



Law Council  
OF AUSTRALIA

# **Inquiry into the effectiveness of the current temporary skilled visa system in targeting genuine skills shortages**

**Senate Legal and Constitutional Affairs Reference Committee**

**21 December 2018**

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful to the Law Institute of Victoria, the Law Society of Western Australia and the Law Society of South Australia for their assistance with the preparation of this submission, together with the Migration Law Committee within the Law Council's Federal Litigation and Dispute Resolution Section.

## Introduction

1. The Law Council of Australia welcomes the opportunity to provide comments to the Legal and Constitutional Affairs References Committee (**the Committee's**) inquiry into the effectiveness of the current temporary skilled visa system in targeting genuine skills shortages (**the Inquiry**). The Law Council offers the following comments for consideration, which are largely based on material provided to it by the Law Institute of Victoria and the Law Society of Western Australia.
2. The terms of reference for the Inquiry require the Committee to examine the effectiveness of the current temporary skilled visa system in targeting genuine skills shortages, with particular reference to:
  - the interaction between the temporary skilled visa system and the system in place for training Australian workers, including how a skills shortage is determined;
  - the current skills assessment regime, including but not limited to, the correct application of ANZSCO codes and skills testing requirements;
  - the relationship between workers on skilled visas and other types of visas with work rights, including the rationale and impact of the 400 visa;
  - the effectiveness of the current labour market testing arrangements;
  - the adequacy of current skilled visa enforcement arrangements, with particular regard to wages and conditions and access to information about rights and protections;
  - the use and effectiveness of labour agreements; and
  - related matters.
3. In 2017, the Temporary Work (Skilled) subclass 457 visa program was substantially reformed. In March 2018, the 457 visa program was replaced with the Temporary Skills Shortage (**TSS**) visa. The new TSS regime reflects a general tightening of the visa criteria, adding layers of complexity for most applications, and streamlining others.
4. There are a number of key themes identifiable in the structure of the new TSS visa program. These include:
  - greater discretionary powers in the TSS provision allowing the Department of Home Affairs (**the Department**) to look behind the employment arrangements for TSS visa holders, and to refuse applications where there are concerns with market salary rates or lodgements of multiple TSS visas for Short Term occupations where it seems the visa applicant is not a genuine temporary entrant; and
  - new measures focusing on genuineness and integrity including:
    - broadening the definition of 'adverse information' which is assessed at the TSS sponsorship, nomination and visa application stage;
    - more prescriptive labour market testing (**LMT**) requirements with limited exemptions;
    - a greater focus on the genuineness of positions to prevent the TSS program being used to procure a visa outcome for an applicant; and
    - a greater focus on non-discriminatory recruitment practices to ensure that they are transparent, competitive and merits based.

5. Additional information on the history and inquiries into the temporary skilled visa program can be found at [Appendix A](#).

## The Skilling Australians Fund

6. Previously, training benchmarks that existed in the 457 visa program required sponsors to demonstrate ongoing expenditure on training Australians in their business, or in the industry more broadly. In August 2018, this requirement was replaced with a tax-deductible Skilling Australians Fund (**SAF**) charge which is payable by sponsors at the time of lodgement of each TSS nomination application. The SAF requires sponsors to pay a levy upfront each time they lodge a nomination application for a TSS visa, with the funds allocated to certain areas. The SAF levy cannot be passed onto or recovered from any person, including the sponsored employee.
7. The SAF levy is projected to raise \$1.2 billion in revenue over the first four years and the Budget papers specify that the SAF will prioritise apprenticeships and traineeships for occupations in high demand, occupations with a reliance on skilled migration pathways, industries and sectors of future growth, trade apprenticeships, and apprenticeships and traineeships in regional and rural areas.
8. The SAF levy amount is determined by the turnover of the business:

Turnover	TSS visa period
Less than AUD10 million	\$1,200 per year of visa requested
More than AUD10 million	\$1,800 per year of visa requested

9. A refund of this levy is only available in very limited circumstances, including where:
- the visa application is refused on health or character grounds;
  - the visa holder fails to commence employment in their nominated position;
  - (for applications lodged after 17 November 2018) the TSS visa holder ceases within the first 12 months of employment in their nominated role (if the visa was approved for a period of 24 months or more); or
  - the nomination application is withdrawn from processing in certain circumstances.
10. The levy is not refundable if the nomination application is refused. There has been a spike in refusal rates for nomination application, predominantly on the grounds that the labour market testing requirement was not met in some form.
11. A refused nomination for a TSS visa means that the employer does not retain the benefit of the overseas worker whom it seeks to sponsor. The SAF levy was intended to be a *quid pro quo* in exchange for being permitted to sponsor overseas workers. For employers whose nomination applications are refused, the Law Council submits that it is unreasonable to retain the SAF levy from an employer as they fail to derive any benefit from the TSS program.
12. Considering the employer never receives the benefit of the employee working for the business, the Law Council submits that the Department should consider refunding the levy in these circumstances.

13. Additionally, under the SAF levy, there is no recognition of actual training expenditure outlaid by sponsor employers. This can operate unfairly against sponsors who already increase the skills of Australians through outlay on their own training programs. The payment of the SAF levy can be a significant impost on sponsors who are already committing funds and resources to upskilling their workforce through training opportunities.

**Recommendations:**

- **A mechanism should be implemented whereby sponsors are able to offset their SAF levy liability by claiming their actual training expenditure on all employees.**
- **Refund provisions should be extended to include a refund of the levy if the nomination application is refused.**

## Changes to occupations lists

14. The reforms leading to the introduction of the TSS visa also introduced two new occupation lists taking effect from 19 April 2017, the Short-Term Skilled Occupations List and Medium and Long-term Strategic Skills List.
15. The Australian and New Zealand Standard Classification of Occupations (**ANZSCO**) is a skill-based classification of occupations. Occupations that are eligible for a TSS visa are now divided into three lists as follows:
- The Short-Term Skilled Occupation List (**STSOL**) comprises occupations which are in current short-term shortage. Unless an international trade agreement provides otherwise, visas granted for such occupations are valid for a maximum period of two years, with the possibility of onshore renewal for a further two years. A third application for an STSOL occupation may only be lodged from outside Australia and will be subject to strict genuine temporary entry requirements. These period of stay restrictions do not apply to some intra-corporate transfers under Australia's international trade obligations. Occupations on the STSOL are not eligible for the Employer Nomination Scheme, unless the visa holder is eligible for transitional arrangements.
  - The Medium and Long Term Strategic Skills List (**MLTSSL**) comprises occupations in high demand, with a high value to Australia's economic development, and with a relatively long lead time for development of occupational skills within Australia. Occupations on the MLTSSL are eligible for a four-year TSS visa, with the possibility of indefinite renewals, and access to a transition pathway to permanent residency through the Employer Nomination Scheme.
  - The Regional Occupation List (**ROL**) restricts certain occupations to regional areas of Australia only. The regions are defined by postcode but generally include anywhere outside the metropolitan areas of Sydney, Wollongong, Newcastle, Melbourne, Brisbane, the Gold Coast and Perth.
16. The Department of Jobs and Small Business (**DJSB**) conducts a review of the skilled migration occupation lists each January and July to ensure they are responsive to Australia's labour market needs and whether any occupations should be added, removed or moved from one list to another. This review examines whether there is a shortage in the occupation and whether current and anticipated demand for the occupation can be met within the Australian labour market. The DJSB accepts

submissions with industry stakeholders during the consultation period via an online form with supporting documentation and other evidence to demonstrate current labour market conditions for the occupation. The DJSB makes recommendations to the Minister who makes the final determination.

17. The Law Council is concerned with the ability of the methodology used to determine skills shortage to identify emerging and uniquely specialised occupations. Conventional best practice is employed using traditional statistical data sources. The methodology does not include use of emerging analytical methods from the field of cognitive computing and artificial intelligence, which could capture new and niche skill sets at an earlier stage than conventional labour market studies. For example, the digital revolution has created jobs for highly skilled workers in entirely new occupations and industries, such as 'Big Data' architects, digital marketing specialists and data scientists. The absence of these novel occupations from the ANZSCO lists could result in Australian businesses missing the opportunity to recruit overseas talent in these specialised fields.
18. The Law Council submits that the review methodology could also benefit from international comparative studies of similar programs. Proactive engagement with relevant bodies such as the Migration Advisory Committee, universities and other stakeholders could assist the DJSB to appreciate the challenges in various industries and locations.
19. The ANZSCO occupations list has been shortened by 216 occupations, including occupations such as research and development managers, building and engineering technologists, musicians, microbiologists, interior decorators and environmental health officers. Of the 435 occupations listed, 29 of these occupations are restricted to use only in regional Australia. A further 16 occupations on the MLTSSL are restricted to apply only to skilled independent visas (subclass 189), temporary graduate visas in the post-study work stream (subclass 485) and skilled-regional provisional visas in the family nominated stream (subclass 489).
20. The access to 59 other occupations is now subject to caveats, which impose additional threshold requirements specific to the occupation, such as the location, size and nature of the business, the proposed base salary and the level of work experience required.

**Recommendations:**

- **The consideration of whether to restrict access to occupations should include a consideration of whether this is better managed through the imposition of a caveat rather than placement on STSOL or removal.**
- **The six-month period between an occupation's placement on the red list and its removal from the program should be extended to twelve months, allowing a six month period for submissions and consideration, and if necessary, a six month notice period for visa holders and their employers to plan and make alternative arrangements.**

## Skills assessment

21. The Law Council is concerned that the movement of occupations to the STSOL list and removal of the high-income skills exemption for high income positions could have the effect of highly-skilled and experienced individuals in senior and 'mission critical' positions being ineligible for permanent residency due to skills assessment criteria.

22. This could include situations where the applicant has decades of work experience, but they either have no qualification (common for individuals over 45-years-old), or a qualification which does not align perfectly with the ANZSCO code (common across the workforce). For example, a sales and marketing manager (occupation on the STSOL list) who is over 45-years-old and on a salary of over \$250,000 is in a senior management role in a large multinational company, who reports directly to the Chief Marketing Officer. The ANZSCO requirement is that the manager must hold a bachelor degree or five years of relevant work experience. However, the requirement of Australian Institute of Management (the assessing body for managers) to obtain the relevant skill assessment is that the manager's role must report directly to the CEO and that the role has three subordinate management level positions. Despite the fact that the business is not structured in this way, a skills assessment would be refused.
23. This could also include situations where the duties of an applicant's position straddle numerous different ANZSCO codes, such that they do not fit the skills assessment requirements of any occupation. For example, a senior manager in a major global bank with portfolio responsibility for banking customer service, product development and portfolio management would not fit the ANZSCO occupation of 'specialist manager' because it deals with general business functions of a bank and does not contribute to a specialised function.
24. The Law Institute of Victoria has provided the Law Council with several other examples of similar situations, which can be provided to the Committee upon request.
25. Noting these concerns with current skills assessments, the Law Council submits that the removal of the requirement to obtain a skills assessment under the 186 Employer Nomination Scheme in the Temporary Residence Transition (**TRT**) stream would avoid uncertainty to applicants whom have many years of experience, yet are unable to obtain a skills assessment because they do not hold the qualifications required by the skills assessment authorities. These applicants have already demonstrated their ability to perform the work with their sponsoring employer for at least two to three years, and it would be unfair for both the sponsor and the visa applicant to fail at the 186 TRT stage if a skills assessment is required and requested. This also discourages genuine applicants from applying for the initial TSS visa because of the uncertainty at 186 TRT stage, given that they may not obtain a favourable skills assessment.
26. For 186 Direct Entry stream applicants, the Law Council submits that an exemption to skills assessment for certain highly paid occupations should be reintroduced. This exemption is to be based on a specific salary for occupations designated at Skill Level 1, instead of at the Australia Tax Office's high-income threshold exemption. A further skills assessment exemption could be based on demonstrated work experience of at least eight years.

**Recommendation:**

- **For TSS applicants, a skills assessment should not be required where an applicant has demonstrated a substantial number of years of work experience in their occupation.**
- **For 186 TRT stream applicants, a skills assessment should not be required.**
- **For 186 Direct Entry stream applicants, an exemption to skills assessment for certain highly paid occupations should be reintroduced.**

## Relationship with other types of visas with work rights

27. Multinational businesses have a need for two patterns of travel to Australia that are not sufficiently catered for in the Australian Migration Program. First, there is the situation of short-term assignments of three to 12 months which arise particularly in project-based industries, where there is no ongoing position in the Australian business and no intention to permanently reside in Australia. Secondly, there is the situation of short visits for only a few days or weeks at a time, but these short visits are constant or regular over a long-term period and involve substantive work.
28. The subclass 400 Temporary Work (Short Stay) visa program is used primarily for intra-corporate transfers of skilled workers on short-term work assignments to Australia. It is submitted that neither of the travel patterns described are suited to the business visitor visa program because they involve substantive work.
29. Due the current policy settings of the subclass 400 visa, these travel patterns are directed to the TSS program, the policy settings for which are too onerous for the length of stay involved. At the same time, the processing of subclass 400 visa applications can be slow and convoluted because documentary requirements are inconsistent from post to post, as well as processing times which are not sufficiently responsive to business needs and vary from post to post.

### Recommendations

- **The period of stay for the subclass 400 visa should be for a period of up to six months, with a validity period of 12 months from the date of first entry.**
- **Processing times should be reduced to 48 hours by:**
  - **adopting a risk-tiering approach to processing applications that negates the need for assessment of every aspect of every application; and/or**
  - **implementing a 'Trusted User' or 'Accredited' status across multiple visa programs for businesses with a sound compliance history.**

## Effectiveness of labour market testing arrangements

30. Sponsors are required to test the Australian labour market to demonstrate that no suitably qualified and experienced Australian citizen or permanent resident is readily available to fill the nominated position. A nomination application will be refused if LMT evidence is not submitted at the time of application. Evidence must include details of the advertising of the position and any similar positions, commissioned or authorised by the approved sponsor. LMT must have been conducted within the four months prior to lodgement of the nomination application. However, where there have been redundancies or retrenchments in the same or a similar occupation in the business of the sponsor within those four months, the LMT must have been conducted since those redundancies or retrenchments.
31. The LMT condition will generally be considered satisfied if:
  - the nominated position has been advertised in Australia;

- the position was advertised in at least two places through the following acceptable channels:
  - national recruitment websites, such as JobSearch;
  - national print media;
  - national radio;
  - an industry-specific national recruitment website;
  - through subscription to LinkedIn Recruiter;
  - if the sponsor is accredited, on the business' website;
- the advertisements ran for at least 28 consecutive days; and
- the advertisement was in English and contained the title or description of the position, name of sponsor or recruitment agency, skills and qualifications requirements, and the annual earnings (unless those earnings are higher than \$96,400).

32. In some situations, alternative evidence may be accepted instead, including where:

- the application is for the purposes of an intra-corporate transfer from an overseas office of the business to its Australian entity;
- the application is being lodged because the sponsor is changing due to a change in business structure; or
- the sponsor is able to demonstrate that the person is a distinguished talent whose skills are both unique and of exceptional benefit.

33. The Law Council submits that the prescribed LMT requirement is cumbersome, inflexible, and has had some unintended consequences and adverse impact in certain circumstances. These issues are described in greater detail below.

#### **When the nominee is already incumbent in role**

34. Notably, employers would be expected to test the local labour market before nominating any incumbent TSS visa holder for a further visa. The LMT policy requires an employer to advertise a role prior to lodging a further nomination application for an incumbent sponsored employee. If the expectation is that the business will terminate employment of the TSS visa holder if the campaign identifies a suitable Australian candidate, the visa holder would have legitimate grievances under employment law for unfair dismissal. If that is not the expectation, then running a recruitment campaign would be nonetheless problematic for reasons including that:

- it is unnecessary administrative work and expense for the business if there is no recruitment outcome;
- it elicits genuine job applications for a position that is already filled;
- it is false advertising that may be a complication in terms of compliance with trade practices legislation;
- it may expose the business to legal action under employment law; and
- it skews statistics about current job vacancy rates collated and reported by the DJSB based on internet recruitment websites.

35. LMT exemptions apply under various free trade agreements, as well as the World Trade Organisation's *General Agreement on Trade in Services*. These include exemptions based on the visa applicant's nationality, the jurisdiction from which the visa applicant is

making an intra-corporate transfer, and/or the nature of the visa applicant's proposed role in Australia. While some visa renewal scenarios would be exempted due to international trade obligations, there are many common scenarios where that exemption would not apply. For example, where:

- the visa holder has been in Australia for less than two years and needs to apply for a further visa as their current visa is expiring, including when the visa holder's assignment to Australia was intended to be for less two years but the project has run overtime;
  - the visa holder was not an intra-corporate transferee at the time they commenced work with the Australian employer, even if they have been in role for more than two years;
  - the visa holder has been in Australia in the same occupation for two years, but has changed employers;
  - a new nomination application is required to effect a change in ANZSCO occupation code for the sponsored employee within the first two years of employment; or
  - a new nomination application is required to transfer employment and sponsorship to a different entity as part of a corporate restructure, merger or acquisition.
36. The Law Council submits that consideration should be given to an LMT exemption for all nomination applications in which the nominee is already employed by the sponsor. This would be similar to the exemption provided under the United Kingdom's labour market testing regime for visa renewal applications (noting that the United Kingdom system does not have the nomination step).

#### **Time constraints on applications**

37. The requirements of the time within which an LMT must be completed were amended three times during the course of 2018. The amendments gradually reduced the recency of the required advertising from 12 months to four months prior to lodgement. New processing arrangements can mean that the time taken to prepare a fully-documented TSS application may exceed four months from when the recruitment campaign concluded.
38. The Law Council acknowledges that recency of advertising can be one way to ensure that the recruitment campaign is relevant to the position being nominated for a TSS visa. However, a window of four months can create a very tight timeframe for lodgement of an application. During the time between finalising a recruitment campaign and preparing the TSS application, the business could issue offers of employment to preferred candidates, not all of which will be accepted, or accepted immediately. Once the offer is accepted and visa application process starts, there are a number of requirements such as English language testing, health and police checks that may take months to complete.
39. In these circumstances, the Law Council takes the view that consideration should be given to one or more of the following:
- allowing labour market testing that is more than four months old where the sponsor can demonstrate that the advertising is for the role that is being nominated; or
  - further clarifying that applications will be accepted even if not fully documented if:

- the reason for doing so is to ensure that the relevant labour market testing evidence does not 'lapse'; and
- the business and prospective employee have done all they can to acquire the documents that remain outstanding at the time of lodgement.

### Redundancies and ANZSCO codes

40. The ANZSCO dictionary is a tool designed for the statistical interpretation of data. However, the same codes are used for migration purposes. As such, quite different roles can be mapped to the same ANZSCO occupation code. This is because the ANZSCO dictionary does not allow for granular descriptions of the role being nominated and therefore a particular ANZSCO occupation code can best fit a range of roles. However, from a business perspective, the roles that fall under the same occupation code may be quite different in terms of the skillset and experience required. For example, in an ICT role, such as a software developer or ICT business analyst, the individual may specialise in a particular technology, the skills for which are highly nuanced and not easily transferable to other roles, which may be also categorised in the same ANZSCO occupation.
41. Subsection 140GBA(4A) of the *Migration Act 1958 (Migration Act)* requires LMT to have been conducted after any redundancy from 'positions in the nominated occupation'. Policy extends this further by referring to redundancies in 'the same or similar occupations in the business'. Subparagraph 140GBA(3)(b)(ii) of the Act already requires sponsors to accompany a nomination application with information about any redundancies in the nominated occupation.
42. The Law Council submits that if a sponsor provides additional information as to why the redundancy is not relevant to the particular nominated position, this should be sufficient for the Department to accept evidence of prior LMT activity and be satisfied that the labour market has been tested, even though this activity may have been completed before the redundancy of a different role which is also mapped to the same ANZSCO.

## Adequacy of skilled visa enforcement arrangements

### **Enforcement arrangements**

43. The *Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018* (Cth) significantly strengthens the sanctions against employer sponsors who breach their obligations under the TSS visas. It allows the Department to publish details of sanctions against sponsors who breach their obligations from 18 March 2015 (effectively making this amendment retrospective in nature).
44. It also allows the Department to enter into an enforceable undertaking with sponsors who have been found to be in breach of their obligations and to collect tax file numbers and share data with the Australian Taxation Office as part of regulatory compliance.
45. The intent of this legislative reform is to increase the integrity of the immigration compliance system, with all businesses facing serious consequences, including reputational damage once an employer's details are disclosed publicly.
46. In the last several years, there has been significant legislative change, including the *Migration Amendment (Charging for a Migration Outcome) Act 2015* (Cth), which targets employers (sponsors and others) who seek to take advantage of visa applicants, and provides for strict civil and also criminal penalties in the event of breach. It includes

contraventions of civil penalty provisions, which impose no-fault or strict liability civil penalties on an employer who is found to be in breach.

47. The *Migration Amendment (Employer Sanctions) Act 2013* (Cth), also imposes an obligation on employers to verify non-citizens' lawful status and work rights using the Department's Visa Entitlement Verification Online entitlement check. It imposes no fault or strict civil liability penalties on employers who are found to be in breach of its provisions.
48. In light of these measures developed over the past decade, the Law Council believes that the Department has adequate enforcement powers under the Migration Act and *Migration Regulations 1994* (Cth) to refuse applications, cancel visas or take action against employers.

## Access to information about rights and protections

### Exploitation of temporary work visa holders

49. Individuals who hold TSS visas often do not enjoy the same access to workplace rights and protections as other workers in Australia. TSS visa holders are the only group of employees in Australia whose ability to remain in Australia is largely dependent upon their employment, and to a large extent, their employer. The Law Council's Justice Project reported that when measures tie work permits to a specific employer, individuals are placed in a situation of dependency, making them more vulnerable to abuse.<sup>1</sup>
50. It is for these reasons that TSS visa holders are often vulnerable and open to exploitation. The Productivity Commission has identified that exploitation of migrant workers has the potential to taint the appeal and integrity of temporary immigration programs, which may impact Australia's ability to fill skill shortages in the future.<sup>2</sup>
51. A TSS visa holder may be reticent to make a complaint about an employer's breach of employment laws due to the risk of having their employment terminated as a result. In its inquiry into the exploitation of temporary work visa holders, the Senate Committee on Education and Employment References received and heard evidence that temporary worker visa holders are fearful that if they complain about their conditions to their employer, their employer will cancel their sponsorship, inevitably leading to deportation.<sup>3</sup> For example, one 457 visa holder (now TSS visa) was forced to work 6 days a week with no pay for two and a half years in order to pay off her sponsorship 'debt', and was extorted of \$50 000 in order to keep her visa. She was told by her employer that if she did not work for free and pay him for the sponsorship, her visa would be cancelled.<sup>4</sup>
52. Furthermore, if a worker on a TSS visa reports their exploitation to the authorities and evidence of exploitation is found, the employer may be banned from sponsoring TSS visas, rendering the worker's TSS visa no longer valid, and the worker can then be deported.<sup>5</sup> For example, after the Australian Border Force and the Australian Taxation

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<sup>1</sup> The Law Council of Australia, 'The Justice Project - People who have been exploited and trafficked' (Final Report, Part 1, 2018) 25 ('*The Justice Project – People who have been exploited and trafficked*'), citing Aim for Human Rights et al, *The Right Guide - Assessment of the Human Rights Impact of Anti-trafficking Measures* (2010) 14 <[https://thbregionalimplementationinitiative.files.wordpress.com/2012/08/the\\_right\\_guide\\_eng.pdf](https://thbregionalimplementationinitiative.files.wordpress.com/2012/08/the_right_guide_eng.pdf)>.

<sup>2</sup> Ibid 26, citing Productivity Commission, *Migrant Intake into Australia* (13 April 2016) 29, 369.

<sup>3</sup> Ibid 17.

<sup>4</sup> Ibid. See Adele Ferguson, 'Blackmail, extortion and slavery at a restaurant near you', *Sydney Morning Herald*, 25 March 2017 <<http://www.smh.com.au/business/workplace-relations/blackmail-extortion-and-slavery-at-a-restaurant-near-you-20170324-gv5usu.html>>.

<sup>5</sup> *Migration Act 1958* (Cth) s 140M; *Migration Regulations 1994* (Cth) reg 2.92.

Office investigated the exploitation on behalf of the employer provided in the example directly above, the employer was banned from sponsorship for three years, thereby also causing cancellation of the affected employee's 457 visa.<sup>6</sup>

### **Challenges with access to information**

53. TSS visa holders may be unfamiliar with Australia's employment laws, including their rights and entitlements, often making individuals more vulnerable to exploitation and less likely to enforce their rights.

54. It is noted that when a TSS visa is granted, the visa holder is given a notice which includes:

- an explanation of each condition attached to the visa and refers the visa holder to the Department's website for further information;
- information about Australian pay rates and workplace conditions and refers them to the Fair Work Ombudsman website to receive "free information, resources and advice";
- information of how to apply for a Tax File Number and refers the visa holder to the ATO website;
- information on how to obtain a "family safety pack" that has information on Australia's laws regarding domestic and family violence, sexual assault and forced marriage and refers the visa holder to the Department of Social Services website; and
- information that the visa can be cancelled if the visa holder does not obey the law and engages in criminal activity.

55. While acknowledging this information provided upon visa grant, the Law Council's Justice Project has reported that temporary work visa holders are less likely to know of their legal rights and, for the reasons discussed directly above, where holders of this visa type are aware of their legal rights, they are less likely to enforce them. The Justice Project noted that temporary work visa holders may have a limited understanding of Australian laws and society, and therefore are unable to identify that they have a legal need.<sup>7</sup> The Justice Project further cited findings that some employers have exploited the lack of knowledge of the Australian legal system by discouraging employees from taking their grievances further.<sup>8</sup>

56. Additionally, TSS visa holders often do not speak English as a first language, which may be a barrier to accessing assistance to enforce their rights. It was reported in the Justice Project that low levels of English language proficiency impede access to legal information and support services.<sup>9</sup> The necessity of free and appropriate interpreter services was one of the most common issues raised by Justice Project stakeholders that commented on recent arrivals.<sup>10</sup> Strong and ongoing concerns were expressed regarding an absence of free interpreter services to support CALD people, including recent arrivals, to negotiate the justice system.<sup>11</sup>

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<sup>6</sup> *The Justice Project – People who have been exploited and trafficked*, 25.

<sup>7</sup> *Ibid* 14, citing Catherine Hemingway, 'Not Just Work' (Report, WEStjustice, 15 November 2016)121.

<sup>8</sup> *Ibid*, citing Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Holders* (2016) 248-9 ('*A National Disgrace*').

<sup>9</sup> The Law Council of Australia, *The Justice Project – Recent arrivals* (Final Report, Part 1, 2018) 12 ('*The Justice Project – Recent arrivals*'), citing WEStjustice, Submission to the Victorian Department of Justice and Regulation, *Access to Justice Review* (2016) 12.

<sup>10</sup> *Ibid* 20.

<sup>11</sup> *Ibid*.

57. The Law Council submits that the grant notice does not adequately address the rights and protections that a visa holder has under the law and suggests that an information pack be developed that in one pack outlines all that the visa holder needs to know under both immigration law and employment law about the visa that they hold, its conditions, and their rights and protections and how to access support. To increase accessibility, this should be provided in hard copy as well as online, should be in plain English and in translated materials. Consideration should also be given to supporting legal services to expand their tailored legal education services to TSS visa holders, including in rural, regional and remote (RRR) areas.

**Recommendation:**

- **An information pack should be developed that outlines in plain English all necessary information under both immigration law and employment law about the visa that they hold, its conditions, as well as their rights and protections under the Migration Act and Fair Work Act, and how to access support.**

### Finalising legal claims

58. TSS visa holders may also be less likely to enforce their rights because they may only be in Australia for a short period of time and may face difficulties pursuing a claim against an employer if they are no longer in the country. It was reported to the Justice Project that it has proven extremely difficult to achieve a just outcome for temporary visa holders when the person had been removed from the country before the meritorious legal claims have been finalised.<sup>12</sup>

59. In its inquiry into temporary work visa holders, the Senate Committee on Education and Employment References Committee found that 'limited right of residency is the key factor that effectively undercuts a temporary visa worker's access to pursue a legal remedy.'<sup>13</sup> The Committee recommended that the Migration Program be reviewed and, if necessary, amended to provide adequate bridging arrangements for all temporary visa holders to pursue meritorious claims under workplace and occupational health and safety legislation.<sup>14</sup> The Law Council supports measures that would allow temporary work visa holders who have been dismissed and have lodged a claim against their employer in respect to the dismissal should be entitled to a bridging visa for the duration of the proceedings.

### Funding for employment law matters

60. The Justice Project further found that people who have been subjected to labour exploitation may require assistance with, for example, seeking unpaid wages and/or redress for unfair dismissal. Due to the generally low legal capability of the persons who often experience labour exploitation, they often require assistance to make Fair Work Claims and navigating the Fair Work system. The Productivity Commission has recognised that employment law is a major gap in civil law assistance, which can have serious consequences.<sup>15</sup>

61. The Recent Arrivals chapter and Trafficked and Exploited Persons chapter of the Justice Project note that many recent arrivals are vulnerable to exploitation in the workplace. Currently, for example, less than three per cent of legal aid grant approvals are for civil matters, and community legal centres, which often fill the civil legal aid assistance gap,

<sup>12</sup> *The Justice Project – People who have been exploited and trafficked*, 19.

<sup>13</sup> *Ibid* 20, citing *A National Disgrace*, 160-1.

<sup>14</sup> *Ibid* 19, citing *A National Disgrace*, 150 [6.96].

<sup>15</sup> *Ibid* 22, citing Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (2014) 30.

report turning away nearly 17,000 people annually. Particular gaps have been identified with respect to culturally appropriate legal assistance services and interpreting services for recent arrivals, particularly in RRR areas. While increasing numbers of migrants are settling in RRR Australia, the provision of culturally appropriate legal services and interpreters in these areas lags behind. The Justice Project final report reflected stakeholder concerns that without access to legal advice and representation, and adequate interpreter services, many recent arrivals will not pursue legitimate legal claims. This may have the practical effect of leaving them open to situations of workplace exploitation, particularly in more 'hidden' RRR locations.<sup>16</sup> Further, it weakens the operation of the rule of law, which can only be effective if individuals have a means of upholding it.

62. As stated in the Justice Project, the Law Council supports the prioritisation of face-to-face, intensive and free assistance, allowing additional time for services to meet recent arrivals' needs, including in civil matters such as employment issues.<sup>17</sup>

**Recommendation:**

- **Additional Federal Government funding should be provided to the provision of critical legal and support services to visa holders, particularly employment legal assistance services and translating and interpreting services.**

63. In addition to the above, the Law Society of Western Australia has suggested that the following initiatives could help to address the above issues faced by temporary work visa holders:

- introducing expedited court and tribunal procedures for employment law claims made by temporary work visa holders to allow these matters to be resolved more quickly (and reduce the period for which a claimant might need a bridging visa);
- giving power to the Fair Work Commission, Federal Circuit Court and Federal Court to order reinstatement of an employer's visa sponsorship obligations, in addition to the power to order reinstatement of the employee's employment;
- enhancing information sharing between the Department of Home Affairs and the Fair Work Ombudsman – the Fair Work Ombudsman would be better able to identify and address breaches of employment laws in respect to temporary work visa holders if the Department of Home Affairs provided information on deportations in circumstances which indicate a potential breach of employment laws; and
- introducing court and tribunal procedures that allow claimants to pursue claims more easily when they are not in Australia – courts and tribunals that deal with employment law matters could facilitate participation in proceedings by overseas claimants by, for example, allowing claimants to attend conciliations, mediations and hearings by phone or by video-link.

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<sup>16</sup> *The Justice Project – Recent arrivals*; The Law Council of Australia, *The Justice Project – Regional, Rural and Remote (RRR) Australians* (Final Report, Part 1, 2018).

<sup>17</sup> *The Justice Project – Recent arrivals*, 23.

## Effectiveness of labour agreements

64. The increasing prevalence of labour agreements in the TSS visa program is a further matter of concern, noting that there has been a proliferation of labour agreement types and subtypes over the last few years.<sup>18</sup>
65. Labour agreements have utility when it is preferable to make immigration arrangements in advance because a large-scale project with high human resources demands will need to supplement Australian supply of labour with a large contingent from overseas. However, the labour agreement program should not be used as alternative decision-making regime to the TSS program because the assessment of core criteria can be diverted, nor because the TSS program has shortcomings in meeting industry demand for overseas workers. The labour agreement regime is an unsatisfactory workaround because the guidelines for approval sit entirely outside the *Regulations* and the outcome is subject to significant Departmental and Ministerial discretion. A regime which is entirely discretionary, non-compellable, and without the TSS regulatory framework is not an appropriate mechanism for careful control of particular industries, occupations or regions.
66. The Law Council recognises the need for assistance to regional areas that supports employers in their efforts to stay in business. However, any concessions to cater for these needs should sit within the Regulations themselves. If anything, the diversion of more aspects of the TSS program into labour agreements highlights the need for further recalibration of the Regulations so that the TSS program remains adaptable to how employers use temporary visa labour. In this regard, and as an aside, the Law Council also notes that recent changes to the RSMS program (in particular the requirement for 3 years of full-time work experience for visa applicants) have in fact made it far more difficult for regional employers to source skilled workers.

## Related matters

### Intra-Corporate Transfers

67. While noting the Department's position that global mobility movements are best accommodated within the TSS program, intra-corporate transfers are fundamentally different from the arrival of new entrants to the Australian labour market. The requirements and optimal settings of a general work visa program which operates as the gatekeeper to the labour market are inconsistent with a visa program that facilitates international business and trade.
68. Measures such as labour market testing, skills assessments, a training levy, and attempts to limit access to occupations based on labour market forecasts, are not relevant to intra-corporate transfer appointments. The heightened restrictions and the additional processing times they create only serve to frustrate international trade and business. For this reason, the Law Council endorses an approach that would see visa pathways to facilitate intra-corporate transfers decoupled from Australia's general work visa program.

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<sup>18</sup> Department of Home Affairs, *Nominating a position* (3 December 2018) <<https://immi.homeaffairs.gov.au/visas/employing-and-sponsoring-someone/sponsoring-workers/nominating-a-position/labour-agreements>>.

## Age exemptions

### Permanent sponsored migration

69. The Permanent Employer Sponsored Migration programs (ENS and RSMS) introduced upper age limits where applicants must be under 45 years old. The policy considerations that lead to this change are outweighed by the substantial contribution that older, highly qualified applicants can bring in terms of their wealth of experience and skills. As Australia's primary stream for permanent skilled migration, the ENS and RSMS program should be sufficiently agile to recognise, on a case by case basis, when a person's permanent presence in Australia is of inherent benefit regardless of the applicant's age.
70. The Law Council suggests that there are a number of circumstances in which it would be appropriate to amend or extend the current age exemptions under the ENS and RSMS program, and submits that:
- an age exemption should be available for all occupations where the business can successfully demonstrate that the nominee is of 'exceptional benefit' to Australia;
  - senior management roles, which in some professions tend to correlate with lengthy work experience, should be included among the occupations provided with an exemption; and
  - the age exemptions could support development in regional areas by allowing for an exceptional benefit exemption if the state/territory body so endorses.

### 'Exceptional benefit' age exemption

71. The existing age exemptions for certain roles are based on notions that most people would not attain a senior position in such an occupation before the age of 45, and the presence of certain older workers presents benefits to Australia beyond merely the number of working years that remain before they reach retirement age.
72. The cohorts currently afforded an age exemption are fine examples of where the benefit to Australia rightfully outweighs considerations of age. The Law Council is concerned that, by being overly prescriptive, the exemptions serve to exclude other potential applicants who would be of exceptional benefit.
73. The Law Council submits that consideration should be given to the reinstatement of the 'exceptional benefit' age exemption, assessed on a case by case basis, that applied to all occupations in the previous subclass 856 visa program. Importantly, the notion of exceptional benefit is different from the idea that the person is 'pre-eminent in the upper echelons of their field', as required by the Distinguished Talent program – not least because by applying through ENS the person already has long-term employment prospects in Australia.

### Senior management roles

74. Finally, the Law Council submits that consideration should be given to extending the age exemption to senior management roles, given the time taken to ascend to such a role, particularly in some industries. The exemption could be limited by factors such as the size of the business' turnover and/or workforce. Some obvious examples might include:
- Chief Executive Officer/ Managing Director (111111);
  - Corporate General Manager (111211);

- Specialist Managers (not elsewhere classified) (139999);
- Engineering Manager (133211);
- Chief Information Officer (135111);
- Human Resources Manager (132311);
- Sales and Marketing Manager (131112);
- Finance Manager (132211);
- ICT Account Manager (225211); and
- ICT Project Manager (135112).

## Appendix A: History of inquiries into the 457 visa program

75. The Temporary Business Entry (Class UC) Subclass 457 – Temporary Work (Skilled) visa<sup>19</sup> was introduced by the Howard Government in August 1996 following recommendations by the 1995 *Business Temporary Entry—Future Directions* report<sup>20</sup> by the Committee of Inquiry into the Temporary Entry of Business People and Highly Skilled Specialists (**the Roach Committee**) that the entry of business people to Australia be simplified by replacing the previous range of temporary visas with a new temporary business visa regime.
76. When the 457 visa was introduced, the skill requirements for 457 visas had to correspond to the Australian Bureau of Statistics ‘Australian Standard Classification of Occupations’ (**ASCO**) levels 1-4 which broadly equated to most managerial, professional and trade occupations. ASCO skill level 5-7 (semi-skilled occupations) could be sponsored under concessional arrangements for particular regional or low population growth areas. Sponsors were required to have a satisfactory record of training Australian workers and to indicate how the overseas workers would benefit Australia, for example by creating employment opportunities for Australians or expanding trade and international business links. Labour market testing (LMT) was initially required for particular ‘non-key’ activities, generally occupations involving minimal skills and experience or skilled occupations that were not essential to the business of the sponsor.
77. From 1996 to 2009, the 457 visa program was amended numerous times, including measures to remove the LMT requirements, introduce minimum salary levels and tighten the English language requirements. New civil penalties for employers who employed unlawful workers were also introduced, as well as greater powers for the then Department of Immigration & Citizenship to investigate employers. Despite these measures, the 457 visa program continued to attract criticism, on the basis that the minimum salary and skill requirements were easy to circumvent together with concerns about the exploitation of 457 workers by unscrupulous employers.

### Deegan review

78. In April 2008 the then Minister for Immigration and Citizenship, Senator Chris Evans, announced the establishment of an independent integrity review process to be conducted by industrial relations expert Ms Barbara Deegan (the Deegan review), following concerns raised about the 457 visa program. As part of the Deegan review, three issues papers were released for public comment, on the topics of minimum salary level and labour agreements<sup>21</sup>; English language requirements and occupational health and safety issues<sup>22</sup>; and integrity and exploitation issues<sup>23</sup>. The final report<sup>24</sup> of the Deegan Review was released in October 2008. The Review found that concerns about exploitation of 457 visa workers were well-founded, particularly in relation to visa holders at the lower end of the salary scale and that the MSL was often well below the true ‘market rate’ for the position.
79. The Review made a number of recommendations aimed at improving the integrity of the 457 visa system and protecting the rights of 457 workers. A number of these

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<sup>19</sup> Previously known as the Temporary Business Entry (Class UC) Business Long Stay (subclass 457) visa.

<sup>20</sup> Philip Ruddock, ‘Streamlined temporary business entry approved’ (Media Release, 5 June 1996), online at <<http://www.minister.immi.gov.au/media/media-releases/1996/r96021.htm>>.

<sup>21</sup> See <<https://www.homeaffairs.gov.au/trav/work/work/subclass-457-integrity-review>>.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

recommendations were adopted and introduced into the 457 program from September 2009, including:

- the implementation of a market-based minimum salary for all new and existing 457 visa holders to ensure overseas workers were not exploited and local labour market conditions were not undercut. This included the introduction of the 'Temporary Skilled Migration Income Threshold' (TSMIT) designed to ensure Subclass 457 visa holders could be financially self-sufficient;
- an increase to the English language requirements;
- skills assessments for applicants from high risk immigration countries for certain trades occupations;
- the development of training benchmarks to clarify the existing requirement on employers to demonstrate a commitment to training local labour; and
- the introduction of a new sponsorship obligations framework which were legally enforceable.

80. The *Migration Legislation Amendment (Worker Protection) Act 2008* also came into effect in September 2009, aimed at tackling exploitation of 457 workers. The new worker protection laws provided expanded powers to monitor and investigate employer non-compliance incorporating powers from the Fair Work Act, a framework for punitive penalties and improved information sharing between the then Department of Immigration and Citizenship, the Fair Work Ombudsman and other Government agencies.

### 2014 Azarias review

81. In February 2014, the then Assistant Minister for Immigration and Border Protection, the Hon Michaelia Cash MP, announced a review of the 457 visa program by an independent panel chaired by John Azarias which was tasked to examine:

- the level of non-compliance in the 457 program;
- the current framework to better understand whether the existing requirements balance the needs of business with the need to ensure integrity in the programme;
- the viability of a deregulation strategy of the current programme; and
- the appropriateness of the current compliance and sanctions.

82. The panel's *Robust New Foundations*<sup>25</sup> report was released on 10 September 2014 with 22 recommendations to simplify the 457 program and reduce red tape, while strengthening integrity, preventing abuse and protecting Australian workers. These recommendations included the introduction of a new streamlined model for processing sponsorship, nomination and visa applications based on certain risk factors, a review of the TSMIT and the abolition of LMT.

83. In March 2015, the Government formally responded<sup>26</sup> to the recommendations of the panel, supporting (or supporting in-principle), the majority of the panel's

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<sup>25</sup> John Azarias et al, 'Robust New Foundations – A Streamlined, Transparent and Responsive System for the 457 Programme' (Report, September 2014), online at <<https://archive.homeaffairs.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/streamlined-responsive-457-programme.pdf>>.

<sup>26</sup> See <<https://www.homeaffairs.gov.au/about/reports.../reviews...review.../response-to-integrity>>.

recommendations with the exception of the recommendation to abolish LMT and to expand the list of nationalities that are exempt from the English-language requirements.

84. Further reform of the 457 program ensued including some relaxation of English requirements and extended sponsorship approval and notification periods from 1 July 2015 and the introduction of new penalties in December 2015 to make it unlawful for sponsors to receive payment in return for sponsoring a 457 worker. This was followed by further amendments in 2016 to create new tiered processing arrangements benefitting low-risk sponsors and a new sponsorship obligation for sponsors to not engage in 'discriminatory recruitment practice'.
85. A further recommendation that was adopted by the Government was to reinstate the Ministerial Advisory Council on Skilled Migration (**MACSM**) which was initially created by then Minister Bowen in 2012 to provide the Government with expert advice on the role of skilled migration in the Australian economy. In December 2016 the MACSM was tasked by Minister Dutton to review the effectiveness of the then Consolidated Skilled Occupation Lists (which applied to the 457 and permanent Employer Nomination Scheme 'Direct Entry' stream applications programs) to ensure that the composition of the list 'better aligned to industry needs'<sup>27</sup>.

### Temporary Skills Shortage visa

86. On 18 April 2017, then Prime Minister Malcolm Turnbull and Minister for Immigration and Border Protection Peter Dutton announced a series of reforms to the Temporary Work (Skilled) subclass 457 visa program and the permanent employer sponsored Employer Nomination Scheme (subclass 186) and Regional Sponsored Migration Scheme (subclass 187) visa programs. Amongst the key changes was announcement that the 457 visa program would be replaced with a new, more restricted Temporary Skills Shortage visa from March 2018 and the introduction of two new occupation lists taking effect from 19 April 2017: the Short-Term Skilled Occupations List (**STSOL**) and Medium and Long-term Strategic Skills List (**MLTSSL**).
87. The effect of these two new occupation lists was to remove access to 216 occupations from the 457 visa program and the 'Direct Entry' stream of the Employer Nomination Scheme (subclass 186) visa and restrict a further 59 occupations through the introduction of caveats based on factors such as the location, proposed base salary and required minimum level of experience for the nominated position and the turnover and size of the nominating business.
88. Further tightening of the 457 and permanent employer sponsored visa categories took place between 1 July 2017 and March 2018.
89. On 18 March 2018, the TSS visa program commenced. The new TSS regime reflects a general tightening of the visa criteria, adding layers of complexity for most applications, and streamlining others. There are a number of key themes identifiable in the structure of the TSS visa program. These include:
  - greater discretionary powers in the TSS provision allowing the Department to look behind the employment arrangements for TSS visa holders, and to refuse applications where there are concerns with market salary rates or lodgements of multiple TSS visas for Short Term occupations where it seems the visa applicant is not a genuine temporary entrant;
  - new measures focusing on genuineness and integrity including:

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<sup>27</sup> Peter Dutton, 'Review of the Consolidated Skills Occupation List' (Media Release, 2 December 2016) <<http://www.minister.border.gov.au/peterdutton/2016/Pages/Review-csol.aspx>>.

- broadening the definition of Adverse Information which is assessed at the TSS sponsorship, nomination and visa application stage;
- more prescriptive LMT requirements with limited exemptions;
- focus on the genuineness of positions to prevent the TSS program being used to procure a visa outcome for an applicant; and
- focus on non-discriminatory recruitment practices to ensure its transparent, competitive and merits based.

The notable key features of the program include the following.

**Sponsorship Obligations** - A new obligation has been introduced requiring sponsors to notify the Department within 28 days of the employment start date agreed between sponsor and visa holder, if the visa holder fails to commence employment. Other changes include:

Amendments to the obligation to ensure equivalent terms and conditions of employment, to reflect the changes to salary requirements discussed below.

- Strengthening of the obligation to ensure the primary sponsored person works only in their nominated occupation, to reflect the new visa Condition 8607 discussed below.
- Broadening of the obligation not to pass on the costs associated with a nomination application, to prevent sponsors from passing on the Skilling Australians Fund levy costs on to visa holders/ applicants.

**Accredited Sponsorship** - The accredited sponsorship program provides a number of benefits including priority processing, auto-approval of certain applications and facilitated assessment of criteria such as labour market testing.

**Sponsorship applications** - All sponsorship applications lodged after 18 March 2018 are approved for a period of five years. Also, a dedicated sponsorship stream for Overseas Business Sponsors has been reinstated, allowing approval of businesses based overseas to be a sponsor of TSS visas in order to assign a person to Australia to fulfil a contractual obligation or establish a new business presence in Australia.

**Occupations Lists and Visa Period** - Occupations eligible for the TSS visa are divided into three lists. For a nomination application to proceed, the nominated occupation must be eligible at the time the nomination application is lodged.

**Caveats on Occupations** - Caveats apply to occupations on both the STSOL and MLTSSL, restricting their use based on factors such as the nature of the role and/or the business setting for the role, the nominated base salary and the size and turnover of the nominating employer.

**Salary Requirements** - Sponsors are required to determine the salary that is, or would be, paid to an Australian performing the same role in the same location (known as the Annual Market Salary Rate (AMSR)). The monetary component of the AMSR (i.e. excluding any non-cash benefits) must be greater than or equal to TSMIT (currently set at \$53,900). The proposed guaranteed annual earnings (GAE) of the visa applicant (*including* non-cash benefits) must be greater than or equal to the AMSR. The cash components of the visa applicant's GAE (*excluding* any non-monetary benefits) must be greater than or equal to TSMIT.

**Labour Market Testing and Exemptions** - Sponsors are required to test the Australian labour market to demonstrate that no suitably qualified and experienced Australian citizen or permanent resident is readily available to fill the nominated position. A nomination application will be refused if LMT evidence is not submitted at the time of application. LMT exemptions apply under various free trade agreements, as well as the World Trade Organisation *General Agreement on Trade in Services*.

**Skilling Australians Fund** - From 12 August 2018, a tax-deductible Skilling Australians Fund charge is payable by sponsors at the time of lodgement of each TSS nomination application. A refund of this levy is only available in very limited circumstances, and the levy is paid 'up front' at the time of lodging the nomination application.

**Genuine Position** - For a nomination application to be approved the Department must be satisfied that the nominated position is genuine. The nomination application form also requires sponsors to certify that the employment contract with the TSS visa holder/ applicant is compliant with the National Employment Standards.

**Work Experience** – TSS visa applicants must have at least two years relevant work experience, and under policy it is expected that TSS visa applicants have completed two years full-time (or part-time equivalent) within the last five years.

**Visa Condition 8607** - TSS visas are granted subject to condition 8607 which requires the visa holder to work only in the occupation for which they were last granted a TSS visa. The effect is that TSS visa holders are unable to change occupations unless they lodge both a new nomination and TSS visa application.