Law Council
OF AUSTRALIA

Inquiry into the Administration and Operation of the Migration Act 1958

Senate Legal Constitutional References Committee

26 September 2005

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INTRODUCTION

1. The Law Council of Australia ("Law Council") welcomes this inquiry into the administration and operation of the *Migration Act* 1958 ("Migration Act"). The Law Council is grateful for the opportunity to make a submission to this inquiry which features as one of the most important in recent times.

2. The Law Council has serious concerns in relation to the operation of the Migration Act. Many of these concerns are addressed in the submission made by the Law Institute of Victoria on 10 August 2005 to the present inquiry and also by the Immigration Lawyers Association of Australasia ("ILAA") in its submission to the Inquiry of the Joint Committee on Migration into "Skills Recognition, Upgrading and Licensing" in June 2005. The ILAA submission is ***attached***.

3. The Law Council endorses the submissions made by the LIV and the ILAA. The Council supports the issues and concerns raised in these submissions, and has sought to complement them rather than to restate the issues.

4. In this submission, the Law Council has focussed on the administration and operation of the Migration Act in relation to migration detention and the deportation of people from Australia including:

    a. The adequacy of healthcare, including mental healthcare, and other services and assistance provided to people in immigration detention;

    b. The outsourcing of management and service provision at immigration detention centres; and

    c. Legal assistance provided to detainees.

    d. The role and functions of the Commonwealth Ombudsman in relation to detainees.

BACKGROUND

Terms Of Reference Of The Inquiry

5. On 21 June 2005 the Senate referred the following matters to the References Committee:

    (a) The administration and operation of the *Migration Act 1958*, its regulations and guidelines by the Minister for Immigration and Multicultural and Indigenous Affairs and the Department of Immigration and Multicultural and Indigenous Affairs, with particular reference to the processing and assessment of visa applications, migration detention and the deportation of people from Australia;

(b) The activities and involvement of the Department of Foreign Affairs and Trade and any other government agencies in processes surrounding the deportation of people from Australia;

(c) The adequacy of healthcare, including mental healthcare, and other services and assistance provided to people in immigration detention;

(d) The outsourcing of management and service provision at immigration detention centres; and

(e) Any related matters.

Recent Developments Relevant To The Inquiry

Palmer Report

6. The Palmer report was released on 14 July 2005 in relation to the wrongful detention of Cornelia Rau and to some extent, the wrongful deportation of Vivian Alvarez.

7. In response to the Palmer Report, the Federal Government has modified its policies including:

   a. The Department of Immigration and Multicultural and Indigenous Affairs ("DIMIA") will be required to implement new case management systems;

   b. DIMIA is required to seek ongoing independent expert advice on its contract with the company that runs detention centres;

   c. Detention staff are required to be better trained;

   d. The power to lock up individual detainees will be restricted to experienced staff only;

   e. Strengthening the role of the Commonwealth Ombudsman ("Ombudsman") to deal with immigration detention matters;

   f. The Ombudsman will continue the inquiry into the cases of 200 other detainees who were allegedly wrongly detained and were originally referred to Mr Palmer for investigation.

The Proposal by Petro Georgiou to Introduce Private Members Bills on Immigration Detention Matters

8. In June 2005, the Federal Government announced that its immigration detention policies will be softened in response to the two Private Member's Bills which were to be introduced by the Member for Kooyong, Petro Georgiou MP.

9. Relevant changes include:

   a. All detainees with children will be released from detention centres into the community under community detention arrangements;

b. Where a person has been in detention for two years, a report is required to be provided to the Commonwealth Ombudsman every six months. The Commonwealth Ombudsman is required to make an assessment which is provided to the Minister and tabled in Parliament. The Commonwealth Ombudsman may in his assessment recommend the release of a person, the grant of a permanent visa, that the person remain in detention or any other recommendation as appropriate.

IMMIGRATION DETENTION POLICY OF THE FEDERAL GOVERNMENT

10. The Law Council is opposed to imprisoning people deemed to be "unlawful non citizens" in detention facilities. The Law Council believes that Australian immigration detention laws and policies are disproportionately harsh in their impact on individual cases. The Law Council believes that the law is arguably at odds with notions of human rights and civil liberties that are fundamental to traditional understandings of justice and the rule of law in this country. Further, the United Nations High Commissioner for Refugees opposes the detention of asylum seekers, particularly when it is prolonged.[1]

11. The Law Council acknowledges that the merits of the immigration detention policy fall outside the scope of the Parliamentary inquiry. Accordingly, this submission addresses the issues and concerns of the policies and practices associated with the immigration detention facilities.

12. The current immigration policy developed by the Australian Government, and administered pursuant to the Migration Act provides that all non Australian citizens who are unlawfully in Australia must be detained. Unless they are given permission to remain in Australia, unlawful non-citizens must be removed as soon as practicable. The Australian Government considers that this policy reflects Australia's sovereign right under international law to determine which non-citizens are permitted to remain in Australia and if not, the conditions under which they may be removed.

13. The Law Council maintains its long held view that arrest and detention of any person should be the subject of judicial oversight. It maintains that a significant source of the problems demonstrated in the Cornelia Rau and Vivian Alvarez scandals is the removal of such judicial oversight from these important administrative functions.

14. In *Chu Kheng Lim and others v. The Minister for Immigration, Local Government and Ethnic Affairs and Another* ("Chu Kheng Lim")[2], Brennan, Deane and Dawson JJ said that detention for the purpose of punishment

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[1] UNHCR spokesperson Kris Janowski - at the press briefing, on 25 January 2002, at the Palais des Nations in Geneva.

[2] (1992) 176 CLR 1

is an exclusively judicial function, and the involuntary detention of a citizen in custody by the State is *prima facie* penal or punitive in character and hence, except in exceptional situations, can only result from the exercise of judicial power.

15. The Law Council acknowledges that current law may permit a person to be deprived of their liberty without a judicial order.[3] In Chu Kheng Lim[4] references were made to a number of situations in which involuntary non-punitive detention can occur, including for mental health purposes or remand pending trial. In *Kruger v Commonwealth*[5] Gaudron J commented that there are a number of examples of non-punitive detention which negate the view that there is a constitutional principle that involuntary detention can only result from a court order.

16. Currently, s 189(1) of the Migration Act requires a DIMIA compliance officer or a police officer to detain any person they know or reasonably suspect to be an unlawful non citizen. Section 196(1) provides that an unlawful non citizen detained under s 189(1) must be kept in immigration detention until removed from Australia, deported or granted a visa. to detain a person where there is suspicion.

17. The Palmer Inquiry found that many of the DIMIA officers that were interviewed, had used the detentions powers under s 189(1) with little understanding of what, in legal terms, constituted a "reasonable suspicion". The Palmer Report attributed this to:

    a. Misinterpretation of the operation of s 189(1) and the legislative responsibilities that it brought. In particular, the Palmer Report stated that officers believed that the provision allowed indefinite detention where there was a reasonable suspicion and there was no restriction of length of time taken to investigate the suspicion.(Palmer report page 25).

    b. A lack of understanding of the gravity in taking away a person's human right to liberty.

18. In this regard, the Law Council submits that the Government has not adopted a best practice approach which balances considerations of efficacy, fairness and proper safeguards to individual liberty. Depriving a person of his or her liberty is to deny a most fundamental human right. The seriousness of taking away a person's liberty warrants a person faced with this prospect to be accorded fair and balanced treatment from a judicial officer before being sent to detention. This cannot always be properly achieved by DIMIA officers.

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[3] *Al-Kateb v Godwin* [2004] HCA 37 (6 August 2004); *Al Khafaji* [2004] HCA 38 (6 August 2004); and *Re Woolley; Ex parte Applicants M* 276/2003 [2004] HCA 49 (7 October 2004).

[4] (1992) 176 CLR 1

[5] (1997) 190 CLR 1at 110

19. The Law Council reminds the Committee that before 1 September 1994, persons arrested on suspicion of being unlawful non-citizens had to be brought before a magistrate within 24 hours of their arrest. Detention was only justified if the Department could demonstrate a basis for their suspicions. If the person's true status was not determined, the person had to be brought back before the magistrate every 7 days. Under this system, with extremely rare exceptions, people were simply not permitted to languish for months in detention on the basis of "suspicion". The rights of those placed under arrest were also protected by the grant of legal aid.

20. These safeguards have all disappeared. The circumstances of Cornelia Rau and Vivian Alvarez and those of the estimated 200 other wrongful arrest cases, most of which post date 1994, demonstrate the urgent need to reintroduce judicial oversight at the front end of the arrest process. The ability of the Commonwealth Ombudsman to investigate people who have been held in detention for two years or more is no substitute for proper judicial oversight.

21. The Law Council also recommends that minimum standards for detention must be prescribed. Currently, the schedule to the contract between Global Solutions Limited and DIMIA provides performance standards and measures. However, based on the findings of the Palmer Inquiry, the well publicised blunders and mishaps in recent times and the ongoing investigation by the Commonwealth Ombudsman in relation to about 200 detainees who may have been mistakenly detained, the Law Council submits that incorporating standards necessary for the discharge of a public service into the terms of a private contract is not satisfactory.

22. There are a number of models which need to be explored in order to entrench minimum standards. These include:

    a. The enactment of legislative provisions specifying the minimum standards and rights of detainees in immigration detention in the Migration Act; or

    b. Providing similar safeguard as (a) in the Regulations to the Migration Act; or

    c. A Charter in the form of a public document which establishes minimum standards for detention.

23. The Law Council suggests that a number of concerns raised by the Palmer Inquiry would be addressed by any of the above models, including:

    a. Recommendation 4.3 on information and communication;

    b. Recommendation 4.6 on changing the visiting conditions; and

    c. Recommendation 4.9 in relation to the treatment of female detainees in management units.

24. The Law Council notes that as the scope of the Palmer review was centred on the wrongful detention of Cornelia Rau with some examination of the circumstances of the wrongful deportation of Vivien Alvarez, its

recommendations are limited.[6] The Law Council submits that the adoption of one of the models mentioned in paragraph 21 above will safeguard the rights of detainees across the various detention facilities.

DEPORTATION OF PEOPLE FROM AUSTRALIA

25. The Law Council supports the discussion and recommendations made by the Law Institute of Victoria to this Inquiry in Part C, paragraphs 59-73 of its submission.

THE ADEQUACY OF HEALTHCARE, INCLUDING MENTAL HEALTHCARE, AND OTHER SERVICES AND ASSISTANCE PROVIDED TO PEOPLE IN IMMIGRATION DETENTION;

26. The Law Council has serious concerns in relation to the treatment and conditions of people in immigration detention centres. The Law Council is not in a position to provide meaningful comment on the condition of community detention. Community detention is a recent innovation in relation to which data on conditions remains unavailable and in any event, it may be too early to evaluate this program.
27. The Law Council submits that there needs to be proper access to adequate health care, including mental health care and other services and assistance, particularly in immigration detention centres.
28. The Law Council acknowledges that one of the main objectives of detention facilities is to discourage people from entering Australia unlawfully. Based on a number of medical expert opinions, the Law Council submits that amongst other factors, the denial of liberty, the isolation and the prison conditions including surveillance and monitoring in detention facilities are likely to have a detrimental impact on detainees including breeding mental conditions and illnesses.[7]
29. In implementing its policy to hold people in detention, the government owes a legal duty to take care of people held in detention.[8] The Law Council commends the government in its recent changes as discussed in the forgoing discussion on recent developments. The Law Council urges the government to continue to make changes to detention facilities.

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[6] Palmer Report, page 3 and also refer to Appendix A: The Inquiry's Terms of Reference, Palmer Report, page 196.

[7] *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549. [71-73]

[8] *S v Secretary, Department of Immigration & Multicultural & Indigenous Affairs* [2005] FCA 549. [257]

30. In relation to mental illnesses and conditions suffered by detainees, the Law Council encourages the government to manage these issues early and to take steps to:

    a. Ensure that mental illnesses and other conditions are identified;

    b. Provide for the proper treatment of mental illnesses once a diagnosis has been made of the health risks;

    c. Ensure that detainees are able to obtain their own medical specialists should they so wish or be able to be transferred to hospital when appropriate. In this regard, the Law Council is extremely concerned that legal practitioners have been compelled to resort to making application to the Federal Court to obtain a medical assessment from a psychiatrist of the detainee's choice or transferred to a hospital in relation to detainees who are considered to be "clearly" ill.

31. The Law Council recommends that the government adopt effective strategies to counteract denial of an individual's liberty and the condition of involuntary confinement. This may be achieved by changing the focus of detention facilities to care instead of containment (discussed below).

32. In relation to immigration detention centres, the contract between the government and the detention facility service provider may address the treatment and conditions of the detainees. For instance, the contract with Group 4 FALCK Global Solutions Pty. Ltd contains clauses in relation to performance management and reviews. Schedule 3 to the main contract provides for the immigration detention standards, performance measures and performance linked fee matrix. This schedule includes standards in relation to health and safety of detainees.

33. As concluded in the Palmer Report, the performance measures are inadequate for a number of reasons including, that it is exception based and only provides after the event information to management.[9] For instance, according to IDS 2.2.1.1.1, the performance standard is "Detainees are able to access timely and effective primary health care including psychological/psychiatric services (including counselling) in a culturally responsive framework and where a condition cannot be managed within the facility by referral to external advice and/or treatment." The associated performance measure is "No substantiated instance of a detainee not having access to health care of this nature." The limitation in exception based reporting is that it does not provide progressive information to management in order to take corrective action.

34. The Law Council concurs with the findings of the Palmer Inquiry that the performance management system does not provide a meaningful evaluation of the quality of the services provided and in particular, whether the services meet the fundamental needs of detainees. For instance, in relation to the above IDS on health, what is "timely and effective primary health care" and what constitutes a "culturally responsive framework"?

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[9] Palmer Report, page 68-70

The performance measure in this regard is ambiguous and does not meaningfully measure the standard of timely and effective health care. Instead, the performance measure is directed at instances where a detainee did not have access to health care ("of this nature").

35. The Law Council recommends that performance measures should not only adopt quantitative measures, for instance that is based on the number of complaints but also provide for qualitative assessment measures. Qualitative analysis of whether performance standards are achieved may be made by, for instance,

    a. Undertaking a study at regular intervals of a random sample of detainees that are representative of the detainee population and interviewing the sample group on their perception of treatment at detention.

    b. Requiring detainees who actually use the services such as, medical, dental and optical services to be required to provide feedback on whether the delivery of the particular service satisfied their needs.

    c. The Law Council also submits that service delivery forms should be made available to visitors and detainees for completion as part of gathering information on the quality of services provided by the Detention Facility.

36. These methods can be incorporated into management procedures and practices of the detention facility without significant cost or process issues.

37. The Law Council concurs with the recommendations in the Palmer Report in relation to the need of staff at the detention facility to communicate with detainees with a view to providing information on progress of actions and requests. Refer to the Palmer Report at part 4.3.2 on Communication and Feedback (pages 70-75).

38. The Law Council submits that these recommended practices are designed to ensure that the focus of detention facilities is on care rather than containment. The detention facility containment policy should be limited to particular circumstances in which there are security issues and concerns. The Law Council submits that improving treatment and conditions while incarcerated serves to minimise incidents of breaches of the government's duty to detainees to take care of them and at the same time, such changes are unlikely to encourage people from entering Australia unlawfully. The policy of mandatary detention itself is likely to deter entry into Australia.

THE OUTSOURCING OF MANAGEMENT AND SERVICE PROVISION AT IMMIGRATION DETENTION CENTRES

39. There is a fundamental problem with the approach of outsourcing a public service function to care for people to a privately run entity. To do so is at the peril of discharging the duty of government effectively.

40. The Law Council submits that to minimise the risks of outsourcing, effective management practices are necessary including:

    a. Ensuring that government is involved in the management of the business (refer to Part c (iv) below).

    b. The need to provide adequate means of monitoring the treatment of detainees (particularly where there are allegations of mistreatment),

    c. Ensuring that DIMIA is accountable to Parliament in relation to the management of Detention centres notwithstanding that the function is outsourced to a private contractor. This may be better achieved by:

        i. The provision of reports by DIMIA in relation to Detention centres at close regular intervals, which are tabled in Parliament. Currently, service providers of a detention facility may provide information to DIMIA regularly as part of its performance review of the detention facility. However this report appears to remain within the confines of the DIMIA and not tabled in Parliament.

        ii. Establishing as a minimum a Charter of Rights for Detainees (as discussed earlier), which will promote uniformity in standards and treatment of detainees across detention centres and provide certainty and accuracy of information to detainees.

        iii. Selecting entities that are suitable to run the detention facility in a way that does not compromise the government's duty of care to detainees, with a particular focus on care rather than containment.

        iv. Placing Government officials permanently at the sites of the detention centres in order to oversee the operation of detention centres more closely, effectively and accurately. The DIMIA representatives could also perform the function of the centre's problem resolution complaint handling thereby keeping statistics and providing management reviews and reports.

LEGAL ASSISTANCE TO DETAINEES

41. The Migration Act provides that legal assistance may be made available to an immigration detainee if a request in writing for such assistance is made. The law does not mandate the giving of such assistance if people do not know to ask for it. The Act is also clear that there is no obligation on officers to offer advice to detainees about their position. The Law Council maintains its long-held view that these arrangements are grossly inadequate.

42. The Law Council believes that where a person may be or has been denied their liberty, the need to be provided with access to legal representation becomes particularly acute. In *Dietrich v The Queen*, the High Court held that "the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation only in exceptional circumstances."[10]

43. The Law Council submits that the prospect of denying a person's liberty warrants the provision of legal assistance. The Law Council also submits that the effective operation of the Migration Act depends on detainees being able to understand the law in order that they are able to make applications for appropriate visas and to present their case.

44. The benefits of providing legal assistance include:

    a. Legal advice may inform the detainee of the likelihood of success and avenues of review and appeal and the difficulties and obstacles faced, and the usual experience of others in similar circumstances.

    b. Where the likelihood of a successful application to obtain a visa is remote, the person may be encouraged at some stage of the detention to return to his or her country.

    c. The provision of legal assistance and the information provided under lawyer-client confidentiality may expose cases in which Australian citizens are wrongfully detained.

45. Currently, the provision of legal assistance to detainees is severely limited. DIMIA funds legal representation in respect of detainees who apply for protection visas. The legal representation is provided to assist with the completion of the protection visa application. Asylum seekers who are unable to seek refugee status are unable to be provided with legal representation under the funding program.

46. According to the contract between GSL and DIMIA, while there is a need to provide health care and information as to the workings of the detention centre, there is no requirement to provide access to a lawyer. Assuming that all contracts in relation to the management of the detention centres are similar, the Law Council recommends that a more active role be taken by DIMIA to ensure that legal representation is provided to all prospective detainees and current detainees. The Law Council believes that legal representation should be provided when a person enters the detention facility and thereafter at regular intervals unless the detainee has engaged a lawyer or has sought legal representation at an earlier time.

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[10] *Dietrich v The Queen* (1992) 177 CLR 292, 311

THE ROLE AND FUNCTIONS OF THE COMMONWEALTH OMBUDSMAN IN RELATION TO DETAINEES

47. As discussed in the background above, the Commonwealth Ombudsman is able to seek a report from DIMIA and make an assessment in relation to a detainee where the detainee remains in detention for at least two years.

48. The Law Council submits that the period of two years after which the Commonwealth Ombudsman has such power to investigate is an excessively lengthy period. Further, such a lengthy period increases the likelihood of the detrimental long term effects to the detainee including the prospect of mental illness. The Law Council believes that a lesser period should be prescribed, such as six months, in accordance with the notion of what is reasonable.

49. As discussed in paragraph 19-20 above, the Law Council remains of the view that the use of the Commonwealth Ombudsman as a vehicle for overseeing immigration detention is no substitute for proper judicial oversight.

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- ACT Bar Association;
- Bar Association of Queensland;
- Law Institute of Victoria;
- Law Society of the ACT;
- Law Society of NSW;
- Law Society of the Northern Territory;
- Law Society of South Australia;
- Law Society of Tasmania;
- Law Society of Western Australia;
- New South Wales Bar Association;
- Northern Territory Bar Association;
- Queensland Law Society;
- The Victorian Bar; and
- Western Australian Bar Association.

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.

Immigration Lawyers Association of Australasia

Submission to the Joint Committee on Migration

Inquiry into Skills Recognition, Upgrading and Licensing

June 2005

[WS: 2139165v1]

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2. Migration Occupations in Demand List (**MODL**).

3. Migrating as a Skilled Person extract from Department of Immigration and Multicultural and Indigenous Affairs Website.

4. Australia Visa Assessment of your Qualifications extract from Australia Immigration Visa Services website.

5. Trades Recognition Australia Uniform Assessment Criteria – July 2005.

6. Sample Letter of Acknowledgement of Migration Skills Assessment dated 2 July 2005.

7. Australian Institute of Management Application Form for Assessment of Management Skills for Migration, revised June 2005.

8. VETASSESS Application for Competency Assessment.

9. VETASSESS Candidate's Kit Information for applicants.

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12. Architects Accreditation Council of Australia website extract.

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Inquiry into Skills Recognition, Upgrading and Licensing

Joint Committee on Migration

The Immigration Lawyers Association of Australasia (**ILAA**) welcomes the opportunity to make this submission in response to the Inquiry into Skills Recognition, upgrading and licensing. The ILAA is a network of Australian lawyers and academics active in practising and promoting awareness about various areas of migration law and policy.

This submission has been prepared by the ILAA and has been endorsed by the Law Institute of Victoria (**LIV**). The LIV is the professional association for legal practitioners, including immigration lawyers, in Victoria.

Background

On 19 April 2005 the Minister for Immigration and Multicultural and Indigenous Affairs, Senator Amanda Vanstone, requested that the Joint Committee on Migration (**Committee**) inquire into skills recognition, upgrading and licensing.

The terms of reference for the inquiry are to:

1. Investigate and report on current arrangements for overseas skills recognition and associated issues of licensing and registration for:
    - Skills stream migrants who obtain assessment prior to migrating;
    - Families of skill stream migrants, family stream migrants and humanitarian entrants who seek assessment/registration/upgrading after arrival;
    - Temporary residents who need skills assessment/recognition; and
    - Australian citizens returning after significant time overseas, with overseas qualifications.
2. Consider how Australia's arrangements compare with those of other major immigration countries.
3. Identify areas where Australia's procedures can be improved including in terms of:
    - Communication of processes to users;
    - Efficiency of processes and elimination of barriers;

- Early identification and response to persons needing skills upgrading (e.g. bridging courses);
- Awareness and acceptance of recognised overseas qualifications by Australian employers;
- Achieving greater consistency in recognition of qualifications for occupational licensing by state and territory regulators; and
- Alternative approaches to skills assessment and recognition of overseas qualifications.

The ILAA would welcome future opportunities to provide further comment on the issues being examined by the Inquiry and those issues raised in this submission.

Executive Summary

The Skilled Migration Scheme and Australia's overseas skills recognition arrangements are exceedingly complex. This submission highlights a number of shortcomings in Australia's Skilled Migration Program and makes recommendations for suggested improvements to ensure that the Program achieves its prescribed aims of enhancing the Australian labour force, addressing shortages of skilled labour and contributes greatly to the Australian economy.

Issues identified include:

- Ongoing skills shortage in the Australian labour market;
- Frequent changes in law and policy in relation to the Skilled Migration and Employee Nomination schemes;
- Shortcomings in skill assessments undertaken by third party assessment authorities (including TRA, AIM, ACS etc);
- Overall complexity of the Skilled Migration and Employee Nomination schemes, including:
  - the use of outdated Australian Standard Classification of Occupations (**ASCO**) dictionary for classification of occupations;

- the use of complex forms such as Form 1121i Skilled Occupation List (**SOL**), Sydney and Selected Areas Skill Shortage List (**SSASSL**)[1] and the Employer Nomination Scheme Occupation List (**ENSOL**);

- the frequency with which the Migration Occupations in Demand List (**MODL**) changes;

- the changes in the number of points for skill allocated for the occupation in the General Skilled Migration points test system;

- delays in the processing of visa applications;

- delays in the processing of skill assessment applications;

- lack of effective review rights in respect of primary skill assessment decisions; and

- potential conflict of interest in assessment bodies undertaking skill assessments and at the same time representing their industry group.

These issues (to name only a few) mitigate against what could otherwise be achieved through the Skilled Migration Program.

There is a need for certainty in the law, coupled with clear and transparent skill assessment criteria, guidelines and decision-making processes. It is essential that there be some certainty on outcome. There must also be effective systems of review.

The present system gives broad powers to assessment bodies. There is no consistency of approach. Decision-making is often not transparent. There are limited substantive review rights. To the extent that assessment bodies represent their industry group, and therefore may have competing interests, there is a risk of a conflict of interest.

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1 The SSASSL is a restricted list of occupations for Sydney and Selected Areas. The *Sydney Morning Herald* (SMH) reported that despite Premier Bob Carr wishing to restrict migration to Sydney because of infrastructure problems, NSW as a State would benefit most from the Federal Government's increased migrant intake. According to the SMH, Sydney would gain around one third of the projected 2 million migrants up to 2021-22 which would also lower the proportion of residents aged over 65. The SMH also reports that if migration remains at its current level, it could provide over 700,000 more people, 500,000 more jobs and $60 billion more a year for the economy by 2021, than if migration ceased. 'Migrants will drive NSW jobs, income' <http://www.smh.com.au/news/National/Migrants-will-drive-NSW-jobs-income/2005/04/28/1114635695683.html> (29 April 2005)
Source: *Sydney Morning Herald*.

As the terms of reference for the inquiry are broad ranging, at best, this Submission touches upon some of the issues. By way of example of the complexity of this area of law and the skill assessment regimes, appended to the Submission are a number of documents relating to the Skilled Migration Program and some of the assessment authorities. The latter are intended to give an insight into some of the complexities of skills assessment and the different approaches taken by assessment bodies.

One questions whether the complexity of this system of law and the skill assessment regimes, best serve Australia's ongoing needs at a time of the international movement of and intense competition for skilled workers and the clear benefits that Australia derives from its Skilled Migration Program. The challenges facing Australia in attracting skilled migrants are compounded by the frequent, constant and unpredictable nature of this ever changing area of law.

Skills Shortages

In a period of rapid economic growth, low unemployment, zero population growth, an ageing population, and more people leaving the work force than entering it, education and training systems and labour participation initiatives cannot keep pace with the global demand for talented workers. The Australian Government's National Industry Skilled Initiative project is aimed at easing Australia's talent shortages with short and long-term strategies. The Migration Program is weighted towards skilled and business migration.

Skill shortages were recently attributed as a key factor in revised Treasury forecasts which have shown that Australia's economy is slowing down.[2]

The shortage of skilled employees forces many companies to fill positions ranging from trade, technical, para-professional, professional to management with overseas labour.

A recent survey of investor confidence by the Australian Chamber of Commerce and Industry found that one of the greatest constraints for investment was the availability of suitably qualified employees.[3]

Thirty per cent of Australian business owners believe that skill shortages will be the biggest constraint on business, compared to a global average of 23 per cent according to a survey of 6,300 medium-sized businesses from 24 countries.[4]

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2 Government lamblasted over skill shortage by Craig Donaldson Human Resources Magazine Issue 72 - 25 January 2005.

3 Ibid.

Similar sentiments have been expressed in the mainstream print media. For example, the Business Review Weekly Employment article 'Help wanted – urgently'[5] noted that:

> *In 2008, for the first time, more people will leave the workforce than enter it. In the next decade, annual workforce growth will drop by 0.8 per cent to 0.4 per cent. In the next five years, more than 20 per cent of senior executives will reach retiring age. The current workforce growth is 170,000 a year. In 2012 it is forecast to be 105,000 a year. In 2020 it is forecast to be 12,000 a year.*
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> *The basic economic effect of an ageing population is a reduction in the available labour force relative to the total population, assuming only minor changes in participation rates*[6] *. With the 'reduction in the available working population relative to the non-working population' and the slowing of 'the growth in per capita of domestic product (GDP), assuming constant productivity growth', the estimates 'indicate that by mid-2020s, ageing will reduce Australia's per capita GDP growth to half its current rate (with an assumed baseline productivity growth rate of 1.75 per annum).*[7]

Skill shortages are a global phenomenon. Business is increasingly vocal about the need for human capital as a key to competition. Further, the Government recognises the considerable economic, social and other benefits that Australia derives from its migration program. At the same time, Australia's Immigration laws are becoming even more complex, codified and subject to frequent and ongoing change.

International Movement of Skilled Workers to and from Australia

The Report 'Immigration in a Time of Domestic Skilled Shortages – Skilled Movements in 2003-04[8]' examines the international movement of skilled workers to and from Australia. Whilst it shows that Australia is attracting increasing numbers of skilled workers despite intense international competition, it also acknowledges that Australia has experienced a 'brain drain'. It notes '*that through 2003-04 the net loss of skilled residents was 24,079. This*

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4 Human Resources Magazine (8 February 2005), p 26.

5 Emily Ross, 'The labour shortage is nearing crisis point, as staff-starved companies face the costs and consequences of a shrinking talent pool', *Business Review Weekly* (27 January – 2 February 2005).

6 *Global Ageing: Economic Implications for Australia*, Department of Parliamentary Services Research Note (10 May 2005) No. 46, 2004-05, ISSN 1449-8456.

7 Ibid.

8 Report of Bob Birrell, Virginia Rapson and T.Fred Smith, Centre for Population and Urban Research, Monash University, May 2005.

figure was roughly the same as the net gain Australia made on the movement of skilled long-term visitors in 2003-04 (23,151)[9]'. The Report notes that '*the in flow of settlers can be thought of as a straight gain to the Australia skilled work force. Its scale is growing as a consequence of the expansion in the migration program. It is thus making a significant and increasing contribution to Australia's skilled workforce*[10]'.

Any consideration of the Skills Recognition, Upgrading and Licensing regimes must be considered against the ongoing '*Intense competition for skilled labour in the international marketplace*' and the need to ensure that despite Australia's loss of skilled residents to overseas locations, that Australia continues to achieve a net gain in skilled workers[11].

There is a real need to simplify and make more certain, this area of law and the skills assessment regime. This will enable Australia to better attract and retain skilled workers.

Complexity of the Skills Migration and Employee Nomination schemes

The General Skills Migration category imposes many challenges including the following:

- the frequency with which the MODL changes;
- the changes to the number of points for skill allocated for the occupation in the General Skilled Migration points test system;
- processing delays;
- the uncertainty of this area of law given that it is subject to frequent and ongoing change; and
- the skills assessment regimes.

The outdated Standard Classification of Occupations dictionary and the complexity of application forms to be completed further contribute to impediments for Skill visa applicants.

Australia's overseas skills recognition arrangements are based on an outdated occupational classification, namely the ASCO dictionary. Occupations are listed alphabetically in the ASCO dictionary in accordance with four major occupational groups namely:

- Managers and Administrators,

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9 Ibid, p 20.
10 Ibid, p 20.
11 Ibid, p 20 and p 1.

- Professionals,
- Associate Professionals, and
- Tradespersons and Related Workers.

ASCO was devised by the Australian Bureau of Statistics for an all together unrelated purpose. It was then adopted by the Department of Immigration and Multicultural Affairs (**DIMIA**) as the basis upon which General Skilled Migration and Employer Nomination Scheme occupations were to be classified.

Whilst it is recognised that the ASCO dictionary is out of date and is currently under review, DIMIA has advised that its replacement is not expected to be available until late 2007.

An example of the complexity of the General Skilled Migration and the Employer Nomination Scheme is the Form 1121i Skilled Occupation List (**SOL**), Sydney and Selected Areas Skill Shortage List (**SSASSL**)[12] and the Employer Nomination Scheme Occupation List (**ENSOL**).

A review of the Form 1121i shows that the process requires a detailed understanding of:

1. the Skilled Migration Program so as to assess which application (if any) one may be eligible to apply for;
2. an understanding of how ASCO classifies occupations; and
3. match one's occupation, against the relevant ASCO and the relevant List; and
4. identify the relevant skills/qualifications for the occupation;
5. identify the relevant assessing authority;
6. become familiar with the assessing authority's requirements for the skills recognition process; and

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12 The SSASSL is a restricted list of occupations for Sydney and Selected Areas. The Sydney Morning Herald (SMH) reported that despite premier Bob Carr wishing to restrict migration to Sydney because of infrastructure problems, NSW as a State would benefit most from the Federal Government's increased migrant intake. According to the SMH, Sydney would gain around one third of the projected 2 million migrants up to 2021-22 which would also lower the proportion of residents aged over 65. The SMH also reports that if migration remains at its current level, it could provide over 700,000 more people, 500,000 more jobs and $60 billion more a year for the economy by 2021, than if migration ceased. SMH: Migrants will drive NSW jobs, income <http://www.smh.com.au/news/National/Migrants-will-drive-NSW-jobs-income/2005/04/28/1114635695683.html> (29 April 2005)
Source: SMH

7. obtain all the necessary application forms and associated information relating to the assessment; and

8. proceed to make the appropriate application, pay the charge, and await the outcome.

Each of the above steps potentially raise a myriad of issues in a given case.

Judicial review

These difficulties in the Skilled Migration and Employee Nomination schemes impact on the overall effectiveness of the Skilled Migration Program and inhibit merits and judicial review. The complexity of the system is such that even the courts have not always agreed on the proper interpretation of the law.

For example, the time for determination where the nominated occupation is an occupation in demand was the subject of consideration by the Federal Court of Australia in *Kaur v Minister for Immigration, Multicultural and Indigenous Affairs* [2005] FCA 230 in which Spender J took the opposite view of that of Selway J in *Aomatsu*. Spender J held that for practicality and certainty in its approach, item 6A72 of the points test requires an applicant to have nominated in her application an occupation that was on the MODL at the time of her application and not at the time of the assessment of the application.

Spender J gave '*an illustration of the perversity that would flow from the adoption of the reasoning of the decision maker in the present case*' in respect of 'accountants' which had been added to the MODL and then removed from the list with the consequences that the applicant was not then entitled to the points which were allocated in satisfaction of item 6A72.

What purpose is served through such a complex system of law? Where is the balance? It has always been a maxim of legal jurisprudence that justice is served through having certainty in the law. The only certainty that legal advisers can provide to would be applicants is that they may be eligible currently, but it cannot be forecast as to whether they will eligible at the time of the decision.

The response of DIMIA to the myriad of challenges facing Australia as a result of skill shortages and the ageing workforce is to create an even more complex system of law which is subject to even more frequent and ongoing change. In the process a whole industry which is often 'hit and miss' has been created in respect of the Skilled Migration Program and Skills Recognition.

The devolution of absolute power in regard to skills recognition to the assessing authorities which are responsible for undertaking skills assessment for migration purposes is also fraught with difficulty. Processes become 'institutionalised' and 'artificial barriers' are often created through the skill assessment process starting with the application forms and the associated information relating to the assessment which can be provided and whether additional information can be provided and when.

It has been said that '*Australian immigration is a near-air tight sieve that will let through only the best of the best*'.[13] However, as nations fight skill shortages, why has Australia created such a complex and ever-changing regulatory scheme? How does this enable Australia to effectively complete for human talent in the age of globalisation and at a time when there is a $9 billion skills shortage.

There must be a fundamental change in the culture and attitude towards skilled migrants. Instead of placing a myriad of barriers to entry to Australia through a complex, rigid and uncompromising system of skills recognition, there is a need to liberalise and simplify the Skilled Migration Program and the skills recognition regime. There should be appropriate checks and balances, artificial barriers to entry should be removed and there should be a fair and transparent system including an effective means of review.

There are clear and unequivocal economic, social and cultural benefits to Australia of its Migration Program. The economic benefits are most clearly evident through the skills migration program. Skilled temporary residents are but one example.

The Benefits to Australia's Economy of Temporary Business Entrants and Skilled Long-Term Temporary Entrants

The Department of Immigration and Multicultural and Indigenous Affairs 2003–04 Annual Report analyses the benefits to Australia's economy of temporary business entrants and skilled long-term temporary entrants. On the basis of Access Economics Modelling, the Commonwealth budget can be expected to benefit by about $2 billion over four years from the 40,633 temporary business entrants granted visas in 2003-04. The modelling also indicates that on average, state and territory budgets could share around $800 million over four years.

Skilled long-term temporary entrants continue to make a major contribution to Australia's international competitiveness, bringing with them new ideas, skills, technology,

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13 *Reeling In the Offshore Talent*, Human Capital Magazine Issue 2.10, p 9

understanding and contacts. Many of these apply onshore for permanent residence on skill grounds [14]

A study by ECONTECH estimates that the continuation of the current Migration Program would deliver an increase in living standards of about $21 billion by 2021-22. This is attributed to the increased focus on the Skill Stream of the Migration Program which was over 60 per cent in 2003-04 and with that the higher skill levels, relative youthfulness, good English language skills, and greater levels of wealth of skilled migrants.[15]

Analysis by Access Economics estimates that the continuation of the 2004-05 Migration Program is expected to deliver a net benefit in excess of $4 billion over four years to the Commonwealth of Australia.[16]

Access Economics have also modelled the benefits derived from sponsored temporary business entrants to Australia's living standards as well as the impact on State and Commonwealth Budgets. For every 1,000 long-term temporary business entrants, Access Economics estimates that the Commonwealth Budget nets around $55.9 million over four years.[17]

On the basis of the Access Economics' model living standards of existing residents would ultimately rise by 5.4 per cent as a result of 20 years of the sponsored temporary business resident program at the 2000-01 (40,493) level of intake.

Trades Recognition Australia (TRA)

The shortage of skilled workers in traditional trades is evident from the number of trades occupations currently on MODL and the recent media coverage of companies being forced to turn to overseas countries to fill trade vacancies such as for welders.

On 4 May 2005, a number of professional and skilled trade occupations were added to the MODL. This means applicants nominating one of these occupations who lodge an application on or after 4 May 2005 or lodged their application before 4 May 2005 and it is not yet finalised, will be awarded additional MODL points.

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14 Department of Immigration and Multicultural and Indigenous Affairs 2003-04 Annual Report, p 56.

15 DIMIA Population Flows Immigration Aspects 2003-04 edition, p 87.

16 Ibid.

17 Ibid.

The following trade occupations were added to the MODL on 4 May 2005.[18]

Trades

Bricklayer	(ASCO Code: 4414-11)
Cabinetmaker	(ASCO Code: 4922-11)
Carpenter & Joiner	(ASCO Code: 4411-11)
Cook	(ASCO Code: 4513-11)
Electrical Powerline Tradesperson	(ASCO Code: 4313-11)
Electrician (Special Class)	(ASCO Code: 4311-13)
Electronic Equipment Tradesperson	(ASCO Code: 4315-11)
Fibrous Plasterer	(ASCO Code: 4412-11)
General Electrician	(ASCO Code: 4311-11)
General Electronic Instruments Tradesperson	(ASCO Code: 431-11)
General Plumber	(ASCO Code: 4431-11)
Solid Plaster	(ASCO Code: 4415-11)

The DEWR Annual Report 2003-2004 states that TRA reported a 22.4 per cent increase in the number of international applicants seeking assessment over the previous year and that this sustained increase in workload has placed significant pressure on existing TRA processes. International applicants seeking 'priority assessment' of their applications are being charged $500 for 'priority assessment' of their applications. As a full cost recoupment assessment organisation the TRA performance target is to expedite its processing of applications. The ILAA was recently advised at a DIMIA Liaison meeting by TRA senior officers that:

- The migration skills assessment system was re-engineered in 2004 with the emphasis being on 'decision-ready' applications.
- The evidentiary requirements have not changed.
- The level of successful applications as a percentage of total applications has also not changed from the previous five years, namely a 63 per cent approval rate.
- At the same meeting, the TRA senior officers provided a *Processing Model Overview, International Stream Pre Migration Skills Assessment*, a copy of which is attached to this Submission.

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[18] A complete list of occupations on the MODL can be found at: http://www.immi.gov.au/migration/skilled/modl.html

Also attached to this Submission is an extract from the TRA website which includes: Changes to TRA Requirements for Pre Migration Assessment and Uniform Assessment Criteria – July 2005[19]. The Uniform Assessment Criteria – July 2005 states that the TRA bases its assessment criteria on the so called "benchmark" of an "Australian tradesperson". As such, TRA considers the apprenticeship training plus work experience in determining whether the applicant meets the pre-migration skill assessment requirements.

There appears to be a preference for applicants who have completed an apprenticeship type of training be it formal or informal. However, in many countries, trade skills are often gained through work experience. Overall, the TRA approach appears to be narrow and may work against work experience based applicants.

The Uniform Assessment Criteria (07/05) appears to impose an additional requirement at paragraph 9.2 that applicants basing an application on work experience must now demonstrate that they have been "formally recognised" as a skilled tradesperson or be "licensed". This only makes the process more uncertain for experience based TRA applications, particularly where there is no licensing system – and we are left to guess what TRA will deem as equivalent to "formal recognition".

The ILAA was also advised at the DIMIA Liaison meeting by TRA senior officers that in respect of the performance targets, 95 per cent of applications were decided in 120 calendar days for 2003/2004. In 2004/2005 95 per cent applications were decided in 90 days. Currently, the TRA is meeting its performance targets with the average processing time being 60 to 75 days.

Some would argue that speed is at the expense of considered assessment and the right to provide additional information where the information provided with the application may not have been considered adequate. The current TRA processes do not permit this. If the information provided on the application forms and the associated information relating to the assessment is not considered to be adequate, the application is refused. Although there is the right to seek an Internal Review at a fee of $300, this process does not permit the submission of additional documentation in support of the review application. Some critics have suggested that '*Caesar is reviewing Caesar*'.

At the same liaison meeting the TRA representatives advised that if an applicant wishes to submit additional information in respect of their failed skill assessment, they would be better advised to make a fresh application and presumably pay another priority fee of $500.

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19 www.workplace.gov.au/tra

Attached to the Submission is a sample Letter of Acknowledgement of Migration Skills Assessment from TRA dated 2 July 2005. It is of concern that a priority application takes up to 3 months at a time of critical trade shortages in Australia.

It was heartening to hear that a proposed new service will allow an unsuccessful applicant to speak with the assessor to determine why the application was refused.

The DEWR Annual Report 2003-2004 states that: "*To ensure that TRA can continue to deliver a high-quality and efficient assessment service to its international clientele, the Workplace Relations Services Group commissioned an external consultant to review existing TRA business processes and systems*" and that these "*have prompted development of streamline business process ... along with an innovative IT solution*". We question the TRA assessment processes and priorities. One questions whether an assessment process which is based on "full cost recoupment" is appropriate when one considers the impact of Australia's skills crisis on economic growth. Surely, it would be sensible to have a service which allows an applicant or their adviser to communicate with the assessor during the processing of an application so that if necessary, documentation can be submitted in support of the skills assessment application. What benefit will the proposed new service offer in allowing an unsuccessful applicant to speak with an assessor to determine why an application was refused, other than to encourage the applicant to make a fresh application? If this was permitted during the processing of an application, further information could have been provided to avoid the refusal in the first place.

We question how the TRA can claim to deliver a high-quality and efficient assessment service to its international clientele which does not permit communication and additional information to be lodged to augment an application prior to its determination.

The increase in the total number of trade skills assessment applications supports this point. For example, in 2003-04 the total number of trade skills assessment applications received by TRA increased by 14.8 per cent over the previous year (from 9362 to 11,054 applications).[20]

The DEWR Annual Report 2003-04 also refers to 'Re - Engineering Trades Recognition Australia for the Future'[21] by providing 'a platform for an Internet-based tool allowing both domestic and international clients to lodge their applications online in 2005-06'. It is the view of the ILAA that a system which is not effectively working will not work any more effectively through online applications although it may generate more revenue.

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20 DEWR Annual Report 2003-2004, p 3.

21 Ibid, p 5.

The real aim is to have a transparent, fair and open system which enables applicants to have access to assessors during the processing of an application. The aim is not only to 'assist potential migrants faster' but to get the best outcome through a high quality and transparent system of skill assessment.

Many of TRA's policies are out of date and fetter skilled migration. The example of Mr Abbas Coberli is a case in point.

Coberli case

Refrigeration and air conditioning mechanics are listed on the MODL, current as at 8 September 2004, as an occupation in demand. Refrigeration and air conditioning mechanics (ASCO 2 Code 4312-11) are on Skilled Occupation List Form 1121i as being a trade that is worth 60 points. The assessing authority for refrigeration and air conditioning mechanics is TRA.

Mr Coberli has been granted a Temporary Protection Visa (Class XA-Subclass 785) under the 1951 United Nations Convention on Refugees.

He has satisfactorily, completed all the necessary Australian examinations to practice as a refrigeration and air-conditioning mechanic in Australia. The TRA has received $600 from him in return for allowing him to sit two exams that it has notified him he has passed. Yet it has not awarded him an Australian Recognised Trade Certificate (***ARTC)*** as usually follows from completion of these exams.

By way of background, he has the recognised equivalent of an Australian Bachelor of Engineering granted by the University of Mosul. His qualification exceeds the requirements set out in ASCO which states that the entry requirement for his occupation is an AQF Certificate III or higher qualification in addition to state based regulation and licensing. Victoria has provided him with the relevant licences, the Ozone Layer Protection Licence and a D-Licence (disconnect and reconnect licence).

Yet, he has been advised by an officer of TRA, within DEWR that:

> *After assessing your application, the Committee [Victorian Local Trades Committee (Electrical)] decided to recognise you as a Refrigeration Mechanic. However, as you are not yet a permanent resident, the*

Committee is unable to issue you with an Australian Recognised Trade Certificate (ARTC) at this time.[22]

The inability to issue an ARTC is said to follow from a policy for the "Processing of Temporary Entry Cases" determined by a Joint Central Trades Committee meeting of 5 September 1984 pursuant to section 34 of the Tradesmen's Rights Regulation Act 1946.

The above position has been confirmed by Mr Rodney Lee Walsh, Director – Trades Recognition Australia, in a statement of reasons for refusing to issue Mr Coberli with an ARTC dated 2 February 2005.

TRA has informed Mr Coberli that the letter supplied to non-citizens who are not permanent residents in lieu of a trade certificate is "just as good as" a trade certificate[23]. Mr Coberli's ongoing efforts to find steady employment suggest otherwise. The relevant Western Australian authority, the Office of Energy, has refused to provide him with the necessary certification in the absence of an ARTC, and employers have engaged him for a period of time, subjected him to on the job testing and expressed satisfaction with his ability, discussed payment, ability to use a work car, down-payment for tools etc, have then become hesitant and renege on earlier understandings when the letter "just as good as" an ARTC is produced in place of an ARTC.

Mr Coberli is willing and able to work in an area in which the government has nominated an acute skills shortage. Employers have acknowledged his ability to conduct his trade and attested to his excellent work ethic and client manner. However, on being asked to produce the relevant documentation, and failing to produce an ARTC, employers have been reluctant to take him on.

The ability to meet an acute skills shortage of current concern to Australia is being frustrated by a policy that was formulated in 1984. We note that the letter from the Director of Trades Recognition Australia dated 2 February 2005 states that they are currently "clarifying" a national approach to long stay visa holders to address the potential for differential approaches to occupational licensing between different state and territory jurisdictions.

Such a review should also address the way in which occupational licensing policy is frustrating the ability of the Australian government to address the current skills shortage. Further, the existence of such a review should not be used as an excuse for not addressing

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22 Letter from Carl Walsh, Secretary – Local Trades Committees (Vic & Tas), dated 6 August 2004.

23 Letter from Carl Wash to Mr Coberli, dated 14 October 2004.

the way in which government policy presently exacerbates the skills shortage in the case of Mr Coberli.

Vocational Education and Training Assessment Services (VETASSESS)

VETASSESS is the authority in Australia responsible for assessing a range of management, administrative, professional and associate professional occupations for the DIMIA Skilled Migration Program. VETASSESS have successfully operated assessments for more than 50 per cent of the skilled occupations on the entire skilled occupations list. Success is measured by accuracy, speed of response and communication and accessibility.

As the VETASSESS website notes, the criteria used in assessing occupations in their bailiwick, includes such factors as:

- the education system of the country concerned;
- the awarding institution; and
- the level, structure, length and content of the program of study undertaken.

The VETASSESS process is limited in that many occupations are only assessed on the basis of formal post secondary qualifications, and pays no heed to work experience. This is despite the fact that many ASCO entries in these occupations provide for a range of pathways for entry into the occupation and skills development/formation.

In general skilled migration a significant proportion of applicants possess tertiary and/or post secondary qualifications.

Since April 2005 the skills assessment regime has been expanded such that VETASSESS also assesses certain occupations on the ENSOL as well as the SOL. It's inability to undertake Competency Assessments in many cases, is of concern.

In the ENS subclasses 121 and 856 a significant number of highly skilled personnel currently possess suitable skills through their experience but may not necessarily possess appropriate formal qualifications. Examples of this abound but may include marketing professionals, Company Secretaries, Medical Administrators, Welfare Centre Managers, Agricultural advisers, Food technologists to name just a few.

For example, a Production Manager (Manufacturing) ASCO Code 1222-11 which is on the SOL and ENSOL is assessed by VETASSESS. However, if an applicant does not have academic qualifications equivalent to an Australian Bachelor Degree, VETASSESS cannot

assess them as meeting the skills requirement for that occupation. If for example, the applicant had a Diploma it might be possible for him to be assessed by VETASSESS as a Project or Program Administrator (ASCO3292-1) which is on the SOL and ENSOL but it is a 40 point occupation. But this may not be a helpful outcome for an employer who has determined to offer the applicant the position of Production Manager.

The fettering of business may also be inconsistent with the law, given the regulations refer to "skills" rather than "qualifications".

Migration Regulation 856.213 provides:

Each of the following is satisfied:

> *(a) the applicant has been nominated by an employer, in accordance with subregulation 5.19(2), for an appointment in the business of that employer;*
>
> *(b) either;*
>
> *(i) both of the following are met:*
>
> *(A) an assessing authority specified by the Minister in a Gazette Notice for this sub-subparagraph as the assessing authority for the occupation to which the appointment relates has assessed the applicant's skills as suitable;*
>
> *(B) unless exceptional circumstances apply, the applicant has been employed in the occupation to which the appointment relates for at least 3 years before making the application[24]; or*

VETASSESS does provide Competency Assessment in some occupations[25]. This is conducted by a qualified assessor on the basis of a completed form which provides evidence of the work-related skills that an applicant possesses. These may be gained through work, formal education or training, or life experience.

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24 See Migration Regulations 1994.

25 See VETASSESS website at: http://www.vetassess.com.au/competency/industries.html

The Application for Competency Assessment sets out the type of evidence which may be included, including certificates, references, letters, proof of employment, products, videos, core syllabuses, testimonials, trade documents or related details, log books or diaries, newsletters and such like.

The current fees for Competency Assessment are $390 (Certificates I-III), $615 (Certificate IV), $680 (Diploma) and $745 (Advanced Diploma).

After receiving the application, VETASSESS appoints a qualified assessor to begin the process of planning the assessment based on the information and evidence provided in the application form.

The assessor reviews the information sent with the application and organises a time with the applicant to plan the assessment.

In respect of overseas students studying in Australia, the assessment can be arranged at the TAFE Institute or if the person is already working, at their workplace.

The assessment process requires the applicant to demonstrate they have the practical skills and knowledge of the application.

If the applicant disagrees with the outcome of the assessment an appeal can be made on the grounds of:

- the judgment was not made in accordance with the assessment plan;
- the VETASSESS competency assessment process was not followed; and
- an applicant believes that hey were unfairly treated or discriminated.

There is a $250 fee for the appeal which is not refundable. The application for appeal must be lodged within 14 days of VETASSESS issuing advice to the applicant of their Competency Assessment outcome. VETASSESS reviews the information provided in the appeal application and the outcome of the appeal is final.

One of the attractions of the VETASSESS Competency Assessment Service are the Candidates Kit Information for Applicants which includes a Self-Assessment Guide for the applicant's industry. These are helpful as they set out the range of competencies that the applicant would be expected to have for that occupation.

However, the Competency Assessment is not possible for offshore applicants.

At a time when the Federal Government and State Governments are allocating millions of dollars to attract skilled migrants, why does the skills assessment/recognition system not permit VETASSESS to take into account a competency assessment based on relevant proof of employment?

Workplace based vocational and management skills can often be assessed as the equivalent of say a Bachelor degree in the case of say a Production Manager (Manufacturing) applicant if VETASSESS was allowed to take this into consideration.

The VETASSESS Application for Competency Assessment and the VETASSESS Candidate's Kit Information for Applicants, appended to the Submission provide further information in regard to VETASSESS Competency Assessment processes, and information available to applicants.

We would recommend that skills assessment processes be widened to allow a range of methodologies, such as competency. The ASCO is equally consistent with competency as well as educational pathways, and VETASSESS have the capacity to assess competencies[26].

Unless this occurs soon there is the danger of restrictions to business and clearly flies in the face of the changes to the employer nomination regulations to make it easier for business.

Australian Institute of Management (AIM)

There is a significant difference in assessing standards applied by different skills assessing authorities in determining a pre-migration skills assessment. AIM has adopted their own standard namely, Associate Fellow of the Australian Institute of Management (**AFAIM**) whereas a non-migrant is only required to satisfy the requirements of membership (**MAIM**). By setting an "Australian Standard" at AFAIM level, many manager-applicants skill assessments are unlikely to meet the AIM requirements.

Attached to the Submission is the "Australian Institute of Management Application Form for Assessment of Management Skills for Migration, revised June 2005".

Rather disturbingly the AIM apply an arbitrary numerical 'staff headcount' basis to the determination of whether a person exercises management responsibility. Paradoxically it could be argued that a company that employs a staff of 15 could require a higher degree of operational as well as strategic management skills given the comparative size of the

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26 See VETASSESS website at: http://www.vetassess.com.au/competency/industries.htm.

company. With the reduction in the levels of middle management globally, and the reach available to a manager through clever use of technology, many companies that previously may have employed 30-40 persons may now employ less than 20 and fall below the threshold applied by AIM to the determination of whether a business is a small or medium sized business.

The recent changes to Australia's employer nomination regulations are likely to increase instances where skill assessment is mandatory. This may have unintended consequences for applicants in a management occupation.

At a time of intense international competition for skilled labour, including managers, there is a need to ensure that there are no artificial barriers to entry to Australia through arbitrary assessment criteria.

Australian Computer Society (ACS)

The ACS is a good example of both experience and qualifications based assessment where comprehensive assessing guidelines are published. The ACS has a mechanism for the recognition of prior learning.

However, the decisions are not always clearly set out when experience is being assessed as the decision merely states that either the experience was relevant or not relevant without reasons being provided.

Further the ACS may be seen to be seeking to restrict overseas ICT applicants. For example ACS has released a "range of recommendations to assist in better aligning migration programs for ICT [information and communications technology] workers with the current realities of the Australian ICT job market". The Age reports that the ACS has called on the Federal Government to limit the number of work visas it issues to information and communications technology professionals until all Australian graduates are absorbed by the market. According to The Age, the ACS has also claimed that DIMIA should collect data on current Subclass 457 visa holders including the average salaries and that the visa holders should face mandatory skills assessment.[27]

Attached to the Submission is the "Australian Computer Society Membership" form and the "Australian Computer Society Application for a Skills Assessment".

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[27] ACS media release <http://www.acs.org.au/news/290405.htm> (29 April 2005). 'Call to limit ICT visas', *The Age* <http://www.theage.com.au/news/Breaking/Call-to-limit-ICT-visas/2005/04/29/1114635730903.html> (29 April 2005).

Architects Accreditation Council of Australia Inc (AACA)

Many would argue that applicants seeking assessment through the AACA face additional challenges not the least because the assessment process is the least transparent. Further, it is the most expensive with an assessment fee of $1050. The assessing period for an overseas qualification is six to eight months and the outcome is often uncertain because of inadequate guidelines. The decision provided to the applicant is either that their overseas qualifications are equivalent to an Australian qualification and therefore the application is successful or it is not. There is no explanation as to why the applicant's qualification fails to meet the Australian Standard.

Please refer to the attached "Architects Accreditation Council of Australia" website extract for further information.

Australian Education International – Qualifications Recognition Services

As part of the Department of Education Science and Training (**DEST**) the website information in regard to Australian Education International (**AEI–NOOSR**) states that it '*offers a range of information and advisory and training services for individuals or organisations on qualifications assessment and recognition.*' It also provides Professional Development Services '*that assess and/or recognise overseas qualifications*'. Further it provides courses and workshops '*on topics such as educational assessment methodology, assessing outside the AEI-NOOSR guidelines, using CEPs and other reference materials, assessing qualifications from specific countries and the Australian education system*'.

Many of the Country Education Profiles (**CEP**) have not been reviewed since the early 1990s. This raises concerns where the assessment is based on academic qualifications as we rely on the CEP to ascertain whether there is an equivalency to an Australian qualification. For a 40 point occupation, the overseas qualification must be equivalent to an Australian TAFE Diploma and for a 50 point qualification it must be equivalent to an Australian Bachelor Degree. The CEP are in the main, out of date and inadequate in advising applicants with recent qualifications.

Skills Assessment in the age of globalisation

Many would argue that Australia's pre-migration skill assessment approach of most of the assessment authorities is "one dimensional" to the extent that they fail to take into account

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'ACS demands migration clampdown', Computer World <http://www.computerworld.com.au/index.php/id;1553561897;fp;16;fpid;0> (29 April 2005).

other factors including recognition of prior learning including work-based learning, particularly in the case of applicants who do not have formal qualifications be they a Bachelor Degree or Diploma. There are many occupations in Australia which do not require a Degree or Diploma as is evident from ASCO itself. This is also evidenced by the fact that many of the incumbents in the positions that are filled have qualifications less than those stipulated by the assessing authorities. Not only is it a one dimensional approach to assess applicants solely on the basis of a formal qualification, it is also totally removed from reality in that as a starting point, nominating employers ought to be able to have some input into what is required in order to fill particular positions within their organisations.

This is quite evident in the case of large global employers who move people around the world according to their needs and their perception of the employee's ability to be able to do a particular job irrespective of the level of formal qualifications that person might have. Whilst this particular problem may have been somewhat alleviated in terms of the ENS following the 2 April 2005 changes, some applicants for subclass 457 visas and ENS are subject to assessment. Accordingly, employers may be prevented from bringing needed staff into Australia for short-term or long-term purposes if they fail to meet the assessment requirements.

Assessing authorities should take a broader approach and develop a second stream of assessment based on recognised prior learning and having regard to the needs of employers in different industry sectors. Whilst an assessment based on recognised prior learning may be more costly and document intensive the cost may be offset by the opportunity for applicants to have their overall competency assessed.

Conclusion

Many would argue that an overhaul of the assessing system is vital to meet Australia's economic needs.

The Western world is increasingly faced with an ageing population, a virtual zero population growth and the need for a skilled workforce as the primary challenge to future economic growth.

Countries such as the United States, United Kingdom, Germany and Canada face retirement age and workforce pressures similar to those of Australia.

In a world which is competing for skilled labour, there is a need for Australia to explore '*flexible approaches to attracting and selecting migrants appropriate to the economic and*

social goals it seeks to achieve[28]. At a time when the Federal Government is increasing existing levels of skilled migration it needs to balance its strict regulatory regime including the skill assessment regime with a clear recognition of the vast economic benefits of attracting skilled labour.

One proposal put to the ILAA is that there be only one central processing authority with one assessing fee and the ability to obtain assessments from a variety of sources. The review body would be totally independent of the assessment process.

Any scheme which requires nominating an occupation based on an outdated ASCO occupational assessment scheme and having an applicant's skills and qualifications assessed by the relevant assessing authority, is complex and unwieldy.

Australia's critical shortage of skilled workers in the traditional trades of itself suggests that skill assessment through TRA is not properly addressing Australia's trade skills assessment requirements.

The aim is to regulate less not more.

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28 *Preparing for Victoria's Future, Challenges and Opportunities in an Ageing Population, The Victorian Government Submission to the Productivity Commission Research Study on the Economic Implications of an Ageing Australia* (November 2004) p 55.