# Proposed Changes to the 457 Visa Program - Good for Business

Less stringent English standards, removal of Labour Market Testing (LMT), and the introduction of a fast-tracking system for visa application approvals are among a number of changes to Australia's 457 visa program recommended by a panel established by the Federal Government earlier this year. The recommendations have the potential to substantially increase the flexibility of the 457 program.

The major recommendations include:

- A more transparent and responsive **Occupations List**. Despite what it describes as its shortcomings, the Panel recommends retaining the list for skill level 3 and above occupations, but with amendments. These amendments include adding skilled jobs recognised in the community to the list and refining it "where there may be integrity or appropriateness concerns";
- Amending the existing **English language requirement** so that instead of applicants having to score at least 5 in each of the 4 components in the international testing system, they would instead have to get an average of 5 across the 4 competencies. It also recommends alternative English language test providers, expanding the list of nationalities exempt from the testing, and accepting 5 years of cumulative rather than continuous study as an exemption to the English requirement;
- A reduction of the **market salary threshold** from $250,000 back to $180,000: so that for salaries above $180,000, employers wouldn't have to demonstrate market salary;
- Keeping the **Temporary Skilled Migration Income Threshold (TSMIT)** at its current rate of $53,900 pending a full review, within 2 years. This rate normally increases annually on 1 July in line with average weekly earnings. The Panel argues that there is justification for lowering the threshold by 10% for determining the eligibility of nominated occupations;
- Introduction of a **three-stream approval process**, with fast-tracking available to the two top tiers:

  Stream 1 - would include companies with a turnover of more than $4 million that have been an approved business sponsor for more than four years, have a sanction-free track record and are sponsoring individuals in occupations with salaries in excess of $129,300;

  Stream 2 - would include companies with a turnover of at least $1 million, have no sanctions for more than one year, and are sponsoring workers in occupations with base salaries of between $96,400 and $129,300; and

  Stream 3 - would capture the rest, and have a more rigorous approval process;
- Enabling the **Labour Agreement** pathway to be more open and accessible for additional industry sectors by developing additional template agreements that will address temporary local labour shortages in industries of need; and
- An increase to the approval period for **standard business sponsorship** from 3 years to 5 years for existing businesses and 12-months to 18-months for start-up businesses, with the Department to develop a simplified renewal process.

The Government has made positive comments about the recommendations. If legislated (which of course depends on the Senate), these reforms will give Australian businesses easier access to skilled workers from overseas.

For more information on the above or for any other visa-related enquiries or assistance, please contact:

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# More fiddling with the Superannuation Guarantee Charge rates

We published an update in May, reporting on changes to the SGC rates under the Budget - *view article here.*

However, five months later, the proposed changes to rates have themselves been changed, as a result of negotiations between the government and the Palmer United Party senators in connection with the repeal of the mining tax.

The rate of 9.5% employer contributions which took effect on 1 July 2014 will now continue until 1 July 2021, instead of 1 July 2018.

The rate will then increase by 0.5% to 10% from 1 July 2021, and by 0.05% each year after that until it reaches 12% in 2025, rather than 2022 as previously planned.

For more information on superannuation guarantee charges please contact our experienced employment lawyer:

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# High Court: there is no “term as to trust and confidence” implied into employment contracts

On 10 September 2014, the High Court overturned Federal Court decisions which allowed the general implication into employment contracts of a term requiring the employer to act so as to avoid damaging the relationship of trust and confidence with the employee.

In the case of Barker v Commonwealth Bank of Australia, the bank had managed a redeployment process following on Mr Barker's redundancy in a very slapdash manner. The Bank sent communications to Mr Barker about redeployment opportunities – but only by way of his work email address which had been disconnected on the date of his redundancy. Mr Barker argued, and two levels of the Federal Court agreed, that

- the Bank was under a general obligation to avoid damaging the relationship of trust and confidence with him as an employee
- in this case that required the bank to take positive steps to give Mr Barker the benefit of its redeployment program
- and failing to do so resulted in damages exceeding $300,000.

These decisions adopted an approach taken by English courts in a different industrial relations context, and by a somewhat adventurous use of the rules regarding implication of terms into contracts.

The High Court overturned these decisions and held that the Bank was not liable to Mr Barker except for a small amount due under his contractual notice entitlements. The High Court relied on conventional analysis of when a term should be implied into a contract because of necessity, and decided that there was no necessity in this case, and also that implication of such a broad and uncertain term would have uncertain consequences both for employers and employees, and was therefore a matter for legislation rather than lawmaking by the courts.

The possible existence of an implied term as to trust and confidence has caused much speculation among employers and employment lawyers, because it potentially opened up a wide range of situations in which an employee could sue for damages for breach of contract. However, the High Court's decision makes quite clear that this term will not be routinely implied into contracts of employment.

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# Damages for discrimination set to increase substantially

We have previously commented on the sexual harassment case of Richardson v Oracle Corporation - *view article here.*

Our previous alert concerned the importance of employers having up-to-date and robust anti-discrimination and anti-harassment policies which take direct account of Australian legislation.

Ms Richardson proved her case, and had been awarded damages for non-economic loss and damage, essentially "pain and suffering" and "loss of enjoyment of life" of $18,000. This was within the "standard range" of $12,000-$20,000 for such damages, well established in previous discrimination cases. There had been larger awards of damages, $90,000 - $100,000, in cases where the complainant could prove substantial and demonstrable psychological or medical problems arising from the harassment, but these cases were outside the more common run of cases where the "pain and suffering" and "loss of enjoyment of life" components fell short of that level.

Ms Richardson appealed against the level of damages awarded.

Ms Richardson's damage consisted of distress and humiliation at the actions of the fellow employee, further distress and humiliation caused by the need to continue to deal with the offending employee (as a result of Oracle keeping the employee in a team within which she needed to have contact with him, albeit only by phone, while her claim was being investigated), damage to her relationship because of the distress caused by the harassing behaviour, and a need for counselling. The distress occasioned noticeable change in Ms Richardson's demeanour and physical symptoms and a "not insignificant" adjustment disorder with mixed features of anxiety and depression, which lasted as long as Ms Richardson continued to be employed by Oracle. The Full Federal Court acknowledged that this damage was less severe than in the previous cases outside the general run of damages awards.

However, the Court reassessed the general range of damages appropriate in discrimination cases. The Court then concluded that discrimination cases had become stuck in a time warp, because awards of general damages in other areas had increased substantially since these parameters were set, back in the 1980s, and community expectations of compensation in such a case had also increased substantially. The Full Federal Court decided that Ms Richardson's case merited general damages of $100,000. It follows that in cases with severe demonstrable personal or psychological injury, general damages of substantially more will now be possible.

This means that the general area of discourse for damages, where sexual harassment is proved, will be substantially above the modest level which has applied to date. **This emphasises the importance for employers of having their houses in order if they are to avoid vicarious liability for the conduct of an employee by showing that they have done everything reasonably practicable to avoid such conduct in the workplace.** This means having robust and up-to-date policies, sufficient training on and communication of those policies to employees, and prompt and effective complaint-handling processes.

Failure to do so will mean substantially greater exposure to damages, should a claim of sexual harassment arise.

For more information on workplace conditions and issues with inappropriate workplace behaviour please contact our experienced employment lawyer:

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