



Migration Legislation Amendment (Worker Protection) Bill 2008

Elibritt Karlsen
Law and Bills Digest Section

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Migration Legislation Amendment (Worker Protection) Bill 2008

Date introduced: 24 September 2008

House: Senate

Portfolio: Immigration and Citizenship

Commencement: Sections 1 to 3 commence on the day of Royal Assent. All other provisions commence on a day to be fixed by Proclamation, or nine (9) months after the day of Royal Assent, whichever is the sooner.

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

The purpose of this Bill is to amend the *Migration Act 1958* (the Migration Act) to create a new sponsorship framework with heightened enforcement mechanisms (including civil penalty provisions, monitoring and investigation powers, and information sharing provisions) and to amend the *Taxation Administration Act 1953* to enable disclosure of information to the Department of Immigration and Citizenship (DIAC or the Department).

Background

This Bill revives some of the provisions of the [Migration Amendment \(Sponsorship Obligations\) Bill 2007](#) ('the Sponsorship Obligations Bill') which was introduced to the House of Representatives on 21 June 2007. It was referred to the Senate Legal and Constitutional Affairs Committee on 21 June 2007, which subsequently tabled its [report](#) on 7 August 2007.¹ The Sponsorship Obligations Bill was not debated in either house and subsequently lapsed when Parliament was prorogued for the 2007 federal election.²

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1. 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.
 2. This Digest has been prepared using some of the information contained in the [Bills Digest](#) prepared for the Sponsorship Obligations Bill: Moira Coombs, 'Migration Amendment (Sponsorship Obligations) Bill 2007', *Bills Digest*, no.26, Parliamentary Library, Canberra, 2007-08.

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The Temporary Business (Long Stay)(Subclass 457 visa) was introduced by the Howard Government in 1996 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’.³ During 2007/08, almost 60,000 visas were granted to overseas workers (including Subclass 457 visas).⁴

Basis of policy commitment

In the 2008/09 Budget, the Government announced that it would be allocating \$19.6 million to improve the processing and compliance of the temporary skilled migration program:

The Government will provide \$19.6 million over four years (including \$0.4 million in capital funding in 2008-09) to strengthen the integrity of temporary working visa arrangements, including the 457 visa program, by clarifying the obligations and rights of employers and workers, further protecting workers from exploitation.

The funding will support a comprehensive information strategy and the development and introduction of legislation to better define employers' obligations, improve investigative powers of the Department of Immigration and Citizenship, and develop a more robust sanctions framework to protect workers' rights.

This measure also includes the establishment of a departmental working group to develop a longer-term reform package to improve the responsiveness and integrity of temporary working visa arrangements. The group will receive input from an expert in industrial relations, and representatives from state and territory governments, industry and unions.⁵

Current reviews and consultation processes

A number of reviews of the temporary skilled migration program are currently underway. These include:

- The Skilled Migration Consultative Panel comprising representatives of the New South Wales, Victorian, Queensland and Western Australian State Governments; Australian Chamber of Commerce and Industry; Australian Industry Group; Business

3. Explanatory Statement, Migration Regulations (Amendment) 1996 No.76, p. 18. See also: Janet Phillips, [Temporary \(Long Stay\) Business Visas: subclass 457](#), *Research Note*, no. 15, 21 February 2007.
4. Senator the Hon Chris Evans (Minister for Immigration and Citizenship), *New laws to protect overseas workers*, media release, Parliament House, Canberra, 24 September 2008.
5. Budget Measures 2008-09, ‘Budget Paper No. 2: Expenses Measures - Immigration and Citizenship’, [<http://www.budget.gov.au/2008-09/content/bp2/html/expense-18.htm>], accessed on 9 October 2008.

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Council of Australia; Australian Council of Trade Unions and the Minerals Council of Australia;⁶

- Subclass 457 Integrity Review by Ms Barbara Deegan (Commissioner of the Australian Industrial Relations Commission);⁷

See further:

- External Reference Group, Visa Subclass 457 (April 2008);⁸
- Joint Standing Committee on Migration, Temporary visas...permanent benefits: Ensuring the effectiveness, fairness and integrity of the temporary visa program (August 2007) (see 'Committee consideration' below).

According to DIAC's discussion paper, Business (Long Stay) Subclass 457 and related temporary visa reforms released on 30 June 2008:

The Minister has also announced that a Working Party will be established to consider and implement the recommendations of these review processes and other recent review processes... and the Council of Australian Government's directed review by the Commonwealth State Working Party on Skilled Migration... The Working Party will develop a longer term reform agenda to be presented to Government in the 2009-10 Budget context.⁹

Potentially contentious aspects of this Bill

Though this Bill is similar in many respects to the Sponsorship Obligations Bill in that they both expand the powers to monitor and investigate, and create punitive penalties for non-compliance, there are some significant differences. The most notable is that this Bill, unlike its predecessor does not attempt to elevate key sponsorship obligations into the Migration Act. The two reasons provided for this in the second reading speech are:

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6. Senator the Hon Chris Evans (Minister for Immigration and Citizenship), *Panel of experts to advise on changes to 457 visa program*, media release, Parliament House, Canberra, 8 July 2008, [<http://www.chrisevans.alp.org.au/news/0708/immimediarelease08-01.php>], accessed on 9 October 2008.
 7. Further information and links to the three issues papers produced by the review are available at the Department of Immigration and Citizenship website: <http://www.immi.gov.au/skilled/457-integrity-review.htm>. Ms Deegan is currently on six months leave from her current position as Commissioner.
 8. Available at the Minister for Immigration and Citizenship website: <http://www.minister.immi.gov.au/media/media-releases/2008/erg-final-report-april-2008.pdf>
 9. Department of Immigration and Citizenship, *Discussion Paper: Business (Long Stay) Subclass 457 and related temporary visa reforms* (30 June 2008) available at the Minister for Immigration and Citizenship website: <http://www.minister.immi.gov.au/media/media-releases/2008/discussion-paper-for-legislation.pdf>.

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First...there will be a need to prescribe additional obligations as more visas are brought within the new sponsorship framework; and second, a high degree of flexibility is essential for the efficient and effective program operation over time in a dynamic area such as this.¹⁰

Another reason put forward for prescribing the obligations in the Migration Regulations rather than the Migration Act is to provide an opportunity for the Minister to consider advice provided through various review processes before finalising each particular sponsorship obligation¹¹ (see ‘Current reviews and consultation processes’ above). Importantly, there has been some disagreement in the past especially amongst industry groups, as to the nature of sponsorship undertakings and the financial impact such obligations have on businesses (see ‘Committee consideration’ below).¹²

Other potentially contentious aspects of this Bill might include:

- The impact of the Bill on pre-existing sponsorship arrangements including the applicability of enforcement mechanisms to existing Subclass 457 visa sponsors. The Minister will also have the power to make amendments to pre-existing sponsorship obligations (**proposed subsections 140E and 140H** see also ‘Transitional matters’ below);
- The appropriateness of civil penalty provisions in the Migration Act and whether the penalties for contravention (in **proposed section 140Q**) are reasonable;
- the use of a non-disallowable legislative instrument to work out the actual cost to the Commonwealth in relation to a sponsorship obligation (**proposed subsection 140J(2)**);¹³
- The scope of inspectors’ powers (under **proposed subsection 140X(2)**) and whether they should be in accordance with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*;¹⁴

10. Senator the Hon Joe Ludwig, (Minister for Human Services), ‘Second reading speech: Migration Legislation Amendment (Worker Protection) Bill 2008’, Senate, *Debates*, 24 September 2008 p. 6

11. Explanatory Memorandum, Migration Legislation Amendment (Worker Protection) Bill 2008, p. 21, para. 114. This is also given as a reason why the commencement date of the proposed amendments is set at 9 months rather than the usual 6 months: See Explanatory Memorandum, p. 4, para. 3.

12. DIAC’s discussion paper outlines a number of obligations that might be imposed under the new sponsorship obligations framework: Department of Immigration and Citizenship, *Discussion Paper: Business (Long Stay) Subclass 457 and related temporary visa reforms*, 30 June 2008, Section 1, pp. 5–20.

13. Due to subsection 44(2) of the *Legislative Instruments Act 2003*: Explanatory Memorandum, p. 22, para. 124.

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- The shorter minimum period of 7 days in which to respond to an inspector's written notice to produce a document or thing (rather than 14 days which is presently the case) (**proposed paragraph 140X(2)(c)**);¹⁵
- The impact on privacy because the Minister need not provide written notice to the person about whom information relates, when disclosing personal information to another government agency (**proposed subsection 140ZH(4)**); and
- The inclusion of more visas within the new sponsorship framework¹⁶ (perhaps including visas that do not currently have a sponsorship requirement).¹⁷

Key Issues

Sponsorship obligations

Employers currently seeking to employ overseas persons to work in Australia on a temporary basis have to make certain undertakings in relation to those employees. Presently, section 140H of the Migration Act provides that the Regulations may require a proposed sponsor to make prescribed undertakings.¹⁸ For the purposes of section 140H of the Migration Act, Regulation 1.20CB prescribes some 14 undertakings a sponsor must make for approval as a standard business sponsor.¹⁹ Importantly, existing subsection 140H(2) and (3) provide that the undertakings only have effect once the applicant consents in writing to sponsor that person and the undertakings do not take effect until the visa is granted.

According to Departmental guidelines, existing section 140Q of the Migration Act provides that unless otherwise specified in regulation 1.20DB, a sponsor's undertakings remain enforceable against the sponsor until either the sponsored person ceases to hold the

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14. The Explanatory Memorandum notes that the powers in **proposed subsection 140X(2)** are not in accordance with the Guide: Explanatory Memorandum, p. 40, para. 253
 15. This was an issue raised during the Senate Legal and Constitutional Affairs Committee (see 'Committee consideration' below).
 16. Senator the Hon Joe Ludwig, op. cit., p. 6.
 17. As contemplated in Department of Immigration and Citizenship, Discussion Paper: Business (Long Stay) Subclass 457 and related temporary visa reforms, op. cit., p. 7.
 18. 'The Subclass 457 and Subclass 470 (Professional Development) visa programs are the only temporary visa programs that currently operate entirely within this framework. Other temporary visa programs rely on part of this framework, a separate sponsorship framework, or incorporate no formal sponsorship at all': Department of Immigration and Citizenship, *Discussion Paper: Business (Long Stay) Subclass 457 and related temporary visa reforms* (30 June 2008), p. 5.
 19. These can also be found on the Department of Immigration and Citizenship website: <http://www.immi.gov.au/skilled/skilled-workers/sbs/obligations.htm>

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457 visa for which they were sponsored or the approval of the sponsor ceases under regulation 1.20E. Under regulation 1.20DB, some undertakings may continue to be enforceable until a later date such as those relating to co-operation with monitoring, payment of medical and hospital expenses and costs to the Commonwealth.²⁰

This Bill will make changes to existing sponsorship obligations. Most significantly, under the proposed amendments:

- A person will be required to satisfy sponsorship obligations automatically, by operation of law as opposed to when they have consented in writing and the visa has been granted, as is presently the case (**proposed section 140H**);
- A person will be required to satisfy sponsorship obligations in the manner (if any) and within the period (if any) prescribed by the Regulations (**proposed section 140H**);
- A person who is party to a ‘work agreement’ (as defined) will be expressly subject to the new sponsorship regime (**proposed subsection 140H(2)**);
- Different kinds of sponsorship obligations may be prescribed for different kinds of visa and different classes in relation to which a person may be, or may have been approved as a sponsor under **proposed subsection 140H(6)**;
- All existing partners of a partnership or members of an unincorporated association’s committee of management at any given time are required to satisfy a sponsorship obligation under **proposed Subdivision G**, where previously new partners or new members of a committee could elect whether to be bound by an obligation.²¹

Information sharing

Presently the Minister may disclose ‘personal information’ (as defined in the *Privacy Act 1988*) about a visa holder or former visa holder to an approved sponsor or former approved sponsor. However, the Minister must notify the visa holder in writing of the disclosure and of the details of the personal information disclosed (existing section 140V). Regulation 1.20IA lists the type of information that may be disclosed about a visa holder (or former visa holder) and the circumstances in which it may be disclosed.

This Bill will make significant changes to the manner in which personal and other information is handled. Most significantly, under the proposed amendments:

- DIAC may disclose ‘personal information’ (of a prescribed kind) about visa holders (including former visa holders) and approved sponsors (including former approved sponsors) to the visa holders and sponsors as well as to other government agencies;

20. Department of Immigration and Citizenship, Procedures Advice Manual 3 (PAM3): Sanctions and Monitoring Instructions, as at 19 September 2008.

21. Explanatory Memorandum, *op. cit.*, p. 3.

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- DIAC need not provide written notice to the person about whom information relates, when disclosing personal information to other government agencies (**proposed subsection 140ZH(4)**);
- DIAC may request that an approved sponsor (or former approved sponsor) disclose 'personal information' (of a prescribed kind) about a visa holder (or former visa holder) (**proposed section 140ZI**);
- The Secretary of the Department has new information gathering powers under **proposed section 486U**. They enable the Secretary to require a person (other than the wrongdoer), who the Secretary suspects on reasonable grounds can give information relevant to an application for a civil penalty order to give all reasonable assistance in connection with such an application. A Court may enforce compliance with such a request and the penalty for failing to give assistance is a maximum of 30 penalty units.
- The Commissioner of Taxation may disclose information acquired under a taxation law to DIAC if satisfied that the information satisfies two requirements. These relate to whom the information concerns, and the purpose for which it must be relevant. DIAC may then disclose or make a record of such information for specified purposes (**proposed section 3ED** of the *Taxation Administration Act 1953*).
- Inspectors (see below for discussion of provisions introducing inspectors) may disclose information acquired in the course of their duties to another person if they consider, on reasonable grounds that it is necessary or appropriate to do so in the course of exercising their power. More specifically, an inspector may disclose information so acquired to the Department of Employment and Workplace Relations (DEWR) if the inspector considers on reasonable grounds that the disclosure will assist the administration of the *Workplace Relations Act 1996*. However, such information may only then be used or further disclosed for the same purposes for which the original disclosure was made (**proposed section 140ZA**);

Investigation powers

Presently, DIAC monitors business sponsors through a variety of means including through education and awareness raising activities, desk auditing using a monitoring form, interviews and site visits etc.²² DIAC can acquire information for monitoring under existing subsections 137H(1) and (2) of the Migration Act which permits them to seek information from sponsors in relation to all matters arising from the business sponsorship application and approval e.g. payslips, record of hours worked, evidence of deductions etc. Under existing subsection 137H(3) the time allowed to respond to such a request for information must be 'reasonable'. Departmental Guidelines presently provide that 14 days would be a reasonable period but as little as 7 days might also be reasonable if the Department believes there are 'extenuating circumstances'. If no response is received

22. Department of Immigration and Citizenship, Procedures Advice Manual 3, op. cit.

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within the time specified, an extension of 14 days is normally provided.²³ Failure to respond can result in a ‘breach notice’²⁴ being sent and a site visit being scheduled.

The authority to conduct ‘site visits’ comes from both existing section 137H of the Migration Act (‘provision of information – business sponsors’) and specifically from regulation 1.20CB(1)(c) (‘to comply with its responsibilities under the immigration laws of Australia’) and regulation 1.20CB(1)(e) (‘to cooperate with the Department’s monitoring of the applicant and the sponsored person’), both of which the sponsor undertakes to comply with during their sponsorship application.²⁵

Presently, Departmental officers must request permission to enter premises and a sponsor may lawfully refuse entry to Department staff wanting to conduct a site visit. In this regard it should be noted that the Migration Act does not presently contain any search powers. A sponsor’s failure to co-operate can be considered a breach of sponsorship undertakings and may result in a breach notice being issued and sanctions being imposed (such as cancellation or barring action).

DIAC’s 2006/07 Annual Report states under the heading ‘Robust integrity measures’,

There continues to be an overall, high level of business sponsor compliance with sponsorship undertakings. However, in response to allegations of abuse of the subclass 457 programme and issues emerging from the department’s own monitoring in 2006-07, a more targeted, risk-based approach was developed and implemented.²⁶

However, of the 6463 business sponsors monitored to assess their compliance with sponsorship undertakings in 2006/07, only 26 per cent were visited onsite based on DIAC’s new targeted risk profiling.²⁷ In addition, statistics provided in DIAC’s 2006/07 Annual Report indicate a *decrease* in the number of sponsors monitored and site visits conducted since 2004:

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23. Department of Immigration and Citizenship, Procedures Advice Manual, op. cit.
 24. ‘A Breach Notice is not defined in the Regulations. A Breach Notice informs the sponsor that an actual or potential breach of their undertakings or requirements under the subclass 457 programme has occurred. The Breach Notice advises the sponsor that their access to the programme has been suspended and provides them with an opportunity to remedy the breach; comment on changes to ensure breach does [sic] recur, provide evidence the breach did not occur etc’: Department of Immigration and Citizenship, Procedures Advice Manual, op. cit.
 25. Department of Immigration and Citizenship, Procedures Advice Manual 3, op. cit.
 26. Department of Immigration and Citizenship, *Annual Report 2006/07*, ‘1.1.6 Temporary Residents: Robust integrity measures’, http://www.immi.gov.au/about/reports/annual/2006-07/html/outcome1/output1_1_6.htm, accessed 16 October 2008.
 27. *ibid.*

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	2004/05	2005/06	2006/07
100 per cent of subclass 457 visa sponsors monitored for compliance with visa conditions.	96.60	65.20	58.00
25 per cent of subclass 457 visa sponsors site visited at place of employment.	22.40	18.00	13.70 ²⁸

This Bill will make changes to existing monitoring arrangements. Most significantly, under the proposed amendments:

- Inspectors will be appointed by an instrument of appointment under **proposed section 140V**;
- The powers exercisable by inspectors will be expressly set out in the Migration Act (**proposed section 140X**). Though the Migration Regulations may prescribe other additional powers (**proposed paragraph 140X(2)(d)**);
- Inspectors will not have the power to enter premises using force (**proposed paragraph 140X(2)(a)**); and
- A person will commit an offence punishable by a maximum 6 months imprisonment, if they do not comply with an inspector's request to produce a document or thing at a specified place or within a specified period (of not less than 7 days) under **proposed section 140Z**.

Penalties and sanctions

There are a number of actions that may currently be taken with respect to sponsors found to be in breach of a sponsorship undertaking (or former standard business sponsors against whom an undertaking remains enforceable). Existing section 137B of the Migration Act provides express statutory authority for the Minister to cancel a sponsorship approval. The Regulations prescribe the grounds for cancelling business sponsorship approvals under section 137B of the Act.²⁹ These include providing incorrect or false information to

28. Department of Immigration and Citizenship, *Annual Report 2006/07*, statistics extracted from 'Table 32: Temporary residents – performance information', http://www.immi.gov.au/about/reports/annual/2006-07/html/outcome1/output1_1_6.htm, accessed 16 October 2008.

29. Regulation 1.20F, Migration Regulations 1994.

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DIAC, failing to comply with sponsorship undertakings, and not continuing to satisfy the requirements for approval as a standard business sponsor.

In addition, existing section 140L lists the actions that may (or must) be taken under existing sections 140J and 140K.³⁰ These include cancelling the sponsorship for specified kinds of temporary visas or all kinds of visas, barring the sponsor for a specified period from sponsoring more people under one or all existing approvals, or barring the sponsor for a specified period from making future applications for approval as a sponsor etc. An authorized officer may also require and take a 'security' (which is akin to a bond) under existing section 269 or enforce a security already taken.

According to DIAC's 2006/07 Annual Report, 'during the year 313 sponsors were formally warned and 95 sponsors had a bar imposed on sponsoring further workers, including 14 who had their sponsorship agreement cancelled'.³¹

This Bill will introduce new civil penalties that may apply to sponsors. Most significantly, under the proposed amendments:

- Two 'civil penalty provisions' (as defined) are inserted into the Migration Act by **proposed subsections 140Q(1) and (2)**. Civil penalty provisions have not previously been included in the Migration Act.³²
- If a person fails to satisfy a sponsorship obligation in the manner (if any) or within the period (if any) prescribed by the Regulations, a person contravenes a civil penalty provision under **proposed section 140Q** which currently imposes a maximum penalty of \$6,600 for an individual and \$33,000 for a body corporate;
- The Government or another person owed an amount (prescribed in the Regulations) by an approved sponsor (or former approved sponsor) in relation to a sponsorship obligation may recover the amount as a debt in an 'eligible court' (as defined) under **proposed section 140S** (including through an informal small claims procedure in a Magistrates Court under **proposed section 140SC**);
- The Minister may commence civil penalty proceedings against a person who contravenes a civil penalty provision or against others involved in the contravention under **proposed Part 8D**. Under these civil penalty proceedings, a Court may order a

30. Regulations 1.20HA and 1.20HB prescribe the grounds for imposing sanctions under sections 140J and 140K respectively of the Migration Act. Note that the power to waive a bar imposed on a person under these sections is contained in section 140O of the Migration Act.

31. Department of Immigration and Citizenship, *Annual Report 2006/07*, op. cit. See also: Commonwealth Government, Submission No. 33, Joint Standing Committee on Migration, 'Temporary visas...permanent benefits: ensuring the effectiveness, fairness and integrity of the temporary business visa program', August 2007, p. 13.

32. Explanatory Memorandum, op. cit., p.7, para. 19.

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person to pay a pecuniary penalty for each contravention (but not more than the relevant amount specified for the provision) under **proposed section 486R**;

- The regulations may make provision enabling a person who is alleged to have contravened a civil penalty provision to pay a specified penalty (not exceeding one-fifth of the maximum prescribed penalty) *as an alternative* to civil penalty proceedings (**proposed section 140R**);
- The actions that may be taken for failing to satisfy a sponsorship obligation (such as cancellation and barring) will not be limited to sponsors of *temporary* visa holders and will not be limited to circumstances relating to a failure to satisfy a sponsorship obligation (**proposed sections 140L and 140M**);³³ and
- A visa holder will not be jointly and severally liable for any of the costs which arise from a sponsorship obligation because **item 27** repeals existing section 140R.

Committee consideration

On the 15 October 2008, the Senate Selection of Bills Committee referred this Bill to the Legal and Constitutional Affairs Committee for inquiry and report by 7 November 2008. The reasons for referral/principal issues for consideration included ‘issues about retrospectivity, additional red tape, compliance costs and additional visa holder costs to be met by sponsors will disadvantage small employers’.³⁴

This Bill has also been considered by the Senate Standing Committee for the Scrutiny of Bills which commented on three aspects of the Bill. Namely, its commencement more than six months after assent (which the Committee noted was due to reviews being conducted by persons and bodies not directly under the control of the Minister), investigators power to enter ‘another place’ without warrant (the rationale for which the Committee accepted), and the abrogation of the privilege against self-incrimination (which the Committee found struck a reasonable balance between the competing interests of obtaining information and protecting individuals’ rights).³⁵

The issue of monitoring and enforcement of temporary business visas has been the subject of a previous inquiry by the Joint Standing Committee on Migration. Similarly, provisions of the 2007 Sponsorship Obligations Bill have previously been the subject of an inquiry by the Senate Legal and Constitutional Affairs Committee. Accordingly, the following information is provided for historical reference.

33. Explanatory Memorandum, op. cit., p. 25, para. 139 and 141.

34. Senate Selection of Bills Committee, *Report No. 13 of 2008*, 15 October 2008, p. 3 and Appendix 2.

35. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No.11 of 2008, 15 October 2008, pp.14–16, <http://www.aph.gov.au/senate/committee/scrutiny/alerts/2008/d11.pdf>, accessed 21 October 2008.

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Joint Standing Committee on Migration

On 6 December 2006, the Joint Standing Committee on Migration was tasked with inquiring ‘into the eligibility requirements and monitoring, enforcement and reporting arrangements for temporary business visas’.³⁶ The [report](#) of the inquiry, entitled ‘*visas...permanent benefits: ensuring the effectiveness, fairness and integrity of the temporary business visa program*’ was subsequently tabled on 12 September 2007.³⁷ Importantly, the Sponsorship Obligations Bill was announced late in the inquiry process after the majority of evidence had been received by the Committee. Therefore, it did not examine the legislation or its proposed effect in any great detail.³⁸

Nonetheless, the Committee found that a central theme that emerged in the evidence it received was broad support for a stronger monitoring and compliance regime, as this would reinforce the integrity of the program and reduce exploitation of subclass 457 visa holders.³⁹

In noting that several inquiry participants raised concerns about the small number of sponsors monitored by DIAC and the low rate of site visits,⁴⁰ the Committee found that the following issues were identified by a range of organisations about DIAC’s existing monitoring, reporting and enforcement arrangements:

- it lacked the enforcement provisions to fine sponsors;
- provided pre-notification to employer sponsors before making a site visit for an alleged breach of program requirements;
- had to refer certain matters to other agencies for investigation (alleged OH&S or workplace relations breaches, for example) but legislative difficulties complicated the sharing of information with these agencies, particularly across the states and territories;
- did not have the power to order an employer to pay a 457 worker owed money under the minimum salary level requirement;

36. Joint Standing Committee on Migration, *Temporary visas...permanent benefits: ensuring the effectiveness, fairness and integrity of the temporary business visa program*, August 2007, p.xi.

37. *ibid.*

38. *ibid.*, pp. 110–111.

39. Alleged breaches of the 457 visa program included the underpayment of the minimum salary level; unlawful deductions from the minimum salary for travel or medical costs etc; non-payment for overtime; discrimination against union members; employment of skilled workers in unskilled roles; unfair termination of employment; and racial abuse and threats of physical harm: Joint Standing Committee on Migration, *op. cit.*, pp.112–114.

40. Joint Standing Committee on Migration, *op. cit.*, p. 119.

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- lacked sufficient resources to undertake adequate monitoring; and
- had limited investigative powers to access employer documents, particularly in terms of monitoring the minimum salary level requirement.⁴¹

A number of suggestions for improvement were put forward to the Committee by a range of organisations. Some of these were adopted by the Sponsorship Obligations Bill and are in the present Bill. The recommendations included:

- workplace inspections should be ‘both announced and unannounced’ and workplace inspectors should have the power to conduct interviews with temporary business visa holders and employer staff;
- monitoring and integrity measures ‘should focus on what is at the heart of the sponsorship mechanism’—that is, ‘ensuring that the right money is paid’ and ‘that the work nominated is being undertaken’;
- any employer found abusing the system ‘should be excluded from further participation in the scheme and be subject to civil and criminal penalties’;
- in order to expedite the 457 visa process, standard business sponsors ‘who have a demonstrable record of compliance with the spirit and intent of the 457 visa process should be provided with dispensation in respect of some of the requirements’;
- DIAC should have the ‘same powers as the OWS to demand access to company information particularly where it relates to pay rates and conditions’;
- there should be data matching of ‘457 data against tax records of 457 visa-holders held by the ATO’;
- there should be ‘capacity to source information from other Government Departments’ and ‘joint and priority investigation of breaches of Australian laws such as those related to employment relations, superannuation, occupational health and safety, workers compensation, taxation’;
- there should be a ‘ban on agents charging potential 457 holders exorbitant fees to secure employment and a visa’;
- there is a need for ‘appropriate legislation that is enforceable’—the current 457 visa program ‘does not have sufficient legislative support to ensure integrity in the enforcement process’; and
- ‘some attention is immediately required to make clear what are permissible and impermissible deductions and what deductions cannot be brought into account in determining whether minimum salary levels have been met’.⁴²

41. Senate Standing Committee on Legal and Constitutional Affairs, *Migration Amendment (Sponsorship Obligations) Bill 2007 [Provisions]*, op. cit., p. 121.

42. *ibid.*, pp. 124–126.

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Relevantly, the Joint Committee made the following recommendations in relation to compliance arrangements:

- DIAC should commission an independent review to assess the impact of the proposed changes to the program's effectiveness, fairness and integrity;
- DIAC should ensure that adequate resources are allocated to the compliance regime under the 457 visa program, and in particular, to the implementation and enforcement of the new arrangements; and
- DIAC should regularly report on its website details of monitoring and enforcement activities.⁴³

Senate Legal and Constitutional Affairs Committee

As previously mentioned, the Senate Legal and Constitutional Affairs Committee inquiry into the provisions of the Sponsorship Obligations Bill of 2007 tabled its [report](#) on 7 August 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.⁴⁴

The Committee also noted that matters relating to greater investigative powers of departmental officers and stronger penalties were not in dispute during the inquiry.⁴⁵

Submissions to the Committee canvassed a number of concerns. For example:

- Some business organisations expressed the view that the Bill represented a disproportionate and potentially detrimental response to a limited problem;
- The Association of Consulting Engineers Australia (ACEA) considered that medical costs would be a significant cost for sponsors and that employees should pay their own costs;
- The Australian Industry Group was of the view that visa holders should pay their own travel costs;
- the Law Institute of Victoria considered that the requirement to pay migration agents' costs would unnecessarily inhibit employers from utilising the scheme;

43. *ibid.*, pp. 124–126

44. *ibid.*, p. 13.

45. *ibid.*, p. 13.

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- The Australian Industry Group was of the view that retrospectivity of the operation of the Bill's provisions to current visa holders and sponsors was a major concern;
- The ACEA considered that more compliance time was needed to respond to provide information on request and 21 days would be a reasonable time.⁴⁶

The Committee recognised that although it was 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.⁴⁷

The Committee recommended that the Bill be passed subject to the following recommendations:

- that there should be a right to challenge unreasonable and unspecified migration agents' and recruitment agents' charges;
- that a minimum of 14 days to provide information replace the proposal in the Bill of not less than 7 days;
- that the Department 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.

Position of significant interest groups/press commentary

The National Secretary of the Construction, Forestry, Mining and Energy Union (CFMEU), Mr John Sutton, is reportedly supportive of the Bill. In an article in the *Australian Financial Review* he is quoted as having said the bill is 'positive' and represents steps in the right direction,

He wanted the new obligations to apply retrospectively and cover all 457 visa holders, not just those who arrived following the introduction of the legislation. Otherwise there would be a "duality" among such workers, where some would benefit from the greater protections while others would not.⁴⁸

In the same article, Immigration analyst Bob Kinnaird is quoted as having said 'the bill was 'overdue', considering the Howard government tried to introduce a similar piece of legislation in June last year'.⁴⁹

46. *ibid.*, pp. 7–12.

47. *ibid.*, p. 14.

48. A. Symonds, 'First steps towards 457 visa makeover', *Australian Financial Review*, 25 September 2008.

49. *ibid.*

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Other party policy position/commitments

Federal shadow immigration minister, the Hon Dr Sharman Stone MP's response was reportedly as follows, 'she would support sweeping changes to the 457 visa scheme, admitting it had led to cases of exploitation',

Dr Stone said the scheme which allows temporary migrants to enter to the country to fill short-term vacancies had been extraordinarily successful. "Of course just one case of exploitation is one too many; therefore it is important that this program evolves to a tighter regime," she said.⁵⁰

Financial implications

The Explanatory Memorandum states that the Bill will have minimal financial impact. Whilst making reference to the \$19.6 million allocated under the 2008/09 Budget to improve the temporary skilled migration program, it also states that there will be 'modest revenue' from the new civil penalties and infringement notices regime.⁵¹

Main provisions

Schedule 1 – Migration Act 1958

Item 9 repeals existing Subdivision GA of Division 3 of Part 2 of the Migration Act (relating to the cancellation of approval as a business sponsor). While **item 12** repeals sections 140B ('sponsorship as a criterion for prescribed visas'), 140C ('Sponsorship as a criterion for valid visa applications'), and 140D ('Approved sponsor').

The proposed new definition of 'approved sponsor' contained in subsection 5(1) will include:

- a person who has been approved by the Minister under **proposed subsection 140E(2)**⁵²; and
- a person (other than the Minister) who is a party to a work agreement (including a partnership or unincorporated association).

50. F. Prior, 'Liberals back changes to end 457 visa exploitation' *West Australian*, 6 October 2008.

51. Explanatory Memorandum, op. cit., p. 3.

52. And whose approval has not been cancelled under **proposed section 140M** or otherwise ceased to have effect under **proposed section 140G**.

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Subdivision B – Approving sponsors and nominations

Items 1 – 8 insert various definitions into subsection 5 of the Migration Act (the interpretation section).

Item 15 broadens existing section 140E (Approving sponsor) by inserting subsection (3) which provides that different criteria for approval as a sponsor may be prescribed in the regulations for different purposes. Namely:

- for different kinds of visa,
- for different classes in relation to which a person may be approved as a sponsor e.g. ‘professional development sponsor’ for the Subclass 470 (Professional Development) visa holder;⁵³ and
- for different classes of person within a class in relation to which a person may be approved as a sponsor.

Items 16 similarly provides that different processes may be prescribed for different kinds of visa and different classes in relation to which a person may be approved as a sponsor.

Item 17 provides that the actual term of approval as a sponsor may be prescribed by the regulations and different terms may be prescribed for different kinds of visa and different classes in relation to which a person may be approved as a sponsor. **Item 18** inserts **proposed section 140GA** which similarly provides that the regulations may also create a process for the Minister to vary a term of a person’s approval as a sponsor. Subsection (3) states that different processes and different criteria may be prescribed.

Proposed section 140GB relates to nomination. The Explanatory Memorandum notes that an express power to prescribe a process and criteria in relation to nomination is required because nomination will no longer be part of the process of *becoming* an approved sponsor, rather a nomination will be made by a person who is *already* an ‘approved sponsor’ (as defined).⁵⁴ Subsection (1) provides that the sponsor may nominate either:

- an occupation, program or activity; or
- the visa applicant or proposed visa applicant in relation to their occupation or a program to be undertaken or an activity to be carried out by them.

Though the Minister *must* approve a nomination if the prescribed criteria are satisfied, subsection (4) provides that different criteria and different processes may be prescribed for different kinds of visa and different classes in relation to which a person may be approved as a sponsor.

53. Explanatory Memorandum, op. cit., p. 13.

54. Explanatory Memorandum, op. cit., p. 16, para. 79.

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Proposed section 140GC provides that the regulations may prescribe requirements that work agreements *must* satisfy.

Subdivision C – Sponsorship Obligations

Item 19 repeals sections 140H – 140M which relate to the current sponsorship system.

Proposed section 140H provides that a person who is (or was) an approved sponsor must satisfy their sponsorship obligations which are prescribed by the regulations. A note is to be inserted which lists the types of obligations that *might* be prescribed. These include the obligation to pay a minimum wage, to pay to the Commonwealth certain costs, to pay the costs of the departure from Australia of the person being sponsored by them etc. **Proposed subsections 2 and 3** provide that persons who have a work agreement that may contain other sponsorship obligations or a term that varies a sponsorship obligation must also comply with such other or varied undertakings. The proposed amendment also expressly provides that the regulations may require a person to satisfy the sponsorship obligations in respect of each visa holder or generally. Furthermore, different sponsorship obligations may be prescribed for different kinds of visa and different classes in relation to which a person may be, or may have been, approved as a sponsor. Existing section 140H states that the undertakings only have effect if the applicant consents in writing and do not have effect until the visa is granted. Significantly, neither of these restrictions are retained in **proposed section 140H**.

Proposed section 140J provides that if an amount is payable (under the regulations) by an approved sponsor in relation to a sponsorship obligation, then they are not liable to pay the Commonwealth more than:

- if a limit is prescribed by the regulations – that limit; and
- the actual costs incurred by the Commonwealth (whichever is the lesser amount).

Importantly, an approved sponsor is deemed *not* to have satisfied the sponsorship obligation if they are reimbursed an amount payable under the regulations by the visa holder, or on behalf of the visa holder (**proposed subsection 140J(3)**).

Subdivision D – Enforcement

Sanctions

The sanctions that may be imposed on approved sponsors are set out in three interlinked provisions. Namely, proposed sections 140K, 140L and 140M.

Proposed section 140K does not give the authority to impose a sanction rather, it provides a list of actions that may be available under other provisions. It provides that if a sponsor fails to satisfy a sponsorship obligation *one or more* of the following actions may be taken:

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- the Minister may bar the sponsor under subsection 140M(1) from doing certain things (if prescribed under the regulations);
- the Minister may cancel the person's approval as a sponsor under subsection 140M(1) (if prescribed under the regulations);
- the Minister may apply for a civil penalty order under Part 8D;
- the person may be issued with an infringement notice under section 140R;
- an authorized officer may require and take a security under section 269 or enforce a security already taken under than section.

This action (excluding cancellation) may also be taken against former approved sponsors under subsection (2).

Proposed section 140L provides that the regulations may prescribe the circumstances in which the Minister *may* take action and the circumstances in which the Minister *must* do so. To this end, the Regulations may prescribe the circumstances in which the Minister may take one or more of the actions outlined in **proposed section 140M**. These circumstances may be circumstances that are not in relation to a failure to satisfy a sponsorship obligation. Different circumstances and criteria may be prescribed for different kinds of visa and different classes in relation to which a person may be, or may have been approved as a sponsor (in circumstances in which the Minister *must* take action).

Proposed section 140M outlines the action that may be taken in relation to approved sponsors if regulations are prescribed under section 140L. These include:

- cancelling the approval of a sponsor in relation to a class to which the sponsor belongs;
- cancelling the approval of a sponsor for all classes to which the sponsor belongs;
- barring the sponsor, for a specified period from sponsoring more people;
- barring the sponsor, for a specified period, from making future applications for approval as a sponsor in relation to one or more classes prescribed by the regulations.

Subsection (2) outlines the action that can be taken in relation to former approved sponsors.

Civil Penalties

Under **proposed section 140Q**, if a person fails to satisfy a sponsorship obligation in the manner (if any), or within the period (if any), prescribed in the Migration Regulations or in a work agreement they will incur a civil penalty. The maximum penalty for an individual is 60 penalty units and for a body corporate 300 penalty units. Section 4AA of the *Crimes Act 1914* defines a penalty unit as \$110 (as inserted by **item 6**). Criminal penalties have not been used for the reasons set out in the Explanatory Memorandum,

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Civil penalties have been preferred to criminal penalties as the appropriate sanction in this context as a sponsor's conviction for a criminal offence may have unintended consequences. For example the mere fact of a criminal conviction may mean that the sponsor loses entitlements to licences or other things essential to their business or livelihood, and this outcome would not be in Australia's best interests.

The use of civil penalties is also considered appropriate for the enforcement scheme to be flexible and administratively manageable. In addition, civil penalties facilitate the infringement notice scheme provided for in proposed new section 140R (inserted by item 27).⁵⁵

Infringement Notices

Proposed section 140R will enable the making of regulations to enable a person who is alleged to have contravened a civil penalty provision to pay a specified penalty as an alternative to civil penalty proceedings. 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.

Subdivision E – Liability and recovery of amounts

Proposed section 140S provides that a payee (the Commonwealth, a State or Territory or another person) may recover an amount owed to them in an 'eligible court' as defined in **item 1**. **Proposed section 140SA** provides that a party to such proceedings may apply to receive interest up to judgment. Alternatively the Court may instead order that a lump sum be included instead of interest. Situations where this does not apply are set out in **proposed subsection 140SA(3)**. **Proposed section 140SB** outlines the interest applicable to a judgment debt.

Proposed section 140SC provides that certain persons commencing proceedings under **proposed section 140S** may choose to proceed under a small claims procedure. Though this option is normally only available if the amount to be recovered does not exceed \$5000, the proceedings will be informal and the court will not be bound by technicalities or the rules of evidence. However, a person is not entitled to legal representation in such proceedings unless allowed by the Court (**proposed paragraph 140SC(2)(d)**).

Subdivision F – Inspectors

Item 30 repeals existing Subdivision C ('Application of the sponsorship system to partnerships and unincorporated associations') and inserts new Subdivision F – Inspectors. **Proposed subsection 140V(1)** provides that the Minister may appoint an inspector or a class of persons to be inspectors by written instrument. **Proposed subsection (3)** provides that the Act or regulations will confer the powers and functions of an inspector. **Proposed**

55. Explanatory Memorandum, op. cit., p. 59.

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section 140W provides that the Minister must 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 (**proposed subsection 140W(3)**).

Proposed subsection 140X provides that the purpose of inspectors is to determine whether a sponsorship obligation is being, or has been complied with, or a purpose prescribed by the regulations. Subsection (2) lists the powers of inspectors. They include:

- to enter a place without force if the inspector believes there may be information, documents or any other relevant thing relating to whether obligations are being complied with;
- to inspect any work, material, machinery, appliance, article or facility at that place;
- to interview any person at that place;
- to require documents or other things to be produced within a specified period (of not less than 7 days);⁵⁶
- any other power prescribed in the regulations.

The powers may be exercised outside working hours where considered necessary in order to achieve the purpose of the inspectors mentioned above.

The power of inspectors to enter ‘business premises or another place’ without force, but also without a warrant, is not too dissimilar to the powers exercisable by workplace inspectors under the Commonwealth’s *Workplace Relations Act 1996*.⁵⁷ However, comparable State and Territory legislative regimes do not appear to grant inspectors such broad powers. For example, workplace health and safety inspectors appointed under Queensland’s *Workplace Health and Safety Act 1995* may only enter a (non-public) workplace if its occupier *consents* to the entry or the entry is authorized by a warrant issued by a magistrate.⁵⁸ Similarly, though the Commonwealth’s *Workplace Relations Act 1996* provides that a workplace inspector’s powers can be conferred by the Act, the regulations or by another Act⁵⁹, Queensland’s *Workplace Health and Safety Act 1995*

56. The *minimum* period has been set at 7 days because there may be compelling reasons in special cases for requesting information in as few as 7 days, taking into account the special vulnerability of non-citizens in Australia on temporary visas to exploitation: Explanatory Memorandum, op. cit., p. 41, para. 259.

57. Section 169 of the Commonwealth’s *Workplace Relations Act 1996* provides that an inspector can, without force, enter a place of business or particular premises (any land, building, structure, mine, mine working, ship, aircraft, vessel, vehicle or place).

58. Section 104 of the *Workplace Health and Safety Act 1995 (Qld)*.

59. Subsection 167(5) of the Commonwealth’s *Workplace Relations Act 1996*.

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provides that an inspector's powers may instead be *limited* under a regulation, a condition of appointment or by written notice.⁶⁰

As noted in the Explanatory Memorandum, the powers conferred on inspectors by subsection 140X(2) are *not* in accordance with the [Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers](#).⁶¹ The Guide relevantly states:

'Legislation should only authorise entry to premises under warrant or by consent, or in a limited range of other circumstances such as a condition of a licence. In all cases, any departure from this general rule requires justification'.⁶²

The justification provided in the Explanatory Memorandum is that:

[It] is necessary for inspectors appointed under new section 140V to have similar powers as Workplace Inspectors, as it is probable that Workplace Inspectors will also be appointed as inspectors under new section 140V. If so, it would be intended that the Workplace Inspectors will exercise their powers for the purposes of both the *Workplace Relations Act 1996*, and the purposes in section 140X(1), concurrently.⁶³

Notwithstanding this justification, it is worth noting that according to the Guide, the Senate Committee view is that 'legislation should authorise entry without consent or warrant only in 'situations of emergency, serious danger to public health, or where national security is involved'.⁶⁴

Proposed subsection 140Y(4) provides that a person is still required to produce information or documents even though it may tend to incriminate the person or expose them to a penalty. However, subsection (5) states that producing the information or document, or the direct or indirect consequences of doing that is not admissible as evidence in criminal proceedings other than for an offence against section 137.1 or 2 of the *Criminal Code*.⁶⁵

60. Section 100 Workplace Health and Safety Act 1995 (Qld).

61. Explanatory Memorandum, op. cit., p. 40, para. 253.

62. Attorney-General's Department, 'A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers' (interim guide), December 2007, p. 77, http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_GuidetoFramingCommonwealthOffences,CivilPenaltiesandEnforcementPowers, accessed 31 October 2008.

63. Explanatory Memorandum, op. cit., p. 40, para. 253.

64. Report 4/2000, paragraphs 1.36 and 1.44, as quoted in Attorney-General's Department, op. cit., p. 79.

65. Sections 137.1 and 2 relate to the offences of providing false or misleading information or documents respectively.

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Proposed section 140Z creates a criminal offence for failing to produce a document or thing to an inspector at a specified place within a specified period (of not less than 7 days) under **proposed paragraph 140X(2)(c)**. This offence is punishable with a maximum penalty of imprisonment for 6 months.

See the discussion under Penalties in the [Bills Digest](#) for the Migration Amendment (Employer Sanctions) Bill 2006. 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.⁶⁶

Subdivision G – Application of division to partnerships and unincorporated associations

Proposed section 140ZB provides that this Division, the regulations made under it and any other provision of the Migration Act as far as it relates to this Division or the regulations, apply to a partnership as if it were a person. A sponsorship obligation imposed on the partnership is imposed on each partner but can be discharged by any.

Proposed subsection 140ZC(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, or was in any way knowingly concerned in, or party to, the act or omission. **Proposed subsection 140ZC(3)** provides that if a partner contravenes a civil penalty provision, then the civil penalty to be imposed must not exceed an amount equal to one-fifth of the maximum penalty that could be imposed on a body corporate for the same contravention. For the purposes of subsections (1) and (2) if the conduct by a partner was in the ordinary course of business, or within authority, then this will suffice to establish the partnership engaged in the particular conduct. **Proposed subsection 140ZC(5)** 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 the relevant state of mind. **Proposed section 140ZD** provides that a partnership must continue to satisfy any applicable sponsorship obligation even if the partnership ceases to exist.

Proposed sections 140ZE - ZG applies the above provisions relating to partnerships to unincorporated associations.

Subdivision H – Miscellaneous

Proposed section 140ZH deals with disclosure of personal information (of a prescribed kind) by the Minister. This provision inserts a table which explains that personal information relating to particular persons can be disclosed to particular persons or government agencies. For example, personal information of a prescribed kind about a visa

66. Moira Coombs, 'Migration Amendment (Employer Sanctions) Bill 2006', *Bills Digest*, no. 120, Parliamentary Library, Canberra, 2005-06, pp.6-7.

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holder can be disclosed by the Minister to their approved sponsor, their former sponsor and a government agency prescribed by the regulations. Similarly, such information about an approved sponsor may be disclosed to the visa holder, former visa holder or a government agency prescribed by the regulations.

Proposed subsection (3) provides that the regulations may prescribe the circumstances in which the recipient may use or disclose the personal information disclosed while **proposed subsection (4)** provides that if the information is disclosed other than to a government agency, the person to whom it relates must be notified in writing of the disclosure and the details of the information.

Proposed section 140ZI provides that the Minister may request an approved sponsor or former approved sponsor to disclose to the Minister personal information of a prescribed kind about a visa holder or former visa holder. **Proposed subsection (3)** provides that nothing in this section has the effect of authorising a disclosure that is prevented by law.

Part 8D – Civil penalties

Item 42 inserts **proposed Part 8D** which has three Divisions: Division 1 (‘Obtaining an order for a civil penalty’); Division 2 (‘Civil penalty proceedings and criminal proceedings’) and Division 3 (‘Miscellaneous’). **Proposed section 486R** provides that a person may be ordered to pay a pecuniary penalty for contravening a civil penalty provision.⁶⁷ Importantly, proposed subsection (1) provides that an order can be made within 6 years of the contravention, while proposed subsection (2) provides that the Court may order payment for *each* contravention but the pecuniary penalty must not be more than the relevant amount specified for the provision.

The Explanatory Memorandum provides an example of how this provision might apply in practice,

... If the sponsorship obligation prescribed in the regulations provides that an approved sponsor must pay at least a minimum wage (however this is described) to their visa holders, and the approved sponsor does not pay at least the required minimum wage to each of their three visa holders, then this is at least three contraventions of a civil penalty provision. The approved sponsor could then receive a total maximum penalty of 180 penalty units if they are an individual, or 900 penalty units if they are a body corporate (see new section 486ZA in relation to joining actions for multiple contraventions of civil penalty provisions).⁶⁸

67. Proposed subsections 140Q(1) and (2) are the only civil penalty provisions included in this Bill. The maximum civil penalties that apply are 60 penalty units for an individual (currently \$6600) and 300 penalty units for a body corporate (currently \$33,000).

68. Explanatory Memorandum, op. cit., p.60, para. 404.

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Proposed subsection (3) outlines the matters the Court must have regard to in determining the amount of pecuniary penalty. These include the nature and extent of the contravention, the nature and extent of loss or damage, the circumstances surrounding the contravention and whether the sponsor has previously been found by a Court to have engaged in the same or ‘similar conduct’. **Proposed subsection 486R(4)** defines the term ‘similar conduct’. The Explanatory Memorandum notes that this ‘includes where a person has previously been found by a court to have failed to satisfy a sponsorship obligation which is the same or different from the sponsorship obligation to which the proceedings relate’.⁶⁹ **Proposed subsection (6) and (7)** relate to the Court’s ability to order an amount prescribed by the regulations. More specifically, **proposed paragraph 486R(6)(c)** provides that the Court may order an amount be paid if proceedings to recover an amount have not been brought under **proposed section 140S** (which allows a person to bring proceedings to recover an amount owed if the Court does not make an order under this subsection).

Proposed section 486S provides that a person involved in contravening a civil penalty provision (say by aiding its contravention, or conspiring to contravene it) is taken to have contravened that provision. **Proposed section 486U** enables the Minister to require a person (other than the wrongdoer or their lawyer), who he or she suspects on reasonable grounds can give information relevant to an application for a civil penalty order to give all reasonable assistance in connection with such an application. A Court may order a person to comply and the penalty for failing to give assistance is an offence punishable with a maximum of 30 penalty units.

Proposed Division 2 set out how civil proceedings for contravention of a civil penalty provision will relate to criminal proceedings commenced for the same actions. **Proposed sections 486V-X** cover the situation where civil proceedings are commenced *after* criminal proceedings, criminal proceedings are commenced *during* civil proceedings, and criminal proceedings are commenced *after* civil proceedings.

Proposed section 486Y relates to the inadmissibility of evidence for criminal proceedings previously given in civil proceedings, while **proposed section 486Z** provides that a person ordered to pay a pecuniary penalty for contravening a civil penalty provision is not liable to pay a pecuniary penalty under some other provision of law of the Commonwealth.

Proposed subsection 486ZA(1) in proposed Division 3 enables proceedings for multiple contraventions of civil penalty provisions to be joined in certain circumstances. **Proposed subsection (2)** provides that the Court may make a single order to pay a pecuniary penalty for *all* the contraventions but the penalty must not exceed the sum of the maximum penalties that could be ordered if a separate penalty were ordered for each of the contraventions. The Explanatory Memorandum provides an example of how this provision would operate in practice:

69. *ibid.*, p.61, para. 408.

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...if a sponsorship obligation prescribed under new section 140H (inserted by item 19) requires a person to pay at least a minimum salary to the visa holders that they sponsor, and to pay the minimum salary at least once a month, the person may contravene subsection 140Q(1) (inserted by item 27) 10 times if they do not satisfy the obligation in relation to five visa holders for a period of 2 months (there is 10 contraventions because there is a contravention for each visa holder (5), for each month (2))... Under new section 486ZA proceedings for an order in relation to all 10 alleged contraventions could be joined, and a single order made in relation to all 10 contraventions.⁷⁰

Transitional matters

Item 45 makes transitional arrangements for existing standard business sponsors. It provides that the new law applies to ‘standard business sponsors’ (as defined) or ‘approved sponsors’ (as defined) as if they were approved as a sponsor under **proposed section 140E**. The terms of the sponsorship made under existing section 140G continue to apply after the new law commences, though the term may be varied under **proposed section 140GA** of the new law.

Importantly, if the person had made an undertaking under existing section 140H, it ceases to have effect when the new law commences and they must then satisfy any applicable sponsorship obligation prescribed by the regulations under section 140H of the new law. However, if, before the day on which the new law commences, the person breaches an undertaking made under existing section 140H, then section 140M of the new law applies as if regulations made under existing sections 140J and 140K were regulations prescribed under section 140L of the new law.

Item 46 relates to former sponsors who remained bound by an undertaking made under existing section 140H. It provides that the new law applies to them upon commencement as if they were a former approved sponsor under the new law. Accordingly, upon commencement any old undertakings cease to have effect and they must satisfy any applicable sponsorship obligations prescribed by the new law. However, if, before commencement they breach an undertaking made under existing section 140H, then **proposed section 140M** of the new law applies as if regulations made under existing sections 140J and 140K were regulations prescribed under section 140L of the new law.

Item 47 relates to recovery of debts from standard business sponsors. It provides that **proposed section 140S** applies to a debt of a kind mentioned in existing section 140R (joint and several liability for debts) or 140S (liability to pay other amounts) and where proceedings for recovery of the debt have not begun.

70. *ibid.*, pp. 65–66, para. 443–444.

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Item 48 provides that the existing law continues to apply to ‘approved professional development sponsors’ (as defined) until they cease to be an approved professional development sponsor. **Item 49** provides that applications not finally determined upon commencement, will be determined in accordance with the new law.

The Explanatory Memorandum notes that the application of the new sponsorship framework to existing subclass 457 visa sponsors is necessary for the following reasons:

- the nature of the sponsorship obligations which will be required to be satisfied will not be significantly different from the existing undertakings;
- the possible transitional period if these existing sponsors are not transitioned into the new sponsorship framework is impractically long (up to six years) for the large caseload;
- the administrative complexity for sponsors, the Department of Immigration and Citizenship, and other stakeholders of administering two sponsorship frameworks makes the alternative unworkable for the large caseload; and
- existing subclass 457 visa sponsors will have sufficient notice to terminate the sponsorship of their Subclass 457 (Business (Long Stay)) visa holders if they are not prepared to satisfy the new sponsorship obligations in relation to those visa holders.⁷¹

Schedule 2 – Taxation Administration Act 1953

Part 1 - Amendment

Proposed subsection 3ED(1) overrides secrecy provisions to allow the Commissioner for taxation to disclose tax information to the Department in certain circumstances. The Explanatory Memorandum predicts that DIAC will use such information to monitor whether approved sponsors are complying with their sponsorship obligations and to assess whether a person should be approved as a sponsor.⁷²

Under **proposed subsection 3ED(2)** certain persons (such as migration officers) are prohibited from disclosing or making a record of the information. A maximum penalty of two years imprisonment applies. **Proposed subsection 3ED(3)** provides that subsection (2) does not apply if the information was disclosed or recorded in connection with the exceptions listed; such as the exercise of the Minister’s powers under Division 3A (Sponsorship) or regulations made under that Division, a review of a decision concerning the exercise of the Minister’s powers under Division 3A, civil penalty proceedings under Part 8D in relation to a contravention of a provision in Division 3A etc.

71. *ibid.*, p. 69, para. 466.

72. *ibid.*, p. 77, para. 518.

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Part 2 - Application

Item 2 provides that the amendments made by Part 1 of Schedule 2 apply to information acquired by the taxation Commissioner before, on or after the day on which this schedule commences. In other words, amendments made in schedule 2 have retrospective application.

Concluding comments

The aim of this Bill is to establish a new sponsorship framework to primarily strengthen the *integrity* of temporary working visa arrangements which has been eroded primarily due to a lack of compliance with the existing statutory scheme. However, it appears that the low rate of compliance can not *solely* be attributed to a deficiency in the existing statutory scheme. As Ms Deegan observed in her third report into the 457 visa review, ‘current arrangements to ensure compliance with [sponsorship] undertakings are not well defined; liability is not always clear and sanctions for infringement are primarily administrative and rarely enforced’.⁷³

Notwithstanding, this Bill will make significant amendments to the Migration Act to give the Department new or greater legislative authority to: specify sponsorship obligations and the manner in which they can be breached (with civil penalties for non-compliance); acquire and share information; monitor and investigate (with punitive penalties for non-compliance); and the power to create significantly broader Regulations to define the scope of the newly expansive sponsorship framework.

Whether these measures are a proportionate and necessary response to the problem, and whether they will ultimately improve the integrity of the system remains to be seen.

73. Barbara Deegan, ‘Visa Subclass 457 Integrity Review: Third paper: Integrity /Exploitation’, September 2008, p. 28.

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