MIGRATION INSTITUTE
— OF AUSTRALIA —

Further submission to the Senate Standing Committee on Legal and Constitutional Affairs' Inquiry into the Migration Legislation Amendment (Worker Protection) Bill 2008

The MIA thanks the Committee for the opportunity to provide further comment following our appearance on 31 October 2008.

A. **Inspectors**

1. The MIA notes that the Explanatory Memorandum attached to the *Migration Legislation Amendment (Worker Protection) Bill 2008* states that the powers of inspectors *"are not in accordance with the Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers (the Guide). However, it is necessary for inspectors appointed under new section 140V to have similar powers as Workplace Inspectors, as it is probable that Workplace Inspectors will also be appointed as inspectors under new section 140V. If so, it would be intended that the Workplace Inspectors will exercise their powers for the purposes of both the Workplace Relations Act 1996, and the purposes in section 140X(1), concurrently."*

2. At the first instance the MIA believes that the framing of the Bill must be in accordance with the Commonwealth's own *Guide*.

3. The *Guide* embodies well established principles in relation to the framing of Commonwealth civil penalties and enforcement powers. The MIA is strongly of the view that for the sake of equity and consistency, all Commonwealth portfolios should be bound by what are in effect the Commonwealth's own guidelines. The MIA accepts that the guidelines were implemented for sound reasons to provide an equitable framework for legislation in this area. An example of departure from the *Guide* is in the case of entry to premises. The Guide states that entry to premises without consent should only be authorised in *"situations of emergency, serious danger to public health, or where national security is involved"*. Mere inconvenience should not be a sufficient ground to depart from established principles and safeguards. If the Bill is to enjoy the confidence of the community and accord appropriate safeguards, the *Guide* should be adhered to. Before any consideration can be given to any deviation from the *Guide*, strong and cogent reasons should be established.

4. The reason given in the Explanatory Memorandum that *"It would be impractical for inspectors to ensure compliance with their powers, if they are exercising two different sets of powers on the same workplace inspection"* is not in our view an acceptable ground for a departure from the *Guide*.

MIGRATION INSTITUTE OF AUSTRALIA
T 02 9279 3140 | F 02 9279 3172 | E info@mia.org.au | W www.mia.org.au
Post: PO Box Q102, QVB Post Office NSW 1230 | Street: Level 3, 83 York Street, Sydney
ABN 83 003 409 390

5. The MIA is concerned that there appears to be no provision for an inspector to have the power to extend the time in which someone is required to produce documents. This is unreasonable and allows no opportunity to extend due process or procedural fairness to recipients.

6. The MIA believes that the powers of inspectors to enter premises (in proposed Section 140X(2)(b)) should only be when there are reasonable grounds for suspecting a breach, not to determine whether or not there has been compliance. That is, not to undertake fishing expeditions.

B. **Information sharing**

7. The *Migration Legislation Amendment (Worker Protection) Bill 2008* proposes that information may be disclosed by inspectors and by the Minister (sections 140ZA & 140ZH).

8. The MIA's general position is that the disclosure of any personal information should be confined to verifying information rather than broad disclosure. The MIA is concerned that the disclosure provisions in the Bill go beyond this. It provides for the disclosure of personal information as defined by the Privacy Act (subsection 5(1)). As the Explanatory Memorandum (paragraph 28) points out (extract only), "Section 6 of the *Privacy Act 1998* provides that personal information means information or an opinion (including information or an opinion forming part of a database), whether true or not..."

9. What are the checks and balances proposed in terms of DIAC officials disclosing information which may be inaccurate? It is clear that the exchange of information may contain not only factual information but "opinion" whether true or not. The Bill as it stands provides a low test for information sharing, providing no apparent safeguards for the subject(s) of the information or opinion, and may be open to abuse.

10. The MIA believes that the close involvement by the Privacy Commissioner in regard to this part of the Bill should be encapsulated in the Bill as suggested in the Privacy Commissioner's submission to the Senate Standing Committee (29 October 2008).

11. The MIA believes that in the interest of transparency and accuracy, the proposed subsection 140ZH(4) should not exempt the Minister from the obligation of providing written notice where information is to be disclosed to an agency of the Commonwealth or a State or Territory. In our view, written notice should be provided to the person about whom the information is disclosed in all instances. Further, to ensure full and accurate disclosure, paragraph 140ZH(4)(b) should be expanded to include a requirement to provide a copy of the information disclosed.

C. **Proposed Section 486U - Gathering information for application for pecuniary penalty**

12. Proposed subsection 486U(2) enables the Secretary to require a person who the Secretary, on reasonable grounds, suspects can give information relevant to an application for a civil penalty order, to give all reasonable assistance in connection with such an application, and failure to give such assistance can be enforced by a penalty.

13. The MIA is of the strong opinion that this section should not apply to Registered Migration Agents who have acted, or are acting, on behalf of an alleged wrong-doer as this directly conflicts with a Registered Migration Agent's duty to his client (see Migration Act and Migration Regulations).

14. Subsection 486U(3) states that subsection 486U(2) does not apply in relation to a lawyer. The MIA believes that subsection 486U(3) must be amended to include Registered Migration Agents. Not to make such an amendment would accord different treatment between Registered Migration Agents, and undermine confidence in the Registered Migration Agent scheme and in the legislation. This would create inconsistent administration and treatment of registered migration agents under different parts of the Migration Act. It would add an unnecessary layer of confusion for clients, including the sponsored worker for whom the Bill is designed protect. Further it would disadvantage clients who do not differentiate between lawyer and non-lawyer Registered Migration Agents, and who should not be required to do so in order to be properly represented.

D. **Amendment to Taxation Administration Act 1953**

15. The MIA supports the submission of the Privacy Commissioner (29 October 2008) with respect to the proposed Section 3ED.

E. **Cost recovery (new section 140J)**

16. In respect to debts to the Commonwealth for locating and detaining, the MIA recommends that the limit of the liability of a sponsor should not be higher than the current position. In reality, the actions of a sponsored employee which may result in costs to the Commonwealth (such as detention costs) are not in the control of the sponsor. The liability of the sponsor should not be open ended, but should be set at a modest level.

F. **Conclusion**

17. The MIA is of the view that having access to draft regulations at this time would give a better indication of the intent of the Bill and make the consideration of the Bill more coherent. The

Bill without the details of the Regulations may be viewed as premature, given the fact that the results of reviews and reports have not been fully disclosed or considered.

Maurene Horder

Chief Executive Officer
The Migration Institute of Australia Limited
PO Box Q102, QVB NSW 1230, Australia
Level 3, 83 York St, SYDNEY 2000
Tel (02) 9279 3140 **Fax** (02) 9279 3172
www.mia.org.au

4 November 2008