



## **Australian Government**

Australian Government response to the Senate Inquiry report:

The Framework and operation of subclass 457 Visas,  
Enterprise Migration Agreements and Regional Migration  
Agreements

July 2014

## **Preamble**

The Australian Government welcomes the opportunity to respond to the report of the Legal and Constitutional Affairs Reference Committee titled *Framework and operation of subclass 457 Visas, Enterprise Migration Agreements and Regional Migration Agreements*. The report was published on 24 June 2013.

The Government notes the importance of the Subclass 457 visa programme, Enterprise Migration Agreements and Regional Migration Agreements (now called Designated Area Migration Agreements) in allowing employers to access skills and technical expertise that are unavailable in Australia and enabling overseas businesses to establish an Australian operation or to fulfil a contractual obligation in Australia.

The Government is grateful for the work the Committee has taken in respect to this important subject, and to those who contributed views and evidence to the Committee.

The Government's response to the recommendations made by the Committee follows. A number of the recommendations have already been implemented. Many of the recommendations were referred to the independent panel appointed by the Government to review the integrity of the Subclass 457 visa programme. The independent panel provided their report to the Assistant Minister for Immigration and Border Protection, Senator the Hon Michaelia Cash, on 30 June 2014.

## Responses and Recommendations

**Table 1: Summary**

<b>Recommendation</b>	<b>Response</b>	<b>Pg</b>
<p><b>Recommendation 1</b>  <b>2.105</b> The committee recommends that, for the exclusive purposes of the 457 visa programme, the Australian Workforce and Productivity Agency be given the responsibility and commensurate funding to compile and prepare a skills in demand list which also takes into account regional labour market skill shortages.</p>	Supported in principle, with any subsequent work to be undertaken by the Department of Industry	5
<p><b>Recommendation 2</b>  <b>2.106</b> The committee recommends that the government institute a review of the extent to which Australia's immigration system does and should facilitate the flow of low- and- semi-skilled labour into Australia.</p>	Referred to the independent review of the 457 programme	5
<p><b>Recommendation 3</b>  <b>2.110</b> The committee recommends that a dedicated pathway for intra-company transfers be introduced to the 457 visa programme.</p>	Referred to the independent review of the 457 programme	6
<p><b>Recommendation 4</b>  <b>3.76</b> The committee recommends that the <i>Fair Entitlements Guarantee Act 2012</i> be amended to make 457 visa holders eligible for entitlements under the Fair Entitlements Guarantee scheme.</p>	Not supported	6
<p><b>Recommendation 5</b>  <b>3.79</b> The committee recommends that the Government initiate an inquiry into the extent to which relevant workplace and occupational health and safety legislation protects the legal rights, remedies and entitlements of 457 visa holders and whether temporary migrant workers in Australia are adequately protected by relevant workplace and occupational health and safety laws.</p>	Not supported	7
<p><b>Recommendation 6</b>  <b>3.80</b> The committee recommends that the immigration programme be reviewed and, if necessary, amended to provide adequate bridging arrangements for 457 visa workers to pursue meritorious claims under workplace and occupational health and safety legislation.</p>	Referred to the independent review of the 457 programme	8

<b>Recommendation</b>	<b>Response</b>	<b>Pg</b>
<p><b>Recommendation 7</b> 3.91 The committee recommends that the Department of Immigration and Citizenship be required to provide 457 visa holders, on each approval, variation or re-approval of an application, with comprehensive information regarding sponsors' obligations; relevant workplace and human rights governing the employment relationship; and sources of workplace, legal and migrant advice and assistance while working in Australia.</p>	Referred to the independent review of the 457 programme	9
<p><b>Recommendation 8</b> 4.24 The committee recommends that the Government prepare and release submission guidelines for Enterprise Migration Agreements and Regional Migration Agreements.</p>	Supported in principle	9
<p><b>Recommendation 9</b> 5.104 The committee recommends that the government initiate a review of the Ministerial Advisory Council on Skilled Migration (MACSM) to establish clear terms of reference, operating guidelines and consultation and communication strategies for that body.</p>	Supported in principle	9
<p><b>Recommendation 10</b> 5.111 The committee recommends that the proposed changes to on-hire arrangements and sponsors' obligation not to recover certain costs be effected immediately and separately to the regulation currently proposed to commence on 1 July 2013.</p>	Referred to the independent review of the 457 programme	10
<p><b>Recommendation 11</b> 5.114 The committee recommends that the proposed empowerment of Fair Work Inspectors under the <i>Migration Act 1958</i> and to subclass 457 visa condition 8107 be effected immediately and separately to the Migration Amendment (Temporary Sponsored Visas) Bill 2013.</p>	Referred to the independent review of the 457 programme	10

### **Recommendation 1 – Supported in principle**

*The committee recommends that, for the exclusive purposes of the 457 visa programme, the Australian Workforce and Productivity Agency be given the responsibility and commensurate funding to compile and prepare a skills in demand list which also takes into account regional labour market skill shortages.*

The Government supports this recommendation in principle, with any subsequent work to be undertaken by the Department of Industry.

Preliminary analysis by the Australian Workforce and Productivity Agency (AWPA) indicates that additional data would be necessary to complete a list at the state/territory or regional level. However, this view would need to be confirmed with in-depth analysis of the matter prior to formulating any final view and the cost involved in obtaining the additional data is undetermined at this time.

### **Recommendation 2 – Referred to the Independent Review of the 457 Programme**

*The committee recommends that the government institute a review of the extent to which Australia's immigration system does and should facilitate the flow of low- and- semi-skilled labour into Australia.*

The Government has referred this recommendation to the independent review of the 457 programme.

The role of Australia's skilled migration programme is to contribute to Australia's economic prosperity through the supplementation of Australia's labour force with skilled migrants. Temporary skilled programmes support economic growth by assisting employees to address shortages, over the short to medium term, in particular industries and regions. Australia's permanent skilled programme contributes through the introduction of skills of high value over the long-term.

It is desirable, in developing skilled migration policies to allocate priority to those potential migrants who have the highest levels of human capital with an aim of raising the overall productive capacity of the labour force.

A number of programmes exist which permit visa holders to work in semi-low skilled occupations. These include the working holiday maker programmes, the special category visa for New Zealand citizens, the student visa programme and the seasonal worker programme. Those people who enter Australia under the family programme or as a dependent on a temporary or permanent skilled visa also have work rights.

It is not possible to determine the number of visa holders who seek work in low and semi-skilled occupations in Australia as skill levels are only recorded for primary applicants who apply for skilled visas.

### **Recommendation 3 - Referred to the Independent Review of the 457 Programme**

*The committee recommends that a dedicated pathway for intra-company transfers be introduced to the 457 visa programme.*

The Government has referred this recommendation to the independent review of the 457 Programme.

The purpose of the subclass 457 visa programme is to enable employers to fill short to medium term skill shortages by recruiting qualified overseas workers where they cannot find appropriately skilled Australians. The subclass 457 visa programme has provision for intra-company transfers.

When Labour Market Testing commenced in late 2013, certain intra-company transferees nominated for a subclass 457 visa became exempt in order to ensure Australia's compliance with international trade obligations. Those exempt will include executives and senior managers who are employees of a company operating in Australia, and who will be responsible for the entire or a substantial part of that company's operations in Australia.

### **Recommendation 4 – Not Supported**

*The committee recommends that the Fair Entitlements Guarantee Act 2012 be amended to make 457 visa holders eligible for entitlements under the Fair Entitlements Guarantee scheme.*

The Government does not support this recommendation.

The *Fair Entitlements Guarantee Act 2012* is a safety net scheme designed to safeguard employees whose employer may become insolvent and is unable to meet their liabilities, such as paying employee entitlements.

It has been a long standing principle in Australia that Government safety net schemes are only available to people with ties to Australia, such as through citizenship or permanent residence. Broadening the scheme to cover subclass 457 visa holders would be a significant policy change that may impact more broadly across other aspects of Government's financial assistance programmes.

Payments under the *Fair Entitlements Guarantee Act 2012* only become necessary in a very small percentage of liquidations and bankruptcies. In the vast majority of cases employees are able to get their entitlements through the assets of their former employer.

Ineligibility for assistance under the *Fair Entitlements Guarantee Act 2012* in no way affects a subclass 457 visa holders' right to recover unpaid entitlements from a former employer in the liquidation or bankruptcy process applicable to that employer.

These restrictions on residence requirements were tested in 2012 when the Fair Entitlements Guarantee legislation progressed through Parliament.

The Parliamentary Joint Committee on Human Rights accepted the residence eligibility requirements were unlikely to be incompatible with Australia's human rights obligations under the International Covenant on Civil and Political Rights, as they were necessary to maintain consistency with broader social security legislation and the restriction was appropriate and proportionate to that objective.

### **Recommendation 5 – Not Supported**

*The committee recommends that the Government initiate an inquiry into the extent to which relevant workplace and occupational health and safety legislation protects the legal rights, remedies and entitlements of 457 visa holders and whether temporary migrant workers in Australia are adequately protected by relevant workplace and occupational health and safety laws.*

The Government does not support this recommendation.

The *Fair Work Act 2009 (FW Act)* does not deal with coverage of employees by reference to the *Migration Act 1958*. The *FW Act* applies to national system employers, including trading and financial corporations formed within Australia and foreign corporations, and their employees throughout Australia including the territorial sea, Christmas and Cocos (Keeling) Islands.

The Government does not consider an inquiry into the extent to which relevant workplace relation laws protect subclass 457 visa holders is required at this time. The Fair Work Ombudsman provides tailored advice and assistance for workers that are identified as vulnerable, including subclass 457 visa holders, to ensure they receive their legal entitlements under the *FW Act*.

In place of another inquiry, the Government supports implementation of practical measures to ensure vulnerable workers are aware of their rights. The Department of Immigration and Border Protection currently makes available a fact sheet on the rights and obligations of overseas workers on its website. An informational video on the same topic is also made available. The fact sheet and video have both been translated into multiple languages to cater for persons from non-English speaking backgrounds who prefer to view this information in their native language.

In addition, Recommendation 11 has been implemented and will increase compliance monitoring in relation to employment conditions for sponsored subclass 457 visa holders.

With regard to work health and safety (WHS) laws, it is the nature of a person's employment which determines their legal rights and remedies under these laws rather than their residence status. All Australian jurisdictions have laws to protect workers from workplace harm and injury. Seven of the nine jurisdictions have adopted the nationally harmonised work health and safety laws. Under these laws, the definition of worker includes but is not limited to, employees, contractors, employees of labour hire companies and outworkers. Persons conducting a business or undertaking are required to ensure, so far as is reasonably practicable, the health and safety of workers engaged or caused to be engaged by them, as well as workers whose activities in carrying out work are influenced or directed by that person. Victoria and Western Australia are yet to adopt the harmonised legislation and continue to operate under their OHS legislation where protection is limited to 'employees'.

**Recommendation 6 – Referred to the Independent Review of the 457 Programme**

*The committee recommends that the immigration programme be reviewed and, if necessary, amended to provide adequate bridging arrangements for 457 visa workers to pursue meritorious claims under workplace and occupational health and safety legislation.*

The Government has referred this recommendation to the independent review of the 457 Programme.

With effect from 1 July 2013 the time period increased from 28 to 90 consecutive days, for primary subclass 457 holders to find a new sponsor or to depart Australia, if they cease employment with their sponsoring employer. This time period allows visa holders to pursue meritorious claims under workplace and occupational health and safety legislation before the consideration is given to cancelling the visa.

If a visa holder has a genuine need to be in Australia then the Department of Immigration and Border Protection may defer cancellation of the 457 visa until after this need has been met. Alternatively, if sufficient justification exists then a decision may be made not to cancel the visa, in which case the visa holder may remain in Australia until their subclass 457 visa expires. However, once the subclass 457 visa expires a person's options are limited.

Under current bridging visa provisions there is not capacity to provide a person the authority to stay in Australia while pursuing non-immigration related claims after a visa expires.

If a person is undergoing medical treatment in Australia in relation to a workplace injury, then they may be eligible for Medical Treatment (Subclass 602) visa. To be eligible for this visa the applicant would need to provide a medical treatment plan that includes an end date for the treatment.



**Recommendation 7 - Referred to the Independent Review of the 457 Programme**

*The committee recommends that the Department of Immigration and Citizenship be required to provide 457 visa holders, on each approval, variation or re-approval of an application, with comprehensive information regarding sponsors' obligations; relevant workplace and human rights governing the employment relationship; and sources of workplace, legal and migrant advice and assistance while working in Australia.*

The Government has referred this recommendation to the independent review of the 457 Programme.

The Department of Immigration and Border Protection currently makes available a fact sheet on the rights and obligations of overseas workers on its website. An informational video on the same topic is also made available. The fact sheet and video have both been translated into multiple languages to cater for persons from non-English speaking backgrounds who prefer to view this information in their native language.

**Recommendation 8 – Supported in principle**

*The committee recommends that the Government prepare and release submission guidelines for Enterprise Migration Agreements and Regional Migration Agreements.*

The Government supports this recommendation.

The Department of Immigration and Border Protection has prepared submission guidelines for both the Enterprise Migration Agreements and Regional Migration Agreements (now called Designated Area Migration Agreements) programmes, and is consulting with stakeholders prior to their release.

**Recommendation 9 – Supported in principle**

*The committee recommends that the government initiate a review of the Ministerial Advisory Council on Skilled Migration (MACSM) to establish clear terms of reference, operating guidelines and consultation and communication strategies for that body.*

The Government supports this recommendation.

In light of the current inquiries into the subclass 457 visa programme and the Significant Investor Visa programme, the government believes that the Ministerial Advisory Council on Skilled Migration (MACSM) should be reconstituted with new terms of reference once the review reports are received.

**Recommendation 10 - Referred to the Independent Review of the 457 Programme**

*The committee recommends that the proposed changes to on-hire arrangements and sponsors' obligation not to recover certain costs be effected immediately and separately to the regulation currently proposed to commence on 1 July 2013.*

The Government has referred this recommendation to the independent review of the 457 Programme.

The changes to prevent on-hire arrangements and to strengthen the obligation not to recover costs were implemented on 1 July 2013 through the *Migration Amendment Regulation 2013* (No. 5). All businesses who sponsor subclass 457 visa holders are required to comply with these requirements.

**Recommendation 11 – Referred to the Independent Review of the 457 Programme**

*The committee recommends that the proposed empowerment of Fair Work Inspectors under the Migration Act 1958 and to subclass 457 visa condition 8107 be effected immediately and separately to the Migration Amendment (Temporary Sponsored Visas) Bill 2013.*

The Government has referred this recommendation to the independent review of the 457 Programme.

The empowerment of Fair Work Inspectors and the change to visa condition 8107 were introduced by the *Migration Amendment (Temporary Sponsored Visas) Act 2013* which came into effect on 1 July 2013.