"Annexure B"

MINISTERIAL ADVISORY COUNCIL ON SKILLED MIGRATION (MACSM)

DISCUSSION PAPER

STRENGTHENING THE INTEGRITY OF THE SUBCLASS 457 PROGRAM

This paper has been prepared by the Department of Immigration and Citizenship for consideration by the Ministerial Advisory Council on Skilled Migration and contains privileged information. The Department requests that the information in this paper be held in confidence, and that the paper not be disclosed or disseminated into the public domain.

Background

1. This paper has been prepared for the consideration of MACSM members following an introductory presentation and discussion at the Council's 11 December 2012 meeting regarding changes in the Australian labour market and the integrity of the Subclass 457 (temporary worker) program. The paper is intended to inform the Council's consideration of a range of measures proposed by the Department to ensure integrity of the 457 program.

2. Responses to this paper, as well as interim comments and further requests for information should sent by email to **macsm@immi.gov.au**.

Timing

3. The Department has been asked to prepare a consolidated proposal, informed by the MACSM, to the Minister by mid-January 2013. To enable this timing, the views of Council members are sought on the measures presented below by 14 January 2013.

Introduction

4. Two fundamental tenets of the Subclass 457 Temporary Work (Skilled) Visa are to:

   a. enable businesses to sponsor a skilled overseas worker if they cannot find an appropriately skilled Australian citizen or permanent resident to fill a skilled position; and

   b. ensure that the working conditions of sponsored visa holders are no less favourable than those provided to Australians, and that overseas workers are not exploited.

5. A major reform of the Subclass 457 visa program was conducted in 2008-09. The Migration Legislation Amendment (Worker Protection) Act 2008 (the Worker Protection Act) amended the Migration Act 1958 (the Act). It took effect from 14 September 2009, and introduced a range of sponsorship obligations to ensure the working conditions of sponsored visa holders meet Australian standards and that they are not exploited.

6. Since then, the 457 visa program has been growing strongly. 2011-12 saw a new record in the number of 457 visa grants (68 313) and this rate of growth is increasing in 2012-13. The stock of primary 457 visa holders reached 100 000 for the first time at the end of September.

7. It is now timely to evaluate the efficacy of the existing integrity measures and, where needed, adjust those measures to ensure that program continues to deliver on Australia's interests.

8. The Minister is considering a suite of amendments that all go to ensuring the central tenets of the program continue to be maintained. These proposed amendments seek to strengthen the Department of Immigration and Citizenship's capacity to identify and prevent employer practices that are not in keeping with the fundamental tenets of the Subclass 457 visa. These measures are outlined below.

Measure 1: Strengthening the Employer Attestation provision

Ensuring employers do not discriminate in favour of overseas workers (subject to advice from Department of Foreign Affairs and Trade and Attorney General's Office of International Law of compatibility with international trade commitments)

Background:

The *Migration Regulations 1994* (the Regulations) provide that in order for a standard business sponsorship to be approved or varied, the sponsor must attest, in writing, that they have a strong record of, or a demonstrated commitment to employing local labour and non-discriminatory employment practices.

The attestation requirement at present non-binding, and the Department has no capacity to refuse a sponsorship application if the attestation is not genuine. In addition, the Department 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.

Issue:

Under the current Regulations it is possible for employers to attest that they have a strong record of or commitment to employing local labour and non-discriminatory employment practices without having any genuine intent to abide by that attestation.

A sponsor may subsequently be found to be discriminating in favour of overseas workers and the Department has no power to take any sanction action, despite this being inconsistent with the intent of the 457 program. In addition, there are no grounds for the Department to refuse subsequent applications for standard business sponsorship.

Recent cases include examples of certain sponsors who have advised the Department that they do not seek to recruit locally as it does not fit with their business model, or because it is too expensive to recruit domestically.

Change required:

This measure proposes to strengthen the current attestation to make it an ongoing binding commitment that requires employers to demonstrate that they do not discriminate in favour of overseas workers. This requirement would apply at time of approval, and for the duration of the sponsorship. It is anticipated that enforcement would occur through monitoring and any adverse findings may result in sanction action and/or be taken into account as adverse information in any subsequent application for sponsorship approval.

It should be noted that the construct of this measure is subject to confirmation of lawfulness, in respect of Australia's international trade commitments, from the Attorney-General's Department (AGD), and the Department of Foreign Affairs and Trade (DFAT).

Impact:

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.

Measure 2: Training Benchmarks

Strengthen the enforceability of the existing training benchmarks to ensure that sponsors are genuinely contributing to ongoing training of Australians.

Background:

The training of Australian citizens and permanent residents by business sponsors 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. In order to achieve these aims, the Department requires sponsors to meet certain training benchmarks.

Prior to being approved as a standard business sponsor, the business is required to demonstrate to the Department that they meet the benchmarks for the training of Australian citizens and permanent residents (if trading 12 months or more) or has an auditable plan to meet those benchmarks (if traded less than 12 months).

The benchmarks are currently specified by reference to a requirement for recent payments by the business to an industry training fund to a value of at least 2% of the payroll, OR recent expenditure equivalent to 1% of the payroll in the provision of training to employees in the business. The benchmarks require the business to commit to maintaining that level of expenditure in each fiscal year, for their term of approval as a sponsor.

Currently, where a sponsor is found to be not meeting the training benchmarks, the Department may consider taking action under *Regulation 2.91 Application or variation criteria no longer met*, as the sponsor no longer meets the training criterion under *Regulation 2.59 Criteria for approval as a standard business sponsor*. This creates a circumstance that may result in a sponsor being barred from sponsoring more people, or having their sponsorship cancelled.

However, assessment and enforceability of this requirement is difficult for a number of reasons.

Issues

Issue 1: Records and information

Monitoring relies heavily on *Regulation 2.83 - Obligation to provide records* to request records and information from sponsors. Where records are required to be kept, as specified under *Regulation 2.82 - Obligation to keep certain records*, it is a straightforward process to request those records. However, in assessing whether a sponsor continues to meet a training benchmark, there is currently no specific requirement for the sponsor to keep any associated records. This hinders the Department's ability to make a full and proper assessment of whether a sponsor is meeting their commitment to the training benchmarks.

Issue 2: Auditable plan rather than meet commitment

When applying to become a standard business sponsor, a business that has been trading for less than 12 months is required to provide an auditable plan to meet the training benchmarks (as opposed to demonstrating recent expenditure and commitment to continuing to meet the benchmarks). This regulation does not require these businesses 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.

Issue 3: Criteria for seeking new sponsorship or variation

Regulation 2.68 – Criteria for variation to terms of approval – requires sponsors to meet a training benchmark. However, 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.

Change required:

This measure proposes to strengthen the provisions that relate to training benchmarks, both at approval and post approval stages, to make them a binding requirement rather than a commitment. It would also strengthen the ability of the Department to sanction sponsors who do not meet this requirement.

Impact:

This measure is assessed as having a no or low impact upon business, as most sponsors 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. These issues can be addressed as part of the consultation and education process with sponsors.

Measure 3: Genuineness criterion

Introduce a 'genuineness' criterion in the assessment of 457 visa nominations to ensure that the nominated position and surrounding circumstances are genuine.

Background:

Under existing provisions employers are only required to certify that the tasks of the nominated position correspond 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 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.

Example:

Under current provision it is possible for a visa to be granted where the position has been 'dressed up' to appear more skilled or where there is a more appropriate ANZSCO classification available.

For instance, an overseas person has been working for a company as the holder of a working holiday maker. The person is working in a restaurant as a bar manager, however, this occupation is considered to low skilled to qualify for the Subclass 457 program. The employer decides to nominate the person as a Restaurant or Café Manager instead. The delegate must accept the nominating employers certification that the tasks of the position include a significant majority of the tasks of the nominated occupation as listed in the ANZSCO Dictionary and that the qualifications and experience of the nominee are commensurate with the qualifications and experience specified for the occupation in the ANZSCO Dictionary. There is no provision for the delegate to request further information to demonstrate that this is correct.

There are also concerns that the 457 program is being used to secure the entry or stay of persons who would otherwise not be eligible for migration. For instance, a family member of a grocery store owner may be nominated as a Specialist Manager not elsewhere classified, when in fact a more appropriate occupation as per the tasks of the nominated occupation would be an occupation which is not eligible for the visa such as Sales Assistant (General). Again in this situation there would be no provision for the delegate to request further

information demonstrating that the occupation nominated is the most appropriate one for the tasks proposed to be undertaken.

Recent changes to the Employer Nomination Scheme and Regional Sponsored Migration Scheme provide a streamlined pathway for 457 visa holders through the Temporary Residence Transition (TRT) stream of these visas. Under the TRT stream the occupation is not re-considered in determining the permanent residence application. Consequently, there is a risk that a person may obtain permanent residence without their occupation being considered by a delegate.

Change proposed:

Amendment to the 457 nomination requirements to require:

> The delegate to be satisfied that the tasks of the nominated occupation correspond to the tasks of an eligible occupation, and
> The delegate to be satisfied that the position associated with nominated occupation is genuine.

With the introduction of these provisions, the delegate would have discretion to refuse a 457 nomination where there are integrity concerns. Similar provisions exist for other visa subclasses.

In assessing a nomination, a decision maker may take into account a range of factors such as:

> 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, or
> whether the nominated position fits broadly within the scope of the activities and scale of the business.

Consideration may also be given to whether the nomination is genuine in circumstances where the nominee is a relation or personal associate of an owner or relevant person of the sponsoring business.

Impact:

This measure would have no impact on genuine applicants. The measure is important to ensure ongoing public confidence in the 457 program, and integrity within the caseload.

Measure 4: Amendments to the terms of an approved sponsorship

Sponsors will be required to adhere to an agreed number of nominated positions for the duration of their sponsorship. An option to amend numbers, if required, will be provided.

Background:

Currently there is no restriction to the number of 457 workers which a company can nominate once a sponsorship is approved. There is no capacity for the Department to intervene in cases where an employer is using the program beyond its stated policy intent as a program to address skill shortages.

This measure would require an employer to provide an explanation for the number of 457 workers they intend to sponsor. The Department could have discretion to approve a sponsorship with a lesser number, or to refuse the sponsorship application where the requested number is not justified by the sponsor. Subsequently, a sponsor may apply to exceed an approved level of nominations though the lodgement of an application to vary the terms of their sponsorship agreement, or through a new sponsorship application.

This measure would introduce greater rigour into the 457 program in cases where an employer's use of the program is unreasonable or not within the broad policy intent of the program. In most cases the number of nominations requested by the employer would be accepted and set at that level.

The application of a nomination ceiling on a Standard Business Sponsorship (SBS) has occurred in the past (prior to the 2009 reforms) and currently occurs within the labour agreements stream of the program.

Example:

A start-up company becomes approved as a standard business sponsor and in their application they indicate that they intend to nominate 25 Subclass 457 workers over the course of their 3 year sponsorship. After the second year of their sponsorship the company has actually sponsored 200 workers without justification for this increase.

Change proposed:

Existing legislation permits a nomination ceiling to be applied to a sponsorship, as the Regulations enable a sponsorship to cease upon occurrence of a certain event. This measure previously existed under this legislation prior to 2009.

This measure would not cap a 457 sponsor's use of the program, but rather limit the terms of a sponsorship to an approved level, which would be able to be increased through a new application. As such this measure would not be opposed to the principle that the 457 program is uncapped and demand-driven.

Impact:

This measure would apply from date of implementation and, sponsorships approved and active prior to the change would continue to be valid for three years, and would not expire when their notional nomination ceiling is reached.

Measure 5: Strengthen assessment of generalist occupations.

Strengthen the network approval process and scrutiny of 'Program and Project Administrator', 'Specialist Managers' and certain other generalist occupations by requiring skills assessments for these occupations, and limiting their use to relevant industries only.

Background:

Program or Project Administrators (511112) and Specialist Managers nec (139999) have been identified as occupations of integrity concern in the Subclass 457 program. These occupations were the first and third most nominated occupations, respectively, in the program in 2011-12.

The stated tasks and duties of these occupations are defined by the Australian and New Zealand Standard Classification of Occupations (ANZSCO), and are very general, allowing them to be used widely. Of concern, there is scope for the occupations to be 'dressed up' as lower skilled occupations, or to used to facilitate the stay of a temporary visa holder who does not have the formal qualifications required for the nominated position

Example:

A Working Holiday visa holder, who holds no formal qualifications, is employed as a construction project manager. The employer is happy with the worker and wants to sponsor them to remain in Australia working in that occupation. However, the occupation that the person is working in requires them to hold a formal qualification, which they do not. The person has gained their experience through on-the-job training and workplace experience. In order to nominate the person, they will need to identify another occupation that is suitable and provides a more flexible skills requirement. The employer uses the Program or Project Administrator classification, massaging the tasks and duties of the person to reflect some of the tasks of a Program or Project Administrator.

Change proposed:

The assessment of these occupations could be improved in three ways:

1. Using the CSOL to limit the circumstances in which these occupations may be nominated. There is a precedent for this approach – for example Café or Restaurant Manager (ANZSCO 141111) cannot be used for position in Fast Food or Takeaway Food Services. In particular, it is proposed that in industries where a clear alternative occupation exists, then a generalist occupation would be excluded. For example, as the occupation of 'Construction Project Manager' exists on the CSOL, there is limited utility in continuing to allow the occupation of 'Program or Project Administrator' to be open for nomination for construction project manager positions.

2. Requiring subclass 457 visa applicants nominated in these occupations to undertake a skills assessment with VETASSESS to substantiate their skills.

Impact:

The CSOL would be updated to provide clarification on when it is appropriate to nominate a person as a Program or Project Administrator or Specialist Managers nec. Employers nominating people in these occupations would have to comply with any caveat applied to these occupations.

Visa applicants who are nominated as a Program or Project Administrator or Specialist Manager nec will be required to have their skills endorsed by the relevant skills assessing body, which in both cases is VETASSESS.

There would be a low or no impact on users of the 457 program.

Measure 6: Strengthening the market rate provisions

Change the market rates provisions to ensure that workers on Subclass 457 visas are not used to undermine the employment conditions of Australian citizens and permanent residents.

Background:

A sponsor must engage 457 visa holders on equivalent terms and conditions that are, or would, be provided to an Australian working an equivalent role or position.

Where there is an Australian worker employed by the sponsor 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 and result in earnings above the Temporary Skilled Migration Income Threshold (TSMIT). Evidence might include:

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

The current market salary rate provisions are not sufficient to ensure equitable remuneration arrangements or that Australians are not disadvantaged.

On this basis, 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.

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.

Related to this proposed measure is a proposed amendment to the market rate exemption threshold. This exemption to the requirement applies if the annual earnings of the nominee will be greater than $180 000. In summary, 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.

The rationale for introducing this exemption was the assumption that persons earning a salary at this level were in a position of relative strength in negotiating their employment terms and conditions and at low risk of exploitation.

While in most cases this rationale is sound, the exemption at the current level presents potential risks as some non-executive occupations are remunerated above this level, and there is a potential financial incentive for employers to source their labour from offshore where the market rate of pay exceeds the $180 000 threshold.

Example:

Under the current Regulations, there is potential for the 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. The risk of this occurring is considered particularly high in businesses which employ predominately 457 workers.

Conditions in the domestic labour market could also be undermined in cases where an occupation commands a market salary greater than $180 000, and employers reduce their costs by engaging foreign workers willing to work for $180 000.

Change proposed:

This measure more broadly will examine how to improve the market rate provisions by expanding its application beyond the particular workplace to that workplace's regional locality. It will mitigate the risks more immediately by increasing the market salary assessment exemption threshold. Increasing the threshold to $250 000 will ensure that most senior company executives and highly paid professionals will continue to be exempt.

This measure would ensure that 457 visa holders on high level salaries are provided equitable remuneration arrangements and ensure that Australian workers are not discriminated against.

Impact:

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.

Measure 7: Undesirable employment relationships

Prohibiting 457 sponsors from establishing undesirable employment relationships (such as on-hire arrangements outside of an approved labour agreement) and employment arrangements that resemble an independent contractor arrangement (unless in a specified occupation)

Background:

The sponsorship obligation embodied in Regulation 2.86 (Obligation to ensure primary sponsored person works or participates in nominated occupation, program or activity) requires that the primary sponsored person is engaged only as an 'employee' of the sponsor or an associated entity of the sponsor.

The common law definition of 'employee' does not prohibit certain undesirable employment arrangements that are not intended to be permissible within the 457 visa program.

Issues

On-hire arrangements

Labour Agreements are intended under current policy to be the only pathway available for on-hire companies seeking to access Subclass 457 workers. This is due to concerns that on-hired Subclass 457 visa holders could be stood down during slow work periods and that their conditions/security of employment may be precarious. The on-hire labour agreement provides necessary checks and balances to assist in managing these risks.

Notwithstanding this policy intention, if a standard business sponsor is found to have on-hired a Subclass 457 visa holder to an unrelated entity (not through a Labour Agreement), it may be that no failure of the obligation in Regulation 2.86 has occurred as the visa holder may still be an 'employee' of the sponsor.

A Subclass 457 visa holder who has been on-hired may be considered the 'employee' of the standard business sponsor if it is the sponsor that exercises control over matters such as recruitment, wages, discipline and dismissal, (notwithstanding the fact that the client company exercises day-to-day control over the work performed).

Employment arrangements that resemble independent contractor arrangements

Since September 2009, policy intends that sponsored persons may only be engaged as independent contractors where the nominated occupation is specified in an instrument in writing (predominantly health and managerial professions).

Notwithstanding this policy intention, if a standard business sponsor is found to have engaged a Subclass 457 visa holder in an arrangement that resembles an independent contractor arrangement (in an unspecified occupation), it may be that no failure of the obligation in Regulation 2.86 has occurred as the visa holder may still be an 'employee' of the sponsor.

This may include in circumstances where the employer is using such an arrangement to avoid the usual 'employee' entitlements such as superannuation and leave arrangements.

According to the common law definition of employment, a Subclass 457 visa holder working in an independent contracting arrangement for the sponsor may be considered the 'employee' of the standard business sponsor where the sponsor exercises control and directs the Subclass 457 visa holder in the manner in which they do their work.

Where a Subclass 457 visa holder is found to be an 'employee' of the standard business sponsor, there is no breach of the obligation in regulation 2.86 and no corresponding sanction action can be taken by the Department.

Change proposed:

The purpose of this measure is to tighten regulation 2.86 to prohibit possible abuse of the 457 program. It intends to:

prohibit on-hire arrangements that fall outside approved Labour Agreements; and

prevent sponsors from engaging visa holders under arrangements that resemble independent contracting arrangements, thus avoiding the provision of employee entitlements (noting independent contractor arrangements are permissible for Subclass 457 visa holders in certain specified occupations).

Impact:

This measure would have no impact on genuine users of the program.

Measure 8: Strengthen the obligation not to recover certain costs

Ensure that approved sponsors are solely responsible for meeting certain costs, thereby strengthening the existing obligation not to recover certain costs from sponsored persons (primary and secondary)

Background:

The sponsorship obligation embodied in *Regulation 2.87 Obligation not to recover certain costs from a primary sponsored person or secondary sponsored person* requires approved sponsors not to recover certain costs from a primary or a secondary sponsored person. The costs relate specifically to the recruitment of the primary sponsored person and costs associated with becoming or being an approved sponsor or a former approved sponsor, including migration agent costs.

Policy intends that a sponsor must bear the recruitment costs associated with becoming an approved sponsor. In this way, the obligation acts as a price signal to sponsors, ensuring that it is relatively more expensive to engage an overseas skilled worker than a skilled Australian citizen or permanent resident. This premise relates to the fundamental tenet of the 457 program that business should seek to recruit skilled Australians in the first instance, and only where an appropriate skilled Australian cannot be found locally, should sponsors turn to overseas workers.

However, this regulation currently only relates to the 'recovery' of costs from visa holders. It does not prevent sponsors from requesting visa holders to pay these costs up front, thereby avoiding the act of 'recovery'.

Issue:

Sponsors may be able to circumvent the obligation by requiring the visa applicant to make a pre-payment of costs. If the visa applicant pre-pays costs associated with the employer becoming an approved sponsor, the Department cannot evidence the act of 'recovery', and as such there is no failure of Regulation 2.87.

This may occur through either complicity on behalf of the visa holder who is happy to pay in order to obtain a visa, or through coercion on behalf of the sponsor.

Change proposed:

This measure intends to strengthen Regulation 2.87 to broaden the scope of the obligation to ensure that sponsors are required to pay certain costs associated with becoming a sponsor and not pass these costs, in any form, onto a sponsored person.

Impact:

This measure would have no impact on genuine users of the program.

Measure 9: Prevent potential for misuse of the English language salary exemption

This measure will not affect the current English language requirement but rather introduce a supporting provision which will require a visa holder who is exempted because of a high nominated salary, from continuing to be exempted if their salary falls below the exemption threshold level.

Background:

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.

To be granted a Subclass 457 visa an applicant must demonstrate that they meet the English language requirement. Applicants who are required to have a specific level of English ability to obtain licensing or registration for their nominated occupation, the applicant must demonstrate that they have that level of English. Other visa applicants must demonstrate that they have achieved a score of five in each of the test components of an International English Language Testing System (IELTS) test, or be exempt.

A number of exemptions to the above requirement exist. An exemption is available to applicants whose annual earnings will be at least $92,000 (a threshold which is regularly indexed and specified in a legislative instrument). However, it has been established that the current structure of the legislation has allowed some applicants to circumvent this requirement.

Legislative change has made it more streamlined for a Subclass 457 visa holder to change employers when the new employer will be sponsoring them in the same occupation. In order to transfer sponsors the new employer is required to become a Standard Business Sponsor, if they are not one already, and to lodge a nomination which identifies the Subclass 457 visa holder. When the nomination is approved the sponsorship of the Subclass 457 visa holder is transferred to the new employer.

Example:

A person applies for a Subclass 457 visa and their nominated annual earnings will be more than $92,000. They are exempted from the English language requirement and their visa is granted. Subsequently, the visa holder finds a new employer who nominates them in the same occupation, but at a salary that is below $92,000. There is no ability in the legislation to re-consider the visa holder's English ability.

Change proposed:

A new regulation would be introduced at the employer nomination stage. This new criterion would require the visa holder to have met the English language requirement or be exempt.

Impact: No impact on businesses or genuine applicants.

Measure 10: Terms of sponsorship amendments for overseas business sponsors and start-up businesses

This measure would reduce the period of approved sponsorship for overseas businesses and start-up businesses to the term of a contract or 12 months. This will ensure that the overseas business sponsorship is used for genuine temporary purposes (for example to meet contractual obligation) and will provide greater risk assurance with respect to start-up businesses.

Background:

The flexibility of the Subclass 457 program offers solutions for meeting skills demands of employers in many different situations. At the moment there are two terms of sponsorship approval:

The term of an Accredited overseas Business Sponsor, which is five years, and
All other sponsorships which have a validity of three years.

The Subclass 457 program intends to cater to a broad range of requirements, including for overseas and start-up businesses. Under this measure overseas businesses would still be able to sponsor skilled workers through the 457 program, as long as these workers are needed to establish business operations or fulfil contractual obligations in Australia. A period of 12 months is proposed, as it is expected that this timeframe is sufficient to allow the business to establish, or meet their short-term project needs.

With respect to start-up businesses, noting they nature of a commencing business presents greater risks of failure, it would provide integrity for visa applicants and the Department to provide only a limited period of sponsorship to mitigate the consequences of a business failure. There are inherent difficulties in assessing eligibility against specified sponsorship criteria. Commencing businesses tend to rely on projections and business plans to justify their eligibility to sponsor Subclass 457 workers. New business ventures are at a higher risk of failure than more established enterprises, which can present a risk to Subclass 457 visa holders who are sponsored by them.

Example:

1. An overseas business is contracted to undertake work on a project that is based in Australia, the project will take approximately eight months to complete. In order to meet project timeframes they want to utilize the skills and experience of workers that they currently employ. They become an approved overseas business sponsor under the Subclass 457 program and their workers are able to travel to Australia to perform the necessary work. Once the project is complete, however, the business will continue to be an approved sponsor for a further 2 years. This would allow them to sponsor other workers for other unrelated projects over that time.

2. An overseas business wants to establish operations in Australia. They choose to use an existing company executive to see through the process of establishing the business. As an overseas business they are not required to meet the training requirements or show that they have a record of, and commitment to, training Australians or non-discriminatory work practices. They become an overseas business sponsor and the executive sets up a business arm in Australia. As such the business now has a

presence that is actively and lawfully operating inside Australia. The overseas business sponsorship is valid for three years and it would be possible for the business to continue sponsoring workers under this arrangement, instead of establishing a standard business sponsorship.

3. A business wishes to sponsor a skilled overseas worker. The worker is working as a sole trader overseas. Instead of entering into an employee-employer type arrangement, the Australian business 'contracts' the skilled worker's overseas business to complete project type work. The Australian business does not need to become a sponsor or demonstrate that they meet any of the sponsorship requirements. Instead, the worker's business becomes an overseas business sponsor and they sponsor themselves.

4. A family that operates a business overseas wants to relocate to Australia. The overseas business provisions under the Subclass 457 provides them with that ability, instead of using the more appropriate Business Skills and Business Innovation and Investment visa program.

5. A family intends to set up a restaurant in Sydney. Premises, furniture and equipment have been secured and they have obtained an Australian Business Number and the business has been registered. As such, the business can be considered to be lawfully operating because it has been registered and has commenced business activities. The family wish to sponsor a chef from overseas to oversee the operations of the kitchen. Because the business has been operating for less than 12 months, they must demonstrate that they have an auditable plan in place to meet one of the training benchmarks. They become a sponsor, however by the end of their sponsorship they have not implemented the auditable plan.

Change proposed:

Additional terms of sponsorship approval will be introduced. The new terms will provide that:

The sponsorship term for an overseas business will be for the term of the project (up to three years) or 12 months, whichever is more, and
The sponsorship term for a start-up business will be 12 months.

If the term of approval for a sponsorship was insufficient for an overseas business they would be able to apply to vary the terms of their sponsorship or to apply for a new one. Start-up businesses would be able to apply for a three year Standard Business Sponsorship after the completion of their first one-year term. The validity of any Subclass 457 visa granted in association with an employer who is an overseas business sponsor or a start-up business would be limited to the same period.

Impact:

Overseas business sponsors who will be establishing a business operation, or are undertaking a project, will be able to sponsor skilled overseas workers through the Subclass 457 program, however, sponsorships will be valid for 12 months or for the term of the contract (up to three years) whichever is longer. The initial sponsorship of a start-up business will be valid for a period of 12 months. Any subsequent sponsorship would be considered a Standard Business Sponsorship and be valid for three years.

Measure 11: Mandatory eLodgement of Subclass 457 applications

Require all Subclass 457 sponsorship, nomination and visa applications to be lodged using the eLodgement facility.

Background:

As part of the introduction of SkillSelect it was agreed that all skilled visas would be lodged electronically. The Subclass 457 program is the only skilled visa program that is not wholly eLodged.

Example:

Employers and visa applicants will be required to lodge their sponsorship, nomination and visa applications electronically using the Department's eVisa facility.

Change proposed:

The introduction of mandatory eLodgement will require legislative change.

Additionally, part of the Subclass 457 caseload is currently processed offshore. As the Department's offshore visa system is not integrated with the eVisa functionality, it will necessary to repatriate this component of the caseload.

Impact:

All applications will need to be lodged online using an internet based system.

Overseas businesses, whose applications were previously processed offshore, will now have their cases assessed by a delegate based in a Centre of Excellence in Australia, which will provide for more timely outcomes and consistent decision making.

Measure 12: Minor Technical amendments to clarify existing provisions

These minor technical amendments will solve ongoing minor issues within the program and do not represent significant shifts in policy.

Background:

As a three stage process, comprising sponsorship, nomination and visa, the Subclass 457 regulations are, in some circumstances, ambiguous and across the three stages there is sometimes a lack of clarity regarding overarching policy intentions.

Furthermore, since the introduction of the Worker Protection Reforms in 2009 a number of technical issues have been identified that continue to affect the effectiveness of the program and the efficiency in which it is managed.

These are easily fixed through minor legislative changes.

This measure will include:

Clarifying the need for a direct employer-employee relationship.

It is expected that, unless covered by a specified exemption, there is a direct employee-employer relationship between the sponsor and the Subclass 457 visa applicant. This is not clearly articulated, which leads to the expectation that some employment arrangements are suitable for sponsorship under the Subclass 457 program, for instance, self-sponsorship and independent contracting or on-hired employment arrangements.

Requiring a visa applicant to be the subject of a valid approved nomination.

Visa applicants must be the subject of an approved nomination which has not ceased. The existing construction of the regulation does not clearly support this intention.

Improving the ability to make a timely assessment of a Subclass 457 visa applicant's skills.

Applicants are encouraged to lodge fully documented applications as this can assist in a decision being made on their application more quickly. However, there are some circumstances where a decision cannot be made expeditiously because the construction of the regulation requires a decision maker to contact the applicant for further information before they make their decision, even though it is clear that they do not meet the requirement.

Extending the Visa Application Charge (VAC) refund provisions.

It is possible for a visa applicant to seek a refund for the VAC for their visa application when the nomination that is associated with their application is refused. However, a similar provision is not provided to cover situations where the nomination is withdrawn.

If a nomination is refused or withdrawn the visa application cannot be approved. Where a nomination is refused it is common practice for the decision maker to contact

the applicant to ask whether they would like to withdraw their application or for it to proceed. This process is particularly important where an applicant may be adversely affected by the refusal, for instance being barred from making another application while they remain in Australia impacting their ability to pursue merits review.

Removal of redundant transitional regulations.

As part of the Worker Protection Reforms in September 2009 a number of transitional arrangements were allowed for. These arrangements assisted in smoothly implementing the reforms. Many of these reforms are now no longer required and their removal would be consistent with broader objectives to simplify regulations.

Example:

While the intentions of the Subclass 457 are broadly accepted and understood, some of the more nuanced requirements are clouded by ambiguous requirements which make the program extremely complex. These issues can simply be addressed through minor amendments which will provide the necessary clarity.

Change proposed:

The issues outlined maybe addressed through:

Minor wording changes to specific criteria,
Increasing the consistency across related sponsorship, nomination and visa requirements by mirror similar wording,
Specifying requirements more clearly, for instance, requiring sponsors and applicants to enter into contractual arrangements,
Removal of regulations to simplify the existing program, and
Introducing new regulations to accommodate expanded refund provisions.

Final page - Intentionally Blank.