MIGRATION INSTITUTE
— OF AUSTRALIA —

Discussion paper by MIA National Executive - Policy & Planning Committee -

Joint DIMIA – MIA Business Skills Surveys & Monitoring activities

As mentioned to DIMIA officers at the February MIA National Executive meeting, the MIA set out to identify and promote a range of positive opinions in response to the DIMIA BSC discussion paper. The following matters have been identified as warranting comment in that context, and the discussion paper then sets out some options for improvements to current BSC compliance rates.

On reading the discussion paper provided to the MIA by DIMIA Business Branch, it was noted that according to statistics provided by DIMIA, the present (127, 128 & 131) BSC program operates at an 87% success rate. That is to say, 87% of migrants coming to Australia within the BSC programs are successfully in business and are demonstrably doing what is expected of them in relation to their BSC undertaking, while 13% are failing for one reason or another. On the basis of information provided by DIMIA in the discussion paper, for the 1996/97 and 1997/98 years, those entering Australia as Business skills Migrants have invested a total of $436 million in businesses in Australia and have directly generated employment for more than 8,611 Australian residents.

These statistics support the view of the MIA that the BSC program is clearly an overall success, and on that basis the existing BSC program must be regarded as a significant net contributor to the welfare of the national economy, and a viable aspect of the overall skilled migration program. The statistics also support the view that if any change of criteria is warranted, the change should be a matter of fine-tuning rather than a dramatic change. Given DIMIA's own statistics, there appears to be little apart from perhaps anecdotal information to suggest that the current program is not meeting objectives.

It has been noted in the DIMIA discussion paper that discussion takes place in regard to a number of subclass 845 EBA visa holders, who obtained their

residence after establishing a business in Australia, and who are quoted as performing better than subclass 127 migrants. We should never loose sight of the fact that 845 visa holders have had between 2 and 4 years of Australian business experience, and you would expect them to show up well in statistics. It is otherwise quite inappropriate to compare the business record of temporary residents / EBA applicants with the record of other business migrants. In the first instance few (if any) of those who come via the 457/845 route would do so if they were able to achieve permanent residence from the outset. By definition, far and away the greater proportion of those individuals are not candidates of first choice for Australia. Although many fulfill a very valuable niche and make a contribution to Australia, as a group, it could be argued that they do not possess the business skills, entrepreneurial capacity, experience and capital of 127, 128 & 131 candidates.

Against this background, it is strongly felt by the MIA that there is indeed very little to be gained, and much to be lost, by imposing what we regard as a retrograde and unrealistic *'provisional'* visa regime on what is by any reasonable judgment a very successful program. It is our contention that to replace the existing arrangements with a provisional, two step process is unsustainable in that it will have far reaching and dramatic effects on the level of interest of prospective BSC applicants. The discussion paper provided to the MIA makes mention that it is DIMIA's view that the proposed changes will not adversely affect overall levels of interest or application rates. Our counter view is that this unresearched statement cannot be supported. It flies in the face of reality for DIMIA to suggest the 'pull factors' would remain anywhere near strong enough to overcome the quite clear and distinct loss of attractiveness that Australia would represent to the interested businessperson. As has already been noted to DIMIA officers, soundings taken by MIA members of applicants and overseas agents indicate that Australia's appeal, and the security of permanency for the businessperson (the prospective migrants) will be substantially diminished. Overseas agents have indicated they will push other destinations as they already offer simpler criteria and procedures.

The discussion paper provided by DIMIA made mention of the subclass 128 Senior Executive category. The MIA applauds the fact that DIMIA has not cancelled visas in situations where the visa holder has obtained employment and there is clear demonstrated benefit to Australia. There is a strong school of thought which would suggest that we should allow 128 applicants to do what we originally identified / selected them for, which is that they are experienced senior executives, and that they should be allowed to operate as senior executives in Australian businesses. Simply because they are senior executives in major businesses does not in every case mean that they are great potential business owners. The view of the MIA is that the number of coffee shops, petrol stations and hot bread shop franchises operated by new migrants would spiral downwards if 128 visa holders were allowed to remain

as senior executives. It is not considered as simple as opening up ENS as an alternative for 128 applicants while ever the arbitrary upper age limit of 45 remains in policy in the ENS category. DIMIA's own data suggests that 128 migrants are finding senior executive appointments in Australia and hence they are making contributions to the economy. The MIA suggests that DIMIA recognise the abilities and benefits offered by 128 applicants and target this group for its intrinsic value, whether this be in self-owned businesses or as employees. If any change in criteria and objectives is thought necessary we believe it should be aimed at sharpening the focus of the criteria and allowing post arrival flexibility to pursue business, employment or investment activity.

The discussion paper provided by DIMIA also made mention of the subclass 131 Investment-Linked category, and specifically mentioned that post-arrival requirements of the Investment-linked category are out of step with other subclasses. It was stated that the increasing number of Investment-linked applications "*has led to concern that this category is being chosen as the 'easy option', as there is no requirement to engage in business activity. The original policy intention of the category was to attract active investors with larger portfolios who did not fall within the business owner or senior executive subclasses, yet had a wide range of business and/or investment skills to offer Australia*". The discussion paper suggested that it might now be appropriate to consider whether the category still meets original policy intention and whether there should be other post-arrival requirements placed on Investment-linked visa holders to bring them into line with other migrants under the Business Skills category.

The opposite view of this suggestion is that this represents a potentially unworkable solution to what is essentially a perfectly good subclass. Having said that, along with DIMIA officers a number of RMA's spent some weeks as members of a BAP Working Party on redesigning the 131 / 844 subclass, only to see that despite the passing of 3 years, the subclasses have been left as they were. The view of the MIA is that the papers provided to the BAP should be re-examined prior to any potential changes. The MIA believes that increasing the range of investment options should be considered, with a direct focus on investments that offer identifiable benefits that can be readily recognised by the community at large. This would contribute to increased public confidence in the program. Such investments might include Government or (carefully screened) private sector infrastructure funds.

We also note that in practise the "investment-linked" category is far from an 'easy option'. As one of the most onerous and difficult visa categories under which to make a successful visa application, it could more accurately be labelled the category of 'last resort' only turned to when other options appear unsuitable.

The MIA and its members share with DIMIA a desire for a Business Skills Category program with and offering benefits consistent with program criteria.

To date we have not seen any convincing evidence that the current program is falling short on integrity or is not delivering demonstrated benefits. In fact DIMIA's own figures as reported in the discussion paper and in various publications and Media Releases over the years point to a program that is delivering desired results. This is not to say that improvements are not possible or should not be sought, but the MIA is strongly opposed to draconian steps that radically change the fundamentals of the program such as the "provisional" visa concept flagged in the discussion paper. Our concerns include:

- Removal of certainty for intending applicants – contrary to the proposition put in the discussion paper that "provisional" visas would provide certainty; they will in fact deny applicants of any real certainty. Thought has to be given to the target market here. At a practical level why would an established and successful business person take the extreme risk of winding up his/her business, or putting it in the hands of management, while venturing on an excursion to Australia with only a temporary visa in hand. To assume, without any significant backup research, that Australia is such an attractive destination to such applicants that they will come nevertheless could be interpreted as arrogance in the extreme. Certainly for some applicants the "push" factors will be so strong they will take the risk regardless, but Australia will certainly miss out on its true potential in attempting to placate perceived difficulties by an all out and fruitless overhaul of an already sound program. Australia is very much a participant in the global market place competing against all comers. It is not an automatic given that high quality business people will flock to us simply because we are what we are. Australia is competing successfully now because, by and large, it offers a good product for intending business migrants. Why then change the parameters and ignore reality?
- Competitor countries – a "provisional" visa regime will place Australia at a severe disadvantage to other destinations which offer the certainty of residence;
- Sending the wrong signal – a "provisional" visa regime will send a message that Australia is not really committed to attracting successful business people;
- Undermine confidence in the Migration Program – such a change will suggest that the current criteria is somehow being rorted when in fact DIMIA's own data strongly suggests the opposite;
- Undermine applicant confidence – major policy shifts always send negative messages to applicants, who tend to see such changes as representing efforts to close the door. It may be really helpful to have a period of sustained stability in this policy area;
- Lack of data and or research to support the proposed changes – major policy changes should be supported by serious qualitative long-term

research. The MIA notes DIMIA's own data over the life of the current BSC program has been positive and has highlighted the success of the program. We are not aware of any data to dispute the previous DIMIA data and Minister statements. We also note the absence of research into the long-term outcomes of the program. In this respect we suggest that qualitative research should be conducted with a view towards looking at outcomes at least 5 years out from migration and seeing whether this helps to develop a profile of successful applicants. A lack of any clear purpose or rationale for such wholesale and absolute philosophical change to a program that is clearly successful. This strikes as recklessness in the extreme, gambling with Australia's future. If DIMIA feels there is scope to extract even better results than are currently achieved from the Business Skills program, then carefully considered fine-tuning should be the clear and obvious way forward. Wholesale changes risk the integrity of the program and the benefits it currently generates.

In the course of the recent discussion between officers from the Business Skills Branch of DIMIA and the MIA National Executive, it was suggested to those DIMIA officers that rather than undertake what we believe would be a retrograde and overly dramatic rationalisation of the existing subclass 127, 128 and 131 programs, we perhaps look at ways in which the MIA might be able to assist the Department in bringing the monitoring aspects of the existing BSC program and the all important BSC surveys into far sharper focus.

Comment was provided to the MIA by DIMIA that BSC assessing officers at posts were reporting that BSC migrants were being actively counselled in regard to their signed BSC undertaking. Against that background, it is common knowledge to members of the MIA that some posts *DO NOT* interview every BSC applicant, which makes the reporting process to DIMIA in Canberra unrepresentative and potentially rather misleading. Further, there are many instances available to MIA members of the onshore equivalent (subclasses 840, 841 and 844) applications proceeding to interview and subsequent grant without *any* discussion by case officers in relation to the reporting / monitoring requirements, which in our view must again distort the comments being provided to DIMIA Canberra.

It is interesting to reflect on material contained in Generic Guidelines K (BSC visas) in light of the now identified compliance issues of the BSC program, and comments raised by the MIA in regard to situations where interviews are not taking place. Items of interest have been ***underlined in italic bold***;

GENERIC GUIDELINES K - BUSINESS SKILLS VISAS

4.1 **Business Skills (Migrant) visas**

4.1.1 Preliminary enquiries regarding the Business Skills (Migrant) visa may be made in or outside Australia.

4.1.2 Outside Australia, prospective Business Skills (Migrant) visa applicants may be counselled (wherever possible, by an A-based DIMA officer) before they apply for a visa. The purpose of any counselling should be to provide

- an explanation of Business skills objectives (see section 3 above);
- an explanation of the regulatory requirements for grant of the visa (see paragraph 8.1.1 below);
- an opportunity for officers to make a preliminary assessment of the prospective applicant's ability to meet Schedule 2 prescribed criteria;
- information on possible alternative permanent visa (sub)classes;
- ***advice on making an exploratory visit to Australia in order to assess business conditions and opportunities and general living conditions in Australia***; and
- advice on general living conditions in Australia.

Where considered appropriate, the counselling may be provided as part of an interview (see section 8.8 below).

4.1.3 ***Officers should in the course of counselling bring to attention that***

- only those applications for which a form 949 "State/Territory sponsorship" is lodged at time of application will be assessed against the visas for which State/Territory sponsorship is a criterion;
- if requested by the assessing officer, complex and/or unusual visa applications may be referred (for advice) to the Business Advisory Panel (BAP - see the corresponding section in PAM3: GenGuideA);
- the BAP treats all applications on a "commercial-in-confidence" basis;
- company searches or credit checks (at the applicant's expense) may need to be conducted to verify business claims;
- ***the Business skills profile form sets out the expectations and obligations of a business skills visa holder, including compulsory participation in monitoring, the need to notify changes of address in Australia for three years after arrival, and the fact that a business skills visa may be cancelled in certain circumstances (see Part 2 Division 3 Subdivision G of the Act).***

4.1.3 the Business skills profile form sets out the expectations and obligations of a business skills visa holder, including compulsory participation in monitoring, the need to notify changes of address in Australia for three years after arrival, and the fact that a business skills visa may be cancelled in certain circumstances (see Part 2 Division 3 Subdivision G of the Act).

8.8 Interview and site visits

All visas

8.8.1 All applicants should be interviewed to assess their

- English language ability for the purposes of the Schedule 7 Business Skills Points Test (see PAM3: Sch7);
- overall business or investment history;
- claims regarding their role in the business or investment;
- ***commitment to establishing a business (or making a designated investment) in Australia;***
- ***understanding of the Declaration;*** and
- claims to satisfying prescribed criteria (if the basis for such claims is unclear).

The interview record should detail the issues covered and the officer's assessment.

8.8.2 Although officers are expected to interview applicants who appear to satisfy visa-specific criteria, no interview is necessary if there is sufficient satisfactory documentation on which to make an assessment. (*This seems to counter the otherwise specific comment in PAM that all applicants should be interviewed, and begs the question of whether assessors are themselves taking an 'easy option'****)***

8.8.3 Officers need not interview applicants whose claims are manifestly unfounded.

10.1 Notifying applicants of visa grant

10.1.1 as outlined below, at time of visa grant, applicants are to be reminded of their visa obligations.

If an applicant for a Business Skills (Migrant) applicant:

- ***Officers are to provide with the visa notification a form 922 for notifying DIMA of their initial residential/contact address in Australia;***
- ***and instructions for notifying Business Skills Section, DIMA CO, of any change of address (visa 127/128/129/130/131 holders);***
- ***returning a completed form 1010 to Business Skills Section two years and three years after initial arrival (visa 127/128/129/130 holders only).***

It is the view of the MIA that significantly greater efforts on the part of both DIMIA and perhaps registered migration agents must be attached to the whole area of BSC monitoring and surveys with a view to ramping up the policy intentions of the BSC program.

In this regard, there are a number of potential options concerning DIMIA's expressed concerns:

- DIMIA to do more to encourage 'pre-application' business visits by intending BSC applicants, as was the case in the old BMP days. The intention being that visits made by a potential migrant prior to making an application and subsequently taking up residence will have effects on their ability to make more informed decisions concerning their business activities in Australia. This of course brings about other issues like difficulties at some posts in granting subclass 456 visas, and bona fides of intending BSC applicants. The MIA's view would be that sufficient integrity measures and control mechanisms are available in the form, for example, of the increasingly common 8503 Schedule 8 condition. **(Considered important)**

- Look to have Registered Migration Agent's involved in a sign off with the BSC client on a 'counselling statement' that significantly backs up the intentions of the existing Declaration. This could be fundamental requirement for RMA's to complete in response to an item that would need to be included in the MARA Code of Conduct. **(Considered worthwhile given high usage rate of RMA's in BSC applications)**

- A heightened DIMIA focus on 'counselling' applicants at interview on their post arrival BSC obligations. The interview is normally a very stressful occasion for applicants and any 'counselling' will tend to be quickly forgotten by applicants unless there is some tangible reminder that applicants can take with them. The interview is a final stage; often simply confirming known facts, yet it appears common, if not normal, practise for officers to leave applicants in suspense at the conclusion with a "we will write to you". There appears no reason why decisions

should not be conveyed on the spot, and once the anxiety is removed, the officer could then move on to targeted 'counselling'. This could be reconfirmed by requiring both the applicant and interviewer to re-read and sign the undertakings at the conclusion of the interview. This would overcome the problem of officers simply forgetting to counsel applicants and provide a final reminder to applicants.

- A form of intensified combined training for active BSC agents and DIMIA BSC primary decision makers put in place to make it mandatory for BSC applicants to 'sign off' on the fact that they have read and understood their BSC obligations. **(Our preferred immediate option if otherwise we are looking at the possible implementation of a 'provisional' visa arrangement**)

Combined DIMIA / MIA training

It is unfortunately impracticable for currently serving BSC officers to be recalled to Australia for training in BSC monitoring / survey considerations, although there is considered to be sound reasons to include substantial training for officers selected to be posted offshore. It is the MIA's understanding that these officers are provided substantial operational training in Canberra prior to going overseas, and presumably, this training occurs at regular intervals annually. This training is supplemented by instruction in the activities and workings of the MARA, which is currently provided by Andrew Cope (Vice President – MARA) and presents an opportunity for the training to be extended out significantly to include combined MIA / DIMIA training specifically related to:

- The Business skills profile form;
- The expectations and obligations of a business skills visa holder;
- Compulsory participation in monitoring;
- The need to notify changes of address in Australia for three years after arrival;
- That business skills visas may be cancelled in certain circumstances.

There is an existing format for this training available as the primary vehicle for such an activity, that being the well-established MIA Continuing Professional Development (CPD) activities conducted throughout Australia every month. It would not be feasible for this training to be held at numerous locations throughout Australia, given that the preponderance of the training provided to departing PMO's and CMO's appears to occur in Canberra.

The view of the MIA would be that appropriately experienced RMA's, familiar with both onshore and offshore BSC applications could be invited to attend combined training with the selected DIMIA officers in Canberra or Sydney. A degree of liaison between DIMIA and the MIA national office in Sydney would be required to set in place appropriate arrangements to

arrange this training, which for transparency sake would need to include RMA's who are not current members of the MIA.

The training would take advantage of existing DIMIA training expertise, and would also involve external commercial expertise provided by the MIA.

Our intention would in time be that these combined training regime's might be able to include specialised training in accounting issues, again provided in co-operation between the DIMIA and MIA, although the essential primary activity in the early stages would be related to practical training associated with the BSC obligations of a business skills visa holder.

Access to fee free education for dependants

The BSC discussion paper makes a number of references to the fact that BSC visa holders are entitled to all the benefits (not so, they don't get ALL benefits) of permanent residence, including access to Australian citizenship after two years residence (including the residence concession for residence outside Australia if engaged in activities of benefit to Australia), fee-free education for school and tertiary study-aged dependants. The MIA would contend that it would be fair to say that there is hardly any such thing as fee free education anymore, except at state schools. We would imagine that a significant number of BSC migrants would have children either at university or in private schools, neither of which can be said to be anything like fee free. If DIMIA is of the view that access to fee free education is a matter of some concern, it should be a matter left to the Education portfolio to remedy, rather that leaving it to an Immigration program to attempt a remedy.

Conclusion

Given that the current BSC program is showing, on DIMIA figures, an 87% compliance rate the MIA is of the view that it is an impossible dream to imagine that this level of compliance can ever be lifted to a 100% rate. Nonetheless, a target of 90% or perhaps better should be attainable with concerted efforts on the part of all stakeholders.

The MIA believes that those stakeholders associated with the BSC program should not have any difficulty with accepting visa cancellation in situations where visa holders are demonstrably not complying with ***clearly stated, obvious*** obligations. It is well known that existing review arrangements provide opportunities for visa holders in the event that cancellation was not warranted.

The MIA is of the view that it is appropriate to re-introduce, at the 12-month mark after the business migrant's first landing, a polite and encouraging 'tap on the shoulder' by DIMIA to maintain focus as part of the existing survey /

monitoring arrangements. A gap of two years is too long, and it could be argued that people can and do become complacent.

In general terms, DIMIA has to decide in the greater community interest whether to continue to promote and grow the BSC program. If the decision is made to continue promoting a BSC program, it is our view that the 'provisional' proposal is one that has very real prospects of strangling a very successful program and becoming a nonsensical and completely unnecessary failure. A decision to implement a 'provisional' visa proposal will represent a totally unjustified act of recklessness, gambling with the demonstrable (on DIMIA's own figures and analysis) success of the Business Skills program. An unwarranted gamble for no clear purpose.

Through Regulation, the BSC program demonstrably delivers very significant economic benefits to the Australian community, with the understanding that those same Regulations put a strong base under the integrity and monitoring processes.