



ICLG

The International Comparative Legal Guide to:

Corporate Immigration 2019

6th Edition

A practical cross-border insight into corporate immigration law

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Contributing Editor
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Rachel Williams

CEO
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

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Global Legal Group Ltd.
59 Tanner Street
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Australia

BDO Migration Services

Maria Debra Jockel



1 Introduction

1.1 What are the main sources of immigration law in your jurisdiction?

The Migration Act 1958 (Cth) (**the Act**) and the Migration Regulations 1994 (Cth) (**the Regulations**) provide the legal and regulatory framework for the entry into, and presence in Australia of persons who are non-citizens.

1.2 What authorities administer the corporate immigration system in your jurisdiction?

On 20 December 2017, the Home Affairs Portfolio was established. It supports a ‘federation’ of Australia’s federal law enforcement, national and transport security, criminal justice, emergency management, multicultural affairs and immigration and border-related functions.

It includes the Department of Home Affairs (**the Department**) and the Australian Border Force, its operational enforcement arm.

A number of other Agencies assist the Department, including the Australian Taxation Office, in ensuring compliance for individuals and companies, including temporary skilled visa holders and their sponsors.

1.3 Is your jurisdiction part of a multilateral agreement between countries (EU/NAFTA/MERCOSUR) which facilitates the movement of people between countries for employment purposes?

Australia is a signatory to the World Trade Organization General Agreement on Trade in Services 1994 (**WTO GATS**), which allows for the movement of persons seeking access to the employment market on a temporary basis.

Australia is a signatory to a number of bilateral and regional Free Trade Agreements (**FTAs**) that allow for the movement of persons supplying services without the need for Labour Market testing (**LMT**).

Australia’s FTAs are complex. Australia currently has the following FTAs in force:

1. Australia-New Zealand (**ANZCERTA** or **CER**).
2. Singapore-Australia (**SAFTA**).
3. Australia-United States (**AUSFTA**).
4. Thailand-Australia (**TAFTA**).
5. Australia-Chile (**ACI-FTA**).

6. ASEAN-Australia-New Zealand (**AANZFTA**) – Australia, New Zealand, Brunei, Burma, Malaysia, the Philippines, Singapore, Vietnam, Thailand, Laos, Cambodia and Indonesia.
7. Malaysia-Australia (**MAFTA**).
8. Korea-Australia (**KAFTA**).
9. Japan-Australia (**JAIPA**).
10. China-Australia (**ChAFTA**).
11. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**).

As all FTAs are different; each FTA needs to be looked at separately and in the context of determining whether in a given instance there is a need for LMT.

The aim of LMT of the Australian labour market is to demonstrate whether a suitably qualified and experienced Australian citizen or permanent resident is readily available to fill the prescribed position.

At the time of the lodgement of a Subclass 482 Temporary Skills Shortage (**TSS**) nomination application, evidence of LMT must be provided unless an International Trade Obligation (**ITO**) or specified exemption applies.

2 Business Visitors

2.1 Can business visitors enter your jurisdiction under a relevant visa waiver programme?

Business visitor visas allow holders to enter Australia to engage in business activities. Eligible passport holders may apply online or through an approved travel agent for:

- an Electronic Travel Authority (**ETA**) (Subclass 601) visa; or
- an eVisitor (Subclass 651) visa.

Otherwise, a paper-based or online (for eligible passport holders only) application can be made for:

- a Visitor (Business Visitor or Frequent traveller stream) (Subclass 600) visa; or
- a Temporary Work (Short Stay Specialist) (Subclass 400) visa.

2.2 What is the maximum period for which business visitors can enter your jurisdiction?

Subclass 601, 651 and 600 visas can be granted to travel to and enter Australia on multiple occasions for up to three months during the validity period of the visa grant.

Subclass 400 visas are generally granted with the right to remain in Australia for three months after first entry, but up to six months in limited circumstances if supported by a strong business case.

2.3 What activities are business visitors able to undertake?

The Subclass 651 and Subclass 600 visas are granted subject to Condition 8115, which allows limited work. For example, it relates to the making of a general business enquiry or negotiating a business contract.

The Subclass 400 visa allows for:

- short-term, highly specialised, non-ongoing work; or
- in limited circumstances, participation in an activity or work relating to Australia's interests.

2.4 Are there any special visitor categories which will enable business visitors to undertake work or provide services for a temporary period?

The Highly Specialised Work stream of the Subclass 400 visa allows for short-term, highly specialised, non-ongoing work.

The Australia's Interest stream of the Subclass 400 visa allows applicants to participate in an event, or engage in an activity or work that relates directly to compelling circumstances that affect Australia's interests, and require the applicant's entry into and stay in Australia.

2.5 Can business visitors receive short-term training?

Some business visitor visas allow for attendance at specialised 'one-off' training courses. Subclass 600 visas are granted subject to the mandatory Condition 8201, 'no study for more than three months'.

If the primary purpose for the visa is to obtain an approved degree or qualification, a student visa may be appropriate.

The Subclass 407 Training visa allows persons to take part in workplace-based training to enhance their skills in their occupation, area of tertiary study and field of expertise and to participate in a professional development training programme in Australia.

3 Immigration Compliance and Illegal Working

3.1 Do the national authorities in your jurisdiction operate a system of compliance inspections of employers who regularly employ foreign nationals?

The Department, together with Fair Work Australia, have significant powers to monitor employers to ensure compliance with Australia's immigration and employment laws. This is to ensure that foreign nationals are lawfully permitted to work in Australia, undertake work in accordance with the basis upon which their visa is granted, including any work restrictions or work prohibitions, and that all employees, be they foreign nationals or Australians, are provided with the minimum terms and conditions of employment under the *Fair Work Act 2009* and the National Employment standards.

3.2 What are the rules on the prevention of illegal working?

The *Migration Amendment (Reform of Employer Sanctions) Act 2013* contains civil and criminal liability provisions for allowing

unlawful non-citizens to work or allowing lawful non-citizens to work in breach of work-related conditions. This imposes an obligation for employers to take reasonable steps at reasonable times to verify the visa status and work rights of foreign nationals, for example by checking the Department's records prior to allowing a person to work and thereafter, to see if the person is still allowed to work.

'Work' is defined in Regulation 1.03 of the Regulations and is taken to mean any work, be it paid work, voluntary work or work done in return for accommodation, food or any other benefit.

3.3 What are the penalties for organisations found to be employing foreign nationals without permission to work?

The *Migration Amendment (Reform of Employer Sanctions) Act 2013* has a three-tiered sanctions framework, namely: infringement notices, civil penalty orders and criminal offence provisions. There are four types of civil liability offences:

- Allowing an unlawful non-citizen to work (90 penalty units).
- Allowing a lawful non-citizen to work in breach of a work-related condition (90 penalty units).
- Referring an unlawful non-citizen for work (90 penalty units).
- Referring a lawful non-citizen for work in breach of a work-related condition (90 penalty units).

The maximum civil penalties are:

- For an individual: \$50,400.
- For executives of bodies corporate: \$252,000.

There are four types of criminal liability offences:

- Allowing an unlawful non-citizen to work.
- Allowing a lawful non-citizen to work in breach of a work-related condition.
- Referring an unlawful non-citizen for work.
- Referring a lawful non-citizen for work in breach of a work-related condition.

The penalty of two years' imprisonment applies where the elements of knowledge or recklessness can be proved. If the worker is subject to or will be subject to exploitation and the person knows of, or is reckless to that circumstance, then they may be liable to the aggravated criminal offence in which event the penalty is five years' imprisonment.

In addition to imprisonment the maximum criminal penalties are:

- For an individual: \$75,600.
- For executives of bodies corporate: \$378,000.

4 Corporate Immigration – General

4.1 Is there a system for registration of employers who wish to hire foreign nationals?

On 18 March 2018, the Subclass 482 Temporary Skill Shortage (TSS) visa replaced the subclass 457 visa programme and enables Australian and overseas businesses to be approved as standard business sponsors, to sponsor skilled overseas workers to fill prescribed positions on a temporary basis. There are three new streams:

- a Short-term stream for occupations on the Short-term Skilled Occupation List (STSOL) for a maximum of up to two years (or up to four years if an international trade obligation applies);

- Medium-term stream – for occupations on the Medium and Long-term Strategic Skills List (MLTSSL) for up to four years; and
- Labour Agreement stream – in accordance with a Labour Agreement, where there is a demonstrated need that cannot be met in the Australian labour market under the TSS.

4.2 Do employers who hire foreign nationals have ongoing duties to ensure immigration compliance?

Employers who hire foreign nationals under the TSS visa programme must comply with the sponsorship obligations and the *Fair Work Act 2009* which provides for a safety net of minimum terms and conditions of employment.

Sponsorship obligations apply to all approved sponsors and former approved sponsors and must include, but are not limited to, the following:

- To ensure non-discriminatory recruitment practices.
- To cooperate with inspectors.
- To ensure equivalent terms and conditions of employment (namely to pay the market salary rate, however described) to the primary TSS visa holder.
- To pay prescribed costs of the departure of the visa holder (or a former visa holder) from Australia.
- To pay prescribed costs to the Commonwealth in relation to locating the former visa holder, and removing the former visa holder from Australia.
- To keep records.
- To provide records and information to the Department.
- To notify the Department of prescribed changes in the circumstances of an approved sponsor, a former approved sponsor, a visa holder or a former visa holder.
- To ensure that a visa holder works or participates in an occupation, programme or activity nominated by an approved sponsor (including by preventing the on-hire of a visa holder).
- To require an approved sponsor or former approved sponsor not to recover, transfer or take actions that would result in another person paying for certain prescribed costs.
- To require an approved sponsor or former approved sponsor to meet prescribed training requirements (prior to 12 August 2018).

4.3 Are employers who hire foreign nationals required to show a commitment to train or up-skill local workers?

An approved sponsor or former approved sponsor must meet prescribed training requirements.

The Migration Amendment (Skilling Australians Fund) Act 2018 came into effect on 12 August 2018.

The Skilling Australians Fund (SAF) levy must be paid in full at the time the employer nominates an overseas worker under the TSS visa programme and the subclass 186 Employer Nomination Scheme (ENS) / subclass 187 Regional Sponsored Migration Scheme (RSMS) visa programs. The amount of the levy depends on the turnover of the business. The levy does not apply to dependent visa applicants or existing 457 visa holders.

| Business size | TSS visa | ENS / RSMS visas |
|--|----------------------------------|------------------|
| Small (annual turnover less than \$10 million) | \$1,200 per year or part thereof | \$3,000 one-off |
| Other businesses | \$1,800 per year or part thereof | \$5,000 one-off |

Businesses are prohibited from passing on the costs of the SAF levy to overseas skilled workers.

Since the SAF came into effect, an approved sponsor or former approved sponsor is no longer required to meet the prescribed training requirements.

4.4 Are employers who hire foreign nationals required to pay government charges and fees which contribute towards the training or up-skilling of local workers?

See question 4.3 above.

4.5 Do the immigration authorities undertake routine inspections of employers who sponsor foreign nationals, to verify immigration compliance?

Employers, including approved sponsors under the TSS visa programme, are monitored by the Department to ensure that they comply with the obligations in relation to the foreign worker (and any accompanying family member(s)).

See the answer to question 4.2 on sponsorship obligations.

Sponsors are monitored by the Department and Australian Border Force through interviews and site visits, desk auditing through monitoring forms, referral to other agencies and/or other sections of the Department, as well as education and awareness-raising activities.

4.6 Do the immigration authorities maintain a list of skilled occupations which may be filled by foreign nationals?

From 1 July 2017 foreign workers must be nominated by an Australian employer to fill a position in an occupation that appears in the MLTSSL or the STSOL or the Regional Occupation List (ROL). These Occupation Lists apply to the following visa programmes:

- the Temporary Skill Shortage (Subclass 482) (TSS) visa;
- the Training (Subclass 407) visa;
- the Temporary Graduate (Subclass 485) (Graduate Work stream) visa;
- the Skilled Regional (Provisional) visa (Subclass 489);
- the Employer Nomination Scheme visa (Subclass 186);
- Regional Sponsored Migration Scheme visa (Subclass 187);
- independent points-based Skilled Migration who are not nominated by a state or territory government agency (Subclass 189); and
- points-based Skilled Migration who are nominated by a state or territory government agency under a State Migration Plan (Subclass 190).

4.7 Is there a recognition that some occupations may be in short supply and do special exemptions apply to certain sectors and occupations?

The Occupations Lists specify occupations on the basis that these occupations are in short supply. The MLTSSL provides for occupations that require foreign workers for four years and are considered occupations which the Australian labour market requires for 'medium to long-term' periods.

The STSOL provides for occupations that require foreign workers for two years and are considered occupations which the Australian labour market requires for 'short-term' periods.

The ROL specifies occupations which are in short supply in designated regional areas of Australia.

All occupations are subject to LMT unless an ITO or specified exemption applies.

4.8 Are there annual quotas for different types of employment-related work permits or visas?

The TSS visa programme is demand-driven and is not subject to a quota.

The ENS and RSMS is subject to an annual quota as determined by the Minister of Home Affairs.

4.9 Are there restrictions on the number of foreign workers an employer may sponsor, in relation to a maximum percentage of foreign workers in the employer's workforce?

There are no restrictions as such on the number of foreign workers an employer may be able to sponsor provided that the sponsor is able to meet specified criteria including that the employer has a strong record of, or commitment to, employing local labour and non-discriminatory employment practices.

However, employers seeking accreditation as Standard Business Sponsors must meet specified requirements.

For example:

- Category 3 is for employers who have Australian workers who comprise at least 85% of their workforce in Australia.
- Category 4 is for employers who have Australian workers who comprise at least 75% of their workforce in Australia.

4.10 Are employees who are sponsored to work in your jurisdiction required to demonstrate language proficiency?

The English language requirements depend on the visa category applied for.

Employees who are sponsored to work in Australia under the TSS visa programme are required to demonstrate language proficiency, unless exempted because:

- the person holds a valid passport issued by the United Kingdom, the United States of America, Canada, New Zealand or the Republic of Ireland; or
- the person has completed at least five years of full-time study in a secondary and/or higher education institution where the teaching instruction was delivered in English; or
- the person is an employee of an overseas business who is coming to Australia to work for that company or their associated entity and they have a nominated base rate of pay of at least \$96,400 per annum (in addition to superannuation).

Unless exempted, the person must undertake a prescribed English language test and demonstrate that their level of English proficiency meets the necessary requirements.

Otherwise, applications for ENS and RSMS under the Temporary Residence Transition (TRT) stream require an IELTS (or equivalent) score of six in each component (Competent English).

4.11 Are employees who are sponsored to work in your jurisdiction required to undergo medical examinations before being admitted?

Employees who are sponsored to work are required to undergo medical examinations if the health, physical or mental condition of the person is relevant to the granting of the visa.

The health assessment process depends on the visa applied for, the age of the person, the proposed length of stay, the person's medical history, the types of activities they intend to engage in while in Australia, and the relevant Public Interest Criteria (PIC) which must be met in regard to health. This can include medical and x-ray examinations and in certain cases, an HIV test, hepatitis B or C test or other specific test.

All applicants and their migrating dependants (and in some instances, dependants who may not be migrating with the main applicant) must meet the health criteria.

If an applicant or a member of their family cannot satisfy the health requirements, then the application must be refused, unless the visa applied for allows for a health undertaking or a health waiver.

A health waiver may be available for applicants for some visa subclasses if a Medical Officer of the Commonwealth (MOC) finds the applicant does not meet the health requirement.

The applicant must first meet all other eligibility criteria for the visa. The Department must then be satisfied that granting the visa is unlikely to:

- result in a significant cost to the community; and/or
- prevent Australian citizens from accessing health care or community services in short supply.

The Department will not exercise a health waiver if the applicant fails to meet the health requirement because:

- the person has active tuberculosis; and/or
- the person's condition might pose a danger to the community or is a threat to public health.

4.12 Are employees who are sponsored to work in your jurisdiction required to have medical insurance or are they entitled to any free public medical services?

Unless exempted, all employees who are sponsored to work under the TSS visa programme must have private working health insurance.

Employees from countries that have a Reciprocal Health Care Agreement (RCHA) with Australia may be eligible for limited Medicare benefits. The nature of the free public medical services depends on the terms of the RCHA with the relevant country.

4.13 Does the work permit system allow employees who hold work permits to be seconded to a client site?

Under the TSS programme, the employee is engaged generally only as an employee of the sponsoring company or an employee of an associated entity of that company. As such, an approved Standard Business Sponsor must demonstrate that a direct employer-employee relationship is available including in circumstances where the employee who holds a TSS visa is seconded to a client site.

Certain occupations are exempt from the direct employer requirement and specified TSS visa holders may work as independent contractors (for example, general managers sitting on the board of directors of several unrelated businesses, medical professionals working as locums at various hospital clinics).

Otherwise, employees can only be seconded to a client site pursuant to the On-Hire Labour Agreement requirements.

5 Highly Skilled Visas

5.1 Is there an immigration category which covers highly skilled individuals?

The TSS visa programme and the ENS/RSMS cover highly skilled individuals.

The Distinguished Talent (Subclass 124/858) visa is a visa for individuals with an internationally recognised record of exceptional and outstanding achievement in:

- a profession;
- a sport;
- the arts; or
- academia and research.

6 Investment or Establishment Work Permits

6.1 Is there an immigration category which permits employees to be authorised to work based on investment into, or setting up a subsidiary or corporate presence in, your jurisdiction?

The Business Innovation and Investment Program (BIIP) is designed to attract high-quality investors and entrepreneurs to invest in Australia. The Business Innovation and Investment Program is made up of three visa subclasses:

- Business Talent (Permanent) (Subclass 132).
- Business Innovation and Investment (Provisional) (Subclass 188).
- Business Innovation and Investment (Permanent) (Subclass 888).

The Business Talent (Permanent) (Subclass 132) visa is the only Business Skills visa which allows for direct entry permanent residency.

The Business Talent (Permanent) (Subclass 132) has two streams namely:

- Significant business history stream.
- Venture capital entrepreneur stream.

The Business Innovation and Investment (Provisional) (Subclass 188) visa and the Business Innovation and Investment (Permanent) (Subclass 888) visa streams are:

- Business innovation stream.
- Investor stream.

In the case of the Business Talent (Permanent) (Subclass 132) and the Business Innovation and Investment (Permanent) (Subclass 888) the intending migrant must be invited to apply for a visa by a state or territory government, based on their Expression of Interest. On that basis, these two visa subclasses are not subject to a points test.

The required investments vary depending on the subclass, for example:

- The Subclass 188 Significant Investor visa stream requires the applicant to make a complying investment of at least A\$5 million and for the applicant to maintain the complying investment for at least four years.

- The Premium Investor stream visa requires an investment of A\$15 million and provides access to permanent residence after 12 months.

In addition, the TSS visa programme permits employees to work in Australia to set up a subsidiary or corporate presence in Australia.

7 Temporary Work Permits

7.1 Is there an immigration category permitting the hiring of temporary workers for exchanges, career development, internships or other non-economic purposes?

Please see the answer to question 2.5 as to the Subclass 407 visa stream which relates to work-based training and participating in a professional development training programme in Australia.

The Temporary Activity visa (Subclass 408) allows a person to come to Australia on a temporary basis to:

- Participate in activities at the invitation of an Australian organisation.
- Participate or observe in an Australian research project.
- Work in a skilled position under a staff exchange arrangement.
- Participate in high-level sports competitions or sports training programmes.
- Participate in a special programme approved by the Department that provides for opportunities for youth exchange, cultural or community benefits.
- Participate in a government endorsed event.

The Subclass 600 (Tourist stream) visa allows for internships where the applicant is a student of an overseas university undertaking research as part of their course, and the internship is purely on an observational basis.

7.2 Are there sector-specific temporary work permit categories which enable foreign workers to perform short-term temporary work?

The Temporary Activity visa (Subclass 408) allows persons to come to Australia on a temporary basis to:

- Work in the entertainment industry.
- Participate in high-level sports competitions or sports training programmes.
- Do full-time religious work.
- Be employed as a superyacht crew member.
- Do full-time domestic work in the household of certain senior foreign executives.

The Temporary Work (Short Stay Activity) (Subclass 400 visa) (please see the answer to question 2.3).

The Labour Agreement stream of the TSS allow for sector-specific temporary work categories.

There are five types of labour agreements:

1. Company specific labour agreements.
2. Designated area migration agreements.
3. Project agreements.
4. Global Talent Scheme (GTS) agreements.
5. Industry labour agreements.

8 Group or Intra-Company Transfer Work Permits

8.1 Does a specific immigration category exist for inter-company transfers within international groups of companies?

The TSS visa allows for intra-company transfers within international corporations establishing Australian operations based on investment.

There are three main steps in the approval process under the TSS visa programme:

- Sponsorship application which is lodged by the company and which evidences that:
 - the company is actively and lawfully operating the business;
 - the employment of the employee will benefit Australia;
 - it is able to comply with sponsorship obligations;
 - it will be the direct employer or ‘related to’ the direct employer of the employee;
 - there is no adverse information regarding the sponsor; and
 - it has a strong record of, or commitment to, employing local labour and non-discriminatory employment practices.
- Nomination application, which is lodged by the company, relates to the nominated occupation and meets the following requirements:
 - the position is on the MLTSSL or STSOL and the position meets the minimum skills threshold for that occupation;
 - the base salary meets or exceeds the Temporary Skilled Migration Income Threshold (TSMIT) (currently \$53,900 gross per annum) in addition to superannuation for a 38-hour week;
 - the terms and conditions of employment are no less favourable than those provided to Australian staff in the same position in the workplace’s regional locality (‘the market salary rate’);
 - the details of the employee are provided; and
 - unless exempted, it meets the LMT requirements.
- Visa application, which is lodged by the employee nominated to fill the position, who must:
 - demonstrate they have the requisite skills and experience for that position;
 - be offered employment at the relevant market salary rate (which cannot be below the TSMIT);
 - if necessary, provide evidence they meet the English language requirements;
 - if necessary, provide a skill assessment;
 - provide a police check/s; and
 - if necessary, undertake a health check.

8.2 What conditions must an employing company or organisation fulfil in order to qualify as part of a group of companies?

In order for a company or organisation to qualify as part of a group of companies, the requirements of section 50AAA of the *Corporations Act 2001* (as to the term ‘associated entity’) must be met. An associated entity is a party that is either controlled by, or operates wholly (or to a significant extent) for the benefit of, one or more parties. Those parties are considered to be associated.

8.3 What conditions must the employer fulfil in order to obtain a work permit for an intra-company group employee?

The TSS visa programme enables intra-company group employees to obtain a work permit to work for the associated entity in Australia for up to four years.

All TSS visa holders have the condition 8607 which provides that they must:

- only work in the occupation for which the TSS visa was granted;
- work for the approved Sponsor;
- commence work within 90 days;
- not cease employment for more than 60 consecutive days; and
- must hold mandatory licence, registration or membership.

Please see question 8.1 for details as to the process to obtain a work permit for an intra-company group employee.

8.4 What is the process for obtaining a work permit for an intra-company group employee?

Please see the answer to question 8.1 above.

8.5 What is the process for the employee to obtain a visa under the intra-company group transfer category?

Please see the answer to question 8.1 above.

8.6 How long does the process of obtaining the work permit and initial visa take?

The processing times vary depending on a range of factors including whether the person holds a ‘low risk’ or ‘high risk’ passport.

The current indicative processing times in respect of applications under the TSS visa programme may range from 37 to 73 days for the Short-term stream and from 35 days to 61 days for the Medium-term stream.

The current indicative processing times for ENS applications range from 12 to 13 months for the Temporary Residence Transition stream and 11 to 16 months for the Direct Entry stream.

The current indicative processing times for RSMS applications range from 12 to 21 months for the Temporary Residence Transition stream and from 21 to 24 months for the Direct Entry stream.

The actual processing times are impacted each month by changes in application volumes, seasonal peaks, complex cases and incomplete applications.

8.7 Is there a maximum period of validity for initial intra-company transfer visas, can they be extended and is there a maximum period of stay in this category?

Under the TSS Medium-term stream visa programme, occupations on the MLTSSL can be granted for a period of up to four years and can be extended for further periods of up to four years each.

Under the TSS Short-term stream visa programme, occupations on the STSOL are only eligible for a Subclass 482 visa permitting a stay for up to two years or up to four years if an ITO applies and can only be renewed once while the person is onshore. Further, there is no permanent residency pathway for occupations on the STSOL.

8.8 Can employees coming under the intra-company route transfer to a permanent stay visa route and apply for permanent residence?

The ENS and the RSMS programs allow for employees coming under an intra-company transfer route to apply for permanent residence by being nominated by their employer.

The ENS/RSMS has three streams, namely:

- Temporary Residence Transition stream.
- Direct Entry stream.
- Labour Agreement Stream.

The Subclass ENS/RSMS Temporary Residence Transition stream is only available for holders of a Subclass 457 visa or a Subclass 482 Medium-term visa.

8.9 What are the main government fees associated with this type of visa?

The TSS visa programme fees and charges for visas are:

- Sponsorship Application: \$420.
- Nomination Application: \$330 per nominee.
- Visa Application:
 - Short-term stream: \$1,175 for a primary applicant, \$1,175 for additional applicant 18 years and over and \$295 for additional child applicant under 18.
 - Medium-term stream: \$2,455 for a primary applicant, \$2,455 for additional applicant 18 years and over and \$615 for additional child applicant under 18.

The ENS visa programme fees and charges for visas are:

- Nomination Application: \$540.
- Visa application: \$3,755 for a primary applicant, \$1,875 for additional applicants 18 years and over and \$940 for additional child applicants under 18 years.

The RSMS visa programme fees and charges for visas are:

- Nomination Application: nil.
- Visa application: \$3,755 for a primary applicant, \$1,875 for additional applicants 18 years and over and \$940 for additional child applicants under 18 years.

9 New Hire Work Permits

9.1 What is the main immigration category used for employers who wish to obtain work permits for new hires?

The TSS visa programme and the ENS/RSMS visa programs are the main visa programs for new-hire work permits (with the latter being for permanent residency).

9.2 Is there a requirement for labour market testing, to demonstrate that there are no suitable resident workers, before a work permit can be issued to new hires?

LMT is required unless exempted under Australia's ITO as referred to in questions 1.3 and 4.7.

TSS visa Short-term stream and Medium-term stream LMT requires Sponsors to provide a copy of the advertising material used to advertise the position.

For most nominations, advertising must be done:

- Within the four months immediately before lodging a nomination application.

Advertising of the nominated position must:

- be in Australia and in English, and include the following information:
 - the title, or a description, of the position;
 - the skills or experience required for the position;
 - the name of the approved sponsor or the name of the recruitment agency being used by the sponsor; and
 - the salary for the position – if the annual earnings for the position are lower than A\$96,400. It is acceptable to publish a salary range; for example A\$80,000 to A\$90,000.
- At least two advertisements were published in any of the below:
 - on a prominent or professional recruitment website with national reach (for example jobactive.gov.au) that publishes advertisements for positions throughout Australia;
 - in national print media – that is, newspapers or magazines with national reach that are published at least monthly and marketed throughout Australia;
 - on national radio with national reach; or
 - on the business' website if the sponsor is an accredited sponsor.
- advertisements including on websites, are expected to have run for at least four weeks; and
- applications or expressions of interest for the advertised position must have been accepted for at least four weeks.

If there are no suitable Australian citizens or permanent resident workers for the position, then the LMT requirements are met.

9.3 Are there any exemptions to carrying out a resident labour market test?

Please see the answer to questions 1.3 and 4.7 above.

9.4 What is the process for employers obtaining a work permit for a new hire?

Please see the answer to question 8.1 as to the approval process under the TSS visa programme.

9.5 What is the process for the employee to obtain a visa as a new hire?

Please see the answer to question 8.1 above.

9.6 How long does the process of obtaining the work permit and initial visa for a new hire take?

Please see the answer to question 8.6 above.

9.7 How long are initial visas for new hires granted for and can they be extended?

Please see the answer to question 8.7 above.

9.8 Is labour market testing required when the employee extends their residence?

Under the TSS visa programme, all occupations are subject to LMT unless exempted.

For example, LMT would not be required for a new nomination lodged by the same sponsor or an associated entity of that sponsor if an ITO applies provided:

- the visa applicant/holder will be staying in the same nominated position; and
- either:
 - the new sponsor is still an associated entity of the original sponsor; or
 - the employer has stayed the same (that is, even if one company has ceased to exist).

Please see the answer to questions 4.7 and 8.1.

9.9 Can employees coming as new hires apply for permanent residence?

The ENS Direct Entry stream is for:

- people who have been nominated by their employer under the Direct Entry stream;
- people who have never, or only briefly, worked in Australia; or
- temporary residents who do not qualify for permanent residency under the Temporary Residence Transition stream.

9.10 What are the main government fees associated with this type of visa?

Please see the answer to question 8.9 above.

10 Conditions of Stay for Work Permit Holders

10.1 What are the conditions of stay of those who obtain work permits and are resident on this basis?

Persons who are approved under the ENS/RSMS are permanent residents of Australia and have work rights.

All primary TSS visa holders' visas are subject to condition 8607 which means that the holder must:

- only work in the occupation for which the TSS visa was granted;
- work for the approved Sponsor;
- commence work within 90 days;
- not cease employment for more than 60 consecutive days; and
- if required, hold the mandatory licence, registration or membership.

All secondary TSS visa holders have unrestricted work rights.

All TSS visa holders must comply with condition 8501, which means that unless exempted, they must have medical insurance.

10.2 Are work permit holders required to register with municipal authorities or the police after their arrival?

No, they are not required to register with municipal authorities or with the police.

11 Dependants

11.1 Who qualifies as a dependant of a person coming to work on a sponsored basis?

A 'dependant' must be a 'member of the family unit' (MOFU) of the person coming to work on a sponsored basis. MOFU is defined in Regulation 1.12 of the Regulations. Generally, a person is considered to be a MOFU of the 'family head' if the person is:

- a spouse or *de facto* partner of the family head;
- a child or step-child of the family head or of a spouse or *de facto* partner of the family head (who is not engaged, married or in a *de facto* relationship); or
- a dependant child.

'Spouse' is defined in section 5F(1) to mean two persons (whether of the same sex or a different sex) who are in a married relationship.

The concept of a '*de facto* partner and *de facto* relationship' is defined in section 5CB(1) of the Act to mean that a person is the *de facto* partner of another person (whether of the same sex or different sex) if the person is in a *de facto* relationship with the other person. For this purpose, a person is in a *de facto* relationship with the other if they are not married to one another, and:

- they have a mutual commitment to a shared life to the exclusion of all others;
- their relationship is genuine and continuing;
- they live together or do not live separately and apart on a permanent basis; and
- they are not related by family.

'Dependant child' is defined in Regulation 1.03 and means a single or unattached person who has not turned 18.

If they have turned 18, the 'adult dependant child' must be wholly or substantially reliant on the 'family head' or the 'family head's spouse' or *de facto* partner or interdependant partner for their basic needs, or are incapacitated for work.

11.2 Do civil/unmarried or same-sex partners qualify as family members?

Yes; civil, unmarried or same-sex partners can qualify as family members provided they are in a *de facto* relationship with the person coming to work on a sponsored basis. Under the TSS visa programme, the *de facto* relationship must have existed for at least six months immediately before the person applies for the visa.

Under the ENS/RSMS visa programme, the *de facto* relationship must have existed for at least 12 months immediately before the person applies for the visa.

11.3 Do spouses and partners have access to the labour market when they are admitted as dependants?

Yes, spouses and partners of primary Subclass 457 or TSS visa holders have unrestricted work rights.

11.4 Do children have access to the labour market?

If a child's visa is granted on the basis that the child meets the requirements of 'dependant child' as defined in Regulation 1.03 of the Regulations, then the child would be expected to be a full time student and be wholly or substantially reliant on their parents for financial support. Therefore any access to the labour market is required to be consistent with the dependency requirements. Please see the answer to question 11.1 for further details.

Under the TSS visa programme, a dependent child applicant ceases to hold the TSS visa once they turn 23 years of age.

12 Permanent Residence

12.1 What are the conditions for obtaining permanent residence?

The conditions for obtaining permanent residency depend on the visa subclass applied for.

Under the ENS, the process has two steps:

Step 1 – nomination of an 'approved appointment' requires the employer to show that:

- the business is lawfully and actively operating in Australia and is of good standing;
- it meets the training benchmark as part of its commitment to the ongoing training of its Australian citizens and permanent resident staff (prior to 12 August 2018);
- it has the need to fill a full-time nominated position for at least two years (with the possibility of extending the employment);
- the position is on the MLTSSL; and
- the terms and conditions of employment must be at least equivalent to those that are, or would be, provided to an Australian permanent resident/citizen worker. The salary must also meet at least the salary specified in the Legislative Instrument and accord with the relevant market salary rate for that position.

The second step of the ENS depends on whether the applicant applies under the Temporary Residence Transition stream or the Direct Entry stream.

An applicant for an ENS under the Temporary Residence Transition stream must meet the following:

Step 2 – a visa application is made by the person to fill the position, who must:

- have the relevant skills;
- have worked in Australia for at least the past three years as a primary Subclass 457 or 482 visa holder in the nominated occupation with the nominating employer prior to the lodgement of the nomination application; and
- unless the person or nominated position, or both, fall within a specified exemption, the person must:
 - be under 45 years of age; and
 - have 'competent' English (at least 6.0 on each component of reading, writing, listening and speaking) under the International English Language Testing System (IELTS) or at least a score of 'B' on each component of reading, writing, listening and speaking under the Occupational English Test (OET) (or as otherwise prescribed).

An applicant for an ENS under the Direct Entry stream must meet the following:

Step 2 – a visa application is made by the person who is nominated to fill the position, who must:

- unless the person or the nominated position falls within a specified exemption or the transitional arrangements, the person must:
 - be under 45 years of age;
 - have three years of relevant work experience; and
 - provide evidence of a positive skills assessment from the relevant authority; and
- have 'competent' English (at least 6.0 on each component of reading, writing, listening and speaking) under the International English Language Testing System (IELTS) or at least a score of 'B' on each component of reading, writing, listening and speaking under the Occupational English Test (OET) (or as otherwise prescribed).

12.2 Is it possible to switch from a temporary work visa to a work visa which leads to permanent residence?

Eligible temporary work visa holders may be eligible for nomination under the TSS visa programme.

STSOL TSS visa holders are not eligible to be nominated by the employer under ENS/RSMS, unless they are eligible under transitional provisions.

MLTSOL TSS visa holders are eligible to be nominated by the employer under the ENS/RSMS.

Eligible Visa Holders may be nominated by employers for permanent residence under the ENS.

See answers to questions 8.8 and 12.1.

13 Bars to Admission

13.1 What are the main bars to admission for work?

Australia's immigration laws and policies are arguably the most complex in the world. There are 99 operational visa subclasses with 9 bridging visas, with prescribed legal, policy and evidentiary criteria to be met, including in respect of permission to work.

Australia's immigration laws and policies change frequently in response to the priorities to the government of the day.

There are strict criteria to be met in regard to all visas including work visas and work rights.

13.2 Are criminal convictions a bar to obtaining work permission or a visa?

All visa applicants seeking to enter or stay in Australia must be assessed against Section 501 of the Act, which defines the character requirements.

The onus is on the person to show that they are of good character. The character test also introduces mandatory and discretionary powers to either refuse or cancel visas if the person does not pass the character test.

Whether a person meets the character test depends on the nature of the criminal record, their past and present criminal or general conduct and whether there is a significant risk posed by that person to the Australian community or a segment of the community.

Under clause 482.217 of the Regulations, all applicants must be of good character and satisfy the PIC.

Where the person does not pass the character test, the departmental officer will decide whether to refuse the application or cancel a visa after consideration of a range of factors that are relevant to the exercise of this discretion.

Factors that may be considered include:

- a substantial criminal record;
- a member of a group or organisation, or had or have an association with a person, group or organisation that the Minister reasonably suspects of being involved in criminal conduct;
- the Minister reasonably suspects that the applicant has been involved in people smuggling, people trafficking, genocide, a war crime, a crime against humanity, a crime involving torture or slavery, or a crime that is of serious international concern, whether or not the applicant has been convicted of such an offence;
- past and present criminal or general conduct shows that the applicant is not of good character; or
 - if there is a risk that whilst the applicant is in Australia they would:
 - engage in criminal conduct;
 - harass, molest, intimidate or stalk another person;
 - vilify a segment of the Australian community;
 - incite discord in the Australian community or in a part of it; or
 - be a danger to the Australian community or a part of it.



Maria Debra Jockel

BDO Migration Services
Collins Square, Tower 4, Level 18
727 Collins Street
Melbourne
Victoria 3008
Australia

Tel: +61 414 714 626
Email: maria.jockel@bdo.com.au
URL: www.bdo.com.au

Maria Jockel is acknowledged as one of Australia's leading immigration lawyers. Maria has been listed in "The International Who's Who of Corporate Immigration Lawyers" (2010–2019) and has been recognised in the peer reviewed "Best Lawyers" in the areas of Immigration law (2008–2019).

Maria's book *457 visa law addressing Australia's skilled labour shortage* is considered to be the definitive resource providing an overview on this complex and dynamic area of law.

Maria has also contributed to the Australian chapters in *Immigration Law Client Strategies in the Asia-Pacific* (Aspatore, 2009), *Getting the Deal through: Corporate Immigration* (Law Business Research 2012–2017), *Global Mobility* (ILW, 2012–2016); *Corporate Immigration Annual Review* (Financier worldwide), and the *International Comparative Legal Guide to: Corporate Immigration* (2017–2019).

Maria's high standing is also reflected in her appointment by Federal and State Governments to advise on sensitive policy issues relating to immigration and related matters.

In her current and former roles Maria has contributed to shaping immigration law in Australia having advised on government policy and legal matters at State and Federal levels.

Maria, as an Accredited Immigration Law Specialist, heads BDO Migration Services' team of migration specialists dedicated to providing strategic, expert and practical advice and business solutions in all aspects of visa and migration related requirements.



BDO Migration Services is part of BDO's global footprint, serving clients across all borders.

BDO Migration Services is a dedicated incorporated immigration law firm led by Maria Jockel, offering pre-eminent expertise in all aspects of immigration and nationality law with particular emphasis on skilled temporary and permanent residency and business skills visas.

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59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk