

# Chapter 1

## Introduction

### Referral

1.1 On 17 September 2015, the Senate referred the provisions of the Migration Amendment (Charging for a Migration Outcome) Bill 2015 to the Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 10 November 2015.<sup>1</sup>

1.2 The proposal to refer the Bill in the Selection of Bills Committee report requests that the committee 'further investigate potential and unintended consequences of the Bill'.<sup>2</sup> The committee has also been asked to investigate more fully the extension of the 'grounds upon which a visa may be cancelled to include situations in which the Minister is satisfied that a benefit was asked for by the visa holder from another person in return for a sponsorship related event (regardless of whether this sponsorship occurs)'.<sup>3</sup>

### Conduct of Inquiry

1.3 Details of the inquiry, including a link to the Bill and associated documents, were placed on the committee's website.<sup>4</sup> The committee also wrote to 151 organisations and individuals, inviting submissions by 8 October 2015. Submissions continued to be submitted after that date.

1.4 The committee received 11 submissions for the inquiry. The list of submissions and additional information received by the committee is listed at Appendix 1.

### Acknowledgement

1.5 The committee thanks those organisations who made submissions.

### Background

#### *Employer sponsored temporary and permanent visa programmes*

1.6 The Temporary Work (Skilled) (Subclass 457) visa programme was introduced by the Australian government in 1996 in order to enable 'Australian employers to address workforce needs by sponsoring skilled workers to fill vacancies where an appropriately skilled Australian citizen or permanent resident cannot be found to fill the position'. This programme has been underpinned by two principles:

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1 *Journals of the Senate*, No. 118—17 September 2015, p. 3146.

2 Senate Selection of Bills Committee, *Report No. 12 of 2015*, 17 September 2015, Appendix 1.

3 Senate Selection of Bills Committee, *Report No. 12 of 2015*, 17 September 2015, Appendix 2.

4 See:

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Visa\\_for\\_payments\\_Bill](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Visa_for_payments_Bill)

- to enable a business to sponsor a skilled overseas worker if they cannot find an appropriately skilled Australian citizen or permanent resident to fill a skilled position; and
- to ensure that the working conditions of a sponsored visa holder are no less favourable than those provided to an Australian worker and that overseas workers are not exploited.<sup>5</sup>

### ***Independent Review of the 457 visa programme (2014)***

1.7 In February 2014, the then Assistant Minister for Immigration and Border Protection, Senator the Hon Michaelia Cash, commissioned an independent panel to review the Temporary Work (Skilled) subclass 457 visa programme (independent review). The terms of reference for this comprehensive review required the panel to:

...recommend a system that, operating in the national interest, was sound and resistant to misuse (the 'integrity' goal), and at the same time, flexible and able to respond quickly to economic and business changes (the 'productivity' goal).<sup>6</sup>

1.8 The panel issued a report of their findings in September 2014 with a series of recommendations. In response to its findings 'that some sponsors have been paid by visa applicants for a migration outcome' and that this 'undermines the integrity of the programme', the panel recommended:

That it be made unlawful for a sponsor to be paid by visa applicants for a migration outcome, and that this be reinforced by a robust penalty and conviction framework.<sup>7</sup>

### ***Migration Amendment (Charging for a Migration Outcome) Bill 2015 [Provisions]***

1.9 On 16 September 2015, the Migration Amendment (Charging for a Migration Outcome) Bill 2015 was introduced into the House of Representatives by the Minister for Immigration and Border Protection, the Hon Peter Dutton MP (Minister).

1.10 In his second reading speech, the Minister noted that the Bill is a direct response to the independent review and its recommendation:

This bill will implement a key integrity recommendation of the independent review into integrity in the subclass 457 program: that it be made unlawful for a sponsor to be paid by visa applicants for a migration outcome and that this be reinforced by a robust penalty and conviction framework.<sup>8</sup>

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5 Department of Immigration and Border Protection, *Submission 10*, p. 3.

6 John Azarias, Jenny Lambert, Professor Peter McDonald, Katie Malyon, *Robust New Foundations. A Streamlined, Transparent and Responsive System for the 457 Programme: An Independent Review into Integrity in the Subclass 457 Programme*, September 2014, p. 6, <http://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/streamlined-responsive-457-programme.pdf> (accessed 2 October 2015).

7 See: Recommendation 10.7, *Robust New Foundations*, p. 73.

8 Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 16 September 2015, p. 23.

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## Key provisions and purpose of Bill

1.11 The Bill seeks to amend the *Migration Act 1958* to:

[I]ntroduce a new criminal and civil penalty regime that will make it unlawful for a person to ask for, receive, offer or provide payment or other benefits in return for a range of sponsorship related events. The bill also allows visa cancellation to be considered where the visa holder has engaged in such conduct, referred to as 'payment for visas' conduct.<sup>9</sup>

1.12 The Bill is comprised of one schedule with the following key provisions.

### *Definitions of benefits*

1.13 Proposed section 245AQ sets out a number of definitions including the prohibited types of payments or other benefits to be exchanged for visas.<sup>10</sup> This section would add a definition of benefits which includes:

- a payment or other valuable consideration; and
- a deduction of an amount; and
- any kind of real or personal property; and
- an advantage; and
- a service; and
- a gift.<sup>11</sup>

### *Definitions of sponsorship activities*

1.14 Proposed section 245AQ also contains definitions for the prohibited types of conduct between a sponsor and a visa applicant or visa holder 'at any point in the visa application process or throughout the duration of the visa' that may be classed as being 'payment for visa'.<sup>12</sup>

### *Types of visas affected*

1.15 This Bill would affect a range of visa classes including:

- Subclass 457 (Temporary (Skilled)) visa;
- Subclass 401 (Temporary Work (Long Stay Activity)) visa;
- Subclass 402 (Training and Research) visa;
- Subclass 420 (Temporary Work (Entertainment)) visa;
- Subclass 488 (Superyacht Crew) visa;
- Subclass 186 (Employer Nomination Scheme) visa;

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9 *House of Representatives Hansard*, 16 September 2015, p. 23.

10 Explanatory Memorandum, pp 7–10.

11 Explanatory Memorandum, p. 7.

12 Explanatory Memorandum, pp 7–10.

- Subclass 187 (Regional Sponsored Migration Scheme) visa.<sup>13</sup>

1.16 The Bill would also retain the flexibility to allow for changes to the 'class and subclass numbers and titles of the visas and sponsor classes' to be 'amended from time to time' through the use of regulations.<sup>14</sup>

### ***Criminal and civil penalties***

1.17 The Bill prescribes a range of criminal and civil penalties for sponsors, visa applicants or holders, or any other third party convicted of exchanging a payment or benefit for a visa.<sup>15</sup>

1.18 Prohibition on asking for or receiving a benefit in return for the occurrence of a sponsorship-related event is defined in proposed sections 245AR and 245AS. In both of these sections, the evidentiary burden or onus of proof is reversed and placed on the defendant. The Explanatory Memorandum notes that this is because 'the information as to whether the benefit constitutes a reasonable fee for a professional fee is uniquely within the knowledge of the defendant'.<sup>16</sup>

1.19 Criminal penalties would apply to sponsors and other third parties who are deemed to have contravened proposed section 245AR. The maximum penalties are 'imprisonment for 2 years or 360 penalty units [currently \$64 000] or both'. Criminal penalties would not apply to visa holders.<sup>17</sup>

1.20 Civil penalties would apply to sponsors, visa holders and third parties who are deemed to have contravened proposed sections 245AR and 245AS. The maximum civil penalty would be 240 penalty units or \$43 200 for an individual or \$216 000 for a body corporate.<sup>18</sup>

1.21 Additional criminal and civil penalties are defined in proposed sections 245AT and 245AU for an executive officer of a body corporate who committed a sponsorship related offence (as defined in proposed sections 245AR and 245AS). Executive officers are deemed to be a chief executive officer, chief financial officer or the secretary of a body corporate. The Bill would also provide for additional offences whereby:

- the officer knew that, or was reckless or negligent as to whether, the sponsorship-related offence would be committed; and
- the officer was in a position to influence the conduct of the body in relation to the sponsorship-related offence; and

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13 Explanatory Memorandum, p. 8.

14 Explanatory Memorandum, p. 8.

15 Explanatory Memorandum, pp 7–10.

16 Explanatory Memorandum, pp 10 & 11.

17 Explanatory Memorandum, p. 10.

18 Explanatory Memorandum, pp 10–12.

- the officer failed to take all reasonable steps to prevent the sponsorship-related offence being committed.<sup>19</sup>

1.22 In addition to extending penalties to other corporate executive officers, the Bill would also seek to capture unincorporated associations. Proposed section 245AY provides that penalties may 'apply to an unincorporated association as if it were a person' whereby each member of the committee of management is deemed to have committed the offence.<sup>20</sup>

1.23 Further, proposed sections 245AR and 245AS may be deemed to be contravened 'even if the sponsorship related event does not take place'.<sup>21</sup>

1.24 In addition to the penalties outlined above, item 18 of the Bill would introduce 'a new discretionary power to consider visa cancellation, where any person engages in "payment for visas" conduct'. Any person subject to a visa cancellation would be able to 'seek merits or judicial review of that decision'.<sup>22</sup>

1.25 Consequential regulatory amendments would also 'allow for the cancelling and barring of a sponsor who engages in "payment for visas" conduct' and 'strengthen sponsorship obligations' to improve the Department of Immigration and Border Protection's (department) ability to verify sponsor's records.<sup>23</sup>

### ***Extraterritorial jurisdiction***

1.26 Proposed section 245AW of the Bill provides for criminal and civil penalties to apply if the 'payment for visas' conduct occurs wholly or partially in Australia. The EM explains:

For example, if a person in Country X sends a letter to a person in Australia asking for, offering or transmitting a benefit in return for the occurrence of a sponsorship-related event, the conduct is taken to have occurred partly in Australia for the purposes of section 245AW of the Act.<sup>24</sup>

## **Consideration of the Bill by other committees**

### ***Scrutiny of Bills***

1.27 On 14 August 2015, the Senate Standing Committee for the Scrutiny of Bills sought the Minister's advice on the following aspects of the Bill:

- merits review of the Minister's discretionary power to consider cancellation of a temporary or permanent visa under item 1, proposed subsection 116(1AC);

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19 Explanatory Memorandum, p. 12.

20 Explanatory Memorandum, pp 21–22.

21 Explanatory Memorandum, pp 9 & 12.

22 Hon Peter Dutton MP, Minister for Immigration and Border Protection, *House of Representatives Hansard*, 16 September 2015, p. 24. See also: Explanatory Memorandum, p. 27.

23 Department of Immigration and Border Protection, *Submission 10*, p. 10.

24 Explanatory Memorandum, p. 20.

- trespass on personal rights and liberties—abrogation of privilege against self-incrimination in items 5, 14 and 15;
- trespass on personal rights and liberties—evidential onus in item 6, proposed subsections 245AR(3), 245AR(6) and 245AS(4);
- trespass on personal rights and liberties—evidential onus in item 6, proposed subsection 245AW(5); and
- trespass on personal rights and liberties—strict liability in item 6, proposed subsections 245AR(5) and 245AS(1).<sup>25</sup>

1.28 At the time of drafting, the Senate Standing Committee for the Scrutiny of Bills had not published the Minister's response.

### ***Human Rights***

1.29 The Parliamentary Joint Committee on Human Rights (PJCHR) concluded that the Bill does not appear to give rise to human rights concerns.<sup>26</sup>

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25 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 11 of 2015*, 14 August 2015, pp 20–25.

26 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report, Twenty-ninth report of the 44<sup>th</sup> Parliament*, 13 October 2015, p. 2.