



Market Rates for Temporary Skilled Overseas Workers

On 6 September 2009, the Minister for Immigration and Citizenship Senator Chris Evans, announced details of the requirement for Temporary Skilled Workers to be paid market salary rates.

The requirement will apply to all new Subclass 457 visa holders from 14 September 2009 except where annual earnings of \$180,000 or more are proposed.

Under transitional arrangements, employers currently paying less than the market salary rate to Subclass 457 employees will have until 1 January 2010 to comply.

How the Market salary rate is determined:

- a) If there is an equivalent Australian worker in the work place;

The market rate will be determined by the Industrial arrangements that apply to this worker – for example, a collective agreement, award, award condition with above awards salary rates or a common law contract.

- b) If there is no equivalent worker on site:

The employer may reference collective agreements or awards for that position to substantiate the market rate. If there is no applicable agreement or award, other evidence such as remuneration surveys or earnings data must be provided.

In this case it is the Sponsor's responsibility to identify market terms and conditions of employment supported by a range of evidence.

The idea of tying proposed salaries to market rates has long been promoted by peak bodies interested in migration law reform – such as the Law Institute of Victoria and the Law Council of Australia. The previous arrangement of minimum salary levels bore no relationship to actual market rates and created many anomalies. Unfortunately however, the Minister appears to have complicated what should be a fairly straight forward process by deciding that visas will not be granted to new Subclass 457 visa applicants if the market salary rate for the position is below a Temporary Skilled Migration Income Threshold (“TSMIT”) currently set at \$45,200. The threshold will be indexed in line with ABS earnings data.

We see a number of difficulties with this approach leading to adverse consequences for those employers who may be affected. Some of the problems we see are:

- Until the actual Regulations are published, it is not exactly clear what is meant by “the Market” – for example, is it defined by occupation, or region or both. Is the market for a motor mechanic in a mining site in remote Western Australia the same as it is for that in Melbourne, or a regional town such as Robinvale. In his statement, the Minister acknowledge that trades people working on mine sites or other industries, where skills are in high demand, are often paid well above award rates. While this is true, the award for a motor mechanic is still below \$45,200 (it is in fact \$16.78 per hour which equates to around \$32,000 per annum for a 38 hour week) and there are many employers, particularly in rural areas, for whom this is the market rate. Until the meaning of “the market” becomes clearer, it would seem reasonable to assume that it may vary from region to region, and it will be up to the employer to make a meaningful case in support of a Nomination.
- Of particular concern to regional employers who up until now have been able to benefit from concessional salary arrangements is that the chances of being able to rely upon the 457 visa scheme as a solution to labour shortages have greatly diminished – except of course for positions which would normally command a salary in excess of \$45,220.
- Employers relying on the need to recruit trades people are most likely to be the most affected by these recent developments, as generally speaking, award rates for trades people have remained low, and whilst it is true to say that many trades people working in the mining industry are very well paid irrespective of the award, it is equally true to say that others are not – panel beaters are a good example, as the rates paid to panel beating companies are totally controlled by the insurance companies.

It is also interesting to note that the current Migration Occupations in Demand List which displays occupations and specialisations identified by the Department of Education, Employment and Workplace Relations (“DEEWR”) that are in short supply, currently comprises almost fifty trades occupations, most of which will now be ineligible for a Subclass 457 visa due to the imposition of the TSMIT.

One can only wonder how the Department of Immigration and DEEWR believe that the demand for trades people in Australia is going to be satisfied from this point on.

- The transitional arrangements may prove to be problematic for employers who will need to determine between now and 1 January 2010 whether they are paying their Subclass 457 staff the market rate or not. If compliance staff from the Department of Immigration ask the question, it will be necessary to be able to demonstrate how the salary figure has been arrived at. Remember that with the implementation of new worker protection laws from 14

September 2009, officers will have broad powers to monitor work place and conduct site visits to determine whether employers are complying with their Sponsorship obligations and if not, fines of up to \$33,000 can be imposed.

Nevett Ford Lawyers has an employment law section headed by Philip Brewin, an accredited Workplace Relations Specialist, and we would be happy to work with employers to assist them in determining applicable market rates for their Subclass 457 visa holders.

If you require any further information in relation to this issue, please contact David Stratton, Helen Zheng or Ryan Curtis-Griffiths.

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