

**AUSTRALIAN
CORPORATE
IMMIGRATION:**
A YEAR IN REVIEW, 2018



AUSTRALIAN CORPORATE IMMIGRATION, A YEAR IN REVIEW 2018.

As part of the Department of Home Affairs simplification of Australia's visa framework during recent years, there has been a number of significant changes in the temporary work visa space. It has been a tumultuous journey for immigration advisors and businesses who rely on the temporary work visa program to fill skill shortages.

These significant changes led to the realignment and downsizing of who, what and how a skilled worker is classified for entry to, or stay, in Australia. The new Temporary Skills Shortage (TSS) program which replaced the old 457 visa, has resulted in a notable decline in visa applications for skilled workers. Many businesses have been significantly impacted by the removal of certain skilled occupations, stricter visa requirements, the implementation of the Skilling Australian Funds Nomination Training Contribution Charge and longer processing times.

In this publication we will provide an overview of the changes during 2018, highlight key trends and insights and outline how to prepare for what's next in 2019.

THE IMMIGRATION TEAM



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WHAT HAPPENED TO TSS VISAS IN 2018?

18 March 2018

- the Subclass 457 visa was abolished
- introduction of the Subclass 482 Temporary Skills Shortage (TSS)
- final implementation of Phase 3 of reform including:
 - mandatory Labour Market Testing (LMT) unless exempt
 - mandatory 2 years recent work experience
 - mandatory police clearances
 - genuine temporary entrant requirement and renewal limitations apply to Short term stream visa applicants

LMT requirements updated and formalised into a legislative instrument (limited exemptions, no discretion)

12 August 2018

Implementation of Skilling Australians Fund (SAF) now applies to all TSS and Subclass 186/187 nominations lodged on or after this date.

5 September 2018

Priority processing no longer available. The Minister for Immigration, Citizenship and Multicultural Affairs will process applications in the following order:

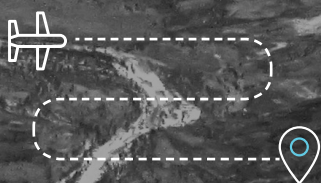
1. applications lodged by Accredited Sponsors
2. applications lodged for positions that are located in regional Australia
3. applications lodged under the Labour Agreement stream
4. all other applications

6 November 2018

Labour Agreement requests moving to e-lodgement

2017 2018 IMMIGRATION STATISTICS

Permanent Migration



162,417

permanent visas granted

111,099
skilled

47,732
family

3,350
child

236
special eligibility

8,694,048

temporary visas granted



5,639,167

visitors

210,456

working holiday
maker

64,470

temporary
resident (skilled)



1,856,614

New Zealand
special category

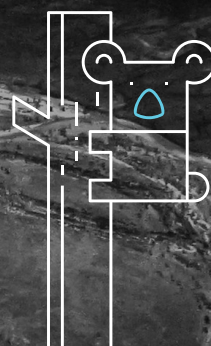


923,341

others

AU\$ 2
million

collected in visa
application charges



1
million

telephone calls to
Department of Home
Affairs service centres

5,744

visas
cancelled

4,584

persons refused
entry at Australian
air and sea ports

14,750

unlawful non-
citizens located

457/TSS visa applications

	2016-17 at 30/06/17	2017-18 at 30/06/18	% difference
Primary applications lodged	54,820	39,230	-28.4%
Primary applications granted	46,480	34,450	-25.9%
Number of primary visa holders in Australia	90,590	83,470	-7.9 %

Source: Department of Home Affairs Annual Report and Media releases from the Department of Home Affairs
<https://www.homeaffairs.gov.au/News/Pages/annual-report-2017-18.aspx>

TRENDS AND INSIGHTS

“ Prime Minister Scott Morrison...confirmed the Government was planning a new temporary visa for regional workers, which would require them to spend five years outside the major cities. “Just taking a top-down approach to migration levels, I don’t think has served us well,” he said.¹ ”



INSIGHT

Have you considered sponsorship accreditation?

For eligible businesses, obtaining sponsorship accreditation status it is extremely beneficial. It offers significantly reduced visa processing times from three months to usually less than two weeks; LMT may be undertaken on the company website; and police clearances are not required if sponsoring employers are willing to provide a character undertaking for the employee.



TREND:

SUPPORTING FARMERS

Australians understand more than most the impact that the weather has on the farming industry. During 2018 parts of Australia were in drought or drought affected which had a devastating impact on Australian farmers.² The Australian farming industry relies heavily on the seasonal and backpacker workforce to fill the labour gap when there is not sufficient local Australian labour to meet seasonal demand. Recent announcements by Prime Minister Scott Morrison have indicated some helpful updates to the temporary work visa programs, which focus on providing immediate and consistent support to the Australian farming industry.

On 5 November 2018, the working holiday maker and seasonal worker restrictions were relaxed with the intent of supporting the challenges experienced by the agriculture industry. Among the changes was an increase in the age limit to 35 years for passport holders from Canada and Ireland; an increase in the time a single agricultural employee can work from 6 to 12 months; and the option of a third year visa for working holiday makers who undertake 6 months of regional work in the second year of their visas. These changes followed a clarification on the Migration Policy earlier in the year that allowed working holiday visa holders to work beyond 6 months when they worked in different locations for the same employer. Seasonal workers from the Pacific Islands will also now be able to work in Australia for up to three months. On 13 November 2018, the Prime Minister announced the Government's plans to introduce a new temporary work visa for regional workers, coined the “five year bush visa” which requires workers to spend at least five years in a regional area. The visa framework and legislation for this visa has not been released.

Employers of working holiday makers and seasonal workers from the Pacific Islands should ensure that the minimum terms and conditions of work under the *Fair Work Act* are met.

¹<https://www.abc.net.au/news/2018-11-13/regional-migration-approvals-stalling-five-year-bush-visa/10488204>

²<https://www.reuters.com/article/us-australia-drought-impact-graphic/farming-impact-of-australias-worst-drought-in-living-memory-idUSKBN1KR060>

³<https://www.theguardian.com/australia-news/2018/nov/05/australia-to-relax-working-holiday-visas-to-ease-farm-jobs-shortage>

“ *Boutique arrangements are granted at the Government's discretion when there are vacancies for niche positions that cannot be filled locally and when that particular job does not fall within the Skills Shortage List of more than 600 occupations eligible for skilled visa categories¹* ”



INSIGHT

Skilling Australian Funds levy–Temporary Skilled Shortage (TSS) program

In lieu of the training the former 457 program benchmarks, an additional payment is now payable at the time of application of a Temporary Skills Shortage (TSS) nomination.

\$1200 AUD per year for businesses with AU\$10 million or under annual turnover. AU\$1,800 per year for business with more than AU\$10 million, annual turnover

This payment should be considered in workforce planning for the future. Refunds of this payment are only available in limited circumstances.

TREND:

RELIANCE ON LABOUR AGREEMENTS

A boutique arrangement, traditionally known as a labour agreement is a negotiated set of terms between the Department of Home Affairs and businesses or industry bodies. Throughout the negotiation process, an applicant business or industry body must provide evidence that there is a genuine, well established shortage of labour in the occupations to be included in the labour agreement.

There are five types of labour agreements available which businesses or industry bodies can apply for. They are:

1. **Company specific labour agreements**, directly between and employer and the Department of Home Affairs (Department) to fill a specific business need.
2. **Global talent scheme agreements**, available to accredited employers seeking to fill 'niche, highly-skilled roles' that do not fit within the usual skilled worker programs.
3. **Industry labour agreements**, providing a set of fixed terms and conditions for industry sectors that have ongoing labour shortages (e.g. meat, dairy or religious industries).
4. **Designated area migration agreements**, allow a special agreement with a state or territory which identifies unique labour shortages in the location and supports recruitment of semi-skilled labour from outside Australia.
5. **Project agreements**, allow endorsed infrastructure or development projects to recruit overseas labour where there is a genuine skills shortage, and Australians jobs are not jeopardised.

The most common types of agreements are company-specific or industry labour agreements which are utilised to supplement the existing Australian workforce. In preparing and negotiating these agreements, certain concessions from standard visa requirements may be included to attract talented workers within short time frames, or to account for the skill level and English language ability of semi-skilled labour. Workers under these agreements are sponsored under the Temporary Skills Shortage or Employer Nomination Scheme for entry to Australia.

Due the tightening of requirements for Australian work visas, including a reduced skilled occupation list and the onus on employers to meet burdensome requirements, companies and industry bodies are more readily looking to labour agreements to fill labour shortages. To be successful in the labour agreement process, employers must be able to show that relevant stakeholder consultation and labour market testing has been undertaken in respect of any proposed roles.

¹<https://www.sbs.com.au/news/exclusive-special-visas-offered-to-regions-with-skill-shortages>



INSIGHT

4 year temporary visas and permanent residency no longer available to all skilled workers

There are now two occupation lists available for nomination under the temporary skilled worker program - the Medium and Long Term Strategic Skilled List (MLTSSL) and the Short Term Skilled Occupation List (STSOL). Occupations on the STSOL offer a two year visa only, with no access to a permanent employer sponsored option; those occupations nominated on the MLTSSL offer a visa of up to four years with the option of applying for permanent residency after three years.



TREND:

STRICT PROCESSING OF VISAS

The Department of Home Affairs' tougher stance on the integrity of information and documentation submitted to support of visa applications has seen a 27% increase in visa refusals in the last financial year, with a reported 308,150 non-humanitarian visa applications refused, compared to 238,335 during 2016 - 2017. In practice, integrity checking has meant that each application is being scrutinised more closely. This has meant the level of documentation and information required for applications now needs to be more comprehensive and detailed. For example, criteria relating to the financial capability of the employer to sponsor a skilled worker for permanent residency, or genuineness of the position in the business, are the most closely scrutinised criteria. The Department will look at the employer's financial information and performance to see if the employer has financial capacity to operate and pay the sponsored worker's salary. It is good practice to provide clear explanations with as much supporting evidence as possible to address potential concerns in every application.

For TSS visa applications, strict processing has meant that it is now taking longer to obtain relevant documentation before a visa application can be lodged. In addition to this, if an employer is not an accredited sponsor, processing times are currently 2-3 months which hinder the employer's ability to fill a critical skills shortage quickly.



INSIGHT

Transitional arrangements for permanent residency

Continue to apply for 457 visa holders who held, or had applied for a 457 visa (and was subsequently granted) on or before 18 March 2017. This will be phased out as of 18 March 2022.



INSIGHT

2 years recent work experience, no exception

All applicants for a Temporary Skills Shortage (TSS) visa must show evidence of at least two years of relevant, paid work experience in the nominated occupation in the last five years. This should be evidenced by detailed work references and payment records.

WHAT TO LOOK OUT FOR IN 2019



LMT CHECKLIST-TSS APPLICATIONS

Unless otherwise advised, the following evidence is required for all TSS applications:

- ✓ Copies of at least two advertisements – on a recruitment website with national reach (e.g. Seek or LinkedIn); or in a national newspaper; or broadcast on a national radio station; or posted on the Sponsor's website (for accredited Sponsors only).
- ✓ Advertisements must include: title, description and skills required for the position; name of the Sponsor, recruitment agency or associated entity; salary for the position unless it exceeds AU\$96,400.
- ✓ Advertisements must be advertised for at least four weeks (28 calendar days) and have been live within four months from the date of application.
- ✓ Details of number of applications received and reasons why a suitable candidate was not found.

Please note that where the above is not met, applications will be refused. Evidence of LMT must be uploaded at the time of lodgement.

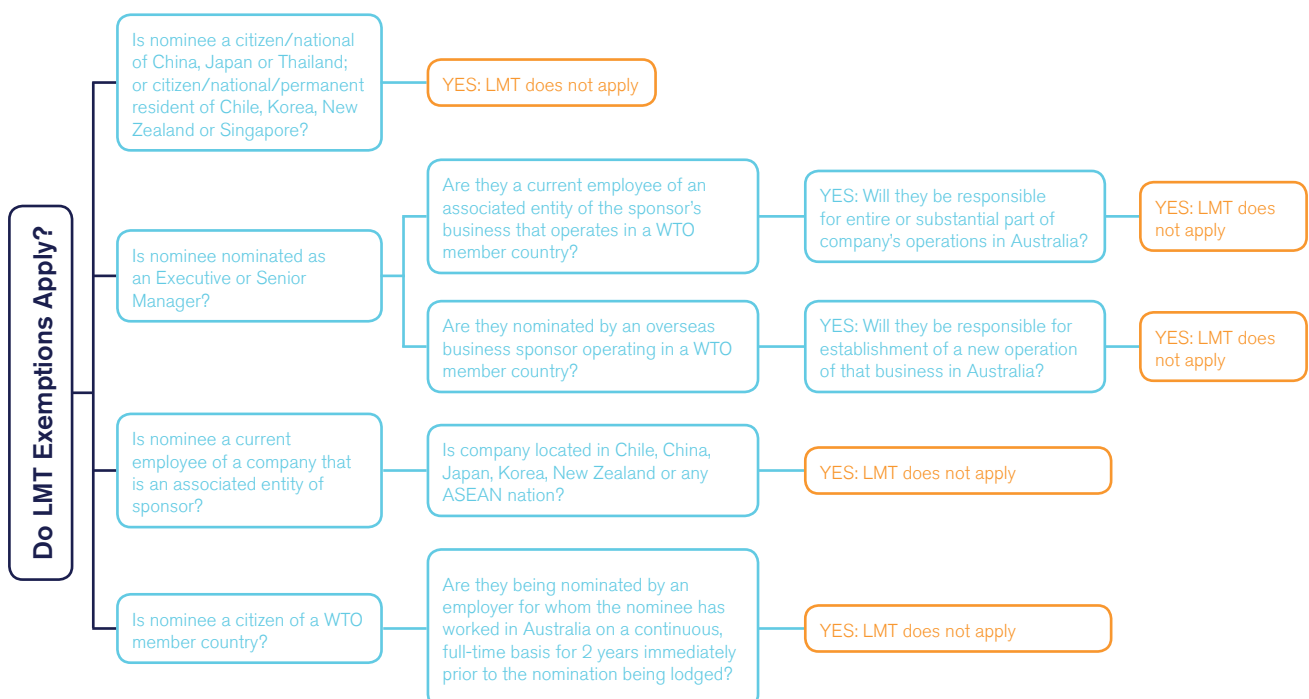
LABOUR MARKET TESTING

UNLESS EXEMPT, REQUIREMENTS MUST BE MET

As a part of the 2018 tranche of changes to the Temporary Skills Shortage (TSS) visa program, Labour Market Testing (LMT) is required for the majority of applications made for this visa. The Department of Home Affairs (Department) has prescribed the type of evidence required to meet the LMT requirements. However, prescribed LMT evidence is not required in cases where:

1. It would be **inconsistent with an international trade obligation** to undertake LMT; or
2. The person is nominated in a **select occupation or select position**, and alternative LMT evidence may be provided. The alternative evidence requires a submission letter to be provided by the nominating employer outlining the LMT efforts that were undertaken and why a suitably qualified Australian was not readily available to fill the role.

See the below decision making tree to determine if LMT applies.



IS YOUR BUSINESS IMMIGRATION COMPLIANT?



As a Sponsor of 457/TSS visa holders, businesses are required to meet certain obligations which require specific record keeping, notifications being made within required timeframes, ensuring sponsored workers are working in their nominated occupation and are not being underpaid. These sponsorship obligations are frequently (although not intentionally) overlooked. Following on from the challenges in 2018 around sponsored workers, it is expected that compliance will be at the forefront of the immigration agenda in 2019.

The beginning of a new year is always an ideal time to complete an immigration health check on your visa population to ensure that all records and information are in order. We've created a Compliance Health Check worksheet to assist you in meeting key obligations. For a complete list of sponsorship obligations please contact the Colin Biggers & Paisley Immigration team.

COMPLIANCE HEALTH CHECK

As a sponsor of foreign workers, there are certain obligations imposed on your business that should be adhered to for the duration of your sponsorship (and beyond), while you have foreign workers employed. The obligation that is most frequently overlooked is notification of certain events, these should be made within 28 days of the date of the event.

Use the below to health check to review your records and ensure that your obligations have been adequately maintained.



Required notifications regarding visa holders

- **has any visa holder ceased employment?** (require, date of termination and details of flights (if applicable) paid)
- **has any visa holder changed duties/role since grant of their 457/TSS?** (require, date of change and new position description to confirm if ANZSCO remains relevant)



Required notifications regarding the business

- **have any new Directors been appointed since the grant of the business sponsorship?** (hint: a historical ASIC search will detail all directors. Required, date of appointment, complete name and date of birth of person)
- **has the business structure changed since the grant of the business sponsorship?** (require, date of change and details of new structure e.g. partnership to Pty Ltd company)



Other obligations

- keep records for up to five years in a reproducible format relating to all immigration matters and visa holders
- pay for return flights for the 457/TSS visa holder (and their dependents) within 30 days, upon request from the visa holder, in writing
- pay all sponsored 457/TSS visa holders their Guaranteed Annual Earnings (i.e. the amount listed on the nomination approval and/or market rate for the occupation)

FOR ALL EMPLOYERS:

Importantly, even if your business does not employ a 457/TSS visa holder, you do have obligations under the employer sanction provisions of the Migration Act 1958. Specifically, ALL employers must NOT employ or refer persons to work, that do hold appropriate work rights or visa status in Australia.

ALL employers are obliged to take reasonable steps to check that employees have appropriate work rights in Australia. For example, your business may undertake a Visa Entitlement Verification Online (VEVO) check, with the persons consent, on the Department of Home Affairs website.

AUSTRALIAN CITIZENSHIP— IS IT CHANGING?

The Australian Government has vigorously debated changes to Australian Citizenship requirements throughout 2017 and 2018. Some of these changes have included the adoption of a requirement for applicants to sit an English test and an increased waiting period to become eligible for citizenship by conferral. The purpose of these proposed changes is to protect Australia and ensure that all 'new' Australians are able to take advantage of the opportunities available in the country. To date, no proposed changes have been ratified into legislation however a review of the citizenship program is likely to be on the horizon for 2019.

Despite the increase in processing times (currently 15 months) resulting from a halt to review of applications during the Government's discussions around proposed changes, Australia has welcomed

many new citizens throughout this financial year. 80,562 persons acquired citizenship by conferral; and 99,893 acquisitions via the descent, adoption or resumption pathways.

As a general rule, citizenship has four pathways - adoption, descent, resumption or conferral. It is available to children (adopted or biological) of Australian citizens by descent or adoption; or by resuming citizenship after it has been lost usually as a result of holding more than one citizenship in a country that does not allow dual nationality. The most common pathway however is by conferral, that is, once a permanent resident of Australia has met the *residence requirement*. The *residence requirement* expects that an applicant for Australian citizenship, has resided in Australia for a least four years, and has been a permanent resident in Australia for at least last 12 months. During this residency period, travel is limited to 12 months in total, with no more than 90 days outside of Australia in the most recent 12 month period. In addition to meeting the residence requirement, applicants should have ongoing good character and health, and successfully complete the Citizenship Test. Once citizenship is granted, a person must attend a citizenship ceremony to be formally recognised as an Australian.



VISAS FOR INNOVATION?

As part of the Australian Government's '*visas for innovation*' project, two pilot visa schemes were unveiled in March 2018 - the *Global Talent Scheme* (GTS) and the *Supporting Innovation in South Australia* scheme. The aim of these programs is to support economic prosperity, facilitate skills transfer and job creation, and promote growth in the country.

The GTS, opened as a pilot program on 1 July 2018, presenting two streams for applications, established businesses and start-ups. The premise of the GTS was to offer greater flexibility in visa requirements for niche industries that require highly skilled (and remunerated) individuals to fill specialist roles. For roles that met these specialist requirements, four year visas could be offered with access to permanent residency.

The application process for the GTS requires a specific, negotiated boutique agreement to be reached with the Department of Home Affairs

(Department) subsequently followed by a visa application by the highly skilled individual. To be considered for the scheme, businesses are required to seek permission to make an application for their unique agreement. In seeking permission, start-up businesses must provide evidence of a venture capital investment or a commercialisation grant. Processing times are not yet published, however priority is expected to be allocated for this type of application.

Since its inception, there has been widespread discussion about the GTS pilot, particularly about the requirement to undertake traditional labour market testing when making the application for the TSS visa. This can be problematic for the type of talent the GTS is attempting to attract - for start-ups, the original innovators or founders of a new organisation; and for established businesses, persons with high level proprietary knowledge and an unmatched skill set globally. To date, limited visas have been granted under the game changing GTS visa scheme.

On 21 November, the Australian Government released a Legislative Instrument which directed the Subclass 408, Temporary Activity to be utilised for the *Supporting Innovation in South Australia* scheme. To date limited information is available on this pathway, however is one to watch for 2019.

