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No. 177 2002–03

Migration Legislation Amendment (Sponsorship Measures) Bill 2003

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Migration Legislation Amendment (Sponsorship Measures)
Bill 2003

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Migration Legislation Amendment (Sponsorship Measures) Bill 2003

Date Introduced: 4 June 2003

House: House of Representatives

Portfolio: Immigration and Multicultural and Indigenous Affairs

Commencement: Royal Assent

Purpose

To amend the *Migration Act 1958* to provide a comprehensive framework for the Migration Regulations to deal with sponsorship requirements

Background

The Minister for Immigration and Multicultural and Indigenous Affairs, the Hon. Philip Ruddock, MP, noted in the Second Reading Speech that:

Sponsorship is an important element of the system for managing the entry and stay of persons in Australia. It plays a central role in protecting the Australian community from the costs and risks associated with the stay of non-citizens in Australia.¹

The *Explanatory Memorandum* states that:

This Bill formally recognises the long-standing Government policy that where non-citizens are brought to Australia by sponsors, the sponsors, as opposed to the Australian community, should bear all costs in relation to the non-citizens. This is particularly the case in relation to temporary residence sponsors who gain a commercial advantage from the sponsorship arrangements.²

Current sponsorship arrangements

Arrangements currently exist for sponsoring the entry and residence in Australia of employees, family members and people for humanitarian reasons.³ In addition, there are special arrangements for sponsoring employees to work in regional areas of Australia.⁴ There are particular rules under the Migration Regulations 1994 covering sponsorship for

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temporary business purposes and family reunion.⁵ In addition, the official Migration Instructions contain detailed guidance for immigration officials in relation to sponsorship of various categories of entrants.⁶

'Sponsorship' is defined in the Migration Regulations.⁷ A sponsor accepts responsibility for:

- all financial obligations to the Commonwealth incurred by an applicant for a temporary visa
- compliance with all relevant legislation and awards in relation to any employment entered into by the applicant, and
- compliance by the applicant with the conditions of entry into Australia specified in the visa.

In the case of family members, the sponsor gives a written undertaking to provide support during the relative's first two years in Australia, including accommodation and financial assistance as required.⁸

In general, a sponsor must be over 18, and an Australian citizen, permanent resident or an eligible New Zealand citizen.⁹

Review of the Temporary Residence Program

The Bill follows a review of Australia's Temporary Residence Program carried out by the 'external reference group' for the Department of Immigration and Multicultural and Indigenous Affairs.¹⁰

The Review noted that sponsorship requirements varied for different visa applicants. For some temporary resident visas there is no sponsorship requirement and no employer undertakings, for some there is no formal sponsorship requirement but the Australian party must provide a similar form of support,¹¹ and for others extensive obligations are imposed on the sponsor covering everything from salary and medical costs to social security claims:

In summary, the requirements to be approved as a sponsor, the undertakings required of the sponsor and the sponsorship approval processes differ for different visas. The differences do not necessarily reflect different policy objectives but seem to have resulted from sponsorship requirements for different visas drifting apart over time.¹²

The Review made two main recommendations in relation to sponsorship under the Migration Act:

- that sponsorship be a requirement for all temporary residents except under the short stay business visas or where there is an agreement in place which obviates the need for sponsorship [eg diplomatic visas], and

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- that there should be a standardised sponsorship, involving standardised undertakings, for temporary resident visa sponsors.¹³

The current Bill

The Government has partly accepted the Review's recommendations in drafting the Bill. The Bill provides that regulations can be made requiring sponsorship for all visas (not just temporary visas) but does not impose standardised undertakings across all types of visa. As the Minister explained:

In accordance with the recommendation of the report *In Australia's Interests: Review of the Temporary Residence Program*, this bill aims to standardise sponsorship arrangements as much as possible. However, it also recognises differences between types of sponsors and sponsorships and the need to provide for different sponsor relationships.... The bill gives power to make regulations that differentiate between the approaches taken in different visa regimes. This is the case in relation to sponsorship approval criteria and processes, as well as the undertakings and sanctions applicable against sponsors. This will enable the government to take different approaches to sponsors of different types. For example, it will allow us to differentiate between sponsors who sponsor large numbers of people or gain a commercial advantage from sponsorship and sponsors in the family stream.¹⁴

The framework proposed by the Bill provides for regulations to be made, depending on the type of visa, for:

- sponsorship to be a criterion for a visa (both a criterion for the application or for the grant of a visa)
- a process and criteria for the approval of sponsors, and
- undertakings to be made by sponsors.

The Bill also allows certain actions to be taken against sponsors of prescribed temporary visa holders if they breach their undertakings. In addition, it will prevent appeals to the Migration Review Tribunal where an approved sponsor is required for the particular type of visa but arrangements for the sponsorship are not in place or in prospect at the time of the appeal.

The Government has stated that 'long stay sponsored business visas' and 'sponsored professional development visas' (i.e. for education and/or training) are the first visa classes planned to be covered by the Bill.¹⁵

New sponsorship regulations made under the proposed provisions in the Bill will not automatically apply to every type of visa. The Bill provides that specific classes of visas need to be 'prescribed' (i.e. included in separate regulations) before they will come within the new sponsorship regime. As the Minister noted, this means that the inclusion of particular classes of visa in the new regime 'will be subject to parliamentary scrutiny'.¹⁶

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Main Provisions

Schedule 1 – The Sponsorship System

Schedule 1 Item 2 inserts **proposed 'Division 3A – Sponsorship'** in **Part 2 of the Migration Act**.

'Opt-in' Mechanism

Proposed section 140A states that Division 3A will apply to 'visas of a prescribed kind'. Under section 5 of the Migration Act, only visas specified in regulations will be 'prescribed'. According to the Explanatory Memorandum, this 'opt-in' mechanism will allow:

a staged, smooth and effective transition from existing sponsorship arrangements to new arrangements...It is complemented by new section 140W, which ensures that current regulations, including those dealing with sponsorship arrangements, can continue to operate effectively alongside the new framework. The combined effect of new sections 140A and 140W is that sponsorship arrangements may be developed in a progressive manner, maintaining continuity for those involved and allowing for appropriate community consultations to occur before operating under the new system. Initially, it is envisaged that sponsored business visas and the proposed new professional development visa will “opt-in” to the new sponsorship system provided for by new Division 3A of Part 2 of the Act.

Sponsorship as a criterion

Proposed section 140B states that regulations may provide that sponsorship by an approved sponsor is 'a criterion for a visa'. **Proposed section 140C** states that regulations may provide that sponsorship by an approved sponsor is a criterion for a 'valid application for a visa'.

Both sections state that any sponsorship criterion is in addition to any other criteria for a valid visa or valid application specified elsewhere in the Migration Act or Migration Regulations.

Approval as a sponsor

Proposed sections 140D to 140G provide that a person has to consent in writing to sponsor a visa applicant, that different criteria for approval as a sponsor may be prescribed for different visas, and that different processes for the Minister to approve a person as a sponsor may be prescribed for different visas.

A person can be approved as a sponsor even where the name of the visa applicant is not yet known (**proposed subsection 140D(b)**). As the *Explanatory Memorandum* notes:

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This takes into account the fact that in some circumstances, at the stage of being approved as a sponsor, the sponsor may only know, for example, the occupation of the person to be sponsored, the type of activity that the person will be undertaking in Australia or the identity of the person's overseas employer.¹⁷

References in section 140D to the approval of 'a person' as a sponsor cover any legal person, i.e. natural persons and corporations. By virtue of **proposed Subdivision C** (see below), this term will also cover bodies that are not legal entities such as partnerships and unincorporated associations.¹⁸

Sponsorship undertakings

Proposed sections 140H and 140I provide that regulations may require an undertaking on the part of a sponsor to pay the costs of the Commonwealth together with other 'prescribed undertakings'. A note in **proposed section 140H** lists the following examples of undertakings that could be specified in regulations:

- (a) to pay debts for medical or hospital treatment incurred by a visa holder sponsored by the sponsor
- (b) to pay to the Commonwealth the costs of locating, detaining and removing from Australia a visa holder sponsored by the sponsor
- (c) to pay the costs of the departure from Australia of a visa holder sponsored by the sponsor
- (d) to comply with the Department's requirements to provide information to the Department
- (e) to notify the Department of changes in the circumstances of the sponsor or of a visa holder sponsored by the sponsor, and
- (f) to cooperate with the Department's monitoring of the sponsor or of a visa holder sponsored by the sponsor.

Cancellation or barring approval as a sponsor

Proposed sections 140J and 140K allow regulations to be made describing the circumstances in which the Minister can cancel or bar the approval of a sponsor or former sponsor. **Proposed section 140L** sets out the various actions available to the Minister to do this. The sections apply to sponsors of temporary visas only. The *Explanatory Memorandum* notes that:

This makes it clear that where undertakings are made under regulations made under new section 140H in relation to a permanent visa, the actions listed in new section 140L are not available.¹⁹

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The sections also do not apply to cancellation of approval as a business sponsor, which is already dealt with in Subdivision GA of Division 3 of the Migration Act.²⁰

The *Explanatory Memorandum* notes that 'It is important to ensure that new section 140J applies to former sponsors as such persons can continue to be bound by undertakings if regulations made under **new section 140Q** so provide.'²¹ Under proposed section 140Q regulations can specify that undertakings remain enforceable against sponsors of temporary visa holders even if 'the visa holder ceases to hold the visa' or 'the sponsor ceases to be an approved sponsor'.

Disclosure of personal information

Proposed section 140V provides that the Minister may disclose 'personal information of a prescribed kind about a visa holder or former visa holder' to 'an approved sponsor or former approved sponsor'. The type of personal information that can be disclosed must be 'prescribed', i.e. specified in regulations and laid before Parliament, before information of that type can be released.

The *Explanatory Memorandum* notes that provision for disclosure 'is necessary to accord natural justice to a sponsor who is to be held responsible for the visa holder's actions.'²² For example, under proposed section 140L the Minister could take action against a sponsor where a visa holder breached a condition of their visa. To allow for such cases:

regulations made under new subsection 140V(3) might specify that the sponsor may use or disclose personal information disclosed under new subsection 140V(1) for the purposes of seeking review of a decision of the Minister to take one or more of the actions under new section 140L.²³

Disclosure of personal information by the Commonwealth is prohibited by the *Privacy Act 1988*. This prohibition does not apply where 'the disclosure is required or authorised by or under law'.²⁴ Proposed section 140V would have the effect of authorising disclosure of personal information in accordance with the terms of the section.

However, the sponsor – as the recipient of personal information about a visa holder – would be prohibited by the Privacy Act from using or disclosing such information 'for a purpose other than the purpose for which the information was given' to the sponsor.²⁵ If, for example, the information was released to the sponsor for the purpose of seeking a review by the Minister, the sponsor could not use the information for any other purpose.

While **proposed subsection 140V(5)** refers to the definition of 'personal information' in the Privacy Act, Parliament may wish to consider including either in this Bill or in the relevant regulations a more specific reference to restrictions in the Act on use or disclosure of such information. This may help avoid an unwitting breach of privacy by the sponsor.

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Existing regulations

Proposed section 140W provides that proposed Division 3A does not affect the operation of existing regulations in this area.

Partnerships and unincorporated associations

Proposed sections 140X and 140ZC apply the sponsorship system in **proposed Division 3A** of the Migration Act to partnerships and unincorporated associations respectively. As non-legal entities, such bodies would otherwise be outside the description of an 'approved sponsor' in **proposed section 140D** (see above). These proposed provisions recognise 'that in many instances a visa applicant will be sponsored by a partnership or unincorporated association rather than a person'.²⁶

Proposed sections 140Y and 140ZD provide that sponsorship obligations undertaken by a partnership or unincorporated association are instead imposed on individual partners and members of the association's committee of management.

Proposed sections 140Z and 140ZE provide that if a person becomes a partner or member of an association's committee of management after the partnership or association is approved as a sponsor, the new partner or member may elect to accept sponsorship obligations.

Proposed sections 140ZA and 140ZF allow for regulations to be made prescribing the circumstances in which a retiring partner or former management committee member will remain liable for sponsorship obligations.

Commencement: **Schedule 1** commences on Royal Assent.

Schedule 2 – MRT Reviewable Decisions

Item 1 of Schedule 2 adds **new paragraph 338(2)(d)** to the Migration Act to provide that in the case of a temporary visa 'prescribed for the purposes of this paragraph' where a criterion is having an approved sponsor, a decision to refuse the visa is only reviewable by the Migration Review Tribunal if, at the time of applying for a review:

- the person has an approved sponsor, or
- a decision on approval of a sponsor is pending.

The *Explanatory Memorandum* notes that:

The purpose of new paragraph 338(2)(d) is to ensure that only those visa applicants who have an approved sponsor, or are seeking review of a decision to refuse to approve sponsorship, may apply to the MRT for review of a decision to refuse to grant a prescribed visa. This is to prevent abuse of the merits review process by refused visa applicants, who have no sponsor, and therefore no ability to meet the

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criteria for grant of the visa, seeking to extend their stay in Australia by lodging a review application.²⁷

The Minister said in the Second Reading Speech that:

In these cases, the decision to refuse to grant the visa cannot ever be overturned by the tribunal, because the requirement that the applicant be sponsored is simply not satisfied. This amendment will effectively close off a loophole that has led to visa applicants pursuing what are clearly unmeritorious claims.²⁸

Commencement: **Schedule 2** applies to decisions to refuse a visa made on or after Royal Assent

Concluding Comments

The Bill is in part a response to an official review of Australia's temporary residence program, but potentially applies to all types of visas, not only temporary ones. The Bill will enable regulations to be passed making sponsorship by an 'approved sponsor' a requirement both for any 'prescribed visa' and for applying for any 'prescribed visa'.

The current intention is to target employers sponsoring workers and education providers that attract 'potentially large numbers of visa holders from markets that traditionally exhibit high immigration risk'.²⁹ However, the ability to require an 'approved sponsor' before a person can hold a valid visa or make a valid visa application could potentially be used to limit the access of any group or class of people to Australia's visa program. On the other hand the Commonwealth clearly has power under the Constitution to make laws to do this.³⁰ Moreover the Bill stipulates that an approved sponsor can only be required for prescribed classes of visas through regulations laid before Parliament.

Members of partnerships and management committees of unincorporated associations will need to consider carefully their new liabilities under this Bill before committing their organisations to sponsorship obligations.

Of particular interest to the Parliament may be the restrictions set down in Schedule 2 of the Bill on appeals to the Migration Review Tribunal. Preventing any appeal against refusal of a visa where the visa applicant does not have an approved sponsor appears logical where the Australian community would expect a sponsor, e.g. in the case of visas for temporary employment or education/training in this country. If this system is extended to require an approved sponsor for permanent and other types of temporary visas, preventing any appeal may not be in line with community expectations. Again, however, particular types of visa will need to be specifically prescribed by regulations for the purpose of preventing an appeal to the Tribunal. As the Explanatory Memorandum states:

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only applicants who are seeking review of a decision to refuse to grant a temporary visa, that is prescribed in the regulations for the purpose of new paragraph 338(2)(d), will be subject to the additional requirements of new paragraph 338(2)(d).³¹

This will give Parliament the opportunity to review any proposal to prevent appeals to the Migration Review Tribunal in the case of particular visa types.

Endnotes

- 1 Second Reading Speech, 4 June 2003, *House Hansard*, p. 15291.
- 2 *Explanatory Memorandum*, p. 2.
- 3 See e.g. [DIMIA, Sponsoring an Employee](http://www.immi.gov.au/faq/migration_employer/employer01.htm), at http://www.immi.gov.au/faq/migration_employer/employer01.htm
- 4 [DIMIA, Employer Sponsored Migration to Australia](http://www.immi.gov.au/allforms/employer.htm), at <http://www.immi.gov.au/allforms/employer.htm>
- 5 Division 1.4.
- 6 Department of Immigration and Multicultural and Indigenous Affairs, *Migration Series Instruction (MSI)353: Form 40 - Sponsors And Sponsorship*.
- 7 Regulation 1.20.
- 8 [DIMIA, Information For Sponsors Of Migrants](http://www.immi.gov.au/settle/info/sponsors_of_migrants.htm), at http://www.immi.gov.au/settle/info/sponsors_of_migrants.htm
- 9 [DIMIA, Sponsorship for Migration to Australia](http://www.immi.gov.au/allforms/pdf/40.pdf), at <http://www.immi.gov.au/allforms/pdf/40.pdf>
- 10 DIMIA, *In Australia's Interests: A Review of the Temporary Residence Program (2002)* (not available on-line).
- 11 E.g. 'assurances of support' in the case of parents or other relatives.
- 12 *Review of the Temporary Residence Program*, p. 97.
- 13 *ibid*, p. 99.
- 14 Second Reading Speech, 4 June 2003, *House Hansard*, p. 15291.
- 15 *ibid*.
- 16 *ibid*.
- 17 *Explanatory Memorandum*, p. 7.
- 18 *ibid*, p. 7.
- 19 *ibid*, p. 8.
- 20 Subdivision GA of Division 3.

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- 21 *Explanatory Memorandum*, p. 11.
- 22 *ibid*, p. 18.
- 23 *ibid*, p. 18.
- 24 Privacy Act, section 14, Information Privacy Principle 11: Limits on disclosure of personal information.
- 25 *ibid*, Information Privacy Principle 11.3
- 26 *Explanatory Memorandum*, p. 19.
- 27 *ibid*, p. 26.
- 28 Second Reading Speech, 4 June 2003, *House Hansard*, p. 15291.
- 29 *ibid*.
- 30 Based on section 51 (27) 'immigration and emigration'.
- 31 *Explanatory Memorandum*, p. 25.

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