

JANUARY 2019

IMMIGRATION ALERT



Enhanced Integrity Act

DEPARTMENT OF HOME AFFAIRS – OVERVIEW

Following the establishment of the Department of Home Affairs (which includes the Department of Immigration and Border Protection) and its operational enforcement arm - the Australian Border Force, the Government continues to implement reforms to strengthen the quality and integrity of Australia's temporary and permanent employer-sponsored skilled migration programs.

SPONSORSHIP APPLICATIONS

In March 2018, the Temporary Work (Skilled) (Subclass 457) Visa was replaced with the new Temporary Skilled Shortage (TSS) (Subclass 482) Visa.

The reforms are intended to ensure that Australia's skilled migration programs meet Australia's labour market needs, increase the quality and economic contribution of skilled migrants, and address integrity concerns.

The Department continues to move to a digital processing model, including lodgement, assessment and decision making on visa applications, all of which are lodged online and can be processed anywhere as decided by the Department.

As part of the ongoing reforms, the Department continues to make significant changes to the 482 Sponsorship, Nomination and Visa Application Forms so as to allow for greater information to be collected using dynamic questions which are targeted and based on answers to previous questions.

SPONSORSHIP OBLIGATIONS AND COMPLIANCE

The Sponsorship for Temporary Business Entry Visa includes questions as to the business, its operations, whether it is currently, or was it previously, a business sponsor, its legal standing, whether it is registered with the Australian Taxation Office (ATO) and/or the Australian Securities & Investments Commission (ASIC) or the Australian Stock Exchange (ASX), as well as details of all Directors and/or high managerial agents, including the person authorised to communicate with the Department relating to compliance with sponsorship obligations.

On approval of the Sponsorship, the business is subject to Sponsorship Obligations and Sponsorship Monitoring by the Australian Border Force.

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These Sponsorship Obligations include:

- ▶ Cooperate with inspectors
- ▶ Ensure equivalent terms and conditions of employment (namely to pay the market salary rate described) to the 457/482 visa holder
- ▶ Pay travel costs to enable sponsored persons to leave Australia
- ▶ Pay costs incurred by the Commonwealth to locate and remove unlawful non-citizens
- ▶ Keep records
- ▶ Provide records and information to the Minister
- ▶ Provide information to Immigration when certain events occur
- ▶ Ensure primary sponsored person does not work in an occupation other than an approved occupation
- ▶ Not recover certain costs from a primary sponsored person or a secondary sponsored person
- ▶ Meet prescribed training requirements of Australian citizen and permanent resident staff
- ▶ Not to engage in discriminatory recruitment practices.

The Department, together with the Australian Border Force, has a broad range of powers to monitor and investigate possible non-compliance with Sponsorship Obligations and a range of measures to address identified breaches of obligation.

These include taking administrative action to bar or cancel the sponsorship approval, or to issue civil pecuniary penalties by way of infringement notices or take such other action depending on the nature and extent of the breach.

482 NOMINATION APPLICATION

The Department continues to make significant and ongoing changes to the Nomination Application including as to the business, the nominated position, the workforce details, the salary arrangements for an equivalent Australian worker, the salary arrangements of the nominated position, the workplace location, the labour market testing, the nominee details and such like.

The Authorised Officer of the business is required to certify and declare that all information provided to the Department is true and correct and is cautioned in regard to the consequences in the event of a breach.

THE DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION AND DATA MATCHING GUIDELINES

The Department has a Data Matching Program Protocol with the ATO which provides extensive data relating to employers and visa holders to the ATO to detect and deal with non-compliance and fraud and to protect the integrity of the tax system.

The Data Matching Program may be shared with other agencies, including State and Territory revenue authorities and law enforcement agencies.

The Data Matching Program allows the ATO (and other agencies) to identify instances of non-compliance and undertake compliance activity relating to visa holders, sponsors and migration agents.

The introduction of Single Touch Payroll Reporting (STPR) provides the ATO with real-time payroll data and therefore the opportunity to quickly identify and act on any anomalies or non-compliance.

MIGRATION AND OTHER LEGISLATION AMENDMENT (ENHANCED INTEGRITY) ACT 2018

The Enhanced Integrity Act and related measures contained in the associated Regulations enable the Minister to publish information including personal information about an approved sponsor or former sponsor who has failed to meet the applicable Sponsorship Obligations.

The following information about the sanctions must be published:

- ▶ Information identifying the approved sponsor or former approved sponsor – this may include the business or trading name, the ABN or individuals within the organisation in the case of sole traders or partnerships, however, individuals' personal information released will be limited to business details only
- ▶ The sponsorship obligations that they have failed to satisfy, and other details of the breach
- ▶ Action taken against them under the *Migration Act 1958* (the Act), including details of any sanctions or any subsequent decisions to waive the sanction.

The associated Regulations also:

- ▶ Allow the Department to collect, record, store and use the tax file numbers of skilled migrants for compliance and research purposes
- ▶ Allow the Department to enter into an enforceable undertaking with a sponsor who has breached their obligations.

The associated Regulations do not provide a specified period for publishing this information in the Act or Regulations but allows the Government to publish the information *at any time* in order to protect consumers and in the public interest.

The Minister is not required to observe *natural justice rules* in publishing this information and *no civil liabilities can arise* from the publication, in good faith, of such information.

There is a right of review of the decision to the Administrative Appeals Tribunal (AAT). Any application for review will be *added to* the published information. The outcome of the review will also be updated to the published information.

If the application for review is successful and the sanctioned decision is varied or set aside, the published information will be *updated or removed* as relevant.

The Enhanced Integrity Act provisions are retrospective as they allow for actions that were undertaken under the relevant provisions that occurred **on or after 18 March 2015** to be published.

This means that the Minister may publish sanctioned actions that have been undertaken on or after 18 March 2015.

ATO AND TAX FILE NUMBERS (TFN)

The Regulations also proscribe the visas for which TFN may be requested from a visa holder or a former visa holder of the Act.

The Regulations specify the temporary and permanent skilled visas for which TFN may be requested.

It includes subclasses 124, 132, 186, 187, 188, 189, 190, 457, 476, 482, 485, 489, 858, 887, 888, 890, 891, 892 & 893 visas.

The Department will only use the TFN information to identify sponsors that have not complied with Sponsorship Obligations and visa holders who have not complied with their visa conditions.

The TFN can be used, recorded or disclosed to:

- ▶ Verify the identity of a person
- ▶ Use, record or disclose the TFN to ensure compliance with the Act and the Regulations
- ▶ Use, record or disclose the TFN for the purposes of developing policy related to prescribed visas
- ▶ Use, record or disclose the TFN for the purposes of research, intelligence gathering and identifying trends or risks in relation to prescribed visas.

The Enhanced Integrity Act commenced on **13 December 2018**.

CORPORATE CULTURE TO ENSURE VISA AND SPONSORSHIP COMPLIANCE

The establishment of the Department and the Home Affairs Portfolio is a "once in a generation" change which is part of the Government's ongoing reform program.

The Enhanced Integrity Act significantly strengthens the sanctions against employer sponsors who breach their obligations under the subclass 457/482 visa programs.

It allows the Minister to publish details of sanctions against sponsors who breach their obligations from 18 March 2015.

The collection and use of TFN's of skilled migrants for compliance purposes and sharing of data with the ATO serves to further expand the power and reach of both the Department and the ATO at a time of increased focus on regulatory compliance, enforcement and sanctions for breach.

The Enhanced Integrity Act targets employers (sponsors and others) who seek to take advantage of sponsored workers, by publicly disclosing details of the breach.

It is a further example of the Department's use and disclosure of personal and business information obtained under the Act and the Regulations including to the ATO for the purposes of enforcing Australia's laws.

It adds to the Minister's already extensive discretionary powers and is yet another reason for businesses to ensure they understand, mitigate and manage risk, and ensure regulatory compliance or suffer the consequences of 'naming and shaming' and the consequential reputational and brand damage.

The Enhanced Integrity Act places greater responsibilities on Boards, Directors, Senior Managers and Shareholders to create a corporate culture requiring compliance.

Businesses should also anticipate increased sponsor monitoring and enforcement activities by the Australian Border Force as the operational enforcement arm responsible for sponsorship monitoring.

These profound changes are part of an ongoing reform agenda which will continue to impact on all aspects of immigration law in the increasingly robust and evolving regulatory framework.

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