

CHAPTER 1

INTRODUCTION

Referral of the inquiry

1.1 On 20 March 2013, the Senate referred the following matters to the Legal and Constitutional Affairs References Committee (committee), for inquiry and report by 3 June 2013:

The current framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements, including:

- (a) their effectiveness in filling areas of identified skill shortages and the extent to which they may result in a decline in Australia's national training effort, with particular reference to apprenticeship commencements;
- (b) their accessibility and the criteria against which applications are assessed, including whether stringent labour market testing can or should be applied to the application process;
- (c) the process of listing occupations on the Consolidated Sponsored Occupations List, and the monitoring of such processes and the adequacy or otherwise of departmental oversight and enforcement of agreements and undertakings entered into by sponsors;
- (d) the process of granting such visas and the monitoring of these processes, including the transparency and rigour of the processes;
- (e) the adequacy of the tests that apply to the granting of these visas and their impact on local employment opportunities;
- (f) the economic benefits of such agreements and the economic and social impact of such agreements;
- (g) whether better long-term forecasting of workforce needs, and the associated skills training required, would reduce the extent of the current reliance on such visas;
- (h) the capacity of the system to ensure the enforcement of workplace rights, including occupational health and safety laws and workers' compensation rights;
- (i) the role of employment agencies involved in on-hiring subclass 457 visa holders and the contractual obligations placed on subclass 457 visa holders;
- (j) the impact of the recent changes announced by the Government on the above points; and

(k) any related matters.¹

1.2 On 3 June 2013, the committee presented an interim report in which it indicated its intention to table its final report by 24 June 2013.²

Context of the inquiry

1.3 As term of reference (j) makes clear, the inquiry arises in response to a number of proposed changes to the Temporary Work (Skilled) (subclass 457) visa program (the 457 visa program), which were announced on 23 February 2013 by the Minister for Immigration and Citizenship (the minister).³

1.4 On 6 June 2013, the minister introduced the Migration Amendment (Temporary Sponsored Visas) Bill 2013 (the bill) into the Parliament, giving effect to a number of changes to the 457 visa program. The minister indicated that further changes would be effected by amendments to the Migration Regulations 1994, intended to commence on 1 July 2013.⁴

The 457 visa program

1.5 The purpose of the Temporary Work (Skilled) - Standard Business Sponsorship (Subclass 457) visa program (457 visa program) is to allow employers to address skilled labour shortages by sponsoring skilled workers from overseas to fill vacancies that cannot be filled by appropriately skilled Australian workers.⁵

1.6 The 457 visa program is uncapped and therefore driven by employer demand. As at 30 April 2013 there were 108 810 primary 457 visa holders in Australia.⁶

1.7 The 457 visa scheme was introduced in 1996 and has undergone a number of significant changes since that time including,⁷ for example, in 2003,⁸ 2004,⁹ 2007,¹⁰

1 *Journals of the Senate*, No. 142-20, March 2013, pp 3826-3827.

2 Senate Legal and Constitutional Affairs References Committee, *Framework and operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements*, Interim Report, June 2013, p. 2.

3 The Hon Brendan O'Connor, MP, Minister for Immigration and Citizenship, 'Reforms to the temporary work (skilled) (subclass 457) program', media release, 23 February 2013.

4 The Hon Brendan O'Connor, MP, Minister for Immigration and Citizenship, *House of Representatives Hansard*, 6 June 2013, p. 3.

5 Department of Immigration and Citizenship website, 'Fact Sheet 48b – Temporary Work (Skilled) (subclass 457) Visa', November 2012, <http://www.immi.gov.au/media/fact-sheets/48b-temporary-business-visa.htm> (accessed 27 March 2013).

6 Department of Immigration and Citizenship, 'Subclass 457 State/Territory summary report, 2012-13 to 30 April 2013', p. 2.

7 For an account of the program's history, see Dr Joo-Cheong Tham and Dr Iain Campbell, 'Temporary Migrant Labour in Australia: The 457 visa scheme and challenges for labour regulation', Centre for Employment and Labour Relations Law, March 2011, Working Paper No. 50, additional information received 26 March 2013, pp 9-18.

8 Migration Amendment Regulations 2003 (No. 5) (Cth) [F2003B00167].

2008,¹¹ and 2009.¹² The scheme has also been the subject of a number of specific and related inquiries, including:

- an inquiry by the Joint Standing Committee on Migration into temporary business visas (2007);¹³
- an inquiry by the Visa Subclass 457 External Reference Group into the capacity of temporary migration to ease labour shortages (2008);¹⁴
- the Visa Subclass 457 Integrity Review (the Deegan review) arising from concerns about the exploitation of temporary migrant workers (2008);¹⁵ and
- an inquiry into the Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012 [Provisions] by the Senate Standing Committee on Education, Employment and Workplace Relations.¹⁶

Elements of the 457 visa program

1.8 In broad terms, the policy settings of the 457 visa program seek to balance the goal of addressing skilled labour shortages with the need to protect the employment opportunities and conditions of local (that is, Australian or permanent resident) workers, as well as the working conditions of 457 visa holders.¹⁷ The extent to which an effective balance is achieved in these respects depends on the program design and

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- 9 *Migration Legislation Amendment (Migration Agents Integrity Measures) Act 2004* (Cth); and Migration Amendment Regulations 2004 (No. 3) [F2004B00151].
- 10 Migration Amendment Regulations 2007 (No. 5) [F2007L01980]; and Migration Amendment Regulations 2007 (No. 11) F2007L03558
- 11 *Migration Legislation Amendment (Worker Protection) Act 2008*.
- 12 Migration Amendment Regulations 2009 (No. 5) [F2009L02373]; Migration Amendment Regulations 2009 (No. 9) [F2009L03143]; and Migration Amendment Regulations 2009 (No. 2) [F2009L01048].
- 13 Joint Standing Committee on Migration, Inquiry into temporary business visas, *Temporary visas...permanent benefits: ensuring the effectiveness, fairness and integrity of the temporary business visa program*, August 2007.
- 14 Department of Immigration and Citizenship, *Final Report to the Minister for Immigration and Citizenship*, Commonwealth of Australia, Canberra, April 2008.
- 15 Department of Immigration and Citizenship, *Visa Subclass 457 Integrity Review Final Report*, Commonwealth of Australia, Canberra, October 2008.
- 16 Senate Standing Committee on Education, Employment and Workplace Relations, *Inquiry into the Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012 [Provisions]*, 12 March 2013.
- 17 Department of Immigration and Citizenship; Department of Education, Employment and Workplace Relations; Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and Department of Resources, Energy and Tourism, *Submission 24*, p. 1. See also: Dr Joo-Cheong Tham and Dr Iain Campbell, 'Temporary Migrant Labour in Australia: The 457 visa scheme and challenges for labour regulation', Centre for Employment and Labour Relations Law, March 2011, Working Paper No. 50, additional information received 26 March 2013, p. 7.

administrative processes supporting the granting of 457 visas and compliance monitoring of the scheme.

1.9 There are three processing stages in the sponsoring of an overseas employee under the 457 visa program: sponsorship, nomination and visa application.

Sponsorship

1.10 Before an Australian business is able to sponsor an overseas skilled worker on a Subclass 457 visa, they must be approved as a Standard Business Sponsor (SBS). To qualify as an SBS the business must be lawfully operating and:

- have a strong record or demonstrated commitment to employing local labour and non-discriminatory work practices; and
- meet one of two specified training benchmarks, being either:
 - expenditure of one per cent of payroll expenditure on the provision of structured training to employees; or
 - a contribution equivalent to two per cent of payroll expenditure to an industry training fund.¹⁸

1.11 The business must also demonstrate a commitment to meeting one of the specified training benchmarks for each fiscal year for the term of their approval as a sponsor.¹⁹

1.12 If a business has been trading for less than 12 months, it must instead demonstrate that it has an auditable plan to meet one of the benchmarks.²⁰

Nomination

1.13 The 457 visa program is restricted to the eligible occupations included on the Consolidated Sponsored Occupations List (CSOL). The skill level (qualification and experience requirements) of those occupations is defined by reference to the Australian and New Zealand Standard Classification of Occupations (ANZSCO).²¹

18 Department of Immigration and Citizenship; Department of Education, Employment and Workplace Relations; Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and Department of Resources, Energy and Tourism, *Submission 24*, p. 6.

19 Department of Immigration and Citizenship; Department of Education, Employment and Workplace Relations; Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and Department of Resources, Energy and Tourism, *Submission 24*, p. 6.

20 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, 'Strengthening the Integrity of the Subclass 457 Program', discussion paper, December 2012, p. 4.

21 Department of Immigration and Citizenship; Department of Education, Employment and Workplace Relations; Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and Department of Resources, Energy and Tourism, *Submission 24*, p. 7.

1.14 Also, before a position in a business can be filled, the sponsor must:

- certify that a nominated visa applicant is suitably skilled, and that their qualifications and experience are commensurate with those that would be required of Australians employed in the nominated occupation; and
- demonstrate that the proposed terms and conditions of employment are no less favourable than those provided to Australians to perform equivalent duties in that particular workplace or the local labour market.²²

1.15 The nomination stage includes an assessment of the market salary rate for the nominated position and the salary to be paid to the prospective employee. Employers are required to pay the market salary rate for the nominated position, and this must be an amount greater than the Temporary Skilled Migration Income Threshold (TSMIT), which is currently set at \$51 400.²³ The purpose of the TSMIT is to ensure that 457 visa holders can adequately provide for themselves and do not therefore impose undue costs on the Australian community.

1.16 A sponsor may be exempt from the requirement to demonstrate payment of the market salary rate if the proposed annual earnings of the worker is at least \$180 000.²⁴

Visa application

1.17 A nominated Subclass 457 visa holder must demonstrate that they have the skills, qualifications and experience to perform the occupation for which they have been nominated, and that they have sufficient proficiency in the English language.²⁵

1.18 Certain trade occupations are also required to undergo a formal skills assessment (the indicative skill levels for approvable occupations are defined by the ANZSCO classifications).

Monitoring and compliance

1.19 Employers and 457 visa holders are routinely monitored by the department to ensure that sponsor's obligations and visa conditions are being met, and the department is also able to respond to information, such as that arising from allegations or media reports. The three main avenues of compliance monitoring are:

22 Department of Immigration and Citizenship; Department of Education, Employment and Workplace Relations; Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and Department of Resources, Energy and Tourism, *Submission 24*, p. 6.

23 Department of Immigration and Citizenship website, 'SkillSelect (Subclass 457 visa)', <http://www.immi.gov.au/skills/skillselect/index/visas/subclass-457/> (accessed 16 May 2013).

24 Department of Immigration and Citizenship website, 'SkillSelect (Subclass 457 visa)', <http://www.immi.gov.au/skills/skillselect/index/visas/subclass-457/> (accessed 16 May 2013).

25 Department of Immigration and Citizenship; Department of Education, Employment and Workplace Relations; Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and Department of Resources, Energy and Tourism, *Submission 24*, p. 7.

- information exchange with other Australian, state and territory government agencies;
- requests to sponsors to provide information in accordance with their sponsorship obligations; and
- visiting business with or without notice.²⁶

1.20 Where a sponsor fails to meet their obligations, the department may impose a range of sanctions, including cancellation of existing sponsorship approvals, barring further sponsorships for a specified period and fines of up to \$6600 (individual) or \$33 000 (body corporate).²⁷

1.21 A failure by a 457 visa holder to comply with their visa conditions could lead to cancellation of the visa. The main conditions that specifically apply to a 457 visa holder are:

- requirements to work in the nominated occupation, to work for the nominating sponsor and not to cease employment for a period longer than 28 days; and
- a requirement to maintain adequate health insurance for themselves and their family.²⁸

Enterprise Migration Agreements

1.22 Enterprise Migration Agreements (EMAs) are project-wide temporary overseas migration arrangements for large-scale resource projects that are intended to address the skilled labour needs of the resource sector.²⁹ EMA's are designed to supplement a local labour force to meet a temporary spike in demand associated with major project and ensure that skill shortages do not act as a constraint.³⁰

26 Department of Immigration and Citizenship website, 'Temporary Business (Long Stay) – Standard Business Sponsorship (Subclass 457)' (Sponsors [sic] Obligations), <http://www.immi.gov.au/skilled/skilled-workers/sbs/obligations-employer.htm> (accessed 16 May 2016).

27 Department of Immigration and Citizenship website, 'SkillSelect (Subclass 457 visa)', <http://www.immi.gov.au/skills/skillselect/index/visas/subclass-457/> (accessed 16 May 2013).

28 Department of Immigration and Citizenship website, 'Temporary Business (Long Stay) – Standard Business Sponsorship (Subclass 457)' (Sponsors [sic] Obligations), <http://www.immi.gov.au/skilled/skilled-workers/sbs/obligations-employer.htm> (accessed 16 May 2016).

29 Department of Immigration and Citizenship website, 'Fact Sheet 48a – Enterprise Migration Agreements', <http://www.immi.gov.au/media/fact-sheets/48a-enterprise.htm> (accessed 16 May 2013).

30 Department of Immigration and Citizenship; Department of Education, Employment and Workplace Relations; Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education; and Department of Resources, Energy and Tourism, *Submission 24*, p. 4.

Regional Migration Agreements

1.23 Regional Migration Agreements (RMAs) are agreements between the Australian Government and a state or territory government or local council that are intended to address labour shortages in regional Australia, particularly remote regions or regions impacted by resource projects.³¹ Information on the department's website indicates that RMAs will establish the overarching arrangements for the sponsorship of overseas workers in a particular location, including eligible occupations, the number of workers and local training, under which employers will sign individual labour agreements.³²

Conduct of the inquiry

1.24 The committee advertised the inquiry in *The Australian* newspaper on 27 March 2013. The committee also wrote to 88 organisations and individuals, inviting submissions by 26 April 2013. Submissions continued to be accepted after the official closing date. Details of the inquiry were also placed on the committee's website at www.aph.gov.au/senate_legal.

1.25 The committee received 46 submissions and certain additional information, listed at Appendix 1. The committee also received a number of confidential submissions. The committee held a public hearing on 23 May 2013 at Parliament House in Canberra. A list of witnesses who appeared at the hearing is at Appendix 2, and copies of the *Hansard* transcript are available through the committee's website.

Acknowledgement

1.26 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

Structure of the report

1.27 The committee's report is structured in the following way:

- Chapter 2 examines the effectiveness of the 457 visa program;
- Chapter 3 examines the protection of 457 visa holders' rights;
- Chapter 4 examines EMAs and RMAs; and
- Chapter 5 examines the impacts of the proposed changes to the 457 visa program.

Note on references

1.28 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

31 Department of Immigration and Citizenship website, 'Fact Sheet 48c – Regional Migration Agreement', <http://www.immi.gov.au/media/fact-sheets/48c-rma.htm> (accessed 16 May 2013).

32 Department of Immigration and Citizenship website, 'Fact Sheet 48c – Regional Migration Agreement', <http://www.immi.gov.au/media/fact-sheets/48c-rma.htm> (accessed 16 May 2013).