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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**MIGRATION LEGISLATION AMENDMENT (SPONSORSHIP MEASURES) BILL
2003**

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Immigration and Multicultural and Indigenous Affairs,
The Hon. Philip Ruddock MP)

MIGRATION LEGISLATION AMENDMENT (SPONSORSHIP MEASURES) BILL 2003

OUTLINE

1. In broad terms, the Migration Legislation Amendment (Sponsorship Measures) Bill 2003 (“the Bill”) amends the *Migration Act 1958* (“the Act”) to provide a comprehensive and transparent framework for the regulations to prescribe requirements relating to sponsorship.
2. Sponsorship is an important and integral element in providing for the entry of persons into Australia. It has a vital role to play in protecting the Australian community from the costs and risks associated with the stay of non-citizens in Australia.
3. This Bill formally recognises the long-standing Government policy that where non-citizens are brought to Australia by sponsors, the sponsors, as opposed to the Australian community, should bear all costs in relation to the non-citizens. This is particularly the case in relation to temporary residence sponsors who gain a commercial advantage from the sponsorship arrangements.
4. The framework established by the Bill provides for:
 - sponsorship to be a criterion for a valid visa application and for the grant of a visa;
 - a process for the approval of sponsors; and
 - undertakings to be made by sponsors (according to the kind of visa sought by the person to be sponsored).

It also allows the Minister to take certain actions against sponsors if these undertakings are breached. The Bill allows such actions to be targeted at different visas, and limits the imposition of sanctions on the sponsors of prescribed temporary visas.

1. While aiming to standardise sponsorship arrangements as much as possible, as was recommended by the report “In Australia’s Interests – A Review of the Temporary Residence Program”, the amendments contained in the Bill also recognise the differing characteristics of sponsoring organisations and the need to reflect different sponsor relationships.
2. The regulation making powers provided in the Bill are not intended to affect sponsorship regulations in force before or after the commencement of the Bill that were or are made under any other provisions of this Act.
3. In addition, the amendments contained in the Bill will prevent abuse of the merits review process by certain temporary visa applicants who fail to meet the sponsorship requirements of their visa.

FINANCIAL IMPACT STATEMENT

4. The amendments contained in the Bill will have a minimal financial impact.

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NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short title

1. The short title by which this Act may be cited is the Migration Legislation Amendment (Sponsorship Measures) Act 2003.

Clause 2 Commencement

2. Subclause 2(1) provides that this Act commences on the day on which it receives the Royal Assent.

Clause 3 Schedule(s)

3. This clause provides that each Act specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned. In addition, any other item in a Schedule to this Act has effect according to its terms.

SCHEDULE 1 – The sponsorship system

Migration Act 1958

Item 1 Subsection 5(1)

4. This item inserts a new definition of “approved sponsor” in subsection 5(1) of the Act, consequential to the insertion of new section 140D by item 2 of the Bill. This definition provides that “approved sponsor”, in relation to a visa of a kind (however described) to which new Division 3A of Part 2 of the Act, has the meaning given by new section 140D.

Item 2 After Division 3 of Part 2

5. This item inserts new Division 3A after Division 3 of Part 2 of the Act.

Division 3A – Sponsorship

6. The insertion of new Division 3A into Part 2 of the Act recognises the fundamental and increasingly important role sponsorship has to play in providing for the entry and stay of non-citizens in Australia and protecting the community from the associated costs and risks.

7. New Division 3A of Part 2 of the Act provides a framework for the making of regulations to deal with sponsorship. It provides greater transparency than the current prescription of sponsorship matters, whereby regulations dealing with sponsorship are made under various powers in the Act that do not explicitly mention sponsorship.

Subdivision A – Application of Division

8. New Subdivision A of new Division 3A of Part 2 of the Act contains an application provision for new Division 3A of Part 2 of the Act.

Section 140A

9. New section 140A provides that new Division 3A of Part 2 of the Act applies to visas of a prescribed kind (however described). The effect of this application provision is that new Division 3A of Part 2 of the Act will not apply in relation to sponsorship arrangements for visas until regulations are made under new section 140A.

10. This “opt-in” mechanism is necessary to allow for a staged, smooth and effective transition from existing sponsorship arrangements to new arrangements made under new Division 3A of Part 2 of the Act. It is complemented by new section 140W, which ensures that current regulations, including those dealing with sponsorship arrangements, can continue to operate effectively alongside the new framework.

11. The combined effect of new sections 140A and 140W is that sponsorship arrangements may be developed in a progressive manner, maintaining continuity for those involved and allowing for appropriate community consultations to occur before operating under the new system. Initially, it is envisaged that sponsored business visas and the proposed new

professional development visa will “opt-in” to the new sponsorship system provided for by new Division 3A of Part 2 of the Act.

Subdivision B – Sponsorship system

12. New Subdivision B of new Division 3A of Part 2 of the Act deals with matters relating to sponsorship.

Section 140B Sponsorship as a criterion for prescribed visas

13. New section 140B provides the context as to when sponsorship may be required for visas to which new Division 3A of Part 2 of the Act applies. That is, it points out that sponsorship may be a criterion to be satisfied for a visa.

14. New subsection 140B(1) provides that the regulations may specify that sponsorship by an approved sponsor is a criterion (whether at the time of application or at the time of decision) for a visa of a prescribed kind (however described).

15. The reference to a visa of a prescribed kind (however described) is intended to enable the prescription of sponsorship as a criterion for, as an example:

- a visa class;
- a visa subclass; or
- a visa stream within a visa subclass.

1. That is, it gives flexibility, for instance, for sponsorship requirements to vary not only between visa classes but also within visa subclasses.

2. New subsection 140B(2) makes it clear that a criterion prescribed under new subsection 140B(1) is in addition to any other criteria for the visa that:

- may be prescribed under any other provision of this Act or any other Act; or
- are set out in this or any other Act.

1. For example, a criterion prescribed under new subsection 140B(1) is in addition to any other criteria for the visa that may be prescribed under subsection 31(3). Subsection 31(3) of the Act provides that the regulations may prescribe criteria for a visa or visas of a specified class.

Section 140C Sponsorship as a criterion for a valid visa applications

2. New section 140C, like new section 140B, provides the context as to when sponsorship may be required for visas to which new Division 3A of Part 2 of the Act applies. In broad terms, it points out that sponsorship, whether already existing or proposed to be in place, may be necessary for an application for a visa to be valid.

3. Under new subsection 140C(1), the regulations may specify that it is a criterion for a valid application for a visa of a prescribed kind (however described) that the applicant is sponsored by an approved sponsor.

4. The reference to a visa of a prescribed kind (however described) is intended to enable the prescription of sponsorship as a criterion for a valid application for, as an example:

- a visa class;
- a visa subclass; or
- a visa stream within a visa subclass.

1. Under new subsection 140C(2), the regulations may specify that it is a criterion for a valid application for a visa of a prescribed kind (however described) that the applicant's proposed sponsor has applied to be an approved sponsor. This application for approval as a sponsor must be made at, or before the time, the application for the visa is made.

2. New subsection 140C(3) mirrors new subsection 140B(2). It makes it clear that a criterion prescribed under new subsection 140C(1) or 140C(2) is in addition to any other criteria that:

- may be prescribed under any other provision of this or any other Act; or
- are set out in this or any other Act.

1. For example, a criterion prescribed under new subsection 140C(1) or 140C(2) is in addition to any other criteria that may be prescribed under subsection 46(3) or 46(4) of the Act. Subsection 46(3) provides that the regulations may prescribe criteria that must be satisfied for an application for a visa of a specified class to be a valid application. Subsection 46(4) provides that, without limiting subsection 46(3), the regulations may also prescribe:

- the circumstances that must exist for an application for a visa of a specified class to be a valid application;
- how an application for a visa of a specified class must be made;
- where an application for a visa of a specified class must be made; and
- where an applicant must be when an application for a visa of a specified class is made.

Section 140D Approved sponsor

1. New section 140D defines when a person is an "approved sponsor". It provides that, at a particular time, a person is an approved sponsor (the first person) of another person (the second person) for a visa to which new Division 3A of Part 2 of the Act applies if new paragraphs 140D(a) to 140D(e) are satisfied.

2. A reference to a person (the first person) in new section 140D is intended to include the following:

- all legal persons, that is natural persons or corporations;
- partnerships and unincorporated associations, in the manner provided for by new Subdivision C of new Division 3A of Part 2 of the Act.

1. New paragraph 140D(a) requires the first person to have consented in writing to sponsor the person for the visa. This consent must not have been withdrawn by notice in writing to the Minister.

2. Under new paragraph 140D(b), the Minister must have approved the first person as a sponsor of the second person for the visa before that particular time. This is the case whether the person to be sponsored is named in the approval or otherwise described. This takes into account the fact that in some circumstances, at the stage of being approved as a sponsor, the sponsor may only know, for example, the occupation of the person to be sponsored, the type of activity that the person will be undertaking in Australia or the identity of the person's overseas employer. The name of the person to be sponsored may only be known at a later stage, when the person applies for a visa.

3. Under new paragraph 140D(c), the approval must not have been cancelled by the Minister before that time. That is, the approval under new paragraph 140D(b) must be existing at the particular time for the person to be an approved sponsor.

4. Under new paragraph 140D(d), a bar of the kind mentioned in new paragraph 140L (c) or (d) that would affect the sponsorship of the person to be sponsored must not be in force at that time. That is, the sponsor must not at the relevant time have been barred from sponsoring the person.

5. New paragraph 140D(e) provides that the terms on which the sponsorship was approved must be satisfied at that time for a person to be an approved sponsor. Under new section 140G, the Minister's approval of a person as a sponsor may be on specified terms. If the approved sponsor operates outside these terms, their status as an approved sponsor ceases in relation to operations or activities undertaken outside those terms.

Section 140E Approving sponsor

6. New subsection 140E(1) ensures that the Minister must approve a person as a sponsor if the person satisfies prescribed criteria.

7. Prescribed criteria might be, for example, that for a person to be eligible for approval as a sponsor, he or she must:

- be of a certain age;
- have a certain relationship with the person to be sponsored;
- be in a certain financial position; or
- be an organisation of a certain type.

1. The prescribing of criteria for approval as a sponsor is somewhat similar in nature to the prescribing of criteria to be satisfied for the grant of a visa under subsection 31(3) of the Act.

2. New subsection 140E(2) makes it clear that different criteria for approval as a sponsor may be prescribed for different kinds of visa (however described). This provision provides the necessary flexibility for the regulations to specify not only different sponsorship approval criteria between visa classes, but also between subclasses of visa or between different visa streams within a subclass.

Section 140F Process for approving sponsors

3. New section 140F provides power for the regulations to establish, in relation to visas to which new Division 3A of Part 2 of the Act applies, a process for the Minister to approve a person as a sponsor. It also provides flexibility within this regulation making power for different processes to be prescribed for different kinds of visa (however described).

4. Regulations made under new section 140F might, for example, set out how an application for approval is to be made and what fee is to be paid for an application. In this way, the regulation making power is somewhat similar to the powers in subsections 46(3) and 46(4), that allow the regulations to prescribe criteria that must be satisfied for an application for a visa to be valid.

5. It is proposed that where the Minister refuses to approve a person as a sponsor, this decision may be prescribed under subsection 338(9) of the Act as an MRT-reviewable decision. As decisions to refuse or reject applications for approval as a business sponsor are currently prescribed under subsection 338(9) as MRT-reviewable decisions, this would be consistent with existing practice.

Section 140G Terms of approval as a sponsor

6. New subsection 140G(1) allows an approval of a person as a sponsor under new Division 3A of Part 2 of the Act to be on terms specified in the approval. Under new subsection 140G(2) these terms must be of a kind prescribed by the regulations.

7. These terms of approval limit when a person is an approved sponsor, as indicated by new paragraph 140D(e). Where the sponsor undertakes activities outside the approved terms (for example, attempts to sponsor more persons than they have approval for) then the sponsor remains an approved sponsor for the purposes of their activities within the terms (ie for the number of persons they are allowed to sponsor) but are not an approved sponsor for any persons that exceed the number of the approved sponsored person.

8. The note at the end of new subsection 140G(2) provides examples of the kinds of terms that might be set out in regulations made under new subsection 140G(2). The terms might set out:

- the number of people whom the approved sponsor may sponsor under the approval; or
- the duration of the approval.

1. As is made clear under section 15AD of the *Acts Interpretation Act 1901*, the examples provided in this note are not to be taken to be exhaustive.

2. New subsection 140G(3) provides that different kinds of terms may be prescribed for different kinds of visa (however described). This provision provides the necessary flexibility for the regulations to specify different terms of approval not only between visa classes, but also between subclasses of visa or between different visa streams within a subclass.

Section 140H Sponsorship undertakings

3. New section 140H deals with sponsorship undertakings in relation to visas to which new Division 3A of Part 2 of the Act applies. It enables the regulations to require undertakings to

be made by applicants seeking to be approved as sponsors and sets out when those undertakings have effect. It puts beyond doubt that sponsors have obligations in relation to persons they sponsor to come to Australia, and that they are expected to enter into undertakings to that effect. This is consistent with long-standing Government policy and aims to protect the Australian community.

4. New subsection 140H(1) makes it clear that the regulations may require an applicant for approval as a sponsor to make prescribed undertakings. The note at the end of new subsection 140H(1) lists, not in an exhaustive way, examples of what might be dealt with in undertakings prescribed under new subsection 140H(1). The note suggests, for example, that an applicant for approval as a sponsor might be required to undertake to pay certain costs incurred by the sponsored visa holder.

5. New subsection 140H(2) provides that undertakings only have effect if the sponsor consents in writing to sponsor the person referred to in new subsection 140H(1). The sponsor can consent either at the time of applying for approval as a sponsor, or at a later date.

6. It is important to allow for consent to be given by a sponsor after the time of applying for approval as a sponsor because, in relation to certain visas, the sponsor may not know the person to be sponsored when applying for approval as a sponsor. At this stage, the sponsor may only know, for instance, the kind of person to be sponsored, that is that he or she is sponsoring a person of a particular occupation. This provision ensures that the undertakings will have effect in relation to that person, once it is clear to the sponsor who that person is and the sponsor consents to sponsor that person (for example, at the visa application stage).

7. New subsection 140H(3) provides a limitation on new subsection 140H(2). New subsection 140H(3) provides that, regardless of when the sponsor consents to sponsor the person, the undertakings do not have effect until the visa is granted to the person to be sponsored. New section 140Q provides for regulations to be made as to when undertakings cease to be enforceable if the sponsored person ceases to hold his or her visa or the sponsor ceases to be an approved sponsor of the visa holder. Other than in these circumstances, undertakings remain on foot and enforceable.

8. New subsection 140H(4) clarifies that different sponsorship undertakings may be prescribed for different visas (however described). This provision provides the necessary flexibility for sponsorship undertakings to differ not only between visa classes, but also between subclasses of visa or different visa streams within a subclass. For example, different approaches may be taken in relation to permanent as opposed to temporary visas or in relation to sponsors who obtain a commercial advantage from sponsorship arrangements as opposed to those who sponsor for family reasons.

9. It is important to be able to provide for different undertakings to be made by sponsors so that these undertakings can be tailored to accord with the needs of particular entry programs.

Section 140I Amounts payable to the Commonwealth

10. New section 140I provides for the making of regulations prescribing undertakings, which may be required of sponsors, to pay certain costs to the Commonwealth. It is not intended to limit in any way the operation of section 140H, which provides more generally for regulations prescribing undertakings.

11. New subsection 140I(1) allows regulations prescribing undertakings to repay costs to identify the costs in two ways.

12. Paragraph 140I(1)(a) provides for the regulations to describe the kind of cost to which the undertaking relates. For example, the regulations may provide for an undertaking to repay to the Commonwealth the cost of processing any subsequent visa application made by the applicant after arrival in Australia.

13. Paragraph 140I(1)(b) provides for the regulations to describe the cost by reference to a Ministerial determination setting out how a particular kind of cost is to be calculated. For example, the regulations may prescribe an undertaking to repay costs of locating an unlawful non-citizen calculated in accordance with a method determined by the Minister in a particular provision of a specified determination. An example of a method for calculating such a cost would be a formula requiring the number of field operations by a specified dollar amount.

14. New subsection 140I(2) allows the determination referred to in paragraph 140I(1)(b) to be made by notice in the Gazette.

15. New subsection 140I(3) ensures that the Commonwealth cannot recover from the sponsor, under an undertaking prescribed under new subsection 140I(1), any more than the actual cost incurred by the Commonwealth in relation to which the undertaking was given. For example, if an undertaking is given to repay the costs of locating an unlawful non-citizen, and the cost calculated using the method determined by the relevant Gazette notice is more than the sum actually incurred by the Commonwealth, the Commonwealth can only recover from the sponsor the actual amount incurred.

Section 140J Cancellling or barring approval as a sponsor if undertakings breached

16. In broad terms, new section 140J provides the context as to how and when actions available to the Minister under new section 140L may be taken in the event of a breach of a sponsorship undertaking made under new section 140H.

17. New subsection 140J(1) sets the limits as to when new section 140J applies. It provides that new section 140J only applies if:

- an approved sponsor of a person for a temporary visa breaches an undertaking; or
- a person who is no longer an approved sponsor of a person for a temporary visa, but remains bound by an undertaking, breaches the undertaking.

1. This makes it clear that where undertakings are made under regulations made under new section 140H in relation to a permanent visa, the actions listed in new section 140L are not available.

2. It is important to ensure that new section 140J applies to former sponsors as such persons can continue to be bound by undertakings if regulations made under new section 140Q so provide.

3. New subsection 140J(2) provides power for the regulations to deal with:

- the circumstances in which the Minister may take one or more of the actions mentioned in new section 140L as a result of the breach of an undertaking; and
- the criteria to be taken into account in determining what action to take.

1. For example, regulations made under new subsection 140J(2) might allow the Minister to consider the severity of the breach, the past conduct of the sponsor and / or the impact on the Australian community in determining what action to take of those available under new section 140L.

2. New subsection 140J(3) provides power for the regulations to prescribe circumstances in which the Minister must take one or more of the actions mentioned in new section 140L. This provision recognises that, in certain circumstances, a mandatory cancellation or barring of an approval as a sponsor may be appropriate.

3. New subsection 140J(4) makes it clear that different circumstances and different criteria may be prescribed for different kinds of temporary visa (however described). This provision provides the necessary flexibility for the circumstances for cancelling or barring an approval as a sponsor, and the criteria to be taken into account by the Minister in taking such action, to differ not only between temporary visa classes, but also between subclasses of visa or different visa streams within a subclass.

4. New subsection 140J(5) puts it beyond doubt that new section 140J does not deal with the cancellation of approval as a business sponsor (as defined in section 137A). As the note at the end of new subsection 140J(5) points out, this is because the cancellation of an approval as a business sponsor is dealt with by Subdivision GA of Division 3 of Part 2 of the Act.

Section 140K Cancelling or barring approval as a sponsor in other circumstances

5. New section 140K supplements new section 140J. Section 140J deals only with how and when the Minister may take one or more of the actions mentioned in new section 140L for a breach of an undertaking. In contrast, new section 140K sets out how and when the Minister may take one or more of the actions mentioned in new section 140L in circumstances other than where there has been a breach of an undertaking made under regulations made under new section 140H.

6. New subsection 140K(1) provides power for the regulations to prescribe:

- circumstances in which the Minister may take one or more of the actions mentioned in new section 140L (other than where there has been a breach of an undertaking); and
- the criteria to be taken into account in determining what action to take.

1. As an example, regulations made under new subsection 140K(1) might allow the Minister to take action to cancel an approval as a sponsor where:

- the sponsor has repudiated the undertakings that were made (under regulations made under new subsection 140H(1)). That is, the sponsor has made it entirely clear that he or she has no intention to comply with the undertakings; or

- it is found that the sponsor made wrong or fraudulent claims in the application for approval as a sponsor.

1. New subsection 140K(2) provides power for the regulations to prescribe other circumstances in which the Minister must take one or more of the actions mentioned in new section 140L. This provision recognises the fact that in certain circumstances, a mandatory cancellation or barring of an approval as a sponsor may be appropriate.
2. New subsection 140K(3) restricts new section 140K to taking action in relation to persons who are approved sponsors, or former approved sponsors, of persons for temporary visas. This accords with the situation under new section 140J, where action is also limited to approved sponsors, or former approved sponsors, of persons for temporary visas.
3. New subsection 140K(4) provides for different circumstances and different criteria to be prescribed for different kinds of visa (however described). This provision provides the necessary flexibility for the circumstances for cancelling or barring an approval as a sponsor, and the criteria to be taken into account by the Minister in taking such action, to differ not only between visa classes, but also between subclasses of visa or different visa streams within a subclass.
4. New subsection 140K(5) makes it clear that new section 140K does not deal with the cancellation of approval as a business sponsor (as defined in section 137A). As the note to new subsection 140K(4) points out, the cancellation of an approval as a business sponsor is dealt with by existing Subdivision GA of Division 3 of Part 2 of the Act.

Section 140L Actions under sections 140J and 140K

5. New section 140L lists the actions the Minister may (or must) take against approved sponsors or former approved sponsors under new sections 140J and 140K. The actions the Minister may (or must) take are:
 - cancelling the approval of the sponsor for specified kinds of temporary visa (however described);
 - cancelling the approval of the sponsor for all temporary visas;
 - barring the sponsor, for a specified period, from sponsoring more people under the terms of one or more specified approvals for temporary visas;
 - barring the sponsor, for a specified period, from sponsoring more people under the terms of all existing approvals for temporary visas;
 - barring the sponsor, for a specified period, from making future applications for approval as a sponsor for specified kinds of temporary visa (however described) for which sponsorship is a criterion;
 - barring the sponsor, for a specified period, from making future applications for approval as a sponsor for all temporary visas for which sponsorship is a criterion;
 - or
 - barring the sponsor, for a specified period, from nominating a person or activity in relation to a temporary visa where the sponsor would otherwise be entitled to make the nomination under the regulations.

1. The actions listed in new section 140L are not intended to be mutually exclusive in all circumstances. For example, in accordance with the report “In Australia’s Interests – A

Review of the Temporary Residence Program”, a sponsor who is found to be grossly in breach of their undertakings (for example, found to be exploiting their sponsored visa holders) may have their sponsorship cancelled as well as being subject to a 5 year bar on making future applications for approval as a sponsor.

2. Where new section 140L refers to a bar “for a specified period”, it is intended that such a period may include a period limited by reference to time (for example, six months) or a period limited by reference to an event (for example, until the sponsor reports to the Department).

Section 140M Right to take security under section 269 etc. not affected

3. New section 140M puts it beyond doubt that nothing in new section 140J or 140K affects the right to require or take a security under section 269, or the right to enforce such a security.

4. For example, if a security has been required and taken from a sponsor for compliance with his or her undertakings, the breach of an undertaking may result in forfeiture of the security, in addition to action being taken to cancel or bar the approval of the person as a sponsor under new section 140J or 140K.

Section 140N Process for cancelling or barring approval as a sponsor

5. New section 140N enables the regulations to establish a process for cancelling certain sponsorship approvals or barring approval as a sponsor.

6. Under new subsection 140N(1), power is provided for the regulations to establish a process for the Minister to cancel the approval of a person as a sponsor under new section 140J or 140K.

7. Under new subsection 140N(2), power is provided for the regulations to establish a process for the Minister to place a bar on a person under new section 140J or 140K.

8. For example, regulations made under new subsection 140N(1) or 140N(2) might provide that if the Minister decides to cancel or bar an approval as a sponsor, the Minister is to give the sponsor written notice of this decision.

9. New subsection 140N(3) makes it clear that different processes may be prescribed for different kinds of temporary visa (however described). This provision provides the necessary flexibility for the process for cancelling or barring an approval as a sponsor to differ not only between visa classes, but also between subclasses of visa or different visa streams within a subclass.

10. A decision to cancel an approval as a sponsor and a decision to bar an approval as a sponsor may both be prescribed for the purposes of subsection 338(9) as MRT-reviewable decisions.

Section 140O Waiving a bar

11. New section 140O deals with waiving a bar that has been imposed on a sponsor under new section 140J or 140K. It recognises that there may be circumstances in which it is appropriate to waive a bar – for example, because of the changed behaviour or circumstances of a sponsor.

12. New subsection 140O(1) restricts the application of new section 140O to temporary visas of a prescribed kind (however described). This provision makes it clear that the waiver of a bar may not be appropriate for sponsors of persons for certain kinds of visa.

13. New subsection 140O(2) provides for the making of regulations to establish circumstances in which the Minister may waive a bar imposed on a sponsor under new section 140J or 140K. This is only provided in relation to a visa to which new section 140O applies.

14. New subsection 140O(3) provides that the regulations may prescribe the criteria to be taken into account by the Minister in determining whether to waive a bar.

15. New subsection 140O(4) makes it clear that different circumstances and different criteria may be prescribed for different kinds of temporary visa (however described). This provision provides the necessary flexibility for the circumstances for waiving a bar on approval as a sponsor, and the criteria to be taken into account in waiving a bar, to differ not only between visa classes, but also between subclasses of visa or different visa streams within a subclass.

Section 140P Process for waiving a bar

16. New subsection 140P(1) allows for the regulations to establish a process for the Minister to waive a bar placed on a person under new section 140J or 140K.

17. Regulations made under new subsection 140P(1) might, for example, set out who may apply for waiver of a bar and how to apply for waiver of a bar.

18. New subsection 140P(2) makes it clear that different processes may be prescribed for different kinds of temporary visa (however described). This provision provides the necessary flexibility for the processes for waiving a bar on approval as a sponsor to differ not only between visa classes, but also between subclasses of visa or different visa streams within a subclass.

Section 140Q Consequences if the visa holder or the sponsor change status

19. New subsection 140Q(1) enables the regulations to specify the circumstances in which, and for how long, an undertaking arising out of the sponsorship of a temporary visa holder under new Division 3A of Part 2 of the Act remains enforceable against the sponsor where:

- the visa holder ceases to hold the visa for which he or she was sponsored; or
- the sponsor ceases to be an approved sponsor of the visa holder (whether because the approval is cancelled or for any other reason).

1. This provision makes it clear that certain undertakings required to be made under regulations made under new subsection 140H(1) will continue to apply despite a change in the status of the visa holder or the sponsor. This is important, for example, where the type of

undertaking made by the sponsor, such as an undertaking to bear detention costs, will only apply once the visa holder's visa has been cancelled or has ceased to be in effect.

2. It is implicit from new section 140Q that undertakings remain enforceable at least until the visa holder ceases to hold the visa or the sponsor ceases to be an approved sponsor. If one of these events occur, it then becomes a matter for the regulations to specify when, and for how much longer, an undertaking remains enforceable. In the absence of regulations made under new subsection 140Q(1), the undertakings are no longer enforceable against the sponsor if one of these events occur.

3. New subsection 140Q(2) provides that different circumstances and periods may be prescribed for different kinds of temporary visa (however described). This provision provides the necessary flexibility for the consequences of a change of status of the visa holder or the sponsor to differ not only between visa classes, but also between subclasses of visa or different visa streams within a subclass.

Section 140R Joint and several liability for debts

4. Broadly, new section 140R deals with the liability of sponsors to pay certain debts.

5. New subsection 140R(1) provides that new section 140R only applies if the circumstances in new paragraph 140R(1)(a) or 140R(1)(b) apply.

6. Under new paragraph 140R(1)(a), new section 140R applies if an approved sponsor for a temporary visa is bound by an undertaking to pay debts of another person that are of a kind specified in the undertaking. The person whose debts the person bound by the undertaking is obliged to pay is the primary debtor.

7. Under new paragraph 140R(1)(b), new section 140R applies if a person who is no longer an approved sponsor of a person for a temporary visa remains bound by an undertaking to pay debts of another person that are of a kind specified in the undertaking. The person whose debts the person bound by the undertaking is obliged to pay is the primary debtor.

8. If either new paragraph 140R(1)(a) or 140R(1)(b) are satisfied, new subsection 140R(2) makes the person bound by the undertaking jointly and severally liable to pay the debts with the primary debtor.

9. New subsection 140R(3) provides that, without limiting any other provision of the Act, debts payable to a person under the undertaking may be recovered by the person as a debt due to the person in a court of competent jurisdiction. This means that a person to whom debts are payable by the sponsor as a result of an undertaking may be recovered by that person from either the sponsor or primary debtor in a court of competent jurisdiction.

Section 140S Liability to pay other amounts

10. New section 140S complements new section 140R. As new subsection 140S(1) points out, new section 140S deals with an approved sponsor's, or former approved sponsor's, liability to pay amounts that are not debts dealt with under new section 140R.

11. New subsection 140S(2) sets out when new section 140S applies. It provides that, subject to new subsection 140S(1), new section 140S applies only if the circumstances in new paragraph 140S(2)(a) or 140S(2)(b) apply.

12. Under new paragraph 140S(2)(a), new section 140S applies if an approved sponsor for a temporary visa is bound by an undertaking to pay an amount of a kind specified in the undertaking.

13. Under new paragraph 140S(2)(b), new section 140S applies if a person who is no longer an approved sponsor for a temporary visa remains bound by an undertaking to pay an amount of a kind specified in the undertaking.

14. The kinds of amounts that might be specified in an undertaking are, for example:

- costs related to an application for a protection visa; or
- costs associated with locating an unlawful non-citizen.

1. The difference between such amounts and debts under section 140R are that the visa holder does not have liability to repay costs dealt with in section 140S. However, if a sponsor is not held responsible, they would be costs that would be borne by the Australian community.

2. New subsection 140S(3) provides that, without limiting any other provision of the Act, amounts payable to a person under the undertaking may be recovered by the person as a debt due to the person in a court of competent jurisdiction.

Section 140T Calculating amounts of debts, and other amounts, payable to the Commonwealth

3. New section 140T complements new section 140I, which deals with amounts payable to the Commonwealth as a result of sponsorship undertakings.

4. New subsection 140T(1) provides that, where a debt, or other amount, that a person has undertaken to pay to the Commonwealth becomes payable, the Minister may issue a notice in writing stating the amount of the debt or other amount.

5. New subsection 140T(2) clarifies the status of a notice issued under new subsection 140T(1). It provides that, in any proceedings, a notice issued under new section 140T is prima facie evidence that the amount of the debt or other amount is that stated in the notice.

6. This means that if an approved sponsor (or former approved sponsor) brought legal proceedings to challenge such a notice, the approved sponsor (or former approved sponsor) would bear the evidentiary burden. That is, the approved sponsor (or former approved sponsor) would have to prove that the amount stated in the notice, or the amount calculated using the method stated in the notice, was incorrect.

7. New section 140T is intended primarily to allow the Department to recover costs from approved sponsors (or former approved sponsors), such as amounts spent locating sponsored visa holders who have absconded.

Section 140U Liability is in addition to any other liability

8. New section 140U makes it clear that any liability created under new Division 3A of Part 2 of the Act is in addition to any liability created under:

- this Act or any other Act; or
- regulations made under this Act or any other Act.

Section 140V Disclosure of personal information in prescribed circumstances etc.

1. New subsection 140V(1) authorises the Minister to disclose personal information to an approved sponsor or former approved sponsor in certain circumstances. These circumstances are where:

- the personal information is about a visa holder or former visa holder whom the approved sponsor or former approved sponsor agreed to sponsor; and
- the personal information to be disclosed is of a prescribed kind.

1. New subsection 140V(1) therefore also authorises the prescription of the kind of personal information that the Minister may disclose.

2. New subsection 140V(2) provides that the regulations may prescribe circumstances in which the Minister may disclose the personal information.

3. As an example, regulations made under new subsection 140V(2) might prescribe the following circumstance where personal information may be disclosed:

- the approved sponsor or former approved sponsor made an undertaking to ensure that the visa holder comply with the conditions of his or her visa;
- the visa holder breaches a condition of his or her visa; and
- the Minister is to take one or more of the actions available under new section 140L (ie to cancel or bar approval as a sponsor) as a result of a breach of an undertaking under new section 140J.

1. The disclosure of personal information in such circumstances is necessary to accord natural justice to a sponsor who is to be held responsible for the visa holder's actions.

2. New subsection 140V(3) provides power for the regulations to prescribe circumstances in which the approved sponsor, or former approved sponsor, may use or disclose personal information disclosed under new subsection 140V(1).

3. As an example, regulations made under new subsection 140V(3) might specify that the sponsor may use or disclose personal information disclosed under new subsection 140V(1) for the purposes of seeking review of a decision of the Minister to take one or more of the actions under new section 140L.

4. New subsection 140V(4) states what action must be taken if the Minister discloses personal information about a visa holder under new subsection 140V(1). It provides that the

Minister must notify the visa holder in writing of the disclosure and of the details of the personal information disclosed.

5. New subsection 140V(5) defines “personal information” for the purposes of new section 140V to have the same meaning as in the *Privacy Act 1988*.

Section 140W Other regulation making powers not limited etc.

6. New section 140W clarifies how the regulation making powers under new Division 3A of Part 2 of the Act interact with existing regulation making powers.

7. New subsection 140W(1) makes it clear that regulations made for the purposes of new Division 3A of Part 2 of the Act do not limit the power to make regulations under any other provision of this or any other Act. That is, existing regulation making powers are not limited.

8. New subsection 140W(2) puts it beyond doubt that nothing in new Division 3A of Part 2 of the Act is intended to affect:

- regulations in force before or after the commencement of this Division that were or are made under any other provision of this or any other Act; or
- anything done under those regulations.

1. New subsection 140W(3) makes it clear that nothing in new paragraph 140W(2)(a) affects the power to amend or repeal the regulations mentioned.

2. The combined effect of new subsections 140W(2) and 140W(3) is that the operation of existing sponsorship regulations is preserved while also allowing for the amendment or repeal of these regulations.

Subdivision C – Application of the sponsorship system to partnerships and unincorporated associations

3. New Subdivision C of new Division 3A of Part 2 of the Act deals with the application of the sponsorship system to approved sponsors that are partnerships or unincorporated associations. That is, it sets out how the sponsorship system operates in relation to organisations that are not legal persons.

4. New Subdivision C of new Division 3A of Part 2 of the Act recognises that in many instances a visa applicant will be sponsored by a partnership or unincorporated association rather than a person.

Section 140X Application to partnerships

5. New section 140X applies new Subdivision B of new Division 3A of Part 2 of the Act, and regulations made under it, to a partnership as if it were a person. This is subject, however, to the changes set out in new sections 140Y to 140ZB.

Section 140Y Sponsorship obligations and rights of partnership

6. New section 140Y sets out the ways in which sponsorship obligations and rights apply to a partnership.
7. New subsections 140Y(1) and 140Y(2) establish the general rule that a sponsorship obligation or right that would otherwise be imposed on a partnership (if it was a separate legal entity) is instead imposed on each partner in a partnership at particular times. This general rule is subject to new section 140ZA, which deals with retiring partners.
8. Under new paragraphs 140Y(2)(a) and 140Y(3)(a), where the sponsorship obligation or right arises before the sponsorship is approved, the obligation or right applies to each person who is a partner at the time the obligation or right arises.
9. Under new paragraphs 140Y(2)(b) and 140Y(3)(b), where the sponsorship obligation or right arises at any other time, the obligation or right applies to each person who is a partner at the time the sponsorship is approved.
10. New subsection 140Y(3) sets out who, in a partnership, is liable to pay an amount that would otherwise be payable by a partnership in relation to sponsorship or as a result of sponsorship. It provides that:
 - each person who was a partner at the time the obligation arises is liable to pay the amount where the liability arises before sponsorship is approved;
 - each person who was a partner at the time the sponsorship was approved is liable to pay the amount where the liability arises at any other time.

1. However, as new section 140ZB makes clear, this sponsorship obligation may be discharged by any one of the partners in the partnership.

Section 140Z New partners

2. New section 140Z deals with the way in which sponsorship obligations or rights affect a person who becomes a partner after the partnership is approved as a sponsor.
3. The general rule, that sponsorship obligations only apply to a new partner if he or she elects to accept these obligations, is set out in new subsection 140Z(1). New subsection 140Z(1) also spells out that the sponsorship obligations a new partner may elect to accept are those that:
 - would, but for subsection 140Y(1) or any previous application of section 140Z, be imposed on the partnership; and
 - arise after the new partner makes the election.
1. New subsection 140Z(2) explains the consequences of a new partner electing to accept a sponsorship obligation under new subsection 140Z(1). It provides that each obligation is imposed on the new partner instead of on the partnership (a partnership not being a separate legal entity). This is regardless of whether the obligation is also imposed on any other partner or retired partner.
2. New subsection 140Z(3) deals with the rights of new partners which arise after the new partner makes an election under new subsection 140Z(1) and do not arise because of a

sponsorship obligation that existed before the election was made. It provides that if such a right would, but for new subsection 140Y(2) or any previous application of new section 140Z, be exercisable by a partnership, the right is exercisable by the new partner instead of by the partnership. This is regardless of whether it is also a right exercisable by any other partner or retired partner.

3. New subsection 140Z(4) sets out the liability of new partners to pay an amount arising from a sponsorship obligation accepted by election under new subsection 140Z(1). It provides that the new partner is liable to pay such an amount together with:

- any other partner on whom the liability is also imposed under new section 140Z or new section 140Y; and
- any retired partner who remains liable for the amount under new section 140ZA.

Section 140ZA Retiring partners

1. New section 140ZA enables the regulations to deal with the consequences of a partner leaving a partnership after it is approved as a sponsor.

2. New subsection 140ZA(1) provides that, despite new section 140Y, the regulations may prescribe:

- the circumstances in which, and for how long, a sponsorship obligation remains enforceable against the retiring partner;
- the circumstances in which, and for how long, a sponsorship right is exercisable by the retiring partner;
- which debts remain payable by the retiring partner.

1. New subsection 140ZA(2) provides that different matters may be prescribed for different kinds of visa (however described). This provision provides the necessary flexibility for circumstances relating to the liability and rights of a retiring partner to differ not only between visa classes, but also between subclasses of visa or different visa streams within a subclass.

Section 140ZB Discharging sponsorship obligations and exercising sponsorship rights – partnerships

2. New subsection 140ZB(1) makes it clear that a sponsorship obligation may be discharged by any of the partners in a partnership on whom the obligation is imposed under new Subdivision C of new Division 3A of Part 2 of the Act.

3. New subsection 140ZB(2) makes it clear that a right exercised by one of the partners in a partnership is taken to have been exercised on behalf of all of the partners who are entitled to exercise the right under new Subdivision C of new Division 3A of Part 2 of the Act.

Section 140ZC Application to unincorporated associations

4. New section 140ZC mirrors new section 140X (which relates to partnerships). It provides that new Subdivision B of new Division 3A of Part 2 of the Act, and regulations

made under it, apply to an unincorporated association as if it were a person. This is, however, subject to the changes set out in new sections 140ZD to 140ZG.

Section 140ZD Sponsorship obligations and rights of unincorporated associations

5. New section 140ZD mirrors new section 140Y and deals with the way in which rights and obligations arising under sponsorships apply to unincorporated associations.

6. New subsections 140ZD(1) and 140ZD(2) establish the general rule that a sponsorship obligation or right that would otherwise be imposed on an unincorporated association (if it were a separate legal entity) is instead imposed on each member of the association's committee of management at particular times. This general rule is subject to new section 140ZF, which deals with retiring members of the association's committee of management.

7. Under new paragraphs 140ZD(2)(a) and 140ZD(3)(a), where the sponsorship obligation or right arises before the sponsorship is approved, the obligation or right applies to each person who is a member of the association's committee of management at the time the obligation or right arises.

8. Under new paragraphs 140ZD(2)(b) and 140ZD(3)(b), where the sponsorship obligation or right arises at any other time, the obligation or right applies to each person who is a member of the association's committee of management at the time the sponsorship is approved.

9. New subsection 140ZD(3) sets out who, in an unincorporated association, is liable to pay an amount that would otherwise be payable by the unincorporated association in relation to sponsorship or as a result of sponsorship. It provides that:

- each person who is a member of the association's committee of management at the time the obligation arises is liable to pay the amount where the liability arises before sponsorship is approved;
- each person who is a member of the association's committee of management at the time the sponsorship is approved is liable to pay the amount where the liability arises at any other time.

1. However, as new section 140ZG makes clear, this sponsorship obligation may be discharged by any one of the partners in the partnership.

Section 140ZE New members of committees of management

2. New section 140ZE deals with what happens when a new member joins the association's committee of management after an unincorporated association is approved as a sponsor.

3. The general rule, that sponsorship obligations only apply to a new member of the committee of management if he or she elects to accept these obligations, is set out in new subsection 140ZE(1). New subsection 140ZE(1) also spells out that the sponsorship obligations a new member may elect to accept are those that:

- would, but for subsection 140ZD(1) or any previous application of section 140ZE, be imposed on the association; and

- arise after the new member makes the election.

1. New subsection 140ZE(2) explains the consequences of a new member electing to accept a sponsorship obligation under new subsection 140ZE(1). It provides that each obligation is imposed on the new member instead of on the association's committee of management (this not being a separate legal entity). This is regardless of whether the obligation is also imposed on any other member or former member.

2. New subsection 140ZE(3) deals with the rights of new members which arise after the new member makes an election under new subsection 140ZE(1) and do not arise because of a sponsorship obligation that existed before the election was made. It provides that if such a right would, but for new subsection 140ZD(2) or any previous application of new section 140ZE, be exercisable by an unincorporated association, the right is exercisable by the new member instead of by the unincorporated association. This is regardless of whether it is also a right exercisable by any other member or former member.

3. New subsection 140ZE(4) sets out the liability of new members to pay an amount arising from a sponsorship obligation accepted by election under new subsection 140ZE(1). It provides that the new member is liable to pay such an amount together with:

- any other member on whom the liability is also imposed under new section 140ZE or new section 140ZD; and
- any former member who remains liable for the amount under new section 140ZF.

Section 140ZF Former members of committees of management

1. New section 140ZF enables the regulations to deal with the consequences of a member leaving an association's committee of management after the unincorporated association is approved as a sponsor.

2. New subsection 140ZF(1) provides that, despite new section 140ZD, the regulations may set out:

- the circumstances in which, and for how long, a sponsorship obligation remains enforceable against the former member;
- the circumstances in which, and for how long, a sponsorship right is exercisable by the former member;
- which debts remain payable by the former member.

1. New subsection 140ZF(2) provides that the different matters may be prescribed for different kinds of visa (however described). This provision provides the necessary flexibility for circumstances relating to the liability and rights of a former member to differ not only between visa classes, but also between subclasses of visa or different visa streams within a subclass.

Section 140ZG Discharging sponsorship obligations and exercising sponsorship rights – unincorporated associations

2. New subsection 140ZG(1) makes it clear that a sponsorship obligation may be discharged by any of the members of the committee of management of an unincorporated association on

whom the obligation is imposed under new Subdivision C of new Division 3A of Part 2 of the Act.

3. New subsection 140ZG(2) makes it clear that a sponsorship right exercised by one of the members of the committee of management of an unincorporated association is taken to have been exercised on behalf of all of the members who are entitled to exercise the right under new Subdivision C of new Division 3A of Part 2 of the Act.

Section 140ZH Definitions

4. New section 140ZH provides a definition section for new Subdivision C of new Division 3A of Part 2 of the Act. It defines “committee of management”, “sponsorship obligation” and “sponsorship right”.

5. For the purposes of new Subdivision C, “committee of management” of an unincorporated association is defined to mean a body (however described) that governs, manages or conducts the affairs of the association.

6. “Sponsorship obligation” means, for the purposes of new Subdivision C, an obligation in relation to sponsorship or as a result of sponsorship. For example, a sponsorship obligation may be to pay certain costs of the sponsored visa holder.

7. “Sponsorship right” is defined to mean, for the purposes of new Subdivision C, a right in relation to sponsorship or as a result of sponsorship. For example, a sponsorship right may be to bring a non-citizen to Australia for employment purposes.

SCHEDULE 2 – MRT-reviewable decisions

Migration Act

Item 1 At the end of subsection 338(2)

8. This item inserts new paragraph 338(2)(d) at the end of subsection 338(2) of the Act.

9. In broad terms, subsection 338(2) provides that a decision to refuse to grant a non-citizen a visa is an “MRT reviewable decision” if the non-citizen made the application for the visa in certain circumstances. For example, the non-citizen applied for the visa in the migration zone, and the visa could be granted while the non-citizen is in the migration zone. That is, any decision to refuse to grant a non-citizen a visa in the circumstances set out in subsection 338(2) is reviewable by the Migration Review Tribunal (MRT).

10. New paragraph 338(2)(d) limits the circumstances in which a decision to refuse to grant certain visas may be reviewed by the MRT under subsection 338(2). It provides that if it is a criterion for the grant of a visa that the non-citizen is sponsored by an approved sponsor, and the visa is a temporary visa prescribed for the purposes of this paragraph, a decision to refuse to grant the visa is only reviewable by the MRT if:

- the non-citizen is sponsored by an approved sponsor at the time the application to review the decision is made (subparagraph 338(2)(d)(i)); or
- an application for review of a decision not to approve the sponsor has been made, but not finalised, at the time the application to review the decision to refuse to grant the visa is made (subparagraph 338(2)(d)(ii)).

1. The Regulations will prescribe those temporary visas, however described, that will be affected by new paragraph 338(2)(d). This means that only applicants who are seeking review of a decision to refuse to grant a temporary visa, that is prescribed in the regulations for the purpose of new paragraph 338(2)(d), will be subject to the additional requirements of new paragraph 338(2)(d). That is, a review applicant is either required to have an approved sponsor, or an application for review of a decision to refuse the application for approval as a sponsor must have been lodged (regulations made under subsection 338(9) provide for the review of such decisions by the MRT).

2. The reference to a visa of a prescribed kind (however described) is intended to enable the prescription of the following kinds of visas where sponsorship is a criterion, for example:

- a visa class;
- a visa subclass; or
- a visa stream within a visa subclass.

1. This gives flexibility for sponsorship requirements to vary not only between visa classes but also within visa subclasses.

2. The purpose of new paragraph 338(2)(d) is to ensure that only those visa applicants who have an approved sponsor, or are seeking review of a decision to refuse to approve sponsorship, may apply to the MRT for review of a decision to refuse to grant a prescribed visa. This is to prevent abuse of the merits review process by refused visa applicants, who have no sponsor, and therefore no ability to meet the criteria for grant of the visa, seeking to extend their stay in Australia by lodging a review application.

Item 2 Application

3. This provision makes it clear that new paragraph 338(2)(d) in item 1 of this Schedule only applies to decisions to refuse to grant prescribed visas made on or after commencement of the item.