Australian Government

Department of Immigration and Border Protection

Temporary Work (Skilled) Migration (Subclass 457) Programme Legislative amendments in 2013

Post Implementation Review

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Purpose

The purpose of this document is to assess the effectiveness of four legislative amendments to the Temporary Work (Skilled) Migration (Subclass 457) Programme (457 programme) in 2013 in accordance with Post Implementation Review requirements of the Office of Best Practice Regulation (OBPR).[1]

The amendments being assessed were contained in the *Migration Amendment (Temporary Sponsored Visas) Act 2013* and the Migration Legislation Amendment Regulation 2013 (No. 3, F2013L01229) and introduced:

1. an obligation for sponsors to keep records of training and to honour their commitment to contribute towards training Australians
2. a genuineness test to assess the position's validity to the nominated occupation
3. changes to the occupation based exemptions to the English language provisions
4. Labour Market Testing (LMT).

The first three amendments came into effect on 1 July 2013, while LMT came into effect on 23 November 2013.

[1] See the OBPR website: http://ris.dpmc.gov.au/summary-compliance-reporting/post-implementation-reviews/

The 457 Programme

Overview

The 457 programme is a temporary visa programme designed to benefit Australia's economy. It is a demand driven programme which enables reputable businesses to sponsor a skilled overseas worker where they cannot find an appropriately skilled Australian citizen or permanent resident to fill a skilled position. The programme supports Australian businesses to meet their full economic potential by limiting the impact of skill shortages and helps overseas businesses to expand their business activities to Australia and fulfil contracts in Australia. The 457 programme also facilitates Australia's international trade in services obligations.

Skilled migrants are able to work in Australia for up to four years. Sponsors must ensure that the working conditions of sponsored 457 visa holders are not less favourable than those provided to Australians, and that overseas workers are not mistreated. The 457 programme provides a visa pathway to permanent employer sponsored visa options after probationary periods of employment.

Businesses affected by reforms to the 457 programme

In June 2013, there were 2,079,666 actively trading businesses, including 815,368 employing businesses in Australia[2]. At 30 June 2013, there were 30,090 active 457 sponsors, a small percentage of which were Government business enterprises and overseas businesses.[3] The regulatory changes to the 457 programme affected less than four per cent of Australian employers.[4]

Impact of the programme on the Australian labour market

Primary sponsored 457 visa holders represented less than one per cent of the Australian workforce of 11,573,100 at 31 May 2014.[5] The low percentage of 457 workers in any given occupation suggests it is unlikely that the terms and conditions of employment in Australia are affected by the 457 programme.

Further information on the 457 programme is at Appendix 1.

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[2] Australian Bureau of Statistics 8165.0 – Counts of Australian Businesses, including Entries and Exits, June 2009 to June 2013.

3 Department of Immigration and Border Protection Annual Report 2013-14 (2013-14 Annual Report), Table 23, page 72.

4 Noting that Government business enterprises and overseas businesses are excluded from the ABS data.

[5] *Robust New Foundations – A Streamlined, Transparent and Responsive System for the 457 Programme*, page 38.

2013 Legislative amendments

What was the problem these amendments intended to solve?

These reforms resulted from evidence that suggested some employers might be:

- sourcing overseas skilled labour without first checking the availability of Australian labour
- creating positions for the sole purpose of nominating a specific visa applicant
- misrepresenting the duties of positions to facilitate visas for applicants who were not otherwise eligible (e.g. did not meet the skill or English language requirements for the actual occupation).

These actions are not in-line with the intention of the 457 programme and might disadvantage Australian workers.

Analysis of 457 visa applications between 2009 and 2012 identified an increasing disconnect between the rate that applications were being lodged and variations in unemployment data published by the Australia Bureau of Statistics (ABS). [6] Further analysis indicated a significant component of this growth:

- was in industries and regions not experiencing skills shortages and therefore not consistent with broader labour market conditions[7]
- resulted from applications lodged by people who were in Australia on working holiday and student visas
- occurred in the occupations of Program and Project Administrators and Specialist Managers (not elsewhere classified), many of whom were in Australia when nominated.

The descriptions for Program and Project Administrators and Specialist Managers (not elsewhere classified) in the Australia and New Zealand Standard Classification of Occupations (ANZSCO)[8] are general in nature. This broad framing of these occupations made it possible to use the titles for a multitude of job roles, including those that would not otherwise have been considered sufficiently skilled for the 457 programme. There was a high prevalence of nominations for the occupations of Program and Project Administrators and Specialist Managers in industries that predominantly employ trade workers.

The Department also identified concerns with a small number of businesses with links to overseas businesses, which appeared to be using the 457 programme to recruit large numbers of workers from their home countries. In comparison, these companies engaged few Australian workers.

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[6] ABS 6202.0—Labour Force, Australia—the unemployment rate is based on data for persons over the age of 15 who are not employed and are actively looking for work.

[7] With reference to the ANZ job advertisement series which measures the number of jobs advertised in the major daily newspapers and internet sites covering the capital cities each month. More information is available at: www.anz.com/corporate/research/australian-industry-economics/job-advertisement-series/

[8] ANZSCO was developed jointly by the ABS and Statistics New Zealand for use in the collection, analysis and dissemination occupation statistics in Australia and New Zealand. ANZSCO classifies occupations by skill level and skill specialisation. The skilled migration programme uses ANZSCO to classify occupations. More information is available at: www.abs.gov.au

Why was Government action needed?

Scrutiny of existing visa requirements and sponsorship obligations indicated existing legislation did not always allow the Department to appropriately respond where client behaviour was not in-line with the intention of the programme. Of particular concern was the legal enforceability of the following three provisions in the 457 programme:

- the sponsor commitment to continue to contribute towards training Australians
- the sponsor certifying the nominee's qualifications and experience, aligning to the occupation's tasks as defined in ANZSCO
- the employer attesting to a strong record of, or demonstrated commitment to, employing local labour and non–discriminatory employment practices.

As long as the commitment, certification and attestation were made, the existing legislation did not allow the Department to refuse an application or cancel a sponsorship if there were concerns as to the validity of a sponsor's statements.

To mitigate possible risks within the 457 programme, measures were introduced to:

- legally obligate sponsors to contribute towards training Australians, while continuing to access the programme
- verify nominated positions were genuine
- remove occupation based English language exemptions to prevent circumventing of English language requirements
- require employers to provide evidence they had tested the Australian labour market prior to sponsoring a worker under the 457 programme.

What options were considered?

In addition to the four options implemented in 2013, there were two options that did not progress due to concerns raised by stakeholders during consultation in October 2012. Consultation forums included:

- Departmental: workshop with representatives from policy, legal, client services, and operational integrity
- Other Commonwealth agencies: inter–departmental committee (IDC)
- State and Territory Governments: Senior Migration Officials Group (SMOG)
- Industry and union associations: Ministerial Advisory Council on Skilled Migration (MACSM).

During late July and August 2013, the Department also undertook targeted consultations seeking stakeholder views on implementation of LMT.

The two provisions that were considered but not progressed were:

1. **Making the employer attestation of their commitment to employing Australians a binding commitment under the sponsor obligation framework**

   As part of the sponsor obligation framework, the Department initially proposed binding sponsors to their commitment of a strong record, or dedication to, employing local labour and non–discriminatory employment practices.

   An alternate option of introducing a binding obligation to enable the Department to take action if sponsors engage in discriminatory recruitment practices was considered feasible. However, this option was later withdrawn when it was decided to introduce LMT.

2. Removing occupations of concern from the 457 programme list of eligible occupations

Noting the issues with the Program and Project Administrators and Specialist Managers (not elsewhere classified) occupations, the Department initially proposed removing them from the list of eligible occupations. However, this was reviewed due to stakeholder concerns about restricting access by employers who were legitimately sponsoring workers with these occupations.

This issue was addressed by changing policy settings to make skill assessments for these occupations mandatory, introducing the genuine position amendment, and changing the exemptions to the English language provisions.

Consultation

Stakeholders were consulted on the impact of the 2013 legislative amendments to the 457 programme visa as part of an independent review and a survey of 457 sponsors. This section provides general information on the review and survey. Specific feedback on the four amendments is considered when analysing their impact.

The 2014 Integrity Review

In February 2014, the Australian Government commissioned the Independent Review into Integrity in the Subclass 457 Programme (the 457 Integrity Review). The review panel's report: *Robust New Foundations – A Streamlined, Transparent and Responsive System for the 457 Programme,* released on 10 September 2014, is a comprehensive source of information on stakeholder views about the programme.[9]

The terms of reference for the 457 Integrity Review required examining the integrity of the 457 programme in the context of reforms made to the programme over recent years, including the four amendments being assessed.

The panel met with over 150 stakeholders through face–to–face meetings and discussion forums in capital cities and received 189 written submissions.[10] The panel also used social media to invite comment, including a post on the Migration Blog and facilitating a live chat with the public on the Department's Facebook page.

2014 survey of 457 sponsors

To supplement consultation about the impact of the amendments, the Department surveyed Australian 457 business sponsors in April and May 2014. This survey sought information from sponsors about the effect of regulatory reforms to gauge their level of satisfaction with the 457 programme. Some survey questions replicated questions of a broader 457 survey in 2012.[11]

Approximately 84 per cent of the 305 respondents were personally involved in nominating 457 visa holders before and after July 2013, and provided comparative comments on changes. As shown in table 1, the majority of respondents were small businesses.

Table 1: Survey respondents by size of business

Business size	Number of employees	Number of sponsors	% Total
Small	less than 20	190	62%
Medium	20 to 199	82	27%
Large	200 or more	33	11%
		305	

[9] The report is available on the Department's website at: www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/streamlined-responsive-457-programme.pdf.

[10] Stakeholder submissions that were received during the review's consultation process are available on the Department's website at: www.border.gov.au/about/reports-publications/reviews-inquiries/independent-review-of-the-457-programme/submissions-received.

[11] Filling the gaps – Findings from the 2012 survey of subclass 457 employers and employees is available online at: www.border.gov.au/ReportsandPublications/Documents/research/filling-gaps.pdf. This survey collected data from 1500 employers who had sponsored 457 visa holders between late 2009 and mid-2011.

These business size proportions are similar to those of the 457 sponsor population. At 31 March 2014 the population of active 457 sponsors consisted of 65 per cent small, 28 per cent medium and seven per cent large businesses.

While only 11 per cent of respondents were large businesses, almost 30 per cent of respondents reported a payroll of more than $1 million per year. More than 50 per cent of respondents indicated their turnover was more than $1 million.

Impact Analysis

General impact on programme outcomes and trends

As shown in table 2, the number of nominations and primary visa applications lodged and the number of primary visas granted in 2013–14 fell noticeably from levels in 2012-13.

Table 2: Applications and visa grant trends 2011–12 to 2013–14

Measure	2011–12	2012–13	2013–14	% difference between 2012–13 and 2013–14
Nominations lodged	85,141	95,637	65,173	-31.9%
Visa applications lodged*	71,839	81,547	49,145	-39.7%
Visa grants*[12]	68,310	68,480	51,939	-24.2%

* Includes primary visas only – excludes visa applications/grants for secondary applicants such as family members

Some of this reduction might be attributable to the unemployment rate, which fluctuated between 5.6 and 6.1 per cent in 2013–14.[13] The reforms to the 457 programme in 2013 appear to also have contributed by limiting access to the programme but this impact cannot be specifically quantified.

1. Training obligations

Since 2009, 457 sponsors have been required to demonstrate recent expenditure on training Australians equivalent to one of two benchmarks:

Training Benchmark A: two per cent of their annual payroll in payment to a fund that provided training to Australians in their industry.

Training Benchmark B: one per cent or more of their annual payroll on the provision of training to their Australian employees.

While a 457 sponsor, businesses were required to demonstrate a commitment towards maintaining this level of training expenditure. Unless a sponsor was already financially contributing to training Australians at the training benchmark level, they incurred additional training costs to sponsor a skilled worker from overseas.

The intention of the training benchmarks was to encourage employers to invest in the training of Australian workers and consider upskilling an Australian employee before seeking an overseas worker. Although there was no evidence of non-compliance, the Department could not take any action if a business failed to maintain their training expenditure after being approved as a sponsor.

In July 2013, the honour–bound commitment was changed to a legally binding obligation that required sponsors:

- to keep records of training expenditure
- to continue to financially contribute towards training Australians.

[12] 2013-14 Annual Report, Table 20, page 69.
[13] BR0063 ANZ Job Services and Unemployment Rate Trend.

It should be noted, there was no evidence of non-compliance with the honour-bound commitment prior to this change.

Impacts

Sponsors affected by the obligation to keep records of training

Since July 2013, sponsors have been legally bound to keep records of expenditure related to training Australians. This allows the Department to assess whether sponsors meet the new training obligation. Compliant records consist of receipts showing payments equating to two per cent of the business' payroll to industry training for Australians; or one per cent on training the business' Australian employees.

Noting that expense receipts must be retained for taxation purposes, the training record keeping amendment required the business to show that training expenditure related to training Australians. The amount of time spent to develop and maintain these records would vary depending on the circumstances, and might be more difficult for sponsors who employ and train a mix of both Australian and overseas workers.

Sponsors affected by the obligation to honour training commitments

The training obligations introduced in July 2013 changed the previous honour–bound commitment to a legally binding obligation that can be enforced by the Department.

In 2013–14, approximately 12 per cent of applications for approval as a sponsor were from previously approved sponsors, a total of 1,786 of 15,363 applications.[14] On this basis and given no evidence of previous non–compliance with the honour–bound commitment prior to this change, it is estimated that a maximum of 1,800 sponsors per year might be required to provide training expenditure records on renewal of sponsorship.

The Department monitored 2,223 sponsors in 2013–14[15] and 2,199 sponsors in 2014–15.[16] However sponsors were not monitored for compliance with training obligations in 2013–14 as the obligations required a minimum of 12 months to pass before a sponsor's compliance could be assessed. In 2014–15 the Department did not commence monitoring of these obligations given the 457 Integrity Review's consideration of related issues. At 31 December 2014, the Department had not recorded any instances of non–compliance relating to training obligations.

Regulatory Impact

As shown in table 3 the regulatory costs resulting from the implementation of training obligations from July 2013 was $0.19 million per year.[17]

[14] BE8117.01 and BP0013 v103.
[15] 2013–14 Annual Report, Table 23, page 72.
[16] 2014–15 Annual Report, page 80.
[17] This has been costed according to the Commonwealth Regulatory Burden Measurement framework and represents the cost of the regulation as an annual average cost compared to business-as-usual.

Table 3: Regulatory costs of training obligations

Average annual regulatory costs (from business as usual)				
Change in costs ($ million)	Business	Community organisations	Individuals	Total change in cost
Training obligation	$0.19	$0	$0	$0.19

Consultation

In the 2014 survey, 10.3 per cent of respondents indicated they would like the training requirement changed. However, the survey did not seek details on how they would like it to be changed.

The 457 Integrity Review found that:

> *'there was strong support for the principle that employers who wish to sponsor 457 visa holders make some form of contribution to training Australians in return*.'[18]

The review noted that generally sponsors, while not opposed to contributing to training, thought the existing benchmarks were unnecessarily complex and inappropriate, particularly when applied equally to small businesses. The review recommended the current training benchmarks, which require payments based on a percentage of the business payroll, be replaced by an annual training fund contribution based on each 457 visa holder sponsored, with the contributions scaled according to size of business. This recommendation was accepted by the government, and the details relating to a new training fund contribution model were being finalised as at 31 January 2016.

Findings—net benefit

The amendments to legally obligate sponsors to continue to financially contribute towards training Australians while employing a 457 worker enabled the Department to take action in the case of non-compliance. This was not possible before the amendments. An enforcement mechanism improves the effectiveness of the training requirement although it is not clear if compliance has changed given that there is no evidence of previous non-compliance with the honour-bound training commitments. This has been at the cost of $0.19 million per year in regulatory impact on business.

Stakeholders supported the principle that employers accessing the 457 programme make some form of contribution to training Australians in return.

2. Genuine position

In 2009, streamlined nomination provisions were implemented to reduce red tape for employers. This enabled sponsors to certify some requirements were met, such as the skill level of the position and visa applicant. However, the Department was not able to refuse 457 visa nominations when these certifications were inaccurate. For example, a nomination could not be refused when evidence indicated a low, or semi–skilled position had been embellished to appear more skilled, or created specifically to engage the visa applicant.

[18] *Robust New Foundations – A Streamlined, Transparent and Responsive System for the 457 Programme*, page 58.

To rectify this issue, the Department introduced the genuine position amendment in 2013. This genuineness test enabled the Department to refuse nominations when there was evidence the position was created for the sole purpose of nominating a specific visa applicant, or the duties had been misrepresented to facilitate a visa for an applicant who was not otherwise eligible.

Additionally, the genuine position amendment was introduced to deter and respond to an increase in nominations where it was suspected that the duties of positions were misrepresented in two occupations: Program and Project Administrators and Specialist Managers (not elsewhere classified).

Impacts

Sponsors affected by the genuine position amendment

To reduce the potential impact from introducing additional requirements for 457 nominations as part of the genuine position amendment, evidence was only required if there were suspicions regarding the accuracy of certifications made by the sponsor. In particular to ensure that:

- position tasks significantly aligned to an eligible skilled occupation
- nominee's qualifications and experience were commensurate with those required to work in that occupation in Australia.

If sponsors accurately assessed the tasks of the position and skills of the proposed visa holders, the genuine position amendment would not have any impact.

Regulatory Impact

In the 2014 survey, 18 per cent of respondents indicated they were required to provide additional evidence in relation to the genuine position amendment. However, this impact only occurred if there was a suspicion of non–compliance with the regulation. As such, the regulatory impact of these costs is excluded under requirements of the government's Regulatory Burden Measurement Framework (i.e. the regulatory impact resulting from the genuine position amendment is nil).

As shown in table 5, the number of visas granted in the occupations Program and Project Administrators and Specialist Managers (not elsewhere classified) reduced after 2013.

Table 5: Primary visa grants to Program/Project Administrators and Specialist Managers (not elsewhere classified)[19]

Programme year (financial year)	2009–10	2010–11	2011–12	2012–13	2013–14	To 31 Dec 2014
Program or Project Administrator						
Number of primary visas granted	728	1,184	2,152	2,167	586	118
% of Total primary visas granted	2%	2%	3%	3%	1%	Less than 1%
Specialist Managers not elsewhere classified						
Number of primary visas granted	1,035	1,189	1,651	1,243	317	119
% of Total primary visas granted	3%	2%	2%	2%	1%	Less than 1%

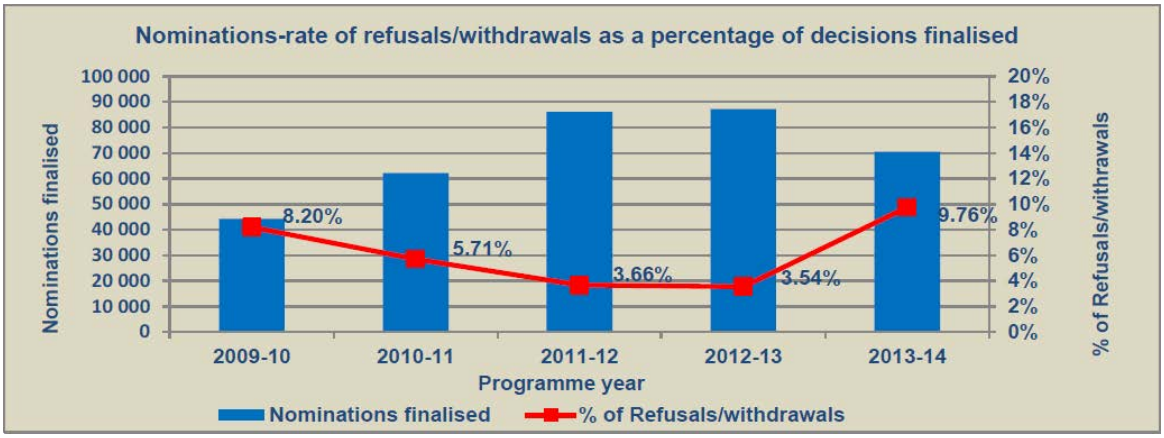
[19] Extracted from BPB0003_T4_FrontEnd v211.

This reduction in visa grants may be partially attributed to the genuine position amendment but cannot be specifically quantified. Other amendments implemented in July 2013, such as changed English language exemptions and new mandatory skill assessments for applicants in these two occupations may have also contributed to this outcome.

The genuine position amendment was also applied to other occupations where there was sufficient reason to believe duties of a lower skilled occupation have been misrepresented to gain access to the 457 programme, or the position was created for the sole purpose of attaining a visa without a corresponding business need.

The following graph shows the total rate of refusals and withdrawals increased as a percentage of nominations finalised in the 2013–14 programme year.

Graph 1: Subclass 457 nominations finalised and percentage of nominations refused or withdrawn[20]



This graph suggests the genuine position amendment implemented in July 2013, affected the number of nominations refused/withdrawn but this impact cannot be specifically quantified. Other changes made on 1 July 2013 may have also contributed to the increase, including:

- LMT provisions
- exclusions for fast food or takeaway food businesses from nominating in the occupations of Chef or Cook.

Consultation

The 2014 survey identified 15 per cent of respondents who thought the 2013 changes were not reasonable. Respondents were asked which specific changes they found unreasonable; however, the genuine position amendment was not identified as part of this exercise.

The 457 Integrity Review noted that:

> '*Many stakeholders consider this requirement to be highly effective as it provides decision–makers with a valuable tool with which to query dubious nominations. However, concerns have been raised by some stakeholders that this requirement provides decision–makers with too much discretion*.'[21]

The review panel supported the genuine position amendment and recommended that decision makers be given targeted training and that they invite further information from the sponsor before

[20] Extracted from BP0013 Global temporary entry nominations finalised.

[21] *Robust New Foundations – A Streamlined, Transparent and Responsive System for the 457 Programme*, page 67.

refusing a nomination on genuine position grounds.[22] These recommendations were implemented in late 2015.

Findings—net benefit

The genuine position amendment has improved the integrity of the 457 programme by limiting opportunities for sponsors to misrepresent the duties of occupations or create a position for the sole purpose of attaining a visa without a corresponding business need. The amendment appears to have contributed to a reduction in visa grants, particularly in the occupations Program and Project Administrators and Specialist Managers (not elsewhere classified).

3. English language exemptions

The English language requirement was introduced in 2007 to provide protection to 457 visa holders by helping them to understand their rights, minimise the risk of occupational health and safety (OH&S) incidents in the workplace, and facilitate participation in Australian society. Unless a 457 visa applicant was exempt from the English language provisions,[23] they were required to provide test results to demonstrate their ability to adequately communicate in English.[24]

Applicants in most occupations (other than occupations with a high OH&S risk or immigration non-compliance risk, predominantly technicians and trades workers) were not required to provide evidence of English proficiency unless this was a requirement of registration/licensing in the occupation. These occupation based exemptions had remained relatively constant since 2007.

In 2013, the occupation based English language exemptions were removed. This was to address concerns applicants were circumventing the English language requirements by misrepresenting the duties of a technician or trade worker by using general occupations such as Program and Project Administrators and Specialist Managers (not elsewhere classified).

Impacts

Applicants affected by changes to English language exemptions

Since 1 July 2013, some applicants previously exempt from the English language provisions on the basis of their nominated occupation, have been required to provide test results to demonstrate their English language ability.

In 2012–13, approximately 16 per cent of primary visa applicants were required to demonstrate English language ability either by providing test results or evidence that they have completed study in English.[25]

Data on whether an applicant was exempt from English language provisions, or provided English language test results was not captured by the Department's systems.

Regulatory Impact

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[22] *Robust New Foundations – A Streamlined, Transparent and Responsive System for the 457 Programme*, page 68

[23] Other exemptions, which were not changed in 2013, include applicants nominated in positions with a salary over the English language threshold ($96,400 per annum on 1 July 2013), with passports from Canada, United States of America, United Kingdom, Republic of Ireland, or New Zealand, and who had completed five years continuous full–time study in English at the secondary or tertiary level.

[24] The English language level has changed marginally over time, from an average score of 4.5 in the International English Language Testing System (IELTS) test in July 2007 to an average score of IELTS 5 In April 2009, to an overall score of 5 with a minimum of 4.5 in each of the four IELTS test components (reading, writing, speaking and listening) in April 2015.

[25] Data extracted from BE6045.01.

As shown in table 6, the regulatory impact to 457 visa applicants resulting from changes to the English language exemptions implemented in 2013 was $6.06 million per year.[26]

Table 6: Regulatory costs of English language exemptions

Average annual regulatory costs (from business as usual)				
Change in costs ($ million)	Business	Community organisations	Individuals	Total change in cost
English language exemptions	$0	$0	$6.06	$6.06

While there is an additional cost to some applicants, changes to the English language exemptions appear to have contributed to the reduction in the number of visas granted in the two occupations of concern: Program and Project Administrators and Specialist Managers (not elsewhere classified) shown in table 5.

Consultation

The 457 Integrity Review noted that:

> '*Stakeholders who support the retention of the current English language requirements state that it should not be lowered, because it is critical in ensuring good OH&S in the workplace, in understanding work rights, and in reducing the potential for exploitation in the workforce. Some have also argued that the English language requirements enhance the productivity and long term employability of 457 visa holders.*
>
> *Many stakeholders have advocated an exemption to English language requirement for certain occupations. There is support for an occupation based exemption for those occupations in ANZSCO Major Groups 1 and 2. Stakeholders have particularly argued that the occupations of academic/researcher, where 457 visa applicants have taught, published and/or studied in English, should be exempt from English language requirements. Feedback also indicates that it may be appropriate for concessions to the English language requirements to be permitted where appropriate, thus providing greater flexibility on an occupational basis*.'[27]

Findings—net benefit

The removal of occupation based English language exemptions appears to have prevented sponsors from circumventing English language requirements by misrepresenting the duties of a nominated position. This is suggested by the decline in positions nominated in the occupations of Program and Project Administrators and Specialist Managers (not elsewhere classified) shown in table 5. This integrity mechanism has been at the cost of $6.06 million per year in regulatory impact on 457 visa applicants and is not supported by all stakeholders.

[26] This has been costed according to the Commonwealth Regulatory Burden Measurement framework and represents the cost of the regulation as an annual average cost compared to business–as–usual.
[27] *Robust New Foundations – A Streamlined, Transparent and Responsive System for the 457 Programme*, page 64.

4. Labour market testing (LMT)

To address concerns some sponsors were accessing the 457 programme without giving due consideration to the Australian labour market, the November 2013 amendments required employers to provide evidence they had tested the Australian labour market prior to sponsoring a worker under the 457 programme.

The *Migration Amendment (Temporary Sponsored Visas) Act 2013* initially proposed mandatory LMT for all technician and trade workers, with discretion to apply them to other occupations. This generated considerable debate in the House of Representatives. Final amendments provided for:

- mandatory LMT for engineering and nursing occupations
- legally binding exceptions if the nomination was for a Working Holiday visa (subclass 417) employed in the agricultural sector.

The LMT provisions implemented on 23 November 2013 apply predominantly to technicians, trades workers, engineers, and nurses. Other mandatory exemptions included:

- nominations under labour agreements (the Australian labour market was considered when these agreements were negotiated)
- in the event of a major disaster declared by the Minister
- nominations where LMT would be inconsistent with international trade obligations of Australia.

Impacts

Sponsors affected by LMT

LMT provisions apply to nominations received on or after 23 November 2013. Sponsors were required to familiarise themselves with exemption information to determine whether LMT requirements applied (see Appendix 2). This impacted approximately 33,000 business sponsors each year.[28]

About 20,000 sponsors were required to provide evidence of LMT from 23 November 2013 to 31 December 2014.[29]

Regulatory Impact

As shown in table 9 the regulatory impact resulting from LMT provisions implemented in 2013 was $4.17 million per year.[30]

Table 9: Regulatory costs of LMT

Average annual regulatory costs (from business as usual)				
Change in costs ($ million)	Business	Community organisations	Individuals	Total change in cost
Labour market	$4.17	$0	$0	$4.17

[28] There were approximately 33,500 active sponsors as at 30 November 2013, BE6936.
[29] Extracted from BE8080.03
[30] This has been costed according to the Commonwealth Regulatory Burden Measurement framework and represents the cost of the regulation as an annual average cost compared to business-as-usual.

Average annual regulatory costs (from business as usual)
testing

Consultation

In the 2014 survey, 13.8 per cent of respondents indicated they would change LMT. A further eight per cent had concerns about the level of evidence required in support of the application and the time it takes to engage an employee on a 457 visa.

There has been a mixed reaction to the LMT provisions. The 457 Integrity Review recommended that LMT be abolished from the 457 programme. The review noted that businesses generally did not support LMT as they viewed it as an additional and ineffective regulatory burden. Those stakeholders who did support LMT had concerns that:

> *"the requirement is poorly constructed and not stringent enough to ensure Australian workers have priority for employment in Australian jobs".*[31]

Findings—net benefit

As noted by the recent 457 Integrity Review, employer conducted LMT is ineffective and its contribution to integrity and compliance in the 457 programme is unclear. The 457 Integrity Review was also critical of the LMT requirement in the 457 programme finding it to be costly for sponsors and unnecessary red tape. The government noted this recommendation and remains committed to ensuring that Australians have priority in the labour market.

[31] *Robust New Foundations – A Streamlined, Transparent and Responsive System for the 457 Programme*, page 45.

Conclusion

Table 10 demonstrates the total regulatory impact for the four provisions under the 457 programme was $10.42 million per year.[32]

Table 10: Summary of regulatory costs

Average annual regulatory costs (from business as usual)				
Change in costs ($ million)	Business	Community organisations	Individuals	Total change in cost
Training obligation	$0.19	$0	$0	$0.19
Genuine position	$0	$0	$0	$0
English language exemptions	$0	$0	$6.06	$6.06
Labour market testing	$4.17	$0	$0	$4.17
Total	**$4.36**	**$0**	**$6.06**	**$10.42**

The introduction of legally binding training obligations for sponsors seeking to access the 457 programme was intended to ensure sponsor commitment to a continued contribution towards the training of Australians. The training obligations have provided a new enforcement mechanism for the Department. As there is no evidence of previous non-compliance with the honour-bound training commitments it is not clear that compliance has improved with the introduction of legally binding training obligation. There has been stakeholder support for the principle that employers accessing the 457 programme make a contribution to the training of Australians in return.

The introduction of the genuine position amendment has improved the integrity of the 457 programme by limiting opportunities for sponsors to misrepresent the duties of occupations or create a position for the sole purpose of attaining a visa without a corresponding business need. The amendment appears to have successfully contributed to a reduction in visas granted in the occupations of Program and Project Administrators and Specialist Managers (not elsewhere classified).

The intent of the removal of the English language occupation exemptions was to prevent the circumventing of the English language requirements in the 457 programme. The amendments appear to have been successful in preventing sponsors from circumventing the English language requirements by misrepresenting the duties of a nominated person. As with the genuine position amendment, the success of this integrity reform is suggested by the decline in positions nominated in the occupations of Program and Project Administrators and Specialist Managers (not elsewhere classified). However, it should be noted that this reduction could be attributed to many factors.

[32] This has been costed according to the Commonwealth Regulatory Burden Measurement framework and represents the cost of the regulation as an annual average cost compared to business-as-usual.

The English language requirements in the 457 programme have been further refined in response to stakeholder feedback received during the 457 Integrity Review. In line with recommendations of this review greater flexibility was introduced to the English language requirements in April 2015. Overall, while the provisions introduced in July 2013 have strengthened the English language requirements, the more flexible arrangements implemented in April 2015 as a result of the 457 Integrity Review have provided a more streamlined approach.

The LMT requirement was introduced into the 457 programme to ensure that sponsors did not source overseas labour without first checking the availability of Australian labour. The effectiveness of the LMT amendments in deterring sponsors from engaging 457 visa holders without giving due consideration to the Australian labour market has been limited. LMT is only a small component of the 457 programme regulatory structure and is estimated to apply to less than one third of current nominations.

There is broad stakeholder criticism of LMT, that it is unnecessary, ineffective and costly red tape or not stringent enough to afford preference to Australian workers.

Appendix 1 – The 457 Programme

The application process

The 457 programme consists of a three–stage application process:

1. **Sponsorship**: the attributes of Australian or overseas businesses are assessed against specific requirements to check the legitimacy and reputation of the business. For example, Australian sponsors are required to demonstrate that they are lawfully operating and committed to training Australians. Sponsorship approvals generally last for five years. [33]
2. **Nomination**: the attributes of the position are assessed against criteria aimed at ensuring it is genuinely skilled and the employment conditions are no less favourable than those provided to Australians. A nomination must be lodged by an approved sponsor for each position they plan to fill with a visa holder.
3. **Visa**: the attributes of the main visa applicant and their family members are assessed against relevant requirements such as skill, English, character, and health provisions.

Sponsor obligations

The application process is supported by an enforceable sponsorship framework, which details obligations a sponsor must satisfy.

The Department monitors sponsors to assess whether they are complying with obligations. If it is found that a sponsor did not meet an obligation, the Department has some discretion based on the circumstances of the case to:

- issue a warning notice
- temporarily bar the sponsor from nominating more 457 programme applicants
- cancel the sponsorship and bar the sponsor from reapplying for up to five years
- financially penalise the sponsor via an infringement notice
- seek a court order for a higher penalty.

Occupations in the 457 Programme

At 30 June 2011 five occupations employed a workforce consisting of more than 10 per cent of 457 primary visa holders[34]:

Other Engineering Professionals	16.3%
Mechanical Engineering Draftspersons and Technicians	15.0%
Chemical and Materials Engineers	11.1%
Geologists, Geophysicists and Hydrogeologists	10.6%
Other Information and Organisation Professionals	10.4%

[33] The Department increased the maximum period for a 457 sponsors from three to five years on 18 April 2015 in response to recommendations of the 457 Integrity Review.
[34] *Robust New Foundations – A Streamlined, Transparent and Responsive System for the 457 Programme*, page 39

Programme review

The Department regularly reviews visa programmes, including the 457 programme, to identify and manage emerging risks, including through ongoing feedback from programme delivery areas and programme trends analysis in the context of broader labour market conditions.

Appendix 2 – Labour market testing

Source: Booklet 9: Temporary Work (Skilled) (subclass 457 visa)[35]

Labour market testing (LMT)

The LMT requirement applies to approved standard business sponsors and does not apply to nominations lodged by parties to a labour agreement.

Standard business sponsors are required to test the local labour market before lodging a nomination and must provide information with their nomination about their attempts to recruit Australian workers and how they have determined on the basis of these attempts that there is no suitably qualified and experienced Australian citizen, Australian permanent resident or eligible temporary visa holder available to fill the position.

Eligible temporary visa holders

A person is an eligible temporary visa holder in relation to a nomination if, at the time the nomination is made:

- the person is the holder of a Working Holiday Maker (subclass 417) visa or a Work and Holiday (subclass 462) visa, and
- the person is employed in the agricultural sector by the nominating employer (or an associated entity of that business), and
- the temporary visa does not prohibit the person from performing that employment.

International trade obligations

LMT will not need to occur where it would conflict with Australia's international trade obligations, in any of the following circumstances:

- The worker you nominate is a citizen of Chile or Thailand, or a citizen/permanent resident of New Zealand.
- The worker you nominate is a current employee of a business that is an associated entity of your business that is located in an Association of Southeast Asian Nations (ASEAN) country (Brunei, Myanmar, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand and Vietnam), Chile or New Zealand.
- The worker you nominate is a current employee of an associated entity of your business who operates in a country that is a member of the World Trade Organization, where the nominated occupation is listed on the Department's website as an Executive or Senior Manager and the nominee will be responsible for the entire or a substantial part of your company's operations in Australia.
- Your business currently operates in a World Trade Organization member country and is seeking to establish a business in Australia, where the nominated occupation is listed on the Department's website as an Executive or Senior Manager.
- The worker you nominate is a citizen of a World Trade Organization member country and has worked for you in Australia on a full–time basis for the last two years.

[35] Booklet 9: Temporary Work (Skilled) (subclass 457 visa) pp25-27, available online at: www.border.gov.au/Forms/Documents/1154.pdf.

For further information on the occupations which are considered to be Executives or Senior Managers for the purposes of Australia's international trade obligations please refer to the Department's website: www.border.gov.au/trav/visa-1/457-

Countries which are members of the World Trade Organization are listed on the Department's website: www.border.gov.au/trav/visa-1/457-

Occupation based exemptions from LMT

If an international trade obligation does not apply to the nomination, there may still be an exemption from the requirement to provide evidence of labour market testing depending on the occupation that is being nominated. For a full list of occupations for which LMT is required, refer to the Department's website: www.border.gov.au/trav/visa-1/457-

Major disasters

If a major disaster has occurred in Australia an exemption from LMT may be provided in order to assist disaster relief or recovery. This exemption can only be granted, in writing, by the Minister for Immigration and Border Protection.

Period in which LMT must have been undertaken

LMT must have been undertaken within the previous 12 months before lodging a nomination.

Evidence of LMT

If you are not exempt from the LMT requirement, you must provide evidence of having tested the Australian labour market within the 12 months prior to lodging the nomination. This evidence must be provided at the time you lodge the nomination. If you do not attach this evidence to your application it cannot be approved and will be refused.

Mandatory evidence

You must provide information with the nomination about your attempts to recruit Australians, including the details and expenses of any advertising you conducted.

You can complete the domestic recruitment table as evidence of your recruitment activities and attach it to your nomination. A copy of the table is available on the Department's website: www.border.gov.au/trav/visa-1/457-

Optional evidence

You may wish to provide other information and evidence about your attempts to recruit Australians, such as labour market research, expressions of support from Government employment agencies or information about your participation in job and career expositions.

Redundancies or retrenchments

If an Australian citizen or permanent resident has been retrenched or made redundant in your business, or an associated entity of your business, within the four months prior to lodging a nomination, you must also provide information about those redundancies or retrenchments.

You must have undertaken LMT after those redundancies or retrenchments, and you must provide information and evidence of that labour market testing with your nomination.