



**Australian Government**

**Department of Immigration  
and Border Protection**

# **Inquiry into the Migration Amendment (Charging for a Migration Outcome) Bill 2015**

**Senate Legal and Constitutional Affairs Legislation  
Committee**

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## Introduction

The Department of Immigration and Border Protection welcomes the opportunity to provide comment to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Migration Amendment (Charging for a Migration Outcome) Bill 2015, following the introduction of this Bill into the House of Representatives on 16 September 2015.

Detailed information on the specific provisions in the Bill is included in the explanatory memorandum ('the EM') to the Bill. This submission provides additional information.

## 1. Inquiry Terms of Reference

This submission aims to respond to the Inquiry's stated terms of reference, which are:

- To further investigate potential impacts and unintended consequences of the Bill; and
- To more fully investigate the extension of the grounds upon which a visa may be cancelled to include situations in which the Minister is satisfied that a benefit was asked for by the visa holder from another person in return for a sponsorship-related event (regardless of whether the sponsorship-related event occurs).

## 2. Background on the Subclass 457 visa programme and the Migration Amendment (Charging for a Migration Outcome) Bill 2015

### 2.1 Employer sponsored temporary and permanent visa programmes

Since its commencement in 1996, the Temporary Work (Skilled) (Subclass 457) visa programme has played an important role in the Australian economy. It is an employer demand-driven programme, enabling Australian employers to address workforce needs by sponsoring skilled workers to fill vacancies where an appropriately skilled Australian citizen or permanent resident cannot be found to fill the position. The programme is underpinned by two fundamental tenets:

- to enable a business to sponsor a skilled overseas worker if they cannot find an appropriately skilled Australian citizen or permanent resident to fill a skilled position; and
- to ensure that the working conditions of a sponsored visa holder are no less favourable than those provided to an Australian worker and that overseas workers are not exploited.

The programme is designed to respond to labour market demand, while maintaining wages, conditions and training opportunities for Australians. The 457 programme supports Australian jobs by preventing skill shortages that limit the growth of our economy.

To address longer term skills needs, there is a direct pathway for workers on the 457 programme to transition to permanent residence through the Permanent Employer Sponsored Migration Programmes (subclass 186 Employer Nomination Scheme, and subclass 187 Regional Sponsored Migration Scheme).

## 2.2 'Payment for visas' conduct

The type of conduct described in the Explanatory Memorandum to the Bill as 'payment for visas' is the main target of the Bill. 'Payment for visas' conduct is not of itself currently unlawful and so cannot be directly addressed by the Department. However, it commonly involves breaches of other laws which can be addressed. 'Payment for visas' conduct involves an individual asking for or receiving, offering or providing payment or other benefits in return for visa sponsorship. Sponsors, visa applicants, visa holders and third parties may be involved.

'Payment for visas' conduct was considered by the Independent Review into Integrity in the Subclass 457 Programme (457 Integrity Review) in 2014. In its report released on 10 September 2014, the independent panel recommended that "it be made unlawful for a sponsor to be paid by visa applicants for a migration outcome and that this be reinforced by a robust penalty and conviction framework". This recommendation was accepted by the Government.

The Government considers this conduct to be unacceptable because it undermines the integrity of Australia's migration programme with potential detrimental effects which include:

- subjecting vulnerable non-citizens to exploitation and extortion;
- reducing employment opportunities in Australia for Australian citizens and Australian permanent residents;
- negative repercussions for Australian wages and conditions;
- the potential for persons who receive payment in return for sponsorship to inappropriately make significant financial gains; and
- exploitation of the migration pathway to gain permanent residence and Australian citizenship.

The Bill implements this recommendation by introducing a new criminal and civil penalty regime that will make it unlawful for a person to ask for, receive, offer or provide payment or other benefits in return for a range of sponsorship-related events. The Bill also allows visa cancellation to be considered where the visa holder has engaged in 'payment for visas' conduct.

## 3. Consultation

In developing the Bill, the following Commonwealth agencies were consulted: the Attorney-General's Department, the Australian Federal Police, the Commonwealth Director of Public Prosecutions, the Department of the Treasury, the Fair Work Ombudsman and the Department of Employment.

## 4. The Bill

### 4.1 Definitions

The term 'benefit' as used in the Bill is defined widely to include anything that may be given in return for sponsorship, including payments, deductions, any kind of real or personal property, any advantage, service or gift (including sexual favours).

The Bill defines 'sponsorship-related event' to capture 'payment for visas' conduct that occurs at any point before and during the visa application process or while the visa is in effect, including entering into a sponsorship arrangement, making a nomination, or employing a person.

The definition also allows for further types of sponsorship-related events to be prescribed in the *Migration Regulations 1994* (the Regulations), ensuring the legislation will be flexible to respond to regulation amendments to the visa eligibility criteria in the future, or to emerging 'payment for visas' conduct.

### 4.2 Elements of the Bill

The amendments made by the Bill will:

- make it a criminal offence for a person to ask for or receive a benefit in return for sponsorship, punishable on conviction by a maximum of two years imprisonment or 360 penalty points (which currently equates to \$64,800 for an individual person or five times higher – \$324,000 – for a body corporate), or both;
- introduce civil penalties for persons who ask for or receive a benefit in return for sponsorship, with a maximum pecuniary penalty of 240 penalty units (which currently equates to \$43,200 for an individual person or five times higher – \$216,000 – for a body corporate);
- introduce civil penalties for persons who offer or provide a benefit to another person in return for sponsorship, with a maximum pecuniary penalty of 240 penalty units (which currently equates to \$43,200 for an individual person or five times higher – \$216,000 – for a body corporate);
- provide that executive officers of bodies corporate, individual partners in a partnership and members of committees of management of unincorporated associations may be individually liable in certain circumstances;
- provide for the offence and civil penalty provisions to have extraterritorial operation in certain circumstances;
- provide for powers to investigate alleged 'payment for visas' offences and contraventions of civil penalty provisions; and
- provide for discretionary cancellation of visas held by persons who have engaged in 'payment for visas' conduct by giving or receiving payments or other benefits in return for sponsorship.

The conduct of offering or asking for a benefit will result in a person becoming liable for the offence or civil penalty, even if no benefit is given and no sponsorship is made. The intention of the Bill is to discourage and prevent 'payment for visas' conduct at any stage of the visa process.

## 4.3 Aims and Targets of the Bill

The proposed amendments aim to:

- protect overseas workers from exploitation or extortion by reducing incentives for either party to participate in a 'payment for visas' arrangement;
- help maintain employment opportunities for Australian citizens and Australian permanent residents by ensuring there is a 'level playing field' where it is more likely that vacancies are filled by candidates – either Australian or overseas – with the most appropriate skills or background, rather than the person who is willing to pay the most for employment;
- remove the basis for underpaying overseas workers as a result of 'payment for visas' arrangements in order to protect Australian wages and conditions;
- protect businesses that are paying wages and conditions appropriately from competitors who gain an advantage through illegally reduced wage and salary costs; and
- stop sponsors from obtaining an inappropriate financial gain and competitive advantage through 'selling' sponsorship or recovering wages from employees.

Individual persons, bodies corporate, partnerships and unincorporated associations will be liable if they engage in 'payment for visas' conduct. In the simplest sense, this includes sponsors who ask for or receive payments, prospective visa applicants or visa holders who offer or make payments, or third parties who may act as middle-men by facilitating or enabling payments for visa outcomes.

The criminal offence of asking for or receiving a benefit in relation to a prescribed sponsorship-related event will apply to bodies corporate, partnerships and unincorporated associations, and individual persons (including, in certain circumstances, executive officers of bodies corporate, individual partners in partnerships and members of committees of management of unincorporated associations). Executive officers of bodies corporate will be liable if the officer knew that (or was reckless or negligent as to whether) the conduct was occurring and was in a position to influence the body corporate's conduct in relation to the conduct, but failed to take all reasonable steps to prevent the offence being committed. Individual persons who are partners in a partnership or members of committees of management of unincorporated associations may be liable for commission of an offence in similar circumstances.

The civil penalty will also apply to any person, including a third party, who directly or indirectly asks for or receives a benefit, or provides or offers a benefit as a reward for a sponsorship-related event, including individuals who are executive officers of bodies corporate, individual partners in a partnership or members of committees of management of unincorporated association, under certain circumstances.

## 4.4 What conduct is not captured by the Bill

The Bill is not retrospective in that it applies only to 'payment for visas' conduct that occurs after commencement of the Bill.

Legitimate business practices would not constitute conduct that involves asking for or receiving a benefit to enter into a 'payment for visas' arrangement. Therefore, it is not considered that the new offence and civil penalty provision would apply to professional services such as the provision of immigration assistance or recruitment advice, or to benefits received by an employer by way of business profits or other routine business benefits that flow from employing or engaging a person.

To avoid the unintended consequence of capturing legitimate conduct, for example, in situations where the 'payment for visas' conduct occurs in a context in which legitimate professional services are also being provided, the Bill includes a defence to cover the circumstance where the

benefit is a payment of a reasonable amount for a professional service provided; for example, the services of a registered migration agent or recruitment agent. Such payments are not intended to be covered by the amendments proposed in the Bill.

However, it should be noted that Registered Migration Agents are required to act in accordance with the law pursuant to clause 2.1 of the Code of Conduct for Registered Migration Agents. Once 'payment for visas' conduct is made unlawful, Registered Migration Agents involved in unlawful schemes could be subject to criminal prosecutions or administrative action depending on the circumstances.

## 5. Criminal offence and civil penalty framework

### 5.1 Visas to which the criminal offence and civil penalty framework apply

A specific subclass to which the offence/civil penalty will apply is not specified in the legislation. It is intended that the offences will apply to the subclasses listed below, which will be prescribed in the Regulations on commencement when the Bill is passed:

#### Temporary sponsored work visas

- Subclass 457 (Temporary Work (Skilled)) visa
- Subclass 401 (Temporary Work (Long Stay Activity)) visa
- Subclass 402 (Training and Research) visa in the Research stream
- Subclass 420 (Temporary Work (Entertainment)) visa
- Subclass 488 (Superyacht Crew) visa

#### Skilled permanent employer-sponsored visas

- Subclass 186 (Employer Nomination Scheme) visa
- Subclass 187 (Regional Sponsored Migration Scheme) visa

These visas were chosen based on existing allegations within some of these programmes, as well as aiming to reduce the potential for 'payment for visas' conduct to become an issue in other visa programmes.

### 5.2 Penalties

The Bill provides for both a criminal offence and a civil penalty framework. Both are included to allow for a range of sanctions to be imposed, depending on the seriousness of the 'payment for visas' conduct.

Under the criminal offence of asking for or receiving payment, individuals will be liable for a fine and/or a term of imprisonment. The fine will be up to 360 penalty units, currently equivalent to \$64,800. The term of imprisonment could be up to a maximum of two years. Corporations will be liable for fines of up to five times greater than the penalty for individuals, which is currently equivalent to \$324,000.

Contravention of the civil penalty provision prohibiting offering or providing payment for a visa will render a person liable to pay a pecuniary penalty of up to 240 penalty units, which is currently equivalent to \$43,200. Corporations will be liable for a pecuniary penalty of up to \$216,000, which is five times the penalty for individuals.



## 5.3 How the offence and civil penalty framework fit within the Department's sanctions framework

The Department takes a tiered approach to unlawful conduct, with stronger responses and more serious outcomes reserved for more serious conduct. The criminal offence and civil penalty framework will provide the Department with a range of sanctions allowing appropriate action to be taken across a spectrum of non-compliance, depending on the seriousness of the 'payment for visas' conduct and the remedial action that is appropriate to the particular circumstances.

To protect the integrity of Australia's migration programme, the penalties must be set sufficiently high to cover any potential gain and discourage or deter people from this conduct. The high maximum penalties for the criminal offence and civil penalty provisions are commensurate with anecdotal evidence as to the upper limit of amounts paid in 'payment for visas' cases and the severity of the consequences of 'payment for visas' conduct whilst remaining proportionate with other offences under the *Migration Act 1958* (the Act). For example, section 233D – Supporting the offence of people smuggling and section 233E – Concealing and harbouring non-citizens etc. both carry a much heavier maximum penalty of imprisonment for 10 years or 1,000 penalty units, or both.

The criminal offence and civil penalty framework is only one aspect of the Department's options to mitigate and respond to unlawful conduct in the migration programme. It is intended that complementary changes will be introduced into the Regulations to allow the application of established administrative sanctions to apply to less serious instances of the conduct. This may include barring from future sponsorship, cancelling current sponsorship and the issuance of an infringement notice to sponsors involved in 'payment for visas' conduct. Under the intended infringement notice provisions, a person alleged to have contravened a civil penalty provision may be served with an infringement notice giving the person an option of paying a fine of one-fifth of the maximum civil penalty as an alternative to civil penalty action being taken.

## 5.4 How potential offences will be investigated

Allegations of 'payment for visas' conduct may be received by the Department by any number of sources, including through public tip-offs, dob-ins by employees of involved sponsors, and through routine monitoring of sponsors. All suspected offences will be investigated by appropriately delegated Australian Border Force Officers who currently already monitor compliance with sponsorship obligations and visa conditions in the sponsored work visa programmes. As 'payment for visas' conduct may occur with other breaches, appropriately delegated Australian Border Force Officers will be given the power to also investigate 'payment for visas' conduct under Part 8E of the Act, consistent with existing powers to investigate work-related offences and contraventions of relevant civil penalty provisions. This will enable them to investigate all potential breaches simultaneously.

## 5.5 Self-incrimination

During the investigation of 'payment for visas' conduct, a person may be required to provide a document or information in relation to the conduct which may then be used against the person in civil proceedings. It is appropriate to allow information obtained in such a manner to be admissible in civil proceedings because the parties to the 'payment for visas' arrangement are the only people who are likely to possess critical information and documents evidencing the conduct. This will enable the Department to effectively enforce the civil penalty provisions. Information obtained in this manner is not admissible in criminal proceedings (other than to prove the offence



of providing false or misleading information or documents under the Commonwealth Criminal Code).

## 5.6 Extraterritoriality

The criminal offence and civil penalty can be applied to any person where the 'payment for visas' conduct occurs wholly or partially in Australia. The Bill will also have extraterritorial application so that the offence and civil penalty framework will also apply to Australian citizens and Australian bodies corporate where conduct occurs wholly outside Australia. It will apply to non-Australian citizens and businesses in foreign countries if there is a law in the foreign country that provides for a pecuniary or criminal penalty for 'payment for visas' or similar conduct.

## 6. New visa cancellation ground

The Bill will introduce a new discretionary visa cancellation ground, allowing visa cancellation to be considered where a visa holder has asked for, received, offered or provided a benefit in return for the occurrence of a sponsorship-related event. Visa holders are liable if they did this for themselves, or if they did this on behalf of another person. This will capture sponsors who have received a benefit, visa holders who have offered or provided a benefit, and third parties who have been involved in receiving or providing a benefit.

The visa cancellation ground will be enlivened irrespective of whether a benefit has actually been given or a sponsorship-related event has actually occurred. It is the conduct of offering or seeking a benefit that will result in a person becoming liable for consideration of visa cancellation. This recognises the serious detrimental effects that 'payment for visas' conduct can have on the integrity of Australia's migration programme.

Visa cancellation is discretionary and, consistent with other cancellation powers in the Act, the visa holder would be afforded procedural fairness during the cancellation process. In considering whether to exercise the discretion to cancel, the Minister or delegate would consider a range of factors including the visa holder's complicity in the 'payment for visas' conduct, the extent of the 'payment for visas' conduct, and whether a benefit was obtained as a result of the 'payment for visas' conduct. Other considerations would include the strength of the visa holder's ties to Australia and contribution to the Australian community, as well as Australia's international obligations such as the best interest of children, family unit and non-refoulement obligations.

The cancellation framework will apply to visas granted before the commencement date, but only where the 'payment for visas' conduct occurs after commencement. Permanent and temporary visas can be considered for cancellation. It is considered appropriate to include permanent visas because 'payment for visas' is often carried out with the aim of obtaining permanent residence.

Consistent with consequential cancellation arrangements for other cancellation grounds, where a decision to cancel a visa is made, consequential cancellation of the same visas held by family members would automatically apply.

A person whose visa is cancelled by a delegate would have the ability to seek merits review of that decision. Where the cancellation decision is made by a Minister, the person would be able to seek judicial review.

## 7. Associated regulation changes

As mentioned in 5.1, consequential regulations amendments will prescribe the visa subclasses and streams to which the criminal / civil penalty regime would apply. It is also intended that separate complementary changes will be introduced into the Regulations to commence when the Bill commences, and support the Bill's operation:

- consider visa applications for refusal where the person concerned has engaged in 'payment for visas' conduct;
- issue infringement notices relating to the new civil penalty framework;
- allow for the cancelling and barring of a sponsor who engages in 'payment for visas' conduct; and
- strengthen sponsorship obligations to improve the Department's ability to verify sponsor's records.