

# Chapter 2

## Overview of the Bill

2.1 This chapter briefly outlines the main provisions of the Bill.

### **Sponsor obligations**

2.2 In accordance with regulations made under section 140H of the Migration Act, employers must currently agree to certain undertakings to be granted approval to sponsor a person under the 457 visa regime.<sup>1</sup> These include many, but not all, of the obligations proposed to be incorporated into new Subdivision BB of the Migration Act. Sponsors who do not comply with the existing undertakings may be barred from sponsoring employees under the scheme for a specified period.<sup>2</sup>

2.3 The sponsorship obligations proposed to be included in the Migration Act are described below. Proposed new civil penalties for non-compliance with these obligations are outlined below at paragraphs 2.14 – 2.18.

### ***Minimum salary levels***

2.4 Proposed paragraph 140IC(1)(a) provides that workers on 457 visas must be paid a minimum salary subject to determination of the Minister by legislative instrument. Under proposed paragraph 140IC(1)(b) this must be paid either when the visa holder begins working or 28 days after the visa holder enters Australia, whichever occurs first. If the visa holder is in Australia when the visa is granted payment must commence from the earlier of the date of commencement or 28 days after the visa is granted.<sup>3</sup> In his second reading speech the Minister stated:

This obligation ... acknowledges the fact that Australian employers must look first to employing and training Australians and that the Subclass 457 visa programme will not be used to erode the salaries and conditions of Australian employees.<sup>4</sup>

### ***Employment in the nominated or higher skill level activity***

2.5 Proposed section 140ID provides that sponsors must not employ 457 visa holders in a lower skill level activity than that which formed the basis for granting of the visa. Visa holders may be moved to a different activity, but it must be of the same

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1 *Migration Regulations 1994*, regulation 1.20CB.

2 DIAC website, <http://www.immi.gov.au/skilled/skilled-workers/sbs/obligations-sponsor.htm>, (accessed 6 July 2007).

3 *EM*, Item 7.

4 The Hon. Kevin Andrews, Minister for Immigration and Citizenship, Second Reading Speech, *House of Representatives Hansard*, 21 June 2007.

or higher skill level than that originally proposed.<sup>5</sup> In his second reading speech the Minister stated:

This protects against the Subclass 457 visa programme being used to bring overseas workers to Australia to carry out unskilled jobs.

### ***Travel costs***

2.6 Proposed subsections 140IE(1) and (2) provide that approved sponsors are obliged to meet the return travel costs of the primary, and any secondary, visa holders. Under subsection 140IE(3), if a person changes sponsorship the last (most recent) approved sponsor is responsible for meeting his or her travel costs (and those of any secondary visa holder) back to the country whence they came.<sup>6</sup>

### ***Medical costs***

2.7 Proposed subsections 140IF(1) and (2) provide that approved sponsors are obliged to meet the prescribed medical costs of the primary, and any secondary, visa holders. Subsection 140IF(3) establishes what the regulations may specify with respect to the extent of a sponsor's obligation in this area. Instances where sponsors take out health insurance on behalf of sponsors, including the obligation to cover gap payments, are dealt with in subsection 140IF(5).<sup>7</sup>

### ***Other fees and costs***

2.8 Proposed section 140G addresses additional costs to be paid by the sponsor. These include fees imposed under Commonwealth, State or Territory law, costs associated with the recruitment of the visa holder and migration agent costs.<sup>8</sup>

### ***Record keeping***

2.9 Proposed new section 140IH requires sponsors to keep certain records as prescribed by regulations. New section 140IK obliges sponsors to provide certain information when requested by the Secretary of DIAC.<sup>9</sup>

### ***Meeting the costs of processing non-departure***

2.10 Proposed section 140IJ provides that sponsors are obliged to meet expenses incurred by the Commonwealth in locating, detaining and removing 457 visa holders who have overstayed their visa. The Explanatory Memorandum (EM) states:

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5 *EM*, Item 7.

6 *EM*, Item 7.

7 *EM*, Item 7.

8 *EM*, Item 7.

9 *EM*, Item 7.

This amendment ensures that the Australian community does not end up paying for the removal of a person who has come to Australia to undertake employment but rather the person responsible for bringing the person into Australia bears the cost. This is an incentive to employers wishing to sponsor persons to undertake employment activities in Australia on a temporary basis, to ensure that the persons they wish to sponsor genuinely intend skilled employment in Australia.<sup>10</sup>

### ***Other obligations***

2.11 Proposed section 140IL allows for further obligations on sponsors to be prescribed by regulation.

### **Investigative powers**

2.12 Proposed paragraph 140ZJ(2)(a) authorises inspectors to 'enter, without force, a place of business or other place where he or she has reasonable cause to believe that there is information, documents or any other thing relevant to [determining compliance with sponsor obligations]'. Under paragraph 140ZJ(2)(b) this includes:

- inspecting any work, material, appliance, article or facility;
- interviewing any person;
- requiring documents to be produced within a specified period; and
- inspecting, copying or taking extracts from documents.<sup>11</sup>

2.13 Failure to produce documents requested by an inspector is an offence attracting a maximum penalty of six months imprisonment under proposed section 140ZK.<sup>12</sup>

### **Penalties**

2.14 Proposed subsection 140SB(2) provides that breaches of sponsorship obligations are subject to civil penalties of up to 60 penalty units for an individual and 300 penalty units for a body corporate for each identified breach. For breaches prescribed in regulations under proposed section 140IL the maximum is 50 and 250 penalty units respectively.<sup>13</sup>

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10 *EM*, Item 7.

11 *EM*, Item 44.

12 *EM*, Item 44.

13 *EM*, Item 22.

2.15 Proposed subsection 140SB(6) also allows an eligible court to order that restitution be paid where a sponsor owes a person or a government money pursuant to the sponsor's obligations.<sup>14</sup>

2.16 The EM outlines the justification for the use of civil penalty penalties instead of criminal sanctions as follows:

The justification for the use of civil penalties, 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 penalties 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 infringement notices regime.<sup>15</sup>

2.17 Proposed new paragraph 504(1)(jb) enables regulations to be made to establish an infringement notice regime as an alternative to civil proceedings. The EM states:

The purpose of this amendment is to set up a power to make regulations which provide a person who is alleged to have contravened a provision in or under Subdivision BB with an alternative to a civil penalty proceeding under section 140SB. The alternative is to pay to the Commonwealth, an amount not exceeding one-fifth of the maximum penalty that would have applied for contravention of the provision.<sup>16</sup>

2.18 Proposed subsection 140K(1A) allows the Minister to cancel sponsorship approval or bar a sponsor where the Minister reasonably believes an obligation has been breached. Subsection 140K(1B) also allows the Minister to bar a sponsor where the Minister reasonably believes that a Commonwealth, State or Territory law relevant to their status as a sponsor has been breached.<sup>17</sup>

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14 *EM*, Item 22.

15 *EM*, Item 7.

16 *EM*, Item 46.

17 *EM*, Item 10.