
Immigration: a year in review

4 January 2016

In brief

Temporary and permanent skilled migration makes a significant economic and social contribution to Australia, with careful consideration given to migration quotas in each program year. The Migration Australia 2013-14 report released by the Australian Bureau of Statistics confirms that Australia's migrant population is currently at its highest since the gold rush era of the late 1800s, with over 30 per cent of our current population born overseas.

With a continuing focus on future skills and business needs and a further shift to compliance and integrity, 2015 saw the Government make various changes to Australia's migration programs and policies. This included further amendments to the subclass 457 Temporary Work (Skilled) visa program, which is designed to allow Australian companies to source essential and emerging skills from overseas, which are not readily available in the domestic Australian labour market.

The changes which have been implemented over the past year have been designed with a view to strengthening overall program integrity while continuing to support established and new business, as well as encouraging investment into Australia. In addition, the Australian Government's wider deregulation agenda has also had an impact.

In detail

Subclass 457 Temporary Work (Skilled) visa program

In February 2014, the Government commissioned an independent review into the integrity of the 457 visa program. The Robust New Foundations Report provided to the Department of Immigration and Border Protection (the DIBP) in September 2014 contained a range of recommendations designed to streamline and deregulate the current framework. The DIBP in 2014 confirmed 22 recommendations from this review and some of these came into effect in 2015. To date, this has included:

- Labour Market Testing (LMT): where this is required, evidence of recruitment attempts must now be included at the time of lodging a nomination or the application can be instantly refused. If the recruitment activities were paid, evidence of those payments must also be included.
- An exemption to the Labour Market Testing requirements under the Japan-Australia Economic Partnership Agreement (JA-EPA) was introduced resulting in LMT not being required where a Japanese national or employee of a business in Japan is being nominated to transfer to the Australian branch of the company.

- A further exemption to the Labour Market Testing requirements under the China Australia Free Trade Agreement (CHAFTA) took effect allowing an exemption to this requirement for executives, senior managers and managers as inter corporate transferees; specialists as intra corporate transferees; independent executives; contractual service suppliers.
- An amendment to sponsorship obligations for reporting time frames, extending these from 10 to 28 days for certain notifiable 'events' including cessation of employment and a change to a sponsored visa holders' work location and duties.
- Confirmation that the Temporary Skilled Migration Income Threshold (TSMIT) should remain at A\$53,900 for a further two years. This is the minimum base salary which must be offered for approval of a position under the 457 visa program.
- Additional English Language tests were announced – IELTS, TOEFL iBT, PTE Academic, CAE, OET. An amendment to the education exemption was also made allowing five cumulative years of full time study in English to be accepted rather than five consecutive years of full time study.
- Extension of business sponsorship approval periods came into effect - these are now five years for an established business (trading more than 12 months) and 18 months for a start-up business.
- Clarification on certain elements of the mandatory 8107 condition placed on primary sponsored 457 visas including a specification that:
 - A sponsored 457 visa holder must commence work within 90 days of arriving in Australia on the 457 visa or 90 days after grant if onshore.
 - If the nominated occupation has a mandatory licencing, registration or membership requirement in Australia, this must also be obtained within 90 days of visa grant or arrival in Australia.

More recently, the Department has announced a 'Know your rights campaign' designed to ensure vulnerable subclass 457 visa holders are provided with sufficient resources to ensure they know their rights. This has included a new pay and conditions tool allowing visa holders to check their terms and conditions of employment are 'no less favourable' than their Australian counterparts. Additional information is now also provided through visa grant letters.

It is anticipated that further and final changes will be implemented in 2016 and this may include an amendment to the existing Training Benchmark requirement for Standard Business Sponsors. In particular the Department is considering implementing a new framework which would see approved Business Sponsors making a contribution to a Government administered training fund for each primary sponsored visa holder. This may also be required on an annual basis for each year the 457 visa holder employed by the sponsor, with the first payment required as part of the nomination approval process. While this would provide much needed simplification to this challenging sponsorship obligation, the required contribution amount would need to be carefully considered so as not to effectively impose a financial penalty on businesses facing genuine skills shortages.

ATO-DIBP data matching program

On 4 August 2015, the Australian Taxation Office (ATO) issued a gazette notice confirming that it will request immigration records from the Department of Immigration and Border Protection (DIBP) for visa holders and sponsors. The records to be handed over are for financial years 2013-14, 2014-15, 2015-16 and 2016-17. In total, the ATO expects to collect data for approximately one million individuals over these periods.

The information to be shared between the ATO and DIBP includes:

- address history for visa applicants and sponsors
- contact history for visa applicants and sponsors

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- all visa grants
 - visa grant status by point in time
 - migration agents' details
 - address history for migration agents
 - contact history for migration agents
 - all international travel movements undertaken by visa holders (arrivals and departures)
 - sponsor details for subclass 457 visa
 - education providers
 - visa subclass name.

The purpose of this exercise is to use data matching technology to ensure individuals in Australia on working visas have correctly registered and complied with their taxation requirements. This will also capture information to ensure that business sponsors have adequately withheld Pay As You Go (PAYG) tax and complied with their Superannuation Guarantee obligations.

Employers of temporary visa holders may wish to take time to review records on file to ensure compliance with obligations on rate of pay, PAYG withholding and Superannuation Guarantee payments to temporary visa holders to manage potential exposure.

Australia's Department of Human Services (Centrelink) will also be undertaking a data matching program after DIBP announced it would release more than 5000 individual records to this agency, with a focus on identifying fraud in the partner visa program.

Working Holiday/Work and Holiday program – new signatories

- Vietnam – a new agreement was signed in March 2015 to allow reciprocal Work and Holiday visa access to 200 eligible young people from both countries.
- Slovenia and Slovak Republic – have been added to the list of eligible countries for the Work and Holiday visa program commencing 18 December 2015.
- China – a new agreement was entered into under the China Australia Free Trade Agreement (CHAFTA). The implementation date is still to be announced. Separate to the Work and Holiday visa, Chinese travellers may also now apply online for visitor visas and may request a three year validity period with multiple entry permission.
- Fiji – was added to the seasonal workers program in April 2015.

Reciprocal working holiday/work and holiday visa agreements were entered into this year with China, Vietnam, Slovenia and Slovak Republic. Spain and Portugal were added to the program at the end of 2014. Poland joined in March 2014 and we are still waiting on the outcome of Israel joining the Work and Holiday visa program. Some of these agreements are still to come into effect and the number of places available varies for each agreement. If you would like a full list of eligible countries please contact our office.

Offshore Resources Sector

In April, the Federal Court found that a Ministerial Determination issued last year to allow foreign workers holding certain temporary visas to undertake offshore resource activities was invalid. While concerning at the time, a further Ministerial Determination was subsequently issued fixing an error identified by the Court and resulting in work rights being restored to foreign employees on fixed resource installations.

More recently on 14th December 2015, new Section 9A was inserted into the Migration Act to clarify the subclass of visa required for persons who participate in, or support, an offshore resource activity. Importantly this has confirmed that both the subclass 457 and Subclass 400 visas are acceptable visas for individuals working in or supporting the offshore resources sector. Further, these visa holders are exempt from having to pass through immigration clearance and are also able to enter Australia in a way other than through a port or pre-cleared flight.

This more recent amendment provides much needed clarity and flexibility for businesses and employees in this sector.

Charging for a Migration Outcome Bill 2015

The recently introduced Charging for a Migration Outcome Bill 2015 was first read in Parliament in September. In effect from this month, this Bill has introduced a new criminal and civil penalty regime which has made it unlawful for a person to ask for, receive, offer or provide payment or other benefits in return for a range of sponsorship-related events.

The Bill also prescribes the classes of sponsors, sponsored visas, and sponsorship related events captured by the legislation. This includes approved business sponsors and individual holders of subclass 457 and 186 visas. Where parties are found to have engaged in these 'payment for visas' activities, the Department may seek to impose serious penalties including fines and / or imprisonment.

'Allegiance to Australia' Citizenship Bill 2015

This year has seen an increasing focus from the Australian Government on security and character issues. This focus has understandably extended into the migration portfolio.

One of most recent measures has been the introduction of the Allegiance to Australia Citizenship Bill 2015. This Bill has been passed by both houses of Parliament (4th December 2015) and is currently awaiting Royal Assent.

Once in effect, dual citizens who are aged 14 years and over can have their Australian citizenship revoked if they are found to have engaged in certain activities including international terrorist activities or a terrorist act, or where they have committed a serious crime under the Criminal Code resulting in 6 years of imprisonment, where that crime demonstrated the repudiation of allegiance to Australia.

There are some legitimate concerns over how these new powers will be exercised however the final version of the Bill has been amended to reduce what originally appeared to be a broad and ambiguous reach.

More generally, the Australian Border Force (ABF) has adopted a zero tolerance policy in relation to visa holders or visa applicants who fail the character test prescribed under section 501 of the Migration Act. This has resulted in a marked increase in visa cancellations under this section and where a visa has been personally revoked by the Immigration Minister, the individual has extremely limited recourse for appeal or for obtaining a further visa to return to Australia.

Integrity and compliance measures – Fair Work Ombudsman

This year has also seen an increase in monitoring by the Fair Work Ombudsman (the FWO), with a view to supporting the Department's push to strengthen the integrity of the temporary and permanent visa programs. The FWOs focus has extended outside of the 457 visa program to include Working Holiday and student visas, given a rise in exploitation of these often vulnerable workers.

In April, the FWO issued a warning to growers, hostel owners and labour hire contractors that it will not tolerate the deliberate exploitation of backpackers and seasonal workers this summer. This follows growing complaints of backpackers being lured to regional centres by unscrupulous labour-hire operators. Student visa holders are also often subject to underpayment of wages.

In October, a Fair Work amendment Bill was introduced in the House of Representatives and has now been read for the second time. The aim of the Bill is to ensure employees are paid correctly whether or not they are Australian citizens. The Bill also seeks to promote fairer contracts between franchisers and franchisees (these business models are often problematic for the DIBP).

The takeaway

The amendments highlighted above have been mostly positive and welcomed by users of the various visa programs, particularly the subclass 457 visa program which has benefitted from simplification. 2016 will likely see further changes to this program possibly including an increase to the Temporary Skilled Migration Income Threshold. While the Department had previously indicated this would remain static for two years, at a recent roundtable it was suggested that an increase to A\$57,000 may occur.

2016 may also see the introduction of a much needed new 'short term mobility visa' that would allow specialised staff (including intra-company transferees and foreign correspondents) to work in Australia for up to one year. The Australian Council of Trade Unions strongly contested this proposal in the media when it was initially announced, raising concerns overseas workers "could swamp the local market". This would however fill a current gap in the temporary work visa programs.

The review of the temporary and permanent visa program is continuing and currently has shifted into its refinement stage. We would welcome feedback from our clients on their experiences in using the program including any recommendations they would like made on their behalf.

Please contact your immigration consultant or one of the contacts below if you would like to have a conversation around these recent or future changes.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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