Migration Amendment (Temporary Sponsored Visas) Bill 2013

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Law and Bills Digest Section

Note: This Digest is an historical Digest, published after the Bill was passed by Parliament and became an Act.

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Migration Amendment (Temporary Sponsored Visas) Bill 2013

Date introduced: 6 June 2013

House: House of Representatives

Portfolio: Immigration and Citizenship

Commencement: The Bill has been passed by Parliament and is now an Act.¹ Sections 1, 2 and 3 of the Migration Amendment (Temporary Sponsored Visas) Act 2013 commenced on Royal Assent, which occurred on 29 June 2013.² Schedules 1, 3, 4 and 6 commenced on 30 June 2013. Schedule 2 will commence on a date to be fixed by Proclamation, or six months after Royal Assent, whichever is sooner.

Part 1 of Schedule 5 commenced on 29 June 2013, while Part 2 will commence immediately after commencement of Part 6 of the Regulatory Powers (Standard Provisions) Act 2013. However, Part 2 of Schedule 5 will not commence at all if Part 6 of the Regulatory Powers (Standard Provisions) Act 2013 does not commence. The Regulatory Powers (Standard Provisions) Bill 2013 has not been enacted. It lapsed when the 43rd Parliament was prorogued on 5 August 2013. In order for that Bill to be enacted, it will need to be reintroduced to, and passed by, the new Parliament. Part 2 of Schedule 5 of the Migration Amendment (Temporary Sponsored Visas) Act 2013 will not commence if this does not occur.

This Digest considers the final text of the Migration Amendment (Temporary Sponsored Visas) Bill 2013 (the Bill) as enacted, but is expressed as if the Bill is prospective.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose of the Bill

The Bill seeks to amend the Migration Act 1958 (the Act) with respect to the subclass 457 visa scheme.³ The Bill imposes a labour market testing requirement and strengthens enforcement powers to ensure employers’ compliance with their sponsorship obligations.

1. The amended Bill was passed in the House of Representatives on 27 June 2013. It was then passed in the Senate on 28 June 2013.
Structure of the Bill

The Bill consists of three covering sections and six Schedules. The Schedules contain amendments to both the Act and to the Migration Regulations 1994 (the Regulations). 4

Background

The subclass 457 visa scheme allows employers to apply to become ‘approved sponsors’ (referred to in the remainder of this Digest as simply ‘sponsors’). Once approval is given by the Department of Immigration and Border Protection (the Department), a sponsor may then nominate positions to be filled by foreign workers. If the Department accepts a sponsor’s nomination of a position, a visa applicant may later apply for a subclass 457 visa on the basis that he or she is able to perform the functions required in that particular position.

The subclass 457 visa scheme attracts little or no controversy when skilled foreign workers come to Australia to work in fields where there is a labour shortage. There has been concern in recent times that subclass 457 visas are being granted in significant numbers for positions in the hospitality, accommodation and retail sectors, even though the Australian labour market has been weakening, and many positions in these sectors do not require a high level of skills. 5

This concern lead people to wonder whether certain employers are using the subclass 457 scheme to recruit foreign workers in circumstances where locals are available who could fill the positions. A motivation behind such actions on the part of certain employers could potentially be that foreign workers can be paid less than their Australian counterparts. The flow-on effects of such an arrangement could be that Australian working conditions might deteriorate in various sectors of the economy and subclass 457 visa holders could be exploited by unscrupulous employers.

The numbers of subclass 457 visa holders have been increasing. There were 68,400 primary visa holders (that is, not family members) in June 2010. This rose to 106,680 by 31 May 2013, an increase of 56 per cent in three years, at a time of limited economic growth. 6 To place these figures in context, it should be noted that subclass 457 visa holders account for only one per cent of the Australian workforce and two per cent of the skilled workforce. 7

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7. Ibid., p. 20.
Committee consideration

Senate Legal and Constitutional Affairs Legislation Committee

Following the Bill’s introduction on 6 June 2013, it was referred to this Committee on 18 June 2013 for inquiry and report by 20 August 2013.8 To assist the Parliament, the Committee presented its report on 24 June 2013 following a public hearing on 21 June 2013 in Canberra. The time-frame was tight.

The Committee proposed the Bill be passed, however there was a strong dissenting report by Coalition members.9

The Australian Human Rights Commission and the Law Council of Australia noted that the time constraints surrounding the Committee’s inquiry meant there was insufficient consultation with stakeholders.10

The Australian Council of Trade Unions (ACTU) and various unions supported the labour market testing measures contained in the Bill.11 Employer groups were opposed.12

The Coalition members of the Committee also expressed concern that the Government had failed to produce a Regulation Impact Statement (RIS).13 The Office of Best Practice Regulation (OBPR) required a RIS to be produced in relation to the labour market testing requirements contained in Schedule 2. The Prime Minister granted an exemption from this requirement on the basis of exceptional circumstances.14 There is to be a post implementation review of the Bill within one to two years of its implementation.15

Financial implications

The Explanatory Memorandum states that the financial impact of the Bill will be medium.16

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or

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10. Ibid., pp. 22–23.
11. Ibid., pp. 7–8.
12. Ibid., pp. 8–9 and pp. 33–35.
13. Ibid., pp. 35 onwards.
15. Ibid. Senate Legal and Constitutional Affairs Legislation Committee, op. cit., p. 16.

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declared in the international instruments listed in section 3 of that Act.\textsuperscript{17} The Government considers that the Bill is compatible.

There is some impact on the right to work, as the effect of labour market testing requirements might be to make subclass 457 visas less available to foreign workers.\textsuperscript{18} This in turn could raise concerns as to discrimination on the basis of nationality and immigration status.\textsuperscript{19} The possibility of publication of enforceable undertakings on a Departmental website could give rise to privacy concerns.\textsuperscript{20}

There is discussion of the existing limitation on the right against self-incrimination contained in the Act and in the \textit{Fair Work Act 2009}. The Bill does not alter this.\textsuperscript{21}

The Government considers that all the possible abrogations of human rights would be covered by the principle that they are ‘legitimate, proportionate and reasonable’.\textsuperscript{22}

The Parliamentary Joint Committee on Human Rights considered that the Bill was unlikely to raise human rights concerns.\textsuperscript{23}

\textbf{Key issues and provisions}

\textbf{Schedule 1—Sponsorship visas: preliminary}

There is only one item in this Schedule, which contains two new provisions.

\textbf{Item 1} inserts \textit{proposed section 140AA} into the Act, which emphasises that the purpose of the existing Division 3A (‘sponsorship’) of Part 2 of the Act is to provide for temporary sponsored work visas in order to address genuine skills shortages, without displacing employment and training opportunities for the Australian workforce.\textsuperscript{24}

The proposed section also states that the objective of ensuring employment and training for the Australian workforce is to be balanced with the rights of non-citizens under sponsorship programs.\textsuperscript{25}

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\textsuperscript{17} The Statement of Compatibility with Human Rights can be found at Attachment A to the Revised Explanatory Memorandum to the Bill.
\textsuperscript{18} Revised Explanatory Memorandum, Migration Amendment (Temporary Sponsored Visas) Bill 2013, op. cit., Attachment A, p. 3.
\textsuperscript{19} Ibid., p. 4.
\textsuperscript{20} Ibid., p. 5.
\textsuperscript{21} Ibid., p. 6.
\textsuperscript{22} Revised Explanatory Memorandum, Migration Amendment (Temporary Sponsored Visas) Bill 2013, Statement of Compatibility, op. cit., p. 7.
\textsuperscript{24} Proposed paragraphs 140AA(a) and (b).
\textsuperscript{25} Proposed paragraph 140AA(c).
The proposed section also refers to obligations on sponsors to ensure that sponsored workers are protected and that the sponsorship program is not used inappropriately.\textsuperscript{26} There is also reference to additional monitoring powers to ensure compliance with the sponsored visa program.\textsuperscript{27}

**Proposed section 140AB**, which was inserted into the Bill through a Government amendment introduced in the House of Representatives, provides for a Ministerial Advisory Council on Skilled Migration.\textsuperscript{28} The provision does not establish the Council, rather it requires the Minister to take all reasonable steps to ensure it exists. The provision specifies that the Council is to include representatives of unions, industry, state and territory governments and other members nominated by the Minister.\textsuperscript{29} The Council is to meet at least quarterly.\textsuperscript{30} The Council is to provide advice to the Minister in relation to the temporary sponsored work visa program.\textsuperscript{31}

**Schedule 2—Labour market testing**

These are the key provisions to be inserted into the Act by this Bill. ‘Labour market testing’ is defined in proposed subsection 140GBA(7) to be the testing of the Australian labour market to demonstrate whether or not a suitably qualified Australian citizen or permanent resident is readily available to fill a nominated position.

Subsection 140GB(2) presently provides that the Minister must approve a sponsor’s nomination of an applicant in connection with a proposed occupation, program or activity if prescribed criteria are satisfied. Item 1 of Schedule 2 repeals and replaces subsection 140GB(2) to impose an additional requirement that the labour market testing condition contained in proposed section 140GBA must be met, unless the sponsor is exempt under proposed sections 140GBB or 140GBC.\textsuperscript{32}

**Proposed section 140GBA** sets out the labour market testing condition. This condition is to apply to approved sponsors in classes prescribed by regulation.\textsuperscript{33} This condition is not to apply where its application would be inconsistent with an Australian international trade obligation set out by the Minister in a legislative instrument.\textsuperscript{34}

The Minister must be satisfied that the sponsor has undertaken labour market testing.\textsuperscript{35} The sponsor’s nomination is to be accompanied by appropriate evidence.\textsuperscript{36} If the sponsor, either directly or by way of associated entity, made one or more Australian citizens or permanent residents

\begin{itemize}
  \item [26.] Proposed paragraph 140AA(d).
  \item [27.] Proposed paragraphs 140AA(d), (e) and (f).
  \item [29.] Proposed paragraph 140AB(1)(c).
  \item [30.] Proposed paragraph 140AB(1)(d).
  \item [31.] Proposed subsection 140AB(2).
  \item [32.] Proposed paragraph 140GB(2)(a).
  \item [33.] Proposed paragraph 140GBA(1)(a).
  \item [34.] Proposed paragraph 140GBA(1)(c) and proposed subsection 140GBA(2).
  \item [35.] Proposed paragraph 140GBA(3)(a).
  \item [36.] Proposed paragraph 140GBA(3)(b).
\end{itemize}

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redundant, or retrenched them, in the previous four months, and such employees worked in the nominated occupation, such information is to be provided with the nomination.

The Minister must then be satisfied that suitably qualified and experienced Australian citizens and permanent residents are not readily available to fill the nominated position, and further, that a suitably qualified and experienced 'eligible temporary visa holder' is not readily available either.

'Eligible temporary visa holder' is defined in proposed subsection 140GBA(7) to be the holder of a subclass 417 Working Holiday visa or a subclass 462 Work and Holiday visa, who is employed in the agricultural sector by the sponsor, and whose visa does not prohibit that employment. It is unclear why such provision has been made in the Bill for such 'eligible temporary visa holders' as opposed to anybody else. This has not been detailed in the Revised Explanatory Memorandum.

The Minister may determine by legislative instrument a period within which labour market testing is required in relation to a nominated occupation. But despite this, if there have been redundancies or retrenchments in the nominated occupation by the sponsor in the previous four months, labour market testing must be undertaken after those redundancies and retrenchments.

**Proposed subsections 140GBA(5), (6) and (6A) provide for the evidence required to satisfy the labour market testing condition.** The evidence must include information about attempts to recruit suitable Australian citizens and permanent residents. This in turn must include details as to advertising, and fees paid for such advertising. It may also include details as to the sponsor’s participation in career expositions, fees paid in ‘recruitment attempts’ (this term is not defined) and details of the results of such recruitment attempts.

The evidence provided may also include copies of research released in the previous four months relating to labour market trends both generally and in relation to the nominated occupation. It may also include expressions of support from Commonwealth, state and territory government authorities responsible for employment matters. Finally, it may also include other types of evidence provided for by the Minister by way of legislative instrument.

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37. Proposed subparagraph 140GBA(3)(b)(ii).
40. Proposed subsection 140GBA(4).
41. Proposed subsection 140GBA(4A).
42. Proposed paragraph 140GBA(5)(a).
43. Proposed paragraph 140GBA(6)(a).
44. Proposed subparagraph 140GBA(6)(b)(i).
45. Proposed subparagraphs 140GBA(6)(b)(ii) and (iii).
46. Proposed subparagraph 140GBA(5)(b)(i).
47. Proposed subparagraph 140GBA(5)(b)(ii).
The Minister may take any of the optional evidence referred to above into account, but, should a sponsor decline to provide such evidence, the Minister is not to treat a nomination less favourably because of this.\textsuperscript{49}

**Proposed section 140GBB** sets out a ‘major disaster exemption’ from the requirement that a sponsor satisfies the labour market testing condition. It is necessary that the Minister issues an exemption in writing upon being satisfied that a major disaster has occurred which has such a significant impact that a government response is required and, further, that the exemption is necessary or desirable to assist in disaster relief or recovery.\textsuperscript{50} Such an exemption must be expressed to apply to a particular sponsor.\textsuperscript{51} These exemptions are not legislative instruments.\textsuperscript{52}

**Proposed section 140GBC** provides for ‘skill and occupational exemptions’ from the labour market testing requirement. The Minister may by legislative instrument specify an occupation for the purposes of **proposed subsections 140GBC(2)** and **140GBC(3)**.\textsuperscript{51} These legislative instruments are to be subject to the disallowance provisions contained in the *Legislative Instruments Act 2003*.\textsuperscript{54}

**Proposed subsection 140GBC(2)** allows for possible exemption from the labour market testing requirement if at least one of two requirements are met.\textsuperscript{55} One requirement is that the nominated occupation requires the worker to have a relevant bachelor degree or higher qualification, other than a protected qualification,\textsuperscript{56} the latter of which is defined in **proposed subsection 140GBC(6)** to be a qualification in engineering (including shipping engineering) or nursing. The other requirement is that the nominated occupation requires the worker to have five years or more of relevant experience,\textsuperscript{57} other than protected experience, which again relates to engineering and nursing.

**Proposed subsection 140GBC(3)** also allows for possible exemption from the labour market testing requirement if at least one of two requirements are met.\textsuperscript{58} One requirement is that the nominated position requires the worker to hold a relevant associate degree, advanced diploma or diploma covered by the Australian Qualification Framework set out under the *Higher Education Support Act 2003*, other than a protected qualification.\textsuperscript{59} The other requirement is that the nominated occupation requires the worker to have three years or more of relevant experience, again other than protected experience.\textsuperscript{60}

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\textsuperscript{49} Proposed subsection 140GBA(6A).  
\textsuperscript{50} Proposed subsection 140GBB(2).  
\textsuperscript{51} Proposed paragraph 140GBB(4)(b).  
\textsuperscript{52} Proposed subsection 140GBB(5).  
\textsuperscript{53} Proposed subsection 140GBC(4).  
\textsuperscript{54} Proposed subsection 140GBC(5). See paragraphs 83 to 87 of the Revised Explanatory Memorandum, op. cit., for further information.  
\textsuperscript{55} Proposed paragraph 140GBC(2)(a).  
\textsuperscript{56} Proposed subparagraph 140GBC(2)(b)(i).  
\textsuperscript{57} Proposed subparagraph 140GBC(2)(b)(ii).  
\textsuperscript{58} Proposed paragraph 140GBC(3)(a).  
\textsuperscript{59} Proposed subparagraph 140GBC(3)(a)(i).  
\textsuperscript{60} Proposed subparagraph 140GBC(3)(a)(ii).
Schedule 3—Subclass 457 visa conditions

Item 1 alters a visa condition contained in Schedule 8 to the Regulations. Schedule 8 contains work conditions which may be attached to visas. The most common is condition 8101 (no work). A more complicated condition contained in Schedule 8 is 8107, which is relevant to holders of subclass 457 visas. At present, if the visa holder ceases employment, the period of unemployment must not exceed 28 consecutive days. Proposed paragraphs 8107(3)(b) and 8107(3B)(b) increase this to 90 consecutive days.

If a visa holder is unemployed for longer than is permitted under condition 8107, this can amount to a breach of visa conditions, which in turn could lead to a refusal to grant a further visa or even the possibility of cancellation of a currently-held visa.

Item 2 provides that this amendment is to apply to visas already in force as well as those granted on or after the commencement of the Act. The amendment is to apply from the time the visa was granted, whether before, on or after commencement.

The provisions in this Schedule are beneficial to the holders of subclass 457 visas. Given these are amendments to Schedule 8 in the Regulations, there seems to be no compelling need for them to be contained in the Bill. Drafting Direction 3.8 (Subordinate Instruments) issued by the Office of Parliamentary Counsel provides that Acts should not amend regulations except for compelling reasons, such as a possible need to amend a regulation retrospectively in a way that adversely affects a person’s rights or imposes new liabilities contrary to the Acts Interpretation Act 1901. 61

Schedule 4—Sponsorship Obligations

Subsection 140H(1) already provides that approved sponsors must satisfy sponsorship obligations prescribed by the regulations.

Item 6 inserts proposed section 140HA which requires the Minister to take all reasonable steps to ensure regulations made for the purposes of subsection 140H(1) include certain matters such as paying market salary rates, 62 paying departure costs of visa holders 63 and ensuring training requirements are met. 64

Schedule 5—Enforceable undertakings by sponsors

Section 140K already provides the Minister with powers to sanction sponsors for failure to comply with sponsorship obligations. The possible actions are to:

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61. Office of Parliamentary Counsel (OPC), Drafting direction 3.8: subordinate instruments at [68], accessed 15 August 2013.
62. Proposed paragraph 140HA(1)(a).
63. Proposed paragraph 140HA(1)(c).
64. Proposed paragraph 140HA(1)(i).
i. bar a sponsor from sponsoring further people

ii. cancel a sponsor’s approval to be a sponsor altogether

iii. apply for a civil penalty order against the sponsor

iv. issue an infringement notice to the sponsor in lieu of applying for a civil penalty order

v. take a security under the Act or

vi. enforce a security already taken.

Items 1, 2 and 3 add to the existing sanctions available by also allowing the Minister to accept undertakings under proposed section 140RA and then, if the Minister considers that undertaking to have been breached, to apply for an order under proposed section 140RB.

Item 4 contains the two key provisions inserted by this Schedule. Proposed section 140RA provides the Minister may accept three types of written undertakings from a person in relation to complying with sponsorship obligations contained in section 140H. These are that the person will:

i. take specified action

ii. refrain from taking specified action or

iii. take specified action directed towards ensuring either non-contravention of section 140H or the unlikelihood of non-contravention in the future. As well as being difficult to paraphrase, this third category seems superfluous as it would appear to be covered by the first category.

The Minister may by written notice to the person cancel the undertaking. A person may withdraw or vary an undertaking only with the Minister’s consent, and the undertaking may be published on the Departmental website. The Senate Standing Committee for the Scrutiny of Bills noted that the Explanatory Memorandum to the Bill provides that, to protect privacy, the published undertaking will not include the personal information of any person or any other information that may assist in

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65. Subparagraph 140K(1)(a)(i) when read in conjunction with section 140M.
67. Subparagraph 140K(1)(a)(iii).
68. Paragraph 140K(1)(b).
69. Paragraph 140K(1)(c).
70. Ibid.
71. Proposed paragraph 140RA(1)(a).
72. Proposed paragraph 140RA(1)(b).
73. Proposed paragraph 140RA(1)(c).
74. Proposed subsection 140RA(4).
75. Proposed subsection 140RA(3).
76. Proposed subsection 140RA(6).
the identification of a person who has provided the undertaking’.77 However, as noted by the Committee, this restriction is not included in the legislation. Accordingly, the Committee recommended that the Minister consider the insertion of a provision ‘that will limit the publication of personal information’.78 The Bill was not amended in line with the Committee’s suggestion.

Proposed section 140RB provides for the enforcement of undertakings. The Minster may apply to a court if he or she considers that an undertaking has been breached.79 If the court is satisfied there has been a breach, the court may make any or all of four types of orders:

i. an order directing compliance with the undertaking80

ii. an order directing payment to the Commonwealth of any amount up to the amount of financial benefit which has accrued to the person because of the breach81

iii. an order directing compensation be paid to a person who has suffered loss because of the breach82 or

iv. any other order as the court considers appropriate.83

The Department’s Annual Report 2011–12 provides details about the monitoring of sponsors.84 This information is set out in the Appendix below.

Schedule 6—Sponsorship inspector powers

Section 140V presently provides that the Minister may appoint inspectors. Section 140X presently provides that such inspectors’ powers are to be exercised in determining compliance with sponsorship obligations or for other prescribed purposes.

Item 3 inserts proposed section 140UA, which provides that an inspector under the Fair Work Act 2009 may exercise section 140X powers.85 The proposed section also provides that such inspectors may exercise compliance powers contained in Subdivision D of Division 3 of Part 5–2 of the Fair Work Act, which sets out the functions and powers of Fair Work Inspectors for the purposes of Subdivision F of Division 3A or Part 2 of the Act.86

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78. Ibid., p. 54.
79. Proposed subsection 140RB(1).
80. Proposed paragraph 140RB(2)(a).
81. Proposed paragraph 140RB(2)(b).
82. Proposed paragraph 140RB(2)(c).
83. Proposed paragraph 140RB(2)(d).
86. Proposed subsection 140UA(2).
The remainder of the items contained in the Schedule integrate the inspectors under the *Fair Work Act* into the existing provisions concerning inspectors set out in Subdivision F of Division 3A or Part 2 of the Act.
Monitoring of sponsors

The sponsorship framework under the Migration Act aims to enhance the integrity of temporary economic visas, including the subclass 457 visa program. It seeks to ensure that vulnerable overseas workers are not exploited and that the working conditions of sponsored visa holders meet Australian standards.

The department monitors sponsors and has the power to sanction those who are found not to be complying with their sponsorship obligations. In addition to administrative sanctions (to bar a sponsor, or cancel a person’s approval as a sponsor), the department may also apply to a court for a civil penalty order, or alternatively serve an infringement notice where a sponsor has contravened a civil penalty provision.

There are 32 inspectors across Australia who have the power to:

- enter a premises or place without force
- require a person to produce a record or documents
- inspect and make copies of any number of documents and
- interview people while at a premises or place.

In 2011–12, there was a significant increase in the number of infringement notices served. In addition, on 2 July 2012, the department successfully litigated against one standard business sponsor, with the court ordering a pecuniary penalty of $35,000 plus costs. It sent a strong signal to sponsors that they must fulfil their sponsorship obligations.

Table 21 shows monitoring performance by the department over the past three program years.

### Performance

**Table 21: Subclass 457 monitoring performance**

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<tr>
<th></th>
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<td>Active sponsors (sponsors with a primary visa holder in Australia at the end of the financial year)</td>
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<td>Sponsors monitored</td>
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<td>2,091</td>
<td>1,754</td>
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<tr>
<td>category</td>
<td>2014</td>
<td>2015</td>
<td>2016</td>
</tr>
<tr>
<td>--------------------------------------------------------------------------</td>
<td>------</td>
<td>--------</td>
<td>------</td>
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<tr>
<td>Sponsors’ sites visited</td>
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<td>856</td>
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<td>Sponsors formally sanctioned</td>
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<td>Sponsors formally warned</td>
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<td>Referrals to other agencies</td>
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