



Migration Amendment (Sponsorship Obligations) Bill 2007

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Law and Bills Digest Section

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Migration Amendment (Sponsorship Obligations) Bill 2007

Date introduced: 21 June 2007

House: Representatives

Portfolio: Immigration and Citizenship

Commencement: Sections 1 to 3 on Royal Assent, schedules 1 and 2 on a day fixed by proclamation or the first day after a six month period after Royal Assent.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To amend the *Migration Act 1958*

- to introduce a sponsorship obligations regime for approved sponsors of employees temporarily in Australia under a subclass 457 Business (Long Stay) visa;
- to introduce civil penalties that will apply to approved sponsors who breach sponsorship obligations;
- to introduce provisions that impose and recover penalties under Subdivision BB of Division 3A of Part 2 (sponsorship obligations);
- to introduce provisions that appoint inspectors and define their powers and functions;
- to insert general provisions relating to civil remedies.

To amend the *Taxation Administration Act 1953* to provide for the disclosure of information by the Commissioner to the Department of Immigration and Citizenship relating to sponsorship of overseas employees.

Background

This Bill creates provisions for sponsorship obligations that employers need to abide by when sponsoring persons for employment in Australia on a temporary basis. If these obligations are breached, civil penalties will apply. Currently employers make a series of undertakings once their nomination as a sponsor is approved. The history of the current provisions can be found in the recommendations of an inquiry conducted in 1995.

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Business Temporary Entry: future Directions

In 1995 the Committee of Inquiry into the Temporary Entry of Business People and Highly Skilled Specialists investigated the then regime for temporary entry to Australia. The report found that the objective was to achieve an Australian workforce self-sufficient in all skills and that the temporary entry system reflected this objective.

The focus was on ensuring that there could be no entry which was not in accord with this objective. Consequently, current policies and procedures are prescriptive, complex and slow to administer.¹

It considered that “if Australian business is to compete effectively in domestic and international markets, become integrated into the world economy, have speedy access to international best practice and be able to develop overseas contacts and networks, the primary principle governing the temporary entry of key business personnel needs to be that it is of benefit to Australia.”²

The Committee recommended that a new business temporary entry regime that simplified and streamlined procedures be introduced to enable employers of good standing to bring in key business personnel quickly and smoothly. The procedures were designed to simplify the then, often cumbersome process of obtaining new visas for extensions of stay.³ The new arrangements contained procedural simplicity, fast track processing and a monitoring system to ensure that employers complied with their undertakings. The key recommendations were accepted by the Keating Government. For further background information and analysis on the 457 visa generally as well as statistical information see Janet Phillips, [Temporary \(Long Stay\) Business Visas: subclass 457](#), Research Note No.15, 21 February 2007.

Temporary Business (Long Stay) (Subclass 457)

The Temporary Business (Long Stay)(Subclass 457 visa (457 visa)) was introduced by the Howard Government in 1996 by the *Migration Regulations (Amendment) No 76*. The purpose of the new amendments was to introduce a new visa to enable persons to be eligible for a temporary visa that would permit them to enter and remain in Australia for a period of more than three months but less than four years and to enable them to leave and

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1. Business Temporary Entry: Future Directions, *Report by the Committee of Inquiry into the Temporary Entry of Business People and Highly Skilled Specialists*, Canberra, 1995, p. 1.
 2. *ibid.*, p. 3.
 3. *ibid.*, p. 4.

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enter Australia on multiple occasions until the end of that period.⁴ The purpose generally of the regulations was to rationalise arrangements for the “temporary entry of business people and highly qualified specialists, to simplify procedures, and to introduce a degree of self-regulation for certain employers of holders of Subclass 457 visas.”⁵

Employers currently seeking to employ overseas persons to work in Australia on a temporary basis currently have to make certain undertakings in relation to those employees. The Department of Immigration and Citizenship sets out the obligations of sponsors on their website:

<http://www.immi.gov.au/skilled/skilled-workers/sbs/obligations.htm>

Undertakings by Sponsors

Under existing regulations made under section 140H, sponsors are currently required to make a number of prescribed undertakings. This Bill will replace some of these undertakings by placing them in the Principal Act as well as incorporating enforcement provisions.⁶

Complaints of rorting and abuse

There have been many complaints of problems with the 457 visa system. “Unions want the rules tightened after it was revealed that 20 overseas workers had died in the past five years...There have been allegations of employer abuse and underpayment and the government has been at pains to tighten up the scheme to preserve its integrity.”⁷

“There have been many reported cases in the media of alleged situations where 457 visas have been abused by employers. Examples have included underpayment of wages or no payment for overtime, discrimination on the basis of union membership, workplace safety and training requirements not being met and 457 workers being used as strike breakers.”⁸

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4. Migration Regulations (Amendment) 1996 No.76, explanatory statement, p. 17
<http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/frameLodgmentAttachments/22D4675D5C0D8ACDCA256F73000E1BE0>
 5. *ibid*, p. 18
 6. See R 1.20CB Sponsorship Undertakings in the Migration Regulations 1994.
 7. Alexander Symonds, ‘Temporary work visas cop flak from both sides,’ *Australian Financial Review*, 3 July 2007, p. 8.
 8. John Della Bosca, NSW Minister for Industrial Relations, Submission to the Joint Committee on Migration *Inquiry into Temporary Business Visas*, 2007.

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During Estimates hearings, answers to questions on notice have revealed that there are certain industries at risk. Those industries where a number of breaches of sponsor undertakings have occurred are in the following industry sectors:

- construction
- manufacturing
- accommodation, cafes, restaurants
- agricultural and forestry.⁹

‘There have been allegations made against 10 companies in the meat industry since January 2006.’¹⁰

Of the 300 subclass 457 visa sponsors under investigation by Department of Immigration and Citizenship, 70 have been referred to other agencies for their investigation as at 19 February 2007. “Referrals are usually made once DIAC has sufficient evidence to warrant this.”¹¹

What happens currently if there is a breach in sponsor undertakings

According to Form 1196, sponsorship undertakings are currently monitored. The Department requires sponsors to provide monitoring information, including employment records. The Department may also undertake site visits to ensure compliance with undertakings. If a business sponsor fails to provide information requested during monitoring, does not fulfil sponsorship undertakings or provides incorrect information to the Department, the Department may then bar the business from sponsoring or nominating employees for a specified period of time, cancel the business sponsorship agreement and/or cancel the visas of employees the business has sponsored.¹²

9 Senator Kim Carr, Answer to a Question on Notice, Supplementary Budget Estimates, 30 October 2006.

10 Senator Kim Carr, Answer to a Question on Notice, Supplementary Budget Estimates, 30 October 2006.

11 Senator Trish Crossin, Answer to a Question on Notice, Additional Estimates Hearing, 12 February 2007.

12 Department of Immigration and Citizenship, Sponsoring temporary overseas employees to Australia, Form 1196, p. 2.

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Penalties proposed in the Bill

A breach of an obligation under the Bill will incur a civil penalty. The penalty for an individual is 60 penalty units and for a body corporate it is 300 penalty units. For a breach of an obligation contained in the regulations, the regulations may prescribe a civil penalty not exceeding 50 penalty units for an individual and 250 penalty units for a body corporate.¹³ Section 4AA of the *Crimes Act 1914* defines a penalty unit as \$110.

Criminal penalties have not been used for the reasons set out in the Explanatory Memorandum:

The justification for use of civil penalty provisions, as opposed to criminal sanctions, is that the imposition of criminal sanctions on sponsors could have harsh consequences on the sponsor such as a loss of their export licence (or any other licence for that matter), which would not be in Australia's best interest. The use of civil provisions is also considered appropriate for the enforcement scheme to be flexible and administratively manageable. The use of civil penalties will increase compliance with migration legislation (and other relevant laws), thereby preserving the integrity of the Australian labour market and improving the conditions of overseas workers. In addition, the justification for no fault civil penalty offences is to facilitate an infringements notices regime. A power has been included to provide for such a regime in the *Migration Regulations 1994*. (See item 46 which inserts new paragraph 504(1)(jb)).¹⁴

Infringement Notices Regime

In the second reading speech by the Minister for Immigration and Citizenship, Mr Andrews states that the Bill provides a power for regulations to be made to set up an infringement notices regime. **Item 46** in the bill inserts a provision into section 504(1) of the *Migration Act 1958*. **New Subsection 504(1)(jb)** will enable the making of regulations to enable a person to pay a prescribed penalty as an alternative to a proceeding under section 140SB which deals with the imposition and recovery of civil penalties under Subdivision BB. This prescribed penalty would not exceed one-fifth of the maximum penalty. For example if a person was in breach of an obligation, instead of proceedings being instituted against that person for the recovery of a penalty, they would be given the option of paying a prescribed penalty that would not exceed one-fifth of the maximum penalty. If the civil penalty is 50 penalty units, the infringement penalty would be 10 penalty units or \$1100.

13 Section 140IL Other obligations as prescribed, Migration Amendment (Sponsorship Obligations) Bill 2007, p. 11

14 Migration Amendment (Sponsorship Obligations) Bill 2007, *Explanatory Memorandum*, p. 8.

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Non-compliance with a requirement of an Inspector

A criminal offence is created by **new section 140ZK**. A person commits an offence if they do one of the following:

- fails to produce a document within a specified period that was required by an inspector under **subparagraph 140ZJ(2)(b)(iii)**;
- fails to produce a document at a specified place and within a specified time not less than 7 days in response to a written notice by an inspector under **paragraph 140ZJ(2)(c)**;
- does not produce a document under **subparagraph 140ZJ(2)(b)(iii)** and the inspector then issues a written notice to the person under **subsection 140ZJ(4)** to produce a document at a specified place and within a specified time not less than 7 days and the person fails to respond to this request.

The penalty is imprisonment for six months. See the discussion under Penalties in the [Migration Amendment \(Employer Sanctions\) Bill 2006](#) where in Commonwealth legislation section 4B of the *Crimes Act 1914* provides that a court may if it thinks it appropriate impose a pecuniary penalty instead of a prison sentence, unless there is a contrary intention, or it may impose both a prison sentence and a pecuniary penalty.

Senate Standing Committee on Legal and Constitutional Affairs

The Committee has completed a report on [Migration Amendment \(Sponsorship Obligations\) Bill 2007 \[Provisions\]](#) on 30 July 2007. The Committee considered that the Bill:

represents a justifiable measure to better ensure the integrity of the 457 visa system. The obligations contained in the Bill are generally aimed at reflecting, in legislation, the existing undertakings that must be observed by sponsors employing workers under the 457 visa scheme. The Bill further aims to ensure these obligations are met without being circumvented by employers undermining stipulated minimum salary levels by passing on costs to employees. The Committee supports both these objectives.¹⁵

The Committee also noted that matters relating to greater investigative powers of departmental officers and stronger penalties were not in dispute during the inquiry.¹⁶

15 Senate Standing Committee on Legal and Constitutional Affairs, *Migration Amendment (Sponsorship Obligations) Bill 2007 [Provisions]*, Senate Standing Committee on Legal and Constitutional Affairs, Canberra, 2007, p. 13.

16 *ibid*, p. 13.

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Submissions to the Committee canvassed a number of concerns such as:

- the Bill is a disproportionate and potentially detrimental response to a limited problem;¹⁷
- medical costs would be a significant cost for sponsors and that employees should pay their own costs;¹⁸
- visa holders should pay their own travel costs;¹⁹
- the requirement to pay migration agents' costs would unnecessarily inhibit employers from utilising the scheme;²⁰
- retrospectivity of the operation of the Bill's provisions to current visa holders and sponsors is a major concern;²¹
- more compliance time is needed to respond to provide information on request and that 21 days would be a reasonable time.²²

The Committee recognised that although it is undesirable to have retrospective application of laws, in the case of 457 visas and the length that current visas may run, that it was impractical for the law not to apply to these visas as well.²³

Recommendations of the Committee

The Committee has recommended:–

- that there should be a right to challenge unreasonable and unspecified migration agents' and recruitment agents' charges;

17 Senate Standing Committee on Legal and constitutional Affairs, *Migration Amendment (Sponsorship Obligations) Bill 2007 [Provisions]*, Senate Standing Committee on Legal and Constitutional Affairs, Canberra, 2007, p. 7.

18 *ibid*, p. 9.

19 *ibid*, p. 10.

20 *ibid*, p. 10.

21 *ibid*, p. 12.

22 *ibid*, p. 12.

23 *ibid*, p. 14.

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- that a minimum of 14 days to provide information replace the proposal in the Bill of not less than 7 days;
- that DIAC establish guidelines relating to the exercise of powers proposed in sections 140IK (obligation to provide information) and 140ZJ (powers of inspectors) and that notices under these sections clearly state the consequences of non-compliance.

ALP Position

According to the additional comments attached to the Senate Legal and Constitutional Committee report, the ALP supports the recommendations of the Committee but add that in their opinion the Bill does not prevent continued abuse of 457 visas to undercut Australian wages and conditions. They consider that it is being used as a cheap source of labour rather than to address a skills shortage. Their position is that 457 visa holders should be paid the “going market rate of pay, while maintaining the Minimum Salary Level (MSL) as a base salary for temporary work visa holders.”²⁴ The effective market rate of pay for temporary skilled workers is based on the principle of equal pay for equal work.²⁵

Joint Committee on Migration

On 6 December 2006 the Joint Standing Committee on Migration was given a reference to inquire into *Eligibility requirements and monitoring, enforcement and reporting arrangements for temporary business visas*. The report of the inquiry into temporary business visas will be made available soon once it is tabled.

Financial implications

Concerns were raised in submissions to the Senate Standing Committee on Legal and Constitutional Affairs concerning the imposition of costs associated with obligations on employers such as health costs, travel costs, migration agents’ costs and costs associated with non-departure.²⁶ In a submission to the Joint Committee on Migration a union raised

24 Senate Standing Committee on Legal and Constitutional Affairs, *Migration Amendment (Sponsorship Obligations) Bill 2007 [Provisions]*, Senate Standing Committee on Legal and Constitutional Affairs, Canberra, 2007, additional comments by the Australian Labor Party, p. 17.

25 *ibid*, p. 17.

26 *ibid*, p. 8.

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concerns about the “exorbitant deductions being made from the wages of temporary workers for accommodation, airfares and recruitment costs.”²⁷

The Explanatory Memorandum states the changes to the temporary skilled migration visa category are estimated to be \$85.3 million over the next four years from 2007-08. This amount has been included in the 2007-08 Budget and forward year estimates. \$66.1 million has been allocated to the Department of Immigration and Citizenship, \$35.9 of which implements the sponsorship obligations regime with the remainder to the Department of Employment and Workplace Relations, Department of Education, Science and Training and the Australian Taxation Office. Revenue from fines is estimated at \$7.9 million.

Main provisions

Schedule 1 – *Migration Act 1958*

Part 1– Amendments

New Subdivision BA– Sponsorship undertakings may be required for approval as a sponsor

Item 6 new subsection 140H(3) substitutes the existing provision and provides that undertakings do not have effect until the applicant is an approved sponsor of the person.

Item 7 New Subdivision BB–Sponsorship obligations of certain approved sponsors.

New section 140IB defines the meaning of “primary person” as the person being sponsored for a nominated activity, and the meaning of “secondary person” as a person who has a relationship with the primary person.

Obligation to pay at least a Minimum Salary Level

New subsection 140IC(1) provides that the approved sponsor will pay a salary at or above the level that is worked out in a way specified by the Minister from time to time and pay the person who is not in Australia when the visa is granted either on the day the person commences working for the approved sponsor or 28 days after the person arrives in Australia, whichever is the earlier date (**new subsection 140IC(1)(b)(i)**). If the person is already in Australia, the day on which the person starts work or 28 days after the visa is

27 CFMEU Submission to the Joint Committee on Migration, Inquiry into Eligibility Requirements and monitoring, enforcement and reporting arrangements for temporary business visas, 2 February 2007, p. 4

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granted, whichever is the earlier. A civil penalty applies for a breach of **new subsection 140IC(1)**.

New subsection 140IC(2) provides that a legislative instrument may specify ways in which the level of salary is worked out according to different occupations, persons working in different geographical areas and any other circumstances that the Minister considers appropriate. Mechanisms may be included to vary the level on specified days or at the end of specified periods. This would allow indexation of the level of salary by a specified percentage on a particular day each year without the need to re-make the legislative instrument.²⁸ **New subsection 140IC(3)** provides that the obligation on the sponsor is satisfied if the sponsor has arranged with another person to pay some or all of the person's salary, for example the Explanatory Memorandum mentions workers compensation insurance for the primary person. Any shortfall in the salary of the primary person is to be met by the sponsor. Subsection (3) only applies if the sponsor has paid the costs, such as a premium for example, of the arrangement with the other person (**new subsection 140IC(4)**).

Obligation to employ primary person in the same or a higher-skilled activity

New section 140ID provides that there is an obligation to employ the primary person in the same or a higher skilled activity as the nominated activity for which the visa was granted in the first place. A civil penalty applies for a breach of this obligation.

Obligation to pay travel costs of leaving Australia

New section 140IE provides that there is an obligation to pay the travel costs of the primary and secondary person when leaving Australia to return home permanently. **New subsection 140IE(1)** provides that the sponsor pay the travel costs for the primary person to return home. This includes travel within Australia as well for the purpose of returning home. A civil penalty applies for any breach of this obligation. The sponsor is also responsible for paying the travel costs of the secondary person, including internal travel in Australia for the purpose of returning home. A civil penalty applies for a breach of this obligation (**new subsection 140IE(2)**). If there has been more than one approved sponsor, subsections (1) and (2) only apply to the last approved sponsor who is responsible for the travel costs of the primary and secondary persons when they leave Australia permanently (**new subsection 140IE(3)**). If another person, (whether the primary or secondary person) pays some or all of the travel costs, the approved sponsor's obligation is satisfied when the

28 Senate Standing Committee on Legal and constitutional Affairs, *Migration Amendment (Sponsorship Obligations) Bill 2007 [Provisions]*, Senate Standing Committee on Legal and Constitutional Affairs, Canberra, 2007, answer to a question on notice to the Department of Immigration and Citizenship, p. 1.

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approved sponsor fully reimburses the other person within 14 days of being given a receipt (**new subsection 140IE(4)**).

Obligation to pay certain medical costs

New subsections 140IF(1) and (2) provide that an approved sponsor must pay the prescribed medical costs of the primary person and the secondary person. A civil penalty applies for a breach of these obligations. **New subsection 140IF(3)** provides that regulations prescribing medical costs can specify particular medical costs or classes of costs, a limit on the medical costs for a person and a limit on particular medical costs or classes of costs. **New subsection 140IF(4)** provides that if the primary or secondary person pays the medical costs, the sponsor satisfies his or her obligations if these costs are fully reimbursed by the sponsor in 14 days. **New subsection 140IF(5)** makes similar provision in the event of costs being paid by a third person. Subsection (5) only applies if the approved sponsor has paid the costs of the arrangement (**new subsection 140IF(6)**).

Obligation to pay certain other fees and costs

New subsection 140IG(1) provides that the approved sponsor of the person must pay any licence, registration, membership or other fees required under any Commonwealth, State or Territory law for the person to work in that nominated activity; the costs of recruiting the person, and any migration agent fees relating to the person's visa application. A civil penalty applies for a breach of this obligation. The approved sponsor of the secondary person must pay the migration agent's fees associated with the visa application. A civil penalty applies for a breach of this obligation (**new subsection 140IG(2)**). If the another person pays some or all of the fees and costs, the approved sponsor's obligation is satisfied in relation (1) and (2) if the approved sponsor reimburses the person within 14 days (**new subsection 140IG(3)**).

Obligation to keep records

New section 140IH provides that the approved sponsor must keep prescribed records of all payments made under this Subdivision or regulations and any other records that are prescribed by regulations. A civil penalty applies for a breach of this obligation.

Obligation to pay costs of locating, detaining and removing etc. sponsored person

New subsection 140IJ(1) provides that an approved sponsor must pay to the Commonwealth any costs associated with locating and detaining a person, including a secondary person, removal or deportation costs including airfares and processing a protection visa application. **New subsection 140IJ(2)** provides that costs relating to locating a person or processing a person for a protection visa will be determined in writing by the Minister and the costs of detaining, removing, or deporting a person has the same meaning as in Division 10 which deals with the costs of detention, removal and deportation. However, regulations may prescribe a limit on those costs (**new subsection**

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140IJ(2)). Currently there is a limit of \$10000 on costs related to location and detention.²⁹ **New subsection 140IJ(3)** provides that if there are other persons as well as the approved sponsor who are responsible for the costs under Division 10, they will be jointly and severally liable for the costs. **New subsection 140IJ(4)** provides that nothing in Division 10 will override the liability of the approved sponsor in this section.

Obligation to provide information

New subsection 140IK(1) allows the Secretary to require the sponsor to furnish information specified by notice. The information must be for the purposes of the Act or the regulations. **New subsection 140IK(5)** provides that failure to comply with the notice results in a civil penalty. **New subsection 140IK(6)** provides that an approved sponsor does not have to comply with a notice once it is withdrawn in writing by the Secretary.

Subdivision BC—Cancelling approval as sponsor or barring a sponsor

Item 10, new subsection 140K(1A) provides that the Minister may take action under section 140L if an approved sponsor or former approved sponsor with an existing obligation, breaches an obligation. **New subsection 140K(1B)** provides that a Minister may take action under subsection 140L(c) to (g) if an approved sponsor, or former sponsor contravenes a Commonwealth, State or Territory law. Subsections 140L(c) to (g) deal with barring a sponsor.

Subdivision BE—Liability, enforcement and recovery

Item 16 new section 140QA defines ‘eligible court’ and ‘Subdivision BB civil penalty provision’. **Item 22 new section 140SA** provides that the Minister may apply for an order from an ‘eligible court’ relating to a breach of an obligation with a civil penalty attached.

New section 140SB relates to the imposition and recovery of civil penalties under Subdivision BB. **New subsection 140SB(1)** provides that a court can make an order to impose a pecuniary penalty on a person if that person is in breach of an obligation. A person involved in the breach, such as a person who aids or abets a breach will be treated as having breached the obligation and be subject to the civil penalty (**new subsection 140SB(9)**).

New subsection 140SB(3) provides that if a person commits two or more breaches arising out of a course of conduct, the number of breaches will be taken to be a single breach of the provision. **New subsection 140SB(4)** provides that the two or more breaches arising out of a course of conduct have to relate to an obligation to the same person. If another person is owed an obligation and both obligations are breached, then it will constitute two

29 Migration Regulations 1994, r.1.20CC

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separate breaches. **New subsection 140SB(5)** provides that (3) does not apply, if a court has already imposed a penalty for an earlier breach of the provision. If during proceedings under section 140SB, it becomes apparent to a Court that there are unpaid amounts owing to the Commonwealth, State, Territory or another person, the Court may order that these amounts be paid (**new subsection 140SB(6)**). A note refers to sections 140R (Joint and several liability for debts)³⁰ and 140S (Liability to pay other amounts) in the Migration Act 1958 which allow recovery in a court of amounts owed in relation to an undertaking or an obligation. However **new subsection 140SB(7)** provides that a court cannot make an order under subsection (6) if the underpayment was more than 6 years before the court proceedings. Proceedings for a breach of an obligation must not commence if it is more than 6 years since the breach occurred (**new subsection 140SB(8)**).

New section 140SC provides that a court when exercising powers under section 140SB(6) must order that interest on the whole or part of the sum, be included in the sum for all or part of the period between the time the action is commenced and the date when the order is made or judgment is entered. Alternatively the Court instead of ordering interest order that a lump sum be included instead of interest. Situations where this does not apply are set out in **new subsection 140SC(2)**.

Subdivision BF– Other Matters

Section 140V deals with disclosure of personal information in prescribed circumstances. Provisions exist in the section about disclosure of information to an approved sponsor or former approved sponsor. **Item 25 new subsection 140V(1A)** provides that the Minister may disclose prescribed personal information about an approved sponsor or former approved sponsor to a visa holder or former visa holder of that sponsor. **New subsection 140V(1B)** provides that a Minister may disclose prescribed personal information to a prescribed agency of the Commonwealth, State or Territory about a visa holder or former visa holder or an approved sponsor or former sponsor. **Item 26 new subsection 140V(3)** is substituted and provides that regulations may prescribe the circumstances in which personal information can be disclosed or used under (1), (1A) or (1B). **Item 27 new subsection 140V(4)** provides that the Minister must notify the visa holder or former visa holder or the sponsor or former sponsor of the disclosure and details of the information disclosed.

Section 140X is substituted and provides that this Division and regulations made under it apply to a partnership as if it were a person.

30 Joint and several liability “is an obligation or liability of two or more persons, so that all are liable jointly or each is liable separately. The party to whom the liability or obligation is owed may either sue one or more separately or all jointly. This means that a plaintiff is entitled to full compensation from any one of the defendants,” Butterworths Australian Legal Dictionary, 1997, p. 643

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Item 35 new subsection 140ZBA(1) provides that an offence that is otherwise committed by the partnership is taken to have been committed by each partner, who committed the act or made the omission or aided and abetted the act or omission. **New subsection 140ZBA(2)** provides that a pecuniary penalty must not be imposed on a partner bound by a civil penalty provision in relation to a breach of an obligation unless the partner committed the act or made the omission or aided and abetted the conduct. For the purposes of subsections (1) and (2) if the conduct by a partner was in the ordinary course of business and within authority then this will suffice to establish the partnership engaged in conduct. **New subsection 140ZBA(4)** provides that in relation to (1), to establish that a partnership had a particular state of mind when engaging in certain conduct, it is enough to demonstrate that the partner had that particular state of mind.

New section 140ZC substitutes the existing section and relates to unincorporated associations. **Item 36 new section 140ZC** provides that this Division and regulations made under it apply to an unincorporated association as if it were a person.

Item 37 new subsection 140ZD(1) substitutes the existing section and provides that subject to section 140ZF (former members of committees of management), a sponsorship obligation that would otherwise be imposed on an unincorporated association, is imposed on each of the members of the association's committee of management when the association becomes the approved sponsor. The section is subject to the operation of section 140ZF where regulations will prescribe the circumstances of how long a sponsorship obligation will remain enforceable against former members of the committee as well as a sponsorship right and debts that remain payable.

Item 42 new section 140ZGA makes similar provision to that of section 140ZBA in relation to offences by unincorporated associations.

Item 44 new Subdivision D–Inspectors. New section 140ZH includes provisions concerning inspectors. **New subsection 140ZH(1)** provides that the Minister may appoint inspectors as he considers necessary by written instrument. **New subsection 140ZH(5)** provides that the Act or regulations will confer the powers and functions of an inspector. **New subsection 140ZI(1)** provides that the Minister may issue an identity card to an inspector. The inspector must carry the card at all times when exercising the powers and functions of an inspector (**new subsection 140ZI(2)**).

New subsection 140ZJ(1) provides that the purpose of inspectors is to determine whether obligations are being or have been complied with under the Act and regulations. **New subsection 140ZJ(2)** provides inspectors with the power

- to enter a place of business without force if the inspector believes there may be information, documents or other relevant material relating to whether obligations are being complied with;
- inspect any work, material, machinery, appliance, article or facility;

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- interview any person and require documents to be produced within a specified period;
- make copies or extracts of the document, require a person to tell the inspector who has a document and can require a person by written notice to produce a document to him at a specified place within a specified period not less than 7 days.

New subsection 140ZJ(8) provides that a person is still required to produce information or documents even though it may tend to incriminate the person. **New subsection 140ZJ(9)** provides that producing the information or document, or the direct or indirect consequences of doing that is not admissible as evidence in any criminal proceedings other than for an offence against section 140ZK.

New section 140ZK creates an offence for a person who fails to comply with some requirements under section 140JC (see page 9 of this Digest).

Item 45 Part 8D—General provisions relating to civil remedies

New section 486R describes the rules that will apply and how the Part will operate for the purpose of section 140SB (imposition and recovery of civil penalties under Subdivision BB) and any other provisions of the Act or regulations that are declared to be civil remedy provisions.

Item 46 new subparagraph 504(1)(jb) will enable regulations to be made under Subdivision BB to allow a person to pay a prescribed penalty to the Commonwealth rather than a proceeding under section 140SB. The penalty will not exceed one fifth of the maximum penalty that would normally apply. “An infringement notice will be issued pursuant to the regulations made under section 504(1)(jb) in relation to less serious or technical breaches of the obligations. An example might be failing to respond to a requirement to return a monitoring form.”³¹

Schedule 2—Taxation Administration Act 1953

Part 1—Amendment

New subsection 3ED(1) overrides secrecy provisions to allow the Commissioner for Taxation to disclose tax information to DIAC in certain circumstances. Under **new subsection 3ED(2)** a person who receives information under subsections (1) or (3), must not disclose that information. A penalty of two years imprisonment applies. **New subsection 3ED(3)** provides that subsection (2) does not apply if the information was

31 Senate Standing Committee on Legal and constitutional Affairs, *Migration Amendment (Sponsorship Obligations) Bill 2007 [Provisions]*, Senate Standing Committee on Legal and Constitutional Affairs, Canberra, 2007, answer to a question on notice to the Department of Immigration and Citizenship, p. 5.

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disclosed or a record made in connection with exceptions listed; such as the exercise of the Minister's powers under Division 3A or the regulations, a review under the Migration Act or judicial review of a decision concerning the exercise of those powers, proceedings under Subdivision BE (Liability, enforcement and recovery provisions), a penalty is paid by a person in accordance with paragraph 504(1)(jb) of the Act, or any other proceedings arising as a result of (c) or (d) in new section 3ED.

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