

## **EXPLANATORY STATEMENT**

Issued by the Minister for Citizenship and Multicultural Affairs

*Migration Act 1958*  
*Migration Regulations 1994*  
*Migration Amendment (Skilling Australians Fund) Regulations 2018*

The *Migration Act 1958* (the Migration Act) is an Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

Subsection 504(1) of the Migration Act relevantly provides that the Governor-General may make regulations prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act. In addition, the amendments would be authorised by the provisions listed in the Attachment A.

The *Migration Amendment (Skilling Australians Fund) Regulations 2018* (the Regulations) amend the *Migrations Regulations 1994* (the Migration Regulations) to reflect and implement changes to the Migration Act made by the *Migration Amendment (Skilling Australians Fund) Act 2018* (the SAF Act) and make other minor amendments.

The SAF Act amends the Migration Act to implement the ‘nomination training contribution charge’ (the charge) imposed by the *Migration (Skilling Australians Fund) Charges Act 2018* (the SAF Charges Act) and the *Migration (Skilling Australians Fund) Charges Regulations 2018* (the SAF Charges Regulations). The charge is imposed on employers who nominate workers for temporary or permanent skilled work visas. The SAF Act also makes related amendments to the Migration Act. The SAF Act, SAF Charges Act, and SAF Charges Regulations commence on 12 August 2018.

In particular, the Regulations prescribe the nominations that attract the charge. The charge applies to the following nominations:

- nomination of an occupation in relation to a holder of the repealed Subclass 457 (Temporary Work (Skilled)) visa;
- nomination of an occupation in relation to a holder of, or applicant or proposed applicant for the Subclass 482 (Temporary Skill Shortage) visa; and
- nomination of a position in relation to an applicant or proposed applicant for a permanent employer sponsored work visa – the Subclass 186 (Employer Nomination Scheme) visa or the Subclass 187 (Regional Sponsored Migration Scheme) visa.

The Regulations also amend the Migration Regulations to reflect amendments to the Migration Act providing that nominations for temporary work visas may be made by approved sponsors and persons who have applied to become approved sponsors, including persons negotiating with the Commonwealth for a work agreement. Allowing a person who has applied for approval as a sponsor, or is a party to negotiations for a work agreement to lodge a nomination is more efficient for both the nominator and the Department of Home Affairs (the Department), as it allows the sponsorship application and nomination application to be lodged at the same time.

The Regulations also provide the grounds on which the charge may be refunded and make other minor amendments.

The Regulations are part of a broad package of reforms for the employer sponsored skilled visa programs, announced by the Government on 18 April 2017. The reforms include the replacement of the Subclass 457 (Temporary Work (Skilled)) visa with the Subclass 482 (Temporary Skill Shortage) visa, and related reforms to the permanent employer sponsored visas. These changes were implemented on 18 March 2018 by the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018*.

The Department engaged with external stakeholders in developing the policy settings and considered feedback received. The reforms were also informed by earlier reviews including: the 2014 *Independent Review into the Integrity of the Subclass 457 programme*; the 2016 Productivity Commission Inquiry Report: *Migrant Intake into Australia*; the 2016 *Review of the Temporary Skilled Migration Income Threshold*; and the 2016 Senate Inquiry *A National Disgrace: The Exploitation of Temporary Work Visa Holders*. These reviews were subject to extensive consultation processes, including: individuals; academics; bodies and businesses who use the employer sponsored skilled visa programs; migration agents; representatives of foreign governments; the Ministerial Advisory Council on Skilled Migration; and government departments and agencies.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at [Attachment B](#).

Details of the Regulations are set out in [Attachment C](#).

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments made by the Regulations, and has advised that the Regulation Impact Statement is compliant with the Government's requirements. The OBPR reference is 21946. The Regulation Impact Statement is at [Attachment D](#).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on 12 August 2018, immediately after the relevant parts of the SAF Act, except for Schedule 2 to the Regulations, which commences on 17 November 2018.

In addition to subsection 504(1), the following provisions of the *Migration Act 1958* may apply:

- subsection 140E(1) provides that the Minister must approve a person as a sponsor in relation to one or more classes prescribed for the purpose of subsection 140E(2) if prescribed criteria are satisfied;
- subsection 140GA(1) provides that the regulations may establish a process for the Minister to vary a term of a person's approval as a sponsor;
- subsection 140GB(1), as amended on 12 August 2018, provides that a person who is, or who has applied to be, an approved sponsor, or a person who is a party to negotiations for a work agreement, may nominate:
  - an applicant, or proposed applicant, for a visa of a prescribed kind (however described), in relation to:
    - the applicant or proposed applicant's proposed occupation; or
    - the program to be undertaken by the applicant or proposed applicant; or
    - the activity to be carried out by the applicant or proposed applicant; or
  - a proposed occupation, program or activity;
- subsection 140GB(2), as amended on 12 August 2018, provides that the Minister must approve a person's nomination if prescribed criteria are satisfied;
- subsection 140GB(3), as amended on 12 August 2018, provides that the regulations may establish a process for the Minister to approve a person's nomination;
- subsection 140GB(4) provides that different criteria and different processes may be prescribed for:
  - different kinds of visa (however described); and
  - different classes in relation to which a person may be approved as a sponsor;
- subsection 140ZM(1), as amended on 12 August 2018, provides that a person is liable to pay nomination training contribution charge to the Commonwealth in relation to a nomination by the person under section 140GB if the nomination is a nomination of a kind prescribed by the regulations;
- subsection 140ZM(2), as amended on 12 August 2018, provides that a person applying under the regulations, or in accordance with the terms of a work agreement, for approval of a nomination of a position in relation to the holder of, or an applicant or proposed applicant for, a visa, is liable to pay nomination training contribution charge to the Commonwealth in relation to the nomination if:
  - the visa is of a kind (however described) prescribed by the regulations; and
  - the nomination is a nomination of a kind prescribed by the regulations.
- subsection 140ZN(1) of the Act as amended on 12 August 2018, provides that the regulations may make provision for, or in relation to, all or any of the following matters:
  - when nomination training contribution charge is due and payable;
  - the method of paying nomination training contribution charge (including the currency in which the charge must be paid);
  - the remission or refund of nomination training contribution charge;
  - the overpayment or underpayment of nomination training contribution charge;

- the payment of a penalty in relation to the underpayment of nomination training contribution charge;
- the giving of information and keeping of records relating to a person's liability to pay nomination training contribution charge.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ***Migration Amendment (Skilling Australians Fund) Regulations 2018***

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

On 18 April 2017, the Government announced changes to the employer sponsored temporary and permanent skilled work visa arrangements. The *Migration Regulations 1994* (the Migration Regulations) were amended on 18 March 2018 to implement some of these changes, including:

- repealing the Subclass 457 (Temporary Work (Skilled)) visa (Subclass 457 visa) and introducing the new Subclass 482 (Temporary Skill Shortage) visa (Subclass 482 visa); and
- implementing complementary reforms to the Subclass 186 (Employer Nomination Scheme) visa (Subclass 186 visa) and the Subclass 187 (Regional Sponsored Migration Scheme) visa (Subclass 187 visa).

This instrument is part of a further package of legislation, comprising two Acts and two sets of regulations, to support the introduction and collection of a ‘nomination training contribution charge’ from employers accessing workers under the temporary and permanent employer sponsored skilled work visa programs. The relevant Acts and the supporting regulations are:

- the *Migration (Skilling Australians Fund) Charges Act 2018* (the SAF Charges Act);
- the *Migration (Skilling Australians Fund) Charges Regulations 2018* (the SAF Charges Regulations);
- the *Migration Amendment (Skilling Australians Fund) Act 2018* (the Amendment Act); and
- the *Migration Amendment (Skilling Australians Fund) Regulations 2018* (this instrument).

A separate Statement of Compatibility with Human Rights has been prepared in relation to the SAF Charges Regulations. The package commences on 12 August 2018.

The nomination training contribution charge will offset expenditure from the Skilling Australians Fund (SAF), a training fund administered by the Department of Education and Training. The SAF will prioritise the funding of apprenticeships and traineeships in occupations that are in high demand and currently rely on skilled migration, or have future growth potential, including in regional Australia.

The nomination training contribution charge replaces requirements that employers sponsoring a worker under the Subclass 457 visa and Subclass 482 visa, or nominating a worker under the Direct Entry stream of the Subclass 186 visa have recently spent:

- the equivalent of at least two per cent of their business' payroll in contributions to an industry training fund (training benchmark A); or
- the equivalent of at least one per cent of their business' payroll on the training of Australians (training benchmark B).

The Amendment Act amends the *Migration Act 1958* (the Migration Act) to implement the nomination training contribution charge and make related changes. New section 140ZM provides that persons applying for approval of the kinds of nominations specified in the Migration Regulations are liable to pay the nomination training contribution charge. New section 140ZN provides that the Migration Regulations may make provision for matters such as when and how the nomination training contribution charge is payable, and provision for refunds. The Amendment Act also amends the Migration Act to allow nominations under section 140GB to be made by persons who have applied to be approved sponsors or are negotiating a work agreement with the Commonwealth. This procedural change requires a number of consequential changes to the Migration Regulations.

In accordance with the above provisions, this instrument amends the Migration Regulations, by inserting new Division 5.7A, to provide that:

- employers seeking to nominate a worker, on or after 12 August 2018, for the purpose of any of the following visas must pay the nomination training contribution charge:
  - Subclass 457 visa (only applies to nominations from 12 August 2018 that identify an existing holder of the visa);
  - Subclass 482 visa;
  - Subclass 186 visa; and
  - Subclass 187 visa.
- underpayments of the nomination training contribution charge by an employer must be paid in full before another nomination by that employer can be approved;
- refunds of the nomination training contribution charge are available in specified circumstances;
- employers subject to the sponsor obligations framework must keep specified records to enable the Department of Home Affairs (the Department) to verify that the correct amount of the nomination contribution training charge has been paid; and
- all relevant provisions in the Migration Regulations are consistent with the amendment to section 140GB of the Migration Act that allows persons who have applied for approval as a sponsor, or are negotiating a work agreement, to nominate under section 140GB.

As noted above, refunds of the nomination training contribution charge are available in specified circumstances. The related nomination fee can also be refunded in those circumstances. The refund grounds address situations where:

- the nomination cannot be approved for specified reasons and is withdrawn before a decision is made;
- the nomination is approved but the nominated worker is refused a visa on health or character grounds;
- the nomination is approved and the nominated worker is granted a visa, but does not commence work in the position;
- the nomination is approved and the nominated worker is granted a visa and commences work in the position, but the employment ends within 12 months. This ground only applies to nomination for the purposes of the temporary visas, and the

partial refund excludes the nomination training contribution charge for the first year of the nomination.

The refund provisions are intended to balance considerations of fairness to employers who do not obtain the benefit of a nominated overseas worker and the need for employers to make their own enquiries about the suitability and availability of overseas workers prior to making a nomination. The availability of a refund is at the Minister's discretion, to ensure that there is scope to deny a refund in cases of fraud, worker exploitation or manipulation of employment arrangements. There may be other circumstances, with no fraud involved, where a refund of the nomination training contribution charge is not warranted, for example, a long delay in requesting a refund after the worker left the employment of the sponsor. The refund provisions also strike a balance between addressing the concerns raised by business and maximising the quantum and stability of revenue available for training of Australians through the SAF.

This instrument also makes minor changes to the rules relating to Subclass 482 nominations that were introduced on 18 March 2018:

- the criteria for the approval of nominations are amended so that the Minister can disregard the requirement for the nominated position to be full time, if it is reasonable to do so, e.g. fractional appointments for highly specialised or renowned academic staff and other situations where part-time work arrangements may be reasonable and consistent with the Australian workplace relations framework; and
- a technical change is made to the rules relating to the expiry of approved nominations so that the approval of the nomination will not cease before visa processing is completed, including merits review by the Administrative Appeals Tribunal under Part 5 of the Migration Act. This is a beneficial change to assist visa applicants and nominating employers.

## **Human rights implications**

This instrument contributes, as part of the broader legislative package, to the provision of training opportunities for Australian citizens and permanent residents by implementing the legislative framework for the nomination training contribution charge.

The SAF supports training of Australians and the right of Australians to work. This is because the nomination training contribution charge will fund initiatives that improve training opportunities and outcomes for Australian citizens and permanent residents. Such initiatives engage Articles 6.1 and 6.2 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Article 6.1 of ICESCR recognises:

*The right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

Article 6.2 of ICESCR states that:

*The steps to be taken by a State Party of the present Covenant to achieve the full realization of [the right to work] shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedom to the individual.*

This regulatory framework for the nomination training contribution charge supports the right to work under Article 6.1 in relation to Australian citizens and permanent residents. Funding a national training partnership through the sponsorship and nomination framework is an effective mechanism to promote training across a broad range of industries and occupations. The measure positively engages Articles 6.1 and 6.2 of the ICESCR as it is a mechanism for Australia to comply with these rights.

While the refund provisions in themselves do not specifically engage human rights, they do provide fair recourse to employers who have paid the nomination training contribution charge but are unable to access the benefits of employing a skilled overseas worker.

The instrument streamlines processing arrangements by making provision for nominations of occupations made by persons who have applied to be a standard business sponsor or are negotiating with the Commonwealth for a labour agreement. This amendment does not interact with the right to work, however, it will improve the administrative processes of the Department and will facilitate expeditious processing of nominations.

The amendment to cater for part-time work arrangements positively engages Article 6.1 of the ICESCR and Article 11.2(c) of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW).

Article 11.2(c) of CEDAW states that:

*In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: .....*

*(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities.*

For example, the provision for part-time work arrangements reflects the needs of temporary work visa holders consistent with the Australian workplace relations framework.

## **Conclusion**

This Legislative Instrument is compatible with human rights as it promotes the training of Australian citizens and permanent residents in support of Article 6 of the ICESCR, and caters for part-time work arrangements in support of Article 6.1 of the ICESCR, Article 23 of the Universal Declaration of Human Rights and Article 11.2(c) of the CEDAW.

**The Hon. Alan Tudge MP**  
**Minister for Citizenship and Multicultural Affairs**



**Details of the Migration Amendment (Skilling Australians Fund) Regulations 2018**

Section 1 – Name

This section provides that the title of the Regulations is the *Migration Amendment (Skilling Australians Fund) Regulations 2018* (the Regulations).

Section 2 – Commencement

Subsection 2(1) provides that each provision of the instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

The table provides that sections 1 to 4 of the Regulations commence the day after the instrument is registered on the Federal Register of Legislation. The table provides that Schedule 1 to the Regulations commences immediately after the commencement of Part 3 of Schedule 2 to the *Migration Amendment (Skilling Australians Fund) Act 2018* (the SAF Act). The table provides that Schedule 2 to the Regulations commences on 17 November 2018.

Subsection 2(2) provides that any information in column 3 of the table is not part of the instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument. Column 3 of the table provides the date/details of the commencement date.

The purpose of this section is to provide for when the amendments made by the instrument commence.

The instrument will be made before, but commence immediately after, the SAF Act (which inserts the authorising provisions into the *Migration Act 1958* (the Migration Act)). The instrument is therefore made in reliance on section 4 of the *Acts Interpretation Act 1901*.

Section 3 – Authority

This section provides that the instrument is made under the Migration Act. The purpose of this section is to set out the authority under which this instrument is made.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to the Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Regulations has effect according to its terms. The purpose of section 4 is to explain the effect of the Schedules.

## Schedule 1 – Skilling Australians Fund

### *Migration Regulations 1994*

#### Items 1 to 2

These items amend subregulation 2.12F(3B), which sets out the circumstances in which the Minister may refund the amount paid by way of the first instalment of the visa application charge (VAC) in relation to an application for a visa. Item 2 inserts an additional refund ground in relation to applications for the Subclass 186 (Employer Nomination Scheme) visa (Subclass 186 visa) and the Subclass 187 (Regional Sponsored Migration Scheme) visa (Subclass 187 visa). These visas can only be granted if the application is supported by an approved nomination by an employer under regulation 5.19. It is recognised that, in some circumstances, the employer may need to withdraw the nomination, and this is reflected in new provisions allowing a refund of the nomination fee and the nomination training contribution charge if the nomination is withdrawn before the Minister makes a decision about whether to approve it (see new regulation 5.37A, inserted by item 41, below). As the related visa application cannot be approved without the approved nomination, the visa applicant may also choose to withdraw the visa application. The amendments ensure that all of the refund grounds in regulation 5.37A are mirrored in subregulation 2.12F(3), noting that some grounds were already covered. The amendments include reference to the circumstances in subregulations 5.37A(3), (4), and (5) (see the description of these subregulations at item 41, below).

#### Items 3 to 4 – Amendments to regulation 2.60S

These items amend criteria for approval as a standard business sponsor or temporary activities sponsor. The criteria exclude persons who have passed on the costs of sponsorship to a sponsored worker or a third party, although the Minister may disregard these criteria if it is reasonable to do so. The effect of the amendments is that the criteria now include the nomination training contribution charge as a cost that must not be transferred to or recovered from a sponsored worker or a third party.

#### Items 5 to 6 – Amendments to regulation 2.68J

These items amend criteria for the variation of an approval as a temporary activities sponsor. Variation of the duration of the approval is the way in which approval as a temporary activities sponsor is renewed. From 18 March 2018, the variation procedure no longer applies to standard business sponsors. Standard business sponsors make a further application for approval using a streamlined application process.

The purpose of the amendments is the same as the purpose of items 3 and 4. The nomination training contribution charge is specified as a cost that must not be transferred to or recovered from a sponsored worker or a third party.

#### Item 7 – Regulation 2.70

This item repeals and substitutes regulation 2.70. The purpose of regulation 2.70 is to specify the persons who are subject to Division 2.17 of Part 2A of the *Migration Regulations 1994* (the Migration Regulations). Division 2.17 deals with nominations pursuant to section 140GB of the Migration Act.

The amendments align regulation 2.70 with section 140GB as amended by the SAF Act. Whereas that section previously provided for an approved sponsor (including a party to a work agreement) to make a nomination, it now provides that a nomination may be made by a person who is, or who has applied to be, an approved sponsor (including a party to negotiations for a work agreement). Regulation 2.70, as substituted, mirrors section 140GB by including reference to persons who have applied to be sponsors or are negotiating for a work agreement.

The effect of the amendments is to align the legal framework with the administrative practice of the Department of Home Affairs (the Department) of allowing persons seeking approval as a sponsor to lodge nominations on the online nomination system. This practice was implemented to assist the efficient processing of nominations. As was the case prior to the amendments, the nomination cannot be approved until the nominator becomes an approved sponsor (subregulation 2.72(5) of the Migration Regulations and section 140GB of the Migration Act).

#### Item 8 – Paragraph 2.72(1)(a)

This item repeals and substitutes paragraph 2.72(1)(a). The change is consequential to the amendments noted at item 7. Regulation 2.72 sets out the criteria for the approval of a nomination of an occupation in relation to a holder of a Subclass 457 (Temporary Work (Skilled)) visa (Subclass 457 visa), or a holder of, or applicant or proposed applicant for a Subclass 482 (Temporary Skill Shortage) visa (Subclass 482). The effect of this item is that regulation 2.72 applies to standard business sponsors, parties to work agreements, and persons who have applied to be standard business sponsors, or are negotiating for a work agreement.

#### Item 9 – At the end of subregulation 2.72(2)

This item adds a note at the end of subregulation 2.72(2). The note advises that, in addition to the criteria for approval of a nomination set out in regulation 2.72, subsection 140GB(2) of the Migration Act provides that a nomination can only be approved if the nominator is an approved sponsor and has paid any nomination training contribution charge that applies to the nomination.

#### Item 10 – After subregulation 2.72(5)

This item inserts subregulation 2.72(5A), which is an additional criterion for the approval of a nomination of an occupation. The criterion requires the Minister to be satisfied that any debt due by the person, as mentioned in section 140ZO of the Migration Act, has been paid in full. Section 140ZO, inserted by the SAF Act, provides that any unpaid nomination training contribution charge, and any penalty for late payment, are debts due to the Commonwealth and may be recovered by action in a court of competent jurisdiction. For example, if a nominating business has previously misstated its annual turnover with the result that the lower charge was paid (see item 35), the shortfall would be a debt to the Commonwealth and would have to be paid in full before any further nomination could be approved.

The effect of the amendments is that, regardless of whether the Commonwealth takes legal action to recover the debt, no further nomination by that person may be approved unless the debt is paid in full. Item 36 below inserts the same criterion into regulation 5.19, relating to nominations for the purpose of applications for the Subclass 186 (Employer Nomination

Scheme) visa and the Subclass 187 (Regional Sponsored Migration Scheme) visa. Accordingly, any unpaid charges relating to nominations pursuant to section 140GB of the Migration Act (for the purpose of applications for the Subclass 482 visa) or pursuant to regulation 5.19 (for the purpose of applications for the Subclass 186 and Subclass 187 visa) must be paid in full before a nomination can be approved under section 140GB or regulation 5.19.

As noted below (items 16 and 35), the nomination training contribution charge must be paid when the nomination is lodged, and this is required by the Department's online system. Accordingly, it is not expected that underpayment of the nomination training contribution charge will be a widespread problem.

#### Item 11 – After subregulation 2.72(10)

This item modifies the criteria for approval of a nomination of an occupation in relation to a holder of a Subclass 457 visa, or a holder of, or applicant or proposed applicant for, a Subclass 482 visa. The effect of the amendment is that the Minister has a discretion to disregard the requirement for the position to be a full-time position if the Minister is satisfied that it is reasonable in the circumstances to do so (subregulation 2.72(10A)).

The general position under the temporary skilled visa program is that positions must be full-time. This position was formalised in the nomination criteria that came into effect on 18 March 2018 (paragraph 2.72(10)(b)) for the purpose of the new Subclass 482 visa. Part-time work arrangements were previously permitted under the Subclass 457 visa program, but only for positions where an equivalent Australian worker would receive a base salary of at least the level of the Temporary Skilled Migration Income Threshold (TSMIT) for those part-time hours. This policy setting was not carried across to the regulations for the Subclass 482 visa.

Subsequent stakeholder feedback on the new legislation has identified the need for some flexibility, to cater for specific situations such as fractional appointments of highly specialised or renowned academic staff, and other situations where part-time positions may be reasonable, consistent with the Australian workplace relations framework. The new discretion is intended to cater for these special and limited circumstances. The amendment operates retrospectively so that any nominations made from 18 March 2018, that have not been finally determined, can benefit from this change to the legislation (see subclause 7602(1) in Part 76 of Schedule 13 to the Migration Regulations, inserted by item 43 below).

#### Item 12 – After paragraph 2.72(16)(a)

This item complements item 11 by providing that, if the Minister exercises the discretion to approve part-time work arrangements, the Minister may also exercise a discretion to disregard the rule (paragraph 2.72(15)(e)), that requires the annual earnings of the nominated overseas worker to match or exceed the 'annual market salary rate' for the occupation. The annual market salary rate is defined in regulation 1.03 as: "... *the earnings an Australian citizen or an Australian permanent resident earns or would earn for performing equivalent work on a full-time basis for a year in the same workplace at the same location.*" In the limited circumstances in which part-time work arrangements will be approved (see item 11), it is necessary for the Minister to have flexibility to approve those arrangements if the proposed remuneration will be reasonable for the hours worked. In those cases, the Minister would consider what an Australian citizen or permanent resident would earn for undertaking equivalent work under the same part-time work arrangements. The Minister may only

exercise the discretion to approve the part-time work arrangements, including the proposed remuneration, if the Minister is satisfied that it is reasonable in the circumstances to do so.

The amendment operates retrospectively so that any nominations made from 18 March 2018, that have not been finally determined, can benefit from this change to the legislation (see subclause 7602(2) in Part 76 of Schedule 13 to the Migration Regulations, inserted by item 43 below).

#### Items 13, 14 and 15

These items are consequential to the change noted at item 7. The items amend regulations 2.72A and 2.72B to reflect the position that a nomination for the purpose of the Subclass 407 (Training) visa can be made by a person who is a temporary activities sponsor or a person who has applied for approval as a temporary activities sponsor. Items 13 and 14 also omit redundant references to repealed classes of sponsor.

#### Item 16 – After subregulation 2.73(5)

This item inserts subregulation 2.73(5A). Regulation 2.73 sets out the process for nominating an occupation in relation to the holder of a Subclass 457 visa, or a holder of, or applicant or proposed applicant for a Subclass 482 visa.

Subregulation 2.73(5A) provides that the nomination must be accompanied by any nomination training contribution charge the person is liable to pay in relation to the nomination.

#### Items 17, 18, 20, 21, 22, 23, 24 and 25

These items make consequential changes to regulation 2.73 to reflect the change noted at item 7 above. Specifically, the items reflect the new legal framework that allows a nomination of an occupation to be made by a person who is an applicant for approval as a standard business sponsor or is negotiating to enter into a work agreement with the Commonwealth.

#### Item 19 – After paragraph 2.73(9)(d)

This item inserts paragraph 2.73(9)(da). The effect of the paragraph is that a nomination must state the annual turnover of the nominating business. Annual turnover, which is defined in the *Migration (Skilling Australians Fund) Charges Regulations 2018*, is an element in the formula for calculating the amount of the nomination training contribution charge. If the annual turnover of the nominating business is AUD 10 million or more, a higher amount of the nomination training contribution charge is payable. In practice, a figure for annual turnover must be entered into the nomination application form on ImmiAccount (the Department's online visa application system) when the nomination is lodged. The system will not accept the nomination without this information.

#### Item 26 – Regulation 2.73AA (heading)

This item repeals the heading of regulation 2.73AA (*Refund of nomination fee – Subclass 457 (Temporary Work (Skilled)) visa and Subclass 482 (Temporary Skill Shortage) visa*) and substitutes a new heading (*Refund of nomination fee and nomination training contribution*

*charge – Subclass 457 (Temporary Work (Skilled)) visa and Subclass 482 (Temporary Skill Shortage) visa).*

The purpose of the amendment is to reflect the expanded scope of regulation 2.73AA, as set out in items 27 to 29.

#### Items 27 to 29

These items amend regulation 2.73AA. The effect of regulation 2.73AA, as amended, is that the Minister may refund the nomination fee mentioned in subregulations 2.73(5) or 2.73(7), or the nomination training contribution charge mentioned in subregulation 2.73(5A), on the grounds set out below.

Although regulation 2.73AA provides the Minister with a discretion to refund the nomination fee and the nomination training contribution charge on all of these grounds, as a matter of policy the discretion would generally be exercised to exclude a refund of the nomination fee in cases where the nomination has been decided by the Department (as in the grounds at subregulation 2.73AA(3D) and subregulation 2.73AA(3E)). This is because the nomination fee is a fee for service and the service has been provided once the nomination has been processed and approved by the Department.

The grounds for refund under regulation 2.73AA are:

- the nomination was made because of a mistake by the Department (subregulation 2.73AA(2)). This ground was inserted, with effect from 18 March 2018, by the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018*;
- the nomination was for the Subclass 482 visa in the Labour Agreement stream and was withdrawn because the nominated occupation was not specified in the work agreement or the number of nominations permitted under the work agreement in that year had been reached (subregulation 2.73AA(3)). This ground was inserted, with effect from 18 March 2018, by the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018*;
- the nomination, for any stream of the Subclass 482 visa, was withdrawn before a decision was made under section 140GB of the Migration Act and the reason for withdrawing the nomination was that the information in the nomination that was used to work out the amount of the nomination training contribution charge in relation to the nomination was incorrect (subregulation 2.73AA(3A)). This refund ground is intended to cover situations where the nominator makes a mistake in relation to the visa period requested for the nominee, or in relation to the annual turnover of the nominating business. These mistakes will result in the nominator paying the incorrect nomination training contribution charge amount. A refund is only available if the mistake is identified, and the nomination is withdrawn, before the nomination is approved or refused by the Minister;
- the nomination, for a Subclass 482 visa in the Short-term stream or Medium-term stream, is withdrawn because it was made by a person who had applied to be a standard business sponsor, and that application was subsequently withdrawn or refused (subregulation 2.73AA(3B)). In this situation, the nomination is futile, as it

cannot be approved if the nominator is not approved as a standard business sponsor. This refund ground is required because of the changes, discussed at item 7, allowing persons who have applied for approval as standard business sponsors to make nominations;

- the nomination, for a Subclass 482 visa applicant in the Labour Agreement stream, was withdrawn before a work agreement was entered into (subregulation 2.73AA(3C)). This ground is required because of the changes, discussed at item 7, allowing persons to make nominations while negotiating for a work agreement. If the proposed work agreement is not entered into, the nomination is futile as it cannot be approved;
- the Subclass 482 visa application (in any stream), made on the basis of the nomination, is refused on health or character grounds (subregulation 2.73AA(3D)). In this situation, the policy intention is to provide a refund where the nominating employer acts appropriately but the visa is refused for reasons outside the employer's control such as, for example, a situation where the employer is unaware that the nominated worker has a criminal conviction or a pre-existing health condition that prevents the nominated worker from meeting the health requirement; and
- a Subclass 482 visa (in any stream) is granted on the basis of the nomination and the visa holder fails to commence employment as proposed in the nomination (subregulation 2.73AA(3E)). As with the previous ground (subregulation 2.73AA(3D)), this ground caters for situations where the employer has acted appropriately and, for reasons outside the employer's control, the worker has not commenced employment.

In addition to the refund grounds outlined above, an additional refund ground (subregulation 2.73AA(3F)) is inserted by Schedule 2 to the Migration Regulations (see Schedule 2 below).

The Minister has a discretion, rather than a duty, to provide a refund. This is to provide flexibility, and to ensure that there is scope to deny a refund in cases of fraud, worker exploitation or manipulation of employment arrangements. For example, a refund may be inappropriate if the nominating employer was a participant in, or aware of, criminal conduct by the visa applicant that resulted in the refusal of the visa on character grounds. There may be other circumstances, with no fraud involved, where a refund of the nomination training contribution charge is not warranted, for example, a long delay in requesting a refund after the worker left the employment of the sponsor. The refund provisions also strike a balance between addressing the concerns raised by business and maximising the quantum and stability of revenue available for training of Australians through the SAF.

No provision has been made for Administrative Appeals Tribunal (AAT) review of decisions to refuse to provide a refund. This is because most of the refund grounds are objectively framed. For the small number of cases where there could be a genuine dispute that could be determined by the AAT, the costs of AAT review and the limited interests at stake (access to a relatively small refund) make AAT review inappropriate. This is consistent with the existing provisions of the Migration Regulations, under which there is no AAT review of decisions about refunds of fees and charges.

The application provisions provide that the new refund grounds apply to nominations made on or after 12 August 2018 (see subitem 7602(3) in Part 76 of Schedule 13 to the Migration Regulations, inserted by item 43).

#### Item 30 – Paragraph 2.75(2)(b)

This item amends regulation 2.75, which deals with the period of approval of a nomination in relation to a holder of a Subclass 457 visa, or a holder of, or applicant or proposed applicant for a Subclass 482 visa. The regulation provides for a range of scenarios in which the approval of a nomination will cease.

Previously, paragraph 2.75(2)(b) provided that a nomination would cease 12 months after the day on which the nomination was approved, if it had not already ceased under one of the alternative scenarios ('the 12 month rule'). The effect of the amendment is that the 12 month rule is qualified so that it does not apply if a Subclass 482 visa application made on the basis of the nomination has not been finally determined. This change was necessary because it is no longer possible to obtain another nomination in relation to the same visa application. Legislative changes that took effect on 18 March 2018 to support the integrity of the new Subclass 482 visa included provisions to prevent employers making repeat nominations in relation to a Subclass 482 visa application. The new rule is that there can only be one nomination per Subclass 482 visa application. This rule could produce the unintended consequence that an unfinalised visa application could not be approved because the nomination had expired under the 12 month rule. To avoid this problem, new paragraphs 2.75(2)(b) and (ba) link the cessation of approval of the nomination to the finalisation of processing of the related visa application, including an allowance for any review of the visa refusal decision by the AAT under Part 5 of the Migration Act. This is covered by the expression 'finally determined' (defined in subsection 5(9) to (9B) of the Migration Act).

As provided by subclause 7602(4) in Part 76 of Schedule 13 to the Migration Regulations (inserted by item 43), this amendment applies to nominations made on or after 18 March 2018, which was the commencement date of the new nomination provisions, including the limitation to one nomination per Subclass 482 visa application. The effect is that no nominating employer or visa applicant will be negatively affected by the 12 month rule in its previous form.

#### Item 31 – Paragraph 2.82(3)(g)

This item amends the record keeping obligations of standard business sponsors to reflect the legislative change from an annual obligation to meet training benchmarks to the new legislative scheme under which the nomination training contribution charge is imposed on nominations of overseas workers. Paragraph 2.82(3)(g) as repealed and substituted continues the obligation to retain records of compliance with training obligations in force prior to 12 August 2018. Those records must be retained for the period mentioned in subregulations 2.82(4) to (6), i.e. two years after sponsorship ceases, but with an upper limit of five years. New paragraph 2.82(3)(h) imposes an obligation to retain records to substantiate the figure for annual turnover of the business, as provided for the purpose of assessment of the applicable nomination contribution training charge. These records must also be retained for the period mentioned in subregulations 2.82(4) to (6).

#### Item 32 – Subparagraphs 2.87(1A)(a)(iia) and (b)(iia) and (1B)(a)(iia) and (b)(iia)



This item amends regulation 2.87 to include references to the nomination training contribution charge. The effect is that a person who is or was an approved sponsor has an obligation not to take any action to seek to recover the cost of the nomination training contribution charge from the visa applicant or any other person. This obligation complements the criteria for approval as a sponsor at regulation 2.60S (see the amendments at items 3 to 4) and the criteria for variation of approval as a sponsor at regulation 2.68J (see the amendments at items 5 to 6).

#### Item 33 – Regulation 2.87B

This item repeals regulation 2.87B. Regulation 2.87B imposed an obligation on standard business sponsors to meet annual training benchmark requirements for their employees as specified in a legislative instrument. Standard business sponsors who sponsored workers under the subclass 457 visa were required to expend, on an annual basis:

- the equivalent of at least two per cent of their business' payroll in contributions to an industry training fund (training benchmark A); or
- the equivalent of at least one per cent of their business' payroll on the training of Australians (training benchmark B).

The training benchmark requirements have been replaced by the nomination training contribution charge. In particular, the nomination training contribution charge is imposed on all nominations, made on or after 12 August 2018, by standard business sponsors (see subregulation 5.42(1) at item 42 below).

The application provision at subclause 7602(5) in Part 76 of Schedule 13 to the Migration Regulations (inserted by item 43) provides that a person is not required to comply with the repealed training obligations in relation to a period of 12 months ending on or after 12 August 2018. As explained at item 43, this ensures that employers are not subject to any overlap between the old and new legislative schemes

#### Item 34 – Paragraph 4.02(5)(c)

This item makes a consequential amendment to subparagraph 4.02(5), which deals with eligibility to seek review by the AAT, to reflect the new position (see item 7 above) that a person who has applied to be a standard business sponsor, or a person who is seeking to enter into a work agreement, can nominate an overseas worker. It is no longer necessary to be an approved sponsor to make a nomination. The effect of the amendment is that the right of review to the AAT in relation to a decision to refuse to approve a nomination is given to 'the person who made the nomination' rather than 'the approved sponsor who made the nomination'.

#### Item 35 – After paragraph 5.19(2)(f)

This item amends subregulation 5.19(2), which sets out the procedure for applying to the Minister for approval of the nomination of a position for the purpose of a visa application for the Subclass 186 visa or the Subclass 187 visa. The item inserts two new requirements:

- the application must be accompanied by any nomination training contribution charge the nominator is liable to pay in relation to the nomination (paragraph 5.19(2)(fa)); and

- the application must identify the annual turnover (within the meaning of the *Migration (Skilling Australians Fund) Charges Regulations 2018*) for the nomination.

The annual turnover figure is used to assess the amount of the nomination training contribution charge that is payable by the nominator. For businesses with an annual turnover of AUD 10 million or more the one-off charge is AUD 5,000. For businesses with an annual turnover of less than AUD 10 million, the one-off charge is AUD 3,000. The effect of this item is that the charge must be paid in full at the time the application for approval of the nomination is made. The charge replaces the criterion requiring the nominator to meet training benchmarks (see items 37 and 39 below).

#### Item 36 – After paragraph 5.19(4)(d)

This item amends subregulation 5.19(4) to insert a new criterion for the approval of a nomination under regulation 5.19 for the purpose of the Subclass 186 visa or the Subclass 187 visa. The new criterion provides that any debt due by the nominator pursuant to section 140ZO of the Act must be paid in full. Section 140ZO, inserted by the SAF Act, provides that any unpaid nomination training contribution charge, and any penalty for late payment, is a debt due to the Commonwealth. For example, if a nominating business has previously misstated its annual turnover with the result that the lower charge was paid (see item 35), the shortfall would be a debt to the Commonwealth and would have to be paid in full before any further nomination could be approved. A criterion with the same effect also applies to nominations under section 140GB of the Act for the purposes of the Subclass 482 (Temporary Skill Shortage) visa (see item 10 above). Any unpaid charges relating to nominations under section 140GB and regulation 5.19 must be paid in full before a further nomination can be approved under section 140GB or regulation 5.19.

#### Item 37 – Paragraph 5.19(5)(i)

This item repeals paragraph 5.19(5)(i), which contained a criterion for approval of a nomination under regulation 5.19 for the purpose of the Temporary Residence Transition stream in the Subclass 186 visa or the Temporary Residence Transition stream in the Subclass 187 visa. The repealed criterion required the nominator to have met any applicable training obligations during the most recent approval as a standard business sponsor. This criterion is repealed because training obligations have been replaced by the new nomination training contribution charge. However, the repeal of paragraph 5.19(5)(i) does not affect nominations made under regulation 5.19 prior to 12 August 2018 (see subclause 7602(6) in Part 76 of Schedule 13 to the Migration Regulations, inserted by item 43 below). As those nominations are not subject to the nomination training contribution charge, it is appropriate that the criterion requiring compliance with previous training obligations continues to apply. For nominations made on or after 12 August 2018, the nomination training contribution charge must be paid.

#### Item 38 – Paragraph 5.19(10)(b)

This item makes a technical amendment.

#### Item 39 – Paragraph 5.19(10)(c)

This item repeals paragraph 5.19(10)(c). This paragraph was a criterion for approval of a nomination of a position under regulation 5.19 for the purpose of a Subclass 186 visa in the

Direct Entry stream. The criterion required the nominator to meet training requirements for the training of Australian citizens and permanent residents as set out in a legislative instrument or, in the case of a business that had operated for less than 12 months, to have an auditable plan to meet those requirements. The criterion was repealed because training requirements have been replaced by the new nomination training contribution charge. However, the repeal of paragraph 5.19(5)(i) does not affect nominations made under regulation 5.19 prior to 12 August 2018 (see subclause 7602(6) in Part 76 of Schedule 13 to the Migration Regulations, inserted by item 43 below). As those nominations are not subject to the nomination training contribution charge, it is appropriate that the criterion requiring compliance with training requirements continues to apply. For nominations made on or after 12 August 2018, the nomination training contribution charge must be paid, and the training requirements criterion is no longer relevant.

#### Item 40 – Subregulation 5.36(4) (after paragraph (b) of the definition of *fee*)

This item amends subregulation 5.36(4) to include a reference to the nomination training contribution charge in the definition of ‘fee’. Division 5.7 of Part 5 of the Migration Regulations deals with charges and fees payable under the Migration Regulations. Regulation 5.36 provides for a legislative instrument to specify where payments of fees may be made and the currencies in which they may be paid. Subregulation 5.36(4) defines ‘fee’ for the purpose of regulation 5.36. The effect of the amendment is to include a reference to an amount of nomination training contribution charge in the definition of fee.

#### Item 41 – After regulation 5.37

This item inserts new regulation 5.37A into Division 5.7 of Part 5 of the Migration Regulations. Regulation 5.37A deals with the circumstances in which the Minister may refund nomination fees and nomination training contribution charge paid in relation to an application for approval of a nomination of a position under regulation 5.19 for the purpose of the Subclass 186 visa or the Subclass 187 visa. There was previously no refund available in relation to the nomination fee (AUD 540). However, with the introduction of the additional nomination training contribution charge (AUD 3,000 or AUD 5,000 for businesses with an annual turnover of AUD 10 million or more), a refund mechanism has been introduced to provide the Minister with a discretion to refund the nomination fee and the nomination training contribution charge.

The Minister has a discretion, rather than a duty, to provide a refund. This is to provide flexibility, and to ensure that there is scope to deny a refund in cases of fraud, worker exploitation or manipulation of employment arrangements. For example, a refund may be inappropriate if the nominating employer was a participant in, or aware of, criminal conduct by the visa applicant that resulted in the refusal of the visa on character grounds. There may be other circumstances, with no fraud involved, where a refund of the nomination training contribution charge is not warranted, for example, a long delay in requesting a refund after the worker left the employment of the sponsor. The refund provisions also strike a balance between addressing the concerns raised by business and maximising the quantum and stability of revenue available for training of Australians through the SAF.

Although regulation 5.37A provides the Minister with a discretion to refund the nomination fee and the nomination training contribution charge on all of the grounds noted above, as a matter of policy the discretion would generally be exercised to exclude a refund of the nomination fee in cases where the nomination has been decided by the Department (as in the

grounds at subregulation 5.37A(8) and subregulation 5.37A(9)). This is because the nomination fee is a fee for service and the service has been provided once the nomination has been processed and approved by the Department.

The grounds on which a refund of the nomination fee and nomination training contribution charge may be provided are as follows:

- The nomination is made because of a mistake by Immigration (subregulation 5.37A(2)). ‘Immigration’, which is defined in regulation 1.03 of the Migration Regulations as the Department administering the Migration Act, is a reference to the Department of Home Affairs. This ground is included to cover possible cases where a nomination is made because of an error by the Department and needs to be withdrawn or, alternatively, the nomination may have been refused in error and a further nomination is required. The scenarios are unlikely, however this ground has been included out of caution and to provide consistency with the refund grounds for nominations under section 140GB of the Migration Act (see subregulation 2.73AA(2) of the Migration Regulations);
- The nomination relates to a labour agreement and the application is withdrawn because the identified occupation is not covered by the labour agreement or the annual ceiling for nominations under the labour agreement has been reached (subregulation 5.37A(3)). These circumstances would only occur on rare occasions and would usually be due to inadvertent error by the nominating business;
- The nomination is withdrawn because the information provided to calculate the nomination training contribution charge is incorrect (subregulation 5.37A(4)). For example, a nominating business might inadvertently state an incorrect amount for the annual turnover of the business, which could result in the payment of the incorrect amount of the nomination training contribution charge. These mistakes would be unusual and do not justify the additional system costs that would be incurred by allowing for additional part payments or part refunds of the nomination training contribution charge. In these situations, the nominator is required to withdraw the nomination and can then make a new nomination with the correct information;
- The nomination is withdrawn because the nomination relates to a visa in the Labour Agreement stream of the Subclass 186 visa, and the person withdraws the application before a labour agreement comes into existence (subregulation 5.37A(5)). This refund ground is consequential to the legislative changes on 12 August 2018 that allow nominations to be lodged by persons who are negotiating to enter into a labour agreement. A refund will be provided if the nomination is withdrawn, for any reason, before a labour agreement is concluded;
- The nomination relates to a Subclass 186 or Subclass 187 visa in the Temporary Residence Transition stream and the nomination is withdrawn because it identifies the wrong occupation (subregulation 5.37A(6)). A visa holder who is transitioning from a temporary visa (Subclass 457 or Subclass 482) to a permanent visa (Subclass 186 or Subclass 187) must be nominated in relation to an occupation with the same 4-digit ANZSCO occupation unit group code as the occupation in relation to which the temporary visa was granted (see paragraph 5.19(5)(b) of the Migration Regulations). The refund is available if the nominator identifies a different occupation in the

nomination. This will usually be a result of inadvertent error when the nominator selects the occupation from a drop-down list on the nomination system. These mistakes should be rare and the system has not been designed to allow this information to be amended after lodgement. The nominator is expected to withdraw the nomination and lodge a new nomination with the correct information. For a refund to be available, the nomination must be withdrawn before it is refused by the Department. The Department may contact the nominator to recommend withdrawal in these cases;

- The nomination is withdrawn because it identifies the wrong stream (subregulation 5.37A(7)). The criteria in regulation 5.19 contain three streams, the Temporary Residence Transition stream, the Direct Entry stream, and the Labour Agreement stream. These streams mirror the streams in the Subclass 186 and Subclass 187 visa, except that the Subclass 187 visa does not contain a Labour Agreement stream. At the nomination stage, the nominator must identify the subclass and stream to which the nomination relates (see paragraph 5.19(2)(e)). The nomination can only be approved in relation to the selected stream (see subregulation 5.19(4)). If the wrong stream is selected the nomination needs to be withdrawn and a new nomination lodged. As with the refunds for selecting the wrong occupation (subregulation 5.37A(8), noted above) these mistakes should be rare and the system has not been designed to allow this information to be amended after lodgement. As above, for a refund to be available, the nomination must be withdrawn before it is refused by the Department, and the Department may contact the nominator to recommend withdrawal in these cases;
- The nomination is approved, but the related application for a Subclass 186 visa or Subclass 187 visa is refused on health or character grounds (subregulation 5.37A(8)). This refund ground will cater for situations where the nominating employer fails to obtain the benefit of the nominated employee because the visa is refused on health or character grounds, which are matters that the nominating employer would generally not be able to anticipate; and
- A Subclass 186 visa or Subclass 187 visa is granted on the basis of the nomination and the visa holder fails to commence the employment (subregulation 5.37A(9)). This refund ground also caters for situations where the nominating employer fails to obtain any benefit from the nomination. Unlike the situation with nominations for the Subclass 482 visa (see subregulation 2.73AA(3F) inserted by Schedule 2 to the Migration Regulations), there is no refund ground available if the employment of the visa holder ends within 12 months of commencement. It is expected that, in deciding to nominate a person for permanent residence, the nominating business will satisfy itself that the person will remain in the employment for a reasonable period.

No provision has been made for AAT review of decisions to refuse to provide a refund. This is because most of the refund grounds are objectively framed. For the small number of cases where there could be a genuine dispute that could be determined by the AAT, the costs of AAT review and the limited interests at stake (access to a relatively small refund) make AAT review inappropriate. This is consistent with the existing provisions of the Migration Regulations, under which there is no AAT review of decisions about refunds of fees and charges.

The application provisions provide that the new refund grounds apply to nominations made on or after 12 August 2018 (see subitem 7602(7) in Part 76 of Schedule 13 to the Migration Regulations, inserted by item 43).

#### Item 42 – After Division 5.7 of Part 5

This item inserts new Division 5.7A (headed ‘Nomination Training Contribution Charge’) into Part 5 of the Migration Regulations. Division 5.7A contains regulation 5.42 (headed ‘Nominations that attract the nomination training contribution charge’). The purpose of regulation 5.42 is to specify, for the purpose of section 140ZM of the Migration Act, the nominations that are subject to the nomination training contribution charge.

Subregulation 5.42(1) imposes the nomination training contribution charge on a nomination, made on or after 12 August 2018, of a proposed occupation under paragraph 140GB(1)(b) of the Migration Act in relation to any of the following:

- a holder of a Subclass 457 visa;
- a holder of a Subclass 482 visa; or
- an applicant or proposed applicant for a Subclass 482 visa.

Subregulation 5.42(1) is consistent with subregulation 2.72(1), as amended on 18 March 2018. Regulation 2.72 sets out the criteria for approval of nominations made on or after 18 March 2018 in relation to the three cohorts noted above. The reason that holders of the repealed Subclass 457 visa are included is because a Subclass 457 holder will require a nomination under the new Subclass 482 provisions if the holder intends to change employer or occupation.

The effect of subregulation 5.42(1) is that an employer who nominates an occupation, on or after 12 August 2018, in relation to a person in one of the three cohorts noted above, will be liable for the nomination training contribution charge. This places all employers and all temporary skilled workers in the same position from that date. It was not considered necessary or desirable to exempt nominations of Subclass 457 holders from the nomination training contribution charge. In particular, it is appropriate that the nomination training contribution charge is payable because the nominating employer will no longer be subject to the training requirements that applied under the repealed Subclass 457 visa program.

The effect of subregulations 5.42(2) and (3) is that the nomination training contribution charge is imposed on nominations under regulation 5.19 of the Migration Regulations. Nominations under regulation 5.19 relate to the Subclass 186 visa or the Subclass 187 visa.

The amount of the nomination training contribution charge is prescribed in the *Migration (Skilling Australians Fund) Charges Regulations 2018*, which also commence on 12 August 2018.

#### Item 43 – In the appropriate position in Schedule 13

This item inserts a new Part 76 into Schedule 13 to the Migration Regulations. The purpose of Part 76 is to set out the application and transitional provisions that relate to the amendments made by the Regulations.

Subclause 7602(1) has the effect that new subregulation 2.72(10A) (item 11), allowing the Minister to disregard the requirement for a position to be a full-time position if it is reasonable in the circumstances to do so, applies to nominations made on or after 18 March 2018, if the nomination has not been finally determined. The amendment ensures that nominations made from 18 March 2018, when the requirement for the position to be full-time was introduced, can be considered under this beneficial change to the legislation.

Subclause 7602(2) has the effect that the amendments of subregulation 2.72(16) (item 12), allowing the Minister to exercise a discretion to disregard the annual earnings requirement if the position is a part-time position and it is reasonable in the circumstances to do so, applies to nominations made on or after 18 March 2018, if the nomination has not been finally determined. As with subclause 7602(1), the amendment ensures that nominations made from 18 March 2018, when the requirement for the position to be full-time was introduced, can be considered under this beneficial change to the legislation.

Subclause 7602(3) deals with the application of the amendments to regulation 2.73AA (items 26 to 29 of Schedule 1, and Schedule 2 to the Regulations). The amendments to regulation 2.73AA insert grounds for the refund of the nomination fee and nomination training contribution charge paid in relation to nominations of Subclass 457 visa holders and Subclass 482 visa holders, applicants, and proposed applicants. Subclause 7602(3) provides that the amendments apply in relation to a nomination made on or after the commencement date which is 12 August 2018. The subclause is not required in relation to the nomination training contribution charge because the charge is not payable in relation to nominations made before the commencement date. However, the subclause ensures there is no scope to request a refund of the nomination fee, under the new grounds, if the nomination was made before the commencement date.

Subclause 7602(4) deals with the application of the amendments to regulation 2.75 (item 30). The amendments to regulation 2.75 ensure that the approval of a nomination will not cease at the end of the 12 month approval period if a related visa application has not been finally determined. Subclause 7602(4) provides that the amendments to regulation 2.75 apply in relation to a nomination made on or after 18 March 2018. As noted at item 30, this beneficial change operates retrospectively to ensure that no nominating employer or visa applicant will be disadvantaged by the previous rule.

Subclause 7602(5) has the effect that a standard business sponsor is not required to comply with sponsorship obligations under regulation 2.87B in relation to training requirements for a period ending on or after 12 August 2018. Item 33 repeals regulation 2.87B because the sponsor obligation to expend a specified amount on training of Australian employees has been replaced by the new nomination training contribution charge imposed on nominations of overseas workers. However, as regulation 2.87B operated by imposing an obligation for periods of 12 months starting on the anniversary of the sponsor's approval, the obligation could overlap the introduction of the nomination training contribution charge. For example, if the anniversary of approval as a sponsor occurred on 1 July 2018, the sponsor obligation relating to the entire period from 1 July 2018 to 30 June 2019 would be triggered on 1 July 2018. In the absence of a transitional provision, the repeal of regulation 2.87B would not affect the obligation. This would create a significant overlap with the new regime commencing on 12 August 2018, which would be unfair to employers. To avoid this overlap, this item removes the obligation in relation to the period of 12 months that includes 12 August 2018. In other words, the obligation only applies in relation to full periods of 12 months that end before that date.

Subclause 7602(6) has the effect that despite the repeal of criteria, for the approval of nominations made under regulation 5.19, that relate to the training record of the nominating business, those criteria continue to apply to nominations made before 12 August 2018. As noted at items 37 and 39, those nominations are not subject to the nomination training contribution charge, and it is appropriate that the criteria assessing the training record of the nominating business continue to apply.

Subclause 7206(7) has the effect that refunds of the nomination fee and nomination training contribution charge under new regulation 5.37A (relating to nominations under regulation 5.19 for the purpose of applications for Subclass 186 or Subclass 187 visas) are available in relation to nominations applied for on or after 12 August 2018. The purpose of this provision is to clarify that the nomination fee is not refundable if the nomination was applied for before that date. As with subclause 7602(3), subclause 7602(6) is not required in relation to the nomination training contribution charge, because the charge is not payable in relation to nominations made before the commencement date. However, the subclause ensures there is no scope to request a refund of the nomination fee if the nomination was made before the commencement date.

## Schedule 2 – Additional refund provision

### *Migration Regulations 1994*

#### Item 1 – After subregulation 2.73AA(3E)

This item inserts an additional refund ground in regulation 2.73AA. Regulation 2.73AA sets out the grounds on which the Minister may provide a refund of the nomination fee mentioned in subregulations 2.73(5) or 2.73(7), or the nomination training contribution charge mentioned in subregulation 2.73(5A). These refund grounds relate to nominations under the new Subclass 482 nomination provisions (see items 26 to 29 in Schedule 1 to the Regulations).

The additional refund ground in subregulation 2.73AA(3F) provides the Minister with a discretion to provide a partial refund of the nomination training contribution charge if a Subclass 482 visa is granted on the basis of the nomination and the visa holder ceases to be employed by the business within 12 months of commencing employment. Because the new refund ground only permits a partial refund (explained below) it has been drafted as a self-contained subregulation rather than operating under the general discretion, in subregulation 2.73AA(1). For the same reason, subregulation 2.73AA(3F) does not provide for a refund of the nomination fee. It is generally inappropriate to provide a refund of the nomination fee, which is a fee for service, in cases where the nomination has been processed and decided, as would be the case with the additional refund ground. In contrast, a refund of the nomination fee may be appropriate in cases where the nomination is the result of a mistake by the Department (subregulation 2.73AA(2)) or the nomination is withdrawn before it is processed (subregulations 2.73AA(3), (3A), (3B) and (3C)).

The effect of the amendment made by item 1 is that, from 17 November 2018, the Minister has a discretion to provide a refund of the nomination training contribution charge if the nomination, made on or after 12 August 2018, is approved for a period of more than one year (i.e. it will relate to nominations for periods of two, three, or four years) and the nominated overseas worker ceases to be employed by the nominating business or an associated entity, for any reason, within 12 months of commencing the employment. This provision is intended



to provide a partial refund of the nomination training contribution charge to businesses that do not obtain the benefit of the overseas worker for the nominated period. The discretion is in broad terms to provide maximum flexibility, while at the same time allowing the Minister to refuse to provide a refund in cases where the business is at fault for the cessation of the employment, e.g. unfair dismissal or contrived arrangements to dismiss and rehire the overseas worker in order to take advantage of the refund. The refund will exclude the first year of the charge. For example, if the nomination by a small business (annual turnover under AUD 10 million) was for a period of two years, and the overseas worker ceased employment with the sponsoring employer after 9 months, a nomination training contribution charge of AUD 2,400 would have been paid, and refund of AUD 1,200 would be available to the sponsoring employer.

The reason that the additional refund ground has a different commencement date (17 November 2018 – see section 2 of the Regulations) from the other amendments made by the Regulations is that the November 2018 date aligns with the rollout of changes to Departmental systems to support and implement the new refund provision. However, despite this delayed commencement, the refund provision will apply in relation to nominations made from 12 August 2018 (see the application provisions in item 43 in Schedule 1 to the Regulations, in particular the definition of ‘commencement day’ as 12 August 2018 for the purpose of the amendments in subclause 7602(3) in Part 76 of Schedule 13 to the Migration Regulations).

#### Item 2 – Subregulations 2.73AA(4) and (5)

This item makes a technical amendment consequential to item 1.

# **Abolition and replacement of 457 visas**

## **Regulation Impact Statement (OBPR ID: 21946)**

**Department of Immigration and Border Protection**

**August 2017**

## Contents

Overview: Australia’s employer sponsored skilled visa programme .....	28
Current regulatory framework .....	28
The problem .....	33
Why is Government action needed .....	36
Policy options.....	37
Option 1 .....	37
Overview of Option 1 .....	37
Likely outcomes of Option 1 .....	39
Option 2 .....	46
Overview of Option 2 .....	46
Likely outcomes of Option 2 .....	47
Option 3 .....	49
Overview of Option 3 .....	49
Likely outcomes of Option 3 .....	49
Consultation .....	49
Best option .....	53
Implementation and evaluation.....	53

## Overview: Australia’s employer sponsored skilled visa programme

1. The employer sponsored skilled visa programme, and the underpinning legal and regulatory framework, is the primary way the Australian Government regulates how non-citizens may enter and remain to work in Australia, as well as many of the circumstances in which they may work. It also provides mechanisms to ensure that migrants do not pose unacceptable health, character and security risks to the Australian community.
2. The employer sponsored skilled visa programme is part of the broader migration programme, and allows sponsoring businesses to nominate an appropriately skilled non-citizen to fill a temporary or permanent employment vacancy in Australia. This programme regulates both the sponsor and the migrant to facilitate certain policy outcomes, such as ensuring that employers only seek to fill vacancies with overseas workers where appropriately skilled Australian workers are not available.

### Current regulatory framework

3. The employer sponsored skilled visa programme is comprised of the Temporary Work (Skilled) (subclass 457) visa (457 visa) and the permanent Employer Nomination Scheme (subclass 186) visa (ENS, 186 visa) and Regional Sponsored Migration Scheme (subclass 187) visa (RSMS, 187 visa) (permanent employer sponsored skilled visas).

**Top named industries for primary subclass 457, 186, and 187 visa grants in 2016-17 to 31 March 2017<sup>1</sup>**

Rank	Sponsor Industry	Total
1	Other Services	8,639
2	Accommodation and Food Services	7,224
3	Professional, Scientific and Technical	7,202
4	Information Media and Telecommunications	6,813
5	Health Care and Social Assistance	5,306
6	Construction	3,634
7	Education and Training	2,899
8	Manufacturing	2,525
9	Retail Trade	2,213
10	Financial and Insurance Services	2,017

<sup>1</sup> There were 16,452 visas granted to an industry, which is not specified in departmental reporting systems.

**Top occupations for primary subclass 457, 186, and 187 visa grants  
in 2016-17 to 31 March 2017**

Rank	Nominated Occupation	Total
1	351411 Cook	4,635
2	141111 Cafe or Restaurant Manager	3,031
3	261312 Developer Programmer	2,334
4	351311 Chef	2,004
5	225113 Marketing Specialist	1,987
6	242111 University Lecturer	1,872
7	261111 ICT Business Analyst	1,834
8	224711 Management Consultant	1,550
9	221111 Accountant (General)	1,487
10	261313 Software Engineer	1,464

4. Only certain occupations are eligible for use under Australia's permanent and temporary employer sponsored skilled visa programmes.<sup>2</sup> Depending on which visa programme is applied for, applicants must nominate an occupation from either:

- the Medium and Long-term Strategic Skills List (MLTSSL), previously known as the Skilled Occupation List (SOL), which targets occupations that are relevant to the medium to long term skill needs of the economy; or
- the Short-Term Skilled Occupation List (STSOL), previously known as the Consolidated Sponsored Occupation List (CSOL), which targets occupations that are relevant to the short term needs of the economy.<sup>3</sup>

Additionally, the Direct Entry (DE) stream of RSMS can apply for Australian and New Zealand Standard Classification of Occupations (ANZSCO) skill level 1-3 occupations.

5. The SOL and the CSOL were replaced with the MLTSSL and STSOL on 19 April 2017, which involved a reduction of 216 occupations from eligibility for the 457 visa. The number of eligible occupations fell from 651 to 435. The replacement of the CSOL with the STSOL represented a significant shift in approach by limiting temporary migrant occupations to those in need in the Australian labour market and distinguishing between short and

<sup>2</sup> Further information on the occupation lists can be found at: <http://www.border.gov.au/Trav/Work/Work/Skills-assessment-and-assessing-authorities/skilled-occupations-lists>

<sup>3</sup> CSOL was an expansive list of skilled occupations not based on labour market shortages, which was used to determine eligibility for sponsored temporary and permanent migration.

medium to long term needs. On 1 July 2017, the occupation lists were updated based on stakeholder consultation, labour market analysis, and advice from government departments to ensure they accurately reflect the skill needs of the Australian economy. These lists will be reviewed biannually.

### *Temporary employer sponsored skilled visa*

6. The 457 visa allows employers to address temporary labour shortages by enabling businesses, as approved sponsors, to nominate overseas workers when an appropriately qualified Australian citizen or permanent resident is not available. It is an uncapped and demand driven temporary visa aimed at meeting genuine temporary skill shortages.

7. As of 31 March 2017, there were 95,360 primary 457 visa holders in Australia. To be granted a 457 visa, applicants must meet certain requirements including:<sup>4</sup>

- demonstrating that they have the skills and experience necessary to work in the nominated occupation;
- holding any mandatory registration, license or professional membership;
- demonstrating that they have the required English language skills, unless exempt;
- meeting health and character requirements;
- holding adequate health insurance, unless covered by Medicare;
- having no outstanding debts to the Australian Government; and
- providing biometrics if asked.

8. In the 2015-16 programme year there were 34,493 active sponsors in the 457 visa programme. There are two ways an eligible business can become an approved sponsor:

- apply to be a standard business sponsor; or
- negotiate a labour agreement.

9. To become a standard business sponsor, a business must:<sup>5</sup>

- be a lawfully operating business;
- have no relevant adverse information against their business; and
- if the business is in Australia:
  - meet training requirements;
  - demonstrate a commitment to employing local labour; and
  - not engage in discriminatory recruitment practices.

10. Alternatively, a business may be able to enter into a labour agreement if they have a demonstrated need for skilled migrants that cannot be met by the Australian labour market and which falls outside standard employer sponsored skilled visa programmes.

11. All businesses who sponsor a 457 visa holder must meet sponsorship obligations including:

- cooperating with inspectors;

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<sup>4</sup> Further information about what a skilled overseas worker needs to do to apply for a primary 457 visa can be found at: <http://www.border.gov.au/Trav/Visa-1/457-#tab-content-1>

<sup>5</sup> Further information about what an employer needs to do to apply for be a sponsor for the 457 visa programme can be found at: <http://www.border.gov.au/Trav/Visa-1/457-#tab-content-3>

- ensuring equivalent terms and conditions of employment;
- keeping records;
- providing records and information to the Minister of Immigration and Border Protection (the Minister);
- notifying the Department of Immigration and Border Protection (the Department) when certain events occur;
- ensuring the visa holder participates in the nominated occupation;
- not recovering from, transferring or charging certain costs to another person;
- paying travel costs to enable sponsored people to leave Australia;
- paying costs to remove sponsored people who become unlawful non-citizens;
- providing training to Australians and permanent residents; and
- not engaging in discriminatory recruitment practices.

12. To nominate an overseas worker for a 457 visa, an approved sponsor must:<sup>6</sup>

- ensure that the overseas worker works directly for their business or for an associated entity of their business, unless the nominated occupation is exempt;<sup>7</sup>
- ensure that the overseas worker is afforded equivalent terms and conditions of employment to Australian workers;
- meet the 'genuineness' criterion;
- meet the Temporary Skilled Migration Income Threshold (TSMIT) requirements, set at \$53,900 as at 31 March 2017;
- not be subject to adverse information; and
- conduct Labour Market Testing (LMT) for professional, nursing and engineering occupations, unless it conflicts with international trade obligations.

### *Permanent employer sponsored skilled visa*

13. The permanent employer sponsored skilled visas were introduced in their current form in 2012 and are demand-driven programmes, which allow employers to nominate skilled workers for permanent residence to fill genuine vacancies in their business. These skilled workers can be overseas or already in Australia on temporary visas.

14. While ENS applies nation-wide, the RSMS helps businesses in regional, remote or low population growth areas (outside the major metropolitan centres of Brisbane, Gold Coast, Sydney, Newcastle, Wollongong and Melbourne) to recruit the skilled workers they need to manage and grow their operations.

15. The ENS and RSMS visas each have three streams:

- the Temporary Residence Transition (TRT) stream is for subclass 457 visa holders who are nominated by their employer after having worked for two years in the same occupation;

<sup>6</sup> Further information about how a sponsor can nominate a skilled overseas worker can be found at: <http://www.border.gov.au/Trav/Visa-1/457-#tab-content-4>

<sup>7</sup> A list of exempted occupations can be found in the Legislative Instrument: *Specification of Occupations for Nominations in Relation to Subclass 457 (Temporary Work (Skilled)) for Positions other than in the Business of the Nominator - IMMI 13/067*.

- the Labour Agreement stream is for skilled migrants nominated by an employer who is party to a labour agreement; and
- the Direct Entry (DE) stream is for other employer nominated skilled migrants.

16. In the 2016-17 programme year to 31 March 2017, there were 17,044 primary ENS visa grants and 5,228 primary RSMS visa grants. To be granted an ENS or RSMS visa, applicants must meet certain requirements including:

- having been nominated by an approved Australian employer (in regional Australia for RSMS) within the six months before the application;
- being under the age of 50 at the time of application, unless exempt;
- demonstrating that they have the skills and experience necessary to work in the nominated occupation, which may include an assessment by the relevant assessing authority;
- holding any mandatory registration, license or professional membership;
- demonstrating that they meet the required English language skills, unless exempt;
- meeting health and character requirements; and
- meeting other requirements of the relevant visa stream.

17. In the 2016-17 programme year to 31 March 2017, 8,315 individual businesses utilised the ENS and 2,933 individual businesses utilised the RSMS. To nominate a worker for an ENS or RSMS visa, a business must:

- actively and lawfully operate in Australia (in regional Australia for RSMS);
- have a genuine need for a paid employee to fill a skilled position;
- offer a skilled position in the applicant's field that is full time and ongoing for at least two years;
- pay a market salary rate;
- comply with Australian immigration and workplace relations laws;
- have no adverse information known about the business or any person associated with the business; and
- nominate the applicant in one of the three streams and meet the requirements of that stream.

### *Training benchmark requirements*

18. The current training benchmark requirements are applicable to the 457 visa and the DE stream of the 186 visa. The current framework requires employers nominating a 457 visa applicant or 186 visa applicant in the DE stream to meet either:

- training benchmark A - The business must provide evidence of recent expenditure, to the equivalent of at least 2 per cent of the payroll of the business, in payments allocated to an industry-training fund that operates in the same industry as the business; or
- training benchmark B - The business must provide evidence of recent expenditure, to the equivalent of at least 1 per cent of the payroll of the business, in the provision of training to employees of the business.



## The problem

19. The employer sponsored skilled visa framework is not effectively meeting the Australian Government's policy objective of enabling businesses to access skilled labour from overseas, when an appropriately skilled Australian is unavailable, while maintaining visa programme integrity. The current framework settings have resulted in:

- some businesses using the programmes where Australian workers are available.<sup>8</sup> This problem resulted from an inability of the policy settings to make certain that businesses only access overseas migrants for occupations which had been identified as in shortage in the Australian labour market;
- some businesses and visa applicants not meeting the intended requirements of the programmes. This problem has arisen due to a number of legislative inconsistencies and gaps relating to the current policy settings, including English language, training benchmarks, genuine need, and skills assessment requirements;
- some individuals and businesses using the temporary visa programme primarily to seek longer term or permanent residence without a further control to determine they continue to meet Australia's social, economic, and skill needs.<sup>9</sup> This has resulted from current policy settings, such as eligible occupation, English language and age requirements, failing to be set at the requisite levels;
- skills supplied by the visa programme not fully aligning with Australia's short or long term needs.<sup>10</sup> This problem resulted from failures in the occupation lists to ensure that the occupations eligible for temporary skilled migration visas reflect Australia's short or medium to long term needs; and
- widespread criticism that the programme does not successfully balance the facilitation of skilled workers, and prevention of negative impacts on Australian and overseas workers.

20. The employer sponsored skilled visa programmes allow employers to address labour shortages by bringing in skilled overseas workers where there is no appropriately skilled Australian workers available. Whilst it is against the intent of the programme, there are many reasons that employers may seek to use an overseas worker instead of an available Australian worker. Some of these reasons may be that the employer:

- finds it more expeditious to employ an overseas worker than train an Australian worker;
- perceives the overseas worker to have desirable attributes that are lacking in an equivalent Australian worker; or
- is helping to achieve a migration outcome for the overseas worker.

21. The above shortcomings have led to:

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<sup>8</sup> In 2016, the Department received approximately 15,000 enquiries, complaints, suggestions or compliments regarding the 457 visa programme. One of the main issues raised is that overseas workers are using the 457 programme to take Australian jobs.

<sup>9</sup> Departmental data indicates that this pathway is taken by many, with 84 per cent of 186 and 187 visas granted from 1 July 2016 to 31 March 2017 being to individuals whose last substantive visa was a 457 visa.

<sup>10</sup> This is supported by labour market analysis undertaken by the Department of Employment who provided advice to the Department in April 2017 identifying over 200 occupations, which were extraneous to Australia's labour market needs.

- some overseas workers transitioning to permanent residence without having the attributes which optimise their economic contribution and settlement outcomes;
- displacement of Australian workers;<sup>11</sup>
- continuing skills gaps; and
- overreliance on and an over-supply of skilled overseas workers in some occupations.

22. The 457 programme has been the subject of a number of enquiries and reviews. These reviews have involved wide consultation and feedback from a broad range of stakeholders, including industry peak bodies/associations, unions, government, businesses, migration agents and academics. The policy options set out in this document take this feedback into consideration.

23. Evidence of the problems within the employer sponsored skilled visa programmes can be found in:

- the 2014 *Independent Review into Integrity in the Subclass 457 Programme* (the 457 Integrity Review);
- the 2016 Senate Inquiry, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (the 2016 Senate Inquiry);
- the 2016 *Productivity Commission Inquiry Report: Migrant Intake into Australia* (the 2016 Productivity Commission Report);
- departmental sponsor monitoring activities outlined in the *Department of Immigration and Border Protection Annual Report 2015-16* (the 2015-16 Annual Report); and
- in the continuing stakeholder representations received by the Department.

24. The purpose of the 457 Integrity Review was to recommend a system that, operating in the national interest<sup>12</sup>, was sound and resistant to misuse, and, at the same time, flexible and able to respond quickly to economic and business changes. The review examined:

- the level of non-compliance in the 457 visa programme;
- the current framework to better understand whether the existing requirements balance the needs of business with the integrity of the programme;
- the viability of a deregulation strategy of the current programme; and
- the appropriateness of the current compliance and sanctions.

25. The 457 Integrity Review found that, whilst contentious, there was strong support from businesses for a programme that enabled them to fill genuine workforce shortages. Unions also supported this function whilst highlighting the need to protect Australian jobs and vulnerable overseas workers. The Review found that Australians who experience difficulties in finding work see 457 visa holders as a threat.<sup>13</sup>

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<sup>11</sup> The 2016 Senate Inquiry received evidence from several unions that 457 visa holders were being used to fill positions that could have been taken by qualified Australian workers, and were also displacing some Australian workers.

<sup>12</sup> As noted in the 2016 Productivity Commission Report, it is the broad intent of the visa programmes to meet Australia's national interest (including national security and economic and social development).

<sup>13</sup> The 457 Integrity Review, p23.

26. The 457 Integrity Review found that there was a “lack of responsiveness of the current occupation list” and that “employees...say that [the current system] is too easily subverted and, in practice, can turn into a free-for-all, to the disadvantage of Australians”.<sup>14</sup> The 457 Integrity Review also found that the training benchmarks were flawed and should be abolished. The review made 22 recommendations, including reviewing the occupation lists, introducing a national training fund, publishing sponsor sanctions and providing the Department with tax file numbers (TFN).
27. The 2016 Productivity Commission Report examined the costs and benefits of temporary and permanent migration and looked at the scope for reforms within the current system that could deliver superior overall outcomes for the Australian community. The report found that younger and more skilled immigrants are more likely to make a positive economic contribution to Australia. It also noted that employment is a key indicator of integration, and that high levels of English language ability and qualifications result in better employment outcomes.
28. The 2016 Productivity Commission Report identified that significant gains could be made by recalibrating the intake of permanent skilled immigrants, by tightening entry requirements relating to age, skills and English language proficiency. For example, the Productivity Commission found that the fiscal benefit of skilled migrants decreases with age and recommended that the current 50 year age limit for the permanent employer sponsored skilled visa programmes be reduced. Migrants who arrive at a relatively young age, particularly those who are highly educated, generally contribute more tax revenue over their lifetime and make comparatively lower use of government-funded services.
29. The 2016 Senate Inquiry looked at the impact that the 457 visa programme has on employment opportunities for Australian permanent residents and citizens. The inquiry looked at concerns raised by employers seeking to efficiently supplement their workforce with overseas workers, and concerns raised by unions seeking to protect the wages, conditions and job opportunities of Australian workers.
30. The 2016 Senate Inquiry noted that for the 457 programme to be effective “the employment of 457 visa workers must match genuine, short-term skill shortages”. However, the inquiry found that there was evidence that there are occupations eligible for the current 457 programme where there is no skill shortage.
31. As indicated in the 2015-16 Annual Report, in 2015–16 the Department finalised the monitoring of 1390 temporary work sponsors, the majority of which were 457 sponsors. Approximately 58 per cent of sponsors monitored were considered to have satisfactorily met their obligations, while the remaining 42 per cent were found to be in breach of their obligations. Of the sponsors found to be in breach, a total of 372 sponsors were sanctioned (cancelling and/or barring the sponsor), 210 received a formal warning and 28 were issued with infringement notices totalling just under \$272,580. The top

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<sup>14</sup> The 457 Integrity Review, p8.

industries where employers were found to be in breach were Accommodation and Food Services, Other Services, Construction and Retail Trade. This rate is higher than in past years, reflecting improved targeting of risk. These results are indicative of the continued misuse of the programme by some businesses.

32. In 2016, the Department received approximately 15,000 enquiries, complaints, suggestions or compliments regarding the 457 visa programme by a range of stakeholders including individuals, legal and industry peak bodies, businesses and migration agents who use the employer sponsored skilled visa programmes and domestic and foreign government representatives. Broadly, the issues raised include:
- overseas workers using the 457 programme to take Australian jobs;
  - overseas workers being exploited; and
  - certain programme settings make it more difficult for overseas workers to use the programme and prevent businesses and industries from meeting their needs.

33. The Government has already implemented several measures to address this problem. In particular, the Government has implemented the majority of the recommendations by the 457 Integrity Review, which included measures to strengthen integrity in the 457 visa programme, prevent abuse and protect Australian workers. However, whilst the measures implemented have gone some way to address the problem they have not completely solved it.

### **Why is Government action needed**

34. The Government regulates the entry and stay of overseas workers in Australia. Given the competing views from employers, employees and employee organisations, the Government is required to balance these views to meet the national interest. It is therefore appropriate that the Government take action on this matter.

35. External reviews outlined above, and the Department, have identified several failures in the current employer sponsored skilled visa programmes, such as occupation lists that do not sufficiently support Australia's skills needs and policy settings that do not ensure sufficient programme compliance, are not set at requisite levels and have a number of legislative inconsistencies and gaps.

36. To resolve issues in the employer sponsored skilled visa programmes, the Government aims to achieve the following objectives:
- ensure that that employers only seek to fill vacancies with overseas workers where appropriately skilled Australian workers are not available;
  - enhance integrity measures to prevent the misuse of the employer sponsored skilled programmes;
  - ensure that skilled overseas workers have the necessary attributes to successfully contribute to Australia's social and economic prosperity, either temporarily or permanently; and
  - meet Australia's skills needs through policy settings which distinguish between short and medium to long term needs.

37. To resolve issues in the employer sponsored skilled visa programmes, the Government needs to address the areas in which the programmes are currently failing, by:
- regularly reviewing and updating the occupation lists to ensure they support Australia's short and medium to long term skills needs;
  - tightening policy settings to support programme compliance;
  - ensuring that policy settings distinguish between short and medium to long term needs and are set at requisite levels to support settlement outcomes; and
  - address legislative inconsistencies and gaps identified within the policy settings.
38. There are barriers that will impact the Government's ability to achieve its objectives:
- the Australian economy is dynamic. Policy settings will need to be responsive to Australia's changing skill needs while prioritising Australian workers; and there will continue to be people who seek to misuse the employer sponsored skilled visa programmes. Policy settings will need to mitigate risks as they arise.
39. If the Government does not take action, then the failures identified in the current employer sponsored skilled visa programmes will continue to result in integrity issues and suboptimal economic benefits.

## Policy options

40. Three policy options have been considered:
- abolish and replace the 457 visa, and implement complementary reforms to the temporary and permanent employer sponsored skilled visas;
  - reform the 457 visa; and
  - retain the employer sponsored skilled visa framework without changes.

### Option 1

#### Overview of Option 1

##### *Temporary skill shortage visa*

41. Under Option 1, by March 2018 the 457 visa would be abolished and replaced with a new Temporary Skill Shortage (TSS) visa with two streams. The two streams would enable greater control over settings by distinguishing between short-term and medium-term skills needs.
42. The Short-Term stream would enable employers to source genuinely temporary overseas skilled workers to fill short-term positions in a range of occupations for up to 24 months, until they can recruit and train an Australian if the role continues. This would be supported by a genuine temporary entrant requirement and provision for renewal of the visa onshore once only. The Short-Term stream would be underpinned by the STSOL.
43. The Medium-Term stream would enable employers to source highly skilled overseas workers to fill medium-term critical skill gaps for up to four years, with eligibility to apply for permanent residence after three years. The medium-term stream would be underpinned by the MLTSSL.

44. Other key features of the TSS visa, distinguishing it from the current 457 visa, include:

- a requirement that the primary applicant has at least two years relevant work experience;
- mandatory LMT in a prescribed manner, with limited exemptions to accommodate international obligations;
- a higher English language requirement for the Medium-Term stream of an International English Language Testing System (IELTS) score of level 5 overall, with a minimum of 5 in each component score; and
- a non-discriminatory workforce test to allow closer examination of applications from employers whose workforce is predominantly made up of overseas workers.

### *Complementary reforms*

45. From the date of announcement, the Department would implement a number of complementary reforms leading up to the abolition and replacement of the 457 visa in March 2018.

### *Changes to temporary skilled employer sponsored visas*

46. Changes to the 457 visa before the introduction of the TSS visa include:

- reducing the maximum duration of 457 visas issued for occupations that are on the STSOL to two years (unless international trade obligations require a longer period);
- removing the English language salary exemption threshold, which exempts applicants whose salary is over \$96,400 from the English language requirement;
- Processing efficiencies to expand the scope of sponsorship accreditation and streamline nominations for lower risk-sponsors, including trusted traders and government agencies;
- mandatory provision of penal clearance certificates;
- expanded skills assessments; and
- authorising the Department to publicly disclose the details of sponsors who are sanctioned for breaching the sponsor obligations framework.

### *Changes to temporary and permanent employer sponsored skilled visas*

47. Proposed changes to both the temporary and permanent employer sponsored skilled visa programmes include:

- authorising the Department to collect and use TFNs of temporary and permanent skilled visa holders; and
- tightening and clarifying the training benchmarks policy settings, including regarding the requirements a training fund must meet, and the types of acceptable training expenditure. Then, from March 2018, replacing the training benchmarks with a levy to a government managed training fund payable by employers nominating a temporary or permanent skilled migrant.

### *Changes to permanent employer sponsored visas*

48. Proposed changes to the permanent employer sponsored skilled visas include:

- specifying eligible occupations in the MLTSSL, with additional occupations available to support regional employers using the RSMS;
- extending the residence period required to apply for permanent residence from two to three years;
- paying a market rate salary not less than the TSMIT;<sup>15</sup>
- more stringent age, English language, and relevant work experience requirements;
- requiring migrants who accessed regional concessions for their temporary visa to have lived in regional Australia in order to be eligible for permanent residency;
- requiring nominators to provide evidence of 'genuine need' for the person to work in the nominated position;
- removing the exemptions to the skills assessment and English language requirements for applicants earning at least \$180,001; and
- providing the ability to refund application fees where an application must be refused or withdrawn at no fault of the applicant.

## Likely outcomes of Option 1

### *Australian labour market*

49. As Australia's skills needs are constantly evolving and the skilled migration programme is designed to respond to those needs, use of the programme, and the impact of this option, will depend on labour market circumstances in the years ahead. In April 2017, 457 workers accounted for less than one per cent of the Australian workforce,<sup>16</sup> and between 0.17 - 4.47 per cent of any industry.<sup>17</sup> Therefore, the impact that the option 1 measures might have on the overall economy and particular industries is limited but will vary by industry and occupation. A key aspect of option 1 is six-monthly reviews of the occupation list to ensure it remains responsive to Australia's skills needs.

50. The measures in option 1 will have a higher impact on occupations that have the highest percentage of 457 workers compared to total employment. The maximum visa period of two years for occupations on the STSOL, such as Cooks, may result in an increase in the training and employment of Australians and/or a higher turnover of temporary skilled migrants. Of the top ten ANZSCO occupation groups with the highest percentage of 457 visa holders, there is only one ANZSCO occupation group (with the smallest historic 457 use) that does not have an occupation eligible for the 457 programme.<sup>18</sup>

### **Top ten ANZSCO occupation groups with highest percentage of 457 visa holders<sup>19</sup>**

<sup>15</sup> Currently, employers are required to pay the market salary rate to permanent skilled employer sponsored visa holders.

<sup>16</sup> As at 18 April 2017, there were 92,896 primary 457 visa holders in Australia. This accounted for 0.78 per cent of the total Australian workforce, which was 11,922,100 as at February 2016.

<sup>17</sup> Based on the same data as footnote 15, primary 457 visa holders accounted for between 0.17 - 4.47 per cent of the Australian workforce in an industry. The highest percentage (4.47 per cent) of primary 457 visa holders are in the Information Media and Telecommunications industry.

<sup>18</sup> The Graphic Pre-press Trade Workers group only has one occupation, 392211 Graphic Pre-press Trades Worker, which is not currently eligible for the 457 programme.

<sup>19</sup> Sources: Department of Immigration and Border Protection, BP0014 Temporary Work (Skilled) visa holders 2017-05-31 ULv100, and Australian Bureau of Statistics, 6291.0.55.003 - EQ08 - Employed persons by

ANZSCO code	ANZSCO occupation group	Employed Total in May 2017 ('000)	457 visa holders at 31 May 2017	% of 457 visa holders to total employment
3514	Cooks	43.6	6168	14.16%
3125	Mechanical Engineering Draftspersons and Technicians	5.3	692	13.05%
2632	ICT Support and Test Engineers	12.2	1373	11.28%
2611	ICT Business and Systems Analysts	27.3	2900	10.63%
3922	Graphic Pre-press Trades Workers	1.2	109	9.15%
2252	ICT Sales Professionals	12.8	1133	8.86%
6392	Retail and Wool Buyers	4.3	291	6.74%
1411	Cafe and Restaurant Managers	67.5	4391	6.50%
2613	Software and Applications Programmers	106.8	6545	6.13%
3123	Electrical Engineering Draftspersons and Technicians	8.7	509	5.82%

51. There are differing expert opinions on the impact that the option 1 measures might have on the Australian labour market. For example, Dr Birrell has argued that there it is very likely that these measures would significantly reduce the number of overseas workers on the employer sponsored skilled visa programmes, which will benefit domestic job seekers.<sup>20</sup> Whereas, Dr Wright has argued that whilst he agrees that the measures could reduce the number of overseas workers in these programmes, "any claim that a major reduction in workers on temporary visas would have a significant impact upon the Australian labour market is a bit far-fetched".<sup>21</sup>

#### *Australia's ability to attract overseas skilled workers*

52. The measures in option 1 are not expected to substantially affect Australia's competitive position among its peers (Canada, New Zealand, the United Kingdom and the United States) in attracting and retaining the best and brightest skilled migrant workers from around the globe that are in need in the Australian labour market. Visa settings are only one factor in a migrant's choice of destination, with other key aspects including lifestyle, taxation, and education. There are also other skilled migration options, such as Labour Agreements which allow employers with a demonstrated skill need that cannot be met by the Australian labour market to access skilled migrants in occupations outside the skilled occupation lists.

53. Some industries have expressed concern that the option 1 measures will impact on their international competitiveness to attract talent. This issue has predominately stemmed from removing the eligibility for permanent residency for some occupations. Some of those who expressed concern are:

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Occupation unit group of main job (ANSSCO), Sex, State and Territory, August 1986 onwards, released 22 June 2017.

<sup>20</sup> The Australian Population Research Institute's research report: *The Coalition's 457 Visa Reset: Tougher Than You Think*, August 2017

<sup>21</sup> Dr Wright, of the University of Sydney specialises in labour market regulation and immigration. Quotes sourced from A., 'Numerically insignificant': 457 visa overhaul unlikely to be a game changer for local jobs', *SBS News*, viewed 11 August 2017, < <http://www.sbs.com.au/news/article/2017/08/10/numerically-insignificant-457-visa-overhaul-unlikely-be-game-changer-local-jobs>>



- the tertiary education sector, which raised concerns about their ability to attract PhDs, researchers and academics; and
- multinational businesses, which raised concerns about their ability to attract Chief Executive Officers.

54. These concerns were considered as part of the review of occupation lists on 1 July 2017, and resulted in 23 occupations moving from the STSOL to the MLTSSL. Occupations on the MLTSSL are eligible for a visa of up to four years, and the option to apply for permanent residency. Occupations which moved from the STSOL to the MLTSSL include Chemist, Chief Executive or Managing Director, Environmental Research Scientist, Software & Applications Programmers (*nec*), and University Lecturer.

55. Option 1 will also affect the ability for employers to retain a temporary skilled migrant. This will only affect employers who are employing overseas workers in an occupation on the STSOL, which is subject to biannual reviews. These occupations will be restricted to visas of up to two years (unless international trade obligations require a longer period), and the visa holder will only be able to renew once onshore. However, these settings reflect the policy intent to address short term skill needs and encourage the training of Australians rather than reliance of overseas migrants. The industries that have the highest proportion of visa holders in occupations that are on the STSOL compared the MLTSSL are:

- Accommodation and Food Services;
- Arts and Recreation Services;
- Administrative and Support Services;
- Retail Trade; and
- Wholesale Trade.<sup>22</sup>

### *Improving the quality of migrants*

56. The tighter settings would improve the quality of temporary and permanent migrants and ensure they have the necessary attributes to successfully contribute to Australia's social and economic prosperity. They would also ensure that migrants have the necessary attributes to improve employment and community integration outcomes, and are able to successfully transition to permanent residency, if they are eligible. Key aspects include:

- more targeted occupation lists based on labour market analysis and stakeholder consultation that differentiate between short-term and long-term skills that are needed in the Australian labour market;
- reducing the current age limit for the permanent employer sponsored skilled visa programmes from 50 to 45 years will improve the fiscal contribution of these migrants;<sup>23</sup>
- the increased work experience requirement for temporary and permanent employer sponsored skilled migrants recognises the importance of this attribute for effective productivity, workplace contributions and enhanced fiscal outcomes;

<sup>22</sup> This is based on visa holder data from 1 July 2012 to 30 June 2017 and the breakdown is for occupations that are on the STSOL or MLTSSL as at 1 July 2017.

<sup>23</sup> 2016 *Productivity Commission Inquiry Report: Migrant Intake into Australia*

- higher English language requirements ensure that migrants are less vulnerable to exploitation, are able to integrate more easily in the workforce and community, and enable the transfer of skills from migrants to Australian workers; and
- enhanced character checking for the temporary employer sponsored skilled visa programme supports visa integrity and aligns with the way in which other visa programmes operate.<sup>24</sup> While applicants would incur regulatory costs associated with police checks, there is benefit in assessing this requirement before permanent residence to ensure that the Australian community is protected and that persons of concern are identified as early as possible.

57. Whilst the option 1 measures will improve the quality of migrants, they will also result in some migrants not being eligible to use the programmes. For example, recent graduates or those over 45 years old may not meet the new work experience or age requirements respectively. However, employers may look at other options to source skilled migrants who meet the new requirements where Australian workers are not available and there will continue to be exemptions to the age requirement.

### *Supporting Australia's skill needs*

58. The proposed TSS settings under Option 1 would bring a sharper focus on Australia's labour market and skill needs by implementing more targeted, evidence based occupations lists that differentiate between short and medium term skill shortages. Option 1 supports Australia's skill needs by ensuring employers can only nominate occupations in short-term need for shorter visa periods with limited renewal (under the Short-Term stream), but can nominate occupations in medium to long-term need for longer visa periods (under the Medium-Term stream, and through permanent visas) and with no renewal limits.

59. Whether an occupation is, or is not, eligible for the employer sponsored skilled visa programmes will have the most significant impact on employers. For other option 1 measures such as increased English language, skill, age requirements or enhanced LMT, employers will still be able to source an overseas worker if there is a genuine need to fill a skills need. However, employers may need to source skilled overseas workers from outside of existing sources if those sources cannot meet the requirements. In some cases, this may delay, although not prevent, an employer from sourcing skill labour. Some employers may instead choose to recruit an Australian worker.

60. The 1 July 2017 occupation lists update considered several factors including labour market analysis, and advice from government departments. Stakeholder feedback was also considered, in particular feedback regarding skilled occupations that had been removed from eligibility on 19 April 2017 and that employers considered were still needed to fill skills gaps. For the for the subclass 186 and 457 visa programmes, the 1 July 2017 update included the addition of:

- 16 occupations to the STSOL. This included Aeroplane Pilot which had been removed from eligibility on 19 April 2017; and

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<sup>24</sup> Further details on character and police certificate requirements can be found here: <http://www.border.gov.au/Trav/Visa/Char>

- 20 occupations to the MLTSSL.<sup>25</sup>

Regular review of the occupation lists enables stakeholders to provide timely feedback, and ensures the lists meet Australia's skill needs.

61. There will inevitably be differences of opinion as to the need to source overseas migrants in a particular occupation. The occupation lists review process continues to be refined and is designed to consider qualitative labour market data as well as qualitative feedback from industry, unions and the general community. The broad range of stakeholders that have provided input to the occupation list reviews demonstrates the interest in engaging in regular updates of occupation lists.

62. Labour Agreements will remain an avenue to sponsor skilled migrants in occupations not on the lists where there is a demonstrated need that cannot be met by the Australian labour market. Labour agreements are formal arrangements negotiated between an employer and the Australian Government that let an employer recruit an agreed number of skilled workers from outside Australia. They provide a flexible, tailored skilled migration arrangement for businesses and sectors with specific needs that sit outside the mainstream skilled migration programme.

63. The impact on business and visa holders who have made investments on the basis of meeting previous permanent residency criteria would be mitigated by grandfathering access to the permanent skilled employer sponsored visa pathway for existing 457 visa holders and applicants at the time of the Government announcement.

#### *Incentivising employers to give priority to Australian workers*

64. Option 1 would incentivise employers to give preference to appropriately skilled and available Australian workers by tightening the circumstances in which overseas workers could be employed. Measures that would incentivise employers to look to the Australian labour market include:

- better targeted occupation lists, and visa duration linked to the lists;
- limited onshore renewal, and a genuine temporary entrant requirement for the Short-Term stream of the TSS visa. These criteria reinforce the temporary nature of the Short-Term stream, and provide mechanisms to refuse a visa where a migrant is seeking to use temporary visas to establish longer term residence in Australia;
- restricting the ability to access permanent residence through the Temporary Transition stream to the Medium-Term stream of the TSS visa only;
- a national training fund levy which would improve training and employment outcomes for Australians, and reduce longer term reliance on overseas workers;
- a non-discriminatory workforce test to ensure employers are not actively discriminating against Australian workers; and
- mandatory LMT in a prescribed manner, with exemptions to accommodate international trade obligations.

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<sup>25</sup> More information on the 1 July 2017 changes to the lists of eligible skilled occupations can be found: <http://www.border.gov.au/WorkinginAustralia/Pages/summary-of-1-july-2017-changes-to-list-of-eligible-skilled-occupations.aspx>.

65. The LMT measure will impact employers who have not previously needed to meet this criteria. In particular, this will affect employers of professional occupations. There is expected to be minimal impact on employers who have previously sought to find an available and appropriately skilled Australian prior to hiring an overseas worker. Employers whose default approach was to source overseas workers will now have to first test the local labour market.

### *International obligations*

66. Currently, the 457 visa is the primary visa that facilitates Australia's international trade obligations on the movement of natural persons. The measures in option 1 are consistent with Australia's international trade obligations, which include commitments regarding visa duration, and not imposing LMT and occupations.

### *Settlement Outcomes*

67. As the Department's submission to the Joint Standing Committee on Migration's inquiry into migrant settlement outcomes notes, "poor settlement outcomes can have a detrimental effect on individual migrants' lives as well as on the economy and society as a whole. Migrants must be equipped with the tools that assist with positive settlement outcomes, an ability and willingness to integrate, and an understanding of Australia."<sup>26</sup> Characteristics of positive settlement outcomes include social and economic participation, and economic and physical well-being.<sup>27</sup> Settlement outcomes can be improved by measures in option 1 such as:

- extending the period from two to three years that employer-sponsored migrants must remain in their nominated position before being eligible for permanent residence, because they have had additional time to settle in Australia; and
- increasing, and removing exemptions to, the English language requirements.<sup>28</sup>

### *Increased training opportunities for Australians*

68. As the 2016 Productivity Commission Report noted, "ready access to temporary skilled immigration dampens incentives for employers to invest in skills and training". This highlights the importance of a strengthened mechanism to improve Australian training outcomes. An overarching requirement for employers nominating an overseas skilled worker to pay a levy to a government managed training fund would improve training and employment outcomes for Australians and reduce longer-term reliance on overseas workers. This would also address the integrity concerns with the current training benchmark requirements, which were raised by the 457 Integrity Review.

69. The proposed new training fund contribution model aims to make compliance and monitoring simpler by removing the need to maintain complex records to demonstrate

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<sup>26</sup> Further information on the inquiry can be found at:

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Migration/settlementoutcomes](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Migration/settlementoutcomes)

<sup>27</sup> As noted in Appendix 20 to the Department of Immigration and Multicultural and Indigenous Affairs submission to the Joint Standing Committee on Migration report, *To make a contribution: Review of skilled labour migration programs 2004*.

<sup>28</sup> As noted in the 2016 Productivity Commission Report, an overseas worker's English language ability is an important factor in integration and settlement outcomes.

expenditure to meet the current training benchmark requirements, and replacing it with a levy paid to the Skilling Australians Fund (SAF).

70. It is expected that for most employers the cost of the SAF levy will be less than the costs under the training benchmarks, and Australian citizens and permanent residents will have improved training opportunities, with more transparent outcomes.

### *Addressing integrity risks*

71. The Department has identified several legislative inconsistencies and gaps that present integrity risks, which make it easier for employers to misuse the programme. These risks would be addressed by the following measures:

- tightening the current training benchmarks and then replacing them with a national training fund levy;
- removing salary-based exemptions to English language (including the English Language Salary Exemption Threshold (ELSET)) and skills assessments requirements to address misuse, improve social cohesion, and decrease the risk of vulnerability in the workplace. This would have regulatory costs to individuals who otherwise would not have been required to provide evidence of English language competence or skills assessments and do not possess that evidence;
- requiring nominators to provide evidence of 'genuine need' for the person to work in the nominated position. This is to prevent positions from being fraudulently created for the purpose of facilitating the grant of a permanent visa;
- providing the ability to refund application fees where an application must be refused or withdrawn at no fault of the applicant;
- publishing details of sponsor sanctions. This would help to deter businesses from breaching their sponsor obligations by misusing the employer sponsored skilled visa programme, and address public about the integrity of this programme;
- enabling the Department to collect and use TFNs to strengthen compliance monitoring and targeting;
- expanding the skills assessment to cover cohorts of concern, for example, where particular combinations of occupation and nationality have been identified as an integrity risk; and
- requiring nominators to provide evidence of 'genuine need' for the person to work in the nominated position.

### *Regional Australia*

72. Option 1 is likely to have a positive overall impact on regional Australia. It would recognise that employers in regional areas can find it harder to attract and retain skilled employees in comparison to metropolitan employers, and seek to address this through a number of mechanisms:

- regional employers would have access to a broader range of eligible occupations than would be available to metropolitan employers. This broader occupation list available under the RSMS would be extended to also apply to the two streams of the TSS visa;
- the maximum age at time of application for a permanent employer sponsored visa would be reduced from 50 to 45 years of age. However, there are existing age exemptions based on occupation, region (for medical practitioners),

employer, salary, and for New Zealand citizens. If needed, these exemptions could be expanded in future to support regional Australia; and

- a requirement for temporary visa holders who accessed a regional occupation concession to have lived in a regional area for three years to be eligible for a permanent employer sponsored visa would ensure that migrants have a strong incentive to live and settle in regional Australia.

### *Addressing public concerns*

73. The new framework addresses public concerns regarding negative impacts of the existing 457 visa programme on the Australian labour market. Implementing reforms from July 2017 to tighten the 457 visa and permanent skilled employer sponsored visa settings would address the concerns while the new framework is being built, and more closely align the current legislative framework with the future state of the employer sponsored skilled visa programme.

### *Regulatory costs*

74. The Office of Best Practice Regulation (the OBPR) has agreed to the regulatory cost savings of \$1.193 million on average per annum for option 1. Not all measures in option 1 are expected to have a regulatory impact on businesses or individuals. The ones that do have been outlined below. Since the proposal is deregulatory, no regulatory offsets are identified.

<b>Table 1: Regulatory burden estimate (RBE) table</b>			
<b>Average annual regulatory costs (from business as usual)</b>			
Change in costs (\$ million)	Business	Individuals	Total change in costs
Extended LMT	- \$1.839		- \$1.839
Enhanced character assessment		- \$3.819	- \$3.819
Removal of ELSET		- \$1.596	- \$1.596
Educate sponsors on new visa framework	- \$0.445		- \$0.445
Expanded skills assessment		- \$0.116	- \$0.116
SAF levy	- \$0.351		- \$0.351
Removal of training benchmarks	\$9.359		\$9.359
<b>Total, by sector</b>	<b>\$6.724</b>	<b>- \$ 5.531</b>	<b>\$ 1.193</b>

## **Option 2**

### **Overview of Option 2**

75. Option 2 would involve retaining the 457 visa, and only implementing integrity reforms to the 457 visa. The key differences between Option 2 and Option 1 are:

- the 457 visa would be retained; and
- the Department would not reform the permanent employer sponsored skilled visas, but would instead consider changes as part of future visa reform.

76. The Department would introduce integrity measures to the 457 visa, including:

- condensing the occupation list and including additional occupation caveats;
- removing the ELSET;

- expanded skills assessments;
- enhanced character checking;
- publishing details of sponsors who have been sanctioned; and
- allowing the Department to collect and use TFNs of temporary and permanent skilled visa holders.

### **Likely outcomes of Option 2**

77. Option 2 would go some way to improve quality and integrity outcomes for the 457 visa. However, it would not fix all the problems identified in the temporary employer sponsored skilled visa programme and would not address any of the issues with the permanent employer sponsored skilled visa programme until broader visa reforms were introduced. Waiting for broader visa reform means that these programmes will continue to face integrity issues and will in some cases be inconsistent with the temporary 457 visa programme.

78. Option 2 would not address some current issues inherent in the 457 visa framework. This includes not clearly distinguishing between short-term and medium-term skill needs. Occupation lists and visa validity policy settings which differentiate between short and medium-term skills needs would go some way to addressing this issue. However there would be no mechanism to prevent longer term residence for skills that were only in temporary need and for preventing visa holders and sponsors from seeking to use the temporary programme as a vehicle for permanent migration.

79. Option 2 would also run the risk of creating an imbalance between the temporary and permanent employer sponsored skilled visa settings, with permanent settings being lower in some cases, and create uncertainty as to potential future further changes to permanent residence.

80. Like option 1, it is expected that the measures in option 2 will have a limited impact on the overall economy and particular industries, which would vary by industry and occupation. Also, the measures in option 2 are not expected to substantially affect Australia's ability to attract and retain talent. Unlike option 1, the measures in option 2 won't affect the ability for employers to retain a temporary skilled migrant, as there is no shortened visa stream with restrictions on onshore renewal.

81. Industry stakeholders and migration programme users are expected to be less critical of the changes in Option 2 than Option 1. However, the Department expects there would still be criticism of tightening access to the Australian labour market for overseas workers.

### **Addressing integrity risks**

82. There would be no measures implemented to address the integrity risks in the permanent employer sponsored skilled visa programmes. This would result in continuing misuse by some employers. However, some but not all of the integrity risks for the 457 visa programme would be addressed through the following measures:

- publicly disclosing the details of sponsors who are sanctioned for breaching the sponsor obligations framework;



- enabling the Department to collect and use TFNs to strengthen compliance targeting and outcomes;
- updating the skilled occupation lists;
- expanded skills assessments; and
- removing the ELSET.

83. The current training benchmarks would continue to exist unchanged. Therefore, the following problems would also continue:

- a lack of transparency;
- no demonstrable training outcomes; and
- the benchmarks are overly complex and inequitable.

84. As mentioned in Option 1, removing the ELSET and introducing enhanced character checking would increase regulatory costs to individuals.

### *Addressing public concerns*

85. Not replacing the 457 visa would fail to address public concerns about the employer sponsored skilled migration visa programme. This could impede effective reform to the temporary skilled migration visa programmes and the Government's ability to support the Australian economy by facilitating access to skilled labour.

### *Supporting Australia's skill needs*

86. One of the problems with the current settings of the 457 visa programme is that migrant intake is not necessarily reflecting Australia's short, medium and long-term needs. A significant factor is that the 457 programme has become a de-facto pathway to permanent residency. This issue would continue with Option 2 and would result in the skills needs of the Australian economy not being adequately met, as visa settings other than the occupation lists would not differentiate between short and medium-term skills shortages.

87. The occupation list would be condensed, more targeted, and would differentiate between short and medium-term skills shortages. However, the current 457 visa framework would not effectively implement these changes as it lacks the regulatory mechanisms proposed under Option 1 for the Short-Term and Medium-Term stream of the TSS.

### *Improving the quality of migrants*

88. The tighter settings would slightly increase the quality of overseas migrants using the 457 visa programme. Key aspects include:

- more targeted occupation lists based on labour market analysis and stakeholder consultation that differentiate between short-term and long-term skill needs; and
- mandatory penal clearance certificates.

89. Option 2 would not ensure that policy settings are set at requisite levels to support settlement outcomes support. It would not include measures to support skilled overseas



workers to have the necessary attributes to successfully contribute to Australia's social and economic prosperity on a permanent basis.

### *Incentivising employers to give priority to Australian workers*

90. Whilst the 457 visa programme currently has some incentives to prioritise Australian workers, Option 2 would not provide further incentives. Therefore, situations would continue where employers do not use the 457 visa programme to meet genuine temporary skill needs, and instead hire skilled overseas workers rather than training and or employing appropriately skilled Australians.

## **Option 3**

### **Overview of Option 3**

91. Option 3 would involve retaining the employer sponsored skilled visa programmes with no changes (status quo).

### **Likely outcomes of Option 3**

92. Option 3 would not address the current problems with the temporary and permanent employer sponsored skilled visas. In particular, it would not address the issues within the current framework settings which have resulted in:

- some businesses using the programmes where Australian workers are available;
- some businesses and visa applicants not meeting the intended requirements of the programmes;
- some individuals and businesses using the temporary visa programme primarily to seek longer term or permanent residence without a further control to determine they continue to meet Australia's social, economic, and skill needs; and
- skills supplied by the visa programme not fully aligning with Australia's short or long term needs.

## **Consultation**

93. The Department provided an interim Regulatory Impact Statement (RIS) to the OBPR at an earlier decision point. The OBPR agreed to the provision of an interim RIS on the basis that a final RIS would be prepared to inform the final decision point.

94. The Department has drawn on consultation with and feedback received from a broad range of stakeholders to identify issues addressed through the reform, and to obtain stakeholder views on the proposed reforms. The Department identified the following interested stakeholders:

- individuals, legal and industry peak bodies, and businesses who use the employer sponsored skilled visa programmes;
- migration agents whose clients use the employer sponsored skilled visa programmes;
- foreign government representatives; and
- federal government departments and agencies, including:
  - the Department of Foreign Affairs and Trade;

- the Attorney-General's Department;
- the Department of the Prime Minister and Cabinet;
- the Department of Finance;
- the Australian Tax Office;
- the Department of Health, Austrade;
- the Department of Education & Training;
- the Department of Employment;
- the Department of Human Services;
- the Department of Industry, Innovation and Science;
- the Department of Social Services; and
- the Treasury.

95. The Department's consultation process included individual meetings, roundtables, interdepartmental committee (IDC) meetings, submissions, and feedback received through other channels. A range of reforms developed as a result of these consultations have already been implemented. The main consultative processes included:

- the 457 Integrity Review, which met with over 150 stakeholders and received 189 written submissions;
- the 2016 Productivity Commission Report, which received over 100 public submissions, met with a range of stakeholders in Canada, New Zealand, the United States and Australia;
- the 2016 Review of the Temporary Skilled Migration Income Threshold, which involved consultation through 19 one-on-one meetings, a forum with 11 attendees and 40 written submissions;
- the 2016 Senate Inquiry, from the Senate Education and Employment References Committee;
- consultation with and input from the Ministerial Advisory Council on Skilled Migration;
- meetings of the Skilled Migration Officials Group;
- IDC meetings between the Department and other federal government agencies and departments;
- eight roundtables in Melbourne, Sydney and Canberra; and
- meetings, and associated correspondence, with individual stakeholders.

### Stakeholder feedback

96. The feedback from the consultations can be summarised as follows:

- there is broad support for the intent of the reforms and the use of skilled overseas workers where skilled Australians are not available, so long as those employing them offer employment and training opportunities for Australians;
- there are some concerns about the impact of the reforms in limiting access to skilled migrants (expanded on below); and
- there is some support to further tighten policy settings than is proposed.

### Stakeholder feedback

97. Stakeholder consultation shows that the Government needs to consider a wide range of varying, and often opposing views. The Department continues to consider feedback

raised by stakeholders in the development of the TSS visa and future reviews of the occupation list.

98. During the consultation, the Department has considered and subsequently addressed many concerns raised by stakeholders. Some of these have been outlined previously in this RIS and others are outlined in this section.

### *Initial feedback*

99. Initial media after the Government's reform announcement made 18 April 2017 (which reflect the option 1 measures) highlighted both support for and concerns of some stakeholders. Some stakeholders, such as the Australian Industry Group, agreed that the programme needed significant reform, and this could be achieved by replacing it with a new visa that more clearly defined its purpose – to address skill shortages that exist in the Australian economy<sup>29</sup>. The Australian Chamber of Commerce and Industry supported the need for a reset in the way in which the Government handled temporary skilled visas<sup>30</sup>. Other feedback was mixed where stakeholders expressed support for certain aspects of reform, and concerns regarding other measures.

100. Concerns raised centred on the occupation changes which had immediate impact. Through the consultation process, the Department considered a number of concerns raised by stakeholders and made some adjustments to address these concerns, such as:

- expanding the number of eligible occupations, particularly on the MLTSSL, on 1 July 2017 where there was evidence to support an ongoing need for particular occupations. This took into account feedback from employers within the horse racing sector, science and research sector, IT tech and retail sector, tertiary sector and the aviation industry;
- clarifying that the work experience requirement would be assessed in a way that reflects the nature of the particular occupation, including experience in related occupations where relevant. This feedback addresses concerns raised by the tertiary education industry, the medical sector, arts and performance sector and the science and research sector; and
- providing for a high salary exemption to the English language requirement for intra-company transferees. This addressed concerns raised by some of Australia's trading partners about the impact of removing the ELSET.

### *New policy settings for the TSS visa*

101. Stakeholders raised concerns regarding the new policy settings for the TSS visa, including:

- the reduced visa lengths and access to permanent residence, and whether this would impact on Australia's ability to attract talent;
- the reduction in occupations available, and whether this would impact application numbers for permanent skilled employer sponsored visas;

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<sup>29</sup> Sydney Morning Herald, Business welcomes 457 visa changes, warns on red tape, 18 April 2017

<sup>30</sup> Australian Chamber of Commerce and Industry, Media Release: migration changes will help make system sustainable, 18 April 2017

- the two years' work experience requirement, which would negatively impact the tertiary industry, the medical sector, arts and performance sector and the science and research sector;
- increased English language requirements, ELSET removal and introduction of mandatory police checks, which could negatively impact an employer's ability to access and recruit overseas workers;
- replacing the training benchmarks with a government managed training fund levy would add to existing training costs for some businesses, and may not address specific skills gaps in those businesses; and
- the reforms could increase red tape and negatively impact businesses.

### ***Australian labour market***

102. *Some members of the public and unions raised concerns about the negative impact of the current temporary employer sponsored skilled visa programme on the wages, conditions and job opportunities for Australian workers will continue under the new TSS visa.*

### ***Transitional arrangements***

103. *Concerns were raised about how the reforms would impact existing and future visa holders and applicants, particularly regarding:*

- *how existing 457 visa holders would be affected where their occupation has been removed from the relevant skilled occupation list; and*
- *how exemptions, such as to the age and English language requirements, would apply.*

### ***Integrity of the employer sponsored skilled visa programmes***

104. *Stakeholders raised concerns about whether the integrity measures would go far enough to address the exploitation of overseas workers.*

### ***Consultation***

105. *Stakeholders were critical about the lack of transparency and engagement about the reforms prior to the Government's announcement. Notwithstanding this criticism, stakeholders appreciated the early engagement by the Department on the specific policy settings, following the announcement.*

### ***Regional Australia***

106. *Stakeholders sought clarification on how the reforms would provide regional concessions. Stakeholders suggested that the Government should consult further with regional Australia and the agricultural sectors on the reforms.*

### ***Visa processing***

107. *Stakeholders sought clarification on whether the reforms would lead to processing efficiencies or impact visa processing timeframes.*

## Best option

108. The recommended option is to abolish and replace the 457 visa, and implement complementary reforms to the temporary and permanent employer sponsored skilled visas (option 1). This option has a deregulatory impact.

109. Option 1 is the preferred option as it:

- provides a comprehensive and complementary package of reforms to the temporary and permanent employer sponsored skilled visa framework;
- incentivises employers to only seek to fill vacancies with overseas workers where appropriately skilled Australian workers are not available;
- has enhanced integrity measures to prevent the misuse of the employer sponsored skilled programmes;
- meets Australia's skill needs through policy settings which distinguish between short and medium to long term needs;
- ensures that skilled overseas workers have the necessary attributes to successfully contribute to Australia's social and economic prosperity, either temporarily or permanently; and
- provides increased training outcomes for Australians.

110. Options 2 and 3 would not fully differentiate between the short, medium and longer-term skilled labour needs of the Australian economy, and would run the risk creating an imbalance in temporary and permanent employer sponsored skilled visa settings.

111. Options 2 and 3 would not enable the employer sponsored skilled visa programmes to better meet Australia's labour market and economic needs.

## Implementation and evaluation

112. Option 1 would have IT systems, processing, resourcing and legislative implications. The Department undertakes changes to legislation and systems using its Change Management Framework. This includes a detailed implementation plan with risk management strategies.

113. The Department proposes a phased approach for implementing Option 1, with integrity and quality measures introduced between April and December 2017, and the new TSS visa and SAF levy introduced in March 2018. The Department would leverage existing systems, processes and monitoring governance arrangements.

114. Amendments to the *Migration Act 1958*, Migration Regulations 1994, legislative instruments, and policy would be required to change settings for the temporary and permanent employer sponsored skilled visas. Publishing sponsor sanctions and sharing TFNs may also require changes to the *Tax Administration Act 1953* and the *Income Tax Assessment Act 1936*. The proposal to establish a government managed training fund would require taxing Bills.

115. It is possible that legislation to enable the Department will not be passed by Parliament. This would mean:

- in the case of sharing TFNs, the Department would not benefit from an enhanced compliance targeting or enhanced long term research on skilled migration employment outcomes. The overall rating for these risks has been assessed as medium. If this legislation were not to pass, the Department would continue compliance targeting and research using other client identifiers, however this would be less effective than TFN sharing;
- in the case of publishing sponsor sanctions, the Department would not publish sponsor sanctions. This has been assessed as a medium risk. If this legislation were not to pass, the Department would consider other public facing communication strategies to further deter sponsors from breaching their obligations, however, these would be less effective; and
- in the case of the government managed training fund, the Department would have to consider other options to improve training outcomes for Australians. This has been assessed as a high risk.

116. To prepare stakeholders to transition to these arrangements, the Department has developed a communications plan and is continuing to engage closely with stakeholders about the reforms. This engagement plan includes:

- maintaining up to date information about the reforms on the department's website, including factsheets with timelines and frequently asked questions and answers;
- maintaining a register of issues to inform future policy directions;
- ongoing feedback through broader visa reform stakeholder consultation; and
- engagement with stakeholders through existing fora:
  - Ministerial Advisory Council on Skilled Migration;
  - Senior Migration Officials Group;
  - annual migration planning;
  - net overseas migration forecasting;
  - migration agents; and
  - public information.

117. After the measures have been implemented, the Department will evaluate them through existing processes, as well as specific reviews as required. The Department will take into account both internal and external stakeholder feedback to determine if the Government's objectives have been met. As previously stated, the Government aims to achieve the following objectives:

- ensure that that employers only seek to fill vacancies with overseas workers where appropriately skilled Australian workers are not available;
- enhance integrity measures to prevent the misuse of the employer sponsored skilled programmes;
- ensure that skilled overseas workers have the necessary attributes to successfully contribute to Australia's social and economic prosperity, either temporarily or permanently; and
- meet Australia's skill needs through policy settings which distinguish between short and medium to long term needs.