SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO THE MIGRATION LEGISLATION AMENDMENT (WORKER PROTECTION) BILL 2008

Supplementary Submission from the Department of Immigration and Citizenship
5 November 2008

The Department thanks the Committee for the opportunity of making a supplementary submission addressing questions taken on notice from the Inquiry's public hearing in Sydney on 31 October 2008.

2. The Department is also taking this opportunity to respond to some legal issues raised by Fragomen Global in submission number 11 and subsequent oral evidence to the Committee, as well as responding to concerns raised by the Privacy Commissioner in submission number 22.

3. This supplementary submission deals with these issues in the following order:

a) legal and drafting issues raised by Fragomen Global;
b) discretions relating to the offence in proposed section 140Z and civil penalty provisions;
c) application of the maximum civil penalty to unincorporated associations and partnerships in other Commonwealth legislation;
d) provision of a table comparing current sponsor undertakings to what is proposed in the Bill;
e) information exchange issues raised by the Privacy Commissioner; and
f) statistical evidence on the number and nature of sponsor breaches in the 457 visa program.

Introductory remarks

4. The Migration Legislation Amendment (Worker Protection) Bill 2008 ("the Bill") amends the *Migration Act 1958* and the *Taxation Administration Act 1953* to enhance the framework for the sponsorship of non-citizens seeking entry to Australia.

5. The Department considers that the Bill strikes an appropriate balance between the following key issues:

a) facilitating the entry of overseas workers to meet genuine skills shortages - the better defined sponsorship obligations (that will be found in the *Migration Regulations 1994*) will deliver greater clarity to both sponsors and overseas workers;

b) preserving the integrity of the Australian labour market – the proposed improved information sharing and expanded investigative powers will better equip the Australian Government to identify non-compliance without unduly imposing on business; and

c) protecting overseas workers from exploitation – the proposed civil sanctions will give the Department another tool for effectively managing non-compliance and exploitation by sponsors.

6. The Department notes concerns expressed during the course of the inquiry, that it would be difficult to assess the impact of the proposed changes to the existing scheme without knowing what sponsorship obligations may be prescribed under the legislation.

7. As noted in the second reading speech given by the Minister for Immigration and Citizenship, the Bill proposes that the *Migration Regulations 1994* ("the Regulations") may specify the obligations to which particular classes of sponsor will be subject, together with how and when those obligations may be satisfied. This will provide the transparency and legal clarity required for an effective enforcement scheme involving civil penalties for breaches of these obligations.

8. The Bill itself does not set out to specify the obligations for two main reasons:

- there may be a need to prescribe additional obligations as more visas are brought within the new sponsorship framework; and
- a high degree of flexibility is essential for the efficient and effective program operation over time in a dynamic area such as temporary skilled migration.

9. The Regulations are the more appropriate mechanism through which these matters can be achieved. Specifying sponsor obligations in the Regulations will also afford the Australian Government the opportunity to consider advice provided by the Skilled Migration Consultative Panel and an industrial relations expert, Ms Barbara Deegan before finalising the detail of each particular obligation. The possible obligations that could be prescribed for sponsors of subclass 457 visa holders have been the subject of extensive discussion with stakeholders and public consultation.

10. Nonetheless, the Department expects that any sponsor obligations that are prescribed in the Migration Regulations would:

- lead to effective and efficient identification of non-compliance – this could be done for example by obliging sponsors to cooperate with monitoring by the Department of Immigration and Citizenship;
- discourage inappropriate use of temporary skilled visa programs – this could be done for example by obliging sponsors to reimburse the Commonwealth for location, detention and removal expenses should the visa holder abscond;
- provide an effective price signal to encourage the hiring and training of Australian citizens and permanent residents; and, most importantly
- protect overseas workers from exploitation.

11. The Department expects that a draft of the proposed regulations would be available in the early part of 2009. The importance of a smooth transition to the new framework is recognised by the Department, and significant efforts will be made to ensure that all affected stakeholders are aware of any changes well in advance of commencement.

12. The Department notes that this means the Committee will not have had the opportunity to examine the full legislative scheme. However, any regulations made under the amendments proposed in the Bill will be subject to the usual scrutiny in the Senate and by the Senate Standing Committee on Regulations and Ordinances, and in any case would be disallowable.

a) Legal and drafting issues raised by Fragomen Global

13. The Department thanks Fragomen Global for their comprehensive submission. The Department has noted with some interest the issues in the submission and the issues raised in oral evidence before the inquiry. The Department is pleased to have the opportunity to respond to the Committee about the issues raised by Fragomen Global.

The Fragomen Global ("Fragomen") submission suggests that there should be an upper limit to the total penalty that can be imposed for multiple breaches of the civil penalties.

14. Including a limit on the maximum total penalty that could be imposed on a sponsor for a 'course of conduct' was considered in the context of setting the maximum penalty for a single breach of a civil penalty provision. The maximum penalty of 60 penalty units was deliberately set relatively low in consideration of the fact that a sponsor could be liable for multiple breaches of the obligations.

15. It is important to note that the courts always retain the discretion to apply a lesser penalty than the maximum amount (60 penalty units). For example, the sponsor may have failed to satisfy a possible obligation to pay minimum salary level in respect of 10 employees – this means they are liable for 10 breaches, with a maximum possible penalty of $66,000. However, if the court considered that this amount was unreasonable in the circumstances, it could order a lower penalty.

16. The Department is of the view that it is appropriate that a sponsor is liable for a civil penalty for each contravention. Placing a limit on the amount of penalty that can be imposed may lessen the impact of the amendments proposed to be made by the Bill as a deterrent, and also, as mentioned previously the reasonableness of the penalty imposed will always be at the discretion of the courts.

The Fragomen Global submission suggests that the result of proposed section 486S is that, for example, a pay-roll clerk of a company who aids, abet, counsels, procures, or induces a contravention of a civil penalty provision would be personally liable for a civil penalty provision.

17. Proposed section 486S is an example of a very common provision on the statute books in relation to civil penalties and is a parallel to Division 11 of Part 2.4 of the Criminal Code.

18. An individual would be considered to have committed the offence by, for example, aiding or abetting a corporation in doing so. In the Department's view, this would require more than simply working for the corporation, it would require a degree of involvement in the ultimate contravention. The principles of aiding and abetting are well established at law and the Department does not propose to elaborate further on this point.

The Fragomen Global submission suggests that possible maximum penalty for partnerships and unincorporated associations is unfair, as they do not place a limit on partnerships and unincorporated associations as a whole.

19. This concern is addressed under the heading "application of the maximum civil penalty to unincorporated associations and partnerships in other Commonwealth legislation" below.

The Fragomen Global submission suggest that the civil penalties need to be set out in the Act in full

20. The Bill strikes a balance between providing a strong framework governing the civil penalties in principal legislation, and providing detail in regulations. The balance is intended to ensure that there is flexibility for effective and responsive administration of the sponsorship framework through the regulations.

21. This flexibility is necessary because:

- over time sponsor behaviour might change and new obligations will be required;
- there may a need to give visa holders more/less protection as time goes on and this can more swiftly be done by way of regulation;
- the sponsorship framework is intended to apply to a number of different visas with different criteria, and the dynamic nature of the immigration and economic environment means that different obligations will apply to different current and future visas.

22. As already mentioned, any regulations made under the amendments proposed in the Bill will be subject to full Parliamentary scrutiny, including by the Senate Standing Committee for Regulations and Ordinances. This scrutiny includes the possibility of disallowance of the regulations.

The Fragomen Global submission suggests that fault elements must be required or excluded in clear terms

23. New section 140Q as proposed in the Bill does not specify a fault element because the appropriate fault element may differ according to the obligation in question. Similarly, not specifying the offence as being 'strict liability', allows the Regulations to include fault elements as appropriate.

24. The appropriateness of a fault element can be illustrated using the example in the Fragomen submission at pages 6 to 7. In the circumstances described it would clearly be inappropriate for a sponsor to have breached the relevant obligation 'if they knew nothing of the repayment or the arrangements between the visa applicant and the third person'. The relevant obligation would therefore be drafted to include 'intention or recklessness' as the fault element.

The Fragomen Global submission asks why the amendments do not prescribe how the fault and physical elements will be applied to corporations, when they do for partnerships/unincorporated associations.

25. The Bill <u>does not</u> set out how the fault and physical elements will be established for partnerships and unincorporated associations as suggested by Fragomen. The provisions cited by Fragomen as supporting their suggestion apply in the case of criminal offences, and not in the case of the civil penalties.

26. The exception to this is proposed new subsection 140ZC(4), which aids in interpreting the meaning of 'engaged in conduct' for the purposes of the provision which ensures that only the 'wrongdoing' partner is liable to a civil penalty.

27. The Bill does not include express provisions on how the fault and physical elements will be established for corporations or partnerships or unincorporated associations because it is considered that this does not need to be legislated as if the issue arose it would be capable of being resolved by the courts.

The Fragomen Global submission suggests that the expression 'fails to satisfy' is unclear – stating that it could mean "to adequately meet or comply with".

28. The Department suggests that the term "fails to satisfy" is no more uncertain than other phrases suggested by Fragomen, such as 'breaching', 'not meeting', or 'not complying'.

29. The use of the term 'satisfied' is common throughout the Migration Act and the statute book generally and has been used effectively in other contexts. The Department's view is that the proposed formulation, as drafted, is appropriate.

The Fragomen Global submission raises concerns with proposed subsection 140J(3)

30. Proposed subsection 140J(3) provides that a sponsorship obligation has not been satisfied if the visa holder or a person on behalf of a visa holder, reimburses their sponsor or another person, for an amount which the sponsor is required to pay under a sponsorship obligation.

31. The purpose of this provision is to ensure that an approved sponsor is liable to enforcement action if they require a visa holder to reimburse them (directly or indirectly) for costs which they must pay on behalf of the visa holder.

32. It is clearly not the intention of the provision that *any* money spent from salary (such as the salary itself) would be a reimbursement to another person. It will not be interpreted by the Department in this way.

The Fragomen Global submission suggests that the Bill does not achieve the desired outcome of holding only the 'wrongdoing' partner or committee member responsible for a civil penalty if a sponsorship obligation is not satisfied.

34. This suggestion in the Fragomen submission is reached through a narrow interpretation of 'engaged in the conduct' which constituted the contravention of the civil penalty. The Department understands the suggestion to be that because all partners are required to satisfy a sponsorship obligation (but only one need discharge it) if the sponsorship obligation is not satisfied then they will all have 'engaged in conduct' which constitutes the contravention. If this construction of proposed section 140ZC were accepted, then section 140ZC would have no purpose at all.

35. It is obviously not the intention of the Department to interpret the provision in this narrow way. Rather it is the intention of the Department to interpret the provision on the basis that it is only the 'wrongdoing' partner(s) who should be pursued for civil penalties (if civil penalties are the most appropriate sanction option in the circumstances) – that is partners who are involved in the failure.

36. The Department submits that a court would be reluctant to take the construction taken in the Fragomen submission, as the intention of proposed section 140ZC is clear.

The Fragomen Global submission suggests that the new offence created by proposed section 140Z should contain a statutory defence

37. Proposed section 140Z provides that a person commits a criminal offence if they do not comply with a notice to produce documents relating to compliance with a sponsorship obligation.

38. This provision does not require a unique statutory defence, because the defences to this provision are included in Part 2.3 of the Criminal Code. These include defences such as mistake, ignorance of fact, duress, or intervening conduct.

39. The Attorney General's Department recommends that for the purposes of consistency across criminal offences, it is preferable that the defences in the Criminal Code be relied upon, rather than creating unique defences for each criminal offence provision. The Department submits that this preference is appropriate in the context of this Bill.

The Fragoman Global submission suggests that the inspector powers should only be used where there is a reasonable cause to believe that a sponsorship obligation has been breached.

40. A site visit by an inspector is intended to fulfil two functions. First, the function envisaged by the Fragomen submission[1] – as a secondary means of gathering information relevant to compliance with program requirements following an earlier monitoring request from the Department. Second, as a primary means of gathering information for the high risk portion of the caseload or as a secondary means of gathering information where the earlier alternate attempts to gather information have been unsuccessful. The arrangements proposed by Fragomen do not allow for these vital latter functions.

The Fragomen Global submission suggests that a reasonable cause requirement should be included in relation to the issuing of a notice by an inspector to produce documents

41. The power to require a person to produce a document in paragraph 140X(2)(c) is consistent with the power in paragraph 169(2)(c) of the *Workplace Relations Act 1996*. The reasons for this consistency are set out at paragraphs 253 and 254 of the Explanatory Memorandum. Furthermore, it is only intended that an inspector make a request under this paragraph in circumstances where the inspector has been unable to access the relevant document under the non-compellable powers set out in paragraph 140X(2)(b).

The Fragomen Global submission suggests that the new offence created by proposed section 486U is problematic

42. Proposed section 486U provides that a person commits a criminal offence where a person fails to give assistance as required by the Secretary in writing where the Secretary believes on reasonable grounds that the person has information relevant to a contravention of a civil penalty.

43. Section 486U mirrors section 42TE of the *Therapeutic Good Act 1989* inserted by an Act which commenced in 2006. The Secretary would always bring an action under subsection 486U(4) (which allows the court to order the person to comply) prior to bringing an action under subsection 486U(5) (offence provision) providing an opportunity for judicial scrutiny.

The Fragomen Global submission suggests that a human resource manager, or other employee of a company, may be personally liable for failing to provide a document under proposed new section 140Z.

44. The Department's view is that this is unlikely because where the Secretary requires assistance from a body corporate, the notice will be issued to the body corporate, rather than to any particular employee.

The Fragomen Global submission raises concerns with the mandatory sanction provision in proposed subsection 140L(2)

[1] Page 9 of the Fragomen Global submission refers.

45. Subsection 140L(2) provides that the regulations may prescribe the circumstances in which the Minister must impose an administrative sanction.

46. The Department does not envisage the prescription of any mandatory sanction provisions. The power in subsection 140L(2) of the Bill simply preserves the existing power in subsection 140J(3) and 140K(2) of the *Migration Act 1958* in relation to which no mandatory sanctions have been prescribed.

The Fragomen Global submission raises concerns with the retrospective effect of the changes

47. The Department has addressed the issues around retrospectivity elsewhere. The Department does not intend to elaborate further here.

The Fragomen submission suggests that the application of the sponsorship obligations to existing sponsors, could mean that the sponsorship obligations are constitutionally invalid because they will amount to an unjust acquisition of property contravening section 51(xxxi) of the Constitution.

48. The Department, having obtained advice, believes that there is no constitutional issue here.

Use of the term "thing" in proposed inspector powers

49. Finally, the Department notes a line of questioning pursued by a Member of the Committee (Senator Fierravanti-Wells) of Fragomen Global at the inquiry hearing, relating to the use of the word "thing" in proposed section 140X relating to Powers of Inspectors. The word is used as part of the phrase "document or thing" at various provisions, all of which relate to the inspector's power to require the provision of material to help determine whether a sponsorship obligation has been, or is being, complied with.

50. Use of the word "thing" in these context is a common drafting practice, intended to cover the likelihood that relevant information may not be held just in a paper document - it may, for example be held on a Compact Disc or a "thumbnail" drive, or in other forms too numerous to list.

51. This practice is illustrated in many parts of the Migration Act, including those relating to:

- powers to search a person (for example sections 252, 252AA, 252A through to G and 261A through to I),
- powers to request documents from registered migration agents (section 305C amongst others) and
- in procedures for giving documents to merits review tribunals (for example section 379F).

b) Discretions relating to offences and civil penalties

52. The Department has considered concerns raised by a Member of the Committee (Senator Fierravanti-Wells) relating to discretions found in the Bill and elsewhere in relation to pursuing offences and civil penalties proposed in the Bill. There are two contexts for consideration - first, the pursuance of criminal offences and second, pursuing civil penalties.

Criminal offences - proposed sections 140Z and 140X

53. Proposed section 140Z creates an offence with a maximum penalty of 6 months imprisonment if a person fails to comply with a notice to produce documents issued by an Inspector under paragraph 140X(2)(c).

54. In circumstances where an inspector has requested a document within a specified period (of not less than 7 days) under paragraph 140X(2)(c) and a sponsor fails to comply for reasons that are satisfactory to the Inspector in the circumstances, the inspector could simply wait to obtain the document within the newly agreed timeframe.

55. The Inspector has this discretion through the systemic operation of the legal system rather than through an express legislative discretion. The reliance on the systemic discretion rather than on an express legislative discretion is the usual approach when an offence is created. The offence in proposed section 140Z is replicated on the long-standing offence in section 819 of the *Workplace Relations Act 1996* (which is also an offence for failing to comply with a notice to produce documents issued by an inspector) which similarly does not include an express legislative discretion to withdraw or vary the notice.

56. There are a number of layers of discretion which are built into the criminal justice system that occur before a person could be required to defend a criminal prosecution action in the courts. First, the Department has a discretion to refer, or not to refer, the matter to the Commonwealth Director of Public Prosecutions (DPP). Where a notice has not been complied with for reasons that are satisfactory to the Department, a brief would not be prepared for the DPP. Second, the DPP, guided by the Prosecution Policy of the Commonwealth, has discretion as to whether to prosecute the alleged offender. Third, if the DPP chose to prosecute, and the person was found to be guilty of an offence, it is up to the court to decide what sentence/ penalty to impose up to the maximum.

Civil Penalty Provisions

57. In relation to civil penalties, the Bill does not require the Minister to take civil penalty action where an obligation has been breached. The Bill includes a suite of sanctions which the Minister may utilise if a sponsorship obligation has been breached, but there is no compulsion on the Minister to take any action if it is not appropriate (see section 140K for a list of the sanctions that the Minister may choose to take). If the Minister decides to initiate civil penalty proceedings, subsection 486R(1) of the Bill is the source of the Minister's discretionary power to do so.

> *Application for order*
>
> (1) Within 6 years of a person (the ***wrongdoer***) contravening a civil penalty provision, the Minister **may** *[emphasis added]* apply to the Federal Court or the Federal Magistrates Court for an order that the wrongdoer pay the Commonwealth a pecuniary penalty.

58. This makes it clear that the Minister may or may not apply for an order for a penalty at his or her inherent discretion. Further, the court has the discretion to apply a lesser penalty, if any at all, under proposed subsection 486R(2).

59. The Department's intended approach to compliance with the various provisions proposed in the Bill will be such that the most appropriate action will be determined by considering all the circumstances. In the case of minor or inadvertent first-time breaches the Department will likely take no action, while in the case of serious, deliberate and repeated breaches the Department will likely take civil legal action. The other enforcement tools are intended to deal with the range of conduct in between these extremes. The discretion to choose the most effective tool in particular circumstances is a fundamental feature of the program's design.

c) Application of the maximum civil penalty to unincorporated associations and partnerships in other Commonwealth legislation

60. The Department notes a question raised by a Member of the Committee (Senator Fierravanti-Wells) relating to how the maximum civil penalty is applied to unincorporated associations and partnerships in other Commonwealth Legislation.

61. The Department understands that Senator Fierravanti-Wells is concerned that the maximum civil penalty which could be imposed on a partnership or unincorporated association may in some circumstances exceed the maximum penalty imposed upon a corporation.

63. The approach we have taken in the Bill that a contravention by the partnership or unincorporated association is taken (whether for the purposes of criminal or civil liability) to have been a contravention by each wrongdoing partner or committee member is consistent with other Commonwealth Acts. Examples include:

- section 761 of the *Corporations Act 2001;*
- section 585 of the Telecommunications Act 1997; and
- section 237 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*

64. These provisions do not set a maximum amount that a partnership or unincorporated association as a whole could be required to pay, rather the effect of the provisions is that the maximum penalty which could be imposed on each 'wrongdoing' partner or committee member is the maximum penalty that could be imposed on an individual. If there are several 'wrongdoing' partners or committee members, then this could cumulatively amount to more than the maximum amount for a corporation.

65. The Department is not aware of any provisions in Commonwealth Legislation which impose responsibility on partners and committee members as individuals but then seek to set a maximum limit for which the partnership or unincorporated association would be collectively liable.

d) Provision of a table comparing current sponsor undertakings to what is proposed in the Bill

66. The Department notes a question raised by a Member of the Committee (Senator Fierravanti-Wells) relating to whether a table could be provided comparing undertakings that are currently required of sponsors of 457 visa holders, to the provisions found in the Bill.

Current Framework

67. Existing subsection 140H(1) of the Migration Act provides a specific power for regulations to be made requiring an applicant for approval as a sponsor of a person for a visa to make prescribed undertakings. Regulations made under that provision require an applicant for approval as a *standard business sponsor* (these are sponsors of Subclass 457 visa holders) to make a series of undertakings before the Minister can approve an application for sponsorship.

68. Those undertakings are set out in the Regulations at regulation 1.20CB. Details of the required undertakings are set out in the table below.

Proposed Framework

69. Item 19 of the Bill repeals subsection 140H(1) of the Migration Act and other provisions and replaces them with provisions allowing for the creation of new sponsorship obligations that will apply to an *approved sponsor*. The proposed framework sets clear parameters for the sponsorship obligations, whilst allowing for detail of the obligations to be provided in regulations.

70. To achieve this, proposed subsection 140H(4) provides for the regulations to be more explicit in prescribing the manner in which, and the time period within which an obligation must be satisfied. Making the regulations in this way provides transparency for all stakeholders by clarifying exactly what is required from sponsors to maintain compliance with their obligations. In turn, this is expected to minimise instances of sponsors making inadvertent mistakes in relation to those obligations.

71. Also, proposed section 140J ensures that if a sponsorship obligation requires a sponsor to pay an amount to the Commonwealth, the amount payable cannot exceed the lesser of a prescribed amount, or the actual costs incurred by the Commonwealth.

72. If any of the current undertakings become sponsorship obligations prescribed in the regulations, sections 140H and 140J provide the framework to ensure that ambiguities which exist in the current undertakings arrangements are clarified and made more transparent for all concerned.

Undertakings/Obligations

73. The following table has been developed by the Department in response to the requests made by Members of the Committee to outline the existing undertakings, highlight where they have been adopted in the Bill, and identify where they will be included as obligations. The Department notes, once again, that the actual obligations for sponsors have yet to be determined by Government, which will decide these matters in light of advice from the Skilled Migration Consultative Panel and the report of the integrity review being conducted by Ms Barbara Deegan.

Reference in Division 1.4A	***Undertaking made by sponsor of Subclass 457 visa holder***	***Reflected in the Bill?***	***Reflected in an obligation?***	***Comments***
1.20CB(1)	For subsection 140H(1) of the Act, an applicant for approval as a standard business sponsor must make the following undertakings:	N/A	N/A	Applicants for approval as a *standard business sponsor* will no longer be required to make undertakings. Obligations will apply to *approved sponsored* by operation of law.
1.20CB(1)(a)	to ensure that the cost of return travel by a sponsored person is met;	No	To be determined	
1.20CB(1)(b)	not to employ a person who would be in breach of the immigration laws of Australia as a result of being employed;	No	To be determined	
1.20CB(1)(c)	to comply with its responsibilities under the immigration laws of Australia;	No	To be determined	
1.20CB(1)(d)(i)	to notify Immigration of: any change in circumstances that may affect the business's capacity to honour its sponsorship undertakings; or	No	To be determined	
1.20CB(1)(d)(ii)	to notify Immigration of: any change to the information that contributed to the applicant's being approved as a sponsor, or the approval of a nomination;	No	To be determined	
1.20CB(1)(e)	to cooperate with the Department's monitoring of the applicant and the sponsored person;	Not as an obligation (140X)	To be determined	An inspector, under proposed section 140X, has statutory powers to monitor compliance with obligations. Under proposed section 140Z, a person commits an offence if they fail to comply with the requirements of an inspector to produce a document or thing within a specified period (of not less than 7 days).
1.20CB(1)(f)	to notify Immigration, within 5 working days after a sponsored person ceases to be in the applicant's employment;	No	To be determined	
1.20CB(1)(g)(i)	to comply with: laws relating to workplace relations	No	To be determined	An inspector, under proposed section 140ZA, can disclose information to the Secretary, or an

	that are applicable to the applicant; and			employee, of the Department who administer the *Workplace Relations Act 1996*.

1.20CB(1)(g)(ii)	to comply with: any workplace agreement that the applicant may enter into with a sponsored person, to the extent that the agreement is consistent with the undertaking required by paragraph (i);	No	To be determined	
1.20CB(1)(h)	to ensure that a sponsored person holds any licence, registration or membership that is mandatory for the performance of work by the person;	No	To be determined	
1.20CB(1)(i)	to ensure that, if there is a gazetted minimum salary in force in relation to the nominated position occupied by a sponsored person, the person will be paid at least that salary;	No	To be determined	
1.20CB(1)(j)	to ensure that, if it is a term of the approval of the nomination of a position that a sponsored person must be employed in a particular location, the applicant will notify Immigration of any change in the location which would affect the nomination approval;	No	To be determined	
1.20CB(1)(k)	either: for an application made before 1 November 2005 — to pay all medical or hospital expenses for a sponsored person (other than costs that are met by health insurance arrangements); or	No	To be determined	
	or: for an application made on or after 1 November 2005 — to pay all medical or hospital expenses for a sponsored person arising from treatment administered in a public hospital (other than expenses that are met by	No	To be determined	

	health insurance or reciprocal health care arrangements);			

1.20CB(1)(l)	to make any superannuation contributions required for a sponsored person while the sponsored person is in the applicant's employment;	No	To be determined	
1.20CB(1)(m)	to deduct tax instalments, and make payments of tax, while the sponsored person is in the applicant's employment;	No	To be determined	
1.20CB(1)(n)	to pay to the Commonwealth an amount equal to all costs incurred by the Commonwealth in relation to a sponsored person.	Not as an obligation (140J)	To be determined	Proposed Section 140J provides that an amount required to be paid to the Commonwealth by an obligation is not enforceable to the extent that the amount exceeds the cost to the Commonwealth in relation to the amount, or the amount in the regulations (whichever is smaller). This provision replaces existing section 140I, and facilitates the application of an obligation to pay costs incurred by the Commonwealth. It is not anticipated that the Minister will make a legislative instrument (under 140J(2))to outline a method of calculating the actual costs at this stage.
1.20CB(2)(a)	For paragraph (1)(n), the costs include the cost of: locating the sponsored person, and	No	To be determined	
1.20CB(2)(b)	For paragraph (1)(n), the costs include the cost of: detaining the sponsored person; and	No	To be determined	
1.20CB(2)(c)	For paragraph (1)(n), the costs include the cost of: removing the sponsored person from Australia (including airfares, transport to an airport in Australia and provision of an escort (if needed)); and	No	To be determined	
1.20CB(2)(d)	For paragraph (1)(n), the costs include the cost of: processing an application for a protection visa made by a sponsored	No	To be determined	

	person.			

e) Information exchange issues raised by the Privacy Commissioner

74. The Department notes issues raised by submission number 22 to the Inquiry from the Privacy Commissioner. These issues relate to the settings for the information exchange provisions found in the bill, include the proposed amendments to the *Taxation Administration Act 1953*.

75. The Department has consulted with the Office of the Privacy Commissioner during the drafting process for the Bill. On 1 August 2008 the Deputy Privacy Commissioner wrote to the Department with some very useful commentary and suggestions on the [then] draft of the Bill and proposed explanatory memorandum. This commentary and the Deputy Privacy Commissioner's suggestions were taken into account before the Bill was introduced to the Senate by the Minister for Immigration and Citizenship.

76. The Department notes that the Privacy Commissioner's submission to the Committee raises new concerns that were not put to the Department by the Deputy Privacy Commissioner during this consultation process. Nonetheless the Department notes that important issues are involved and is pleased to have the opportunity to respond to the Committee about the Privacy Commissioner's concerns.

77. First, the Privacy Commissioner observes that the Bill should require the department to seek initial information from the Tax Commissioner by way of verification, rather than permitting broader disclosure.

78. The proposed amendment to the Taxation Administration Act will insert a new exception to the taxation secrecy provisions. It will be one of several exceptions to the taxation secrecy provisions contained in the Taxation Administration Act, and the drafting of the provision is consistent with these other exceptions to the taxation secrecy provisions.

79. To recast the provision to provide that the Department must 'verify' information on a yes/no basis as a threshold question before being able to receive other information would be unprecedented for provisions which create an exception to the taxation secrecy provisions.

80. Furthermore, to draft the provision in this way, would unnecessarily limit the ability to obtain certain information that is required by the Department. The example provided at paragraph 522 of the Explanatory Memorandum, is only an illustration of how the department intends to behave in a certain situation. However, not all purposes for which the Commissioner can lawfully disclose information to the Department of Immigration will involve a situation where the department has a piece of information that can be verified (except for identity, and the Bill provides that this must be provided by the Department prior to the Commissioner disclosing any information).

81. To adequately draft the provision suggested would more than likely require the setting out of all the different types of information that the Department would need to verify to then be able to receive further information. This would result in a difficult, complex and inflexible provision, particularly noting that the kinds of information that are relevant to sponsorship obligations may evolve in the future through regulation change.

82. The Department considers that the proposed provision casts an appropriate balance between minimising the collection of personal information and maximising compliance with program requirements.

83. The Privacy Commissioner further submits that it is unclear what type of information may be considered 'relevant'.

84. The Department's view is that it will be clear what is relevant. Under proposed section 3ED of the *Taxation Administration Act 1933* the Commissioner is only able to disclose information which is relevant to the sponsorship framework. Through the provisions in the sponsorship framework, such as criteria for approval as a sponsor, and the sponsorship obligations, it will be clear what kind of information is relevant.

85. To illustrate, if a criterion for approval as a sponsor is that there is no current investigation into a sponsor, then the Commissioner will be able to disclose whether there is a current investigation.

86. The Privacy Commissioner further submits that the Bill should require that the Department consult with the Privacy Commissioner in developing the regulations for disclosures under proposed section 140ZA. As discussed above, the Department has consulted with the Privacy Commissioner during the development of the Bill and has already undertaken to consult with both the Department of Prime Minister and Cabinet and the Office of the Privacy Commissioner in the course of developing both the Regulations and the administrative disclosure arrangements.

87. Finally, the Department's view is that it is unnecessary to enshrine consultation with the Privacy Commissioner, in Legislation when it is already part of the usual administrative processes for developing regulatory amendment to so (and is obviously good practice anyway). In addition, as mentioned above, it would be inappropriate to implement a novel legislative provision given the existing scheme for disclosure of secrecy protected information held by the Australian Taxation Office.

f) Statistical evidence on the number of and nature of sponsor breaches in the 457 visa program.

88. The following table illustrates the department's monitoring activities over the past three financial years. It highlights the significant increase in enforcement activity over that time in relation to Subclass 457 visa sponsors. In turn, this reflects increasing community, industry, union and political concern over compliance by sponsors with their obligations.

Measure	2005-06	2006-07	2007-08
Active sponsors (sponsors with primary visa holder in Australia at the end of the financial year)	N/A	15 410	18 750
Sponsors monitored	6 471	6 463	5 293
Sponsors site visited	1 717	1 553	1 759
Sponsors formally sanctioned	3	95	192
Sponsors formally warned	99	313	1 353
Referrals to other agencies	45	167	218

The following table provides a breakdown, by industry, of the 192 sponsors that were formally sanctioned in 2007-08.

Sponsor industry	Number of sanctions
Accommodation, Cafes and Restaurants	60
Construction	29
Manufacturing	26
Retail Trade	24
Personal and Other Services	10
Agriculture, Forestry and Fishing	10
Health and Community Services	9
Mining	5
Wholesale Trade	4
Property and Business Services	4
Education	4
Transport and Storage	2
Cultural and Recreational Services	2
Finance and Insurance	1
Electricity, Gas and Water Supply	1

Communication Services	1
Government Administration and Defence	0

Further statistical detail on the 457 visa program is available from the department's website at http://www.immi.gov.au/media/statistics/statistical-info/temp-entrants/subclass-457.htm