CHAPTER 5

POTENTIAL IMPACT OF PROPOSED CHANGES TO THE 457 VISA PROGRAM

Introduction

5.1 This chapter addresses inquiry term of reference (j), which required the committee to consider the potential impact of the recently proposed changes to the Temporary Work (Skilled) (subclass 457) visa program (the 457 visa program) on the matters raised by terms of reference (a) to (i).

5.2 As term of reference (j) makes clear, the inquiry arose in response to a number of proposed changes to the 457 visa program announced on 23 February 2013 by the Minister for Immigration and Citizenship (the minister). The minister's media release announcing the changes outlined seven areas of proposed reform.[1]

5.3 Information subsequently posted on the website of the Department of Immigration and Citizenship (the department) indicated that the proposed changes would 'be introduced' on 1 July 2013.[2]

5.4 Two of the proposed changes, relating to sponsorship obligations, were the subject of a Regulation Impact Statement (RIS) (dated January 2013) published on the Office of Best Practice Regulation website on 10 April 2013.[3]

5.5 On 2 May 2013, the minister announced the release under freedom of information laws of a Ministerial Advisory Council on Skilled Migration (MACSM) discussion paper in relation to the proposed changes.

5.6 Further information regarding the proposed changes was provided by officers of the department during the May 2013 Senate estimates hearings conducted by the Senate Legal and Constitutional Affairs Legislation Committee.[4]

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1 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.

2 Department of Immigration and Citizenship, 'Strengthening the integrity of the 457 program', http://www.immi.gov.au/skilled/strengthening-integrity-457-program.htm (accessed 24 April 2013).

3 OBPR ID: 2012/14171, January 2013, available at Department of Finance and Deregulation, 'Sponsorship Obligation Amendments -- Regulation Impact Statement – Department of Immigration and Citizenship', http://ris.finance.gov.au/2013/04/10/sponsorship-obligation-amendments-regulation-impact-statement-department-of-immigration-and-citizenship/ (accessed 13 May 2013).

4 Senate Legal and Constitutional Affairs Legislation Committee, *Estimates Hansard*, 27 May 2013

Migration Amendment (Temporary Sponsored Visas) Bill 2013

5.7 On 6 June 2013, the Government introduced the Migration Amendment (Temporary Sponsored Visas) Bill 2013 (the bill) into the Parliament. Given the timing of the introduction of the bill, it is important to note that none of the evidence provided to, or considered by, the committee for the inquiry was able to specifically address the detail of the bill.

5.8 The explanatory memorandum (EM) to the bill provides the following statement of its purpose:

> The Bill seeks to deal with sponsors who are behaving contrary to the intention of the Temporary Sponsored Work Visa program. Some employers are turning to overseas workers first, rather than investing in local training and recruitment. To address this, the Bill also seeks to ensure a balance between ensuring employment and training opportunities for Australian citizens and Australian permanent residents with that of upholding the rights of non-citizens to work in Australia under the Temporary Sponsored Work Visa program.[5]

5.9 With reference to the inquiry's terms of reference and the main focus of evidence received by the inquiry, the main features of the bill are proposed amendments to the *Migration Act 1958* (the Migration Act) and Migration Regulations 1994 (the regulations) to:

- introduce a labour market testing requirement (LMT)
- enshrine the kinds of sponsorship obligations for which the minister must take reasonable steps to ensure are prescribed in the regulations;
- enhance the enforcement framework in relation to sponsorship to include enforceable undertakings between the minister and an approved sponsor or former approved sponsor and the enforcement of those undertakings;
- empower Fair Work Inspectors to be inspectors under the Migration Act; and
- extend the period in which a Subclass 457 visa holder subject to visa condition 8107 can seek new sponsored employment from 28 consecutive days to 90 consecutive days.[6]

Reason for proposed changes

5.10 In announcing the proposed changes in February 2013, the minister's media release stated that the reforms to the 457 visa program were being proposed 'in response to the changing needs of the Australian economy and domestic employment market', and particularly in the light of concerns that the growth of the 457 visa

5 Migration Amendment (Temporary Sponsored Visas) Bill 2013, explanatory memorandum, p. 2.

6 Migration Amendment (Temporary Sponsored Visas) Bill 2013, explanatory memorandum, pp 2-3.

program was 'out of step' with current skills shortages.[7] The department's website stated that the reforms were 'intended to strengthen the department's 'capacity to identify and prevent employer practices that are not in keeping with the criteria of the subclass 457 program'.[8]

5.11 At the May 2013 Senate estimates hearings and in its submission to the inquiry, the department advised that the package of reforms was being proposed in light of a number of 'integrity concerns' identified by the department in 2012 (see Chapter 2),[9] including:

- a divergence in the historical alignment of the number of 457 visa applications and the general rate of unemployment;[10]
- disparities between the number of 457 visa applications and labour market trends in certain sectors, industries and occupations;
- disparities between the number of 457 visa applications and labour market trends in certain states;
- increased rates of 457 visa applications in historically high-risk occupations for noncompliance;[11]
- increased numbers of onshore 457 visa applications;[12] and
- 'legislative loopholes' allowing the employment of 457 'against the spirit of the 457 legislation and the policy objectives of the overall program'.[13]

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7 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.

8 Department of Immigration and Citizenship, 'Strengthening the integrity of the 457 program', http://www.immi.gov.au/skilled/strengthening-integrity-457-program.htm (accessed 24 April 2013); and Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, Senate Legal and Constitutional Affairs Legislation Committee , 27 May 2013, p. 70.

9 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, 27 May 2013, p. 71.

10 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, 27 May 2013, p. 71. See also: 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. 3.

11 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, 27 May 2013, pp 48-49.

12 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, 27 May 2013, p. 71.

13 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Committee Hansard*, 23 May 2013, pp 67-68.

5.12 As Chapter 2 outlines, the need for changes to the 457 visa program on the basis of integrity concerns was disputed in much of the evidence received by the inquiry.

Proposed changes and impacts

Changes affecting nomination of positions

Employer attestation provisions

5.13 Under the current 457 program, sponsors are required to attest to a strong record of, or demonstrated commitment to, employing local labour and non-discriminatory work practices. This is a non-binding commitment, and the MACSM discussion paper noted that the department currently lacks:

> …a legislative basis to take action against sponsors who fail to comply with their attestation, for example by sanctioning or barring the sponsor, or cancelling their sponsorship, where evidence suggests that Subclass 457 visa holders are being employed in preference to Australian citizens and permanent residents.[14]

5.14 The paper stated that the proposed change would 'strengthen the current attestation to make it an ongoing binding commitment' applying for the duration of sponsorship. Regarding the expected impact of the change, the paper stated:

> Nil impact would be anticipated for most program users. In the rare instances where there is a significant body of evidence that an employer is discriminating in favour of overseas workers, an employer may be sanctioned.[15]

Labour market testing

5.15 While the information in the MACSM paper was somewhat unclear on how the proposed strengthening of the attestation provisions would be achieved (particularly given the conclusion that the change would have nil impact on most program users), the minister's media release announcing the changes subsequently suggested that the strengthening of the nomination process would in fact involve the introduction of labour market testing (LMT). It stated that the change would require employers to '*demonstrate* that they are not nominating positions where a genuine shortage does not exist [italics added].[16] The information provided on the department's website stated that it would involve:

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14 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 3.

15 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 3.

16 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.

> …a requirement for the nominated position to be a genuine vacancy within the business…[with discretion] to allow the department to consider further information if there are concerns the position may have been created specifically to secure a 457 visa without consideration of whether there is an appropriately skilled Australian available.[17]

5.16 The introduction of the bill confirmed the proposal for LMT as a condition to the approval of nominations. In simple terms, the main elements of the LMT condition appear to be:

- sponsors will be required to undertake LMT in relation to a nominated occupation (in a manner consistent with Australia's international trade obligations);
- the condition will be satisfied if the minister is satisfied that a suitably qualified and experienced local worker is not readily available to fill the nominated position;
- the nomination must be accompanied by evidence of LMT, including:
  - information about the sponsor's attempts to recruit suitably qualified and experienced local workers to the position and any other similar positions (such as paid or unpaid advertising),
  - copies of, or references to, any research released in the previous six months relating to labour market trends generally and the nominated occupation,
  - expressions of support from Commonwealth, state or territory government authorities with responsibility for employment matters, and
  - the minister will be able to specify by legislative instrument the class or classes of sponsor to which the LMT will apply, the periods within which LMT must take place, and other types of evidence that may be taken into account for LMT purposes.
- a major disaster exemption to allow sponsors to be exempted from the LMT condition; and
- the ability of the minister to exempt via legislative instrument certain occupations from the LMT condition if the position in relation to the occupation requires certain levels of qualification and/or experience (equating to Australian and New Zealand Standard Classification of Occupations (ANZCO) Skill Level 1 and 2).[18] The minister indicated in the second reading

17 Department of Immigration and Citizenship, 'Strengthening the integrity of the 457 program', http://www.immi.gov.au/skilled/strengthening-integrity-457-program.htm (accessed 15 May 2013).

18 Migration Amendment (Temporary Sponsored Visas) Bill 2013, explanatory memorandum, pp 6-21.

speech to the bill that it would be his intention to exempt most, but not all, Skill Level 1 occupations.[19]

5.17 The explanatory memorandum (EM) to the bill notes that, while a Regulation Impact Statement (RIS) was required for this proposed change, 'the Prime Minister granted an exemption on the basis of exceptional circumstances' and that a 'post-implementation review will be required within 1 to 2 years of implementation'.[20] It is noted that the minister's second reading speech, however, indicated that the Government intended to review the efficacy of the reforms 'within three years' of implementation'.[21]

5.18 The committee notes that the evidence to the inquiry indicated a level of uncertainty amongst submitters and witnesses as to whether LMT was to be a part of the proposed changes. For example, while the Australian Council of Trade Unions (ACTU) was critical of the 'apparent absence' of LMT from the package of changes,[22] the Chamber of Commerce and Industry Queensland was critical on the basis that 'rigorous labour market testing' was being introduced.[23]

5.19 Given this, and noting that all submissions and evidence to the inquiry on the issue of LMT were prepared without reference to the legislative proposal that is now before the Parliament, the committee notes that it is difficult to draw conclusions about the impacts of the proposed change on the 457 visa program beyond the evidence and discussion contained in Chapter 2. This is particularly so in light of the absence of a RIS assessment or dedicated consultation in relation to the proposal.

5.20 To summarise the views in support of and against the introduction of LMT to the 457 visa program, those in favour regarded the broader trends in the program as indicating that, without LMT, the current policy settings of the program are failing to ensure that a proper assessment is being made as to 'whether there are in fact genuine skill shortages that justify the employment of overseas labour in any given case'.[24]

5.21 Opponents of the proposal to introduce LMT generally submitted that the current policy setting of the program are effective in making it more costly for employers to engage 457 visa holders, such that they are sought only when a local worker cannot be found to fill a position. LMT was characterised not only as therefore

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19 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, *House of Representatives Hansard*, 6 June 2013, p. 1.

20 Migration Amendment (Temporary Sponsored Visas) Bill 2013, explanatory memorandum, p. 2.

21 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, *House of Representatives Hansard*, 6 June 2013, p. 1.

22 Australian Council of Trade Unions, *Submission 40*, p. 18.

23 Chamber of Commerce and Industry Queensland, *Submission 13*, p. 6.

24 Australian Council of Trade Unions, *Submission 40*, p. 5.

'unnecessary' but also 'unworkable, impractical and fraught with administrative and bureaucratic problems'.[25]

Genuineness criterion

5.22 The MACSM discussion paper stated that, currently, while employers are required to certify that a nominated position corresponds to the tasks of an occupation eligible under the 457 program, there is no ability for a delegate to consider the veracity of the certification provided. It noted:

> It is not possible for a delegate to refuse a 457 nomination where they have concerns about the occupation. For instance, where the position has been 'dressed up' to appear more skilled or where there is a more appropriate Australian and New Zealand Standard Classification of Occupations (ANZSCO) classification available.
>
> To date delegates have used the 457 visa genuineness criterion to refuse applications. However the validity of approach is in question as many of these decisions have been overturned by the Migration Review Tribunal on the basis that the nomination has already been considered and approved.
>
> There are also concerns that the 457 program is being used to secure the entry or stay of persons, such as a family member or associate, rather than to alleviate a genuine skill shortage. In circumstances where these concerns might be identified there is no recourse for a delegate to reject an application on this basis.[26]

5.23 To address these concerns, it was proposed that the nomination requirements would be amended to require the delegate:

- to be satisfied that the tasks of the nominated occupation correspond to the tasks of an eligible occupation;
- to be satisfied that the position associated with the nominated occupation is genuine; and
- to refuse a nomination where there are integrity concerns, taking a range of factors into account, including:
    - whether the terms and conditions of employment are sufficient to attract a qualified person locally
    - whether the tasks of the position correspond to the tasks of the nominated occupation, and
    - whether the nominated position fits broadly within the scope of the activities and scale of the business.

25 Australian Mines and Metals Association, *Submission 22*, p. 13.

26 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 6.

5.24 The measure was expected to have 'no impact on genuine applicants'.[27]

5.25 As discussed in Chapter 2, a number of submitters and witnesses commented on the matter of refusals occurring at the (visa) application stage (that is, after approvals being granted at the sponsorship and nomination stages) on the basis of concerns that the nominated position with the employer was not in fact genuine. This evidence acknowledged that the department may have difficulty making this assessment at the nomination stage under current program settings, and indicated that the current practice contributes to both inconsistency and uncertainty in the application process overall.[28] The committee notes that, on this basis, the impact of the proposed change may be beneficial.

5.26 However, a number of submitters and witnesses noted that the effectiveness and consequent impacts of the change will depend ultimately on the specific legislative proposal for its implementation. Berry Appleman and Leiden (BAL Australia), for example, offered in-principle support for the change but cautioned that its realisation should not penalise the 'vast majority of compliant business sponsors' through 'increased processing times' and 'excessive bureaucratic scrutiny of applications'.[29]

5.27 More particularly, the Australian Chamber of Commerce and Industry noted that the measure:

> [p]otentially will inhibit the ability of businesses to meet skills demand in new and emerging fields. If an employer is looking to branch out into a new field of operation that is not traditionally a 'fit' for the company, this could prevent that business from accessing skilled labour.[30]

Mandatory regulation of certain sponsorship obligations

5.28 Section 140H of the Migration Act (Sponsorship obligations) provides that a sponsor must satisfy the sponsorship obligations prescribed by the regulations. The bill would introduce new section 140HA to prescribe certain sponsorship obligations for which the minister must take all reasonable steps to be prescribed in the regulations for the purposes of section 140H. These are:

- paying a market salary rate (however described) to a visa holder;
- paying prescribed costs to the Commonwealth in relation to locating a former visa holder, and removing a former visa holder from Australia;
- paying prescribed costs of the departure of a visa holder (or a former visa holder) from Australia;

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27 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 6.

28 Law Council of Australia, *Supplementary submission*, p. 8.

29 Berry Appleman and Leiden (BAL Australia), *Submission 12*, p. 10.

30 Australian Chamber of Commerce and Industry, *Submission 21*, p. 17.

- complying with prescribed requirements to keep information, and provide information to the minister;
- notifying the department of prescribed changes in the circumstances of an approved sponsor, a former approved sponsor, a visa holder or a former visa holder;
- cooperating with the exercise of powers under or for the purposes of Subdivision F (which deals with inspector powers);
- ensuring that a visa holder participates in an occupation, program or activity nominated by an approved sponsor (including by preventing the on-hire of a visa holder);
- requiring an approved sponsor or former approved sponsor not to transfer, charge or recover prescribed costs;
- requiring an approved sponsor or former approved sponsor to meet prescribed training requirements.[31]

5.29 In the second reading speech for the bill, the minister stated that this amendment would 'complement the reforms…announced in February 2013' by ensuring that the regulations include sponsorship obligations in relation to the above matters, and indicated that the 'details of these new obligations will be spelt out' in regulations proposed to commence on 1 July 2013.[32]

5.30 While a number of these sponsorship obligations appear to relate to the proposed areas of reform to the 457 visa program, the bill does not contain the detailed legislative proposal for the changes to be introduced on 1 July 2013. The committee notes that this proposed amendment would not, of itself, impact on the current framework and operation of the 457 visa program until such time as regulations are made giving effect to or amending sponsor obligations in the prescribed areas.

5.31 However, some indication of what may be the substance of certain changes is able to be drawn from the sources outlined in the introduction to this chapter.

Market salary rate

5.32 Currently, a sponsor is required to engage a 457 visa holder on equivalent terms and conditions that are or would be provided to a local worker in an equivalent role or position. The MACSM discussion paper notes that, where an Australian worker is employed in an equivalent role, the market salary rate for the nominated position is based on the terms and conditions of that worker. Where there is no equivalent Australian worker, the employer is required to satisfy the department that the terms and conditions of employment are appropriate for that location and industry

31 Migration Amendment (Temporary Sponsored Visas) Bill 2013, explanatory memorandum, pp 19-20.

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

and result in earnings above the Temporary Skilled Migration Income Threshold (TSMIT). Evidence might include:

- an applicable modern award or enterprise agreement;
- an enterprise agreement for employees performing equivalent work in similar local workplaces; and
- relevant remuneration surveys or published earnings data or other information endorsed by industry or union associations.[33]

5.33 The requirement to pay the market salary rate to 457 visa holders is intended to ensure that the employment terms and conditions of such workers are no less favourable than local workers, ensuring that they are not discriminated against and that the employment conditions of local workers are not undermined. However, the MACSM discussion paper stated that the current market salary rate provisions are 'not sufficient to ensure equitable remuneration arrangements or that Australians are not disadvantaged', and 'it may be possible for a 457 visa holder to displace an Australian employee on less beneficial terms and conditions of employment for performing the same work in the same location'.[34] This is because, where a sponsor determines the market salary rate according to the methodology specified in accordance with the regulations, the department cannot refuse a nomination if the market salary rate is believed to be uncompetitive compared to other employers.

5.34 As a particular example, the current market rate provisions:

> …allow an employer to create their own market rate through sourcing just one Australian citizen or permanent resident worker willing to work for a particular wage, even though other employers in the same geographical region may remunerate equivalent workers at a higher rate.[35]

5.35 The proposed change to address this concern was identified as amending the market rate provisions to expand their application beyond the particular workplace to that workplace's regional locality. Information on the department's website indicated that, specifically, this would allow consideration of ' comparative salary data for the local labour market'.[36]

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33 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 11.

34 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 11.

35 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 12.

36 Department of Immigration and Citizenship, 'Strengthening the integrity of the 457 program', http://www.immi.gov.au/skilled/strengthening-integrity-457-program.htm (accessed 24 April 2013).

5.36 A further concern was raised in relation to the market rate exemption threshold. This currently provides that if a sponsor nominates annual earnings of $180 000 or more then there is no requirement for the nominated salary to be assessed against market salary rates, which recognises that people earning higher salaries are generally in a position of relative strength in negotiating their employment terms and conditions and are at low risk of exploitation. The MACSM discussion paper stated that conditions in the domestic labour market could also be undermined in cases where an occupation commands a market salary greater than $180 000, and an employer was to engage a 457 visa worker willing to work for $180 000.[37]

5.37 The proposed change to address this concern was identified as increasing the market salary exemption threshold to $250 000. The MACSM discussion paper stated that this would ensure that 'most senior company executives and highly paid professionals will continue to be exempt', but ensure that 457 visa holders on high level salaries are provided equitable remuneration arrangements and that Australian workers are not discriminated against.[38]

5.38 Regarding the expected impact of the proposed changes, the MACSM discussion paper stated:

> The proposed widening of the Market Rates assessment, and associated increase in the exemption threshold to $250 000 would have no impact on genuine users of the program. Rather, these measures would assist in ensuring that the 457 program does not cause a distortion to the genuine market rate by allowing employers to sponsor overseas workers at a less than market rate.[39]

5.39 The Australian Council of Trade Unions offered support for these measures as 'long overdue improvements', and offering some confirmation of the capacity for the current policy settings to impact on the terms and conditions of local workers:

> Unions have always argued the 'equivalent Australian worker' requirement should be based on a true industry or occupational market rate, not merely the 'site' rate in place at that individual business.
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> The increase in the threshold to $250 000 recognises that remuneration for some nonexecutive positions (eg Ship Captains) can fall between $180 000 and $250 000. Under the current threshold, employers can exploit this by

37 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, pp 11-12.

38 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 12.

39 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 12.

> employing a 457 visa workers on $180 000, thereby undercutting Australian workers in those positions.[40]

5.40 Berry Appleman Leiden (BAL Australia) offered in-principle support for these changes, subject to the ability to review the detailed legislation and policy proposal. It noted also that 'appropriate guidelines' should be produced to indicate when the department will exercise the discretion to review comparative salary data.[41]

5.41 Other groups, however, considered that there was no evidence to indicate that the proposed changes were necessary,[42] and endorsed the current arrangements as being adequate.[43]

5.42 Concern about the regulatory impact of the new arrangements was expressed by the Australian Mines and Metals Association (AMMA), which submitted that the ability for a broader assessment of the applicable market rate would impose a debilitating time and expense burden on the employer.[44] AMMA also objected to any increase to the market rate exemption, arguing:

> If this threshold is increased to $250,000 then there will be very few 457 visa applicants who will be eligible for this exemption. Only 457 visa applicants who occupy a very senior executive-level position in the company will be exempt from market rates justification. This will simply increase red-tape for employers and is unnecessary. Clearly workers being paid $180,000 are not having their wages or conditions undercut by their employer.[45]

Sponsor obligation not to transfer, charge or recover prescribed costs, including departure costs

5.43 Currently, the regulations provide that a sponsor must not recover certain costs from a sponsored person (Regulation 2.87). These costs relate specifically to the recruitment of the primary sponsored person and costs associated with becoming or being an approved sponsor (or former approved sponsor), including migration agent costs and departure costs. This requirement is intended to contribute to the policy aim of ensuring that 457 visa workers are relatively more expensive to engage than a local worker.

5.44 The concern underlying proposed changes in relation to this obligation was outlined in the January 2013 RIS relating to sponsorship obligations, which explained:

> Whilst this obligation is operating effectively to prevent the 'recovery' of such costs, it does not prevent a small number of sponsors from transferring these costs to visa holders by requesting upfront payment (thus avoiding the

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40 Australian Council of Trade Unions, *Submission 40*, p. 20.

41 Berry Appleman Leiden (BAL Australia), *Submission 12*, p. 11.

42 Law Council of Australia, *Submission 29*, p. 20.

43 Australian Industry Group, *Submission 16*, p. 8.

44 Australian Mines and Metals Association, *Submission 22*, p. 15.

45 Australian Mines and Metals Association, *Submission 22*, p. 14.

> act of 'recovery'). This practice is contrary to the intention of the obligation and is against the spirit of the 457 visa program.[46]

5.45 The RIS advised that the proposed change to this sponsorship obligation would involve re-wording of the legislation to ensure that approved sponsors are solely responsible for recruitment costs, and are not able to circumvent the act of 'recovery' by otherwise transferring the cost to a visa holder or requesting a visa holder to pay up-front:

> Specifically, it is proposed to require that a sponsor does not transfer or seek to transfer to the sponsored visa holder such costs; or seek payment of such costs from the sponsored visa holder.[47]

5.46 The impact of the change was considered to be minor as it would 'not impact on the majority of sponsors who behave in accordance with program objectives'.[48] The minister's second reading speech to the bill indicated that this change would be effected by the regulations to be introduced from 1 July 2013.[49]

5.47 This measure was not the subject of significant comment in the evidence to the inquiry. However, it was explicitly supported by the Law Council of Australia.[50]

5.48 The committee notes, however, that the analysis provided in the RIS establishes a reasonable case in identifying shortcomings in the current legislation in respect of ensuring that sponsors exclusively bear recruitment and other related costs relating to the engagement of a 457 visa worker. As this is an accepted policy intention of the program's current settings, the proposed change to give effect to this intention appears unlikely to significantly impact on the framework and operation of the 457 visa program.

On-hire arrangements and requirement to keep records

5.49 In relation to on-hire arrangements involving 457 visa workers, the January 2013 RIS relating to sponsorship obligations states that the policy intention of the 457 visa program is that such visa holders 'be in continual paid employment for the period of their visa'. This intention is expressed in Regulation 2.86, which provides that a primary sponsored person be engaged only as an 'employee' of the sponsor (or an associated entity). The RIS notes:

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46 OBPR ID: 2012/14171, January 2013, available at Department of Finance and Deregulation, 'Sponsorship Obligation Amendments -- Regulation Impact Statement – Department of Immigration and Citizenship', p. 16.

47 OBPR ID: 2012/14171, January 2013, available at Department of Finance and Deregulation, 'Sponsorship Obligation Amendments -- Regulation Impact Statement – Department of Immigration and Citizenship', p. 22.

48 OBPR ID: 2012/14171, January 2013, available at Department of Finance and Deregulation, 'Sponsorship Obligation Amendments -- Regulation Impact Statement – Department of Immigration and Citizenship', p. 23.

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

50 Law Council of Australia, *Submission 29*, p. 20.

> For the purpose of regulation 2.86, it was never intended that a 457 visa holder be on-hired or engaged in an employment arrangement that resembles that of an independent contractor (unless it is an exempt occupation). These employment arrangements are inherently less secure and it is more likely that employment will not be available on an ongoing basis. Also, an employer is able to bypass the terms and conditions of employment that are associated with a direct employer-employee relationship.[51]

5.50 The RIS outlined two concerns in relation to this sponsorship obligation. First, it noted that in its current form Regulation 2.86 may not prevent employers from being able to on hire 457 visa workers against the policy intent of the program. This is because, under the modern test for determining the employer/employee relationship, a 457 visa worker who is on-hired may still, legally, be an employee of the on-hiring sponsor. While the extent of on-hiring was not known, the RIS noted that some examples of this practice had been identified, and in such cases the department was not able to take action as it was considered the employer would be able to argue that the visa holder had remained their 'employee'.[52]

5.51 Second, the RIS noted concerns over unintended independent contracting arrangements, which, as with on-hire arrangements, are against the policy intention that 457 visa workers fill only genuine skilled vacancies within the sponsor's business. While this was not considered to be widespread, a number of cases had been identified, particularly in the construction industry. As above, the department considered that the application of the legal test for determining the employer/employee relationship may not give rise to a breach of Regulation 2.86 in such cases, as the employer may be able to argue that the visa holder had remained their 'employee'.[53]

5.52 The RIS advised that the proposed change to this sponsorship obligation would involve an amendment to Regulation 2.86 to:

- prohibit on-hire arrangements (outside approved labour agreements), thereby enabling the department to take action against sponsors who do not comply; and
- prevent sponsors from engaging visa holders under unintended independent contracting arrangements by requiring that:

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51 OBPR ID: 2012/14171, January 2013, available at Department of Finance and Deregulation, 'Sponsorship Obligation Amendments -- Regulation Impact Statement – Department of Immigration and Citizenship', p. 13.

52 OBPR ID: 2012/14171, January 2013, available at Department of Finance and Deregulation, 'Sponsorship Obligation Amendments -- Regulation Impact Statement – Department of Immigration and Citizenship', p. 14.

53 OBPR ID: 2012/14171, January 2013, available at Department of Finance and Deregulation, 'Sponsorship Obligation Amendments -- Regulation Impact Statement – Department of Immigration and Citizenship', pp 14-15.

- the sponsored visa holder be engaged on a written contract of employment at nomination and for the duration of the sponsorship,
- the sponsor maintain records of, and provide to the department on request, copies of a written contract of employment vis-à-vis a sponsored visa holder, and
- any subsequent written contract of employment vis-à-vis the sponsored visa holder contains terms and conditions no less beneficial than those approved at nomination.

5.53 A consequential amendment to Regulation 2.82 (Obligation to keep records) was identified as also necessary to enable monitoring to detect and take action against non-compliance.[54]

5.54 The impact of the change was considered to be minor as the change would 'not impact on the majority of sponsors who behave in accordance with program objectives and already create and maintain records relating to contracts of employment'.[55]

5.55 As above, the committee notes that the analysis provided in the RIS establishes a reasonable case in identifying shortcomings in the current legislation in respect of ensuring that 457 visa holders are employed by their sponsoring employers. This is an accepted policy intention of the program's current settings, and the proposed change to give effect to this intention appear unlikely to significantly impact on the framework and operation of the 457 visa program.

Training benchmark requirement and requirement to keep records

5.56 Currently, to qualify as a sponsor in the 457 visa program a business must meet one of the specified training benchmarks, being:

- 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.

5.57 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.[56]

5.58 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.[57]

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54 OBPR ID: 2012/14171, January 2013, available at Department of Finance and Deregulation, 'Sponsorship Obligation Amendments -- Regulation Impact Statement – Department of Immigration and Citizenship', p. 22.

55 OBPR ID: 2012/14171, January 2013, available at Department of Finance and Deregulation, 'Sponsorship Obligation Amendments -- Regulation Impact Statement – Department of Immigration and Citizenship', p. 23.

56 Department of Immigration and Citizenship, *Submission 24*, p. 6.

5.59 The MACSM discussion paper noted that the training benchmark requirement:

> …is a fundamental component of the program. It ensures that where a business has chosen to access an overseas worker they are actively reducing their reliance on the program in the future by up skilling Australians in that field.[58]

5.60 Where a sponsor is found not to be meeting the training benchmark requirement, the sponsor may be sanctioned under Regulation 2.91 (Application or variation criteria no longer met), as the sponsor no longer meets one of the criteria required for approval as a sponsor. However, the MACSM discussion paper stated that assessment and enforcement of the requirement is difficult because:

- there is currently no specific requirement for the sponsor to keep any associated records, which hinders the department's ability to make a full and proper assessment of whether a sponsor is meeting their commitment to the training benchmarks;
- a business that has been trading for less than 12 months and therefore has an auditable plan to meet the training benchmarks is not currently required to make an ongoing commitment to continue to meet the training benchmarks for the duration of their sponsorship. Therefore, if the department became aware that a sponsor was not meeting their plan, no sanction action could be considered; and
- a sponsor seeking ongoing approval is not required to demonstrate that they met their commitments to training Australians throughout the term of their previous sponsorship.[59]

5.61 In the second reading speech to the bill, the minister stated that these changes had arisen in light of evidence that some sponsors are 'failing to commit to the training requirements of the program'.[60]

5.62 The MACSM discussion paper stated that to address these concerns relevant amendments would be made to make the training benchmarks, both at approval and post approval stages, a binding requirement rather than a commitment. It would also involve amending the obligations to require a sponsor to maintain records relating to

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

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

59 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, pp 4-5.

60 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, *House of Representatives Hansard*, 6 June 2013, p. 2.

training, and to strengthen the ability of the department to sanction sponsors who do not meet this requirement.

5.63 The proposed changes were expected to have a 'nil or low impact' as:

> …most sponsors already maintain training records. Some sponsors may be concerned if additional sanction options are introduced for failure to meet the training benchmarks. Examples where an employer would be sanctioned would be rare, and limited to the small number of employers not abiding by their commitment.[61]

5.64 It is noted, however, that the Best Practice Regulation Update of 15 March 2013, identified this proposed change as requiring a RIS, but that one was not completed and assessed as adequate by the OBPR prior to the minister's announcement.[62] The committee notes that the requirement for a RIS would tend to indicate that the proposal has the capacity for a more than insignificant regulatory impact. A number of submitters and witnesses expressed concerns on this front. The Migration Institute of Australia (MIA), for example, submitted that, although it was unclear how the proposal was to be implemented, the change would be likely to make the program more restrictive and therefore act as a disincentive for employers to use the scheme.[63]

5.65 More particularly, the Chamber of Commerce and Industry of Western Australia indicated that employers were concerned about the proposed change to the current training benchmark requirements, and submitted:

> Any changes would need to reflect the actual capacity of employers to meet the benchmarks, and have the flexibility to accommodate the wide range of training needs and practices across the employer community.
>
> Any flow-on consequences of changes to the 457 training benchmarks on the employer sponsored permanent migration categories must also be considered. Both the Employer Nomination Scheme (ENS) and Regional Sponsored Migration Scheme (RSMS) categories have requirements that the employer must also meet the 457 training benchmarks.[64]

5.66 In contrast to concerns about potential impacts, the ACTU suggested that, in addition to the proposed change:

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61 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 5.

62 Department of Finance and Deregulation, 'Non-compliance with the Australian Government's best practice regulation requirements – Reforms to the Temporary Work (Skilled) (Subclass 457) Visa Program– Department of Immigration and Citizenship', http://ris.finance.gov.au/2013/03/15/non-compliance-requirements-subclass-457-visa/ accessed 13 May 2013).

63 Migration Institute of Australia, *Submission 7*, pp 14-15.

64 Chamber of Commerce and Industry of Western Australia, *Submission 34*, pp 9-10.

> …there needs to be a broader overhaul of the training benchmarks so they meet their stated objective of increasing training of Australians in the occupations that 457 visa workers are being employed in order to meet the sponsor's future workforce needs. This would include for example specific requirements to support apprenticeship training.[65]

English language requirements

5.67 Currently, 457 visa applicants are required to provide evidence of an International English Language Testing System (IELTS) score. The required levels of English language proficiency are:

- for a standard sponsorship, the English language proficiency equivalent to an IELTS test score of at least 5 in each of the four test components of speaking, reading, writing and listening;
- for a person required to have a specific level of English ability to obtain licensing or registration for their nominated occupation, that level of English language ability; and
- for a party to a labour agreement, the English language ability specified in the agreement'.[66]

5.68 A range of exemptions may apply to this requirement, including where:

- the person is to receive a salary that exceeds the English language requirement exemption (currently $92 000);
- the occupation does not need a level of English language proficiency for grant of registration, licence or membership;
- the person is a passport holder from Canada, New Zealand, the Republic of Ireland, the United Kingdom or the United States of America;
- the nominated occupation is a highly skilled occupation that is on the gazetted list of English-language exempt occupations;
- the person has completed at least five years of continuous full time study in a secondary and/or higher education institution where instruction was conducted in English; and
- the nominated occupation will be performed at a diplomatic or consular mission of another country or an office of the authorities of Taiwan located in Australia.[67]

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65 Australian Council of Trade Unions, *Submission 40*, p. 19.

66 Department of Immigration and Citizenship website, 'Requirements for skilled workers (primary visa applicants)', http://www.immi.gov.au/skills/skillselect/index/visas/subclass-457/ (accessed 15 June 2013).

67 Department of Immigration and Citizenship website, 'Requirements for skilled workers (primary visa applicants)', http://www.immi.gov.au/skills/skillselect/index/visas/subclass-457/ (accessed 15 June 2013).

5.69 Regarding the English language requirement, the MACSM discussion paper stated:

> The ability of a worker to be able to communicate clearly in English is an important aspect of the Subclass 457 program. A reasonable ability in English in most roles ensures that Subclass 457 visa holders are able to work efficiently, understand Workplace Health and Safety matters as well as supporting better social inclusion outcomes.[68]

5.70 The MACSM discussion paper identified concerns regarding the ability of the English language requirement to be circumvented in cases where a 457 visa holder, who is exempt from the requirement as their salary is above the exemption threshold of $92 000, changes employers to fill a position for which the salary falls below the exemption threshold. In such cases, there is 'no ability in the legislation to re-consider the visa holder's English ability'.

5.71 It was therefore proposed that a new regulation would be introduced at the employer nomination stage. The new criterion would require the visa holder to have met the English language requirement or be exempt.

5.72 The proposed change was considered to have 'no impact on businesses or genuine applicants'.[69]

5.73 It is noted, however, that the Best Practice Regulation Update of 15 March 2013, identified this proposed change as requiring a RIS, but that one was not completed and assessed as adequate by the OBPR prior to the minister's announcement.[70]

5.74 Further, information placed on the department's website regarding this proposed change following the minister's February announcement appeared to propose a broader range of changes. It advised:

> …strengthening the English language requirements [will include] removing exemptions for applicants from non-English speaking backgrounds who are nominated with a salary less than $92 000 and requiring applicants who were exempt from the English language requirement when granted a visa to continue to be exempt from, or to meet the English language requirement

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68 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 16.

69 Department of Immigration and Citizenship, Ministerial Advisory Council on Skilled Migration, Discussion Paper, 'Strengthening the Integrity of the Subclass 457 Program', December 2012, p. 16.

70 Department of Finance and Deregulation, 'Non-compliance with the Australian Government's best practice regulation requirements – Reforms to the Temporary Work (Skilled) (Subclass 457) Visa Program– Department of Immigration and Citizenship', http://ris.finance.gov.au/2013/03/15/non-compliance-requirements-subclass-457-visa/ accessed 13 May 2013).

> when changing employers. Additionally, the definition of English language will be better aligned with the permanent Employer Sponsored.[71]

5.75 The minster's second reading speech on the bill suggested that these changes would be included in the regulations proposed to commence on 1 July 2013.[72]

5.76 A number of submitters and witnesses expressed concern about the potential regulatory impacts of this proposal. Such concerns were well encapsulated by the submission of Berry Appleman and Leiden (BAL Australia), which did not support the change. The BAL Australia submission stated:

> The current system for English language testing is already at times too rigorous for a temporary visa program. The further strengthening of English requirements adds unnecessary costs to business and unnecessary delays to securing labour. This change will reduce Australia's appeal to skilled potential visa applications whilst enhancing the appeal of our competitors – including America, Canada, New Zealand and western- European countries.[73]

5.77 The submission went on to note that, if the change is directed at concerns in particular industries and occupations, a targeted response would be more appropriate:

> Rather than having an unnecessary blanket heavy handed approach to English language requirements, it would be more appropriate to identify what industries and occupations are of concern supported by appropriate primary evidence. These identified industries and occupations could then be targeted for appropriate English language testing.[74]

5.78 Apart from the potential for the change to act generally as a barrier to employers accessing skilled labour through the 457 visa program,[75] a number of submissions outlined concerns about its particular impact on regional areas. The Northern Territory Government submission, for example, noted:

> The Northern Territory Department of Business believes that such an approach will be a barrier to the growth of investment in the mining/mineral exploration activities, particularly from China…[as] the imposition of English language requirements on professionals and semi-professional positions will pose challenges to mining exploration and development activities.

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71 Department of Immigration and Citizenship website, 'Strengthening the integrity of the 457 program', http://www.immi.gov.au/skilled/strengthening-integrity-457-program.htm (accessed 24 April 2013).

72 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, *House of Representatives Hansard*, 6 June 2013, p. 2.

73 Berry Appleman and Leiden (BAL Australia), *Submission 12*, p. 11. See also, for example, Migration Institute of Australia, *Submission 7*, pp 13-14.

74 Berry Appleman and Leiden (BAL Australia), *Submission 12*, p. 12. See also, for example, Northern Territory Government, *Submission 25*, pp 16-17.

75 See, for example, Migration Institute of Australia, *Submission 7*, pp 13-14; and Western Australian Government, *Submission 45*, p. 6.

> …[The] national approach [being proposed] does not take into consideration that some industries are primarily located in regional Australia e.g. mining/resources industries. There could be major consequences for the viability and development of projects even though the proposed changes have been assessed by DIAC to only impact on a small percentage of the overall Subclass 457 nominations.[76]

5.79 In relation to the impact of the proposed changes on potential 457 visa applicants, the MIA questioned the relevance of such a level of English language proficiency to the ability of a worker to work productively in many nominated occupations, and was concerned that any change to the current English language exemptions would act as an 'artificial barrier to the ability of non-English speaking 457 visa workers to be sponsored under the program'.[77] On this point, the Australian Chamber of Commerce and Industry submitted:

> Such a change could mean that the nominated employee loses their ability to change employers because they cannot meet the English language requirement for another employer who may offer a salary less than the original employer but with better working conditions (eg, hours, location etc). They would therefore be "tied" to their original nominator – an issue the current 457 program [settings] sought to eliminate…[78]

5.80 In light of the range of possible impacts, the Western Australian Government submission was concerned that the proposal was not accompanied by any modelling or assessment of the potential impacts of the 'considerably more onerous' requirements.[79] The Chamber of Commerce and Industry Queensland called for the proposed changes to be subject to consultation given concerns about how they might affect the capacity of the program to attract skilled migrants.[80]

5.81 In contrast to the concerns outlined above, the submission of the Australian Council of Trade Unions indicated that the proposed change was generally supported by unions:

> This measure is designed to prevent the potential for misuse of the English language salary exemption. It will not affect the current English language requirement but rather introduce a supporting provision which will ensure a visa holder who is exempted because of a high nominated salary is not exempted if their salary falls below the exemption threshold level. It is also proposed that definitions of English ability will be aligned across skilled programs.[81]

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76 Northern Territory Government, *Submission 25*, pp 16-17.

77 Migration Institute of Australia, *Submission 7*, pp 13-14.

78 Australian Chamber of Commerce and Industry, *Submission 21*, p. 18.

79 Western Australian Government, *Submission 45*, p. 6.

80 Chamber of Commerce and Industry Queensland, *Submission 13*, p. 5.

81 Australian Council of Trade Unions, *Submission 40*, p. 21.

Enhancing compliance and enforcement powers

5.82 The minister's February 2013 announcement indicated that the proposed changes would strengthen compliance and enforcement powers, and it is noted that a number of the proposed changes discussed above appear to involve or include measures that support this intention, such as by closing identified legal loopholes, allowing sponsorship obligations to be enforced and enhancing requirements around the keeping of records.

Empowerment of Fair Work Inspectors

5.83 On 18 March 2013, the minister announced that powers would be given to the Fair Work Ombudsman (FWO) and Fair Work Inspectors to monitor and investigate compliance with sponsorship obligations to ensure workers are working in their nominated occupation and being paid market salary rates.[82] The minister's media release stated:

> The FWO will now be empowered to monitor key aspects of employers' compliance with 457 visa conditions, namely:
>
> - 457 visa holders are being paid at the market rates specified in their approved visa
> - The job being done by the 457 visa holder matches the job title and description approved in their visa.
>
> FWO staff will also be able to immediately refer any suspicious activity to [the department's]…investigation team for more detailed examination beyond these basic checks on pay, conditions, and jobs being done.[83]

5.84 The bill will seek to implement this proposal as foreshadowed.[84]

5.85 Evidence to the inquiry indicated that this proposal is widely supported (see Chapter 3), with submitters and witnesses generally indicating that improved resourcing for the detection of noncompliant behaviour would improve enforcement outcomes under the current program settings. It was also noted that a level of monitoring more in keeping with the scale of the program could provide a more accurate understanding of the extent of noncompliance.

Enforceable undertakings

5.86 The bill will also seek to introduce enforceable undertakings as an additional administrative sanction to the current 457 visa program enforcement framework. While this proposal was not explicitly outlined in any of the information available prior to the release of the bill, the committee notes that it would appear to support the

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82 The Hon Brendan O'Connor MP, Minister for Immigration and Citizenship, *House of Representatives Hansard*, 6 June 2013, p. 1.

83 The Hon Brendan O'Connor, MP, Minister for Immigration and Citizenship, ' Fair Work inspectors to monitor rogue 457 employers', media release, 18 March 2013.

84 Migration Amendment (Temporary Sponsored Visas) Bill 2013, explanatory memorandum, pp. 34-43.

Government's broad statements of intention to enhance compliance and enforcement measures and to 'allow the department to take action against sponsors who engage in discriminatory recruitment practices'.[85]

5.87 In the second reading speech to the bill, the minister advised:

> Enforceable undertakings are promises enforceable in court which would be agreed between the minister and a sponsor.
>
> Enforceable undertakings would be used as an alternative to, or work in combination with, barring a sponsor or cancelling a sponsor's approval.
>
> Enforceable undertakings might also avoid the substantial legal costs associated with litigation in the courts. They are designed to be flexible and to secure compensation for any loss resulting from contraventions (for example, payments to compensate for underpayment of workers).
>
> The amendment will also allow the minister to publish enforceable undertakings on the department's website. This is an important tool to encourage compliance by all sponsors and a means of providing transparency to the Australian public on the monitoring of sponsors.[86]

5.88 In relation to the minister's ability to publish enforceable undertakings, the EM to the bill notes:

> As the undertaking will have been given in circumstances where the approved sponsor or former approved sponsor fails to satisfy an applicable sponsorship obligation, the publication of the undertaking draws public attention to the breach, and is designed to deter the approved sponsor or former approved sponsor from breaching undertakings in future.
>
> The published undertaking will not include the personal information of any person or any other information that may assist in the identification of a person who has provided the undertaking. This will ensure the privacy of the relevant person is protected.[87]

5.89 The committee received no specific evidence on the potential impact of this proposal. However, it is noted that a number of submitters and witnesses maintained that the current enforcement regime is, subject to proper resourcing, adequate.[88] Fragomen noted that, in general, any enhancement of compliance mechanisms should

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85 Department of Immigration and Citizenship, 'Strengthening the integrity of the 457 program', http://www.immi.gov.au/skilled/strengthening-integrity-457-program.htm (accessed 24 April 2013)

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

87 Migration Amendment (Temporary Sponsored Visas) Bill 2013, explanatory memorandum, p. 25.

88 See, for example, Australian Mines and Metals Association, *Submission 22*, p. 14; and Australian Chamber of Commerce and Industry, *Submission 21*, p. 12.

avoid the creation of barriers designed to impede the efficient and effective transfer or recruitment of skilled workers to Australia'.[89]

Amendment to 457 visa condition 8107

5.90 Currently, 457 visa holders are subject to visa condition 8107, which provides that a visa holder must not cease employment for 28 consecutive days. If a visa holder does not comply with this condition there are grounds to cancel their visa.

5.91 The bill proposes to amend the regulations to extend this period from 28 days to 90 consecutive days.[90] The minister's second reading speech to the bill indicated that the intention behind this proposal was to enable:

> …a more socially just outcome for visa holders as they will have more time find an alternative job with an employer sponsor or to arrange their personal affairs at the conclusion of sponsored employment.[91]

5.92 Evidence to the inquiry indicated that this proposal is widely supported (see Chapter 3), with submitters and witnesses generally indicating that attaching a longer period to condition 8107 could reduce the dependency of 457 visa holders on employers, thereby decreasing their potential vulnerability to abuse and exploitation and, possibly, increasing their willingness to report any such behaviour by employers.

5.93 Positive impacts aside, evidence to the inquiry that the department's common-sense administration of the 28-day requirement to date—which was commended for having generally being applied to take into account circumstances of individual cases—would indicate that the potential for negative impacts due to this change is low, as in many if not most cases visa holders have been afforded more than 28 days under condition 8107.

General responses on impact of proposed changes

5.94 In addition to evidence going to the nature and impact of particular proposed changes, a number of submitters and witnesses addressed the matter more generally. Such comments tended to characterise the changes collectively as a regulatory dead-weight, not sufficiently justified by evidence of any significant need for change to the current 457 visa program policy settings. The Business Council of Australia, for example, submitted:

> …we do not see the need for ad hoc changes to the rules that only add cost, undermine business confidence, slow business activity and job creation and create disincentives for future investment.[92]

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89 Fragomen, *Submission 36*, p. 21.

90 Migration Amendment (Temporary Sponsored Visas) Bill 2013, explanatory memorandum, p. 2.

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

92 Business Council of Australia, *Submission 18*, p. 8. See also, for example, Migration Law Program, Legal Workshop, Australian National University College of Law, *Submission 19*, p. 20.

5.95 Similarly, the Australian Federation of Employers and Industries submitted:

> The proposed changes to the scheme announced by the Minister will create [an] additional resource burden and costs for employers and will stifle businesses already looking to recruit employees needed to maintain productivity and competitiveness.[93]

5.96 While supporting the proposed changes aimed at correcting legislative deficiencies in supporting the established policy design and settings of the 457 visa program, the Northern Territory Government submitted:

> It would appear that regulation drafting deficiencies have occurred in the policy changes made to the Subclass 457 visa in 2009. As a consequence some unforeseen practices have emerged. While understanding the need to make the changes to address these issues, the Department believes that, as well as seeking to address these anomalies, the additional regulation changes that have been proposed will further decrease the effectiveness of the Subclass 457 visa in addressing workforce shortages in tight labour markets, such as that in the Northern Territory.[94]

5.97 A number of submitters and witnesses were critical of the level of information and consultation around the proposed changes. The BAL Australia submission, for example, in addition to noting a number of areas in which it was unable to provide a response due to the lack of detail regarding proposed responses, noted more generally:

> The Government's reforms are unfortunately somewhat vague at this time. It is unfortunate that the supporting legislation and policy interpretation have not yet been released. It is quite common, although bad practice, for the substantial information associated with important immigration changes, to be released very close to the commencement date of the intended reforms. Such practice inhibits effective debate on the reforms and leads to unnecessary anxiety within certain sections of the Australian community.[95]

5.98 This sentiment was echoed by AMMA, in calling for any detailed legislative proposal to be subject to a 'proper process of legislative scrutiny based on…[the] specific terms and intended effect [of the proposed legislation]'.[96]

5.99 In contrast, other groups indicated broad support for the changes and for the aspects of the processes underlying their development. The Transport Workers' Union of Australia (TWU), for example, offered support for the changes, noting that the program had been subject to a number of policy refinements since 2007.[97]

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93 Australian Federation of Employers and Industries, *Submission 23*, p. 10. See also, for example, Australian Chamber of Commerce and Industry, *Submission 21*, p. 15.

94 Northern Territory Government, *Submission 25*, p. 16.

95 Berry Appleman and Leiden (BAL Australia), *Submission 12*, p. 13.

96 Australian Mines and Metals Association, *Submission 22*, p. 16.

97 Transport Workers' Union of Australia, *Submission 20*, p. 15. See also, for example, Australian Council of Trade Unions, *Submission 40*, p. 18.

5.100 At a May 2013 Senate estimates hearing, an officer of the department described the range of proposed changes generally as:

> …very comprehensive and actually [making]…the legislation stronger. They give…[the department] sufficient powers to act when we see activities that are clearly not within the key terms of the 457 program, within the spirit of the 457 program.[98]

5.101 The Communications Electrical Plumbing Union pointed to the MACSM as an inclusive forum for consultation around immigration policy:

> We support the creation of the Ministerial Advisory Council on Skilled Migration (MACSM). MACSM is a positive initiative which involved all the stakeholders in improving skilled migration.[99]

COMMITTEE COMMENT

Policy development processes in relation to proposed changes

5.102 The committee's comments and recommendations regarding the impacts of the proposed changes to the 457 visa program must be understood against the broader context of the policy development and consultation processes surrounding the changes announced in February 2013, and the subsequent introduction of the Migration Amendment (Temporary Sponsored Visas) Bill 2013 (the bill) on 6 June 2013.

5.103 A number of submitters and witnesses drew attention to the role and effectiveness of the Ministerial Advisory Council on Skilled Migration (MACSM) as a core consultative process around which immigration policy development currently takes place. While the committee commends this initiative, the comments above suggest that the MACSM currently lacks both transparency and a role in engaging stakeholders and the public more broadly. The committee considers that this key consultative mechanism should be reviewed as part of establishing more transparent and inclusive immigration policy development processes. Such a review should, at a minimum, involve the development of clear terms of reference, operating guidelines and consultation and communication strategies to assist in the ongoing immigration policy development process.

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98 Mr Kruno Kukoc, First Assistant Secretary, Migration and Visa Policy Division, Department of Immigration and Citizenship, *Estimates Hansard*, 27 May 2013, p. 71.

99 Communications Electrical Plumbing Union, *Submission 30*, p. 27.

Recommendation 9

5.104 The committee recommends that the government initiate a review of the Ministerial Advisory Council on Skilled Migration (MACSM) to establish clear terms of reference, operating guidelines and consultation and communication strategies for that body.

Labour market testing

5.105 As noted above, the introduction of the Migration Amendment (Temporary Sponsored Visas) Bill 2013 (the bill) on 6 June 2013 confirmed that introduction of labour market testing (LMT) was to be a part of the proposed changes to the 457 visa program. Given this, all submissions and evidence to the inquiry on the issue of LMT was prepared without reference to the detail of the legislative proposal for LMT contained in the bill. Indeed, there was a significant level of uncertainty as to whether LMT was to be proposed, based on the available sources of information outlined in the introduction to this chapter.

5.106 A particular and critical question raised by the LMT proposal in this regard is how it will interact with and impact upon the other policy and design elements of the 457 visa program. For example, given the changes to the program in 2009 were premised on the notion that the relatively higher costs of employing 457 visa workers would operate to ensure that employers seek to engage 457 visa holders only in cases of genuine need, it is unclear to the committee whether those obligations would still be necessary or may need adjustment if LMT were to be introduced.

Training benchmark requirements and English language requirements

5.107 Similarly, the committee notes that the proposed changes in relation to training benchmark requirements and English language requirements were not the subject of a RIS, despite the Office of Best Practice Regulation (OBPR) identifying these proposed measures as having a potentially significant regulatory impact.

5.108 The potential impacts of these measures is made more uncertain given that the specific legislative proposals, to be in the form of regulations intended to commence on 1 July 2013, have not been made public.

Changes relating to on-hire arrangements and sponsors' obligation not to recover certain costs

5.109 Notwithstanding the comments and recommendation above, the committee notes that the proposed changes in relation to on-hire arrangements and sponsors' obligation not to recover certain costs were the subject of a RIS assessment.

5.110 While the committee notes that there were some objections to the proposal going to on-hire arrangements, the committee considers that, given the appropriate level of transparency and consultation and information about the justification for and intent of these proposals, these proposals should be effected immediately and separately to the regulation currently proposed to commence on 1 July 2013.

Recommendation 10

5.111 The committee recommends that the proposed changes to on-hire arrangements and sponsors' obligation not to recover certain costs be effected immediately and separately to the regulation currently proposed to commence on 1 July 2013.

Empowerment of Fair Work Inspectors and amendment to condition 8107

5.112 The committee notes that the inquiry has revealed widespread support for the proposals to empower Fair Work Inspectors under the *Migration Act 1958* and to extend from 28 days to 90 days the period for which a visa holder must not cease employment.

5.113 The committee considers that, to enable these measures to be implemented as soon as possible, they should be effected immediately and separately to the bill.

Recommendation 11

5.114 The committee recommends that the proposed empowerment of Fair Work Inspectors under the *Migration Act 1958* and to subclass 457 visa condition 8107 be effected immediately and separately to the Migration Amendment (Temporary Sponsored Visas) Bill 2013.

Senator Penny Wright

Chair