

# CHAPTER 1

## INTRODUCTION

1.1 On 6 June 2013, the Migration Amendment (Temporary Sponsored Visas) Bill 2013 (Bill) was introduced by the Minister for Immigration and Citizenship, the Hon Brendan O'Connor MP (Minister).<sup>1</sup> On 18 June 2013, the Senate referred the provisions of the Bill to the Senate Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 20 August 2013.<sup>2</sup> In order to assist the parliament's timely consideration of the Bill, the committee decided to present its report on 24 June 2013.

### Purpose of the Bill

1.2 According to the Explanatory Memorandum (EM), the Bill seeks to:

[Amend] the *Migration Act 1958* (the Migration Act) to enhance the Government's ability to deter sponsor behaviour which is inconsistent with the policy intent of the Temporary Sponsored Visa Program (of which Subclass 457 visas are a part). The Bill, together with proposed amendments to the *Migration Regulations 1994* (the Migration Regulations), presents a comprehensive package of reform which would balance the interests of Australian workers with the need to strengthen protections for overseas workers.<sup>3</sup>

1.3 In his Second Reading Speech, the Minister set out the government's concerns regarding the current operation of the subclass 457 visa protection scheme:

[T]he subclass 457 visa plays an important role in allowing employers to address skill shortages when skilled local labour is unavailable. It is intended as a vehicle to allow employers to quickly supplement the Australian labour market, including the use of enterprise migration agreements and regional migration agreements, where a genuine skill shortage exists...

The use of the subclass 457 visa program has been growing strongly in recent years...

Many growing industries, including those connected with the resources boom, such as mining, as well as non-resource-sector users of the program, such as health care and information and communications technology, accounted for a large portion, over half, of all subclass 457 visa grants in 2011-12.

However, strong growth has also been recorded in industries in which employment has fallen recently, such as accommodation and food service, and retail trade.

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1 *Votes and Proceedings*, No. 171, 6 June 2013, p. 2383.

2 *Journals of the Senate*, No. 148, 18 June 2013, pp 4048-4050.

3 Explanatory Memorandum (EM), p. 1.

It concerns the government that, at a time when the labour market has been flattening and some sectors and regions have experienced lay-offs and increased unemployment, the subclass 457 program has continued to grow.

Coupled with this strong growth is a tendency for some employers to source foreign labour through the subclass 457 program without regard to the Australian domestic labour force.

These trends highlight that current requirements do not commit sponsors to using the subclass 457 program as a supplement to, rather than a substitute for, the domestic labour force.<sup>4</sup>

## Overview of the Bill

1.4 The Bill has six schedules. According to the EM, the Bill would amend the Migration Act to:

- reinforce the purpose of Division 3A of Part 2 of the Migration Act relating to sponsorship;<sup>5</sup>
- require prescribed classes of sponsors to undertake labour market testing in relation to a nominated occupation, in a manner consistent with Australia's international trade obligations;
- provide the evidence for labour market testing which is to accompany an application for a nomination;
- provide exemptions from labour market testing in circumstances where there has been a major disaster, or the skill level of the nominated occupation is equivalent to Skill level 1 or Skill Level 2 as provided for in the Australian and New Zealand Standard Classification of Occupations (ANZSCO);
- in relation to exemptions from labour market testing, provision for the Minister, by way of legislative instrument, to specify the occupations and for such legislative instruments to be subject to disallowance by either House of the Parliament;
- enshrine the kinds of sponsorship obligations for which the Minister must take reasonable steps to ensure are prescribed in the Migration 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;

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

5 Proposed new section 140AA (item 1 of Schedule 1) sets out broad principles to reinforce the importance of temporary skilled workers to the Australian economy while protecting Australian businesses and the employment and training of Australian citizens and Australian permanent residents. See: EM, p. 5.

- clarify that entry to premises under the *Fair Work Act 2009* will enable a Fair Work Inspector to exercise powers under the Migration Act; and
- provide that an additional purpose for exercising inspector powers under the Migration Act is to determine whether a person who is or was an approved sponsor has contravened a civil penalty provision in or committed an offence against relevant provisions of the Migration Act relating to work (employer sanctions provisions).<sup>6</sup>

1.5 The majority of submissions were concerned with the provisions in relation to labour market testing conditions, which are set out in Schedule 2.

### ***Labour market testing (Schedule 2)***

1.6 In his Second Reading Speech, the Minister noted that the government 'will seek assurance from employers that they are only utilising the 457 visa program in circumstances where there is a genuine skills shortage in Australia'.<sup>7</sup> To enable this outcome, Schedule 2 of the Bill introduces a requirement that sponsors must undertake labour market testing in relation to nominated occupations in a manner consistent with Australia's relevant international trade obligations (item 2 of Schedule 2, proposed new subsection 140GBA(1)).

1.7 The labour market testing conditions are satisfied if:

- the Minister is satisfied that the sponsor has undertaken labour market testing in relation to the nominated position within a period determined by the Minister, by legislative instrument, in relation to the nominated occupation;<sup>8</sup> and
- the nomination is accompanied by evidence in relation to that labour market testing; and
- having regard to that evidence, the Minister is satisfied that a suitably qualified and experienced Australian citizen or Australian permanent resident is not readily available to fill the nominated position.<sup>9</sup>

1.8 In relation to the period of labour market testing required, the Minister stated:

It is proposed that the labour market testing requirement will initially require a sponsor to demonstrate that they have sought to find a suitably qualified Australian citizen or Australian permanent resident within six months prior to submission of an application for nomination approval.<sup>10</sup>

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6 EM, p. 1.

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

8 Proposed new subsection 140GBA(4) deals with the Minister's determination by legislative instrument.

9 Proposed new subsection 140GBA(3).

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

1.9 The evidence of labour market testing to accompany the nomination must include one or more of the following:

- information about the approved sponsor's attempts to recruit suitably qualified and experienced Australian citizens or Australian permanent residents to the position and any other similar positions;<sup>11</sup>
- copies of, or references to, any research released in the previous six months relating to labour market trends generally and in relation to the nominated occupation;
- expressions of support from Commonwealth, State or Territory government authorities with responsibility for employment matters; or
- any other type of evidence determined by the Minister, by legislative instrument.<sup>12</sup>

1.10 The Bill contains two exemptions to the requirement for labour market testing, namely:

- a major disaster exemption (proposed new section 140GBB, item 2 of Schedule 2); and
- a skill and occupation exemption (proposed new section 140GBC, item 2 of Schedule 2).

1.11 The skill and occupation exemption provides that a sponsor is exempt from the requirement to satisfy the labour market testing condition in proposed new section 140GBA if:

- either or both of the following are required for the nominated position, in relation to the nominated occupation: a relevant bachelor degree or higher qualification, or five years or more of relevant experience; and the Minister, by way of legislative instrument, has specified that the nominated occupation is exempt (proposed new subsection 140GBC(2), item 2 of Schedule 2);<sup>13</sup> or
- either or both of the following are required for the nominated position, in relation to the nominated occupation: a relevant associate degree, advanced diploma or diploma covered by the Australian Qualifications Framework, or three years or more of relevant experience; and the Minister, by way of

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11 This information may include (but is not limited to): details of any advertising (paid or unpaid) of the position, and any similar positions, commissioned or authorised by the sponsor; information about the approved sponsor's participation in relevant job and career expositions; details of fees and other expenses paid (or payable) for any recruitment; or details of the results of such recruitment attempts, including details of any positions filled as a result (proposed new subsection 140GBA(6)).

12 Proposed new subsection 140GBA(5).

13 Proposed new subsection 140GBC(4) provides for the Minister, by way of legislative instrument, to specify an occupation for the purposes of proposed new subsections 140GBC(2) and (3).

legislative instrument, has specified that the nominated occupation is exempt (proposed new paragraph 140GBC(3), item 2 of Schedule 2).

### **Conduct of the inquiry**

1.12 Details of the inquiry, including links to the Bill and associated documents, were placed on the committee's website at [www.aph.gov.au/senate/legalcon](http://www.aph.gov.au/senate/legalcon). The committee also wrote to over 80 organisations and individuals, inviting submissions by 20 June 2013. Submissions continued to be accepted after that date.

1.13 The committee received 24 submissions, which are listed at Appendix 1. All public submissions were published on the committee's website.

1.14 The committee held a public hearing on 21 June 2013 at Parliament House in Canberra. A list of witnesses who appeared at the hearing is at Appendix 2, and the *Hansard* transcript is available through the committee's website.

### **Acknowledgement**

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

### **Note on references**

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