SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO THE MIGRATION LEGISLATION AMENDMENT (WORKER PROTECTION) BILL 2008

Submission made by the Department of Immigration and Citizenship on 27 October 2008

Introduction

The Migration Legislation Amendment (Worker Protection) Bill 2008 ("the Worker Protection Bill") amends the *Migration Act 1958* ("the Migration Act") and the *Taxation Administration Act 1953* to enhance the framework for the sponsorship of non-citizens seeking entry to Australia.

The Department understands from the Selection of Bills Committee Report No.13 of 2008 that the reasons for referral of the Bill for consideration by your Committee include concerns about:

- retrospectivity;
- additional 'red tape'; and
- compliance costs and additional visa holder costs.

In addition during a Senate Estimates hearing on Tuesday 21 October 2008 a member of the Committee (Senator Hanson-Young) asked the Department for details of proposed regulations that may be made under the changes made by the Bill. This submission addresses each of these issues.

This submission provides a general overview of how the Worker Protection Bill enhances the sponsorship framework. It also takes the opportunity to provide details of the stakeholder consultation processes that have been, or are being, undertaken by the Department.

The attachments deal with these matters in the following order:

- overview
- consultations with stakeholders
- additional red tape
- compliance costs and addition visa costs
- retrospectivity
- details of proposed regulations.

Finally, subject to passage of the Worker Protection Bill, the Department is working towards introduction of the overall scheme from 1 July 2009. As indicated in the Explanatory Memorandum the amendments made by the Worker Protection Bill will commence within 9 months of Royal Assent, rather than the 6 months that would be usual. This will allow time for the consultation and review processes described below to be completed and the

necessary regulations made, and should allow lead time for all affected stakeholders to prepare for the changes.

Overview

Employer-sponsored visas play a critical role in helping to target skill shortages in Australia as they allow skilled overseas workers to be placed directly into skilled vacancies. A sponsor is a person (usually a company or business) who is effectively a guarantor for the person they have selected to fill the skilled vacancy in Australia, and who undertakes obligations and support for the overseas worker and their accompanying family members.

Sponsorship may also be used in other contexts – for example to support the entry of entertainers, sports competitors, religious workers, visiting academic or exchange staff from overseas.

The key factors are that sponsorship and the sponsorship assessment process should provide a degree of protection, certainty and benefit for the sponsored person, the sponsoring organisation, Australian workers and the Australian community.

The Worker Protection Bill introduces a better defined sponsorship framework, which will allow the program to be more responsive to market needs while protecting the employment and training opportunities of Australians and the rights of overseas workers.

The Worker Protection Bill will also facilitate regulatory consistency across all sponsored migration programs. A consistent sponsorship framework will create greater transparency for all parties to the process and reduce the potential for exploitation of overseas workers. This will be achieved by facilitating greater awareness of obligations amongst approved sponsors, and of rights and obligations amongst visa holders.

The obligations themselves will be prescribed in the Migration Regulations 1994 and will clearly set out the period of time and the manner in which an obligation must be satisfied. This will be supported by a robust monitoring and enforcement regime.

Currently, where an approved sponsor fails to satisfy their undertakings, the department may apply administrative sanctions which include cancelling a business's status as a sponsor or barring a sponsor from sponsoring further overseas workers for a specified period. The Worker Protection Bill enhances this regime by providing that civil penalties may be imposed for breaches of obligations.

Under the application provisions found in the bill the new framework will apply to all existing business and most Labour Agreement sponsors, whether or not their sponsorship was approved prior to the date the legislation takes effect. This means for example that sponsors of people who hold the main kind of Australian temporary work visa – called a Subclass 457 (Business (Long Stay)) visa - would no longer be bound by the sponsor undertakings they originally gave, but instead by the obligations prescribed in the Migration

Regulations. These application provisions apply prospectively and are further considered in this paper under the heading *retrospectivity*.

The new framework is also sufficiently broad to apply to other kinds of sponsorship (currently outside the existing sponsorship framework) and other kinds of visas which are not currently sponsored. However any such changes would apply prospectively.

This may mean that some visa applicants who are currently not sponsored (for example where sponsorship is not a criterion for a visa) could in future be subject to sponsorship. It is yet to be determined which arrangements, if any, would transition into the new sponsorship framework. Any such decision would be based on consultations and reflect the objectives of providing protection, certainty and benefit for the sponsored person, the sponsoring organisation, Australian workers and the Australian community.

Extending the framework in this way could however:

- serve to counter the vulnerability of future temporary residents who might otherwise be unsponsored or inadequately supported;
- enhance integrity as a whole by removing any incentive to apply for a less appropriate visa in order to avoid (or enter into) a particular kind of sponsorship arrangement; and
- lead to more effective use of resources for the Department and reduced costs for business by facilitating, in due course, one-to-many sponsorship across the program – once approved, a single sponsor could potentially sponsor many visa applicants across a range of visa subclasses.

Consultations with stakeholders

The Department recognises that temporary skilled migration is a complex issue, and that the cooperation of industry, the unions and all levels of Government is required to make the scheme work with integrity.

The consultative and review processes that are being pursued reflect this complexity and the broad range of interested stakeholders. The processes are, amongst other things, intended to ensure that the obligations framework strikes an appropriate balance between the cost of compliance for sponsors and the integrity of Australia's temporary migration program.

As detailed in the Explanatory Memorandum to the Worker Protection Bill the sponsorship obligations will be prescribed in the Regulations, rather than being set out in the Migration Act, to provide flexibility to remove or add sponsorship obligations in the future. The details of the regulations to be prescribed will be developed in the light of extensive feedback from a wide range of stakeholders engaged during the consultation and review processes.

One of these review processes was the release of Discussion Paper - (Long Stay) Subclass 457 and related temporary visa reforms (the "Discussion Paper") focusing on possible sponsor obligations. The Department wrote to a significant number of stakeholder organisations in June 2008 seeking feedback on the Discussion Paper, and it was publicly released by the Minister for Immigration and Citizenship on 30 June 2008.

Feedback was directly sought from all major stakeholders including:

- each State and Territory government;
- a range of Commonwealth Departments;
- the Australian Council of Trade Unions seeking feedback from the union movement on the proposed changes (in particular, from unions in the area of construction, health and education services);
- the Australian Industry Group;
- the Australian Chamber of Commerce and Industry;
- the Australian Hotels Association;
- the Business Council of Australia;
- the Australian Computer Society;
- the Australian Medical Association;
- Master Builders Australia;
- the Housing Industry Association;
- the National Farmers Federation;
- Restaurant and Catering Australia;
- the Law Council of Australia; and
- the Migration Institute of Australia.

Around 80 submissions were received and assessed. Of those stakeholders who responded, the majority indicated support for a uniform sponsorship framework provided it did not lead to a substantial increase in reporting measures or costs. Many indicated that they were already keeping client records and would therefore be able to comply with record-keeping requirements. The main issues of concern were around the proposal to make sponsors directly liable for some of the costs involved in bringing overseas workers to Australia, for example, health insurance and travel to and from Australia.

The responses to the Discussion Paper are one element of considerations by an Inter-Departmental Committee (IDC) charged with bringing together the various reviews and making recommendations to Government. The IDC is made up of representatives from:

- Department of Immigration & Citizenship;
- Department of Education, Employment & Workplace Relations;
- The Treasury;
- Department of Foreign Affairs & Trade;
- Department of the Prime Minister & Cabinet; and
- Department of Finance and Deregulation.

The IDC will also be drawing on the expertise of the Skilled Migration Consultative Panel. The Panel is tasked with seeking the views of broad stakeholder groups in advising Government on both bringing the various reviews together and developing a package of longer-term reform measures for consideration in the 2009-10 Budget.

The Panel consists of representatives from:

- New South Wales Government
- Queensland Government
- Victorian Government
- Western Australian Government
- Australian Chamber of Commerce and Industry
- Business Council of Australia
- Australian Industry Group
- Minerals Council of Australia
- Australian Council of Trade Unions
- Construction, Forestry, Mining and Energy Union
- Australian Manufacturing Workers Union, and
- The Australian Nurses Federation

The Panel will provide its views to Government in November of this year.

In addition, in April this year the Government appointed industrial relations expert, Ms Barbara Deegan to examine the integrity of the temporary skilled migration program. Ms Deegan's final report, due to Government shortly, will also inform the development of the regulations.

The results of these extensive consultation processes will be considered by Government and will play a significant role in the drafting of Regulations to complete the overall sponsorship scheme. As discussed below drafts of these Regulations are not yet prepared.

Reduced red tape

In general terms, the Worker Protection Bill introduces a better defined sponsorship obligations framework, clarifying sponsor's responsibilities, simplifying communication by the department and facilitating a more effective enforcement regime. Additionally, the Worker Protection Bill is sufficiently flexible to ensure that future programs and regulatory efficiencies can be implemented without additional amendments to the Migration Act.

By clearly defining the sponsorship obligations framework, the Worker Protection Bill clarifies a sponsor's responsibilities in relation to their approval as a sponsor and in relation to the visa holders they sponsor. It is anticipated that the obligations prescribed in the Migration Regulations will clearly set out the period of time in which an obligation must be satisfied, and the manner in which the obligation is to be satisfied. In the process of clarifying these obligations, synergies between various existing visa programs will be identified meaning sponsors of a number of different visa classes will only need to demonstrate their compliance once.

For example, sponsors of both Business – Long Stay (subclass 457) visa holders and Occupational Trainee (subclass 442) visa holders would not be required to deal with the Department in their capacity as a sponsor of Subclass 457 visa holders separate from their capacity as a sponsor of Subclass 442 visa holders.

The process for being approved as a sponsor may be significantly streamlined as most sponsors will need to only apply once for approval as a sponsor, and may remain so approved for a number of years. Once a sponsor has approved sponsorship status, the process for nominating an overseas worker for example, would be very straightforward.

During the consultation processes some organisations pointed out that a sponsorship application and approval process would confer merits review rights on applicants, which some presently do not enjoy because of the lack of a formal sponsorship requirement. This was considered an advantage over the current arrangements.

The proposed new sponsorship framework allows for the application of standardised and streamlined monitoring and reporting arrangements across many visas. This reduces red tape for sponsors as they may only be required to collect a standard set of data about all sponsored visa holders, and submit a single report to the Department.

It is anticipated that any sponsorship obligations (to be defined in the Migration Regulations) that will apply in relation to existing programs could closely reflect the undertakings and responsibilities of employers and sponsors under existing programs. If so, there would be no additional compliance costs or 'red-tape' flowing from the proposed framework compared to existing processes.

Finally, the Worker Protection Bill facilitates the possible introduction of an accreditation system which would allow large number of low risk employers to bring in large numbers of overseas workers with minimal processing arrangements. By facilitating this move to a more risk-based approach, the Worker Protection Bill also mitigates risk by providing more efficient, yet expanded monitoring and investigative powers to aid in the identification of non-compliance by sponsors.

By shifting the focus towards the identification and response to non-compliance, the Department is better able to target its resources towards integrity and responsiveness of the program. Additionally, with better defined sponsorship obligations, which apply by operation of law and replace the existing undertakings regime, it is anticipated that sponsors will be more aware of their obligations and that enforcement of those obligations will be simplified.

Impact on the cost of sponsoring skilled workers

During development of the Worker Protection Bill the Department consulted with the Office of Best Practice Regulation (OBPR) in the Department of Finance and Deregulation. The Department advised OBPR that the Worker Protection Bill would itself involve no or low additional compliance costs for business, and that the new framework actually provides scope for a net reduction in compliance costs for business. It was agreed that a detailed and thorough regulatory impact analysis will be conducted in consultation with OBPR in the course of developing the Regulations, in the context of the overall scheme.

Currently, sponsors are approved as a sponsor in relation to one type of visa. This means that if the sponsor wishes to sponsor a different visa type to the one s/he is approved to sponsor, they must apply and be approved as a sponsor again.

Under the framework introduced by the Worker Protection Bill, sponsors can be approved in relation to a class of approved sponsor and a class of approved sponsor may be approved to sponsor more than one visa type.

This will facilitate:

- "one-to-many" sponsorship, where a sponsor only has to be approved once as a sponsor, but can then sponsor in as many subclasses as their approved class allows them to sponsor, and as many visa holders as they wish, up until any approved limit, and
- an abbreviated process for some types of sponsors, for example, an Australian Government agency.

Some obligations would be common across all subclasses, to minimise complexity for organisations who may be a sponsor in relation to a variety of different visa subclasses. A number of obligations would be unique to particular visa subclasses or groups of visa subclasses, reflecting their unique economic and social policy objectives.

The new framework may increase the requirements for a small number of high risk businesses who seek to become approved sponsors. However, it allows for a reduced burden for low risk businesses, which will be balanced with an enhanced sanctions regime where that trust is broken.

The exact obligations that might apply to 400 series sponsors (these are largely non-business sponsors who seek the entry of people for largely cultural, sporting, social or academic purposes) will be determined in consultation with relevant stakeholders. However, it is anticipated that they will largely be the same as those that will apply to business sponsors for subclass 457 visas, with additional or different obligations as appropriate in recognition of the different visa requirements.

In that context, these 400 series sponsors/nominators or hosts are already required to undertake to meet certain visa holder costs. However, the Government has not yet come to a view about which of these costs would actually be included for each visa subclass under the proposed new sponsorship framework. It is likely that the decision to impose a particular cost on an employer would depend on which party (the employer or the visa holder) was gaining the benefit of the particular visa arrangement.

Finally, the Worker Protection Bill also preserves the status of existing sponsors of 457 visa holders, as they automatically become approved sponsors under the new legislation. These sponsors will only need to re-apply to become an approved sponsor:

- when the terms of their original approval as a sponsor (under the existing law) ceases their approval – currently, all approvals as a standard business sponsor cease at the earliest of 24 months after approval, or reaching the maximum number of nominations stated in the approval; or

- if their approval as a sponsor is cancelled by the Minister.

The terms of approval for existing approved sponsors will be preserved. This means that the period of the sponsorship and the maximum number of nominations permitted under the sponsorship will remain the same for existing approved sponsors.

Retrospectivity

The Worker Protection Bill has no retrospective application. All provisions will apply prospectively from the date of commencement.

There are four aspects of the Worker Protection Bill which may be considered retroactive.

First, the transitional provisions provide that the amendments will apply to a person or organisation who immediately prior to the date of commencement:

- is a sponsor of a Subclass 457 (Business (Long Stay)) visa holder; and
- a sponsorship undertaking is required to be satisfied by the sponsor in relation to a sponsored visa holder.

The Worker Protection Bill provisions, however, will only apply to these existing sponsors from the date of commencement of the Worker Protection Bill, and will not affect the status of acts or omissions that occurred prior to commencement. That is, a sponsor cannot be liable for a civil penalty for an act or omission that occurred prior to commencement. The transitional provisions ensure that rights and responsibilities are preserved for acts or omissions in relation to sponsorship that occur prior to commencement.

Second, the amendments may apply to a person or organisation who is a party to a 'work agreement' regardless of whether the agreement was signed prior to or after commencement.

The Worker Protection Bill provides that a 'work agreement' is an agreement which meets the requirements prescribed in the Regulations. It is intended that the Regulations will prescribe labour agreements and other similar agreements as 'work agreements'. In general terms, these are agreements that are entered into between the Commonwealth, represented by one or more Ministers, and another person or organisation detailing arrangements whereby the other person may sponsor visa holders to perform work.

As with the existing sponsors of Subclass 457 (Business (Long Stay)) visa holders, the Worker Protection Bill provisions will only apply from commencement to parties to work agreements who enter the agreement prior to commencement. The Worker Protection Bill provisions will not affect the status of acts or omissions that occurred prior to commencement. The transitional provisions ensure that rights and responsibilities are preserved for acts or omissions in relation to sponsorship that occur prior to commencement.

It is also important to note that after commencement of the Bill additional visas for which sponsorship is a requirement may be brought within the new sponsorship framework. In addition, it may be decided by the Government that organisations which currently have arrangements to nominate, invite or otherwise bring visa holders into Australia should be moved into the new framework.

There will be transitional provisions included in the regulations which will provide how existing sponsors of these visas and other parties relating to these visas are transitioned into the new sponsorship framework (which may simply be that they are not affected by the new framework).

If an existing sponsor of, or other parties relating to, these visas are transitioned into the sponsorship framework it is intended that the framework will only apply to these existing sponsors, or other parties, from commencement of the regulations which move them into the framework. The status of acts or omissions that occurred prior to commencement will not be affected.

Third, the amendments relating to how the sponsorship framework applies to partnerships and unincorporated associations will apply to all partners and members of the committee of unincorporated associations on commencement.

The existing provisions provide that a partner or member of a committee is only bound by sponsorship undertakings that exist when the partner or member joins the partnership or unincorporated association, if they make an election to be bound when joining.

The effect of the provisions in the Worker Protection Bill is that regardless of whether an election has been made or not, all partners or members of a committee will be responsible, from commencement, for the satisfaction of the sponsorship obligations and other sponsorship provisions if the partnership or unincorporated association is the sponsor of Subclass 457 (Business (Long Stay)) visa holder.

This is necessary to ensure that there is always someone in an entity who is bound by a sponsorship obligation in relation to the sponsored visa holder. Under the existing provisions in relation to partnerships and unincorporated associations, there may not be any person who is responsible for that visa holder.

As with the previous two retroactive aspects which have been discussed, the Worker Protection Bill provisions in relation to partnerships and unincorporated associations will only apply from commencement to existing partners and members of committees. The Worker Protection Bill provisions will not affect the status of acts or omissions that occurred prior to commencement. The transitional provisions ensure that rights and responsibilities are preserved for acts or omissions in relation to sponsorship that occur prior to commencement.

Lastly, the amendments to the *Taxation Administration Act 1953* will enable the Commissioner of Taxation to disclose certain information to the department from the date of commencement, regardless of whether the information was collected by the Commissioner prior to or after commencement.

This is necessary to allow the disclosure of information which was collected by the Commissioner of Taxation prior to commencement to ensure that information such as names and addresses which may have been collected prior to commencement can be disclosed to give meaning to other information which is relevant to, for example, compliance with a sponsorship obligation after commencement, or assessment of an application for approval as a sponsor which is be assessed after commencement.

Such an application provision is not uncommon when new exceptions to the taxation secrecy provisions are enacted. Indeed, it is a necessity, as the Australian Taxation Office information technology systems do not sort all data on the basis of date received.

As noted above the Department is working towards introduction of the overall scheme from 1 July 2009. The importance of a smooth transition to the new framework is recognised by the Department and significant efforts will be made to ensure that all affected stakeholders are aware of any changes well in advance of commencement.

Availability of draft regulations

The Department is not able to make draft regulations available to the Committee at present. This is because the policy settings that underpin any draft regulations are dependent on recommendations yet to be made by the IDC and the Skilled Migration Consultative Panel referred to above, as well as the integrity review presently being conducted by Ms Barbara Deegan.

The Department expects that a draft of the proposed regulations would be available in the first part of 2009, and will make the draft available for comment to the Skilled Migration Consultative Panel at that time. The importance of a smooth transition to the new framework is recognised by the Department and significant efforts will be made to ensure that all affected stakeholders are aware of any changes well in advance of commencement.

The Department notes that this means the Committee will not have had the opportunity to examine the full legislative scheme. However any regulations made under the amendments proposed in the Bill will be subject to scrutiny in the Senate and by the Senate Standing Committee on Regulations and Ordinances, and would be disallowable.