmmakers in the world.

When overseas producers and broadcasters send entire crews to Australia on visas other than a 420 or 423, the requirement to demonstrate a net employment benefit to Australians arising from the proposed activity, as is the case with a 420 visa application, or the requirement to demonstrate that Australians are not available to undertake the work in question, as is the case with a 423 visa application, can be avoided.

On 4 July 2000, the then Minister for Immigration, Multicultural and Indigenous Affairs announced a review of the temporary residence program. The resultant report, *In Australia's Interests: A Review of the Temporary Residence Program*, was released in June 2002.

The report recommended that there was no need for the 423 visa stating that the “persons currently provided for under this visa can be more appropriately handled in other visas without disadvantage to clients or sponsors”<sup>7</sup>.

The report further recommended as follows:

“The distinction between productions for Australian use and those for overseas use has lost its meaning in recent years, as the availability of products is global rather than national, especially for documentaries. With the advent of satellite and cable television, the 423 visa requirement that the documentary or commercial must not be aired in Australia has become outdated. Those documentaries that may once have been made purely for an overseas audience now get aired in part or in full, on Australian television. Therefore, any attempt by decision-makers to distinguish between those documentaries and commercials claimed to be made exclusively for overseas use and those which are not becomes even more difficult. These arrangements can lead to some confusion about the respective use of the Entertainment visa (subclass 420) and the Media and Film Staff Visa (subclass 423).

“It is therefore proposed that all documentary and commercial makers who intend to work in Australia no longer use the 423 visa and apply for the 420 Entertainment visa. This will

---

<sup>7</sup> *In Australia's Interests: A Review of the Temporary Residence Program*, Department of Immigration, Multicultural and Indigenous Affairs, June 2002, page 170.

eliminate client and staff confusion and associated inefficiencies in processing visa applications.”<sup>8</sup>

The report also noted the sponsorship requirement that applies to the 420 Entertainment visa, the need for the sponsor to have good professional standing in the industry and good financial standing, commenting, “These factors, in addition to the role of union consultation, which involves further scrutiny, have resulted in a high degree of visa integrity.”<sup>9</sup>

The Alliance understands that the Government accepted the recommendation for applications relating to commercials and documentaries for overseas use be transferred from the 423 visa to the 420 visa and that the necessary regulatory amendments are supported but implementation is still in the pipeline.

Since that report, DIAC has brought all applications for 420 visas on-shore and centralised processing in the Sydney Entertainment Processing Centre (SEPC), now located at DIAC’s Parramatta office.

In so doing, DIAC has established a high order of consistency in the provision of advice and decision-making for applicants.

The Alliance understands that DIAC is considering bringing processing of 423 visas on-shore and centralising processing within the one office, likely to be the SEPC.

If that were implemented, it would end confusion at overseas posts about when use of the 423 visa is appropriate, often unavoidable with staff turnover and low usage of the visa subclass at many posts.

Consequently, the Alliance recommends processing of 423 visa applications be brought on-shore, centralised within the SEPC and the abolition of the 423 visa once the regulatory amendments have been made that enable transfer applications for commercials and documentaries to the 420 Entertainment visa.

Such measures will assist in alleviating the problems currently encountered by the industry. However, more needs to be done to end overseas crews coming to Australia on business visitor visas and, indeed, as was the case with a German production in January this year, on tourist visas.

By travelling to and working in Australia on business visitor or tourist visas, overseas productions are avoiding their regulatory obligations in respect of maximising employment opportunities for Australians – obligations that acknowledge that the industry in Australia is reliant on state and federal government subsidy and federal government support mechanisms, such as the Australian content standard in respect of free-to-air commercial television, to be viable. Overseas companies also benefit from a range of government support measures – from federal government tax offset rebates for very large productions through to a range of state government support mechanisms and, with documentaries, very often financial and other assistance from state and federal authorities including Austrade and the various tourism commissions.

To that end, both the 423 and the 420 visas impose obligations on filmmakers coming from overseas to engage Australians as a condition precedent to the granting of the visas.

The use of business visitor visas continues to grow. 174,617 Business (Short Stay) 456 visas were issued in 2004-2005, rising to 185,656 the following year.

While only 107 Sponsored Business Visitor (Short Stay) 459 visas were granted in 2004-2005, 634 were granted the following year.

In 2004-2005, 18,417 Business Visitor (Long Validity) (ETA) 956 visas were granted, falling to 15,410 the following year. However, 146,283 Business Visitor (Short Validity) 956 visas were granted in 2004-2005, rising to 166,633 the following year.

---

<sup>8</sup> *In Australia’s Interests: A Review of the Temporary Residence Program*, Department of Immigration, Multicultural and Indigenous Affairs, June 2002, pages 198-199.

<sup>9</sup> *Ibid*, page 201.

In all, 368,333 business visitor visas were granted in 2005-2006, up from 339,424 the previous year.

The Alliance understands that the passenger cards completed by visa holders entering Australia is primarily designed to assist the Australian Bureau of Statistics to estimate net migration to Australia. Obviously, what is entered on the passenger cards is self-reported but it seems to the Alliance that the passenger cards, if redesigned, might provide better information that might enable DIAC personnel to establish if what a person is saying they will be doing in Australia is appropriate for the visa they hold.

Whilst it is possible for DIAC to interrogate paper based applications more closely, internet applications for a short validity 977 visa can, in most cases, be approved in approximately 30 seconds.<sup>10</sup> Clearly, DIAC is reliant on honest self reporting.

The Alliance also thinks it likely that the use of terminology might result in many applicants incorrectly believing they are able to appropriately apply for business visitor visas.

For example, in one webpage on DIAC's ETA website, readers are advised as follows:

Short Validity Business ETA

If you are travelling for business purposes, you should apply for the Short Validity Business ETA. It is valid for 12 months with stays of up to 3 months on each visit, and can be used for single or multiple entry travel. Employment is prohibited.”<sup>11</sup>

Yet on another webpage, the reader is advised:

Short Validity Business ETA conditions

- For visits to Australia for business meetings, conventions and conferences
- Work is not allowed; except for a very short period to undertake work not able to be done by any Australian citizen or permanent resident
- Valid for multiple visits within 12 months from date of issue
- Maximum length of each visit is three months
- **Not** for acting, musical performances or commercial film making; in these cases, apply for an Entertainment visa. See: Entertainment visa (subclass 420)
- Generally, people seeking paid employment in Australia should apply for the Temporary Business Entry Long Stay (subclass 457) visa, or other appropriate class of visa. See: <http://www.immi.gov.au/skilled/index.htm><sup>12</sup>

The fact that at the second dot point the reader is advised both that work is not allowed and work is allowed for a very short period to undertake work not able to be done by an Australian may well lead a documentary filmmaker to conclude that coming to Australia for work a “short period” is acceptable and a 977 visa appropriate for the purpose.

Further, the reader is advised that in the event they are seeking employment they should apply for the Temporary Business Entry Long Stay visa. That one class of business visa precludes employment whereas another is specifically for employment purposes can only cause confusion.

The Alliance recommends the caveat in dot point two be deleted and the Temporary Business Entry Long Stay visa be renamed to appropriately reflect what it is designed to do.

At dot point five above, DIAC specifically directs web readers to the 420 Entertainment visa. The Alliance strongly supports this directive and considers it should apply consistently throughout DIAC fact sheets and web pages.

At present, there are two classes of visa that address working in the entertainment industry – the 420 and 423 visas. As noted earlier, the Government supports repealing the 423 visa and moving applications for documentaries and commercials to the 420.

<sup>10</sup> See online at <http://www.eta.immi.gov.au/ETAAus2En.html>

<sup>11</sup> See online at <http://www.eta.immi.gov.au/ETAAus3En.html>

<sup>12</sup> See online at <http://www.eta.immi.gov.au/ETAAus5En.html>

However, there remain anomalies in the manner in which the temporary entry program operates. Employment restrictions are typically applied to the primary visa applicant. Secondary visa applicants are often able to secure employment within in any sector of the Australian labour market and do not have the restrictions imposed on them that apply to the primary applicant. The same is true of the working holiday maker program where applicants are able to undertake employment, regardless of sector, providing employment with one employer is for no longer than three months.

Both circumstances are anomalous. They are at odds with reasons the restrictions on primary applicants for the 420 were introduced – to maximise employment opportunities for Australians in an industry reliant on government support.

Documentary film crews are often easily identifiable when entering Australia because of the amount of camera equipment they carry. The Alliance understands that DIAC has briefed customs officials in this regard. However, the Alliance is advised that because those arriving in Australia clear immigration before they clear customs, they have been allowed entry prior to the point when their luggage might give rise to concerns about the intention of their visit.

The Alliance recommends better communication between customs and immigration officials so that those persons entering on business visitor visas in possession of film equipment can be questioned about their intentions.

While many documentary crews enter Australia in Sydney or Melbourne, a large number – particularly wildlife documentary crews – often enter at other ports and, given access to Australia's more exotic locations, enter at Darwin and Cairns. The Alliance understands DIAC has briefed personnel at Darwin but considers that regular updates at all ports would be of assistance.

Finally, in order to undertake commercial filming, location permissions, and often location filming permits, are required from those who have control over the locations in question. Such locations are often controlled by federal, state or local government instrumentalities, for instance, national parks. The Alliance recommends that DIAC mount a further education program along the lines of its 2001 *Don't give a job to an illegal worker! A guide on work rights* campaign. That campaign alerted employers of the need to ensure those whom they employed had appropriate work rights. The Alliance considers that just as it is important that people don't seek employment to which they not entitled, it is also important that those who travel to Australia to undertake work do so lawfully.

The Alliance realises that ensuring people from overseas travelling to Australia do so lawfully is largely reliant on good information, awareness-raising programs and enforcement. If government instrumentalities granting people filming permits are made aware that persons from overseas are only entitled to film in Australia if they are here lawfully and made declaration of their visa status a precondition to the granting of a permit, it would assist considerably. The Alliance realises that many such instrumentalities are currently of the view that it is not within their capacity to ask for such information.

#### **Temporary Business (Long Stay) – Standard Business Sponsorship (Subclass 457) Visa**

The 457 visa was originally recommended by a committee established by the Keating Government and chaired by Neville Roach, at the time Fujitsu Chief Executive.

A response to globalisation, it was introduced in 1996 to address skills shortages and enable the timely engagement of business executives and highly skilled specialist employees. Importantly, it removed the need for labour market testing.

However, the manner in which this visa class is used has changed over time and is now the visa class being used to address most skills shortages in the labour market.

With changes in technology in the film, television and games industries and the growth of the digital imaging industry in recent years, this visa class has been utilised to great effect by the postproduction, digital and visual effects (PDV) sectors.

World-wide, there are PDV skills shortages. Major film productions like the *Lord of the Rings* trilogy, *Charlotte's Web*, *Superman Returns*, *The Matrix* trilogy and *Happy Feet* rely heavily on digital visual effects and in order to meet schedules will often contract out sequences to a number of visual effects companies around the world. The one film might have visual effects created in a number of countries. Recent American films produced in Australia have utilised digital effects companies in Australia, New Zealand, the United States and India on the one production.

Although Australia has some of the best PDV personnel in the world, many in the workforce are relatively young and highly mobile. A break in production throughput can result in highly skilled Australian personnel (many only recently trained on-the-job) heading to London, Los Angeles, San Francisco or to Asia or the Middle East where many cities are competing to become media hubs and PDV hubs including Singapore, Kuala Lumpur and Dubai.

The 457 visa has thus enabled employers in the PDV sector to address skills shortages when they are unable to recruit within Australia.

The Alliance is, however, concerned that training in Australia is constrained by a shortage of off-the-job training opportunities, at the level required by industry, resulting in an on-going reliance on this visa class.

While the 457 visa has been useful for the PDV sector, the Alliance is concerned that there are signs the visa is becoming attractive in the wider film, television, and entertainment industries for reasons other than addressing genuine high level skills shortages.

The Alliance notes that some parts of government continue to assert that this visa class is not designed as a mechanism for employers to minimise their obligations to hire and train Australians, nor as a mechanism to undermine Australian rates of pay and conditions.

On the other hand, it is hard to conclude that the 457 visa is not on occasion being used as a mechanism to minimise obligations in respect of training Australians, given the ease with which a second 457 visa can be granted. Further, according to DIAC, "Over 50 per cent of people lodging ENS [employer nomination scheme] applications were holders of a business (long-stay) subclass 457 visa, which now provides a pathway for temporary skilled workers seeking permanent residence."<sup>13</sup>

In the section entitled *A path to permanent residence* in its 2005-06 Annual Report DIAC notes, "In 2005-06, some 13,300 subclass 457 visa holders applied to stay in Australia permanently. The majority of these (80 per cent) applied for permanent entry under the Employer Nomination Scheme, the Regional Sponsored Migration Scheme, or the Labour Agreement, or skilled independent visa programmes."<sup>14</sup> This is hardly an indication that skills transfer to Australians is occurring appropriately, nor that training of Australians is a priority for all employers sponsoring employees from overseas on 457 visas.

DIAC maintains, "The skill focus of the programme is reinforced through minimum salary requirements. In May 2006, minimum salary requirements were increased to \$41,850 for general occupations and \$57,300 for information and communication technology (ICT) occupations. In 2005-06, the average nominated salary under the programme was \$65,000."<sup>15</sup>

However, the Alliance shares the concerns of other commentators who note that the minimum salary requirements are not in line with market rates nor even, in some instances, the minimum award rates that apply to the positions in question. It is therefore difficult to see how the general \$41,850 minimum rate of pay would necessarily drive the skill focus the visa class is intended to address. Rather, it offers a mechanism that some employers might utilise to avoid paying Australian market rates.

---

<sup>13</sup> *DIMA Annual Report, 2005-2006*, see online at [http://www.immi.gov.au/about/reports/annual/2005-06/DIMA\\_AR/performance/Outcome\\_1\\_1.html](http://www.immi.gov.au/about/reports/annual/2005-06/DIMA_AR/performance/Outcome_1_1.html)

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*



The use of 457 visas has been increasing exponentially in recent years. In 2005-06, 39,527 457 visas were granted, approximately 45% more than in the previous year. However, on 12 February 2007, the Senate's Legal and Constitutional Affairs Committee was told that "for the first six months of 2006-07, 21,464 primary applicant visas had been approved, which was 17 per cent higher than the same period in 2005-06"<sup>16</sup>.

It is therefore difficult to see why DIAC monitoring of this visa class is dropping at the same time as the number of visas granted is climbing.

2005-06 Measures	Results			
	2002-03	2003-04	2004-05	2005-06
100 per cent of 457 visa sponsors monitored for compliance with visa conditions	N/A	100 per cent	96.6 per cent	65.2 per cent
25 per cent of 457 visa sponsors site visited at place of employment	N/A	28 per cent	22.4 per cent	18.0 per cent

Source: *Table 26 Performance information – Temporary residents*, DIMA Annual Report 2005-06<sup>17</sup>

The Alliance considers that, in order to guarantee the integrity of the 457 visa class, proper labour market testing should be introduced, market rates should apply in respect of rates of pay and conditions of employment, monitoring of compliance should be increased to the level set by DIAC itself of 100 per cent and the visa should be renamed to more appropriately reflect the fact that it is intended to temporarily address skills shortages in highly skilled employment.

Finally, the Alliance understands that some commentators are calling for the 457 visa to be broadened to accommodate skills shortages in unskilled and semi-skilled positions.

The Alliance is opposed to this proposal. Whilst unemployment overall may be low, it does not take account of levels of underemployment and hides the fact that where the unemployment rate for skilled Australians is marginally less than two per cent, unemployment for other Australians is above six per cent. Additionally, the Alliance understands that unskilled and semi-skilled work in lower paid work such as retail, tourism, food and beverage, and agriculture related work such as cherry picking is being addressed through the expansion of the working holiday maker visa program.

<sup>16</sup> *Growth in 457 numbers*, The Australian, 12 February 2007, see online at <http://australianit.news.com.au/articles/0,7204,21212379%5E15317%5E%5Enbv%5E,00.html>

<sup>17</sup> See online at [http://www.immi.gov.au/about/reports/annual/2005-06/DIMA\\_AR/performance/Outcome\\_1\\_1.html](http://www.immi.gov.au/about/reports/annual/2005-06/DIMA_AR/performance/Outcome_1_1.html)