



Migration Newsflash

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New Temporary Skill Shortage visa program introduced

The Australian Government has introduced the new Temporary Skill Shortage (TSS) visa program with effect from 18 March 2018. Complementary changes to the employer sponsored permanent skilled migration will take effect alongside the new TSS visa framework.

A new visa scheme, the Global Talent Scheme, to attract highly skilled global talent and deliver innovation to Australia will also be piloted from 1 July of this year.

This edition of our Migration Newsflash analyses the changes that have come into effect and also those that are anticipated subject to the passage of legislation. A further Migration Newsflash on the Global Talent Scheme will be released separately.

New TSS visa regime

Major reform to the Temporary Work (Skilled) Subclass 457 visa since the announcement by the Government of its abolishment and replacement with the new TSS visa, has resulted in a TSS visa that bears much resemblance to the significantly reformed 457 visa.

The introduction of the TSS (or Subclass 482) visa brings a further instalment of key changes and replaces the 457 visa altogether. Importantly, the TSS visa heralds in a new era for Australia's temporary work visa regime that is predicated on the need for employers to source foreign workers to fill genuine short-term positions for up to 2 years and also to address critical skills demand in medium-term occupations for up to 4 years.

Key changes

The key changes that underpin the new TSS visa framework have come into effect and are summarised below:

Sponsorship

- All sponsorship approvals will be valid for a period of 5 years for all Standard Business Sponsors (Australian entity, overseas entity and start-ups) with no requirement to meet any legislated training benchmarks (pending the introduction of new Skilling Australian Fund training levy).
- A single, unique identifier will be issued to each sponsor to reference all sponsorship approvals and subsequent renewals.
- Streamlined renewal process available to sponsors requiring existing sponsors to acknowledge that they have updated their details in the immigration electronic lodgment system.
- Full sponsorship application only required for new sponsors or when sponsorship approval has been allowed to lapse.

Nomination

- Introduction of two different nomination streams, Short-term (ST) stream for the nomination of occupations on the Short-term Skilled Occupation list (STSOL) and Medium-term (MT) stream for the nomination of occupations on the Medium and Long-term Strategic Skills List (MLTSSL).
- Single nomination must be made and approved under the aforementioned streams for which a TSS visa application must be assessed against (i.e. further new nominations not allowed once TSS visa application has been lodged).
- Nomination for a change in occupation cannot occur without an existing TSS visa holder nominee also applying for and being granted a new TSS visa.
- Nominated positions must be full-time i.e. 38 hours per week or between 32 and 45 hours where specified by an industry award or is consistent with the National Employment Standards (NES).
- The concept of Annual Market Salary Rate (AMSR) is introduced and defined as the earnings an Australian worker earns, or would earn, for performing equivalent work on a full-time basis for a year in the same workplace at the same location.
- The AMSR excluding monetary benefits must not be less than the Temporary Skilled Migration Income Threshold (TSMIT) (unless it is reasonable to disregard this criterion) and earnings as defined under the Fair Work Act must not be less than the AMSR.
- The AMSR determination must not be inconsistent with Australian labour market conditions relevant to the occupation nominated.
- Sponsors required to certify that the contract that they will be employing the nominee under is consistent with Australian workplace laws.
- Labour Market Testing (LMT) is introduced for all occupations unless an international trade obligation applies and must be conducted within 6 months prior to lodgement of the nomination application.
- New policy specification on when advertising is generally considered sufficient to determine that no suitably qualified/experienced Australian worker is available to fill the nominated position (Further details are provided in a separate section below on LMT).
- Alternative LMT evidence acceptable in circumstances where a nominee has an internationally recognised record of exceptional and outstanding achievement in a profession, a sport, the arts or academia and research, or when a new nomination has been lodged solely due to either a change in annual earnings of an existing Subclass 457 or TSS visa holder or a change in business structure of the sponsor.

Visa

- Visa grant period of 1, 2, 3 or 4 years if nominated under the MT stream, or 1 or 2 years if nominated under ST stream unless an International Trade Obligation (ITO) applies.
- Assessment against genuine temporary entrant (GTE) criterion in circumstances where an international trade obligation does not apply under policy and the visa applicant has held two or more TSS visas in the short-term stream during the last 5 years; or has been in Australia for 4 years already (notwithstanding the visa type held) and the Department has concerns that the applicant is not a GTE.
- Onshore visa applicants (both primary or secondary) can be in Australia either on a substantive or bridging visa.
- Skills assessments where mandatory for the lodgement of the TSS visa application must either accompany the application or evidence to demonstrate that the skills assessment process has commenced must be provided at the time of application.
- Mandatory 2 years of full-time (equivalent) work experience (in the last 5 years) required for all TSS visa applicants.
- Stricter International English Language Testing System (IELTS) 'time of decision' requirements for TSS visa applicants nominated under the MT stream.
- Public Interest Criteria (PIC) 4007 introduced. Health waivers may be sought and considered on an individual case- by-case basis.
- New 8607 visa condition requires the lodgement of a new nomination and visa application to enable a primary visa holder to seek a change in their occupation. Discretionary 8303 visa condition which requires no involvement in disruptive activities / violence may be imposed.

Comparative Analysis

To assist with understanding the key changes, a comparative analysis of the 457 and TSS visa programs, is outlined below:

Key changes	Temporary Work (Skilled) Subclass 457 visa	Temporary Skill Shortage (TSS) Subclass 482 visa
Duration and Transaction Reference Number (TRN) of Standard Business Sponsorship (SBS) approval	<ul style="list-style-type: none"> • 5 year sponsorship approval for established businesses; • 6 year sponsorship approval for established businesses with accredited status; and • 18 month sponsorship approval for overseas and start-up businesses established for less than 12 months in Australia. • Multiple TRNs issued for sponsorship approval and subsequent approvals. 	<ul style="list-style-type: none"> • 5 year sponsorship approval for all businesses; • Single TRN issued for sponsorship approval and subsequent approvals.
SBS Renewal	<ul style="list-style-type: none"> • Full SBS application process required for renewal of or 'variation to extend' sponsorship approval. 	<ul style="list-style-type: none"> • Streamlined process available for SBS renewals (recommended to be lodged 2 months prior to SBS expiry date). • Full application required is SBS allowed to lapse.

Associated nomination	<ul style="list-style-type: none"> • 457 visa application assessed against most recent nomination in place at time of decision. • Nominated occupation can be changed. • Either full-time or part-time positions can be nominated. 	<ul style="list-style-type: none"> • TSS visa application assessed against a single nomination lodged either under the ST or MT streams. • Nominated occupation cannot be changed without lodgement of a new TSS visa. • Only full-time positions can be nominated.
Terms and conditions no less favourable to that offered to an equivalent Australian citizen or permanent resident	<ul style="list-style-type: none"> • Guaranteed Annual Earnings (GAE) which can include non- monetary benefits must be no less than Market Salary Rate (MSR) on a per annum basis. • Annual base salary no less than Temporary Skilled Migration Income Threshold (TSMIT) unless reasonable to consider GAE. 	<ul style="list-style-type: none"> • The concept of Annual Market Salary Rate (AMSR) introduced and defined in Migration Regulations. • AMSR excluding non-monetary benefits must be no less than TSMIT unless reasonable to include. • Earnings (GAE) as defined in the Fair Work Act must be no less than AMSR.
Australian workplace law	<ul style="list-style-type: none"> • No declaration that employment offered is in compliance with Australian workplace law. 	<ul style="list-style-type: none"> • Declaration that employment offered is in compliance with Australian workplace law.
Labour Market Testing	<ul style="list-style-type: none"> • LMT only applicable to 'protected' occupations that are nominated notably engineering, nursing and trade occupations unless exempted due to a prevailing international trade obligation. • No prescribed format or minimum duration of advertising specified as long as occurring in the preceding 12 months prior to the nomination application being made. 	<ul style="list-style-type: none"> • LMT applicable to all occupations nominated unless exempted due to a prevailing international trade obligation. • LMT must be conducted within 6 months prior to lodgement of the nomination application. • New policy specification on when advertising is generally considered sufficient to determine that no suitably qualified/experienced Australian worker is available to fill the nominated position. • Alternative LMT evidence acceptable in certain circumstances.
Duration of visa grant period	<ul style="list-style-type: none"> • 4 year visa grant period if nominated occupation on Medium and Long Term Strategic Skills List (MLTSSL). • 2 year visa grant period if nominated occupation on Short-Term Skilled Occupation List (STSOL). • Shorter visa grant periods available based on duration of fixed-term employment contracts. 	<ul style="list-style-type: none"> • Visa grant period rounded up to the nearest number of years if specified in employment contract. • 1, 2, 3 or 4 year grant period if nominated occupation on MLTSSL ('Medium-term stream'). • 1 or 2 year grant period if nominated occupation on STSOL ('Short-term stream') unless an International Trade Obligation (ITO) applies.
Genuine Temporary Entrant (GTE)	<ul style="list-style-type: none"> • No GTE criteria. 	<ul style="list-style-type: none"> • GTE criteria to be addressed to limit the number of visa renewals if nominated in STSOL occupation.

Onshore visa restrictions	<ul style="list-style-type: none"> Onshore visa applicants who are not on a substantive visa are subject to assessment against additional Schedule 3 criteria. 	<ul style="list-style-type: none"> Schedule 3 criteria removed. Onshore applicants can be on a substantive visa or a Bridging A, B or C.
Skills assessments where mandatory	<ul style="list-style-type: none"> Skills assessment can be applied for post-lodgement of visa application as long as outcome received at time of decision. 	<ul style="list-style-type: none"> Skills assessment must have been applied for at the time of application and evidence provided.
Employment experience	<ul style="list-style-type: none"> Caveats specifying minimum 2 years of full-time work experience applicable to certain occupations. Minimum employment experience based on ANZSCO specification, where applicable. 	<ul style="list-style-type: none"> Mandatory 2 years of full-time (equivalent) work experience (in the last 5 years) for all TSS visa applicants. Minimum experience based on ANZSCO specification, where applicable (which can include the mandatory 2 years of relevant experience).
English language proficiency	<ul style="list-style-type: none"> Equivalent of IELTS average band score of 5 with no less than 4.5 in each of the 4 test components in Listening, Speaking, Reading and Writing. 	<ul style="list-style-type: none"> Equivalent of IELTS average band score of 5 with no less than 4.5 in each of the 4 test components of Listening, Speaking, Reading and Writing. If nominated under MT stream: Equivalent of IELTS average band score of 5 with no less than 5 in each of the 4 test components of Listening, Speaking, Reading and Writing.
Health requirement	<ul style="list-style-type: none"> Health waiver provision under available on the basis of sponsor undertaking to meet health related costs. 	<ul style="list-style-type: none"> Public Interest Criteria (PIC) 4007 introduced. Health waivers may be sought and considered on an individual case-by-case basis.
Visa conditions	<ul style="list-style-type: none"> 8107 condition requires the primary visa holder to engage in work or an activity that is inconsistent with the most recently nominated occupation. 8501 condition requires the maintenance of appropriate health insurance arrangements. 	<ul style="list-style-type: none"> New 8607 visa condition which requires the lodgement of a new nomination and visa application to enable a primary visa holder to seek a change in their occupation. 8501 condition requires the maintenance of appropriate health insurance arrangements. 8303 visa condition which requires no involvement in disruptive activities/violence, may be imposed.

Labour Market Testing

As highlighted above, a key change has been the introduction of new and more robust Labour Market Testing (LMT) requirements which serve to underpin the new TSS visa regime.

LMT will apply to all occupations nominated under the TSS visa program which is significant change to the LMT requirements under the Subclass 457 visa program which only apply to 'protected' occupations.

Importantly, LMT under the TSS visa program must have occurred within a 6-month period prior to the lodgment of a nomination application (or a 12-month period if the nomination application was lodged prior to 18 June 2018).

Proposed legislation relating to LMT when they come into effect, will allow *“the Minister to determine, by legislative instrument, the manner in which labour market testing in relation to a nominated position must be undertaken, and the kinds of evidence that must accompany a nomination”*.

In the meantime, new policy specifications on when advertising is generally considered sufficient for the Department of Home Affairs to determine that no suitably qualified/experienced Australian worker is available to fill the nominated position are:

- the nominated position has been advertised in Australia
- the advertisement was in English and included the following information:
 - the title, or a description, of the position
 - the name of the approved sponsor or the name of the recruitment agency being used by the sponsor; and
 - the annual earnings for the position (unless the annual earnings will be greater than the Fair Work High Income Threshold)
- at least two advertisements have been published:
 - on a national recruitment website (e.g. jobactive.gov.au, not a general classifieds website which is not an acceptable method)
 - in national print media
 - on national radio or
 - if the sponsor is accredited – on the businesses' website.

While advertising can be conducted by an authorized third party, the aforementioned forms of advertising must have either remained 'live' or remained open to applicants for at least 21 calendar days.

In addition, alternative LMT evidence can be considered sufficient to demonstrate that a suitably qualified and experienced Australian worker is not available to fill the nominated position in instances where the nominated position is a position which will be filled by a nominee that:

- has an internationally recognised record of exceptional and outstanding achievement in a profession, a sport, the arts or academia and research; or
- held by an existing TSS or subclass 457 visa holder for which a new nomination has been lodged solely due to either a change in annual earnings of an existing Subclass 457 or TSS visa holder or a change in the business structure of the sponsor.

Training Levy

An impending key change and undoubtedly the hallmark of the new TSS visa regime will be the new Skilling Australians Fund (SAF) Training Levy which is still subject to the passage of legislation.

As flagged in our previous Migration Newsflash editions, the training levy once introduced for the TSS visa regime will replace the training benchmark expenditure requirements of the Subclass 457 visa program.

Key change	Temporary Work (Skilled) Subclass 457 visa	Temporary Skill Shortage (TSS) Subclass 482 visa
Training Requirement	<ul style="list-style-type: none">Recent expenditure, by the sponsoring business, to the equivalent of at least 2 percent of the gross payroll expenditure in payments allocated to a training fund that operates in the same or a related industry of the business or at least 1 percent of the gross payroll expenditure, in the provision of training to employees of the sponsoring business, who are Australian citizens or Australian permanent residents.	<ul style="list-style-type: none">Payment of SAF Training Levy equivalent to AUD 1,800 per visa year for sponsors with an annual turnover of AUD 10 million or more or AUD 1,200 per visa year for sponsors with an annual turnover of less than AUD 10 million.Payable upfront at time of nomination and calculated based on visa grant period applied for or remaining visa grant period (i.e. number of years).

The SAF training levy will be tax deductible and sponsors cannot seek to pass on the costs of the training levy to the visa applicant. While the Department of Home Affairs will have responsibility for collecting the SAF training levy, the SAF itself will be administered by the Department of Education and Training (DET).

Employer sponsored permanent skilled migration

Complementary changes to employer sponsored permanent skilled migration (Employer Nomination Scheme and Regional Sponsored Migration Scheme) have taken effect alongside the TSS visa program.

Key changes include:

- All primary applicants nominated under the Direct Entry (DE) stream must be nominated in an occupation on the MLTSSL or on the new Regional Occupation List (ROL) (available as an additional list for regional employers).
- All primary applicants nominated under the Temporary Residence Transition (TRT) stream must be either a holder of a TSS visa nominated under the MT stream (unless transitional arrangements) or a holder of a 457 visa who has worked full-time for their nominating employer in Australia for 3 out of the preceding 4 years prior to nomination.
- All primary applicants nominated for employer sponsored permanent skilled migration must be under 45 years of age unless age exemptions apply.
- The age exemption available to high salary earners under the TRT stream requires nominees to have been working for their nominating employer as the holder of a TSS or subclass 457 visa for the preceding three years with earnings equivalent to the Fair Work High Income Threshold.
- Transitional arrangements will be available for nominees who either held, or was an applicant for, a subclass 457 visa (which was subsequently granted) on 18 April 2017 to apply under the TRT stream on the basis of having worked for their nominating employer on either a 457 or TSS visa for at least 2 out of the preceding 3 years.

The SAF training levy for permanent residency nominations (i.e. AUD 5,000 per nomination for businesses with annual turnover AUD 10 million and AUD 3,000 per nomination for businesses with annual turnover <AUD10 million) is still subject to the passage of legislation.

Key considerations

With the introduction of the TSS visa framework, employers will need to carefully navigate the new LMT requirements (if not exempted under international trade obligations) in light of the new policy specification on acceptable advertising to demonstrate that no suitably skilled / qualified Australians are available to fill the nominated roles.

The costs of the new SAF training levy will need to be factored into overall expenses relating to the nomination of existing assignees seeking to extend their stay in Australia with a TSS visa, or prospective assignees applying for a TSS visa to enter Australia. Furthermore, administering the upfront payment of the SAF training levy will need to be duly considered as the levy must be paid at the time of nomination.

Furthermore, unless transitional arrangements apply, employers can only nominate assignees for permanent residence in occupations on the MLTSSL (or on the ROL if located in a regional area) and need to communicate this up front to assignees who may be seeking an employer sponsored pathway to permanent residence.

The transitional 'grandfathering' arrangements 'sunset date' of 18 March 2022 will limit the period available to certain eligible Subclass 457 visa holders to apply for employer sponsored permanent residence under the TRT stream. Hence employers and their assignees will need to consider accessing these arrangements as soon as eligibility has been met.

Contact us

KPMG will issue further policy and legislative updates as they arise and we will work with you to help minimise the impact of these changes.

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