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IMMIGRATION LAWS AND POLICIES: IMMIGRATION POINTS SYSTEMS

AUSTRALIA

*Written Statement of Lisa White, LLM
Foreign Law Specialist for Australia*

appearing before the U.S. House of Representatives Committee on the Judiciary
Subcommittee on Immigration, Citizenship, Refugees, Border Security, and
International Law

Hearing before the Subcommittee on an
Examination of Point Systems as a Method for Selecting
Immigrants

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Executive Summary

Australia's migration program is focused on skilled migration. Generally, migrants who settle in Australia under Australia's skilled migration program are successful in achieving labor market participation at an appropriate level (i.e., employment appropriate to their skills and experience).

Australia utilizes a 'points system' in relation to some of its skilled migration visas. The most common visas that utilize the 'points system' are those of Independent Skilled Migrants (students studying in Australia may also apply), Australian Family Sponsored Skilled Migrants, and State or Territory Sponsored Skilled Migrants. The 'points system' is not utilized for family reunion or humanitarian visas nor in relation to employer sponsored visas. Under the 'points system' an applicant is awarded points in relation to specified categories – primarily – qualifications, age; work experience, whether or not his or her occupation is in demand; and English language skills. Points may also be awarded for qualified spouse, Australian qualifications, capital investment, other language skills, and Australian work experience. Australia undertakes to assess applicants' skills and qualifications prior to their arrival in Australia.

I. Australia

Australia is an island continent lying between the Indian Ocean and the South Pacific Ocean. Its land mass is slightly less than the United States of America's contiguous forty-eight states; Australia, however, does not share any land borders with any other country.¹

As of February 8, 2007 Australia's population was estimated to be 20,751,662² and as of this date approximately 43% of the Australian population were born overseas or have one parent who was born overseas.³ For example as at June 30, 2005 an estimated 63,364 Australian residents were born in the U.S.⁴

II. Immigration – General

In general all non-citizens (other than New Zealand citizens) require a valid visa to enter Australia.⁵

¹ CIA World Fact Book, available at <https://www.cia.gov/cia/publications/factbook/geos/as.html> (last visited Apr. 26, 2007).

² Australian Bureau of Statistics, *Population Clock*, as of May 31, 2006, available at <http://www.abs.gov.au/ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/1647509ef7e25faaca2568a900154b63?OpenDocument>.

³ Fact Sheet No. 4. More than 60 Years of Post-war Migration, <http://www.immi.gov.au/media/fact-sheets/04fifty.htm> (last visited Apr. 26, 2007).

⁴ Australian Bureau of Statistics, *Migration Australia 20004-05* (Cat. No. 342.0), 37 (Australia Mar. 2006).

⁵ *Migration Act 1958* (Cth) § 42. The only other exceptions are Norfolk Island residents and citizens of some countries close to Australia who may enter Australia's territory for the purposes of traditional activities (e.g., traditional fishing).

Australia's migration program is administered by the Department of Immigration and Australian Citizenship.⁶

The principal legislation is the *Migration Act* 1958 (Cth) and the *Migration Regulations* 1994 (Cth); Ministerial Directions (made under Migration Act §499) and Government Gazette Notices, however, may also be applicable.

Australia's migration program is divided into a 'Migration Program' and a 'Humanitarian Program.' Both of these programs are divided into streams and categories of visas.

Each visa has criteria that are specific to that visa;⁷ there are, however, some 'general public interest criteria' relating to health and character that are common to all visas.

III. Number of Immigrants

Australia's population growth for the period 2005-2006 included 134,600 persons through net overseas migration.

Australia's Migration Program for the period 2005-2006 consisted of 142,930 places, of which:⁸

- 97,340 were for 'skilled' visas – or 68.1% of the program; and
- 45,290 were for 'family' visas – or 31.7% of the program.⁹

Australia's Humanitarian Program consisted of 14,140 humanitarian visas and 1,390 on-shore humanitarian visas.

The 2006-2007 Migration Program will consist of 134,000-144,000 with a Skill Stream of approximately 97,500. Visas will be allocated across the Skilled Stream (for both primary and secondary visa applicants) as follows:¹⁰

- Skilled – Independent - 49,200 places;
- Skilled – Australian Family Sponsored - 17,700 places; and
- State Regional Sponsored (subclasses 495 & 137) - 10,000 places.

Skilled migrants may also be eligible for employer-sponsored visas or business/investor visas.

IV. Nationalities of Immigrants

During the period 2005-2006 the most common nationalities of immigrants were:¹¹

- Skills Stream – The United Kingdom; India; People's Republic of China; South Africa, and China;¹²

⁶ See the Department of Immigration and Australian Citizenship website, www.immi.gov.au (last visited April 27, 2007)

⁷ *Migration Act* 1958 (Cth) § 31(3).

⁸ In addition 310 visas were granted to special eligibility groups that include former Australian residents who have maintained ties to Australia and others requiring resolution of status.

⁹ Approximately one third of the places in Australia's migration program were visas granted to persons who had initially arrived in Australia on a temporary basis.

¹⁰ Bob Birrell, Lesleyanne Hawthorne, and Sue Richardson, *Evaluation of the General Skilled Migration Categories*, DIMIA, March 2006, at 15, available at <http://www.immi.gov.au/media/publications/research/gsm-report/index.htm>. The totals include primary applicant and any secondary applicants (i.e., family members), available at the Department of Immigration Website, <http://www.immi.gov.au/media/publications/research/gsm-report/index.htm> (last visited April 25, 2007).

¹¹ DIMIA, POPULATION FLOWS: IMMIGRATION ASPECTS 2005-06 (Commonwealth of Australia) (2007).

- Family Stream – The United Kingdom; People's Republic of China; India; the Philippines and Viet Nam.

V. Skilled Migration – Points System

In general the skilled stream of Australia's Migration Program is intended to enhance Australia's economy by allowing skilled people access to Australia's workforce.¹³

Specifically the objective of the 'points test' is to:

- systematically and objectively select the skilled migrants most likely to contribute to the objectives of the General Skilled Migration program; and
- regulate the size of the Skilled Stream (by varying the points required) according to planning levels set by the Australian government.¹⁴

There are twelve different general skilled migration visas. These may be divided into:

- independent – requiring no sponsorship;
- Australian-sponsored – requiring sponsorship by an eligible Australian relative; and,
- state/territory specific visas that involve nomination or sponsorship by an Australian state or territory.

Of these, the independent and the Australian sponsored¹⁵ are assessed via a 'points' system.¹⁶

Under the 'points system' each visa has a 'pass mark,' being the number of points necessary to obtain a visa and a 'pool mark' being the number of points necessary to remain in a pool of applicants should there not be sufficient pass level applicants or should the pass mark be revised. In general, pass marks are 110-120 and pool marks range from 70-120.

Under the 'points system' applicants are accredited with 'points' primarily for:

- qualifications (some visas require Australian qualifications);
- age;¹⁷
- work experience;
- whether their occupation is in high demand; and
- English language ability.¹⁸

¹² Within the Skills Stream outcomes for Independent Skilled Visas (i.e., visas granted less those visas cancelled, refused or not taken up) are: UK 24%; India 18%, PRC 16%, Malaysia 5%, Singapore 3%, South Africa 3%, Indonesia 3%, Republic of Korea 3%, and other 27%.

¹³ In addition to skilled visas there are also visas available for sponsored employees and for persons seeking to establish a business within Australia. DIMIA, POPULATION FLOWS: IMMIGRATION ASPECTS 2005-06 (Commonwealth of Australia) (2007), at 22.

¹⁴ The objectives of the General Skilled Migration program are to: deliver skilled migrants to strengthen the Australian labor market; help sustain Australia's population with managed migration; and help address the skilled labor requirements of regional Australia. Bob Birrell, Lesleyanne Hawthorne, and Sue Richardson, *Evaluation of the General Skilled Migration Categories*, DIMIA, March 2006, at 7, available at <http://www.immi.gov.au/media/publications/research/gsm-report/index.htm>.

¹⁵ The Skilled Independent, Skilled Independent Regional (introduced on July 1, 2004) and the Skilled-Australian Sponsored visas. *Id.* at 14.

¹⁶ *Migration Act 1958* (Cth) §§ 92-96.

¹⁷ Applicants must be aged under forty-five years.

Additional points may be awarded when the applicant has a well-qualified spouse, is providing capital investment, or has fluency in a community language.

In addition to the above visas there are visas specifically for New Zealand citizens (Independent New Zealand Citizen subclass 861 and Australian Sponsored New Zealand Citizen subclass 862). They operate very similarly to the independent and sponsored visas described above (with the same 'points system' test pass mark but no pool option) but are only applicable to New Zealand citizens.

Skilled visas that do **not** operate via a points system include the Employer Nominated, Business Skills categories and Distinguished Talent visas.

VI. Example of an American Lawyer Migrating to Australia as an Independent Skilled Migrant

As an example, for a thirty-four year-old American lawyer with an LLM and Spanish language skills who has worked for a year in Australia and now wishes to migrate to Australia via an Independent Skilled Visa,¹⁹ the applicable visa would be a Skilled – Independent visa (Subclass 136) which currently has a 'points system' pass mark of 120. Applicants that score more than seventy points but less than 120 points will be placed in a reserve 'pool' and will remain in the pool for two years after assessment. If the pass mark is lowered at any time during that two year period to a score that is equal to or lower than the applicant's score, the application will progress further. An applicant who scores less than seventy points will be refused.

Thus, under our example, the lawyer's assessment under the 'points system' would be as follows:

1. *skills* – points are awarded for the skills associated with the applicant's nominated occupation. Points are listed on the Skilled Occupation List (SOL) which also lists the relevant organization within Australia that assessed the applicant's skills and qualifications. Lawyers are awarded sixty points. In practice our lawyer would apply to the bar association (or Law Society) to practice as a solicitor in the jurisdiction in which he or she intends to live (should he intend to live in Sydney, he or she would apply to the NSW Law Society) and once admitted to practice would be given an initial sixty points on the basis of his or her skills;
2. *age* – Because he or she is aged between thirty and thirty-four years, twenty-five points would be awarded;
3. *English language skills* – an American passport holder whose first spoken language is English is considered to be a native born English language speaker and considered competent in speaking, reading, listening and writing in English. Therefore twenty points for English language skills would be awarded;
4. *specific work experience* – an applicant who has work experience for the last three out of four years prior to the application may be awarded either five or ten points for this work experience. If the work experience is within his or her nominated occupation (or closely related to the nominated occupation) and the occupation is worth sixty points, he or she may be granted ten points. If the work experience is in a skilled occupation (but not his or her nominated occupation) or the nominated occupation is worth less than sixty points, he or she may be awarded five points. Thus, presuming that our American lawyer has been working as a lawyer or legislative drafter for the past three years, ten points will be awarded;

¹⁸ All visas require some English language skills.

¹⁹ Independent Skilled Visas are intended for those skilled workers who do not want to be nominated by an employer or who don't have a current employer willing to nominate them.

5. *occupation in demand* - if an applicant's nominated occupation is considered an Occupation in Demand and listed on the Migration Occupation in Demand list, then an applicant may be offered fifteen (if the applicant does not have a job offer) or twenty points (if the applicant has a job offer). In our example, our American lawyer would not be awarded any points, because lawyers are not on the Migration Occupation in Demand list;
6. *Australian qualifications* - if an applicant has Australian qualifications (from English instruction) he or she may be awarded five, ten, or fifteen points. Presuming that our American lawyer does not have such qualification, no additional points will be awarded;
7. *regional study/residence* - if an applicant has lived and studied for at least two years in one or more areas in 'Regional Australia' or a 'low population growth metropolitan area' he or she may be awarded an additional five points. Again, we can presume that this does not apply to our American lawyer;
8. *spouse* - If an applicant's spouse is able to satisfy the basic requirements of age, English language ability, qualifications, nominated occupation, and recent work experience, and has obtained a suitable skills assessment from the relevant assessing authority, the applicant may be awarded an additional five points. Presuming that our American lawyer has a similarly qualified spouse, we can presume he or she will be awarded an additional five points; and
9. *bonus points* - An applicant may claim five bonus points for one of the following:
 - a. capital investment in Australia (a minimum of A\$100,000 in an approved government investment for a term of at least twelve months);
 - b. Australian work experience (six months work experience in a skilled occupation within the last forty-eight months); or
 - c. fluency in one of Australia's community languages - other than English ('fluent' means professional level language skills (written or oral) as evidenced by a qualification and community languages are listed and includes Spanish).

Therefore our American lawyer is able to gain an additional five points either via language skills or via Australian work experience.

Thus, in total, our American lawyer has achieved 125 points and, subject to the visa criteria of health and good character, is eligible to apply for a Skilled Migration Visa which would allow him or her permanent residence in Australia.

VII. Proposed Changes to the Points System

Changes to the General Skilled Migration programme (GSM) will be introduced on September 1, 2007.²⁰

These changes include:

- increasing the English language threshold for GSM visa applicants - the new requirement will be a competency (International English Language Testing System (IELTS) score of five (vocational) to six (competent) on all four components. Applicants applying for trade occupations, however, will be required to meet the

²⁰ See Changes to the General Skilled Migration Program, available from the Department of Immigration and Australian Citizenship website, <http://www.immi.gov.au/skilled/general-skilled-migration/changes/index.htm> (last visited Apr. 27, 2007).

current threshold of an IELTS score of five and bonus points will be awarded to applicants with better English skills;

- greater emphasis on skilled work experience – with additional points awarded for skilled work experience in Australia. In relation to occupations on the Migration Occupation in Demand List (MODL), points will only be awarded to applicants with at least twelve months experience in their nominated occupation or one that is closely related;
- introduction of a new temporary work visa for graduates - international students who are unable to meet the new requirements for a permanent skilled visa may apply for an eighteen-month Skilled-Graduate (subclass 485) visa with unrestricted work rights; and
- simplifying the GSM visa structure – the current fifteen GSM visa subclasses will be reduced to nine (four offshore and five onshore).

VIII. Pros and Cons of Points System

The benefit of a points-based skilled migration system is that it allows the Australian government flexibility to accept migrants with characteristics deemed to be of greatest importance to Australia by altering the ‘points’ allocated to each characteristic. Thus where certain skills are considered to be in demand in Australia, those occupations may be awarded more points. Similarly, because English language skills are considered to be significant in relation to a new migrant’s participation in the labor force, then English language skills may be granted more points.

Detractions of the ‘points system’ include suggestions that students are deliberately targeting educational courses that will maximize their points in relation to a visa application to Australia, and that there is the potential for ‘fraud’ in relation to work experience as applicants seek to maximize points.²¹ A detraction of the skilled-based migration programs as a whole (both those visas that are ‘points based’ and those that are not, such as employer nominated visas) is a reduction in numbers for ‘family’ reunion based migration, which may result in some hardship for individuals within the Australian community.

IX. Employment Outcomes of ‘Points System’ Migrants

In general migrants who enter Australia under the skilled migration program achieve good labor market outcomes within six months of arrival in Australia and maintain these good results over time.²²

In two surveys of skilled migrants conducted six months after arrival (one in 2002 and one in 2005), the employment rate of skilled migrants was 76% and 83% respectively (10% and 12% unemployment and 15% and 5% not in the labor force). In comparison, in 2005 the general employment rate for the Australian population aged 20-54 was 83%.²³

Within the skilled migration group it is possible to identify that:

- independent skilled migrants have the highest earnings of all skilled migrants and the lowest portion of visa holders employed in lower skilled jobs (one in five);²⁴

²¹ Heather Ewart, ALLEGED IMMIGRATION SCAM POINTS TO WIDESPREAD RORTING [cheating]. THE 7:30 REPORT, Australian Broadcasting Corporation, TV program transcript, broadcast 13/11/2006, *available at* <http://www.abc.net.au/7.30/content/2006/s1787591.htm>.

²² Bob Birrell, *supra* note 14.

²³ *Id.* at 77.

²⁴ *Id.* at 93.

- Australian-nominated skilled migrants have worse outcomes in terms of employment, use of qualifications, and job satisfaction than those who are independent (or business-sponsored), earning approximately one-quarter less than independent skilled migrants;
- regionally-sponsored migrants have the highest level of unemployment (23%), and are the least likely to be using their qualifications (only 33% do so often) with generally lower levels of wages;²⁵ and
- English proficiency and recognition of a migrant's qualifications within Australia are significant factors in relation to labor market participation.²⁶

X. Unskilled Migrants

In 2006 the Australian Senate Employment, Workplace Relations, and Education Committee (the Committee) reported on the use of temporary agricultural workers.²⁷ The Committee concluded that:

1. there is only scant evidence that Australia is currently experiencing an indisputable harvest labor shortage. Although the Committee acknowledged that there were instances of losses to producers who were unable to harvest produce due to labor shortages, it found that currently backpacker, 'grey nomad,' and local casual labor is sufficient;
2. it was not prepared to recommend a scheme of contract harvest labor from the Pacific Island states, and, that if such a scheme was to be considered, it should be limited to Pacific Forum Nations and be formalized and regulated to ensure correct minimum wages were paid; and
3. Australia should now begin developing a policy to introduce a contract harvest labor scheme, because such a scheme may become necessary within the next five years, and, that should such a scheme become necessary, then Australia should consider an arrangement utilizing labor from the South Pacific.

XI. Illegal Immigration

Australia does not have a significant illegal immigration problem. Any non-citizen in Australia without a valid visa is an 'unlawful non-citizen.'²⁸ It is possible to become an unlawful non-citizen by arriving without a valid visa or by overstaying a visa or because a visa has been cancelled due to non-compliance with a visa condition (such as study or no work).

The majority of 'illegal immigrants' in Australia are temporary workers and others who overstay their visas ('overstayers'). They generally overstay their visas for a short period (a few days or a week) and voluntarily leave Australia.²⁹ It is presumed, however, that a significant number of long-term overstayers work illegally while in Australia.³⁰

²⁵ *Id.* at. 88-89.

²⁶ *Id.* at 89.

²⁷ Senate Standing Committee on Employment, Workplace Relations and Education, Perspectives on the future of the harvest labour force, October 2006, *available at* http://www.aph.gov.au/senate/committee/eet_ctte/contract_labour/report/index.htm.

²⁸ Migration Act 1958 (Cth) § 14.

²⁹ DIMIA, POPULATION FLOWS: IMMIGRATION ASPECTS 2004-05 ED. 77 (Commonwealth of Australia) (2006).

³⁰ DIMIA, MANAGING THE BORDER: IMMIGRATION COMPLIANCE 2004-05 EDITION, 59, (Commonwealth of Australia) (2005).

As of December 31, 2005 it was estimated that there were approximately 46,400 non-citizens in Australia as a result of overstaying visas. Most overstayers overstayed a visitor visa (39,200); while 2,700 overstayed a student visa; and 2,300 overstayed a temporary resident visa (2,200 overstayed other visas).³¹

An assessment of overstayers in 2005 established that: most overstayers were from the USA (4,940), the UK (4,075), the Peoples' Republic of China (3,760), Indonesia (2,675), and the Republic of Korea (2,620). The USA and UK figures reflect the high number of visas issued to residents of those countries because an analysis of the percentage of visa holders who overstay their visa indicates that these countries are considered low-risk for overstaying. The country with the highest overstay rate was Kiribati (2.46 percent of 1,867 visitors) and the country with the highest non-return rate for visitors was Greece (eight percent).³²

As of April 13, 2007, there were 528 people within Australia's immigration detention system.³³ Of these eighty-one were in residence determination arrangements in the community (including forty children³⁴). Of those in detention sixty-nine (13%) were illegal foreign fishermen, ten were illegal boat arrivals, and forty-six were unauthorized air arrivals. The majority (367 persons (69%)) were in immigration detention as a result of compliance action – that is they either overstayed their visas or breached the conditions of their visas, resulting in their visas being cancelled.³⁵

Prepared by Lisa White
Foreign Law Specialist
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³¹ DICA, Fact Sheet No. 86: Overstayers and people in breach of visa conditions, <http://www.immi.gov.au/media/fact-sheets/86overstayers.htm> (last visited Apr. 26, 2007).

³² DIMIA, POPULATION FLOWS: IMMIGRATION ASPECTS 2004-05 ED. 77 (Commonwealth of Australia) (2006), Chapter 5: 'Dealing with Overstayers,' available at <http://www.immi.gov.au/media/publications/compliance/managing-the-border/pdf/mtb-chapter5.pdf>.

³³ See Migration Act 1958 (Cth) § 5 for the definition of migration detention. Migration detention may include detention within a detention center, prison facilities or detention by an immigration officer.

³⁴ There are no children in immigration detention centers.

³⁵ DIAC, Immigration Detention Statistics Summary for April 13, 2007, available at <http://www.immi.gov.au/managing-australias-borders/detention/statistics/immigration-detention-statistics.pdf>.