Fleming Foster Solicitors

NEWSLETTER

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INSIDE THIS EDITION

Changing Immigration Policies – The Result

New Zealand's immigration landscape has been changing over the last year. New policies were implemented by the former National Government, and now the Labour-led Government ("Labour") is set to implement its campaign policies in the coming months.

The Former National Government Changes

In April 2017, the National Government announced proposed changes to the Skilled Migrant Category ("SMC") and the Essential Skill Work Visa ("ESWV") for migrant visas. This was implemented on 28 August 2017.

The SMC

With a record number of migrants migrating to New Zealand, the SMC's criteria seeks to ensure that New Zealand ("NZ") facilitates and recognizes migrants who provide greater economic benefit to NZ and migrants who have skills for which there is a demand.

The changes to the SMC criteria mean that it will be harder for migrants with little to no recognized skills to gain resident or temporary visas, in contrast to migrants with recognized qualification or skills under Australian and New Zealand Standard Classification of Occupations ("ANZSCO").

The SMC Changes

To be eligible under the SMC, applicants must submit an Expression of Interest ("EOI") to Immigration NZ. Immigration NZ is now only considering EOIs that total 160 points or above rather than the 140-point threshold in 2016. Points may be awarded for qualifications (Bachelor's, Master's degrees and Doctorates) recognized under ANZSCO and employment offers.

Further changes are:

• An applicant must have at least a skill level that can be calculated to be levels 1- 3 under the

ANZSCO. As a requirement of levels 1-3, migrants must be earning at or above a salary of $48,859 per year based on a 40-hour week.

• Migrants with skills above levels 1 -3 must be paid at or above a salary of $73,299 per year based on a 40-hour week.

Migrants who meet the point requirements but do not have skilled employment can apply for a Silver Fern Job Search Visa ("SFV"). The SFV gives highly skilled young people nine months to secure employment for 12 months or longer. However, the number of visas are limited and are not open for application until 28 November 2018.

The ESWV

The ESWV is a temporary work visa category designed to allow employers to recruit overseas workers where no suitable local employees are available or trainable. However, employers are required to first look locally before venturing into the foreign employment market.

The ESWV Changes

Changes to the ESWV include:

• The introduction of a skill band being used to determine the visa length and whether a partner and/or dependent child can apply for a visa on the basis of the relationship. There are three bands, lower-skilled, mid-skilled and highly-skilled;

• The duration of visas for lower -skilled ESWV holders will be three years maximum (holders must be outside NZ for at least 12 months before they may re-apply for another ESWV); and

• Family members cannot be granted visas based on their relationship to an ESWV holder who is undertaking lower-skilled work. In this scenario, they will have to meet the requirements for a visa in their own right.

Labour's implementation of campaign policies

The incoming Labour government has confirmed that they will be implementing policies that will "reduce net migration by 20,000 -30,000". Th ese policies will include:

• No student visas will be granted for courses below a bachelor's degree, or a qualification not independently assessed by the Tertiary Education Commission and NZQA as high quality;

• Limiting the Post Study Work Visa to student s that have studied a degree at a Bachelor-level or higher; and

• Removing the SMC bonus points currently gained by studying or working in New Zealand and standardising the age points to 30 for everyone under 45.

Conclusion

Labour's proposed changes ap pear to suggest a tightening of the criteria for the admission of migrants into NZ. The intention appears to be that Labour wants to reduce the number of migrants gaining entry to NZ and ensure that the migrants admitted have a skill level that is higher and that they are more capable of meeting national job demands.

Alternative Dispute Resolution Series: Arbitration - How can it assist you?

Alternative Dispute Resolution ("ADR") methods are an alternative option to going directly to court. Using ADR methods instead of pursuing the matter in court is commonly more cost effective for the parties involved, ADR may also take less time to resolve the dispute. ADR relieves the court of cases which they believe can be resolved without court assistance. This article is the second article in our ADR article series and will focus on arbitration. The arbitration process is governed by the Arbitration Act 1996 and the Arbitration Amendment Act 2007.

Arbitration is a formal dispute resolution process whereby two or more parties agree to submit all or selected disputes between them to an independent party called an arbitrator who can provide a binding decision. The arbitrator is selected by the parties, or by an agreed nominating body, because of their experience, skill and expertise as an arbitrator in matters closely related to the subject matter of the dispute.

During the arbitration the parties will present their evidence and provide their arguments to the arbitrator who makes a decision, called an award, that is binding on the parties and is enforceable as a judgment of the Court. The primary objective of arbitration is to provide a flexible and efficient means of resolving disputes quickly, cost effectively and confidentially without necessarily adhering to the formalised and technical procedures of court processes.

Advantages and disadvantages of Arbitration

The advantages of arbitration are:

1. The parties have control over the selection of the arbitrator;

2. If a voluntary resolution between the parties is unlikely, arbitration will resolve the dispute without the need of using the court system, although the parties may not agree with the outcome;

3. The process of arbitration is usually less costly than litigation and is commonly more time effective; and

4. Arbitration hearings are private and the results are not a matter of public record.

The disadvantages of arbitration are:

1. In some circumstances, arbitration can be a formal and lengthy process depending on the complexity of the matter and quantity of information to review;

2. Although you present your evidence to the arbitrator, you are relying on the arbitrator to interpret the evidence rather than a judge or jury;

3. The parties have no control over the outcome of the arbitration; and

4. Arbitration can be adversarial and does not aim to preserve important relationships.

Differences between Mediation and Arbitration

Mediation and arbitration are commonly used ADR methods. However, although each method is voluntary, they can produce significantly different results.

Mediation is a process where an independent party called a mediator assists the parties to reach an agreement through the course of the negotiations. Mediation allows the parties to control the terms of the agreement; these terms are not required to reflect the parties' legal rights and entitlements. The mediation process may not result in an agreement, and the mediator has no power to recommend an agreement unless authorised to by the parties. If you would like to find out more about mediation in the context of employment disputes, see our article "Mediation in an Employment Context" in our previous newsletter.

Arbitration can be used after mediation has failed or as an alternative to mediation. The arbitration process takes the control away from the parties and gives the decision-making power to the arbitrator who will determine, in light of the evidence, an outcome. In contrast to mediation, the arbitrator's decision will be guided by the parties' legal rights and entitlements.

Conclusion

There are clear advantages and disadvantages of engaging in arbitration. Despite this, the primary objective of arbitration is to be a fair, prompt and cost-effective process that addresses and resolves disputes in a manner that is proportionate to the amounts in dispute and the complexity of the issues involved. If you are currently involved in a dispute, we recommend that you seek legal advice about what ADR method would suit you.

See the next newsletter to find out more about formal and informal negotiation.

An introduction to shareholders' agreement - Why are they important?

A shareholders' agreement ("Agreement") records the arrangements between the shareholders and directors of a company regarding the ownership, government and management of the company. Companies are not required to implement an Agreement by law. However, implementing an Agreement is recommended as it is designed to address areas regarding governance and control of business activities, whether external or internal, which a company constitution or the Companies Act 1993 may not specifically address.

For example, the Companies Act 1993 may not provide specific guidance regarding the process for shareholders exiting a company. This is where an Agreement can be used by shareholders to outline the process and minimise any potential disputes and associated costs between exiting and continuing shareholders.

Generally, an Agreement sets out matters including, but not limited to:

- How initial and continued shareholder funding is made and minimising shareholders exposure to capital risk;
- The procedure for board meetings;
- How the profits are distributed to shareholders;
- The appointment and removal of directors and shareholders;
- The transfer or sale of shares, i.e. offering shares to existing shareholders, how shares are valued and the number of shares permitted to be transferred in order to safeguard tax benefits;
- Shares which are issued to employees of the company, i.e. employee shares, and how these are transferred when employment ends;
- Shareholder voting rights and the number of shares in the company;
- What decisions may be made by directors, what decisions require shareholder approval, and if shareholder approval is required, whether this is by majority, special resolution or unanimity; and
- How disputes are resolved.

An Agreement provides a number of benefits for different types of companies. Companies with more than one shareholder are encouraged to at least consider the advantages of an Agreement. Companies with only one shareholder may consider that while there is only one shareholder it is not necessary to have an agreement.

An Agreement seeks to remove the ambiguity amongst the shareholders and directors, and provides direction to manage unforeseen circumstances as well as providing guidance for the day-to-day operation of a company.

Agreements are especially useful when there is no majority shareholding, commonly seen in smaller companies, as there is an increased risk of shareholder disagreements. Therefore, to ensure the maintenance of functional shareholder relationships, it is equally important for smaller as well as larger companies to have an Agreement.

The Agreement can include specific and sensitive details (unlike a company constitution which is available to the public) regarding the rights and obligations of the parties involved in the company and/or the rights attached to shares. This protects the interests of the shareholders and directors. Furthermore, under section 32 of the Companies Act 1993, amending a company constitution only requires a special resolution of the shareholders (which is generally 75% of the shareholders entitled to vote). An Agreement may provide that it can only be varied by unanimous agreement amongst the shareholders and accordingly, minority shareholders are further protected.

A constitution can only be implemented once a company is incorporated; however, an Agreement may be executed beforehand. This can be very beneficial where a company must meet specific deadlines for a transaction from the outset of the formation of a company.

An Agreement can provide stability to not only the existing parties involved but also to other external parties such as potential shareholders and creditors.

An Agreement can provide customised administration and protection for shareholders and directors which a constitution may not have the capacity to provide. It can be easy to delay the execution of an Agreement when a new business relationship is formed; however, it is during this initial stage of forming a company, that an Agreement should be put in place. This ensures that all parties involved understand the governance and ownership of the company from the outset. An Agreement aims to reduce additional costs, time and stress resulting from potential shareholder disputes and accordingly, it is an invaluable document which all companies should consider, if not implement.

Whether you are looking at starting a company or wish to provide more clarity among directors and shareholders within an existing company, it is best to seek legal advice to discuss an Agreement suitable for your needs.

Proposed changes to the Employment Relations Act 2000 – What you need to be aware of

During Labour's election campaign, the Party released a plan which detailed their intentions for their first 100 days in office ("100 Day Plan"). Since the campaign, the Labour-led Government has released the proposed changes to the Employment Relations Act 2000 ("ERA") which are predicted to affect New Zealand's employment landscape significantly. In this regard, it is important to be aware of what changes Labour are proposing and how the changes may affect you. The proposed changes are recorded as:

1. The amendment of the existing 90-day trial period as implemented by the former National Government ("trial period");
2. The doubling of Labour Inspectors ("Inspectors");
3. Minimum wage increase from $15.75 to $20.00 by 2021;
4. Introduction of Fair Pay Agreements;
5. Extend paid parental leave;
6. Changes to redundancy provisions; and
7. The abolition of youth rates.

Removal of the 90-day trial period

Section 67 of the ERA addresses Probationary Agreements and outlines the particulars of the existing 90-day trial period. Labour is set to change the ERA to allow employees to bring a claim against employers where they feel they have been unfairly dismissed during their trial period. These claims will be heard through short hearings without lawyers. The remedies available to workers may be reinstatement or damages of up to a capped amount.

Labour will release more information regarding the trial period reform in the coming months. In the meantime, it is recommended that employers become acquainted with what constitutes unfair dismissal under the current employment legislation.

Doubling of Labour Inspectors

Inspectors monitor and enforce compliance with employment standards. They use investigations and audit programmes to find and investigate potential breaches of employment standards and to enforce compliance.

Currently, only 60 Inspectors are inspecting the entire country. Labour has proposed to increase the number of inspectors to 110. The increase implies that New Zealand has transitioned out of the education and compliance phase of the implementation of the ERA and into the enforcement phase.

For any businesses that are not fully aware of their obligations under the ERA, or are not fully compliant, it is recommended to seek the advice of an employment lawyer.

Minimum wage increase

The minimum wage is set to increase from $15.75 to $16.50 per hour by 1 April 2018 with the goal to raise gradually to a minimum wage of $20.00 per hour by 2021.

Fair Pay Agreements

A key and controversial piece of Labour's workplace relations package has been to develop and introduce a system of collective bargaining for each industry. This system is intended to allow unions and employers, with the assistance of the Employment Relations Authority, to create Fair Pay Agreements that set minimum conditions, such as wages, allowances, weekend and night rates, hours of work and leave arrangements for workers across an industry, based on the employment standards that apply in that industry.

Paid Parental Leave

A commitment was made during the campaign to increase paid parental leave from 18 weeks as it currently stands, to 26 weeks by 2020.

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Changes to redundancy provisions

Consultation is to start on changing the minimum redundancy provision protection for workers. Recommendations such as the development of initiatives that smooth the transition of people made redundant into alternative jobs, made back in 2008, have been identified as the basis on which to change the provision. However, no further details have been offered by the Labour-led Government.

Abolish youth rates

Labour has also proposed to remove youth pay rates. Youth pay rates are 80% of the adult minimum rates. The proposal has been endorsed by Labour's coalition partner, NZ First.

A majority of these proposed changes are expected to be passed in Parliament in the coming months. If you are a business owner or an employee, make sure you watch this space

The new Anti-Money Laundering and Countering Financing of Terrorism laws

Anti-money laundering has recently been in the spotlight in New Zealand with the Ministry of Justice estimating that almost NZ$ 1.35 billion from fraud and illegal drugs is laundered through ordinary New Zealand businesses each year.

To combat this kind of criminal activity, New Zealand's anti -money laundering laws have been amended through the Anti-Money Laundering and Countering Financing of Terrorism ("AML/CFT") Amendment Act 2017 ("Amendment Act").

It is intended that this Amendment Act will put practical measures in place that will protect businesses and make it harder for criminals to profit from and fund illegal activity. The amendments appear to have been designed to closely align with international best practice.

Phase 1 of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009 ("Act") has been in force since 2013. This applies to banks, casinos and a range of financial service providers. All other businesses are currently exempt from the set of compliance obligations for "reporting entities" (discussed below).

The Amendment Act essentially puts in place "Phase 2" of New Zealand's AML/CFT laws.

Phase 2 brings more businesses into the AML/CFT regime. The regime now extends to require compliance by lawyers, conveyancers, accountants, real estate agents, sports and race betting, businesses that provide trust and company services, and businesses that deal in certain high-value goods ("high -value dealers").

The new laws will be implemented over a two-year period to give businesses time to implement the changes. Lawyers and conveyancers will be the first sectors that will have to comply, starting on 1 July 2018, closely followed by accountants on 1 October 2018, while real estate agents have until 1 January 2019 to comply. For high-value dealers and the New Zealand Racing Board, the effective date is 1 August 2019. Because these are relatively short implementation timeframes, affected businesses need to start preparing to meet their compliance obligations as early as possible.

As a business owner, the first thing you need to do to determine whether you have obligations under the Act is to understand the term "reporting en tity". Once you have established that your business is a reporting entity, you can start undertaking the necessary steps to ensure your compliance with the Act.

An entity is a reporting entity, if it is a bank, casino, financial institution, high-value dealers, the New Zealand Racing Board, or if, in the ordinary course of business, it carries out one or more activities described in the definition of 'designated non - financial business or profession' in section 5(1) of the Act. These activities are basically of two kinds:

1. Gatekeeper functions (i.e. managing customer funds); and
2. Trust and company service provider functions (i.e. setting up companies for customers).

The Act imposes a number of obligations on reporting entities and these obligations cannot simply be contracted out of. The obligations include:

- The appointment of an AML/CFT Compliance Officer;
- Carrying out an assessment of the money laundering and terrorism financing risk your business may reasonably expect to face;
- Designing a written compliance programme (AML/CFT programme) that sets out procedures, policies, and internal controls to address identified risks among other things;
- Registration on GoAML which is an internet platform that businesses are required to use to report all suspicious matters to the New Zealand Police's Financial Intelligence Unit; and
- Implementation and maintenance of your AML/CFT Programme, which includes:
  - Submitting suspicious transaction reports.
  - Submitting prescribed transaction reports (a domestic physical cash transaction that is NZ$10,000 or more; or an international wire transfer that is NZ$1,000 or more); and
  - Filing an annual report with the relevant AML/CFT supervisor every year by 31 August.

Penalties for non-compliance are severe and can be as high as NZ$ 5 million for businesses and up to $300,000 and two years in prison for an individual. In light of this, it is best to walk on the side of caution and report any suspicious transactions. Not only does this take the matter off your hands, but also ensures that you are generally protected from civil, criminal and disciplinary proceedings and should avoid fines, injunctions and imprisonment.

If you have any questions surrounding your compliance with the upcoming AML requirements we suggest you contact a Solicitor.

Snippets

Who Pays the Rates? – Selling a Property

Property Rates are due throughout each respective council's prescribed rating periods. Payment may be made six monthly, four monthly, three monthly or annually.

When selling your property, you are required, at settlement, to pay the rates up to and including the settlement date. In practice, the Vendor will pay the rates to the end of the current rating period and the Purchaser's share of the rates will be apportioned in the settlement statement and paid to the Vendor by the Purchaser.

For example:

If the second instalment is from 1 October 2017 – 31 December 2017 and settlement is on 10 November 2017, the Vendor will commonly pay the rates up until 31 December 2017 prior to or on settlement.

As the Purchaser will have possession of the property from the settlement date onwards, they are required to reimburse the Vendor for the rates from 11 November 2017 – 31 December 2017. This will be reflected in the Vendor's settlement statement which is given to the Purchaser prior to settlement.

Inheritance – Is it separate property?

Separate property is all property of a spouse/partner that is not required to be equally shared under the Property (Relationships) Act 1976 ("Act") when a relationship comes to an end. Generally, inheritance is separate property. However, if separate property is intermingled with relationship property (property that must be divided between spouses/partners when the relationship ends) and it is impracticable to treat it as separate property, it is no longer separate property. An example is where inheritance money is used to pay the mortgage on a family home. Accordingly, the inheritance enters the relationship property pool and is divided equally.

A contracting out agreement ("Agreement") allows couples to determine for themselves the relationship and separate property, rather than relying on the principles of the Act to determine the relationship property and separate property.

Although inheritance may appear to be separate property, to be safe, we recommend entering into an Agreement which defines inheritance as separate property. The Agreement will arguably protect the inheritance from a relationship property claim.

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If you have any questions about the newsletter items, please contact us, we are here to help.

