

Submission of the Department of Immigration and Citizenship to the inquiry of the Senate Standing Committee on Legal and Constitutional Affairs into the *Migration Amendment (Sponsorship Obligations) Bill 2007*

Introduction

Sponsors of Subclass 457 (Business (Long Stay)) visa holders are required to make a wide range of undertakings under regulation 1.20CB of the *Migration Regulations 1994* ('the Regulations'). These undertakings range from ensuring that the sponsored person is paid at least the specified minimum salary level to requiring a sponsor to return a standard monitoring form. Current undertakings are at Attachment A.

Where these undertakings are breached by business sponsors, the Department of Immigration and Citizenship (DIAC) currently applies administrative sanctions which include cancelling a business' status as a sponsor or barring a sponsor from sponsoring further overseas workers for a specified period. Both sanctions apply to future conduct by effectively preventing businesses from accessing the Subclass 457 visa programme ('the programme').

The new provisions for business sponsors contained in the *Migration Amendment (Sponsorship Obligations) Bill 2007* ('the Bill') will replace the current undertakings regime with obligations that will apply by operation of law. The new obligations include some of the current undertakings (updated and clarified where necessary) and additional obligations which will apply to standard business sponsors who become 'approved sponsors' and to existing 'approved sponsors'.¹

Objectives

The primary objective of the Bill is to encourage sponsors to comply with their sponsorship obligations. To realise these objectives the Bill:

- introduces a series of obligations, which replace the existing undertakings regime and which will be imposed on business sponsors by operation of law;
- provides capacity for action to be taken to impose a civil penalty for breaches of those obligations;
- gives DIAC greater investigative powers to monitor compliance with the obligations through the creation of specific 'inspector' roles; and
- allows for greater information exchange between DIAC, business sponsors, visa holders and relevant government agencies.

¹ 'Approved sponsor' is defined in section 140D of the *Migration Act 1958* ('the Act') and is distinct from approval as a standard business sponsor under regulations made for the purposes of section 140F of Act.

The new obligations

Obligation to pay at least minimum salary level etc.

This obligation reflects an existing undertaking. However, it clarifies when the obligation commences and that the obligation is to pay the minimum salary level as in place from time to time. The legislative instrument specifying the minimum salary level will be developed in consultation with the Department of Employment and Workplace Relations (DEWR) and revised from time to time in line with general wage movements. The relevant provision (new section 140IC) also provides the capacity to be more explicit about issues such as how the salary is to be paid. Apart from the changes highlighted here, it is intended that the instrument better reflect the existing gazette notice made pursuant to regulation 1.20B of the Regulations to provide greater clarity to both sponsors and visa holders.

This obligation, by guaranteeing a minimum level of salary that is equivalent to the average ordinary time earnings of Australians, will contribute to preserving the integrity of the Australian labour market and ensures overseas workers are not exploited.

Obligation to employ primary person in the same or a higher-skilled activity

A mandatory visa condition applied to Subclass 457 visas provides that holders must not (among other things) work in a position or occupation inconsistent with the position or occupation in relation to which the visa was granted. In practice, the existing sponsorship undertaking not to employ a person who would be in breach of the immigration laws of Australia as a result of being employed currently indirectly requires business sponsors to ensure this condition is met. The new obligation will make this responsibility more explicit.

Obligation to pay travel costs of leaving Australia

The current undertaking requires business sponsors to ensure that the cost of return travel for sponsored persons is met. Pursuant to the new obligation business sponsors will be expected to pay the cost of travel from Australia in all cases, not just where the travel costs are not otherwise met. Currently if the costs are met by a visa holder for example, a sponsor is not impacted. If, however, a debt is incurred by the Commonwealth, a sponsor becomes liable.

The new obligation reflects the intended policy position that the sponsor should be liable for travel costs of the overseas worker and their family from Australia at the end of their period of employment with them. The relevant provision (section 140IE) also clarifies who is liable for the costs where there has been more than one business sponsor.

This obligation will contribute to ensuring that the conditions of overseas workers are maintained.

Obligation to pay certain medical costs

This obligation provides that business sponsors must pay the prescribed medical costs of all Subclass 457 visa holders. It is intended that the medical costs prescribed in the regulations reflect the existing undertaking to pay any medical costs associated with treatment in a public hospital. However, the new obligation explicitly provides that business sponsors are expected to pay the relevant costs in all circumstances, not just where the medical costs are not otherwise met (for instance by the sponsored person) and that the costs cannot be passed on to visa holders or their families. Sponsors will be encouraged to take out health insurance for their sponsored employees.

As temporary visa holders, the majority of Subclass 457 visa holders do not have access to treatment in public hospitals free of charge like Australian citizens and permanent residents. This obligation will provide certainty for the visa holder and ensure that the Australian community will not bear the cost for treatment provided in a public hospital but for which no payment has been made.

Obligation to pay certain fees and other costs

There are three parts to this obligation. The first is the obligation to pay fees (including licence, registration and membership fees) that must be paid under a law for the primary person to work in the nominated activity. There is an existing undertaking to ensure that the primary person is appropriately licensed or registered, however, the new obligation additionally requires the business sponsor to pay for that appropriate licence or registration.

The second part of this obligation is to pay the costs associated with recruiting the primary person. It is not appropriate for employers to reduce the cost of recruiting overseas labour by passing on the costs to overseas workers and therefore it is an obligation that employers must pay these costs.

The third part of this obligation is to pay the fees of any migration agent involved with the Subclass 457 visa application in respect of both the primary and any secondary persons. This will also ensure that the costs of overseas recruitment will be borne by the beneficiary: the sponsoring employer.

This obligation will contribute to ensuring that Subclass 457 visa holders are appropriately licensed or registered to work in the nominated position and thereby lessen occupational health and safety risks in the workplace. It, in combination with the obligation for sponsors to meet medical costs and the costs of travel from Australia, also contributes to ensuring that Subclass 457 visa holders are not exploited by preventing sponsors from passing on the relevant costs.

Obligation to keep records

This obligation provides that business sponsors must keep prescribed records including evidence of payment of monies required to be paid pursuant to an

obligation. It is intended that the regulation prescribe similar records to those required by taxation legislation and the *Workplace Relations Act 1978* ('the WR Act') for this purpose. In addition, the sponsor may be required to keep such other records as prescribed.

The obligation to keep certain records will complement DIAC's monitoring powers regarding business sponsors in that it will assist in making sure proper records and documentation are available.

Obligation to pay costs of locating, detaining, and removing etc. sponsored person

This obligation reflects an existing undertaking. It will ensure that employers take responsibility for ensuring only genuine temporary workers are sponsored and where temporary workers are not genuine, that the Australian community is not forced to meet the associated costs.

Obligation to provide information

DIAC currently relies on an existing undertaking to comply with monitoring to obtain relevant information from business sponsors. This new obligation (information to be used for the purpose of the administration of the Act or Regulations) specifically requires business sponsors to provide relevant information where requested to do so by the Secretary.

An obligation to provide information will complement DIAC's monitoring powers regarding business sponsors.

Other obligations may be prescribed

It is intended to prescribe three additional obligations as follows:

- the obligation that a sponsor notify DIAC of relevant changes in circumstances (mirroring an existing undertaking);
- to comply with monitoring to the extent that is not covered by the obligation to provide information above (also mirroring an existing undertaking); and
- to provide the terms of employment to the sponsored person in both English and his or her first language (a new obligation).

The obligation regarding the provision of terms of employment is aimed at ensuring visa holders are aware of their rights and obligations under their employment contract. This will complement additional information that DIAC will be providing visa holders in relation to their rights and responsibilities.

Enforcement of obligations and other remedies

The Bill includes provisions for enforcement of the obligations as follows:

- provisions allowing for the Minister to bring an action seeking to impose a penalty;

- allowing a court making a civil penalty order to include an order for monies owed pursuant to an obligation to be paid; and
- allowing a person owed monies pursuant to an obligation to bring an action to recover them.

Civil penalties

The civil penalties regime is broadly modelled on the successful regime contained in the WR Act. In particular, action may be taken seeking to impose a civil penalty where there has been a breach of any of the new obligations.

The maximum penalty for obligations set out in the Bill will be 60 penalty units or \$6600 for an individual and 300 penalty units or \$33 000 for a body corporate. For obligations intended to be included in the Regulations the maximum penalties will be slightly smaller: 50 penalty units or \$5500 for an individual and 250 penalty units or \$27 500 for a body corporate.

The ability to impose civil penalties in addition to other administrative remedies that may be available will contribute to increasing compliance with the new obligations by providing a significant financial disincentive for non-compliance.

Restitution

The new penalties are intended to provide incentives to the sponsor to make restitution for any underpayment of salary or non-payment of costs. Where this has not occurred and the Minister has initiated legal proceedings in pursuit of a civil penalty, the Court will also have the power to order that any amounts payable pursuant to an obligation be paid to the person owed these monies. This will include monies payable to government bodies as well as individuals.

Recovery actions

Any person (including a government body) owed any money pursuant to an obligation may initiate legal proceedings to recover those amounts (see existing section 140S and new subsection 140S(4)).

Infringement notice regime

There is provision to make an infringement notice regime available in respect of each obligation. We would do so by opting into the existing 'Division 5.5 – Infringement notices' of the Regulations.

The ability to issue infringement notices in lieu of a civil penalty would enhance the efficiency of increasing compliance with relevant laws, in particular, the new obligations.

New investigative powers

DIAC currently relies on the obligation (arising from an undertaking) to comply with monitoring for its officers to conduct investigative work such as site visits. The Bill gives additional powers to specially trained persons appointed as inspectors to monitor compliance with the new obligations. These powers would be similar to those Workplace Ombudsman (WO) inspectors have to monitor compliance under the WR Act.

These new powers will contribute to increasing compliance with obligations by enhancing DIAC's capacity to monitor business sponsors.

Relationship with the Workplace Ombudsman

DIAC understands that the WO is independently making a submission to the committee. The WO will assist with monitoring compliance with the obligations in relation to payment of the minimum salary level, where the WO's specialist skills appear necessary, or where the WO is already investigating the business sponsor independently for their own purposes. The WO currently assists DIAC conduct investigations, however, the powers of WO inspectors are limited with respect to gathering information that is related to compliance with migration legislation. WO officers will be separately appointed as inspectors under the Act to overcome this limitation.

Information Exchange

Between DIAC, business sponsors and visa holders

The Act currently allows the Minister to share information about a visa holder with a business sponsor for certain prescribed purposes set out in regulation 1.201A of the Regulations. The Bill also allows for the reverse: the Minister to share information about a business sponsor with a visa holder for certain prescribed purposes. It is intended that the prescribed purposes include situations where, based on available evidence, it appears that the visa holder may be able to initiate legal proceedings to recover money owed under one of the new obligations, or that the business sponsor may not be in a position to continue to sponsor the visa holder.

Between DIAC and other government agencies

The Bill also allows for the Minister to disclose prescribed information between prescribed government agencies of the Commonwealth or of a State and Territory. That information must be about an approved sponsor or former approved sponsor or a prescribed visa holder or former prescribed visa holder. It is intended to prescribe at least two Commonwealth government agencies: the WO and the Australian Taxation Office (ATO). In relation to the WO, it is intended that information will be disclosed where it would be appropriate for WO inspectors to conduct an investigation on DIAC's behalf or where the prescribed information appears relevant to the administration of its business. In relation to the ATO it is intended that DIAC share information in

order for the ATO to verify certain claims made by business sponsors and to ensure business sponsors are complying with their obligations under taxation legislation.

In relation to other government agencies DIAC will be able to share information in certain circumstances based on agreed protocols.

ATTACHMENT A

1.20CB Sponsorship undertakings

- (1) For subsection 140H (1) of the Act, an applicant for approval as a standard business sponsor must make the following undertakings:
 - (a) to ensure that the cost of return travel by a sponsored person is met;
 - (b) not to employ a person who would be in breach of the immigration laws of Australia as a result of being employed;
 - (c) to comply with its responsibilities under the immigration laws of Australia;
 - (d) to notify Immigration of:
 - (i) any change in circumstances that may affect the business's capacity to honour its sponsorship undertakings; or
 - (ii) any change to the information that contributed to the applicant's being approved as a sponsor, or the approval of a nomination;
 - (e) to cooperate with the Department's monitoring of the applicant and the sponsored person;
 - (f) to notify Immigration, within 5 working days after a sponsored person ceases to be in the applicant's employment;
 - (g) to comply with:
 - (i) laws relating to workplace relations that are applicable to the applicant; and
 - (ii) 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);
 - (h) to ensure that a sponsored person holds any licence, registration or membership that is mandatory for the performance of work by the person;
 - (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;
 - (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;
 - (k) either:
 - (i) 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
 - (ii) 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 health insurance or reciprocal health care arrangements);

- (l) to make any superannuation contributions required for a sponsored person while the sponsored person is in the applicant's employment;
- (m) to deduct tax instalments, and make payments of tax, while the sponsored person is in the applicant's employment;
- (n) to pay to the Commonwealth an amount equal to all costs incurred by the Commonwealth in relation to a sponsored person.

Note Under subsection 140H (3) of the Act, these undertakings do not have effect until the relevant visa is granted. Under paragraph 457.223 (4) (i) or (5) (j) of Schedule 2 to these Regulations, a person must be sponsored by an approved sponsor in order to be granted a Subclass 457 (Business (Long Stay)) visa. See also regulation 1.20BA of these Regulations, by which Division 3A of Part 2 of the Act applies to visas that are relevant to standard business sponsors.

- (2) For paragraph (1) (n), the costs include the cost of:
 - (a) locating the sponsored person; and
 - (b) detaining the sponsored person; and
 - (c) removing the sponsored person from Australia (including airfares, transport to an airport in Australia and provision of an escort (if needed)); and
 - (d) processing an application for a protection visa made by a sponsored person.

Note An undertaking is not enforceable in relation to costs of locating and detaining a sponsored person that exceed the limit prescribed by regulation 1.20CC.

1.20CC Limit in relation to costs of location and detention

For subsection 140I (4) of the Act, the limit (over which an undertaking in relation to the costs of the Commonwealth in locating and detaining a sponsored person is not enforceable) is \$10 000.