

EY Submission to the Senate Legal and Constitutional Affairs Legislation Committee

Migration Amendment (Charging for a
Migration Outcome) Bill 2015

October 2015



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EY Submission - Migration Amendment (Charging for a Migration Outcome) Bill 2015

Dear Sir/Madam

We thank the Committee for the opportunity to make a submission in relation to the Migration Amendment (Charging for a Migration Outcome) Bill 2015 (the Bill).

EY is Australia's second largest immigration service provider. We represent some of the world's largest businesses as well as hundreds of medium and small businesses from all industry sectors including engineering, telecommunications, finance, property development, insurance, shipping, banking, professional services, retail, labour hire and recruitment.

EY supports the continued efforts of the government to continually review and improve the integrity Australia's visa programmes ensuring that both the interests of the Australian labour market and rights of the temporary visa holders are protected.

In this submission, we will respond to the issues raised in the Bill and Explanatory Memorandum.

EY looks forward to contributing to the continual improvement of Australia's visa programmes.

Kind regards.

Yours faithfully

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1. EY recommendations

2.1.1	Proposed section 245AQ be amended to specifically exclude any benefits that would ordinarily arise out of lawful employment.
2.1.2	Policy guidance to specify that benefits that would ordinarily arise out of lawful employment do not fall within the definition of benefit.
3.1.1	The Bill be amended to include provision that in determining whether an amount is a reasonable amount, the Minister must take into account all information provided by the person.
3.1.2	Policy guidelines direct delegates take into account a wide variation in fees for legitimate professional services.
3.1.3	Policy guidelines specify that labour hire services are to be considered legitimate professional services and afforded the same considerations as persons provided immigration and recruitment services.
4.1	A mechanism, such as a Ministerial Direction, be implemented in relation to civil penalties and visa cancellation under which consideration must be given to a person's intent, knowledge of the unlawful nature of the benefit, knowledge of Australian law and market rates for services, English language skills and exploitative work conditions.

2. Refining the definition of “benefit”

Proposed section 245AQ in the Bill defines, among other things, benefit as follows:

benefit includes:

- (a) a payment or other valuable consideration; and
- (b) a deduction of an amount; and
- (c) any kind of real or personal property; and
- (d) an advantage; and
- (e) a service; and
- (f) a gift.

This definition is unnecessarily broad and refinement is required. In particular, the term “an advantage” may be broadly interpreted by immigration department officers, tribunals and courts.

As set out in the Explanatory Memorandum, we understand that it is not intended that the Bill encompass situations where a person or employer derives the ordinary benefit arising out of the lawful employment of a visa holder. To avoid any doubt, this should be specified in the Bill and in immigration department policy guidelines.

2.1 EY Recommendations

- 2.1.1 Proposed section 245AQ be amended to specifically exclude any benefits that would ordinarily arise out of lawful employment.
- 2.1.2 Policy guidance to specify that benefits that would ordinarily arise out of lawful employment do not fall within the definition of benefit.

3. Professional services defence

EY welcomes the specific defence for persons receiving a benefit as payment of a reasonable amount for a professional service at subsections 245AR(1)(3) and 245AS(3). However, we consider that greater clarity is required in the following areas.

Determining a reasonable amount

The Bill places the evidentiary burden on a defendant to prove that a “benefit” is a payment of a reasonable amount for a professional service, that is, at market rates. The question that arises is how and by whom it will be determined that the service was provided at market rates. Fees for immigration services, for instance, vary significantly across the market which encompasses a wide range of providers from sole traders to global law firms. Commercial in confidence information regarding fees charged by competitors may not be available to a defendant and is unlikely to be available to a delegate of the Minister. There is therefore scope for a delegate to erroneously find that a fee charged for a legitimate professional service is not “a reasonable amount”.

The Bill should be amended to include provision that in determining whether an amount is a reasonable amount, the Minister must take into account all information provided by the person.

Clear policy guidelines must also be developed to direct delegates to take into account a wide variation in fees for legitimate professional services.

Professional labour hire services

The Explanatory Memorandum identifies immigration assistance and recruitment advice as activities which would not normally constitute conduct that would lead to an offence or fine, if that assistance or advice is provided at market rates. While the Explanatory Memorandum is silent on labour hire services, EY considers that the same reasoning must be applied to these labour hire services.

We acknowledge that some elements of the labour hire sector have historically presented certain challenges in relation to immigration compliance. However, it must also be acknowledged that the majority of labour hire businesses operate within the spirit and letter of the law to meet the demands of other Australian businesses for a legitimate and necessary professional service.

Policy guidelines must specify that labour hire services are to be considered legitimate professional services and afforded the same considerations as persons provided immigration and recruitment services.

3.1 EY Recommendations

- 3.1.1 The Bill be amended to include provision that in determining whether an amount is a reasonable amount, the Minister must take into account all information provided by the person.
- 3.1.2 Policy guidelines direct delegates take into account a wide variation in fees for legitimate professional services.
- 3.1.3 Policy guidelines specify that labour hire services are to be considered legitimate professional services and afforded the same considerations as persons provided immigration and recruitment services.

4. Protecting the vulnerable

One of the stated objectives of the Bill is to protect vulnerable people. However, EY is concerned that the Bill has the potential to impose high penalties on those vulnerable people.

Many visa applicants and visa holders have limited knowledge of Australian law and business culture and come from cultures where it may be common practice to provide a “benefit” of some kind in return for job placement or other services. Further, as the media investigation into the 7-Eleven labour practices has highlighted, temporary visa holders are vulnerable to exploitative employers and can be coerced into breaches of the law which cements the exploitative situation.

In this context, the proposed cancellation provisions and strict liability penalty at section 245AS under which it is not necessary to prove any particular knowledge or intent on behalf of the visa holder appears onerous. The Explanatory Memorandum makes it clear that the intent is to impose a civil penalty *on a person who is **complicit** in a “payment for visa” arrangement.*

A mechanism, such as a Ministerial Direction, must be implemented in relation to civil penalties and visa cancellation under which consideration must be given to:

- ▶ whether or not the person intended to provide a “payment for visa” or be involved in the provision of unlawful “benefits” to a sponsor gain a visa
- ▶ whether or not the person had knowledge that the provision of such “benefits” was unlawful
- ▶ exploitative work conditions
- ▶ lack of English language skills
- ▶ lack of knowledge of Australian law including migration law as well as employment rights
- ▶ whether or not the person was aware that they are being asked for an unreasonable payment for a service.

4.1 EY Recommendation

- 4.1.1 A mechanism, such as a Ministerial Direction, be implemented in relation to civil penalties and visa cancellation under which consideration must be given to a person’s intent, knowledge of the unlawful nature of the benefit, knowledge of Australian law and market rates for services, English language skills and exploitative work conditions.

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