QUESTIONS ON NOTICE TO DEPARTMENT OF IMMIGRATION AND CITIZENSHIP

Migration (Sponsorship Obligations) Bill 2007

A. Sponsorship Obligations

1. Currently s 140H(3) states that sponsorship undertakings begin on the date the visa applicant is granted the visa. This bill repeals that and replaces it with: "the undertakings do not have effect until the applicant is an approved sponsor of the person of a visa". What is the rationale for changing the point of time at which undertakings have effect?

The Act is currently inconsistent as to when undertakings actually come into effect. This inconsistency needed to be addressed. For example, section 140Y suggests undertakings (referred to as obligations) arose even before section 140E approval as a sponsor is granted. The new obligations in the Bill come into effect on becoming an approved sponsor. As some of the obligations (to pay recruitment costs for example) relate to conduct that occurs before visa grant, it seemed appropriate to shift the point at which they came into effect to the point where the business agreed to sponsor the visa applicant. In order to make this consistent we changed subsection 140H(3) to ensure undertakings come into effect at the same time as the new obligations.

2. Clause 140IC(2) refers to different ways of working out the minimum salary in accordance with "any other circumstances or matter the Minister considers appropriate". What other circumstances or matters may be considered appropriate?

Circumstances in which the Minister may consider it appropriate to specify different ways of working out the level of salary, other than on an occupational or geographical basis, could include factors specific to: an industry or group of industries; a particular employer or group of employers; the characteristics of a nominated visa applicant or class of nominated visa applicants (for example skill level).

3. Clause 140IC(2) refers to a legislative instrument made for the purpose of setting out the minimum salary levels and that it "may include mechanisms for the level to be varied on one or more specified days or at the end of one or more specified periods". What mechanisms are likely to be implemented and what is the rationale for having this flexibility with the minimum salary level?

The subclause providing that the level of salary could be varied on one or more specified days or at the end of one or more specified periods would allow the Minister to specify within the Instrument a formula to regularly index the level of salary. This could include, for example, indexation of the level of salary by a specified percentage or amount on a particular day each year. This subclause could, for example, obviate the need for the Minister to re-make the Instrument

from time-to-time to reflect general wage movements in the specified level of salary.

4. Clause 140ID states that: "An approved sponsor of a primary person for a visa must not employ the person in an activity other than in an activity that requires skills at a level that is the same as, or at least equivalent to, the skills required for the nominated activity in respect of which the visa was granted to the person." Who would make this determination as to whether skills are equivalent to the skills required for the nominated activity? How would you determine whether skills are "at least equivalent to" and could you please provide some examples of when skills would be "equivalent to"? Is this requirement more restrictive or does it allow more flexibility than the current Act and regulations? Please provide an example of a situation where skills would be "at least equivalent to" and an example of situation where the activity would not be "at least equivalent to".

DIAC business monitoring officers would make the determination as to whether the skills are equivalent to the skills required for the nominated activity. As a general rule the skill level will be taken to be at least equivalent to the skills required for the nominated activity where the activity the sponsored person is working in is in the same or higher major ASCO group. For example, a person nominated to the position of a computing professional undertaking Software Designer work would be in an equivalent position if they were working as a computing professional in the capacity of a Systems Designer. There will be occasions where movement within the same major group will also constitute a reduction in skill level. For example, a person nominated for the position of a Bricklayer – supervisor, subsequently working as a bricklayer and not as a supervisor would not be in an equivalent position. DIAC does not propose to make determinations about the required skill level in relation to unrelated occupations in the same major ASCO group – between a motor mechanic and a carpenter for example.

This requirement is less restrictive than the existing legislative framework which does not permit any variation of the nominated activity.

5. Clause 140IG(2) states that the approved sponsor must meet any costs associated with recruiting the primary person for the nominated activity in respect of which the visa is granted. Would this section apply to fees charged by a foreign recruitment company? Is there anywhere in the Bill that prohibits a visa being approved where fees are charged to the visa applicant by a foreign recruitment agency?

It is intended that this section would apply to fees charged by a foreign recruitment company. The Bill does not prohibit a visa being granted where fees are charged to a visa applicant by a foreign recruitment agency. However, the Bill makes employers rather than employees liable for those fees. In practice, we would intend that employers be liable for such costs where they are aware or ought reasonably to have been aware of them.

6. Regarding the obligation to pay prescribed medical costs, currently regulation 1.20CB(k) requires the sponsor 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 health insurance or reciprocal health care arrangements). Would the "prescribed costs" (clause 140IF) be wider or narrower than what the regulations currently require? What limits on medical costs are envisaged for the purposes of the regulations?

It intended that the scope of prescribed medical costs be no wider than what is currently required by the existing undertaking. The Department does not intend to prescribe a monetary limit at this stage.

7. Regarding the limit that the regulations may prescribe as the costs a sponsor would be required to reimburse the Commonwealth under clause 140IJ(2), is the limit envisaged to remain at $10,000?

The existing undertaking limits the costs to $10,000 in respect of location and detention. There is currently no limit as to the costs of removing the sponsored person or processing an application for a protection visa made by the sponsored person. The Department intends to prescribe a limit of $10,000 in respect of the costs set out in paragraph 140IJ(2)(a) and a limit of $10,000 in respect of the costs set out in paragraph 140IJ(2)(b).

8. Under clause 140IL, the regulations may prescribe additional obligations for the sponsor to meet. What sort of additional obligations are envisaged? Why was this included? Is there a rationale behind the civil penalty applying to these additional obligations being less than the civil penalty applying to the obligations stipulated in Subdivision BB?

We intend to prescribe the following obligations in the regulations:

- obligation to notify DIAC of any change in circumstances i.e. address, change to business structure etc;
- obligation to provide the terms of employment to employees in both English and their first language translated by a NAATI accredited translator, no later than 28 days from commencement of employment; and
- obligation to cooperate with DIAC's monitoring of the approved sponsor and sponsored person.

The rationale for putting a power to prescribe obligations in the regulations was to: provide flexibility to quickly respond to emerging issues of possible exploitation by sponsors of visa holders; and also to cover minor more administrative obligations such as an approved sponsor keeping the Commonwealth advised of any change in status such as address.

The lesser civil penalty provided for in relation to obligations set out in the Regulations is the maximum penalty that could be included in regulations as provided in the 'Guide to framing Commonwealth offences, civil penalties and enforcement powers' issued by the Minister for Justice and Customs. It is also reflective of the more minor and administrative nature of the obligations set out in

the Regulations. The greater civil penalty provided for in relation to obligations set out in the Act is consistent with similar provisions contained in the *Workplace Relations Act 1978* on which the civil penalties are modelled.

B. Barring/cancelling approval as a sponsor

1. What is the Department's current policy regarding cancelling a sponsor? How (if at all) will this policy change with when this bill becomes law?

The grounds for cancelling approval as a standard business sponsor under section 137B of the Act are prescribed in regulation 1.20F of the Regulations. There are four grounds, that is that the person:

- gave incorrect information to the Department in relation to their application for approval as a standard business sponsor;
- gave incorrect information to the Department in relation to any other matter relating to the person;
- has not complied or is not complying with the undertakings given by the person; and
- does not continue to satisfy the requirements that the person satisfied for approval as a standard business sponsor.

The Minister also has the option to bar a sponsor from further sponsorships or nominations under the terms of their existing approval where the sponsor has not complied or is not complying with the undertakings given under regulation 1.20HA prescribing circumstances for the purposes of section 140J of the Act. Policy guidance reflects the intention that the discretion to cancel (rather than bar) for non-compliance with undertakings should normally only be exercised where the non-compliance is serious or repeated.

It is not intended that this policy change.

2. What is does the Department's policy say as to when a sponsor would be barred as opposed to cancelled? What is the policy regarding the length of time for which a sponsor would be barred? How (if at all) will this policy change when this bill becomes law?

There are two main types of bars utilised in this context. The first is barring a sponsor from further nominations under the terms of their existing sponsorship for a specified period. This is usually an alternative to cancellation where non-compliance with the undertakings is less serious. The second is barring a sponsor from applying to become a sponsor for a specified period. This is usually in addition to cancellation of a sponsorship.

In relation to the first type of bar, current policy is that the bar should ordinarily apply for the remainder of the term of approval as a sponsor. In relation to the second type of bar, current policy is that the bar should ordinarily be imposed for from three months to 5 years. Policy highlights a number of factors which may mitigate the length of the bar imposed:

- the severity of the breach or omission;
- the sponsor's past conduct and record of compliance with immigration laws;

- whether the sponsor was aware that the information provided or omitted was false, or the actions taken were contrary to immigration laws;
- steps taken by the company to rectify the situation;
- steps taken by the company to prevent any further breaches or problems;
- how well the sponsor has cooperated with the department; and
- whether the sponsor informed the department of circumstances that might lead to cancellation.

It is not intended that this policy change.

C. Liability and enforcement

1. Under clause 140SA, the Minister may apply for an order imposing civil penalties for breach of civil remedy provisions in Subdivision BB. In what circumstances will the Minister be likely to apply to the courts for such an order? In what circumstances would an infringement notice be issued pursuant to regulations made under cl 504(1)(jb) instead? As to how much the sponsor will be fined for breaching an obligation, how will this amount be determined?

An infringement notice will be issued pursuant to regulations made under section 504(1)(jb) in relation to less serious or technical breaches of the obligations. An example might be failing to respond to a requirement to return a monitoring form. The Minister would be likely to apply to the courts for an order imposing a civil penalty for major or repeated breaches of the obligations. An example might be substantial underpayment as compared to applicable minimum salary level. The Bill specifies the maximum applicable penalties. A judge or magistrate would determine the appropriate penalty in the circumstances of the case up to the prescribed maximum.

2. When will regulations be likely to be made under cl 504(1)(jb)?

The regulations under 504(1)(jb) will be made at the same time as the regulations prescribing the various matters set out in the Bill and will come into effect at the same time as the Bill.

D. Inspectors

1. How many inspectors are expected to be appointed under cl 140ZH? Will these be full-time or part-time inspectors?

We intend initially to appoint up to 20 full-time inspectors.

2. Under clause 140ZJ(1) an inspector may exercise power for the purposes of a provision of the regulations that confers powers or functions on inspectors. What sort of additional powers may be prescribed in the regulations?

We have no intention at this stage of prescribing additional powers or functions.

3. Under cl 140ZJ(2), an inspector can only enter a place when the inspector has "reasonable cause to believe" that there is information, documents or any other thing relevant to ensuring the civil penalty obligations, inter alia, are met. What sort of standard of proof would that require?

An inspector will have reasonable cause to believe that there is information documents or any other thing relevant to ensuring compliance with the obligations imposed by or under subdivision BB of the Act where, based on all the information the Inspector is reasonably capable of knowing, the Inspector believes on the balance of probabilities that that there is such information, documents or things at the premises in question. We note that this is consistent with the standard of proof required in a civil legal action.

4. Under cl 140ZJ(2)(b)(iii), what time range would "a specified period" be?

The specified period would depend on the circumstances of the case. The inspector would be guided by what was a reasonable time in the circumstances. If, for example, the Inspector was advised the relevant document was stored off-site, then he or she would probably give the business a period of not less than seven days to produce the document.

5. Would clause140ZJ (9), which makes documents or information inadmissible in evidence against the person in any criminal proceedings, apply to prosecutions relating to national security offences?

The Attorney-General's Department (AGD) has advised that information obtained under section 140ZJ would be inadmissible in any criminal proceeding (apart for an offence against section 140ZK) including prosecutions relating to national security offences. However, the intention is that an Inspector would be able to disclose information under section 140ZL of the Bill that may relate to a national security offence, for example, to AGD or the Australian Federal Police (AFP) as appropriate for the purposes of those agencies conducting their own investigations into the matter. While that particular information disclosed by the Inspector would never be admissible as evidence, if the AFP subsequently obtained other relevant information as part of their investigations that information would be admissible as evidence in a prosecution relating to a national security offence, for example, despite subsection 140ZJ(9).

6. Prior to this bill, a departmental site visit required prior notice. Under this bill, a site visit can be conducted unannounced but "without force" (cl 140ZJ(2)). What scope is there for the sponsor to refuse access? If a sponsor refuses entry or site access to an inspector, what procedures follow and how is this different from the scheme under the Act as it currently stands?

The Department is currently able to conduct site visit unannounced.

A sponsor has scope to refuse access under the Bill. If a sponsor refuses access, the Department could pursue a number of options depending on the circumstances of the case including:

- issuing an infringement notice for failure to comply with monitoring;

- pursuing civil legal action to impose a civil penalty for failure to comply with monitoring (for repeat offenders); and
- requiring the sponsor to provide information under section 140IK.