

“Where will my nanny/plumber come from” – the Australian perspective, Washington IBA, 19 September 2016 – Maria Jockel

▪ **The impact of local legislation on the massive flows of migrants in the world**

As Australia continues to grapple with the ongoing demands of temporary and permanent entry to Australia, our immigration laws and policies, which are subject to constant and ongoing change, are arguably the most complex in the world.

Since 1994, the Department has created over 400,000 individual pages of information relating to Australia’s immigration laws.

The merger of the Department with the Australian Customs and Border Protection Service and the establishment of the Australian Border Force as the operational enforcement arm came into effect on 1 July 2015.

This heralded a new era of regulatory compliance which has significantly expanded the authority and reach of the Department, which, with the Australian Border Force as its operational enforcement arm, is an enforcement agency (and a criminal enforcement agency).

The demand for temporary and permanent entry to Australia is reflected in the fact that the Department receives over 20,000 visa applications each day, worldwide. It is also reflected in the significant revenue from visa fees which the Department continues to raise. In 2014/2015 revenue from visa fees and fines was about \$1.87 billion.

The legislative regime contains strict rules and technical details including detailed descriptions of the strict criteria of eligibility for permanent and temporary stays in Australia.

The legislative scheme provides significant powers to the Department to enforce Australia’s immigration laws through its monitoring, compliance, investigations and sanctions programmes. It has extensive administrative powers, which include suspending employers from participating in employer sponsorship programs. These powers are supported by a range of civil and criminal pecuniary penalties.

▪ **Open systems v immigration quotas**

Australia’s Migration Program focuses on skilled temporary and permanent workers to meet Australia’s labour force needs.

The employer nomination scheme (Subclass 186 and Subclass 187) (ENS) enables businesses operating in Australia to recruit skilled workers on permanent visas to fill specified highly skilled positions that cannot be filled from the Australian labour market. The temporary work (skilled) visa (Subclass 457) provides for the long-term temporary entry of highly skilled persons sponsored by an Australian or overseas business to meet Australia’s skill needs.

The Subclass 457 visa program is demand driven. However, as the Department of Immigration and Border Protection (**the Department**) has identified a trend of employers to use the program to accommodate semi-skilled workers, or to undermine other visa programs, all applications are strictly scrutinised to ensure that it is a genuine position and not a position created to secure immigration outcome.

The employer sponsored scheme is subject to a strict quota and again, all applications are carefully scrutinised and must meet the strict criteria of eligibility.

▪ **Definition of middle and low-skilled workers: when does a worker ‘qualify’ as a ‘non-qualified’ worker?**

The Department uses the Australian New Zealand Standard Classification of Occupations (ANZSCO codes) and specified assessing authorities to assess prescribed applications for skilled migration under the *Migration Regulations 1994* (**Migration Regulations**).

ANZSCO classifies occupations in accordance with eight Skill Levels namely:

1. Managers;
2. Professionals;
3. Technicians and Trades Workers;
4. Community and Personal Service Workers;
5. Clerical and Administration Workers;
6. Sales Workers;
7. Machinery Operators and Drivers; and
8. Labourers.

The ANZSCO code is used by the Department to ensure that applicants who wish to migrate as skilled migrants nominate a skilled occupation for migration purposes. Assessing authorities are independent expert bodies who certify that the applicant's educational qualifications and, in some instances, skilled work experience in their occupation, is comparable to that necessary to undertake the same position in Australia.

Only **specified** occupations are eligible namely:

- The Consolidated Sponsored Occupation List (**CSOL**) which provides eligible occupations identified as being in shortage in the Australian labour market in the short term.

Eligible Manager (Skill Level 1), Professional (Skill Level 2), and Technicians and Trade Workers (Skill Level 3), Community and Personal Service Workers (Skill Level 4 & 5) and Clerical and Administration Workers (Skill Level 6) are included in the CSOL.

Examples of eligible occupations including:

- Skill Level 3 occupations such as Plumber, Horse Trainer, Cook, Baker, Library Technician, Dressmaker, Greenkeeper etc.
- Skill Level 4 occupations such as Ambulance Officer, Intensive Care Ambulance Paramedic, Enrolled Nurse, Prison Officer, Driving Instructor etc.
- Skill Level 5 occupations such as Contract Administrator, Legal Executive, Insurance Loss Adjustor etc.
- Skill Level 6 occupations such as Auctioneer, Insurance Agent, Real Estate Agent etc.
- There is only 1 Skill Level 7 occupation on the CSOL and that is Driller.
- The CSOL applies for:
 - State/Territory nominated visas;
 - the Temporary Work (Skilled) visa;
 - the Direct Entry stream of the Employer Nomination Scheme;

- the Occupational Trainee stream of the Training and Research visa; and
- the Occupational Trainee visa.
- The Skilled Occupation List (**SOL**) provides eligible occupations ANZSCO codes and assessing authorities for independent or family sponsored skilled visas, identified in shortage in the Australian labour market in the medium to long term.
- **Immigration procedures and labour market test**

Australia's immigration procedures are complex as a visa can only be granted if the prescribed criteria for that particular class is met.

For the purposes of the skilled temporary and permanent employer sponsored visa the strict criteria to be met includes:

- Whether the tasks of the position align with the ANZSCO code which requires a consideration of both the tasks and the duties within the context of the business and as part of the assessment as to whether the position is a "*Genuine Position*".
- Labour Marketing Testing (**LMT**) applies under the Subclass 457 visa program, in respect of certain nominated occupations as specified by the Minister of Immigration and Border Protection in a legislative instrument (unless exempted).

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.

- **Terms and conditions of employment for middle to low-skilled employees and other specifics from an employer law standpoint, such as minimum wages etc**

All Australian employers must comply with the *Fair Work Act 2009*, which provides for a safety net of minimum terms and conditions of employment through the National Employment Standards and this includes minimum wages etc.

- **The need for a local sponsor in order to initiate the immigration procedure versus a 'do it on your own'**

Under the temporary and permanent employer sponsored visa schemes, the local sponsor must initiate the immigration procedure in order for the worker to be eligible to apply for the employer sponsored visa.

- **Accompanying family members of middle and low-skilled workers: can they join the family?**

Australia has two official low or non-skilled migration schemes:

- (1) Special Program visa (Subclass 416) for the seasonal worker programme; and
- (2) Labour Agreement Scheme.

Special Program visa (Subclass 416) for the seasonal worker programme

This visa offers seasonal labour in selected industries to Australian employers who cannot source local labour. The program of seasonal work allows seasonal workers to contribute to the economic development of their home country by providing access to work opportunities in Australian agriculture and accommodation industries.

To be eligible for the visa, applicants must be:

- At least 21 years of age;
- Invited to participate in the program by an approved special program sponsors; and
- A citizen of and resident in Fiji, Kiribati, Papua New Guinea, Samoa, Solomon Islands, Timor-Leste, Tonga, Tuvalu or Vanuatu.

Visa applicants must intend to enter Australia temporarily for seasonal work and return to their home country after their employment ceases.

For the Seasonal Worker Program, the sponsor must be an approved employer recruiting seasonal workers for the horticulture, tourism (accommodation), sugar cane farming, cotton farming and aquaculture industries.

Labour Market Scheme

Labour agreements provide a temporary and permanent pathway to recruit overseas workers where standard Subclass 457 visa arrangements do not meet industry needs, there are skilled or semi-skilled labour shortages and access to overseas workers is demonstrably in Australia's best interests.

Overseas workers employed under a Labour Agreement must receive terms and conditions of employment and be no less favourable than those of an Australian worker.

Student visa program (subclass 500)

Student visa holders can generally work up to 40 hours per fortnight when their course is in session and unlimited hours during scheduled course breaks. Students completing a Masters' degree by research or a doctoral degree (PhD) do not have work restrictions.

Eligible family members of student visa holders can accompany them to Australia. The family members of student visa holders can work up to 40 hours per fortnight, after the visa holder has started their course of study in Australia. If the visa holder is doing a postgraduate course, there is no restriction on the number of hours their family members can work.

Student visa holders often work in middle and low skilled positions.

Working Holiday visa (subclass 417)

This visa is for people who want to holiday and work in Australia for up to a year.

To be eligible for the visa, applicants must:

- Be at least 18 but not yet 31 years of age;
- Not have a dependent child accompanying them at any time during their stay in Australia;
- Have not previously entered Australia on a Work and Holiday (Temporary) visa (subclass 462);
- Hold a valid passport from a country involved in the Working Holiday Program with Australia; and
- Have enough money to:
 - Support themselves on a working holiday; and
 - Buy a return or onward travel ticket at the end of their stay.

Only prescribed countries are involved in the working holiday program with Australia.

To apply for a second Working Holiday visa, applicants must have already completed three months of specified work in regional Australia. The specified work must have been completed during the first Working Holiday visa. Specified work is work that is undertaken in a 'specified' field or industry in a designated regional area.

Examples of eligible specified work includes fruit picking, feeding and herding cattle, conservation and environmental reforestation work, erecting fences on a construction site, scaffolding and such like.

These are low skilled positions.

Work and Holiday visa (Subclass 462)

This visa program operates similarly to the Working Holiday visa (Subclass 417) and only applies to applicants who hold a specified passport.

There is an annual limit to the number of Work and Holiday visas issues to each country. No applications will be approved once this limit is reached. The visa program year starts on 1 July each year.

Visa-holders are not permitted to be accompanied by a dependent child if they participate in the program. Visa holders can be accompanied by their partner, but their partner will need to apply for their own visa.

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Worker and Holiday visa holders often work in middle and low skilled positions.

Conclusion

As a nation of immigrants, Australia's Migration Program is part of nation building. In response to the challenges of mass migration and concerns to maintain national security, law enforcement and security priorities, the focus is now on robust regulatory compliance, given the Department's ever expanding authority and reach.

The Migration Program caters for plumbers as this is a skilled occupation whereas nannies are not.

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