Australian Government

Department of Immigration and Border Protection

Inquiry into the Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017

Senate Legal and Constitutional Affairs Legislation Committee

Table of Contents

Introduction

The Department of Immigration and Border Protection (the Department) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017 (the Bill), following the introduction of the Bill into the House of Representatives on 16 August 2017.

This submission provides a response to the reasons for referral and principal issues of concern, which were raised by the Selection of Bills Committee, and will also briefly explain the measures included in the Schedule to the Bill.

Measures in the Bill

The Bill amends the *Migration Act 1958* (the Act), the *Income Tax Assessment Act 1936* and the *Taxation Administration Act 1953* to support important Government initiatives which seek to ensure the integrity of the temporary and permanent employer sponsored skilled visa programmes.

The measures in the Bill are intended to:

- allow the public disclosure of sponsor sanctions;
- allow the Department to collect, record, store and use the tax file numbers of certain visa holders for compliance and research purposes;
- provide certainty around when merits review is available for visas that require an approved nomination; and
- allow the Department to enter into an enforceable undertaking with a sponsor who has breached their sponsor obligations. This is a technical amendment to address incorrect references to the *Regulatory Powers (Standard Provisions) Act 2014.*

Reason for referral

The Bill was referred to the Legal and Constitutional Affairs Legislation Committee by the Selection of Bills Committee on the 16 August 2017. The reason for the referral and principal issues for consideration by the Committee were identified in the Selection of Bills Committee Report No. 9 of 2017 to be:

- the Bill makes significant changes to the migration, visa and work arrangements for overseas workers in Australia;
- stakeholders have been vocal in raising their concerns about the unintended consequences of recent changes to skilled migration visas; and
- the Act is a complex piece of legislation and any amendments warrant further consultation and investigation.

Portfolio submission

Context

On 18 April 2017, the Government announced significant changes to the temporary and permanent employer sponsored skilled visa programmes, including that the Temporary Work (Skilled) visa (subclass 457) programme (457 visa) will be abolished and replaced with the completely new Temporary Skill Shortage (TSS) visa in March 2018.

The reforms commenced from 19 April 2017 and will be implemented in phases. Implementation is anticipated to be completed by March 2018, when the subclass 457 visa is expected to be replaced by the TSS visa.

The measures in this Bill strengthen the integrity of Australia's employer sponsored skilled migration programmes, and are part of the reforms to the temporary and permanent skilled migration programmes.

The Department has consulted broadly on the reforms, which incorporate Parts 1 and 3 of Schedule 1 to the Bill, including through:

- individual meetings;
- ten roundtables in Melbourne, Sydney and Canberra. These were attended by over 100 stakeholders from a broad range of non-government sectors, including universities, industry and legal peak bodies and migration agents;
- interdepartmental committee (IDC) meetings;
- submissions and feedback received through other channels. This includes over 700 pieces of correspondence regarding the reforms.

Whilst stakeholders have raised concerns about some aspects of the reforms, the Department is not aware of concerns being raised regarding the measures in this Bill.

Parts 1 and 3 of Schedule 1 to the Bill will give effect to recommendations made in the 2014 Independent Review into Integrity in the Subclass 457 Programme (457 Integrity Review). This review involved wide consultation and feedback from a broad range of stakeholders, including industry peak bodies/associations, unions, government, businesses, migration agents and academics. This review met with over 150 stakeholders and received 189 written submissions. In March 2015, the Government indicated its intention to implement these recommendations.

Part 1– Public disclosure of sanctions

Businesses who sponsor a skilled overseas worker must comply with the sponsor obligations prescribed in Division 2.19 of the *Migration Regulations 1994* (the Regulations). These obligations are in place to ensure that overseas skilled workers are protected from exploitation, and that the visa programmes are used appropriately, and do not undercut wages and conditions.

Currently, the Department is only able to publicly release limited information regarding breaches. Whilst the Department's annual report includes aggregate data on sponsor sanctions, it does not contain details of the companies that breached their obligations, or the penalty that was issued. This is not enough to inform the public and overseas workers about businesses that breach their obligations.

Public disclosure of details when a party breaches regulatory requirements is an existing practice within the Australian Government. The Office of the Migration Agents Registration Authority regularly publishes details of disciplinary decisions taken against migration agents on its website. This includes agent names, registration numbers, and the results of compliance investigations. Similarly, the Fair Work Ombudsman (FWO) publishes the details, including business names, litigation outcomes, enforceable undertakings, and compliance partnerships on the FWO website.

The disclosure of sponsor sanctions will give effect to a recommendation made by the 457 Integrity Review that was publically accepted by Government in March 2015. [1]

Impact on people seeking a visa and businesses

This measure has been in the public domain since early 2015, when the Government accepted the recommendations of the 457 Integrity Review. The Department is not aware of any concerns raised by stakeholders since that time, including concerns regarding unintended consequences of the measure.

In developing this measure, the Department has consulted the Office of the Australian Information Commissioner and the Attorney-General's Department. The Department also consulted a number of other departments and agencies through several IDC meetings.

The measure does not change the sponsorship, nomination and visa application process and requirements. It does not require visa applicants, visa holders, or businesses to take any additional action or make any additional payments.

Businesses who breach their obligations and are sanctioned will be affected by this measure because details of their business, the obligation breached, and the sanction imposed will be publically disclosed. This could have financial and reputational impacts on the business. However, publication will only occur where it has been determined by a departmental officer that the breach is serious enough to warrant the imposition of a sanction under section 140K of the Act. This will assist in deterring businesses from breaching their obligations.

Deterring businesses from breaching their obligations will protect the wages and conditions of overseas workers and Australians.

Visa holders may be considered to have greater vulnerability to exploitation in the workplace due to their unfamiliarity with Australian practices and laws. Disclosing breaches of the sponsor obligations seeks to redress this issue by informing the public, including visa holders, of a sponsor's adverse compliance history. This will assist visa applicants and holders to make more informed decisions about potential employers and therefore be better placed to avoid workplace exploitation in Australia.

By releasing details of breaches to the public, the Department will be able to demonstrate that there are public repercussions for sponsors who breach their obligations. This will encourage visa holders, and others, to report suspected breaches, and will act as a deterrent to a sponsor who may otherwise breach their obligations.

[1] Government Response to the Independent Review into the integrity of the subclass 457 programme. www.border.gov.au/about/reports-publications/reviews-inquiries/independent-review-of-the-457-programme/response-to-integrity

Part 2– Review of decisions relating to certain visas

This measure will provide clarity around when review rights are available to applicants for visas that require an approved nomination. This includes the 457 visa and the Training (subclass 407) visa.

In recent years, a series of judicial review decisions have expanded the circumstances in which visa applicants can seek merits review for a refused visa application, beyond the original policy intention – with merits review available to a visa applicant if a further nomination application has been lodged but not yet decided by the Department.

This has encouraged sponsors to lodge repeat nomination applications to allow visa applicants to gain access to merits review and remain in Australia. It has also resulted in confusion because visa applicants who are not entitled to seek merits review of a decision to refuse their visa at the time the refusal is made (because there is no approved or pending nomination), can subsequently obtain review rights if a further nomination application is lodged.

The current situation makes it difficult for the Department to properly notify an applicant of their review rights, increases the risk of defective notification, and has led to vexatious applications for merits review aimed solely at inappropriately extending a visa applicant's stay in Australia.

Where defective notifications occur, individuals may be incorrectly recorded as unlawful on departmental systems and could be detained unlawfully. There is also a risk of the defective notification resulting in the unlawful removal of an individual.

This measure will ensure that merits review is only available in circumstances that match the original policy intention. It will also ensure that there is certainty regarding a visa applicant's entitlement to apply for merits review when the decision to refuse is made, which will reduce the risk of defective notification.

Impact on people seeking a visa and businesses

This measure will provide visa applicants with certainty regarding whether merits review rights are available to them, and reduce the risk of an applicant receiving defective notification. This reduces the potential for unintended consequences to arise.

The review rights measure will affect applicants for subclass 457 and 407 visas whose applications are decided after the measure commences, and will only apply to applicants who are onshore when they lodge their application.

Applicants who are in Australia when they lodge an application for a subclass 457 or 407 visa will have review rights if, at the time the decision to refuse the visa is made:

- the applicant is identified in an approved nomination that has not ceased; or
- the applicant's sponsor has been refused sponsorship, and this decision is being reviewed; or
- the sponsor's application to nominate the visa applicant has been refused, and this decision is being reviewed; or
- a 407 visa applicant who does not require a nomination is, at the time that the visa is refused, sponsored by an approved sponsor.

Offshore applicants are not affected by this measure as their merits review rights are determined by the Regulations. The intention is to amend the Regulations so that Australian sponsors of offshore applicants whose subclass 457 or 407 visa application is refused, are able to apply for the decision to be reviewed in the same circumstances that onshore subclass 457 and 407 applicants can.

Part 3– Tax file numbers

This measure allows the Department to collect, record, store, disclose and use the tax file numbers of skilled migrants for compliance and research purposes, which will enhance the Department's ability to access and match data, including salary data, held by the Australian Taxation Office (ATO). The Department already conducts data sharing with the ATO, however does not have the authority to collect or store tax file numbers.

Data matching using TFNs minimises the risk of misidentifying a visa holder when investigating a sponsor for compliance with their obligations. Data obtained from the ATO will assist the Department to undertake:

- more streamlined, targeted and effective compliance activity to identify skilled visa sponsors who breach their obligations, including by underpaying visa holders, and to identify visa holders working for more than one employer in breach of their visa conditions.
- Research and trend analysis, which will provide an additional evidence base for the Department in developing skilled visa policy.

The ability to store tax file numbers will also reduce the administrative burden on the Department as it will not need to redact tax file numbers that are inadvertently provided during the visa application process.

Tax file number sharing will give effect to a recommendation made by the 457 Integrity Review that was accepted by government in March 2015.

Impact on people seeking a visa and businesses

This measure has been in the public domain since early 2015, when the Government accepted the recommendations of the 457 Integrity Review. The Department is not aware of any concerns raised by stakeholders since that time, including concerns regarding unintended consequences of the measure.

In developing this measure, the Department has consulted the Attorney-General's Department, the Office of the Australian Information Commissioner, the Treasury, and the ATO. The Department also consulted a number of other departments and agencies through several IDC meetings.

The measure does not change the sponsorship, nomination and visa application process and requirements. It does not require visa applicants, visa holders, or businesses to make any additional payments.

The Department will obtain most tax file numbers directly from the ATO. This will minimise the impact on visa applicants, visa holders and businesses. Where this is not

possible, the Department may request tax file numbers from an applicant, visa holder or sponsor. Provision would be voluntary.

The Department will be able to use tax file numbers to better identify sponsors who breach their obligations.

Tax file number sharing will deter sponsors from breaching their obligations, including the obligation to pay visa holders an appropriate salary. This measure will also improve the Department's ability to identify and take action against visa holders who do not comply with their visa conditions. This will positively impact overseas and Australian workers by protecting their wages and conditions.