

CHAPTER 2

Overview of the bill

2.1 This chapter briefly outlines the main provisions of the bill.

Approval as a sponsor

Current arrangements

2.2 The current section 140D has the effect that a person (the first person) is an 'approved sponsor' in relation to another person (the second person) once the first person is approved as a sponsor and has consented in writing to sponsor the second person.

Proposed arrangements

2.3 The government proposes to significantly change the process for approval as a sponsor. Item 1 of the bill will replace the existing definition to provide that a person is an 'approved sponsor' if they meet one of two descriptions: that the person is approved as a sponsor under the new 140E arrangements in relation to a class of approved sponsor or is a party to a work agreement.

2.4 A person becomes an 'approved sponsor' when they have met the approval criteria in section 140E. This brings forward the point at which a person becomes an 'approved sponsor'. The purpose of this approach is to trigger compliance obligations earlier to ensure:

... that a person can be required to satisfy a sponsorship obligation from the time they meet the sponsorship approval criteria under section 140E (i.e. before a visa is granted).¹

2.5 Approval as a sponsor can cease or be cancelled by the Minister (depending on the section 140G terms or under section 140M respectively).

2.6 Item 18 of the bill proposes to establish a structure for the Minister to be able to vary sponsorship approval processes and criteria. The purpose of this approach is:

...so that a person who is already approved as a sponsor does not have to lodge another sponsorship application to do something more than their current terms of approval allow them to do.²

1 Explanatory Memorandum, p. 6.

2 Explanatory Memorandum, p. 15.

Classes of sponsor

2.7 Item 13 of the bill proposes to formalise in legislation the practice of identifying in regulations one or more classes of approved sponsor for certain visa subclasses. For example, a 'standard business sponsor' is a person who is approved as a sponsor for subclass 457 (business (long stay)) visas.

2.8 This provides the foundation for the new approved sponsor framework to be specifically structured around classes of approved sponsor. It is proposed that a number of provisions be amended to reflect this approach and consequential amendments are needed to a number of other provisions. See, for example, elements of items 15-19, 21, 23 etc.

Work agreements

2.9 The second way in which a person becomes an 'approved sponsor' is by being a party to a work agreement. Item 8 inserts a definition of work agreement by reference to satisfaction of prescribed requirements. Generally, a work agreement is an agreement between the Commonwealth, represented by one or more ministers, and another person or organisation, detailing arrangements for the other person to sponsor temporary visa holders to perform work. It is envisaged that the regulations will prescribe 'work agreements' to include a kind of existing agreement. The proposed amendments mean that a party to a work agreement other than a minister is an approved sponsor.³

2.10 Proposed section 140GC (Item 18) provides that the regulations may prescribe requirements that a work agreement must satisfy.

Nominations

2.11 Because the framework for approval as a sponsor will be changed, proposed subsection 140GB(1) will make consequential amendments to establish that an approved sponsor may nominate, in relation to a visa of a prescribed kind:

- a person who is a visa applicant, or proposed visa applicant, in relation to a proposed occupation, program or activity to be undertaken by the person; or
- a proposed occupation, program or activity.

2.12 Proposed subsection 140GB(2) then provides that the Minister *must* approve an approved sponsor's nomination if prescribed criteria are satisfied. Different processes and criteria may be prescribed for different kinds of visa or different classes of approved sponsor (proposed subsection 140GB(4)).

3 Explanatory Memorandum, pp 6, 7 and 9.

Sponsorship obligations (item 19)

2.13 Currently, sponsorship obligations can apply if an applicant for approval as a sponsor is required to give prescribed undertakings. The undertakings then take effect once a visa is granted to the person whom the sponsor has consented in writing to sponsor.⁴

2.14 Under the proposed arrangements an approved sponsor or former approved sponsor will be required to satisfy sponsorship obligations prescribed in the regulations. Prescribed sponsorship obligations will apply by operation of law to a person to whom the sponsorship obligation applies. A note following proposed subsection 140H(1) gives examples of the kinds of sponsorship obligations that may be prescribed in the regulations. For example, it could be prescribed that an approved sponsor or former approved sponsor is required to provide particular information to the Department of Immigration and Citizenship.

2.15 The bill proposes that, as an approved sponsor, a party to a work agreement must satisfy the sponsorship obligations prescribed under subsection 140H(1), unless a sponsorship obligation is varied by a term of the work agreement. In this case, the sponsorship obligation must be satisfied in accordance with the obligation set out in the work agreement rather than in the regulations. The bill also provides for circumstances in which an obligation in a work agreement is in addition to satisfying sponsorship obligations imposed by the regulations.

2.16 The bill also seeks to provide that:

- obligations can apply to each visa holder or generally (for example a requirement to notify the department of any change in circumstances that may affect the sponsor's capacity to honour its sponsorship);
- the regulations may prescribe the manner in which, and period of time within which, the sponsorship obligation must be satisfied; and
- different kinds of sponsorship obligations may be prescribed for different kinds of visa and different classes in relation to which a person may be, or may have been, approved as a sponsor.

2.17 The Explanatory Memorandum notes that sponsorship obligations prescribed in the regulations could be prescribed to apply to sponsors existing at the time the new obligation commences. The argument is made that:

It is intended that the nature and purpose of the obligation will be assessed to determine whether it is necessary and appropriate to apply the new sponsorship obligations to existing sponsors at the time of commencement of the new sponsorship obligation.⁵

4 Explanatory Memorandum, p. 18.

5 Explanatory Memorandum, p. 21.

2.18 The Explanatory Memorandum also argues that it is necessary for the detail of the sponsorship obligations to be prescribed by regulation rather than in the *Migration Act 1958* (the Act) to provide flexibility for the efficient and effective operation of the program; to allow for additional visa classes as are included in the new sponsorship framework; and to allow advice from the various review processes to be considered before the detail of each sponsorship obligation is finalised.⁶

Amounts payable in relation to sponsorship obligations

2.19 The proposed scheme for amounts payable in relation to sponsorship obligations will retain the existing approach of limiting an amount to be paid by an approved sponsor to the actual costs of the Commonwealth or to a limit prescribed in the regulations (subsection 140J(1)). The current approach is that a limit can be prescribed in relation to the costs of locating and detaining another person – the proposed approach expands this by providing that a recovery limit for sponsorship obligations can be prescribed in the regulations in relation to any kind of sponsorship obligation.

2.20 The bill also proposes to retain the ability for the Minister to specify methods for calculating the actual costs incurred by the Commonwealth in relation to a sponsorship obligation. However, this needs a new subsection in the Act as the previous ability was framed in terms of sponsorship undertakings, which approach is being removed in the new framework.

2.21 A wholly new aspect to the scheme for amounts payable in relation to sponsorship obligations is proposed in subsection 140J(3). This subsection has the effect that an approved - or former approved - sponsor is liable to enforcement action if they require a current or former visa holder to reimburse them, directly or indirectly, for costs which the prescribed sponsorship obligations require the sponsor to pay.

Sanctions for failing to meet sponsorship obligations

2.22 In proposed subsection 140K the bill seeks to take into account the proposed sponsorship framework, and to expand, the range of sanctions that can be applied to a sponsor for failing to satisfy a sponsorship obligation. The sanctions of cancelling approval as a sponsor; barring approval as a sponsor; and requiring, taking and enforcing a security are existing sanctions. The sanctions of civil penalty proceedings and issuing an infringement notice are new sanctions introduced by items 29 and 42.

2.23 It is also proposed that relevant sanctions will apply to former approved sponsors who do not meet their sponsorship obligations.

2.24 The bill envisages that the detail of the circumstances in which a sponsor may be barred or have their approval cancelled may be prescribed in regulations, including criteria to be taken into account by the Minister is determining which action to impose

6 Explanatory Memorandum, p. 21.

on a sponsor (subsection 140L(1)). This is similar to the current approach, but is reframed to take into account the proposed new sponsorship framework. The bill also proposes that the circumstances may be in relation to a failure to satisfy a sponsorship obligation and other circumstances.

2.25 The bill seeks to introduce in subsection 140L(2) the option for the regulations to prescribe circumstances in which the Minister *must* take one or more cancelling or barring actions under section 140M. Again, the bill also proposes that the circumstances may be in relation to a failure to satisfy a sponsorship obligation and other circumstances.

2.26 New section 140M deals with actions the Minister may or must take (in the circumstances prescribed under regulations under section 140L) in relation to an approved sponsor or former sponsor. The proposed section is similar to the existing approach in 140L, but takes into account the new framework for approval as a sponsor.

2.27 The bill proposes to repeal existing section 140R, which provides that a visa holder is jointly and severally liable to pay a debt which relates to an amount required by an undertaking to be paid by the sponsor on behalf of the visa holder. The Explanatory Memorandum explains that:

The purpose of repealing existing section 140R and not replacing it with a similar provision is to reflect the policy intention of sponsorship obligations. The purpose of the new sponsorship obligations which are prescribed under new section 140H (inserted by item 19) is to place responsibility on a person who is or was an approved sponsor for certain costs. It is not intended that a visa holder is jointly and severally liable for any of the costs which are the subject of a sponsorship obligation.⁷

Enforcement

Civil penalty provisions and infringement notices

2.28 The Second Reading Speech for the bill noted in relation to sanctions that:

The existing administrative sanctions...have proven insufficient to encourage compliance in all circumstances, particularly amongst sponsors who only ever intend to use the relevant visa program once.

The amendments proposed in the bill introduce a civil penalties framework to actively discourage non-compliance.

This will allow civil legal action to be taken against sponsors who are found in breach of the redefined obligations found in the Migration Regulations.

...Alternatively the bill provides for the issuing of infringement notices in lieu of taking civil legal action.

7 Explanatory Memorandum, p. 30.

...These new tools will complement existing tools utilised by the Department in enforcing sponsorship obligations.⁸

2.29 The implementation of these tools is proposed in sections 140Q (civil penalty provisions) and 140R (infringement notices in respect of civil penalty provisions).

2.30 The bill seeks to introduce penalty provisions for any approved sponsor who fails to meet a sponsorship obligation (whether as a person or a party to a work agreement). The civil penalty is proposed to be 60 penalty units for an individual and 300 penalty units for a body corporate. The Explanatory Memorandum notes that this is the same as the civil penalty provisions in the *Workplace Relations Act 1996*.⁹

2.31 The proposed effect of section 140R is that in accordance with a regime to be established by the regulations, an approved - or former approved – sponsor who allegedly contravenes a civil penalty provision may be issued with an infringement notice to pay an amount as an alternative to civil penalty proceedings being commenced. The amount cannot exceed 12 penalty units for an individual and 60 penalty units for a corporation.

2.32 Proposed section 140S is similar to existing arrangements for debt recovery, but takes into account the new framework and expands and clarifies the process for debt recovery action. Proposed sections 140SA and 140SB deal with interest up to and on judgment. Proposed section 140SC seeks to allow section 140S actions to be brought using a small claims procedure.

Expanded investigation powers - inspectors

2.33 The proposed legislative changes that will implement the inspectors scheme are the introduction of the following sections:

- 140V – provides that the Minister may, by written instrument, appoint a person or a class of persons to be inspectors;
- 140W – sets out rules for the issue and use of inspectors' identity cards;
- 140X – outlines the purposes for which inspectors can exercise their powers, and outlines the specific powers;
- 140Y – requirement to produce a document or thing;
- 140Z – establishes an offence if a person fails to comply with a requirement of an inspector to produce a document or thing; and
- 140ZA – provides for the disclosure of information obtained by inspectors to the Department of Immigration and Citizenship or to a department administered by a Minister who administers the *Workplace Relations Act 1996*.

8 Second Reading Speech, *Senate Hansard*, 24 September 2008, p. 4.

9 Explanatory Memorandum, p. 32.

2.34 The specific powers proposed in subsection 140X(2) are modelled on the powers set out in section 169 of the *Workplace Relations Act 1996*. They do not accord with the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*. The Explanatory Memorandum offers the explanation that this is necessary as:

It is probable that Workplace Inspectors will also be appointed as inspectors under new section 140V.¹⁰

2.35 The powers proposed in subsection 140X(2) include the power for an inspector to enter a place of business or other place without force. Entry is permissible when the inspector has reasonable cause to believe that there is information, documents or any other thing relevant to the purposes for which the powers may be exercised.

2.36 Proposed paragraph 140X(2)(b) provides that once an inspector has entered a place he or she may:

- inspect any work, material, machinery, appliance, article or facility;
- interview any person;
- require a person who has custody of, or access to, a document or thing, relevant to the purpose for which the inspector is exercising the power, to produce the document to the inspector within a specified period;
- require a person to tell the inspector who has custody of a document or thing.

2.37 Proposed paragraph 140X(2)(c) seeks to provide that inspectors are also able to require a person, by written notice, to produce a document or thing to the inspector at a specified place within a specified period (of not fewer than seven days).

2.38 The proposed subsection 140Y(4) seeks to provide that a person must give information or produce a document or thing when requested or required to do so under section 140X even if doing so would tend to incriminate them or expose them to a penalty. The justification offered for this proposed approach is:

It would be unacceptable for a sponsor who is exploiting non-citizen temporary workers to legitimately rely on the privilege against self-incrimination to produce documents or information to an inspector that relate to that exploitation...the interests of sponsors, however, are also provided for through the limited use and derivative use immunity.¹¹

10 Explanatory Memorandum, p. 40.

11 Explanatory Memorandum, p. 44.

Partnerships and unincorporated associations

2.39 The Explanatory Memorandum provides the following explanation for the proposed new sections relating to partnerships and unincorporated associations:

New Subdivision G sets out how sponsorships obligations, civil penalties, and offences included in Division 3A of Part 2 of the Migration Act are to apply in relation to partnerships and unincorporated associations. It is necessary to include these specific application provisions for partnerships and unincorporated associations because unlike a natural person, or a body corporate, partnerships and unincorporated associations do not have the status of a separate legal entity.

New Subdivision G differs to existing Subdivision C in the following ways:

- It does not provide for a new partner or member of an unincorporated association to elect whether they wish to be bound by a sponsorship obligation or to be able to exercise a sponsorship right. Rather, it provides that all existing partners of a partnership at any given time are required to satisfy a sponsorship obligation and can exercise a sponsorship right;
- It does not provide that the regulations may prescribe when and for how long a retiring partner remains bound by a sponsorship obligation. Rather, it provides that all existing partners of a partnership at any given time are required to satisfy a sponsorship obligation and can exercise a sponsorship right. If a partnership ceases to exist, and consequently there are no existing partners, all the persons who were partners immediately prior to the partnership ceasing to exist continue to be required to satisfy a sponsorship obligation as if they were an existing partner and the partnership had not ceased; and
- It includes provisions which set out how offences and civil penalty provisions included in Division 3A of Part 2 of the Migration Act apply to partnerships and unincorporated associations.¹²

Miscellaneous

Information sharing

2.40 The bill seeks to authorise the Minister to disclose personal information of a prescribed kind about certain types of persons to other types of persons. The second reading speech outlined the problem the bill seeks to address and the scope of the proposed changes in the following way:

The existing provisions for the disclosure of information have proved insufficient for effective and efficient operation of the temporary skilled migration program. For example, the Department at present cannot lawfully collect contact details of Subclass 457 visa holders from larger employers for the purpose of providing those visa holders with information about their rights and entitlements in Australia.

12 Explanatory Memorandum, p. 47.

The amendments will ensure that the three parties involved in the program will be adequately informed of each others circumstances.

The bill also makes provision for the sharing of information about sponsors and visa holders with prescribed Commonwealth, State and Territory agencies.

This will facilitate a cooperative whole of government approach to business compliance.¹³

Proposed part 8D - Civil Penalties

2.41 Proposed part 8D seeks to insert a new civil penalty framework into the Act. At this stage the bill proposes that subsections 140Q(1) and 140Q(2) are the only the only civil penalty provisions proposed. (These subsections relate to a person or a party to a work agreement who fails to satisfy an applicable sponsorship obligation.) However, the Explanatory Memorandum explains that the part 8D framework (which may otherwise seem overly complex):

... is designed so that it can apply to any future civil penalty provisions which may be included in the Migration Act in the future...¹⁴

Transitional matters

Standard business sponsors and former standard business sponsors

2.42 The proposed effect of items 45 and 46 is that a person who is bound by an undertaking in relation to a subclass 457 visa (Business (Long Stay)) visa holder or former visa holder at the time of commencement will be required to satisfy sponsorship obligations, rather than undertakings.

2.43 The Explanatory Memorandum states that this approach is 'necessary' and outlines four supporting reasons:

- the nature of the sponsorship obligations which will be required to be satisfied will not be significantly different from the existing undertakings;
- the possible transitional period if these existing former approved sponsors are not transitioned into the new sponsorship framework is impractically long (up to six years) for the large caseload;
- the administrative complexity for sponsors, the Department of Immigration and Citizenship, and other stakeholders of administering two sponsorship frameworks makes the alternative unworkable for the large caseload; and
- existing sponsors will have sufficient notice to terminate the sponsorship of their Subclass 457 (Business (Long Stay)) visa holder if

13 Second Reading Speech, *Senate Hansard*, 24 November 2008, p. 3.

14 Explanatory Memorandum, p. 59.

they are not prepared to satisfy the new sponsorship obligations in relation to those visa holders.¹⁵

15 Explanatory Memorandum, p. 73.