MIGRATION INSTITUTE
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Migration Institute of Australia [MIA]

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

The MIA supports any sensible and fair measures to ensure that sponsored visa holders are protected, that their working conditions meet Australian standards and that the integrity of the Australian labour market is preserved.

The MIA is broadly supportive of the Bill and the worker protection aims contained in the Bill. It is also supportive of the "housekeeping" amendments, such as the treatment of partnerships.

While being broadly supportive, the MIA believes the Bill and its outcomes can be enhanced, primarily through the striking of a better balance between worker protection and industry protection.

In some instances our interest and concern is with specific provisions of the Bill, and in others it is with the lack of detail, and hence the uncertainty as to the impact and outcomes of the Bill.

Detailed sponsorship obligations are not yet known as they will be specified later in Regulations. There are, however, indications in the Bill that the balance set by the Bill and subsequent Regulations, in combination, may weigh heavily against the sponsoring employer. If this proves so, Australian employers will avoid sponsoring overseas workers and without the skilled workers they need in the Australian labour market, the employers will either fail or take business offshore. This we suggest is not a desired or intended outcome. Getting the balance correct is the major challenge.

The MIA wishes to draw attention to the following aspects of the Bill:

1. 'Work agreements' (Subsection 5(1), Section 140GC and Section 140H) can vary and in effect override sponsorship obligations. The MIA is concerned that there be

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

a consultation process which ensures adequate safeguards so that an employee who is governed by this knows their employer's obligations.

2. Sponsor obligations (Section 140H) –

    a. The regime of sponsor obligations is potentially very complex and confusing, especially given that obligations may be varied by a work agreement. We suggest that clarity and simplicity will aid both compliance and administration. Complexity and confusion will lead to inadvertent non compliance, often of a largely technical nature.

    b. The potential for confusion will be exacerbated if, for example, an employer is subject to a 'work agreement' (eg, a labour agreement) for a certain sector of its employees but sponsors others outside the 'work agreement'.

    c. The sponsor obligations apply regardless of whether a sponsor has agreed to be bound by the sponsorship obligations (see paragraph 101 of the Explanatory Memorandum). It is insufficient for the Department of Immigration and Citizenship (DIAC) as a "matter of good practice" only, and not law, *to intend to ensure that persons seeking approval to be a sponsor will understand the sponsorship obligations*. The DIAC should be obliged to ensure that sponsors are made aware of the obligations and have confirmation of same.

    d. Micro management of business practices – the Explanatory Memorandum (Paragraph 111 in relation to the new subsection 140H(5)) suggests that the regulations may for example "prescribe that an approved sponsor (or former approved sponsor) must keep records in relation to a visa holder ... that those records must be kept electronically". We suggest that the important issue is that records are maintained and can be produced. It would be an unnecessary intrusion on employers to dictate the format in which they hold records. This could impose an unreasonable economic impost on business, especially small business. The example provided in this paragraph also suggests a rigid timeframe to comply with a request for these records, with the sponsorship obligations not met if the provision of the records is one day late. This is understandable from a literal perspective, however the MIA believes there should always be an opportunity to seek an extension of time to comply. The aim, we suggest, should be compliance and cooperation, not confrontation.

3. The MIA is concerned that there should be safeguards to ensure continued reasonableness for both employer and employee. In this regard, paragraph 114 of the Explanatory Memorandum refers to 'various review processes' without further detail in relation to regulatory change.

4. Enforcement (New subsection 140J(2)) regarding methods of working out cost incurred by the Commonwealth "in relation to a sponsorship obligation", raises a concern for the MIA about what methodology will be applied. As the existing minimum salary level provisions have demonstrated, methods of calculation can

be overly complex and raise the risk of inadvertent noncompliance. Furthermore, it will be contained in a Legislative Instrument, which is not open to disallowance.

5. Enforcement (Section 140L) – 'regulations may prescribe circumstances in which sponsor may be barred or sponsor's approval cancelled'. Subsection 140L(2) provides for the regulations to prescribe circumstances in which a sanction 'must' be imposed. The Explanatory Memorandum gives no details or examples as to what is in mind. This lack of detail is of concern, as this provision has the potential for an overly rigid and oppressive enforcement regime.

6. Workplace inspectors (Sections 140V to 140ZA). While supporting the protection of workers rights, the MIA believes the proposed provisions in relation to workplace inspectors may go too far. For example, while understanding the need for enforcement, the MIA believes that the overriding of the common law privilege against self incrimination in Subsection 140Y(4) is inappropriate. The ramifications are amplified by the penalties for failure to comply with a requirement of the inspector, eg, failure to produce a document carries a 'maximum penalty of imprisonment for 6 months'. We acknowledge that '6 months' is a maximum, but utilisation of imprisonment in this context appears excessive.

   Of further concern is the fact that the inspector then has powers to disclose the information obtained under duress to third parties.

7. Multiple contraventions of civil penalty provisions (Section 486ZA). The example in the Explanatory Memorandum (at paragraph 443) in relation to a contravention of a sponsor obligation, ie, "contravenes Subsection 140Q(1)", is of concern. It suggests an unnecessarily rigid and onerous regime. Subsection 486R(3) provides scope for the court to limit penalties, however, given the mandatory nature of the obligations on employers and the abrogation of common law rights, it would be reasonable, and indeed essential, to balance this with a legislated cap on the penalties.

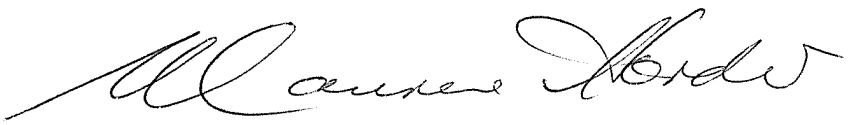
8. It is also of concern that infringement notices may in effect limit the monetary penalty, but this does not appear to be open to the judicial consideration that a penalty may be. The potential business-destroying nature of the penalties is demonstrated in par 443 of the Explanatory Memorandum, where the possibility of multiple contraventions of obligations arises.

9. The MIA is concerned about the transitional provisions and the retrospective application of the new sponsorship obligations. All this, in the light of expanded powers to monitor and investigate, along with penalties (which can easily add up to substantial sums of money), is inequitable. An employer could easily inadvertently breach the complex minimum salary requirements. If a corporation employs 10 subclass 457 employees and misunderstands the MSL requirement, then logically their misunderstanding would apply to the 10 employees. The result is potentially a penalty of $330,000. Where an employer is unable to comply, the employee may also experience detriment by losing his or her job and therefore

livelihood, which would also impact on their immediate family, who often travel to Australia and live with the sponsored employee. This could include drastic disruption to the education of children. The MIA suggests that the legislation not be retrospective, that recognition of "innocent mistake" be incorporated in some manner, and, as stated above, that consideration be given to the capping of penalties to ensure that the proposed measures are reasonable.

The MIA thanks the Committee for the opportunity to make this submission on behalf of its members. As the peak organisation representing Registered Migration Agents, the MIA can make an invaluable contribution to the consultative process in developing workable arrangements for sponsored workers in Australia. The MIA can provide the expertise of our members, and the perspective of our members' clients (both employers and employees).

As there are indications in the Explanatory Memorandum that much of the detail of sponsorship obligations has already been considered and may be ready to be placed in new Regulations once the Bill is passed, the MIA would like an early opportunity to comment on any proposed details.



Maurene Horder

Chief Executive Officer

The Migration Institute of Australia Limited