Australian Government

Department of Immigration and Citizenship

Discussion Paper

Business (Long Stay) Subclass 457
and related temporary visa reforms

Executive summary

The Minister for Immigration and Citizenship has commenced a broad reform of the Subclass 457 visa program. The reform is focused on making the program more responsive to labour market needs, while protecting the employment and training opportunities of Australians and the rights of overseas workers.

Part of this consideration will be the obligations that sponsors should have in relation to temporary workers from overseas. Temporary visa holders are not entitled to a range of government services (health, education and welfare for example) that together provide a safety net for residents and citizens of Australia. In addition they can be subject to powerful incentives, entirely outside of their work arrangements, to remain in Australia and may also be isolated from family and community support networks.

The Minister intends to introduce a Bill to amend the *Migration Act 1958* ('the Act') to reform the sponsorship regime for Subclass 457 and a range of other temporary visas that include work rights. This bill and associated regulation presents the opportunity to clarify sponsor obligations and provide further fair and transparent mechanisms to help deal with the particular vulnerability of temporary workers from overseas.

The reforms in the Bill will focus on four main areas:

- Redefining sponsorship obligations for Subclass 457 and establishing a sponsorship obligations framework for a range of other subclasses;
- Expanding powers to monitor and investigate possible non-compliance with those obligations;
- Enhancing measures to address identified breaches of obligations; and
- Improving information sharing between government agencies at all levels.

The objective of this discussion paper is to obtain feedback from stakeholders on these four areas. The Department is particularly interested in obtaining feedback on the menu of possible obligations set out in sections 1.3 and 1.4. Stakeholders should be aware that the obligations set out in these sections are simply a list of *potential* obligations and should not interpret these sections as a complete list of obligations which would otherwise be imposed. All feedback will be considered in drafting the proposed Bill and associated regulation.

The release of this discussion paper is only one part of the consultation process that will be undertaken in relation to the broad reforms being pursued by the Minister.

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Background

The Minister for Immigration and Citizenship has commenced a broad reform of the Subclass 457 visa program. The reform is focused on making the program more responsive to labour market needs, while protecting the employment and training opportunities of Australians and the rights of overseas workers.

A business-led External Reference Group appointed by the Minister to examine ways to make the program more effective and responsive has recently provided their final report. The Government has agreed to 14 of the 16 recommendations and will further consider the remaining two recommendations. Implementation of the agreed recommendations has commenced and will continue over the coming 18 months.

The Deputy Prime Minister, the Hon Julia Gillard MP, and the Minister have jointly appointed an industrial relations expert, Ms Barbara Deegan, to examine ways to improve the integrity of the scheme. Ms Deegan will be consulting widely as part of that process and her areas of focus will include among other things, the salary mechanism, work entitlements, occupational health and safety and English language considerations as they relate to the Subclass 457 visa program.

The Minister has also announced that a Working Party will be established to consider and implement the recommendations of these review processes and other recent review processes including the Joint Standing Committee on Migration's 2007 Report ('*Temporary visas…permanent benefits'*) and the Council of Australian Government's directed review by the Commonwealth State Working Party on Skilled Migration. A Consultative Forum will also be established comprising representatives from State/Territory Governments, key industry bodies and unions.

The Working Party will develop a longer term reform agenda to be presented to Government in the 2009-10 Budget context.

1. A consistent sponsorship obligations framework

Temporary visa holders are generally not entitled to the broad range of government services (health, education and welfare) and income support that Australian citizens and permanent residents enjoy.

Temporary visa holders may also be isolated from family support networks and some may be subject to powerful incentives, entirely outside of their work arrangements, to remain in Australia rather than return to their home country.

The policy challenge is to counter this vulnerability in a way that does not interfere with the responsiveness of Australia's temporary entry programs and is fair and reasonable to all parties in all the circumstances. Obliging sponsors of temporary workers from overseas to take some responsibility for those people is a key element of achieving that fairness.

The current framework

The Act currently makes provision for formal sponsorship frameworks to be set out in *Migration Regulations 1994* (the Regulations). The Subclass 457 and Subclass 470 (Professional Development) visa programs are the only temporary visa programs that currently operate entirely within this framework. Other temporary visa programs rely on part of this framework, a separate sponsorship framework, or incorporate no formal sponsorship at all.

The current Subclass 457 sponsorship framework requires employers of Subclass 457 visa holders to make a range of undertakings as a precondition to being approved as a Standard Business Sponsor. Alternatively, it requires Labour Agreement parties to contractually agree to certain undertakings.

In either case, the undertakings are designed to clarify the responsibilities of employers and ensure that costs incurred by visa holders for health and other services do not fall to the Australian tax-payer.

For temporary visas other than Subclass 457 on which visa holders may work (set out in a table on page 28 and collectively referred to as the '400 series'), there is considerable variation in sponsorship requirements.

In some cases there is no formal sponsorship requirement, yet the Australian party must undertake to provide certain forms of support, similar to sponsorship undertakings. In the case of Occupational Trainees (Subclass 442) there is a 'nomination' rather than a sponsorship. The undertakings given in this context serve a similar function as a sponsorship but are less formalised.

For some 400 series visas, sponsorship is not currently required for periods of stay less than three months (although there are some exceptions to this general rule). Persons entering under the terms of an agreement between Australia and another country are also exempt. The table on page 28 describes each 400 series visa and indicates whether or not sponsorship is currently required.

Some of these differences reflect different policy objectives but others have resulted from sponsorship requirements for different visas drifting apart over time. In any case, they are not subject to the same rigorous sponsorship arrangements that apply to Subclass 457.

Where sponsorship is currently a requirement for a 400 series visa, sponsors are required to accept responsibility for the following:

- all financial obligations to the Commonwealth incurred by the applicant arising out of the applicant's stay in Australia;
- compliance by the applicant with all relevant legislation and awards in relation to any employment entered into by the applicant in Australia; and
- unless the Minister otherwise decides, compliance by the applicant with the conditions under which the applicant was allowed to enter Australia.

What is proposed

The new legislation proposes to repeal the existing sponsorship and nomination provisions and replace them with a uniform sponsorship framework for these temporary visas (exceptions would need to apply for persons entering under the terms of a government to government agreement). It is proposed to apply the new framework to all Subclass 457 sponsors, whether or not their sponsorship was approved prior to the date of effect of the legislation. Under this model, Subclass 457 sponsors would no longer be bound by the repealed undertakings, but instead the newly legislated obligations. For 400 series sponsors, it is proposed that the new framework apply only to 400 series sponsors approved after the date of effect of the legislation. Existing arrangements as at the date of effect of the legislation would be unaffected.

This would:

- serve to counter the vulnerability of existing temporary residents who are either unsponsored or inadequately supported;
- enhance the temporary migration program integrity as a whole by removing any incentive to apply for a less appropriate visa in order to enter into or avoid a particular kind of sponsorship arrangement; and
- lead to more effective use of resources by facilitating, in due course, one-to-many sponsorship across the program – once approved, a single sponsor could potentially sponsor many visa applicants across a range of visa subclasses.

This would, however, mean that some visa applicants who are currently not sponsored (where the visa currently has no such requirement or where they intend to stay in Australia for less than three months for example) will in future be subject to sponsorship. Their inclusion in this proposal will provide a consistent approach to sponsorship across all temporary visas and enhance the integrity of the broader program.

These include:

- **representatives of overseas organisations** where the organisation has no Australian presence – it is proposed that the overseas organisation be required to undertake the same responsibilities and undertakings as an Australian organisation sponsoring such a person;
- **visiting academics** – currently there is no requirement for any of these people to be sponsored, yet they have a strong association with a particular institution which has invited them to undertake or observe some research at their institution. While Australia benefits from these collaborative research activities, there are also significant benefits from all other temporary resident visa arrangements which are not exempt from sponsorship requirements;
- **Special Program visa applicants** – there are no sponsorship requirements for any of these people although there is a nomination requirement for some. It is inappropriate to exempt these temporary residents, many of whom remain in Australia for 6-12 months, and sometimes longer, from the protections provided for under a sponsorship arrangement;
- **sports competitors** who intend to stay more than three months who are 'internationally known' (or associated with someone who is) and have a record of participation in international events – few sports persons of such calibre would remain in Australia more than three months, however, where they did intend to do so a sponsorship would be appropriate, by an overseas person or organisation if there was no appropriate Australian promoter or contact;
- **domestic workers** who are working for an overseas executive where the overseas executive does not have a sponsor – currently, the executive must provide undertakings that are consistent with the sponsorship obligations;
- **occupational trainees** – these visas are currently subject to a nomination requirement which involves similar responsibilities for the nominator as a sponsorship although the current arrangements for nominations are less formalised than the sponsorship arrangements;
- **Superyacht crew** – who will have access to a new tailored temporary visa from October 2008. The Superyacht crew visa will allow work associated with being a crew member and will require sponsorship by the captain and/or employer; and
- **other** temporary resident visa applicants, for example, sports competitors and journalists, who intend to stay less than three months who are currently not required to obtain a sponsorship**.**

Under the new framework, sponsors would be compelled by operation of law to comply with obligations which would be applicable and consistent across the range of visas in question and other obligations in relation to particular temporary visa holders, each for defined periods.

Some obligations would be common across all subclasses to minimise complexity for organisations who may be a sponsor in relation to a variety of different visa subclasses. A number of obligations would be unique to particular visa subclasses or groups of visa subclasses reflecting their unique economic and social policy objectives. Failure to comply with the obligations could result in a range of sanctions being applied (see 3. Addressing non-compliance on page 23).

1.1 Obligations –Subclass 457 and 400 series visas

This section outlines a number of general obligations that it is proposed would be applied to **all** temporary visa arrangements that fall within the new sponsorship framework.

1.1.1 To keep records

This would oblige sponsor to keep records of their compliance with other applicable obligations.

Stakeholder feedback to date has been exclusively in the 457 visa context and has suggested that the scope of this obligation be kept to a minimum. It should, for example, not expand substantially the records employers are expected to keep under other Commonwealth, State and Territory legislation.

1.1.2 To provide information

This would oblige sponsors to provide relevant information upon request within a prescribed timeframe (see 2. Expanded powers to monitor and investigate possible non-compliance on page 21).

The Department currently uses the Subclass 457 undertaking to cooperate with the Department's monitoring to elicit information from sponsors in writing. The type of information currently requested includes financial information, payment records and evidence of training activity. There is currently no sponsorship requirement on 400 series sponsors to cooperate with monitoring or provide relevant information, although Subclass 416 (Special Program) participants agree to do so when they sign an agreement with the department.

Stakeholder feedback to date has been exclusively in the 457 visa context and has focused on the time period in which information would be required. A graduated timeframe for supplying information depending on the circumstances is being considered: from two days in circumstances where there is an imminent threat to health or safety to one month in routine circumstances.

This obligation might cover a requirement on the sponsor to provide the contact details for the primary visa holder.

1.1.3 To notify the Department of prescribed changes in circumstance

This would oblige sponsors to notify the Department of certain changes in circumstance within a prescribed period, such as change of business address, business registration, the appointment of administrators and the cessation of visa holders' employment or activities with the sponsor.

This proposed obligation largely reflects an existing Subclass 457 undertaking. Consideration is being given to being more prescriptive about the types of changes that must be notified and the timeframe for notifications.

1.1.4 To notify visa holder of certain information

This would oblige sponsors to provide visa holders with certain information, such as information about the rights associated with working in Australia. This is intended to complement and facilitate efforts the Department is making to communicate directly with visa holders.

The Department has recently requested existing sponsors to distribute a Frequently Asked Questions information sheet to Subclass 457 visa holders.

1.1.5 To cooperate with inspectors

This would oblige sponsors to cooperate with inspectors in the exercise of their powers (see 2. Expanded powers to monitor and investigate possible non-compliance on page 21).

The Department currently uses the Subclass 457 undertaking to cooperate with the Department's monitoring to elicit information from sponsors in person. There is no such sponsorship requirement for current 400 series sponsors.

1.1.6 To pay the costs of locating, detaining, removing and processing protection visa applications

This obligation would make sponsors liable to pay the costs of locating, detaining, removing or processing the protection visa applications of visa holders, up to a certain prescribed limit. The Commonwealth would bear any cost over and above that amount.

This proposed obligation reflects existing undertakings for both Subclass 457 and the 400 series. Currently, in relation to Subclass 457, the prescribed limit for location and detention costs is $10,000. Sponsors of 400 series visas are currently required to agree to meet all financial obligations to the Commonwealth incurred by the visa holder arising out of their stay in Australia. However, there is no prescribed upper limit for costs.

1.2 Obligations – Subclass 457 specific-salary related

This section outlines a number of **Subclass 457 specific** obligations that it is proposed would be applied to Subclass 457 visa sponsors under the new framework.

1.2.1 To not use overseas workers as a means of strike-breaking

This obligation would prevent sponsors from utilising temporary overseas labour during periods of lawful industrial action or to influence enterprise bargaining negotiations. There is currently no equivalent undertaking.

1.2.2 To pay income protection insurance

This obligation would make sponsors liable for premiums on insurance policies which offer income protection insurance to a prescribed level to primary visa holders. This would provide a temporary safety net for Subclass 457 visa holders for a prescribed period should they become redundant or unemployed due to circumstances beyond their control.

The obligation indirectly reflects an existing Subclass 457 undertaking. The undertaking to pay a Subclass 457 visa holder at least the minimum salary level requires sponsors to continue to pay at least the minimum salary level for 28 days after the Department is notified of cessation of the Subclass 457 visa holder's employment.

One advantage of this obligation is that it gives visa holders a means to support themselves onshore if they are unable to work for a short time for whatever reason (a non-work related injury for example), while they transition to another visa or while make arrangements to depart.

1.2.3 To pay the primary visa holder at least a particular amount

The Subclass 457 visa program is intended to meet the emerging needs of a dynamic labour market though the provision of skilled overseas workers on a temporary basis. The primary mechanism by which the program seeks to achieve this is a market based price signal – currently enforced through the Subclass 457 sponsor undertaking to pay the primary visa holder at least the minimum salary level. The minimum salary level is, in turn, currently based on the Average Weekly Ordinary Time Earnings of Australian citizens and permanent residents.

The proposed legislation would retain a similar market based price signal but may, subject to the outcome of Ms Deegan's review, use a different mechanism for setting the price signal into the future.

1.3 Obligations –Subclass 457- non salary-related costs

This section details a menu of potential obligations that would involve **non-salary costs** for sponsors. It should not be interpreted as a complete list of obligations intended to be imposed or as necessarily representative of the views of the Department.

1.3.1 To pay travel costs to Australia

An obligation such as this would make sponsors liable for the travel costs of coming to Australia for the primary visa holder and any members of his or her family (secondary visa holders) from the visa holders' usual country of residence. To avoid confusion, the obligation would likely specify economy class airfares as the quantum of costs payable.

The obligation does not reflect any existing undertaking.

One advantage of such a potential obligation is to avoid the possibility of sponsors paying the relevant costs and later recovering them from visa holders' salaries. One disadvantage is to make sponsor liable for these costs in all circumstances, including where the visa holder would ordinarily pay these costs in full completely independent of the sponsor.

1.3.2 To pay travel costs from Australia

An obligation such as this would make sponsors liable for the travel costs of leaving Australia for the primary visa holder and any members of his or her family (secondary visa holders) to the visa holders' usual country of residence. To avoid confusion, the obligation would likely specify economy class airfares as the quantum of costs payable.

It is worth noting that another proposed obligation (see 1.1.6 above) would make sponsors liable for removal costs where the visa holder was unwilling or unable to depart voluntarily. Removal costs would be significantly greater than the potential costs under the present obligation.

This obligation reflects a current requirement to pay for the return travel of the primary visa holder and any members of his or her family.

One advantage of this potential obligation is to facilitate travel from Australia for visa holders at the conclusion of their stay in Australia, making it more likely that they will depart in accordance with the terms of their visa. One disadvantage is to make the sponsor liable for these costs in all circumstances, including where the visa holder would ordinarily pay these costs in full completely independent of the sponsor.

1.3.3 To pay the costs associated with recruitment

An obligation such as this would make sponsors liable for recruitment costs associated with the primary visa holder to avoid the possibility of those costs being charged back to the visa holder. These costs would be limited to costs the employer incurred themselves or costs the employer was aware or ought to have been aware of being incurred by another party including the visa holder.

For example, if an employer was aware that a Subclass 457 visa applicant paid $10,000 to an offshore agent to secure the opportunity to apply for the visa and the employer proceeded with the recruitment anyway, the employer would be required to pay the $10,000 or reimburse the visa applicant.

This obligation does not reflect any existing undertaking. It is intended, in concert with the following obligation, to counter an emerging exploitative trend whereby visa holders are required to pay an agent of the employer or some third party substantial sums to secure the opportunity to apply for a visa.

Following previous stakeholder feedback and consistent with the recommendation of the Senate Standing Committee on Legal and Constitutional Affairs on a similar provision in a previous Bill, the scope of this potential obligation has been limited.

1.3.4 To pay the costs associated with migration agent services

An obligation such as this would make sponsors liable for the costs of migration agent services provided to the visa holders. Again, these costs would be limited to costs the employer incurred themselves or costs the employer was aware or ought to have been aware of being incurred by another party including the visa holder.

This obligation does not reflect any existing undertaking. However, it is intended, in concert with the previous obligation, to counter an emerging exploitative trend whereby visa holders are required to pay an agent of the employer or some third party substantial sums to secure the opportunity to apply for a visa.

Following previous stakeholder feedback and consistent with the recommendation of the Senate Standing Committee on Legal and Constitutional Affairs on a similar provision in a previous Bill, the scope of this potential obligation has been limited.

1.3.5 To pay costs associated with licensing and registration or similar

An obligation such as this would make sponsors liable to pay the costs (up to a prescribed limit) associated with licensing, registration or professional membership of the primary visa holder, where the primary visa holder is required to be so licensed or registered to perform their role with the employer.

An existing undertaking in the Subclass 457 visa sponsor context, requires sponsors to ensure that the Subclass 457 visa holder holds any licence, registration or membership that is mandatory for the performance of their work. This potential obligation would additionally require sponsors to pay for the licence, registration or membership.

One advantage of this potential obligation is that it ensures visa holders are not liable for possibly unexpected costs in advance of commencing work in their occupation. This helps ensure that visa holders are better able to support themselves during the settlement period.

One disadvantage would be making all sponsors liable for costs (up to a prescribed limit that could be set at, say, $1,000) that would normally fall to Australians or Australian permanent residents or at least be the subject of negotiation between employer and employee. This potential obligation would not prevent an employer from making a commensurate reduction to the salary paid, provided that salary did not fall below any applicable minimum standards.

1.3.6 To pay certain medical costs OR to pay for health insurance

An obligation such as this would make sponsors liable for medical costs incurred in public hospitals by visa holders, where those costs were not covered under reciprocal healthcare arrangements. This potential obligation would reflect, almost exactly, an existing undertaking.

Alternatively, such an obligation could make sponsors liable, directly, for insurance premiums for policies which covered medical costs incurred in public hospitals by visa holders. The obligation would also specify that liability would fall to the sponsor should the insurer fail to pay for any reason.

One advantage of these potential obligations is to insulate the Australian community at large from medical expenses incurred by temporary visa holders by placing this liability on the sponsor that is benefiting from their labour. One disadvantage is the risk of making sponsors liable for costs that it may be beyond their means to bear.

1.3.7 To pay education costs for certain minors

An obligation such as this would make sponsors liable for the education costs of visa holders who are required to attend school under Australian law (aged between 4 or 5 and 15 or 16) in State and Territory jurisdictions that do not elect to bear these costs themselves.

This potential obligation does not reflect any existing undertaking. It is intended to ensure that minors for whom it is mandatory to attend school are not prevented from doing so because of the limited financial means of some visa holders.

There would be a limit placed on the amount the sponsor is liable for, which would reflect the reasonable costs associated with the education of the primary children of the visa holder.

1.4 Obligations – 400 series

This part outlines a number of obligations that might apply to the 400 series visas. These are in addition to the administrative obligations outlined in section 1.1 and include some of the non-salary related costs that might apply to Subclass 457 as outlined in section 1.3.

Not all of the cost related obligations that might apply to Subclass 457 are appropriate for the 400 series visas, reflecting the different purposes of these visas and the fact that some visa holders are not employed in Australia or not remunerated sufficiently to support themselves (c.f. 1.2.2 for Subclass 457 visa holders above). The obligations are divided into those that might apply where the visa holder is remunerated, those that might apply where the visa holder is not being remunerated and those that might apply to all sponsors.

Visa holder remunerated

1.4.1 To pay the costs associated with recruitment

This is the same obligation that may apply to Subclass 457 sponsors. It would make sponsors liable for recruitment costs associated with the primary visa holder to avoid the possibility of those costs being charged back to the visa holder. These costs would be limited to costs the employer incurred themselves or costs the employer was aware or ought to have been aware of, being incurred by another party including the visa holder.

This obligation does not reflect any existing undertaking. However, it is intended, in concert with the following obligation, to counter an emerging exploitative trend identified within the Subclass 457 context, whereby visa holders are required to pay an agent of the employer or some third party substantial sums ($10,000 plus) to secure an opportunity to apply for a visa.

Following previous stakeholder feedback on proposed changes to the Subclass 457 visa and consistent with the recommendation of the Senate Standing Committee on Legal and Constitutional Affairs on a similar provision in a previous Bill, the scope of the obligation has been limited.

1.4.2 To pay the costs associated with migration agent services

This is similar to the obligation that may apply to Subclass 457 sponsors. It would make sponsors liable for the costs of migration agent services. These costs would be limited to costs the employer incurred themselves or costs the employer was aware or ought to have been aware of being incurred by another party including the visa holder.

This obligation does not reflect any existing undertaking. However, it is intended, in concert with the previous obligation, to counter an emerging exploitative trend within the Subclass 457 visa context at least whereby visa holders are required to pay an agent of the employer or some third party substantial sums ($10,000 plus) to secure an opportunity to apply for a visa.

Following previous stakeholder feedback and consistent with the recommendation of the Senate Standing Committee on Legal and Constitutional Affairs on a similar provision in a previous Bill, the scope of the obligation has been limited.

1.4.3 To pay costs associated with licensing and registration or similar

This is the same obligation that may apply to subclass 457 sponsors. This would make sponsors liable to pay the costs (up to a prescribed limit) associated with licensing, registration or professional membership of the primary visa holder, where the primary visa holder is required to be so licensed or registered to perform their role with the employer.

One advantage of this obligation is that it ensures visa holders are not liable for possibly unexpected costs in advance of commencing work in their occupation meaning that visa holders are better able to support themselves during the settlement period.

One disadvantage is to make all sponsors liable for costs (up to the prescribed limit of $1,000 say) that would normally fall to Australians or Australian permanent residents or at least be the subject of negotiation between employer and employee (noting this obligation would not prevent an employer from making a commensurate reduction to the salary paid, provided that salary did not fall below any applicable minimum standards).

Visa Holder Not Remunerated

1.4.4 Access to adequate means of support

Where the sponsor will not be the visa holder's employer (for example, some religious workers, certain persons entering under a youth exchange program and visiting academics) the sponsor should be required to ensure the visa holder has sufficient funds (either directly or by providing them with the money to arrange it themselves) to support themselves and any dependants for the duration of their stay in Australia.

1.4.5 Accommodation standards

The sponsor will be obliged to ensure that there are appropriate arrangements for the visa holder's accommodation during their stay in Australia. This would oblige the sponsor to ensure that the sponsored person and their dependants are accommodated in arrangements consistent with what would be considered a reasonable standard of living in Australia.

All Visa Holders

1.4.6 To pay certain medical costs OR to pay for health insurance

This is the same obligation that may apply to subclass 457 sponsors. It would make sponsors liable for medical costs incurred in public hospitals by visa holders, where those costs were not covered under reciprocal healthcare arrangements. This obligation would reflect an existing undertaking by sponsors to accept responsibility for all financial obligations to the Commonwealth incurred by the applicant arising out of their stay in Australia.

Or alternatively, this obligation would make sponsors liable, directly, for insurance premiums for policies which covered medical costs incurred in public hospitals by visa holders. The obligation would also specify that liability would fall to the sponsor should the insurer fail to pay for any reason.

One advantage of this obligation is to insulate the Australian community at large from medical expenses incurred by temporary visa holders by placing this liability on the sponsor that is benefiting from their labour. One disadvantage is the risk of making sponsors liable for costs that it may be beyond their means to bear.

1.5 Obligations – Subclass 420 (Entertainment) specific

This part outlines an obligation that would apply to sponsors of Subclass 420 visa holders only. This reflects an existing policy-based undertaking that sponsors are required to agree to when signing the sponsorship form.

1.5.1 Not to make any variations to itinerary

This obliges the sponsor of applicants for an Entertainment visa not to make any variations to the approved arrangements for the performances without the prior approval of DIAC. This protects the integrity of the arrangements which have generally been endorsed by the relevant unions and protects employment opportunities for Australian residents.

1.6 Obligations – Subclass 488 (Superyacht crew) visa

This part outlines an obligation that would apply to sponsors of Subclass 488 visa holders only. This reflects a policy-based proposal from the superyacht industry undertaking that the captain of a superyacht will agree to when signing the sponsorship form.

1.6.1 To pay travel costs from Australia

This obligation would make sponsors liable for the travel costs of leaving Australia for the visa holder to the visa holders' usual country of residence. To avoid confusion, the proposed legislation would likely specify economy class airfares as the quantum of costs payable.

It is worth noting that another proposed obligation (see 1.1.6 above) would make sponsors liable for removal costs where the visa holder was unwilling or unable to depart voluntarily. Removal costs would be significantly greater than the costs proposed under the this obligation.

One advantage of this obligation is to facilitate travel from Australia for visa holders at the conclusion of their stay in Australia, making more likely that they will depart in accordance with the terms of their visa.

2. Expanded powers to monitor and investigate possible non-compliance

Under current Subclass 457 visa arrangements, employers sign a sponsorship undertaking to cooperate with the Department's monitoring activity. This undertaking allows the Department to undertake a desk audit and/or site visit of a business sponsor to check their compliance with a broader set of undertakings, such as payment of a minimum salary level. An administrative sanction to bar or cancel a sponsorship may be imposed where a business sponsor fails to cooperate with the Department's monitoring of the employer and any person/s they sponsor.

This framework does not provide detail about what the Department expects of business sponsors throughout the monitoring and investigation process. It similarly does not provide an explicit mechanism to ensure that employers provide information in a certain form or in a timely way in the circumstances.

There are currently no formal monitoring or investigative arrangements for the other temporary entry visas ('the 400 series') that the new framework would cover. The Department responds to instances that require intervention on a case by case basis. Under the proposed new arrangements, self-reporting would be the principal monitoring mechanism with site visits employed only in the case of sponsors of particular concern.

2.1 Desktop-audit monitoring

The proposed legislation would give departmental officers capacity to request relevant specified information in a particular form and within a specified time period together with an appropriate penalty for non-compliance (see 1.1.2 in 1. A consistent sponsorship obligations framework on page 5). The penalty would be the same as for the other obligations.

2.2 In person monitoring

The proposed legislation would make provision for specially appointed officers to exercise investigative powers. Such officers would have the power to, without force, enter a place of business, or other place (announced or unannounced) in which the Inspector has reasonable cause to believe there is information, documents or any other thing relevant to determining whether the program requirements are being complied with.

The officer would be able to:

- inspect any things;
- interview any persons;
- require production of documents (in writing or otherwise);
- inspect and copy documents; and
- require a person to reveal who has custody of a document.

The proposed powers would be similar to the powers of workplace inspectors under the *Workplace Relations Act 1996* (the WR Act) to the greatest extent possible.

A failure to cooperate with Inspectors in the exercise of their powers would attract a penalty (see 1.1.5 on page 10).

2.3 Offence for providing false or misleading information

The proposed legislation would expand the existing offence provision for providing false or misleading information in connection with the entry or stay of non-citizens to cover the provision of false or misleading information in connection with monitoring and investigating possible non-compliance with sponsorship requirements. The existing provision already applies to information provided by sponsors in the course of applying to be approved as a Standard Business Sponsor and in making nominations. The amendment would simply extend its operation to cover the provision of false or misleading information once the visa holder is onshore.

Immigration fraud is regarded as most serious. This is reflected in the existing maximum penalty of imprisonment for 10 years or 1,000 penalty units (currently $110,000) or both.

3. Addressing non-compliance

Under current Subclass 457 visa arrangements, the Department may, and does, impose a variety of administrative sanctions set out in the Act. Administrative sanctions have the effect of barring sponsors from the Subclass 457 visa program for a specified period. In some cases, administrative sanctions may also indirectly bar sponsors from accessing other visa subclasses.

With the exception of the Subclass 470 visa, there is currently no formal administrative sanctions framework for the other temporary entry visas ('400 series') that the new framework would cover. Non-compliance is managed informally on a case by case basis. The result of non-compliance, however, is generally the same – notionally barring sponsors from accessing the relevant program for a period. In the case of Subclass 416, the Department can cancel the relevant program.

3.1 Administrative sanctions

In some circumstances, administrative sanctions have proven to be highly effective. These include, for example, cancellation and suspension of sponsorship approval. The proposed legislation would seek to retain them and expand their application to other temporary visa programs. This would be the most likely type of sanction to be applied to the 400 series visas.

3.2 Punitive sanctions

Administrative sanctions have proven insufficient to encourage compliance in all circumstances, particularly amongst sponsors who only ever intend to use the relevant program once, or who repeatedly breach their undertakings.

The proposed legislation would introduce a framework for appropriate punitive penalties to actively discourage non-compliance of this kind and to further encourage compliance more broadly.

Civil penalties are the preferred punitive sanction in this context on the basis that criminal penalties may have unintended down stream effects (on obtaining an export licence for example). The appropriate maximum penalty that would apply under the framework is under consideration, noting that the exact penalty for a particular offence would be determined by a magistrate or judge.

3.3 Publishing non-compliance

Currently, the Department does not publish the names of sponsors who have been found in breach of their obligations. The proposed legislation would provide for this to occur. In practice, it is envisaged that sponsor names would only be published where non-compliances has not be remedied or for repeat offenders.

4. Improving information sharing

4.1 Between visa holders, sponsors and the Department

Migration legislation currently allows for very limited information sharing between visa holders, sponsors and the Department. The proposed legislation would facilitate full exchange of information between the three parties for limited relevant purposes, for example, the provision of visa holder contact details to the Department by sponsors for the purposes of facilitating direct communication with visa holders.

4.2 Between government agencies

Sponsors and visa holders currently often consent to the provision of information to a wide variety of Commonwealth, State and Territory government agencies in the course of their applying to become a sponsor or for a visa respectively.

There is considerable merit in formalising this process in legislation to ensure effective two-way sharing of information between agencies so that compliance with a range of regulatory compliance regimes can be cross-checked without imposing further on sponsors. Legislative amendments would also allow the Department to receive information in return in circumstances where that is currently not possible (from the Australian Taxation Office in relation to whether a visa holder is being paid the correct amount, for example).

4.3 With the general public

The Department currently publishes limited aggregate data about visa programs periodically. The proposed legislation would provide for the publication of a greater level of disaggregated data. While it is not intended to provide for the publication of specific details about visa holders and sponsors (such as the names and salaries of Subclass 457 visa holders working for a particular sponsor for example) in order to preserve a certain amount of privacy, it is intended to publish as much data as possible without compromising this principle.

1.20CB Sponsorship undertakings

(1) For subsection 140H (1) of the Act, an applicant for approval as a standard business sponsor must make the following undertakings:

(a) to ensure that the cost of return travel by a sponsored person is met;

(b) not to employ a person who would be in breach of the immigration laws of Australia as a result of being employed;

(c) to comply with its responsibilities under the immigration laws of Australia;

(d) to notify Immigration of:

(i) any change in circumstances that may affect the business's capacity to honour its sponsorship undertakings; or

(ii) any change to the information that contributed to the applicant's being approved as a sponsor, or the approval of a nomination;

(e) to cooperate with the Department's monitoring of the applicant and the sponsored person;

(f) to notify Immigration, within 5 working days after a sponsored person ceases to be in the applicant's employment;

(g) to comply with:

(i) laws relating to workplace relations that are applicable to the applicant; and

(ii) any workplace agreement that the applicant may enter into with a sponsored person, to the extent that the agreement is consistent with the undertaking required by paragraph (i);

(h) to ensure that a sponsored person holds any licence, registration or membership that is mandatory for the performance of work by the person;

(i) to ensure that, if there is a gazetted minimum salary in force in relation to the nominated position occupied by a sponsored person, the person will be paid at least that salary;

(j) to ensure that, if it is a term of the approval of the nomination of a position that a sponsored person must be employed in a particular location, the applicant will notify Immigration of any change in the location which would affect the nomination approval;

(k) either:

(i) for an application made before 1 November 2005 — to pay all medical or hospital expenses for a sponsored person (other than costs that are met by health insurance arrangements); or

(ii) for an application made on or after 1 November 2005 — to pay all medical or hospital expenses for a sponsored person arising from treatment administered in a public

hospital (other than expenses that are met by health insurance or reciprocal health care arrangements);

(l) to make any superannuation contributions required for a sponsored person while the sponsored person is in the applicant's employment;

(m) to deduct tax instalments, and make payments of tax, while the sponsored person is in the applicant's employment;

(n) to pay to the Commonwealth an amount equal to all costs incurred by the Commonwealth in relation to a sponsored person.

Note Under subsection 140H (3) of the Act, these undertakings do not have effect until the relevant visa is granted. Under paragraph 457.223 (4) (i) or (5) (j) of Schedule 2 to these Regulations, a person must be sponsored by an approved sponsor in order to be granted a Subclass 457 (Business (Long Stay)) visa. See also regulation 1.20BA of these Regulations, by which Division 3A of Part 2 of the Act applies to visas that are relevant to standard business sponsors.

(2) For paragraph (1) (n), the costs include the cost of:

(a) locating the sponsored person; and

(b) detaining the sponsored person; and

(c) removing the sponsored person from Australia (including airfares, transport to an airport in Australia and provision of an escort (if needed)); and

(d) processing an application for a protection visa made by a sponsored person.

Note An undertaking is not enforceable in relation to costs of locating and detaining a sponsored person that exceed the limit prescribed by regulation 1.20CC.

Attachment B

Visa	*Description*	*Currently Sponsored*
Exchange (411)	For skilled people to broaden their experience and skills under a reciprocal arrangement with an Australian organisation which allows Australian employees similar opportunities to work overseas. Also provides for persons entering under a bilateral agreement.	**No**
Foreign Government Agency (415)	For representatives of foreign government agencies who are not entitled to a Diplomatic visa, certain foreign language teachers to be employed in Australia by their government or government agency and those entering under a country to country agreement.	**Yes – for stays > 3 months***
Special Program (416)	For people under approved programmes to participate in youth exchange or community-based non-commercial programmes.	**No**
Educational (418)	For persons offered temporary appointment to a position at an Australian tertiary institution or research institution as an academic, librarian, technician, laboratory demonstrator; or to undertake research; or as a teacher at an Australian school or technical college.	**Yes – for stays > 3 months**
Visiting Academic (419)	For academics to visit Australia to observe or participate in research projects at the invitation of an Australian tertiary institution or research organisation without receiving remuneration other than a contribution towards living expenses. Also provides for those entering under a bilateral agreement.	**No**
Entertainer (420)	For certain persons involved in the entertainment industry, including performers for film, television, opera, ballet, circuses etc, and entertainers, whether intending to perform commercially or non-commercially, as well as support personnel to the above. Also intended for non-performing technical personnel for productions to be shown in, or concerts or recordings to be performed in Australia. Also provides for those entering under a bilateral agreement.	**Yes**
Sport (421)	For sports persons including people taking part in specific events and staff employed to assist them; a player, coach or instructor joining an Australian club, team or other organisation; a person wishing to participate in a training programme; a sports instructor who enters under a business arrangement with an organisation in Australia; judges/adjudicators at shows or competitions in Australia; and those entering under a bilateral agreement.	**Yes – for stays > 3 months***
Medical Practitioner (422)	For medical practitioners whose proposed temporary stay in Australia involves providing medical services. Note that the large majority of medical practitioners opt to apply for a Subclass 457 visa.	**Yes**
Media and Film Staff (423)	For members of overseas news organisations assigned to Australia as accredited representatives; media and film staff approved under a bilateral agreement; television/film crew, including actors, production and support staff involved in the production of documentary programs or commercials exclusively for use outside Australia.	**Yes – for stays > 3 months**
Domestic Worker (Executive) (427)	For the temporary entry of persons to be employed as domestic workers by certain holders of Subclass 457 visas.	**Yes, if employer sponsored**
Religious Worker (428)	For persons who are members of religious organisations that are established in Australia, who seek to undertake for their organisation work of a religious nature for which they have relevant training.	**Yes**
Occupational Trainee (442)	For persons to undertake a work-based training program designed specifically to increase a person's skill level in their occupation or area of expertise.	**No**
Superyacht Crew (488)	For members of crew of Superyachts to be introduced in October 2008	**Yes, sponsor will be required**

***Note:** Exemptions currently apply to the following: Director of the British Council, Alliance Francaise, Goethe Institute or Italian Cultural Institute (for subclass 415) and to a sports competitor with an international reputation (for subclass 421). Also, sponsorship is not required where the person is entering under a country to country agreement.