

Australia

Executive Summary

The advent of globalization has led to a dramatic increase in the movement of skilled workers seeking employment opportunities in different countries. Despite the current economic climate, Australia is continuing to experience a skills shortage which has resulted in the consistent popularity of employment visas.

Key Government Agencies

The Department of Immigration and Citizenship (“DIAC”) is the responsible government department that processes all visa applications. Depending on the type of visa applied for and the location of the applicant, applications may be lodged in or outside Australia. If lodged outside Australia, a DIAC officer within a local Australian mission (*e.g.*, an Australian Embassy, Australian High Commission or Australian Consulate) will process the application.

In addition to visa processing duties, DIAC is responsible for monitoring the activities of businesses that sponsor foreign national staff for work visas. DIAC conducts audits every 6 to 12 months in order to ensure that employers of foreign national staff are complying with their immigration obligations. If non-compliance is established, DIAC has specific powers to sanction the employer (and the foreign employee, if applicable), which may result in serious ramifications for the business and reputation of the employer.

Current Trends

The Australian government is placing increasing emphasis on employment visas and compliance. Reforms in 2008 and 2009 indicate continued focus on these issues in order to better monitor employers and prevent worker exploitation.

The government is attempting to achieve a delicate balance between addressing the skill shortages in the Australian labour market and ensuring that this increased employment activity does not result in a breach of immigration and employment laws. Employers of foreign national staff working without a valid visa or in breach of their visa conditions may be subjected to severe civil and criminal penalties, including imprisonment of up to five years in circumstances where the employee is being exploited. Exploitation is defined as being a condition of forced labor, sexual servitude or slavery.

In addition to protecting the rights of foreign national staff, the government is tightening the requirements of employment visas. Employers in many cases are now required to establish that they have either met the requisite ‘training benchmark’ in relation to their Australian staff or that they will implement an auditable ‘training plan’ within the next 12 months. Exceptions are in place for employers located outside Australia.

Another key trend is the expanding requirement for visa applicants to meet specific English language requirements. While many visa streams have flexible exceptions to this requirement, there is a movement by the government to improve the English language ability of all foreign nationals seeking to live and work in Australia.

Business Travel

Business Electronic Travel Authority

The Business Electronic Travel Authority (“Business ETA”) is an electronic visa designed to facilitate travel by foreign nationals of countries who, on the basis of statistical data, have shown to be genuine business visitors and are unlikely to overstay their visas.

Foreign nationals with passports from the following countries are eligible for a Business ETA:

Andorra	Iceland	Portugal
Austria	Ireland	Republic of San Marino
Belgium	Italy	Singapore
Brunei	Japan	South Korea
Canada	Liechtenstein	Spain
Denmark	Luxembourg	Sweden
Finland	Malaysia	Switzerland
France	Malta	Passports issued by the authorities of Taiwan
Germany	Monaco	United Kingdom (including BNO)
Greece	Netherlands	United States of America
Hong Kong SAR	Norway	Vatican City

Primarily, the Business ETA is designed for business visitors who wish to undertake business-related activities such as attending conferences, seminars, business meetings or training sessions.

The Business ETA allows multiple trips to Australia and is normally valid for use for a period of 12 months. Visa holders may enter Australia and stay for a maximum of three months on each occasion (with no limit on the number of entries that may be made). While this visa does not generally allow employment, visa holders may engage in work in exceptional circumstances, that is, if the work is urgent, highly skilled or specialized in nature and for no more than six weeks.

Subclass 651 eVisitor Visa

The Subclass 651 eVisitor Visa (“651 visa”) is also an electronic visa with the same effect and operation as the Business ETA. The holder of this visa may enter Australia for a maximum of three months on each occasion during the 12 month life of the visa. This visa also allows for business activities and employment in exceptional circumstances as outlined above.

This visa is available to the following list of, generally European, passport holders:

Andorra	Iceland	Romania
Austria	Ireland	Republic of San Marino
Belgium	Italy	Slovakia
Bulgaria	Latvia	Slovenia
Cyprus	Liechtenstein	Spain
Czech Republic	Lithuania	Sweden

Denmark	Luxembourg	Switzerland
Estonia	Malta	United Kingdom
Finland	Monaco	Vatican City
France	Netherlands	
Germany	Norway	
Greece	Poland	
Hungary	Portugal	

The main benefit of this visa over the Business ETA is that the foreign national may make an online application without requiring the assistance of a travel agent or airline. There is also no application fee.

Subclass 456 Business Short Stay Visa

The subclass 456 Business Short Stay visa (“456 visa”) is similarly intended for persons seeking a short-term stay in Australia for business purposes but who are not eligible for a Business ETA or a 651 visa (*e.g.*, nationals of India, the Republic of South Africa, and the People’s Republic of China). This visa may be granted for travel to Australia for multiple trips over an extended period (such as one or more years) with a maximum stay of three months on each arrival. The 456 visa is similar to the Business ETA and the 651 visa in that the visa conditions do not permit employment except in exceptional circumstances.

Training

Subclass 442 Occupational Trainee Visa

The subclass 442 Occupational Trainee visa (“442”) is for foreign nationals seeking to enhance their skills or education by undertaking structured workplace based training in Australia. The visa is primarily targeted towards young professionals seeking to further their career and develop their skills in a practical environment.

However, it may also be utilized by overseas students who must undergo a period of workplace based training in order to satisfy specific course requirements. Visa applicants may include their spouse and dependent children.

The 442 visa requires the trainee to be nominated by an Australian business or government organization. The training provided must be a clearly structured program that is workplace based. It must also be designed to improve the trainee’s skills or area of expertise without adversely affecting the occupational training opportunities of Australian workers.

Employment Assignments

Subclass 457 Business Long Stay Visa (Temporary)

Australian and foreign businesses which meet certain requirements can be approved to sponsor foreign nationals for paid employment through the Subclass 457 Business Long Stay visa (“457 visa”). The 457 visa provides temporary residence in Australia to foreign nationals and their families for up to four years (with unlimited options to renew). The 457 visa is intended for skilled workers with the qualifications and/or experience required to accommodate Australia’s labour shortages.

Foreign businesses with or without an operating base or representation in Australia can sponsor foreign nationals to work in Australia for various purposes, including the establishment of business operations in Australia or the fulfillment of contractual obligations.

Australian businesses, whether incorporated or unincorporated, can also sponsor foreign nationals for a 457 visa. In respect of Australian business sponsors, DIAC is careful to assess whether the business provides training and professional development opportunities to Australian employees and whether the level of training expenditure meets the requisite benchmarks at the time of assessment.

The 457 visa also accommodates related corporate entities in circumstances where it may be necessary for the foreign national to be sponsored by a business other than the direct employer or end user. This is possible in cases where the employer is related to the sponsoring business (*e.g.*, an Australian parent company sponsors a foreign national for a 457 visa to work as an employee of its smaller, newly established Australian subsidiary company). Note, however, that there is an important exception to this requirement in instances where the sponsor will be a foreign business. In these circumstances, the foreign national must at all times remain in the employment of the foreign business and cannot be transferred to another related business, whether Australian or foreign.

As part of the application process the sponsoring business, whether foreign or Australian, is required to give undertakings to DIAC in respect of the foreign national employees they sponsor. These ‘sponsorship obligations’ mirror the general obligations of employers under Australian employment and taxation laws but also consist of additional responsibilities specific to subclass 457 visa holding employees. The obligations cannot be waived nor can sponsors contract out of them as they are given by the sponsor to DIAC, not by the sponsor to the employee.

The obligations to be complied with include an obligation to be responsible for the cost of return travel of the foreign national employee and an obligation to cooperate with DIAC in relation to information requests and on-site visits by DIAC inspectors. These obligations may also extend to the foreign national employee's family members if included on their 457 visa. Note, however, that many of these obligations cease once the foreign national employee has ceased employment or obtained another Australian visa.

As of 14 September 2009, new civil penalties apply in relation to breaches of the obligations. These penalties may reach as high as AUD33,000 for a corporation or AUD6,600 for an individual.

Foreign national employees applying for the 457 visa must be appropriately skilled and/or experienced in order to be eligible. University qualifications, although mandatory for some occupations, may not be required if the applicant can show that they have a specified level of relevant work experience (typically three to five years depending on the occupation).

Applicants must also demonstrate functional English language ability. Exemptions are available in certain situations, such as where the applicant is a native English speaker, the role is listed as exempt, the base salary meets the prescribed minimum or the applicant has completed at least 5 consecutive years of full time secondary and/or tertiary education where all instruction was delivered in English.

Employers seeking to sponsor a foreign national will also be required to demonstrate that the foreign national will be paid in accordance with the local labour market rate for their role, skills, experience and location of employment. This may be demonstrated in a number of ways, the most common being by comparative analysis of existing Australian employees performing an equivalent role within the business.

If the foreign national employee seeks to change employers in Australia, approval must first be obtained from DIAC in the form of a nomination application through sponsorship by the new employer or alternatively, the employee may apply for a new 457 visa.

Employer Nomination Scheme Visa (Permanent)

Australian businesses can sponsor skilled foreign nationals for permanent residence under the Employer Nomination Scheme (“ENS”). The ENS visa provides foreign nationals and their families with the opportunity to work and live in Australia permanently.

The application process is similar to the process for a 457 visa in that the employer must apply for approval from DIAC to sponsor the foreign national employee for permanent residence and the employee must demonstrate they are suitably qualified and experienced for the position.

There are some crucial differences between the ENS visa and the 457 visa including that the applicant for an ENS visa must be under the age of 45 (unless they hold a very senior or specialized position) and the sponsor must be an Australian business.

Unlike the 457 visa, employers are not required to give undertakings to the Government in respect of the holder of an ENS visa. In addition, once the ENS visa is granted it ceases to be connected to the visa holder’s employment.

Other Comments

The Australian government has introduced legislation which makes it an offence for an employer to knowingly or recklessly allow a foreign national to work without a valid visa or in breach of their visa conditions.

These sanctions also apply to employers who refer foreign nationals for work (and the employer knows, or is reckless as to whether the foreign national has a valid visa or will be breaching their visa conditions).

For example, an offence may occur if a foreign national is allowed to work after their visa has expired; or a foreign national is allowed to work even though their visa prohibits work.

An offence would similarly occur if a recruitment agency refers a foreign national employee whose visa has expired to work for an end user client; or refers a foreign national for full-time work even though their visa conditions only permit part-time work.

These laws place an unprecedented obligation on employers to verify the work rights of their employees. The consequences of breaching these laws are severe as employers now risk criminal prosecution, financial penalty and, in some cases, imprisonment.

If an employee is being exploited and the employer knows of (or is reckless as to) this circumstance, the sanctions are more severe. Exploitation is defined as being a condition of forced labor, sexual servitude or slavery.

A foreign national's immigration status should, therefore, always be checked prior to an offer of employment being issued and/or prior to employment commencing.

Failure to comply with these requirements may result in the following penalties:

Offence	Penalties	
	Individual offender	Corporation offender
Foreign national allowed or referred for work	AUD13,200 or up to 2 years imprisonment	AUD66,000 per offence
Foreign national allowed or referred for work where exploitation occurs	AUD33,000 or up to 5 years imprisonment	AUD165,000 per offence

In addition to the visas discussed above, there are a broad range of temporary visas that allow restricted work. From time to time these visas may be more appropriate for a foreign national employee if, for instance, sponsorship through a 457 visa is not possible or practical.

Working Holiday visas are available to nationals of certain countries (*e.g.*, United Kingdom, Germany and Canada) and permit the holder to work for up to six months with any one employer while also holidaying in Australia. Applicants must be between the age of 18 and 31 and extensions of this 12 month visa are available in prescribed circumstances.

Foreign nationals on student visas are also permitted to work for up to 20 hours per week and full-time when their course is not in session. Often these visas may be more appropriate for short-term assignments or casual, less qualified workers.

In addition to temporary visas, Australian permanent residence is also available to foreign nationals who wish to apply independently (*i.e.*, without the sponsorship of an Australian employer) on the basis of their skills and experience. Applicants must meet the relevant pass mark in a points based system which allocates points for such factors as age, English language ability, work experience and occupation. In general, the younger and more qualified and/or experienced the applicant, the greater the chance of achieving the relevant pass mark. Changes to the economic climate have resulted in slower processing of these applications unless the applicant's nominated occupation appears on DIAC's 'Skilled Occupation List'.

The family migration program facilitates the movement of spouses, children and other family members of Australian citizens and Australia permanent residents to Australia. This program ultimately provides applicants with Australian permanent residence and unrestricted work rights.

It is important to note that foreign nationals holding permanent residence visas are required to continue to meet specific residence requirements in order to maintain their immigration status. Lengthy periods of residence overseas may jeopardize a permanent resident's ability to re-enter Australia. It is for this reason that Australian Citizenship is recommended for most foreign nationals once they are able to meet the requirements.

Applicants for Australian Citizenship are eligible if they can demonstrate that they have been living in Australia on a valid visa for four years immediately before applying, including one year as a permanent resident, and have not have been absent from Australia for more than one year in total during the 4 year period, including no more than 90 days in the year before applying.

In addition to the residence requirements, all applicants must pass the *Citizenship Test* aimed at ensuring that applicants comprehend their rights and obligations as an Australian citizen.

Further Information

CCH Australia publishes the *Australian Master Human Resources Guide* (online and in print) and the *Australian Human Resources Management* subscription information service (online and in print). Both publications contain commentary authored by Baker & McKenzie and provide more information on the Australian immigration process, various visa categories, employer obligations, employer sanctions, and Australian citizenship.