

## **Briefing by Fragomen LLP on immigration systems in the US, Australia, Canada and Switzerland**

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### **1. What political considerations drive immigration policy in your jurisdiction?**

#### *United States*

Like everywhere in the world, partisan politics are behind many of the periodic changes in immigration policy in the United States, and policies change as presidential administrations and the balance of power in Congress change. Economics is often seen as a major driver, but even when the economy is good, rhetoric about a flagging economy—true or not—is often used in concert with the scapegoating of immigrants for partisan advantage. Highlighting sensationalistic stories about immigrants and crime is another common rhetorical tool used by some politicians, even though all available evidence demonstrates that immigrants in the United States actually commit crimes at much lower rates than native-born Americans. However, the major factor driving immigration policy today—in the United States as in Western Europe—is the rise in nationalism. Other professed considerations such as jobs and crime are really just the ways in which such nationalism is expressed.

One of the big problems we have in the United States is a tendency to conflate regular and irregular migrants. Both major political parties generally support the admission of high skilled migrants, who generally enter the country through legal channels. In this way, immigration in the United States can sometimes bring together individuals and entities who are not normally political allies. Big business, especially the technology industry, typically favors liberalizing immigration policy because they depend on the steady availability of high skilled foreign labor. Immigrants' rights organizations that would not normally ally themselves with business interests thus become their allies. Even American labor unions, which have historically opposed immigration, began to change their position in the latter half of the 20<sup>th</sup> century. This occurred in part because union membership by native-born Americans dropped dramatically while immigration—both legal and illegal—continued to increase. Immigrant workers thus became an important constituency for labor unions, which focused more resources on organizing immigrant workers. Again, this has made for strange bedfellows as labor unions and the business community both continue to advocate for comprehensive immigration reform.

But the presence of lower skilled immigrants—who often enter or remain in the country without authorization—is a problem for both political parties. Certain sectors of the economy, including the agriculture and hospitality industries, may favor liberalizing immigration policy to allow for the lawful entry of low-skilled foreign labor. Labor unions, however, seek to protect the U.S. labor force from the undermining effect of foreign labor willing to work for lower wages. Many more conservative members of Congress agree with that stance philosophically. Once again, this leads to an interesting convergence of opinion against the entry of lower-skilled immigrants by hardline conservatives and the labor movement. But there is an ongoing failure to distinguish between regular and irregular migrants in these discussions.

Finally, there is a real difference of opinion on immigration among minority communities in the United States. For example, it would be natural for African-Americans to feel a kinship with immigrants who may share similar histories of discrimination. However, more and more members of the African-American community are looking critically at U.S. immigration policy and questioning whether the admission of immigrants—both skilled and unskilled—is at the expense of jobs that might otherwise be held by African-American workers.

### *Australia*

Australia's Migration Program is planned. The federal government allocates places each year for people wanting to migrate permanently to Australia (Annual Indicative Planning Levels). Planning numbers fluctuate according to the priorities of the government of the day, from 52,600 places in the early 1980s through to a high of 190,000 places in 2017-18. Temporary visas have also increased substantially, to 8.5 million in the financial year 2016-17. Recent debate on sustainable population growth amid increasing level of community concern about impact of immigration on infrastructure, cost of housing and environmental impact has led to some advocates calling for a reduction of immigration, to enable the country to pause whilst an infrastructure deficit is overcome, and the development of a cohesive population policy.

In September 2017, the Department of Home Affairs (DHA) commenced consultations on Australia's future visa system. Whilst acknowledging Australia's visa system has served the nation well without significant change for over 30 years, changing global migration patterns and the complexity of Australia's visa system makes it difficult for visa applicants to navigate and understand, and challenging for DHA to administer. Key areas for consideration under this 'visa simplification' agenda, include:

- reducing the number of visas from 99 to approximately 10 visa types
- delineating between temporary entry and long term or permanent residence
- the role of provisional residence in enhancing the integrity of the visa system and easing the burden on taxpayers; and
- ensuring the visa system supports Australia as a competitive and attractive destination for temporary and long-term entrants.

The Turnbull government pushes a number of key themes that influence the immigration portfolio. These include:

- An economic plan focused on jobs and growth to ensure Australia continues to successfully transition from the mining investment boom to a stronger more diversified economy. However, stagnant wage growth and strong growth in house prices is turning the public mood away from high levels of immigration.
- A tough border control policy. Following large numbers of illegal maritime arrivals, under Operation Sovereign Borders, the government took a hard line to stop the trade of people smugglers by turning back boats, offshore processing, and temporary protection visas. This policy proved very popular in certain electorates and is widely credited as influencing the election in 2013. The messaging has continued since that time despite the success of the policies in stopping boat arrivals, in the context of the rise of populist minor parties, many of which argue that immigration should be decreased or stopped all together.
- Additional threats to national security, and a focus on targeting organised crime, have also changed the immigration landscape, with the establishment of the Australian Border Force in 2015; and the creation of the DHA 'super ministry' in 2017, with responsibility including national security, law enforcement, border control, and immigration and citizenship.

- Legislation is currently before the Parliament to amend the Citizenship Act to increase the number of years migrants have to be settled in Australia before they can apply for citizenship; and to demonstrate “competence in English” in order to qualify. An earlier version of this bill was defeated in the Senate in October 2017.
- The introduction, in March 2018, of the Temporary Skills Shortage (TSS) visa, which replaced the 457 visa and reduced the number of eligible occupations. Part of the Government’s significant reform package to strengthen the integrity and quality of the Australia’s temporary and permanent employer sponsored skilled migration programmes, its introduction signalled that “Australian jobs [would be put] first”. However, at the same time, the policy emphasised that businesses still get access to the skills they need to grow and invest, and there is a need to attract the best and brightest to grow the economy and meet Australia’s identified labour shortages.

### *Canada*

Immigration continues to play a vital role in shaping Canada’s culture and society. The system takes into account current socio-economic factors that will benefit Canada and Canadians as a whole. The immigration program aims to contribute to commercial growth and contribute to broadly accepted social objectives.

The core of Canadian immigration policy has three goals:

- to foster the development of a strong, viable economy in all regions of the country;
- to facilitate the reunion in Canada of Canadian residents with close family members from abroad; and
- to fulfill Canada’s international legal obligations with respect to refugees and to uphold its humanitarian tradition.

Current Canadian permanent migration and settlement policy is closely related to Canada’s focus on long term labour market demands, especially regarding high skilled labour.

**Population growth is fueled by immigration:** Statistics Canada has projected that by 2036, immigrants could make up 30 per cent of the total population of the country. The Conference Board of Canada has estimated that by 2033, all of the country’s population growth would come from immigration.

**Economic immigration remains a high policy priority:** Immigration, Refugees and Citizenship Canada (IRCC), recently introduced a multi-year immigration plan to welcome over 1 million new permanent residents over the next three years; 310,000 new permanent residents in 2018, 330,000 in 2019, and 340,000 in 2020. The expected makeup of immigrants being granted permanent residence in 2018 will come from Economic-based immigration programs (57.25%), Family-based immigration (27.75%), Refugee-based immigration (13.87%), and other Humanitarian-based immigration (1.13%) – these ratios are expected to remain roughly the same until 2020. For additional information, please refer to Table 1 – Multi-Year Immigration Plan. On the flip side, Immigration policy related to family migration and refugee/humanitarian entry has remained relatively stable over the last few years. The exception is the introduction of a cap of 10,000 places available each year for parents of Canadian citizens/permanent residents. Successful candidates are randomly selected from a pool to apply. Most permanent entry policy changes have related to skilled migration categories.

**The government has fine-tuned a flexible permanent residence immigration system:** The introduction of the Express Entry System, for skilled migrants applying through the Federal programs, has resulted in

faster processing for a large component of the immigration program. This system is being used to increase the government's ability to process a high number of applications while not adding greatly to government staffing needs.

**The government went to quick work on putting to rest controversy on foreign workers in Canada:** In 2013 there was a controversy associated with use of the Temporary Foreign Worker Program amid concerns that temporary entrants may have been taking jobs from Canadian citizens and permanent residents. Subsequent changes have imposed additional criteria for applicants and a compliance audit mechanism has been added to ensure that sponsoring employers comply with undertakings made to government.

**From a policy perspective, temporary skilled workers have become the source of permanent residents:** The presence of temporary skilled workers in Canada is a major source of permanent residents. In 2016, 69% of applicants granted permanent resident status through the Express Entry stream were already lawfully resident in Canada. These applicants are drawn from people holding work permits and international students who subsequently obtained a Post Graduate Work Permit in a skilled occupation.

**Immigration is not very contentious in Canada:** From a political perspective, immigration in Canada remains surprisingly uncontroversial. It is not as contentious as it is in other countries. In fact, all the major political parties in Canada are more or less "pro-immigration", especially when it comes to skilled immigrants.

### *Switzerland*

Switzerland is a Federal State consisting of 26 cantons. The first 3 cantons founded Switzerland in 1291 and the last canton, Jura, was created in 1976 after it split off from the canton of Bern by referendum.

Each canton acts more or less as an independent republic with their own written constitution and the most important legislation on a municipal, cantonal and federal level is decided by a referendum to which only Swiss citizens can participate. To vote on a federal level one must be 18 years old. On a cantonal level the age to vote can differ (mostly 16-18 years). Women can vote on a federal level since 1971 and in 1991, following a decision by the Federal Supreme Court, the canton of Appenzell Innerhoden became the last Swiss canton to grant women the vote on local issues.

Federal referenda are organized almost every quarter (February, June, September and November) and usually consist of 2-4 questions on which the voters have to decide with "yes" or "no". The initiative for a referendum can come from the people (people's initiative based on 100.000 or 50.000 signatures depending on the matter), the cantons (if 8 cantons ask for a federal referendum) or the National Council.

The Swiss Federal Constitution regulates the general principles of Swiss Immigration Law (art. 121) and in general the economic interest, the welfare of the Swiss people, the protection of local workforce and the internal security prevail. The Federal Constitution in a chapter called "Immigration control" foresees annual quantitative and limited quotas of foreigners working and/or living in Switzerland.

In that context immigration policy in Switzerland is depending largely on the public opinion.

Although Swiss people have a tendency for collectivism rather than individualism, the results of referenda on immigration topics are usually very conservative and protective. Thanks to their conservative view on

immigration and euroscepticism, the SVP (Swiss Peoples Party) became the largest party in the National Council (33%) and delivers since 2016 two of the seven members of the Swiss Federal Council. E.g. in 2009 the SVP launched and won the initiative on the prohibition of building minarets which is now embedded in the Federal Constitution. Also the referendum against mass immigration (09.02.2014) and won with 50,3% was an initiative coming from the SVP.

Since 1973 Switzerland has a free trade agreement with the European Union. Membership of the EEA and EU was twice rejected by the people. Since 2002 Switzerland is a member of the United Nations.

Switzerland has signed approx. 210 treaties with the EU. Each treaty took on average 7 years of negotiations between the EU and Switzerland.

In order to gain access to free trade with the EU, Switzerland in 2002 underwrote the Free movement of People and Free movement of Services principle of the EU. Additionally Switzerland pays approx. 2 billion euro a year to the EU and in order to have access to the market of Eastern European member states Switzerland contributed approx. 12 billion euro since 2008 into EU projects designed to reduce the economic and social disparities in an enlarged EU.

The 10 most important treaties with the EU are bundled in what is called “Bilateral I” and “Bilateral II” and include a.o. Free movement of People, Air and Road Traffic, Agriculture, Science, Asylum and the Schengen Agreement. Since 2012 Switzerland is part of the Schengen Area.

In Switzerland 29% of the population is foreigner, which makes Switzerland the 6<sup>th</sup> country in Europe with the highest amount of foreigners (1. Vatican City (100%), 2. Monaco (64%), 3. Andorra (57%), 4. Luxembourg (43%), 5. Liechtenstein (33% - source: United Nations)

The vast majority of immigrants in Switzerland comes from Italy, France, Germany and former Yugoslavia.

## **2. How are higher skilled migration and skills shortages managed?**

### *United States*

Higher skilled migration and skills shortages are managed through an employment-based immigration scheme that is employer-centric, with employers filing paperwork with the government on behalf of individual foreign workers. Most higher skilled migrants enter the United States first as what we call “nonimmigrants” (temporary workers), and later adjust their status to become “immigrants” (permanent residents).

The major short-term or temporary nonimmigrant work visas for higher-skilled workers include the H-1B visa, reserved for foreign nationals possessing at least a U.S. bachelor’s degree or equivalent who will work in a position requiring at least a bachelor’s degree in a related field. There is an annual cap of 65,000 H-1B visas for persons holding bachelor’s degrees, with another 20,000 visas reserved for holders of master’s or higher degrees.

Other relevant nonimmigrant visa categories for higher-skilled workers include the E-1 category, which allows a national of a country with which the United States has entered into a treaty of commerce and navigation to engage in international trade in the United States; the E-2 category, for treaty country

nationals investing a substantial amount of capital in a business in the United States; the L-1 category, for intracompany transferees working in an executive or managerial capacity; the O-1 category, for persons of extraordinary ability in the sciences, arts, education, business or athletics; the P category, for internationally recognized athletes, performers, artists and entertainers; and the TN category, a visa category created by the North American Free Trade Agreement (NAFTA) for professionals from Canada and Mexico.

For permanent residence gained through employment for higher skilled workers, the United States has a merits-based system, where individual workers qualify based on their educational credentials and professional experience. Individual employers sponsor individual foreign nationals to fill specific labor needs, after demonstrating that hiring a foreign worker would have no adverse impact on the employment of similarly situated U.S. workers in the local labor market.

For the most highly skilled workers, employers are exempt from the labor market test. These “priority workers” which constitute the first employment-based immigrant visa category include foreign nationals deemed to possess extraordinary ability in the sciences, arts, education, business or athletics; outstanding professors and researchers; and intracompany transferees at the executive and managerial level. In addition, employers hiring persons of exceptional ability in their fields whose employment in the United States would be in the national interest are also exempt from the labor market test.

The second employment-based immigrant visa category, for persons of exceptional ability or persons holding a master’s or higher degree, requires a labor market test. The same is true of the third employment-based immigrant visa category for persons holding at least a U.S. bachelor’s degree or for skilled workers in occupations requiring at least two years of training or experience.

Out of a total average of more than 1 million persons who migrate permanently to the United States each year, only 140,000 visas are allocated to employment-based migrants. Of these, 110,120 are made available to the high skilled workers discussed above—priority workers, persons with exceptional ability, and persons with education equivalent to a U.S. bachelor’s or higher degree who will be filling jobs requiring such degrees.

As unwieldy as this system is, it does a better job at matching higher skilled workers with appropriate job opportunities than a merit-based points system would do, since points systems can result in encouraging the migration of persons with skills that are not needed in the national economy.

### *Australia*

Changes to the skilled migration program since 2009 have shifted the balance away from independent skilled migrants towards sponsored skilled migrants, who have an offer of employment. This reflects the move away from ‘supply driven’ independent skilled migration towards ‘demand driven’ outcomes, in the form of employer and government-sponsored skilled migration. The policy intention is to enable the program to better target the immediate skills needed in the economy and ensure that skilled migrants are employed in the industries that have the highest need, whilst also increasing the likelihood that new migrants will contribute to the economy and achieve economic independence.

Four main categories exist under the skilled component of the Migration Program:

- General Skilled Migration (GSM) – for skilled workers in high-value occupations who do not have an employer sponsoring them. Migrants are selected on the basis of their nominated occupation, age, skilled, qualifications, English language ability and employability.
- Employer Nomination Scheme (ENS) – for those who have an employer willing to sponsor them.
- Business Skills Migration – which aims to encourage successful business people to settle in Australia and develop new business opportunities.
- Distinguished Talent – a small category for distinguished individuals with special or unique talents of benefit to Australia.

Australia’s employer-sponsored, points-tested and state nominated visa programs are underpinned by three skilled migration occupation lists, developed and reviewed bi-annually by the Department of Jobs and Small Business based on research on skill shortages in the Australian labour market at the state, territory and national level, with final approval resting with the Minister for Citizenship and Multicultural Affairs:

- The Short-Term Skilled Occupation List (STSOL)
- The Medium and Long-Term Strategic Skills List (MLTSSL); and
- The Regional Occupation List (ROL).

The intention of these lists is to ensure that only migrants whose skills are in an identified area of need are able to obtain a visa.

In 2012, significant changes were made to GSM (a migration pathway without employer sponsorship), requiring prospective applicants to first lodge an expression of interest with SkillSelect, an online system that ranks applicants based on factors such as age, education and work experience. Applicants are also required to nominate an occupation on the Skilled Occupation List and be assessed by a relevant assessing authority as having the skills required for that occupation. Highly ranked applicants are then invited to apply for permanent skilled visas, and state and territory governments are able to nominate a highly skilled person for a visa. Independent skilled visas also require an applicant to pass a points test, with additional points awarded to applicants invited to apply for a visa by a State or Territory government. The curtailing of the GSM program has resulted in ENS becoming Australia’s primary skills-based migration pathway.

Arguably the greatest change in immigration patterns to Australia in the past decade has been the growth of long-term temporary migration. Temporary migrants do not comprise part of the Migration Program, however temporary migration is increasingly becoming the first step towards permanent settlement in Australia, particularly under the now defunct 457 visa program.

“Temporary” skill shortages are now addressed by the Temporary Skills Shortage (TSS) visa, with key features including:

- Different lengths of visa able to be granted based on whether an applicant’s occupation falls within the “short term” or the “medium-long term” skills shortage list;
- A requirement of two years’ relevant work experience, mandatory Labour Market Testing (LMT) (unless exemption applies) and limitations on the number of renewals and capacity to progress to permanent migration based on the same premise, including the need for those applicants on the “short term” skills shortage list to show a genuine intention to remain in Australia only temporarily.

*Canada*

Canada has several programs to manage higher skilled migration and skills shortages. The temporary entry of skilled workers sponsored by employers is separated principally into two main programs: the Temporary Foreign Worker Program (TFWP) and the International Mobility Program (IMP).

The TFWP was designed specifically to fill temporary labour and skills shortages where qualified Canadians and permanent residents are not available. The program involves a labour market test to ensure that there are no Canadians or permanent residents willing and available to take the required position. The program contemplates both high and, to a lesser extent, low skilled labour shortages of a temporary nature. In many cases it is subsequently possible to obtain permanent resident status (see paragraph 8).

Most work authorizations under the TFWP usually take several months for the application to be approved. Once approved a work permit application must be submitted either at the port of entry for visa-free nationals, or at a diplomatic mission abroad for those who are required to obtain a visa to travel to Canada. As a result of the time it takes to receive approvals for work authorization, new programs have been introduced to address widespread skills shortages for specific industries in the Canadian economy. The number of applications approved under the TFWP has remained relatively constant since 2015, ranging from 74,000 to 79,000 per annum.

The IMP was created to advance Canada's broad economic and cultural national interests. One IMP category, the intra-company transfer work permit category, is used by employers to sponsor temporary foreign workers. The program includes agreements between Canada and other countries (i.e. NAFTA, Canada-European Union Trade Agreement and the Comprehensive Economic and Trade Agreement, Comprehensive and Progressive Agreement for Trans-Pacific Partnership). The agreements allow for reciprocal work arrangements for Canadians abroad and for foreign workers entering Canada to provide services in a range of high skilled occupations. Some new categories have been introduced in the trade agreements, including concessions for new graduate recruits and some service sellers.

Work authorizations managed under the IMP are not labour market tested, however, candidates must qualify by demonstrating that they possess work experience and knowledge in their occupation. As a result of foreign direct investment and Canada's participation in a multitude of bilateral and multilateral agreements, work permits issued under the IMP have increased from 235,000 approvals in 2013 to over 322,000 in 2017.

### *Switzerland*

In Swiss immigration law a distinction is made between EEA and non-EEA nationals. Until 2024 specific rules will apply for Croatian nationals.

Since the Swiss Immigration Act of 2008 Switzerland works with a quota system for non-EEA nationals on assignment or on a local Swiss employment contract and for EEA nationals on assignment.

As a result of the Bilateral I with the EU, EEA nationals on a Swiss local contract can freely move to Switzerland and will automatically receive a residence and work permit when they provide a Swiss employment contract and a rental agreement.

For 2018 Switzerland will grant maximum 8.000 work permits for non-EEA nationals, consisting of 4.500 L permits (max. 1 year) and 3.500 B permits (max. 5 year). The permits are divided between the 26 Cantons



(50%) and the Federal Authority (50%). Each Canton receives a number of permits depending on several parameters o.a. size, economic interest, industries,... The 50% of permits that are held by the Federal Authorities are released one by one if a canton runs out of permits and can justify why a certain non-EEA national should be granted a permit.

For EEA nationals on assignment a total number of 3500 work permits will be available in 2018. This category of permits is released by the Federal Authorities on a quarterly basis and are in principle available to all Cantons on a first come first serve basis.

For Croatian nationals on assignment or on a Swiss employment contract a total number of 826 work permits is available in 2018.

Most of the Swiss cantons have a border with the EU. In 2016 a total number of approx. 320.000 frontier workers passed the Swiss border every day to work in Switzerland. This category receives a G-permit. The number of G-permits that can be granted is unlimited.

Work permit applications are filed on a cantonal level and in some cantons the approval is needed from 3 different cantonal authorities (e.g. Geneva). For some categories of permits also the approval on a Federal level is needed.

#### Important change:

As a result of the outcome of the referendum against mass immigration on 9 February 2014 and after long negotiations between Switzerland and the EU, new legislation will come into force on 1 July 2018.

The EU was against Switzerland implementing quota for EEA nationals on a local Swiss employment contract as this was against the principle of free movement of people that Switzerland had underwritten in 2002 in order to get free access to the enlarged EU trade market and in order to have Swiss students participate for free at the Erasmus and Socrates programs. The main principle of the new legislation will be that local Swiss workforce will always have priority and a job search in Switzerland will need to be proven for a list of approx. 350 professions for which the unemployment rate is 8% or more. From 1 January 2020 the search will be expanded to all jobs for which the unemployment rate is 5%.

### **3. How are lower skilled migration and labour shortages managed?**

#### *United States*

U.S. immigration law addresses lower skilled migration and labor shortages by permitting employers to bring in foreign workers to fill temporary or seasonal jobs. The H-2A visa scheme permits employers who can demonstrate to the satisfaction of the U.S. Department of Labor (DOL) that there are insufficient U.S. workers who are able, willing, qualified, and available to do the work to employ qualified foreign nationals in temporary agricultural jobs. The employer must also show that employing H-2A workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. Individual workers are only authorized to work in the United States in H-2A status in one-year increments, for a total of no more than three years.

A similar program for temporary non-agricultural workers, known as the H-2B visa program, allows employers to bring in foreign workers to fill temporary or seasonal jobs in other seasonal industries. These typically include jobs in ski resorts, amusement parks, in the hospitality industry, and in landscaping companies. There is an annual statutory cap of 66,000 H-2B visas that can be issued each year. Like the H-2A program, employers of prospective H-2B workers must first obtain certification from the DOL that there are no qualified U.S. workers available before they can employ workers in H-2B status.

To sponsor a lower skilled worker for permanent residence, employers must first submit evidence to the DOL that they are offering at least the DOL-determined prevailing wage for the job offered and that they have been unsuccessful in finding a U.S. worker in the geographic area where the job will be performed to fill the position. Only once the DOL certifies that there are no qualified U.S. workers available, and that hiring a foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers, can the employer proceed with filing a petition to qualify the individual as a permanent resident. That then allows the individual worker to adjust his or her status to permanent resident.

A total of 10,000 immigrant visas (i.e., visas allowing the individual to obtain permanent residence in the United States) are allocated each year to lower skilled workers. In addition to the annual numerical limitation, there are “per country” limits—no more than seven percent of the total available employment-based immigrant visas (for both higher skilled and lower skilled workers) can be issued to persons from a particular country—which can lead to lengthy backlogs for prospective workers from oversubscribed countries. (For example, in April 2018 lower skilled workers from China and India are subject to a wait of over 10 years.) Lower skilled workers are defined as those performing labor requiring less than two years of training or experience. Such labor must not be of a temporary or seasonal nature.

It is worth noting that there is a very strong lobby for increasing the numbers of lower-skilled immigrant workers—typically called “essential workers”—in the United States. As recently as 2013, the U.S. Senate passed a bipartisan comprehensive immigration reform bill that would have created a new “W visa” program for lower-skilled immigrants, potentially admitting as many as 200,000 essential workers each year based on an analysis of employment data.

### *Australia*

Australia has few opportunities for permanent and temporary migration based on unskilled or semi-skilled occupations; noting that in some areas of the country youth unemployment is reported to be as high as 60%. The majority of the occupations on the eligibility lists are professional and/or highly skilled. Many of the lower skilled labour shortages are filled by temporary visa programs, specifically international students, working holiday-makers and seasonal workers under Pacific Island schemes. Periodically, the issues of lower-skilled labour management come under scrutiny in terms of worker protection. Between 2013–2016, the Fair Work Ombudsman dealt with over 6000 requests for assistance from immigrant workers, and in 2014-15 these claims formed just under 11% of all requests.

### Working Holiday Maker/Work and Holiday Maker programs

The stated objective of the Working Holiday Maker program is to encourage cultural exchange and closer ties between Australia and eligible countries (with reciprocal rights for Australian citizens). Starting as a small program for young people from the UK and Canada for work and travel purposes in 1975, it has expanded over the decades to now encompass 40 partner nations and regions (Hong Kong Special Administrative Region of the People’s Republic of China) from across the globe. The programs are capped

and are often exhausted very quickly when places are released. While many working holiday makers travel and work in the traditional areas of retail and hospitality, there are also additional benefits to undertaking specified work in regional areas, and many participants benefit from these additional incentives. This is discussed further below in consideration of approaches to regional immigration.

### Students

The international education industry is Australia's third largest export industry, and in the latest available figures from the DHA, there was an estimated 500,000 student visa holders in Australia in 2017.

Student visa holders have a right to work up to 40 hours per fortnight while their course is in session, and have unlimited work rights during holiday periods. Their work patterns steer towards lower skilled jobs with flexible hours, and many will work in retail or hospitality in comparatively low paid roles with high turnover, competing for these entry-level jobs against young and unskilled Australians seeking entry to the workforce. Media reports of student visa holders working in excess of their visa conditions or being exploited occasionally surface in the media. In 2015-2016, in what was reported as 'probably Australia's greatest worker exploitation scandal', international students were reportedly paid as little as \$0.47 per hour by franchisees of 7Eleven and made to work well in excess of the permitted time, with reports suggesting anywhere from \$25 million to \$50 million was owed across at least 60% of franchises. Also in 2016, the Senate Standing Committee on Education and Employment released its final report following its inquiry into the impact of Australia's temporary work visa programs on Australian labour market and temporary visa holders, titled *A National Disgrace: The Exploitation of Temporary Work Visa Holders*.

### Pacific Island Seasonal Schemes

The Pacific Island Seasonal Worker Program (SWP) provides access to seasonal work opportunities in the Australian agriculture and accommodation industries in Northern Australia to Australian employers who are unable secure local labour. The objectives of the SWP are to support Australia's economic development objectives in the Pacific region, by enabling workers to contribute to economic development in their home countries through remittances, work experience and training.

This SWP started in 2008 intending to alleviate labour shortages for the Australian horticultural industry by providing opportunities for workers from certain countries in the Pacific to undertake seasonal work. The program was capped up until 1 July 2015; after this the cap had been removed. Nevertheless, the numbers remained quite small, with only some 2,800 visa places even after the removal of the cap.

In 2017 the Government announced a new Pacific Labour Scheme to enable citizens of Pacific island countries to take up low and semi-skilled work opportunities in rural and regional Australia for up to three years. The Scheme will commence in July 2018 with an initial intake of up to 2000 workers to focus on sectors with projected employment growth in Australia and which match Pacific island skill sets. These include accommodation and food service industry, health care and social assistance, non-seasonal agriculture, forestry and fishing industries.

The scheme has been set up as an employer sponsored program and, in line with Australian jobs first approach, it requires labour market testing to ensure Australians have priority for local jobs and contain certain protections to safeguard against worker exploitation.

### *Canada*

Lower skilled migration into Canada is managed at both the Federal and Provincial levels. A number of programs have been created to meet the demand for low skilled labour shortages throughout Canada, each program catering to the specific needs of the province or region where a shortage exists.

The Federal government, under what is called the Temporary Foreign Worker Program, maintains one main program specifically designed to meet labour shortages, which relates to seasonal workers in the agricultural sector. The Caregiver Program was a second category for lower skilled workers but it has now been closed. Since 2015 the number of lower skilled migrants utilizing the Federal programs to perform temporary work in Canada has seen a slight increase, from 47,535 temporary foreign worker applications approved in 2015, increasing to 52,935 in 2016, and falling to 51,535 in 2017.

The Global Skills Strategy was introduced in June 2017 to address labour shortages in Canada's IT industry. The program is still in the pilot stage and its effectiveness is still being assessed.

In addition to the Federal programs, some provinces maintain separate and distinct immigration programs to meet their labour needs. The Federal Government will allocate quotas within the overall immigration planning levels to each province. Provincial Nominee Programs are designed to select candidates who have skills, education or work experience in occupations where a shortage of labour exists and provides support for localized labour needs.

For some provinces their programs are critically important in contributing to overall immigration numbers. In 2015 provincial nominees constituted 59% of approvals for Prince Edward Island, 46% for New Brunswick, 51% for Manitoba and 54% for Saskatchewan. It is worth noting that once permanent resident status is obtained, there is no obligation on the applicant to remain in the nominating province. This is an area of concern for some provinces.

#### *Switzerland*

Before the Swiss Immigration Act of 2008, Switzerland had since 1931 a work permit category called "saisonniers" for non-EEA lower skilled immigrants and was since the nineties mostly granted to immigrants from former Yugoslavia to work in the construction business, the agricultural sector or the tourism industry. After 3 years as a "saisonnier" these workers could apply for a B permit (5 years permit).

Since 2008 it is almost impossible for lower skilled non-EEA nationals to apply for a Swiss work permit as first the Swiss labour market and then the EEA market needs to be exhausted.

Lower skilled migration in Switzerland usually comes from the neighbouring countries with Germany, Italy and France taking the lead depending on the canton. As these are EU nationals, based on the free movement principle, they will automatically receive a residence and work permit when they provide a Swiss employment contract and a rental agreement and as far they do not fall under one of the professions that will be listed for job search as from 1 July 2018.

#### **4. How does your immigration system cater for self employed and other atypical workers?**

##### *United States*

The U.S. immigration system does not cater well to self-employed and other atypical workers. The employment-based immigration system (for both permanent and temporary workers) is primarily designed to permit corporations, universities and other institutions to petition on behalf of individual foreign workers to fill specific jobs within those organizations. There are a few exceptions allowing individuals to self-petition, but they account for a very small percentage of the overall employment-based migration scheme.

For permanent (i.e., long-term) workers seeking permanent residence in the United States, it is possible to self-petition if one fulfills the legal criteria of a person of extraordinary ability in one's field; if one is seeking employment that is demonstrably in the national interest of the United States; or if one seeks residence through the investor visa scheme (requiring investment of at least US\$1 million and the creation of at least 10 jobs for U.S. workers, or US\$500,000 in a rural or high-unemployment area).

In addition, just under 10,000 immigrant visas are made available each year for "special immigrants" including certain religious workers, armed forces members, physicians, Afghan and Iraqi translators and others.

For temporary (i.e., short-term) workers, it may be possible to obtain a visa and work authorization through the E-1 temporary visa program for so-called "treaty traders", or through the E-2 visa program for "treaty investors". In both cases, there must be a reciprocal treaty of commerce and navigation between the worker's home country and the United States, and the employing entity must generally be at least 50 percent owned by persons in the United States who have the nationality of the treaty country.

Finally, the Diversity Visa Lottery, while not an employment-based program per se, provides another path to permanent residence for atypical workers. Applicants need only demonstrate that they possess at least a high school education or equivalent, or have two years of work experience within the past five years in an occupation that requires at least two years of training or experience. DV visas are only available to persons from countries who have sent fewer than 50,000 immigrants to the United States in the previous five years.

### *Australia*

There are various piecemeal programs which have the result of catering, if sometimes a little awkwardly, for self-employed and other atypical workers. However, complexity arises from attempts to fit into different categories in the overall overriding focus on sponsored work, and this does sometimes mean that applicants need to change their circumstances to fit within the available visa products.

This has been acknowledged in the context of the Visa Simplification agenda. Fragomen also flagged this issue in our submission to the departmental consultation paper on Managing Australia's Migration Intake, noting that digitalisation and an increasingly globalised economy has led to a growing pool of highly skilled individuals who prefer to engage in work on a project basis and move around the world doing so. One emerging trend not sufficiently catered for at the moment is the gig economy and the growing desire for mobility between employers.

Some of the existing arrangements for atypical workers are as follows:

Temporary Work (Short Stay Specialist) visa (subclass 400) allows short-term, non-ongoing, highly specialised work, where the specialist knowledge is not reasonably able to be sourced in Australia. This

requires an invitation by the company the applicant will be doing the work for; but it does not require formal sponsorship or an employer/employee arrangement. The visa allows a stay of up to three months in any calendar year, which may be extended to 6 months where a strong business case is presented.

The Temporary Activity Visa (subclass 408) allows visa holders to undertake activities such as working in the entertainment industry; participating in or observing an Australian research project; working in a skilled position under a staff exchange arrangement; participating in high level sports competitions or training; full time religious work; employment as a member of a Superyacht crew; full time domestic work in the household of certain foreign executives; or participating in a government endorsed event. This visa does require support (for visas under 3 months) or sponsorship (for visas over 3 months) by an Australian organisation.

Entrepreneurs and investors may look at either the Business Innovation and Investment Visa (subclass 188), which requires an investment of between \$1.5 million and \$15 million; or the Business Talent Visa (subclass 132) for individuals who can either demonstrate a significant business history or who have sourced venture capital funding from a member of the Australian Venture Capital Association Limited. Both of these categories still require a nomination by an eligible government organisation, and applying through Skills Select is mandatory.

From 1 July this year, a new visa scheme designed to attract highly skilled global talent and deliver innovation to Australia will be piloted, under the established business and the start up streams, in response to the government's recognition of the fierce competition globally for high-tech skills and talent with the following key elements:

- Established businesses with an annual turnover of more than \$4 million will be able to sponsor highly skilled and experienced individuals for positions with earnings above \$180,000
- Start-ups will need to be recognised by a start up authority
- The need to demonstrate prioritisation of employment of Australians and a skills transfer to Australian workers
- Additional focus on technology-based and STEM-related start-up businesses.

In both streams, a four year TSS visa will be issued with permanent residence available after three years.

Finally, if applicants under the TSS visa are able to set up their own business and be approved as sponsors, they would also be able to self-sponsor.

### *Canada*

The Government of Canada maintains a handful of programs that have been created for self-employed and atypical workers. The Federal government has created the Start-up Visa program for individuals who intend to start a business that will have the possibility of significant growth in Canada. In 2018 the Federal government committed CAD\$4.6 million to the program, however, despite the intention of the government to foster growth in growth industries, the program has largely been seen as unsuccessful given the requirements of securing commitments from designated Canadian angel investors to fund the business proposition. In the period from 2013 to 2016, a total of 51 applications were approved.

At the provincial level, the provinces operate immigration schemes for entrepreneurs and in Quebec for investors. These programs operate to bring investment into the province through the individual and entrepreneur applicant streams. The programs have very specific criteria that must be met in order for

the applicant to be invited to apply. Eligibility criteria relate to such matters as net worth, minimum investment levels and planned job creation, are all taken into account to ensure the success of the candidate and the viability of the program. Candidates in the entrepreneurial streams are expected to be actively engaged in the business as opposed to passive engagement.

The Province of Quebec operates a Quebec Immigrant Investor Program, in which a passive investment of CAD 1.2 million is made for a five year period (it was CAD 800,000 until 2018). Successful applicants are not required to establish or actively manage a business.

Canada also allows for self-employed individuals to work in Canada through bilateral and multilateral agreements. The provisions of the North American Free Trade Agreement (NAFTA), Canada-European Union Comprehensive Economic and Trade Agreement (CETA), and the yet to be ratified Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), allow for independent professionals to provide services in Canada as long as they meet agreement-specific criteria to be approved for work authorization. Unlike the entrepreneurial and investor programs, work pursuant to the bilateral/multilateral agreements is based primarily on meeting base criteria, such as having work experience and a post-secondary education to meet the requirements for work in Canada. Obtaining work authorization, especially from countries where nationals are visa-free to enter Canada, can be on arrival at the port of entry. Thus these streams tend to facilitate work on a short-term immediate basis in Canada.

### *Switzerland*

The EU free movement of people foresees that EEA nationals can be self-employed on the Swiss territory. They will receive a 5-year permit that can be renewed if they can prove that their business is successful and can cover their living costs. For regulated professions (e.g. attorney, doctor etc.) there is reciprocity between the EU and Switzerland on recognition of diplomas for which minimum 3 years of higher education is necessary.

Self-employed European nationals lose the right to residence if they can no longer cover their living costs and become dependent on welfare assistance.

To get a permit as a self-employed worker, the EEA applicant must present the following documents as a general rule:

- Proof that the company has been correctly registered in the commercial register
- Proof of a professional domicile in Switzerland (a rental contract for the business premises)
- Proof of contributions to the Old-Age and Survivors' Insurance Fund (OASI) or the Swiss Accident Insurance Fund (SUVA)
- Proof of a regular income showing that there is no risk of needing welfare assistance
- Bookkeeping data (interim balance, etc.)
- Business plan

It is extremely rare that a person from a third state (non-EEA) is given a residence permit based on self-employed work. In the rare occasion that a permit was granted, the self-employed, who had previously been successful abroad, had presented a strong and unique business plan to the cantonal authorities and provided employment to a significant number of Swiss local workers. The cantonal authorities checked annually whether the goals of the business plan were achieved.

## **5. How effectively does your system provide for small and medium size employers?**

### *United States*

U.S. immigration law does not distinguish between small- and medium-size employers versus large employers. Small- and medium-size employers must use the same temporary and permanent employment-based visa categories that are used by large employers.

For example, an intracompany transferee may qualify for an L-1 visa as an executive or manager. To qualify, the employer must be doing business in the United States and be the parent, affiliate, subsidiary or branch of a corporate entity abroad, and the employee must have worked for a related corporate entity abroad in an executive or managerial capacity for one continuous year in the three years preceding the employer's filing of a petition with U.S. immigration authorities.

The H-1B temporary work visa is available for persons working in what the immigration statute terms a "specialty occupation" which requires at least a U.S. bachelor's degree or equivalent in a field directly related to the U.S. job. However, there is an annual numerical cap of 65,000 for holders of bachelor's degrees, and 20,000 for holders of master's and higher degrees, which is exceeded each year and which results in a government-managed lottery to determine which filings are even adjudicated.

As a practical matter, the expense, time and difficulty involved in sponsoring foreign nationals for employment in the United States serve as high barriers for small- and medium-size businesses and tend to discourage smaller businesses from taking on sponsorship. Moreover, visa petitions filed by small- and medium-size employers tend to be more highly scrutinized by immigration authorities. These employers often find it more challenging to demonstrate their need to hire a foreign worker with certain skills or their ability to pay the required wage.

### *Australia*

SME and even start-ups can, in many cases, sponsor overseas workers, and generally the same rules apply to them as to larger organisations.

Under the predecessor to the TSS visa (the 457 visa), sponsoring employers had to demonstrate 1 or 2% of their payroll spend on training. This requirement was onerous for businesses and the Government also found it difficult to police. While it could verify that the money had been paid there was little evidence what the money was being spent on. As part of the announcement of the TSS visa, a new fixed-fee levy was unveiled for employers. While the legislation is still before Parliament, it is proposed that this compulsory payment will form part of the Skilling Australians Fund (SAF) to be spent on the training and development of Australians – including 300,000 apprenticeships and traineeships in high-demand occupations that currently rely on skilled migration.

Under the current proposal, businesses will be required to make an upfront payment of up to \$1,800 for every year they employ an individual on a TSS visa and make a one-off payment of \$5,000 for each employee they sponsor for a permanent skilled visa. This is proposed to be at a lower level for SMEs, with the payment reduced to \$1,200 per person per year and a one-off payment of \$3,000 for PR.

The introduction of the TSS visa has received a mixed welcome, with the SME sector undeniably the hardest hit. A number of stakeholders, including the Australian Chamber of Commerce, have vocally



expressed concern about the size of the levy announced and had recommended a levy at just \$400 for small business. The levy, in combination with increases in visa applications lodgement fees, could deter SMEs from using the visa program and lead to a fall in the number of applications.

The bill also proposes to formalise the LMT arrangements for the TSS visa. Some MPs have called for SMEs to be exempt from labour market testing; however it is widely thought this proposal will not receive majority support.

Submissions to DHA argue that policy settings from the perspective of the needs of Australia as a whole severely disadvantage SMEs, particularly those operating in regional areas of Australia<sup>1</sup>. The Northern Territory Department of Business argues that the Territory's high proportion of SMEs in the business community (some 93%, with most having less than 20 staff), are vulnerable to the boom-bust economy, with major projects in the mining and resources sectors have a significant impact on the Territory's labour market and the ability of SMEs to attract and retain workforces. The submission cites the example of the \$1.3 billion Darwin LNG facility over 2004-05, that absorbed the greater majority of the skilled workforce in Darwin, leaving local SMEs with significant workforce shortages.

In addition, the Temporary Skilled Migration Income Threshold (TSMIT) – an entry level salary threshold for sponsored workers to protect lower paid Australian jobs, and to ensure that visa holders have reasonable means of support, currently set at \$53,900 per annum - may also be seen as impacting disproportionately on SMEs in regional areas where the market rate of pay for some occupations is below TSMIT. In order to access overseas workers, SMEs are then forced to pay above market salary rates (often to their Australian workers as well to ensure workplace harmony). This results in an inflationary impact on wages which in turn impacts on a business's competitiveness in the market.

Another consideration is whether departmental sponsor monitoring action more disproportionately affects SMEs. DHA does so because of concerns that workers may be underpaid or may not be genuinely required to work in the nominated occupations; the SMEs' more limited level of sophistication or support mechanism (compared to a large multinational company) may place them at a disadvantage when it comes to fully understanding and fulfilling the sometimes complex sponsorship obligations.

### *Canada*

The current immigration regime in Canada provides some support for SME's. Most SME's tend to limit their use of foreign workers due to the time and expense associated with the work permit process. When a temporary worker is needed from outside Canada, the requirement is often critical to their growth. A number of these businesses use the Temporary Foreign Worker Program (TFWP), which provides for both high and low skilled occupations to obtain work authorization in Canada. However, the TFWP is often criticized for long wait times.

In response to the long wait times, the Federal Government introduced the Global Skills Strategy (GSS) in June 2017 to cater to the needs of sections of the Information Technology industry. The GSS facilitates the entry of IT-based workers for certain "high growth businesses" and IT occupations in short supply.

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<sup>1</sup> <https://www.homeaffairs.gov.au/ReportsandPublications/Documents/submissions/nt-dept-bus.pdf#search=Northern%20Territory%20Department%20of%20Business>

Canada's immigration system also allows SME's to procure talent by recruiting from larger competitors, especially once permanent residence has been obtained by an individual candidate. This secondary effect is largely seen in the IT industry where movement is facilitated by the GSS.

SME's can also take advantage of Canada's Free Trade Agreements, for nominated professionals, to bring in short term, immediate support for their business needs. If the SME has established offices outside of Canada, SME's can also utilize the intra-company transferee work permit category to recruit foreign talent. Through the current provisions of the NAFTA, SME's have been able to find support for their development and economic growth. At this point, due to the fact implementation has been only a few months or not happened as of this time, it may be premature to make a determination as to what benefits, if any, the provisions of CETA and the CPTPP will provide for SME's in Canada.

The Federal Government, with the participation of Canada's Atlantic Provinces, has also created a three year pilot program to address resource gaps and attract talent into their respective provinces by introducing the Atlantic Immigration Pilot. The Atlantic provinces' economies have struggled in the last decade and the program was introduced to support population growth, develop a skilled workforce and increase employment rates in the region. SME's in the Atlantic region are able offer positions in occupations of both high and low skill roles.

#### *Switzerland*

As work permits and access to foreign work force is granted on a cantonal level, it will mostly depend on the politics of the canton. Every canton has different policies but our experience is that an SME which has its head office in the canton, provides sufficient employment and income to the canton receives a beneficial treatment where possible.

### **6. Do you operate a system of regional immigration?**

#### *United States*

No, the United States does not operate any regional immigration system. There have been attempts to do so at the state level. For example, in 2011 the state of Utah enacted its own guest worker program. Because of the well-settled legal principle in the United States that Congress has plenary power over immigration, the Utah law included a provision requiring the state to obtain permission from the federal government before putting its program in place. While the law still remains on the books, the state has never gotten the go-ahead from the federal government and the law has never been implemented.

One federal program that is regional in impact is the Conrad 30 Waiver program for certain foreign medical graduates (FMGs). FMGs who obtain post-graduate medical training in the United States who would normally be required to return to their home countries for at least two years afterwards are eligible for a waiver of that requirement if they agree to be employed full-time for at least three continuous years at a health care facility in a medically-underserved area in the United States. Thereafter, they become eligible to apply for permanent residence.

#### *Australia*

A number of the Immigration portfolio's programs are specifically designed to assist regional and rural Australia, fill labour shortages unique to those areas and encourage migrants to settle there. These initiatives form part of the recent debate on sustainable population growth, which has included the idea of encouraging growth in regional areas away from the big cities. Significant thought leadership on the issue is also contained in *Our North, Our Future: White Paper on Developing Northern Australia*, with investment of \$26.9 million by the federal government to implement the measures recommended.

The Government has been committed to a range of programs to support regional Australia (delineated by postcodes as published from time to time via a Legislative Instrument), including:

- 1) The permanent annual Migration Programme helps to fill the need for skills in a range of regions and sectors. The Regional Skills Migration Scheme (RSMS) is the main program to attract migrants to regional areas. Introduced in 1995-96, it enables employers in a designated RSMS area to nominate applicants to fill skilled vacancies. Successful nominees who are prepared to settle in these regions are able to apply to migrate permanently to Australia.

State and Territory governments may also sponsor migrants under various visa categories.

- 2) Under the TSS visa, employers in regional Australia are able to sponsor skilled workers in a broader range of occupations than employers in non-regional areas. The Regional Occupation List (ROL) was released on 18 March to complement the STSOL and MLTSSL by adding additional occupations that can only be utilised in regional areas.
- 3) Special regional labour agreements (Designated Area Migration Agreement or DAMA) are able to be negotiated between State/Territory governments and the DHA, which simplify the process and lower the requirements for participating employers who wish to sponsor foreign workers to regional areas. There is currently one approved agreement in place, for the Northern Territory; another agreement, for Western Australia's Pilbara region, has been proposed.
- 4) The Seasonal Worker Scheme and the Pacific Labour Scheme are both targeted at supplementing labour shortages in regional and rural areas, in particular in horticulture and agriculture, but also in accommodation and food service industries.
- 5) Under the Working/ Work and Holiday Maker programs, it is possible for participants to become eligible to obtain a second visa if they have undertaken at least three months of specified work in a designated regional area while on their first visa. Approved industries for specified work include:
  - plant and animal cultivation
  - fishing and pearling
  - tree farming and felling
  - tourism and hospitality.
- 6) Other initiatives that are promoted as assisting regional growth and development include the Safe Haven Enterprise visa (encouraging holders of temporary protection visas to work or study in a designated regional area); and programs aimed at settling humanitarian entrants in regional areas (most recently, up to 500 displaced Syrian refugees were settled in Tasmania).

However, the success of these various initiatives is reported to be mixed, with the 2014 departmental report, *Regional Retention of Migrants*<sup>2</sup>, stating that “while visa incentives and settlement services may assist in drawing people to regional communities and in supporting them in their early settlement stages, they may be insufficient in encouraging migrant retention over longer periods of time” with concerns that “many migrants relocate to metropolitan areas ‘once freed from [their] visa requirements”.

### *Canada*

Canada has a well-integrated system of regional immigration. The respective Provincial Nominee Programs (PNP) have been created specifically to address labour shortages in provinces across Canada (see paragraphs 18 and 19, above). Eligibility is determined at the provincial level to ensure that the applicant meets the province’s specific immigration needs and to confirm that the applicant intends to reside in the province. Once the province nominates the individual, an application is made to the Federal Government, which assesses applicants against public interest criteria (i.e. health and character assessments). The application may be for temporary or permanent entry, depending upon the category.

One of the criticisms of the PNP is the inability to deposit immigrants in underpopulated areas of the respective province. Given the propensity of individuals to be attracted to the larger urban areas, some smaller communities are unable to attract talent to aid economic growth and development. As mentioned, a second area of concern is that new permanent residents are able to change their intention to reside in a nominating province and relocate to another part of the country.

The Province of Quebec operates an immigration system with additional features. Given the unique cultural identity and language rights of Quebec, the province has additional arrangements agreed with the Government of Canada.

### *Switzerland*

Distinction is made between EEA nationals and third country nationals.

Inside Switzerland each canton has its specific industry for which specific immigration needs might apply and the cantons are always willing to discuss and negotiate if it is in their economic interest. E.g. tourist industry in the Alpine cantons, seasonal workers in the agricultural cantons, pharmaceutical industry in the canton of Basel, diplomats for the canton of Geneva.

## **7. Does your country have any experience of regularisation schemes, e.g. DACA?**

### *United States*

U.S. law permits the federal government to extend a type of short-term humanitarian relief known as “temporary protected status” to foreign nationals who are already in the United States when a political development or natural disaster makes it impractical or dangerous to return to their home country. For example, TPS was extended to Haitians present in the United States when a devastating earthquake hit Haiti in January of 2010. Citizens of a number of other countries who had entered the United States before a designated date have also been able to qualify for TPS in recent years, including El Salvador, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria and Yemen. TPS does not permit

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<sup>2</sup> <https://www.homeaffairs.gov.au/ReportsandPublications/Documents/research/regional-retention-migrants.pdf>

irregular migrants to regularize their status in any permanent way, but it does provide them with temporary protection against deportation and allow them to apply for work permits. However, at this writing the Trump Administration has announced plans to terminate TPS for many of these countries.

There have been frequent, often ad hoc regularization programs in the United States over the years. The most recent example is the Deferred Action for Childhood Arrivals (DACA) program created by President Barack Obama, which permitted certain irregular migrants who had come to the United States as children and who met certain other criteria to request that the government exercise its discretion to defer deportation action against them for a certain period of time. It also allows them to secure legal work authorization. Because DACA was enacted through executive action rather than by Congressional legislation, DACA was subsequently rescinded by President Donald Trump without the need for Congress to enact any new law. Nonetheless, that rescission has been stayed pending the resolution of legal challenges making their way through the U.S. federal court system. In the meantime, DACA (or more specifically, a more permanent legislative replacement for the DACA program) remains an ongoing subject of discussion between the White House and Congress.

The most significant example of a regularization scheme in recent decades was the Immigration Reform and Control Act of 1986 (IRCA), a sweeping “amnesty” program that eventually legalized nearly three million irregular migrants. The legalization provisions were balanced by the creation of civil and criminal sanctions against employers who knowingly employ unauthorized foreign workers. Together, these two initiatives were meant to legalize much of the undocumented population already present in the United States whilst shutting the door behind them by removing the magnet of jobs that was drawing irregular migrants to the United States, mostly from Mexico and other countries in Latin America.

It is no understatement to say that to the extent that IRCA was meant to shut down irregular migration to the United States, it was a massive failure. IRCA led to the growth of a robust underground industry in counterfeit documents that irregular migrants used to obtain employment. With modern technology, it has become harder for workers to use false documents and for unscrupulous employers to feign ignorance of unauthorized workers’ irregular status. Nonetheless, 30 years after IRCA, the United States now has an undocumented population estimated to be upwards of 11 million.

Other more limited programs in recent years have been enacted mostly in response to political developments in other countries. Examples include Section 124 of the Immigration Act of 1990, which provided a path to U.S. permanent residence for certain residents of Hong Kong employed by U.S. companies in Hong Kong; the Chinese Student Protection Act of 1992—prompted by the Tiananmen Square protests of 1989—which provided a path to permanent residence for certain Chinese students who were already in the United States; the Soviet Scientists Immigration Act of 1992, which eased the permanent residence process for certain engineers and scientists from the former Soviet Union; the Nicaraguan Adjustment and Central American Relief Act (1997), which provided immigration relief to certain nationals of Nicaragua, Cuba, El Salvador and Guatemala, as well as nationals of some former Soviet bloc countries; and the Haitian Refugee Immigration Fairness Act (1998), which allowed certain nationals of Haiti resident in the United States to qualify for permanent residence.

### *Australia*

This is very limited in Australia. The two closest examples follow.

Children born in Australia are ordinarily granted citizenship where at least one of their parents was an Australian citizen or permanent resident at the time of birth; otherwise they hold the same visa their parents hold. However, one small exception is where a child is automatically considered an Australian citizen by birth if they were born in Australia and are ordinarily resident in Australia until they turn 10 years of age. Current legislation before parliament seeks to block this provision from applying to any child who has ever been unlawfully in Australia; who has ever departed Australia without maintaining a valid Australian visa; or whose parent was unlawfully in Australia at the time of the child's birth or any time prior.

The only other "regularisation" option is via Ministerial Intervention.

The Minister has powers under the *Migration Act 1958* to intervene on a case by case basis when the Minister thinks it is in the public interest to do so. What is and what is not in the public interest is for the Minister to decide. The Minister is not legally bound to intervene or to consider intervening. When the Minister intervenes to make a more favourable decision, this usually means that the Minister grants a visa. However, only a small number of all requests for ministerial intervention are successful. In addition, this is not a scheme as such, and all cases are considered individually and on their merits.

The Minister's public interest powers are:

- non-delegable – decisions must be made by the Minister personally or where appropriate by another Minister
- non-compellable – the Minister does not have a duty to consider whether to exercise the powers
- non-reviewable – ministerial decisions made under these powers are not reviewable by the tribunals and cannot be overturned by the courts
- subject to reporting to parliament – the Minister is required to table in parliament a statement of reasons when these powers are used.

### *Canada*

Canada does not currently have any regularization schemes. No such schemes have been implemented in Canada in the past.

### *Switzerland*

Switzerland has no such scheme and no such scheme has been implemented in the past.

**Table 1 – Multi-Year Immigration Plan**

Immigration category	Category	2018 - Low	2018 - High	2018 - Target	2019 - Low	2019 - High	2019 - Target	2020 - Low	2020 - High	2020 - Target
<b>Economic</b>	Federal High Skilled	72,700	78,200	<b>74,900</b>	76,000	83,000	<b>81,400</b>	81,000	88,000	<b>85,800</b>
	Atlantic Immigration Pilot Program	500	2,000	<b>1,000</b>	1,000	4,000	<b>2,000</b>	2,000	4,000	<b>4,000</b>
	Caregivers	15,000	20,000	<b>17,000</b>	9,500	15,500	<b>14,000</b>	4,000	7,000	<b>5,000</b>
	Federal Business	500	1,000	<b>700</b>	500	1,500	<b>700</b>	500	1,500	<b>700</b>
	Provincial Nominee Program	53,000	57,400	<b>55,000</b>	57,000	63,500	<b>61,000</b>	62,000	68,500	<b>67,800</b>
	Quebec Skilled Workers	27,900	29,900	<b>28,900</b>	31,500	33,500	<b>32,500</b>	31,500	33,500	<b>32,500</b>
	<b>Total Economic</b>	<b>169,600</b>	<b>188,500</b>	<b>177,500</b>	<b>175,500</b>	<b>201,000</b>	<b>191,600</b>	<b>181,000</b>	<b>202,500</b>	<b>195,800</b>
<b>Family</b>	Spouses, Partners, and Children	64,000	68,000	<b>66,000</b>	64,000	70,000	<b>68,000</b>	64,000	74,000	<b>70,000</b>
	Parents and Grandparents	17,000	21,000	<b>20,000</b>	18,000	21,000	<b>20,500</b>	18,000	22,000	<b>21,000</b>
	<b>Total Family</b>	<b>81,000</b>	<b>89,000</b>	<b>86,000</b>	<b>82,000</b>	<b>91,000</b>	<b>88,500</b>	<b>82,000</b>	<b>96,000</b>	<b>91,000</b>
<b>Refugees and Protected Persons</b>	Protected Persons in Canada & Dependents Abroad	13,500	17,000	<b>16,000</b>	14,000	20,000	<b>16,500</b>	16,000	20,000	<b>17,000</b>
	Resettled Refugees - Government Assisted	6,000	8,000	<b>7,500</b>	7,000	9,000	<b>8,500</b>	8,500	10,500	<b>10,000</b>
	Resettled Refugees - Blended Visa Office Referred	1,000	3,000	<b>1,500</b>	1,000	3,000	<b>1,650</b>	1,000	3,000	<b>1,700</b>
	Resettled Refugees - Privately Sponsored	16,000	20,000	<b>18,000</b>	17,000	21,000	<b>19,000</b>	18,000	23,000	<b>20,000</b>
	<b>Total Refugees and Protected Persons</b>	<b>36,500</b>	<b>48,000</b>	<b>43,000</b>	<b>39,000</b>	<b>53,000</b>	<b>45,650</b>	<b>43,500</b>	<b>56,500</b>	<b>48,700</b>
<b>Humanitarian and Other</b>	<b>Total Humanitarian</b>	<b>2,900</b>	<b>4,500</b>	<b>3,500</b>	<b>3,500</b>	<b>5,000</b>	<b>4,250</b>	<b>3,500</b>	<b>5,000</b>	<b>4,500</b>
<b>Overall Planned Permanent Admissions</b>		<b>290,000</b>	<b>330,000</b>	<b>310,000</b>	<b>300,000</b>	<b>350,000</b>	<b>330,000</b>	<b>310,000</b>	<b>360,000</b>	<b>340,000</b>

*Source: Immigration, Refugees, and Citizenship Canada*

*<https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/supplementary-immigration-levels-2018.html>*