

DENTONS

Employment and immigration

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2024

Employment and immigration

The laws relating to the employment relationship involve an intersection of various statutes and common law. The vast majority of employment relationships will be regulated by federal legislation and in particular the Fair Work Act which provides for minimum terms and conditions of employment for all private sector employees. There are some unique aspects of the laws related to employment relationships in Australia, in particular the existence of instruments which regulate employment across an industry which have statutory force.

1. Fair Work Act

The *Fair Work Act 2009* (FW Act) is the principal legislation that governs most Australian workplaces. This includes foreign corporations conducting business in Australia, and their employees in Australia.

The FW Act sets out the rights and obligations of employers and employees including minimum terms and conditions of employment (the NES discussed below), modern awards and rights on termination. In addition, all employment relationships will be subject to a common law contract of employment.

Additional obligations will apply in various states and territories around Australia. This includes an entitlement to long service leave (generally two or three months' paid leave after 10 years of service) and workers compensation for work-related injuries.

National Employment Standards

The National Employment Standards are 10 minimum essential employment conditions regarding:

- Maximum weekly hours of work
- Requests to convert from casual to permanent employment
- Unpaid parental leave (although Australia has a statutory, government funded system of paid parental leave for eligible parents)
- Four or five weeks of paid annual leave for permanent employees
- Ten days of paid personal/carer's leave for permanent employees
- Community service leave
- Public holidays
- Notice of termination and redundancy pay
- Long service leave
- Flexible working arrangements
- The Fair Work Information Statement, Casual Work Information Statement and Fixed Term Contract Information Statement

Modern awards

Modern awards are industrial instruments which set out minimum terms and conditions that must be met in relation to particular classes of employees. These will generally apply either to an industry of employers, or to employees in a particular occupation. Modern awards provide for minimum terms and conditions of employment, in particular minimum wages, and are underpinned by the FW Act. Not all employees in Australia are covered by modern awards.

Enterprise agreements

Enterprise agreements are collectively negotiated agreements which set out terms and conditions that are appropriate for a particular enterprise and which provide better and additional terms than modern awards. The law requires compliance with certain prescribed good faith bargaining requirements when negotiating these agreements (such as the requirement to recognise and bargain with all other bargaining representatives). Generally, enterprise agreements will be negotiated by an employer with the relevant union.

2. Employment tribunals

The Fair Work Commission is the principal national workplace relations tribunal which assists in the resolution of workplace issues. It has the power to make and vary awards, set minimum rates of pay, approve enterprise agreements, determine unfair dismissal claims and make orders regarding good faith bargaining and industrial action.

There are a number of other courts and tribunals that deal with employment related matters, including work, health and safety and discrimination matters.

3. Trade unions and industrial action

Federal, state and territory laws protect the rights of employees to join a trade union and participate in trade union activities.

The taking of industrial action in Australia is generally prohibited unless it is authorised by the Fair Work Commission in connection with the negotiation of an enterprise agreement.

4. Common law

Every employment relationship will be regulated by an employment contract (whether written or unwritten).

Where an employment relationship is not formalised by a written contract, there are a number of terms implied into an employment contract under the common law. An employment contract cannot be less beneficial to an employee than the terms of an applicable modern award or enterprise agreement, or the National Employment Standards.

5. Workers' compensation

State and territory laws require that all employers take out and maintain workers' compensation insurance (a statutory insurance scheme that provides coverage for employees who are suffering from a work-related illness or injury). These laws also impose obligations on employers concerning the rehabilitation of injured or ill workers.

6. Work, health and safety

Obligations are also imposed on employers regarding taking steps to ensure the health, safety and welfare of their employees and other people at their place of work.

Significant penalties can be imposed on employers and others, including officers, for breaches of these laws.

7. Discrimination and equal employment opportunity

Federal, state and territory laws make it unlawful to discriminate against people, or treat them less favourably, on certain prescribed grounds. Specifically, the rights of employees not to be subjected to discrimination, vilification, harassment, bullying or victimisation are protected.

8. Visas and migration / Skilled foreign workers

The Australian Government regulates the entry of non-Australian citizens and permanent residents to Australia.

Skilled and business migration

The government is focused on increasing the number of skilled and business migrants who have the ability to advance the Australian economy. Skilled migration is aimed at overcoming skill shortages and driving growth and innovation in sectors of national importance.

Skilled and business migrants are also seen as integral to Australia's economy through the development of new businesses, contributions to technological development and improving Australia's international trade and business markets.

Eligibility for any visa is determined by strict validity and eligibility criteria, all of which must be met for the visa to be granted. This includes meeting health and character criteria.

Skilled Work Visas

Australian and international businesses seeking to recruit overseas employees to work in Australia can sponsor the employee to enter Australia either as a temporary or a permanent resident. See the Employment section for further details on employing workers in Australia.

There are a range of temporary working and skilled visas available which are designed to meet the short to medium-term needs of Australian and overseas businesses for skilled labour if a business is not able to find a suitably skilled Australian to fill a position. Some visas require business sponsorship and may also provide a pathway to permanent residency.

Common visas that a business might consider for shorter to longer term needs are set out below.

Skill Shortage Visas

The Temporary Skill Shortage Visa (SC 482) (**TSS**) is a temporary visa which allows an employer to sponsor a suitably skilled worker to fill a position that it cannot find a suitably skilled Australian to fill.

To sponsor an employee, the business must be approved as a Standard Business Sponsor (**SBS**) or have entered into a Labour Agreement with the Australian Government. The occupation in which the employee is to be nominated must be specified in either the Short Term Skilled Occupation List, the Medium and Long-term Strategic Skills List, or in a Labour Agreement, which will, in turn, determine the relevant stream for the TSS.

A SBS is required to undertake local labour market testing before nominating an employee, unless it is exempt from doing so because it would conflict with Australia's International Trade Obligations (**ITO**) in relation to the nominated position. SBSs must also pay the Skilling Australians Fund levy, an Australian Government initiative designed to support the vocational education and training system in Australia.

The TSS visa allows an employee to stay between two to four years, depending on the stream. Minimum salary requirements apply, which must be at least the prevailing Temporary Skilled Migration Income Threshold (**TSMIT**), currently A\$70,000, excluding superannuation, or the annual market salary rate, whichever is higher. Employees must meet various qualification and experience requirements in addition to language, health and character requirements.

As at the date of publication, the Government has foreshadowed replacing the TSS visa with a Skills in Demand visa, which will have three streams: Specialist Skills Pathway, Core Skills Pathway and Essential Skills Pathway.

The key features foreshadowed for each stream are:

Specialist Skills Pathway	Core Skills Pathway	Essential Skills Pathway
<ul style="list-style-type: none">• Any occupation except trades workers, machinery operators and drivers, and labourers.• Earnings must be at least A\$135,000, but must also be no less than Australian workers in the same occupation.	<ul style="list-style-type: none">• The occupation will need to be either on a new Core Skills Occupation List, which will include occupations identified as being in shortage, or where there is an international trade agreement in relation to the occupation.• Earnings must be at least the TSMIT (to be retitled the Core Skills Threshold) or the relevant average market salary, whichever is higher.	<ul style="list-style-type: none">• A more regulated pathway for lower paid workers with essential skills, similar to the current Labour Agreements stream of the TSS.• This pathway will be sector specific and capped.

It is expected that the Skills in Demand visa will be implemented towards the end of 2024.

Temporary Work (Short Stay Specialist) Visa – Subclass 400

This visa is available for workers in highly specialised jobs to provide short-term assistance of up to six months. This involves highly specialised skills, knowledge or experience that can assist an Australian business and cannot reasonably be found in the Australian labour market.

Occupations usually include as managers, professionals, technicians and trades. It may include specific (proprietary) skills, or knowledge of goods or services developed by an overseas company which goods or services are being introduced to (or are already in use in) Australia, where this specific knowledge would not be readily available in the Australian workforce.

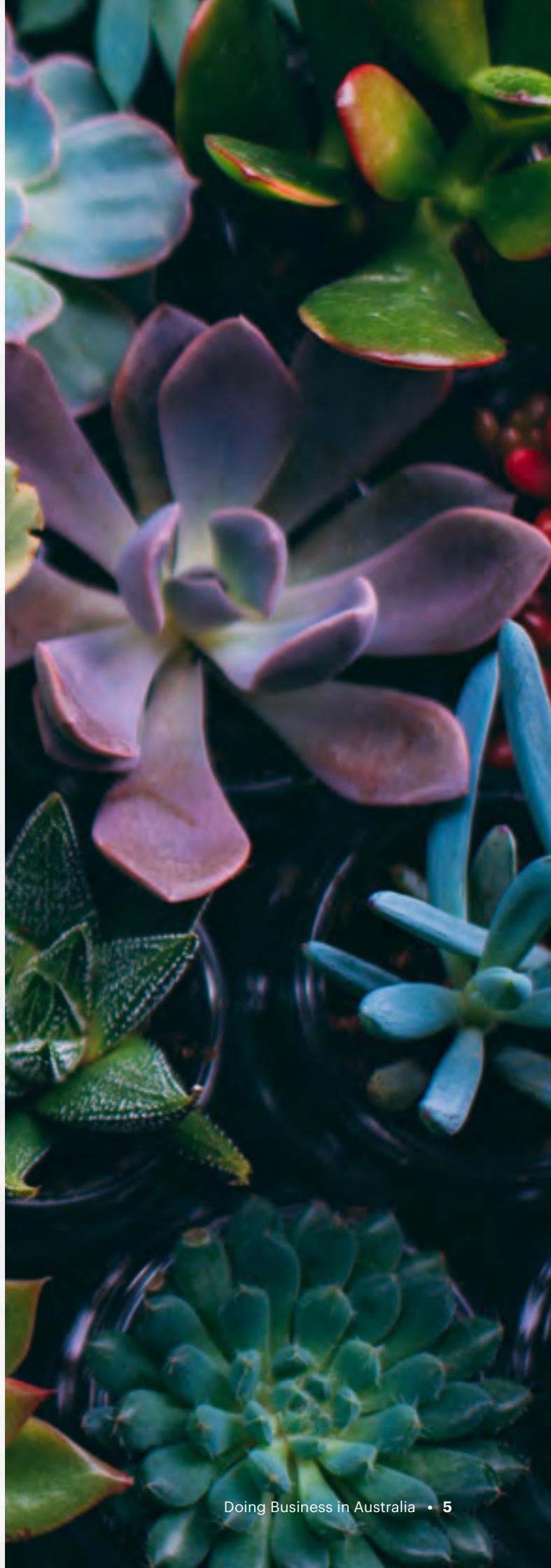
This visa is usually granted for three months, with a strong business case required for longer periods up to six months. The worker's engagement must not be ongoing. This means that the work is likely to be completed within a continuous period of six months or less and that no arrangements are made to stay after the end of that period.

National Innovation visaThe Government has foreshadowed introducing a new visa, to be called the National Innovation visa, to provide a pathway for highly skilled and high performing entrepreneurs, major investors and global researchers to establish and develop businesses and investments in Australia.

This visa is aimed to drive growth, innovative investments and entrepreneurship in sectors of national importance. It is expected that the new National Innovation visa will be introduced in late 2024, replacing the current Global Talent visa (subclass 858).

Business Innovation and Investment Visa

As part of its Migration Strategy, the government has ceased the Business Innovation and Investment visa program. The National Innovation visa is intended to provide a more targeted approach to meet what were previously the objectives of the Business Innovation and Investment visa program.



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