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**THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA**

**HOUSE OF REPRESENTATIVES**

**MIGRATION AMENDMENT (CHARGING FOR A MIGRATION  
OUTCOME) BILL 2015**

**EXPLANATORY MEMORANDUM**

(Circulated by authority of the Assistant Minister for Immigration and Border Protection,  
Senator the Hon. Michaelia Cash)

## **Migration Amendment (Charging for a Migration Outcome) Bill 2015**

### **OUTLINE**

The Migration Amendment (Charging for a Migration Outcome) Bill 2015 (the Bill) amends the *Migration Act 1958* (the Act) to make it unlawful for a person to give or receive a benefit in return for a migration outcome in relation to certain skilled work visa programmes.

The Bill responds to recommendation 10.7 of the Independent Review into Integrity in the Subclass 457 Programme, in its report '*Robust New Foundations – A Streamlined, Transparent and Responsive System for the Subclass 457 Programme*', which was released on 10 September 2014. Recommendation 10.7 is that it be made unlawful for a sponsor to be paid by visa applicants for a migration outcome and that this be reinforced by a robust penalty and conviction framework.

The report found that some sponsors in the 457 visa programme have been paid by visa applicants in return for a migration outcome. Currently, the Australian Government is not able specifically to take action against such 'payment for visas' activity, which occurs where a benefit is asked for, received, offered or provided in return for a migration outcome.

The Government considers that 'payment for visas' activity is unacceptable because it undermines the integrity of Australia's visa programmes. It is not acceptable for sponsors, employers or other third parties to make a personal gain from their position in a 'payment for visas' arrangement and it is not acceptable for a visa holder to become an Australian permanent resident by engaging in 'payment for visas' behaviour. Applicants who have paid for their visa are more vulnerable to exploitation and extortion by their sponsor, behaviour which endangers workers and undermines Australian workplace law.

The Bill therefore introduces a new criminal offence and civil penalty provision which will allow sanctions to be imposed on sponsors and other third parties who engage in 'payment for visas' activity. These sanctions are not limited to the 457 visa programme but also extend to other temporary and permanent skilled visa programmes where there is potential for 'payment for visas' activity to occur.

The Bill also introduces a new civil penalty provision which will provide for a fine to be imposed on visa applicants or holders, or other third parties, who offer to provide, or provide, a benefit as part of a 'payment for visas' arrangement.

The Bill also introduces a new discretionary power to consider cancellation of a temporary or permanent visa where the visa holder has engaged in 'payment for visas' activity.

In particular, the Bill amends the Act to:

- introduce a discretionary power to consider cancellation of a temporary or permanent visa where the Minister is satisfied that:
  - a benefit was asked for, or received by, or on behalf of, the visa holder in return for the occurrence of a sponsorship-related event; or
  - a benefit was offered or provided by, or on behalf of, the visa holder in return for the occurrence of a sponsorship-related event;
- define a "sponsorship-related event" to mean, broadly, a person entering into a sponsorship arrangement or making a nomination in relation to certain sponsored

visas or classes of sponsor, employing or engaging a person in work or an activity, the grant of a visa, or an event prescribed in the regulations;

- define a “benefit” to include a payment or other valuable consideration, a deduction of an amount, any kind of real or personal property, an advantage, a service or a gift;
- introduce a criminal offence which applies to a sponsor or other third party who asks for or receives a benefit from another person in return for the occurrence of a sponsorship-related event, and which carries a maximum penalty of 2 years imprisonment or 360 penalty units, or both;
- introduce a civil penalty provision which applies to a sponsor or other third party who asks for or receives a benefit from another person in return for the occurrence of a sponsorship-related event, and which carries a maximum penalty of 240 penalty units;
- introduce a civil penalty provision which applies to a visa holder or other third party who provides, or offers to provide, a benefit in return for the occurrence of a sponsorship-related event, and which carries a maximum penalty of 240 penalty units;
- impose civil and criminal liability on executive officers of a body corporate, which have been found to be involved in ‘payment for visas’ activity, in certain circumstances where the officer knew that (or was reckless or negligent as to whether) the activity was occurring;
- provide for extended extraterritorial application of the offence as per Category B of the *Criminal Code 1995* and provide for equivalent extraterritorial application of the civil penalty provisions;
- clarify how the offence and civil penalty provisions apply to partnerships and unincorporated associations; and
- allow existing inspector powers and investigation powers to be used in relation to the offence and civil penalty provisions.

The amendments in the Bill are necessary for the Government to send a clear message that ‘payment for visas’ activity is unacceptable and to provide for explicit sanctions to address this conduct.

## **FINANCIAL IMPACT STATEMENT**

The financial impact of the Bill is low. Any costs will be met from within existing resources of the Department of Immigration and Border Protection.

## **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

A Statement of Compatibility with Human Rights has been completed in relation to the amendments in this Bill and assesses that the amendments are compatible with Australia’s human rights obligations. A copy of the Statement of Compatibility with Human Rights is at [Attachment A](#).

**MIGRATION AMENDMENT (CHARGING FOR A MIGRATION OUTCOME)  
BILL 2015**

**NOTES ON INDIVIDUAL CLAUSES**

**Clause 1      Short title**

1. Clause 1 provides that the short title by which this Act may be cited is the *Migration Amendment (Charging for a Migration Outcome) Act 2015*.

**Clause 2      Commencement**

2. Subclause 2(1) provides that each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.
3. Table item 1 provides that sections 1 to 3 and anything in this Act not elsewhere covered by the table will commence on the day this Act receives the Royal Assent.
4. Table item 2 provides that Schedule 1 to the Bill commences on a single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.
5. A note explains that this table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.
6. Subclause 2(2) provides that any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

**Clause 3      Schedules**

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

## **SCHEDULE 1 – Amendments**

### ***Migration Act 1958***

#### **Item 1           After subsection 116(1AB)**

1. This item inserts new subsections 116(1AC) and (1AD) in Subdivision D of Division 3 of Part 2 of the Act.
2. New subsection 116(1AC) provides that subject to subsections 116(2) and (3), the Minister may cancel a visa (the “current visa”) if he or she is satisfied that:
  - a benefit was asked for or received by, or on behalf of, the person (the “visa holder”) who holds the current visa from another person in return for the occurrence of a sponsorship-related event; or
  - a benefit was offered or provided by, or on behalf of, the person (the “visa holder”) who holds the current visa to another person in return for the occurrence of a sponsorship-related event.
3. This amendment provides the Minister with the discretion to cancel a temporary or permanent visa held by a person who has been involved in a ‘payment for visas’ arrangement. The first limb of the cancellation ground may apply to a sponsor, or another visa holder involved in such an arrangement, who has asked for or received the benefit in return for the occurrence of a sponsorship-related event. The second limb of the cancellation ground may apply to a visa holder who has offered or provided the benefit to the sponsor or another person in return for the occurrence of a sponsorship-related event, whether in relation to their own visa or another person’s visa. The visa cancellation ground also applies to a person if the benefit is asked for, received, offered or provided on behalf of the person.
4. “Sponsorship-related event” is defined in new section 245AQ inserted by item 6 of this Schedule to include events such as applying for approval as a sponsor or making a nomination, which must occur for an applicant to meet the criteria for grant of certain visas.
5. The purpose of this new visa cancellation ground is to make clear that a visa holder who has been granted a visa on the basis of a sponsorship, nomination or other event which has occurred pursuant to a ‘payment for visas’ arrangement will be liable to visa cancellation. It also makes clear that any other person who holds a visa and has asked for, received, offered or provided a benefit in return for their support for a visa as part of a ‘payment for visas’ arrangement will be liable to visa cancellation.
6. Subsection 116(1AD) provides that the cancellation ground applies:
  - whether or not the visa holder held the current visa or any previous visa at the time the benefit was asked for, received, offered or provided; and
  - whether or not the sponsorship-related event relates to the current visa or any previous visa that the visa holder held; and
  - whether or not the sponsorship-related event occurred.
7. This firstly makes clear that the new cancellation ground applies whether or not the visa holder held the current visa or a previous visa at the time the ‘payment for visas’ activity

occurred. At the time the benefit was asked for, received, offered or provided, the person may have held a previous visa, or may not yet have applied for, or been granted, a visa. Secondly, it makes clear that the sponsorship-related event need not relate to the current visa or any previous visa and need not have resulted in the grant of a visa.

8. The application provision in item 18 of this Schedule provides that the new visa cancellation ground applies in relation to a visa granted before or after commencement of the new provision, if the benefit was asked for, received, offered or provided after commencement.

**Item 2            Subsections 116(2) and (3)**

9. This item omits “(1AA) or (1AB)” and substitutes “(1AA), (1AB) or (1AC)” in subsections 116(2) and (3) in Subdivision D of Division 3 of Part 2 of the Act.
10. The effect of the amendment to subsection 116(2) is to provide that the Minister is not to cancel a visa under new subsection 116(1AC) if there exist prescribed circumstances in which a visa is not to be cancelled. New subsection 116(1AC) is inserted by item 1 of this Schedule.
11. The effect of the amendment to subsection 116(3) is to provide that if the Minister may cancel a visa under subsection 116(1AC), the Minister must do so if there exist prescribed circumstances in which a visa must be cancelled.
12. This amendment ensures consistency with the other cancellation grounds in section 116 of the Act, which are also subject to subsections 116(2) and (3), and will allow circumstances in which a visa is not to be cancelled, or must be cancelled, to be prescribed in the regulations in the future.

**Item 3            At the end of section 116**

13. This item adds new subsection 116(4) in Subdivision D of Division 3 of Part 2 of the Act.
14. New subsection 116(4) provides that the term “benefit” has a meaning affected by section 245AQ and the term “sponsorship-related event” has the meaning given by section 245AQ, which is inserted by item 6 of this Schedule.
15. The terms “benefit” and “sponsorship-related event” are used in new subsections 116(1AC) and (1AD) inserted by item 1 of this Schedule.

**Item 4            Subsection 117(1)**

16. This item omits “(1AA), or (1AB)” and substitutes “(1AA), (1AB) or (1AC)” in Subdivision D of Division 3 of Part 2 of the Act.
17. The effect of this amendment is to provide that subject to subsection 117(2), a temporary or permanent visa held by a non-citizen may be cancelled under subsection 116(1AC) when the non-citizen is in or outside Australia or in immigration clearance.

18. It is intended that where a person has been involved in ‘payment for visas’ activity, a visa should be liable for cancellation whether it is a temporary or permanent visa. The visa cancellation ground is discretionary and requires consideration to be given to a range of factors such as the person’s complicity in the ‘payment for visas’ arrangement, strength of ties to Australia and contribution to the Australian community, in considering whether or not to cancel the visa.

**Item 5            Paragraph 140X(aa)**

19. This item inserts “or D” after “Subdivision C” in paragraph 140X(aa) of Division 3A of Part 2 of the Act.

20. The effect of this amendment is to provide that the powers of an inspector under Subdivision F of Division 3A of Part 2 of the Act may be exercised for the purpose of investigating whether a person who is required under subsection 140H(1) to satisfy a sponsorship obligation has committed an offence, or contravened a civil penalty provision, under Subdivision D of Division 12 of this Part.

21. Subdivision D of Division 12 of Part 2 is inserted by item 6 of this Schedule and provides for new offences and civil penalties in relation to sponsored visas.

22. Expanding the powers of an inspector will allow information to be gathered in relation to whether a person who is or was an approved sponsor has engaged in ‘payment for visas’ activity that constitutes an offence or contravenes a civil penalty provision in relation to sponsored visas. In many instances, evidence of asking for, receiving, offering or providing a benefit in return for the occurrence of a sponsorship-related event will only be held by the parties to the ‘payment for visas’ arrangement. The powers in Subdivision F of Division 3A of Part 2 of the Act are therefore necessary to facilitate the collection of evidence to enable the effective enforcement of the sanctions in Subdivision D of Division 12 of the Act against a person who is or was an approved sponsor.

23. Current section 140XG relevantly provides that a person is required to produce a record or document to the inspector even if this might tend to incriminate the person or expose the person to a penalty. However, such a record or document is not admissible against the individual in criminal proceedings (except in relation to certain offences relating to the provision of false or misleading information or documents).

24. The investigation powers under Part 8E of the Act, including entry under search warrant, will also be available to investigate whether any person, including a person who is or was an approved sponsor, has committed an offence or contravened a civil penalty provision under new Subdivision D of Division 12 of Part 2 of the Act.

**Item 6            At the end of Division 12 of Part 2**

25. This item inserts new Subdivision D – Offences and civil penalties in relation to sponsored visas, in Division 12 of Part 2 of the Act.

*Section 245AQ – Definitions*

26. New section 245AQ sets out the definitions of certain terms used in Subdivision D – Offences and civil penalties in relation to sponsored visas.
27. New section 245AQ provides that “benefit” includes:
  - a payment or other valuable consideration; and
  - a deduction of an amount; and
  - any kind of real or personal property; and
  - an advantage; and
  - a service; and
  - a gift.
28. The meaning of “benefit” provided for in new section 245AQ reflects the broad range of benefits that are known to be offered or provided in ‘payment for visas’ arrangements, including deductions of a visa holder’s salary or wages, payment for goods or services above market value, or unpaid work. The term “benefit” is used in new section 245AR and 245AS inserted by this item. It is also used in the new visa cancellation ground in subsection 116(1AC) inserted by item 1 of this Schedule.
29. New section 245AQ also provides that “executive officer” of a body corporate means a director, the chief executive officer (however described), the chief financial officer (however described) or the secretary of a body corporate. The term “executive officer” is relevant to new sections 245AT and 245AU inserted by this item, which set out the criminal and civil liability of executive officers of body corporates in relation to sponsorship-related offences and contraventions.
30. New section 245AQ also provides that “sponsor class” means a class of sponsor prescribed in the regulations. This definition would allow the regulations to prescribe the classes of sponsor that are relevant to the events set out paragraphs (a) and (b) of the definition of “sponsorship-related event”. These events relate to a person applying for approval as a sponsor under section 140E, or applying for a variation of a term of an approval as a sponsor under section 140E of the Act. For this reason, the only sponsor classes that could be prescribed in the regulations under the definition of “sponsor class” are those that are prescribed for the purposes of subsection 140E(2) in Division 3A of Part 2 of the Act. Division 3A of Part 2 of the Act provides the framework for the temporary sponsored work visa programme (which includes the Subclass 457 visa programme).
31. Currently regulation 2.58 of the *Migration Regulations 1994* sets out the classes of sponsor in relation to which a person may be approved for the purposes of subsection 140E(2) of the Act. At this time, the subset of sponsor classes that are intended to be prescribed for the purposes of the definition of “sponsor class” in new section 245AQ include the standard business sponsor, long stay activity sponsor, training and research sponsor, entertainment sponsor and superyacht crew sponsor classes.
32. New section 245AQ also provides that “sponsored visa” means a visa of a kind (however described) prescribed in the regulations. This definition would allow for the regulations to prescribe the visa classes, subclasses or streams that are relevant to the events set out at paragraphs (d) to (k) of the definition of “sponsorship-related event”. These events relate

to a person agreeing to become an approved sponsor or making a nomination under Division 3A of Part 2 of the Act, a person applying under the regulations for approval of a nomination of a position, and other related events.

33. At this time, it is intended that the following temporary sponsored work visas will be prescribed for the purposes of the definition of “sponsored visa” in new section 245AQ: the Subclass 457 (Temporary Work (Skilled)) visa, the Subclass 401 (Temporary Work (Long Stay Activity)) visa, the Subclass 402 (Training and Research) visa in the Research stream, the Subclass 420 (Temporary Work (Entertainment)) visa and the Subclass 488 (Superyacht Crew) visa. It is intended that the following permanent skilled visas will be prescribed: the Subclass 186 (Employer Nomination Scheme) visa and the Subclass 187 (Regional Sponsored Migration Scheme) visa.
34. Visa classes, subclasses and streams, and classes of sponsor, are prescribed in the regulations pursuant to section 31 and section 140E of the Act, and the class and subclass numbers and titles of the visas and sponsor classes may be amended from time to time. It is therefore necessary to also prescribe in the regulations the sponsored visas and sponsor classes for the purposes of the definitions in section 245AQ of the Act.
35. Section 245AQ also provides that a “sponsorship-related event” means the events listed in paragraphs (a) to (l) of the definition. The term “sponsorship-related event” is used in sections 245AR and 245AS inserted by this item. It is also used in the new visa cancellation ground in subsection 116(1AC) inserted by item 1 of this Schedule.
36. The sponsorship-related events listed in the definition are intended to capture all the events in relation to which a ‘payment for visas’ arrangement might be made. A person might enter into a ‘payment for visas’ arrangement in return for agreeing to sponsor or making a nomination in relation to a visa applicant or holder. A person might also enter into a ‘payment for visas’ arrangement in relation to a wide range of events associated with a sponsorship or nomination, such as applying for approval to become a sponsor, entering into a work agreement, employing a person to work in an occupation or position, or including a family member in a nomination.
37. The events also anticipate the possibility that a benefit might be extracted from a visa applicant or holder under threat of withdrawal of a nomination or termination of their employment. Also, a benefit could be given upon grant of the sponsored visa in recognition that it was the sponsorship or nomination which allowed the visa criteria to be met.
38. Paragraph (l) of the definition also provides for further sponsorship-related events to be prescribed. It is intended that this may be used in the future to prescribe events of the same kind as those set out above, but where the criteria for grant of a sponsored visa are amended such that they are no longer covered by the events listed in section 245AQ of the Act. This recognises that the criteria for grant of the sponsored visas are set out in the regulations and may be amended from time to time.
39. Section 44 of the *Legislative Instruments Act 2003* provides that a legislative instrument made under Part 2 of the Act is not subject to disallowance.

*Section 245AR – Prohibition on asking for or receiving a benefit in return for the occurrence of a sponsorship-related event*

40. Section 245AR provides for a new offence and civil penalty provision where a person asks for, or receives, a benefit from another person in return for the occurrence of a sponsorship-related event.
41. The purpose of new section 245AR is to ensure that it is prohibited to solicit or receive a benefit as an inducement to sponsor, nominate or otherwise provide the support necessary for a person to be eligible for a visa, or to continue to hold the visa. It is not considered acceptable for sponsors or other third parties to make a personal gain from their involvement in a ‘payment for visas’ arrangement and the opportunity it may provide for the visa applicant or holder to become an Australian permanent resident.
42. This reflects the Government’s position that the purpose of the temporary sponsored visa and skilled visa programmes is to address genuine skills shortages in the Australian labour market, not to provide employers with benefits above and beyond the visa holder’s lawful employment or engagement in the sponsor’s business, organisation or programme. Receiving a benefit as an inducement to enter into a sponsorship or nomination arrangement undermines the integrity of skilled visa programmes and has the potential to affect the Australian job market.
43. In some cases, ‘payment for visas’ arrangements leave visa applicants and holders vulnerable to exploitation and further extortion once in Australia, due to the risk that their visa will be cancelled if the sponsor withdraws their support.
44. Subsection 245AR(1) provides that a person (the “first person”) contravenes this subsection if:
  - the first person asks for, or receives, a benefit from another person; and
  - the first person asks for, or receives, the benefit in return for the occurrence of a sponsorship-related event.
45. The meaning of “benefit” is affected by section 245AQ and the definition of “sponsorship-related event” is also provided in section 245AQ inserted by this item.
46. Subsection 245AR(2) provides that to avoid doubt, the first person contravenes subsection 245AR(1) even if the sponsorship-related event does not occur. For example, subsection 245AR(1) applies if a person asks for or receive a benefit in return for making a nomination, but the nomination application is not lodged.
47. Subsection 245AR(3) provides that subsection 245AR(1) does not apply if the benefit is a payment of a reasonable amount for a professional service that has been provided, or is to be provided, by the first person or a third person. This defence is available to a person who may be providing a legitimate professional service involving conduct of the kind described in subsection 245AR(1), that is, asking for or receiving a benefit in return for the occurrence of a sponsorship-related event. An amount would be considered reasonable if it is commensurate with market rates. It is not considered that the provision of immigration assistance or recruitment advice would normally constitute conduct that contravenes subsection 245AR(1), however, there may be situations in which ‘payment

for visas' conduct occurs in a context in which legitimate professional services are also being provided.

48. As explained in the note below subsection 245AR(3), the defendant bears the evidential burden in relation to the matter in subsection 245AR(3). It is necessary to reverse the onus of the burden of proof in relation to this matter because the information as to whether the benefit constitutes a reasonable fee for a professional service is uniquely within the knowledge of the defendant. The prosecution would still be required to prove that the benefit was asked for or received in return for the occurrence of a sponsorship-related event.

#### *Offence*

49. Subsection 245AR(4) provides that a person commits an offence if the person contravenes subsection 245AR(1). The physical elements of the offence are set out in that subsection.
50. The fault elements of the offence are provided for in section 5.6 of the Criminal Code.
51. The maximum penalty for the offence is imprisonment for 2 years or 360 penalty units, or both.
52. Subsection 4B(3) of the *Crimes Act 1914* provides that where a body corporate is convicted of an offence against a law of the Commonwealth, the court may impose a maximum penalty of an amount equal to five times the amount of the maximum penalty that could be imposed on an individual person.
53. Therefore, at this time, the maximum penalty of 360 penalty units currently equates to \$64,800 for an individual person or \$324,000 for a body corporate.
54. The maximum fine of 360 penalty units is set higher than the standard fine/imprisonment ratio provided for in section 4B of the Crimes Act to counter the potential financial gains from committing the offence, which have been assessed as typically ranging from \$15,000 to \$70,000 in relation to an individual visa holder, and up to \$700,000 where multiple visa holders were involved in 'payment for visas' arrangements with the one sponsor.

#### *Civil penalty provision*

55. Subsection 245AR(5) provides that a person is liable to a civil penalty if a person contravenes subsection 245AR(1) of the Act.
56. The maximum civil penalty is 240 penalty units. Subsection 486R of the Act provides that the maximum pecuniary penalty for a body corporate is five times the amount specified for the civil penalty provision. Therefore, at this time, the maximum penalty currently equates to \$43,200 for an individual person or \$216,000 for a body corporate.
57. A high civil penalty has been set for this civil penalty provision to appropriately address the severity of the prohibited conduct. A strong civil penalty is required to ensure that a person who asks for or receives a benefit in relation to the occurrence of a sponsorship-

related event faces a penalty which is proportionate to the unlawful behaviour and which counters the potential financial gains made pursuant to ‘payment for visas’ arrangements.

58. Subsection 245AR(6) provides that a person who wishes to rely on subsection 245AR(3) in proceedings for a civil penalty order bears an evidential burden in relation to the matter in that subsection.
59. It is necessary to reverse the onus of the burden of proof in relation to this matter because the information as to whether the benefit constitutes a reasonable fee for a professional service is uniquely within the knowledge of the defendant. The applicant for a civil penalty order would still be required to prove that the benefit was asked for or received in return for the occurrence of a sponsorship-related event.
60. The note following subsection 245AR(6) provides that it is not necessary to prove a person’s state of mind in proceedings for a civil penalty order (see section 486ZF).

*Section 245AS – Prohibition on offering to provide or providing a benefit in return for the occurrence of a sponsorship-related event*

61. New section 245AS provides for a new civil penalty provision where a person offers to provide, or provides, a benefit to another person in return for the occurrence of a sponsorship-related event.
62. The purpose of new section 245AS is to ensure that an application for a civil penalty order can be made in relation to a person who is complicit in a ‘payment for visas’ arrangement by offering or providing a benefit to induce another person to enter into a sponsorship arrangement or make a nomination. It is not considered acceptable for visa holders or other third parties to attempt to obtain a temporary or permanent visa, for him or herself or any other person, through a ‘payment for visas’ arrangement.
63. Subsection 245AS(1) provides that a person (the “first person”) contravenes this subsection if:
  - the first person offers to provide, or provides, a benefit to another person (the “second person”); and
  - the first person offers to provide, or provides, the benefit in return for the occurrence of a sponsorship-related event.
64. The meaning of “benefit” is affected by section 245AQ and the definition of “sponsorship-related event” is also provided in section 245AQ inserted by this item.
65. The maximum civil penalty is 240 penalty units, which at this time currently equates to \$43,200 for an individual person or \$216,000 for a body corporate.
66. A high civil penalty has been set for this civil penalty provision to appropriately address the severity of the prohibited conduct. A strong civil penalty is required to ensure that a person who offers to provide, or provides, a benefit in relation to the occurrence of a sponsorship-related event faces a penalty which is proportionate to the unlawful behaviour which undermines the integrity of skilled visa programmes.

67. Subsection 245AS(2) provides that to avoid doubt, the first person contravenes subsection 245AS(1) even if the sponsorship-related event does not occur. For example, subsection 245AS(1) applies even if a person offers to provide or provides a benefit in return for being identified in a nomination made by a sponsor, but the nomination application is not lodged.
68. Subsection 245AS(3) provides that subsection 245AS(1) does not apply if the benefit is a payment of a reasonable amount for a professional service that has been provided, or is to be provided, by the second person or a third person. This defence is available where the benefit is being offered or provided to a person who may be providing a legitimate professional service in return for the occurrence of a sponsorship-related event. An amount would be considered reasonable if it is commensurate with market rates. It is not considered that procuring immigration assistance or recruitment advice would normally constitute conduct that contravenes subsection 245AS(1), however, there may be situations in which ‘payment for visas’ conduct occurs in a context in which legitimate professional services are also being provided.
69. Subsection 245AS(4) provides that a person who wishes to rely on subsection 245AS(3) in proceedings for a civil penalty order bears an evidential burden in relation to the matter in that subsection.
70. It is necessary to reverse the onus of the burden of proof in relation to this matter because the information as to whether the benefit constitutes a reasonable fee for a professional service is uniquely within the knowledge of the defendant. The applicant for a civil penalty order would still be required to prove that the benefit was asked for or received in return for the occurrence of a sponsorship-related event.
71. The note following subsection 245AS(4) provides that it is not necessary to prove a person’s state of mind in proceedings for a civil penalty order (see section 486ZF).

*Subsection 245AT – Criminal liability of executive officers of bodies corporate*

72. New subsection 245AT(1) provides that an executive officer of a body corporate commits an offence if:
- the body commits an offence against new Subdivision D of Division 12 of Part 2 of the Act (in new section 245AT called a “sponsorship-related offence”); and
  - the officer knew that, or was reckless or negligent as to whether, the sponsorship-related offence would be committed; and
  - the officer was in a position to influence the conduct of the body in relation to the sponsorship-related offence; and
  - the officer failed to take all reasonable steps to prevent the sponsorship-related offence being committed.
73. New section 254AQ inserted by this item provides that “executive officer” of a body corporate means a director, the chief executive officer (however described), the chief financial officer (however described) and the secretary of the body corporate.
74. The purpose of new subsection 245AT(1) is to extend criminal liability of bodies corporate that commit sponsorship-related offences against new Subdivision D to

executive officers of those bodies corporate, in certain circumstances where the officer failed to take all reasonable steps to prevent the offence being committed.

75. An executive officer of a body corporate will not be held criminally liable in respect of a sponsorship-related offence committed by the body corporate unless all of the specified circumstances exist. The effect of this provision is that responsible individual persons who are executive officers of a body corporate involved in the commission of sponsorship-related offences may be penalised in the specified circumstances, even when the sponsorship-related offence is committed by the body corporate.
76. New subsection 245AT(1) provides that an offence committed by an executive officer of a body corporate against the subsection is punishable on conviction by a maximum pecuniary penalty of 360 penalty units. This is the same as the maximum pecuniary penalty that may be imposed on an individual person convicted of a sponsorship-related offence under new sections 245AR and 245AS inserted by this item.
77. New subsection 245AT(2) provides that in determining whether the executive officer of a body corporate failed to take all reasonable steps to prevent a sponsorship-related offence being committed by the body corporate, a court must have regard to:
- what action (if any) the officer took towards ensuring that the body corporate's employees, agents and contractors had a reasonable knowledge and understanding of the requirements to comply with Subdivision D, insofar as those requirements affected the employees, agents or contractors concerned; and
  - what action (if any) the officer took when he or she became aware that the body was committing the sponsorship-related offence.
78. New subsection 245AT(3) provides that subsection 245AJ(2) does not limit subsection 245ATJ(1) of the Act.
79. The purpose of new subsection 245AT(3) is to make clear that, although a court must have regard to the matters in subsection 245AT(2) in determining whether an executive officer of a body corporate failed to take all reasonable steps to prevent a sponsorship-related offence being committed by the body corporate, the court may also have regard to any other matters it considers relevant.

*Section 245AU – Civil liability of executive officers of bodies corporate*

80. New subsection 245AU(1) provides that an executive officer of a body corporate contravenes the subsection if:
- the body contravenes a civil penalty provision in new Subdivision D of Division 12 of Part 2 of the Act (in new section 245AU called a “sponsorship-related contravention”); and
  - the officer knew that, or was reckless or negligent as to whether, the sponsorship-related contravention would occur; and
  - the officer was in a position to influence the conduct of the body in relation to the sponsorship-related contravention; and
  - the officer failed to take all reasonable steps to prevent the sponsorship-related contravention.

81. New section 254AQ inserted by this item provides that “executive officer” of a body corporate means a director, the chief executive officer (however described), the chief financial officer (however described) and the secretary of the body corporate.
82. The purpose of new subsection 245AU(1) is to extend the civil liability of bodies corporate in respect of the sponsorship-related civil penalty provisions in new Subdivision D to executive officers of those bodies corporate, in certain circumstances where the officer failed to take all reasonable steps to prevent the sponsorship-related contravention.
83. Civil liability in respect of a sponsorship-related contravention by a body corporate will not extend to an executive officer of the body corporate unless all of the specified circumstances exist. The effect of this provision is that responsible individual persons who are executive officers of a body corporate involved in sponsorship-related contraventions may be penalised in the specified circumstances, even when the contravention is committed by the body corporate.
84. The note to new subsection 245AU(1) advises that section 486ZF of the Act (which provides that a person’s state of mind does not need to be proven in proceedings for a civil penalty order, subject to specific exceptions) does not apply in relation to a contravention of the new subsection.
85. Section 486ZF provides that, except in specified instances, in proceedings for a civil penalty order against a person for a contravention of a civil penalty provision, it is not necessary to prove the person’s intention, knowledge, negligence, recklessness, or any other state of mind of the person. Subsection 486ZF(1) is amended by item 7 inserted by this Schedule to provide that section 486ZF does not apply to a contravention of new subsection 245AU(2) of the Act.

*Civil penalty provision*

86. New subsection 245AU(2) provides that an executive officer of a body corporate is liable to a civil penalty of a maximum of 240 penalty units if the officer contravenes subsection 245AU(1) of the Act. This is the same as the maximum civil penalty that may be imposed on an individual person who contravenes sponsorship-related civil penalty provisions under new sections 245AR and 245AS inserted by this item.
87. The penalty must be read in conjunction with subsection 486R(6) of the Act, which provides that in determining the amount of a pecuniary penalty, the court must take into account all relevant matters, including the matters listed in that subsection.

*Reasonable steps to prevent the contravention*

88. New subsection 245AU(3) provides that in determining whether an executive officer of a body corporate failed to take all reasonable steps to prevent a sponsorship-related contravention by the body corporate, a court must have regard to:
  - what action (if any) the officer took towards ensuring that the body corporate’s employees, agents and contractors had a reasonable knowledge and understanding of

the requirements to comply with new Subdivision D, insofar as those requirements affected the employees, agents and contractors concerned; and

- what action (if any) the officer took when he or she became aware that the body corporate was engaging in a sponsorship-related contravention.

89. New subsection 245AU(4) provides that subsection 245AU(3) does not limit subsection 245AU(1) of the Act.

90. The purpose of new subsection 245AU(4) is to make it clear that, although a court must have regard to the matters in subsection 245AU(3) in determining whether an executive officer of a body corporate failed to take all reasonable steps to prevent a sponsorship-related contravention by the body corporate, the court may also have regard to any other matters it considers relevant.

### *Definitions*

91. New subsection 245AU(5) provides that an executive officer of a body corporate is “negligent” as to whether a sponsorship-related contravention would occur if the officer’s conduct involves:

- such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
- such a high risk that the sponsorship-related contravention would occur; that the conduct merits the imposition of a pecuniary penalty.

92. The purpose of this definition is to ensure that the word “negligent” in the context of new section 245AU is consistent with that term as defined in section 5.5 of the Criminal Code.

93. New subsection 245AU(5) also provides that an executive officer of a body corporate is “reckless” as to whether a sponsorship-related contravention would occur if:

- the officer is aware of a substantial risk that the sponsorship-related contravention would occur; and
- having regard to the circumstances known to the officer, it is unjustifiable to take the risk.

94. The purpose of this definition is to ensure that the word “reckless” in the context of new section 245AU is consistent with that term as defined in section 5.4 of the Criminal Code.

### *Section 245AV – Contravening civil penalty provisions*

95. New subsection 245AV(1) provides that section 245AV applies if a civil penalty provision in new Subdivision D of Division 12 of Part 2 of the Act provides that a person contravening another provision of the subdivision (called “a conduct rule provision”) is liable to a civil penalty.

96. New subsection 245AV(2) provides that for the purposes of the Act, a person is taken to contravene a civil penalty provision if the person contravenes a “conduct rule provision”, as described in subsection 245AV(1) of the Act.

97. The purpose of these provisions is to ensure that references in the Act to a contravention of a civil penalty provision include a contravention of a conduct rule provision in new Subdivision D of Division 12 of Part 2 of the Act.
98. New section 245AV applies to those provisions in new Subdivision D which state that a person is liable to a civil penalty if the person contravenes another provision of Subdivision D. For example, new subsection 245AR(5) makes a person liable to a civil penalty if the person contravenes subsection 245AR(1) (which is contravened by a person who asks for, or receives, a benefit from another person in return for the occurrence of a sponsorship-related event).
99. The effect of subsection 245AV(2) is that, if the person contravenes a provision by doing a certain act, the person is taken to contravene the associated civil penalty provision and so is liable for a civil penalty. This is necessary because the civil penalty provision itself cannot be contravened in its own right. For instance, in the above example, a person contravening new subsection 245AR(1) is taken to be liable for the civil penalty set out in new subsection 245AV(5) (the civil penalty provision). However, in the absence of new subsection 245AV(2), the person could not be taken to have contravened a civil penalty provision, which is a requirement for civil penalty action to be taken under Part 8D of the Act, because subsection 245AR(5) cannot be contravened in its own right.

*Section 245AW – Geographical scope of offence and civil penalty provisions*

*Offences*

100. New subsection 245AW(1) provides that section 15.2 of the Criminal Code (extended geographical jurisdiction - category B) applies to an offence against new Subdivision D of Division 12 of Part 2 of the Act.
101. The application of the geographical jurisdiction set out in section 15.2 of the Criminal Code will ensure that, for example, a person would commit an offence under new section 245AR if the person is an Australian citizen, a resident of Australia, or a body corporate incorporated in Australia, and while outside Australia asks for or receives a benefit in return for the occurrence of a sponsorship-related event. In certain circumstances, other persons outside Australia who ask for or receive a benefit in return for the occurrence of a sponsorship-related event may also commit the offence if a result of the person's conduct leading to the commission of the offence occurs in Australia.

*Contraventions of civil penalty provisions*

102. New subsection 245AW(2) provides that an order for a civil penalty must not be made against a person in civil proceedings relating to a contravention by the person of a civil penalty provision in new Subdivision D unless:
- the person's conduct that allegedly contravenes the provision occurs:
    - wholly or partly in Australia; or
    - wholly or partly on board an Australian aircraft or an Australian ship; or
  - the person's conduct that allegedly contravenes the provision occurs wholly outside Australia and, at the time of the alleged contravention, the person is:
    - an Australian citizen; or
    - a resident of Australia; or

- a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or
- all of the following conditions are satisfied:
  - the person's conduct allegedly contravenes the provision because of section 486ZD of the Act (called an "ancillary contravention" in new section 245AW);
  - the conduct occurs wholly outside Australia;
  - the conduct constituting the primary contravention to which the ancillary contravention relates occurs, or is intended by the person to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship.

103. "Primary contravention" is defined in new subsection 245AW(9) inserted by this item, to mean a contravention of a civil penalty provision in new Subdivision D, other than because of section 486ZD of the Act.

104. The purpose of this provision is to provide for an extended geographical jurisdiction for the contravention of the sponsorship-related civil penalty provisions in new Subdivision D of Division 12 of Part 2 of the Act that is similar to the extended extraterritorial application – category B that applies to the criminal offences in the same Subdivision.

105. That is, if a person engages in conduct which contravenes a sponsorship-related provision, the person will be liable to a civil penalty if they engage in the conduct wholly or partly in Australia, or wholly or partly on board an Australian aircraft or an Australian ship. The fact that the conduct contravening the sponsorship-related provision has occurred, for example, wholly or partly in Australia makes the person potentially liable to a civil penalty.

106. A person who has contravened a sponsorship-related provision will also be liable to a civil penalty even if the contravention occurred wholly outside Australia, provided that, at the time of the contravention, the person is either an Australian citizen, a resident of Australia, or a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

107. Finally, a person who is taken to have contravened a sponsorship-related provision because of section 486ZD (Ancillary contravention of civil penalty provisions) will be liable to a civil penalty if the conduct constituting the ancillary contravention occurs wholly outside Australia, and the conduct constituting the actual contravention of the civil penalty provision civil penalty occurs, or is intended by the person to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship.

108. For example, a person outside Australia who is involved, in any of the ways set out in subsection 486ZD, in a benefit being asked for or received (or attempts to have a benefit asked for or received) in Australia in return for the occurrence of a sponsorship-related event, in contravention of new subsection 245AR(1), will be taken to have contravened that provision under subsection 486ZD(2) of the Act.

*Defences relating to contraventions of civil penalty provisions*

109. New subsection 245AW(3) provides that in civil proceedings relating to a primary contravention by a person, it is a defence if:
- the conduct constituting the alleged primary contravention occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
  - the person is neither:
    - an Australian citizen; nor
    - a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and
  - there is not in force in:
    - the foreign country where the conduct constituting the alleged primary contravention occurs; or
    - the part of the foreign country where the conduct constituting the alleged primary contravention occurs;
- a law of that foreign country, or a law of that part of that foreign country, that provides for a pecuniary or criminal penalty for such conduct.
110. New subsection 245AW(4) provides that in civil proceedings relating to a contravention (referred to as “an ancillary contravention”) by a person of a civil penalty provision in new Subdivision D because of section 486ZD, it is a defence if:
- the conduct constituting the alleged ancillary contravention occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
  - the conduct (referred to as “the primary conduct”) constituting the primary contravention to which the ancillary contravention relates occurs, or is intended by the person to occur, wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
  - the person is neither:
    - an Australian citizen; nor
    - a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and
  - there is not in force in:
    - the foreign country where the primary conduct occurs or is intended by the person to occur; or
    - the part of the foreign country where the primary conduct occurs or is intended by the person to occur;
- a law of that foreign country, or a law of that part of that foreign country, that provides for a pecuniary or criminal penalty for the primary conduct.
111. The purpose of new subsections 245AW(3) and 245AW(4) is to provide for defences relating to contraventions of civil penalty provisions where a civil penalty order would not be prevented from being made by new subsection 245AW(2) of the Act.
112. For example, in relation to new subsection 245AW(3), if a resident of Australia contravenes new subsection 245AR(1) while in in Country X, the person will have a defence if the person is not an Australian citizen or a body corporate incorporated by or under an Australian law, and there is no pecuniary or criminal penalty in Country X for asking for or receiving a benefit in return for the occurrence of a sponsorship-related event.

113. In relation to new subsection 245AW(4), if a person who is neither an Australian citizen nor a body corporate incorporated in Australia, has attempted to contravene the civil penalty provision in new subsection 245AR(1) in Country X (and so is taken to have contravened that provision under subsection 486ZD(2) of the Act), new paragraph 245AW(4)(a) will apply if the attempt to contravene subsection 245AR(1) occurred wholly in a foreign country (but not on board an Australian aircraft or an Australian ship). The person will have a defence if there is no pecuniary or criminal penalty in Country X for asking for or receiving a benefit in return for the occurrence of a sponsorship-related event.
114. New subsection 245AW(5) provides that a defendant bears an evidential burden in relation to the matter in subsections 245AW(3) or 245AW(4).
115. It is considered appropriate for the defendant to bear the evidential burden if the defendant seeks to rely on a defence in subsections 245AW(3) or 245AW(4) because the citizenship of the person and the place of incorporation of a body are matters peculiarly within the knowledge of the defendant.

*Attorney-General's consent needed for certain proceedings*

116. New subsection 245AW(6) provides that civil proceedings relating to a contravention of a civil penalty provision in new Subdivision D in Division 12 of Part 2 of the Act must not be commenced without the Attorney-General's written consent if:
- the conduct constituting the alleged contravention occurs wholly in a foreign country; and
  - at the time of the alleged contravention, the person alleged to have contravened the provision is neither:
    - an Australian citizen; nor
    - a body corporate incorporated by or under a law of the Commonwealth or of a State or a Territory.
117. The purpose of this provision is to require the Attorney-General's written consent to be obtained for the commencement of civil proceedings relating to a contravention of a sponsorship-related provision in new Subdivision D, in circumstances where the conduct constituting the alleged contravention occurs wholly in a foreign country, and at the time of the alleged contravention, the person is neither an Australian citizen nor a body corporate incorporated by or under an Australian law.

*When conduct taken to occur partly in Australia*

118. New subsections 245AW(7) and 245AW(8) deal with when conduct is taken to occur partly in Australia.
119. New subsection 245AW(7) provides that for the purposes of new section 245AW, if a person sends a thing, or causes a thing to be sent:
- from a point outside Australia to a point in Australia; or
  - from a point in Australia to a point outside Australia;
- that conduct is taken to have occurred partly in Australia.

120. For example, if a person in Country X sends a letter to a person in Australia asking for, offering or transmitting a benefit in return for the occurrence of a sponsorship-related event, the conduct is taken to have occurred partly in Australia for the purposes of section 245AW of the Act.
121. New subsection 245AW(8) provides that for the purposes of this section, if a person sends, or causes to be sent, an electronic communication:
- from a point outside Australia to a point in Australia; or
  - from a point in Australia to a point outside Australia;
- that conduct is taken to have occurred partly in Australia.
122. For example, if a person in Country X sends an electronic communication (for instance, an email) to a person in Australia asking for, offering or transmitting a benefit in return for the occurrence of a sponsorship-related event, the conduct is taken to have occurred partly in Australia for the purposes of section 245AW of the Act.

### *Definitions*

123. New subsection 245AW(9) provides definitions for the purposes of new section 245AW. The new subsection provides that in section 245AW:
- “Australian aircraft” has the same meaning as in the Criminal Code.
  - “Australian ship” has the same meaning as in the Criminal Code.
  - “electronic communication” has the same meaning as in the Criminal Code.
  - “foreign country” has the same meaning as in the Criminal Code.
  - “point” has the same meaning as in section 16.2 of the Criminal Code.
  - “primary contravention” means a contravention of a civil penalty provision in this Subdivision other than because of section 486ZD.
  - “resident of Australia” has the same meaning as in the Criminal Code.
124. The purpose of subsection 245AW(9) is to clarify that certain expressions used in new section 245AW (with the exception of the expression “primary contravention”) have the same meaning as in the Criminal Code.
125. The expression “primary contravention” refers to a contravention of a civil penalty provision in new Subdivision D of Division 12 of Part 2 of the Act (that is, the new civil penalty provisions in subsections 245AR(5), 245AS(1) and 245AU(2) inserted by this item). However, the expression “primary contravention” does not refer to a situation in which a person is taken to have contravened one of those subsections in accordance with section 486ZD of the Act, which deals with ancillary contraventions of civil penalty provisions.

### *Section 245AX – Treatment of partnerships*

126. New subsection 245AX(1) provides that new Subdivision D in Division 12 of Part 2 of the Act, and any other provision of the Act to the extent that it relates to Subdivision D, apply to a partnership as if it were a person, but with the changes set out in this section.
127. The purpose of new subsection 245AX(1) is to make a partnership liable as if it were a person for the sponsorship-related offences and sponsorship-related provisions in new

Subdivision D but subject to the other provisions in new section 245AX which, under certain circumstances, may make partners individually liable.

128. New subsection 245AX(2) provides that an offence against new Subdivision D that would otherwise be committed by a partnership is taken to have been committed by each partner in the partnership, at the time the offence is committed, who:
- did the relevant act; or
  - aided, abetted, counselled or procured the relevant act; or
  - was in any way knowingly concerned in, or party to, the relevant act (whether directly or indirectly or whether by any act of the partner).
129. New subsection 245AX(2) relates to criminal offences against new sections 245R and 245AS in new Subdivision D. It provides that where a sponsorship-related offence under new Subdivision D would have been committed by a partnership because of new subsection 245AX(1), each partner at the time the offence is committed is taken to have committed the offence if the partner did the relevant act, or aided, abetted, counselled or procured the relevant act, or was in any way knowingly concerned in, or party to, the relevant act.
130. The effect of new subsection 245AX(2) is only the partners who did or were involved in the relevant act constituting the offence commit a sponsorship-related offence. The maximum penalty that could be imposed on a partner is equivalent to the maximum penalty that could be imposed on an individual.
131. New subsection 245AX(3) provides that a civil penalty provision in new Subdivision D that would otherwise be contravened by a partnership is taken to have been contravened by each partner in the partnership, at the time of the conduct constituting the contravention, who:
- engaged in the conduct; or
  - aided, abetted, counselled or procured the conduct; or
  - was in any way knowingly concerned in, or party to, the conduct (whether directly or indirectly or whether by any act of the partner).
132. New subsection 245AX(3) relates to civil penalty provisions. It provides that where a civil penalty provision in new Subdivision D would have been contravened by a partnership because of subsection 245AX(1), each partner at the time of the contravention is taken to have contravened the civil penalty provision if the partner did the relevant act, or aided, abetted, counselled or procured the relevant act, or was in any way knowingly concerned in, or party to, the relevant act.
133. The effect of new subsection 245AX(3) is that only the partners who did or were involved in the relevant act constituting the contravention are liable for civil penalty action. The maximum penalty that could be imposed on a partner is equivalent to the maximum penalty that could be imposed on an individual.

*Section 245AY Treatment of unincorporated associations*

134. New subsection 245AY(1) provides that new Subdivision D in Division 12 of Part 2 of the Act, and any other provisions of the Act to the extent that it relates to Subdivision

D, apply to an unincorporated association as if it were a person, but with the changes set out in this section.

135. The effect of new subsection 245AY(1) is to make an unincorporated association liable as if it were a person in respect of contraventions of sponsorship-related offences and sponsorship-related civil penalty provisions in new Subdivision D, but subject to other provisions of new section 245AY, under which individual members of an unincorporated association's committee of management may be liable in certain circumstances.
136. Subsection 5(1) of the Act provides that "committee of management" of an unincorporated association means a body (however described) that governs, manages or conducts the affairs of the association.
137. New subsection 245AY(2) provides that an offence against new Subdivision D that would otherwise be committed by an unincorporated association is taken to have been committed by each member of the association's committee of management, at the time the offence is committed, who:
- did the relevant act; or
  - aided, abetted, counselled or procured the relevant act; or
  - was in any way knowingly concerned in, or party to, the relevant act (whether directly or indirectly or whether by any act of the member).
138. New subsection 245AY(2) relates to criminal offences. Where a sponsorship-related offence against new Subdivision D would have been committed by an unincorporated association because of new subsection 245AY(1), new subsection 245AY(2) provides that each member of the association's committee of management at the time the offence is committed is taken to have committed the offence if they did the relevant act, or aided, abetted, counselled or procured the relevant act, or was in any way knowingly concerned in, or party to, the relevant act.
139. The effect of new subsection 245AY(2) is that only the members of the unincorporated association's committee of management who did or were involved in the relevant act constituting the offence commit a sponsorship-related offence. The maximum penalty that could be imposed on a member is equivalent to the maximum penalty that could be imposed on an individual.
140. New subsection 245AY(3) provides that a civil penalty provision in new Subdivision D that would otherwise be contravened by an unincorporated association is taken to have been contravened by each member of the association's committee of management, at the time of the conduct constituting the contravention, who:
- engaged in the conduct; or
  - aided, abetted, counselled or procured the conduct; or
  - was in any way knowingly concerned in, or party to, the conduct (whether directly or indirectly or whether by any act of the member).
141. New subsection 245AY(3) relates to civil penalty provisions. It provides that where a civil penalty provision in new Subdivision D would have been contravened by an unincorporated association because of new subsection 245AY(1), each member of the association's committee of management at the time of the contravention is taken to have

contravened the civil penalty provision if they did the relevant act, or aided, abetted, counselled or procured the relevant act, or was in any way knowingly concerned in, or party to, the relevant act.

142. The effect of new subsection 245AY(3) is that it is only the members of the unincorporated association's committee of management who did or were involved in the relevant act or omission constituting the contravention who are liable to pay a pecuniary penalty ordered for contravention of a sponsorship-related provision. The maximum penalty that could be imposed on a member is equivalent to the maximum penalty that could be imposed on an individual.

**Item 7            Subsection 486ZF(1)**

143. This item inserts the words "or 245AU(2)" after the words "subsection 245AK(2)" in section 486ZF in Division 3 of Part 8D of the Act.

144. The effect of section 486ZF is that, subject to specific exceptions, it is not necessary to prove a person's state of mind in proceedings for a civil penalty order against the person for alleged contravention of a civil penalty provision.

145. The effect of this amendment is that section 486ZF does not apply in relation to proceedings against a person for contravention of the civil penalty provision in new subsection 245AU(2). New section 245AU deals with civil liability of executive officers of bodies corporate for a sponsorship-related contravention under new Subdivision D of Division 12 of Part 2 of the Act.

146. This amendment is necessary because new paragraph 245AU(1)(b) provides that one of the circumstances required for a contravention of subsection 245AU(1) is that the person knew that, or was reckless or negligent as to whether, the contravention of a sponsorship-related provision would occur. It is necessary to prove the person's state of mind in proceedings for a civil penalty order relating to a contravention of new subsection 245AU(2). Therefore, subsection 245AU(2) is an exception to the general provisions in section 486ZF.

**Item 8            Part 8E (heading)**

147. This item repeals the heading of Part 8E of the Act, and substitutes the heading: "Part 8E – Investigation powers relating to certain offences and provisions".

148. Change of the heading of Part 8E is necessary because the effect of amendments made by items 9 to 17 inserted by this Schedule, is that the investigation powers in Part 8E will extend to investigation of sponsorship-related offences and contraventions of sponsorship-related civil penalty provisions under new Subdivision D of Division 12 of Part 2 of the Act (see item 6 of this Schedule), as well as investigation of work-related offences and contravention of civil penalty provisions under Subdivision C (Offences and civil penalties in relation to work by non-citizens) of Division 12 of Part 2 of the Act.

**Item 9           Section 487A (paragraph (a) of the definition of *evidential material*)**

149. This item inserts the words “sponsorship-related offence or a” before the words “work-related offence” in paragraph (a) of the definition of “evidential material” in section 487A in Division 1 of Part 8E of the Act.

150. The effect of this amendment is to extend the meaning of the term “evidential material” in Part 8E of the Act to material relevant to a sponsorship-related offence, as well as work-related offences. A definition of “sponsorship-related offence” is inserted in section 487A by item 12 inserted by this Schedule.

151. The term “evidential material” is used in Division 3 of Part 8E of the Act. If an authorised officer reasonably suspects that there may be “evidential material” on the premises, the authorised officer may enter the premises and exercise the search powers set out in Part 8E, provided he or she has the consent of the occupier, or the entry is made under search warrant, and shows his or her identity card.

**Item 10           Section 487A (paragraph (b) of the definition of *evidential material*)**

152. This item inserts the words “sponsorship-related provision or a” before the words “work-related provision” in paragraph (b) of the definition of “evidential material” in section 487A in Division 1 of Part 8E of the Act.

153. The effect of this amendment is to extend the meaning of the term “evidential material” in Part 8E of the Act to material relevant to a sponsorship-related provision, as well as work-related provisions. A definition of “sponsorship-related offence” is inserted in section 487A by item 12 inserted by this Schedule.

154. The term “evidential material” is used in Division 3 of Part 8E of the Act. If an authorised officer reasonably suspects that there may be “evidential material” on the premises, the authorised officer may enter the premises and exercise the search powers set out in Part 8E, provided he or she has the consent of the occupier, or the entry is made under search warrant, and shows his or her identity card.

**Item 11           Section 487A (definition of *related provision*)**

155. This item repeals the definition of “related provision” in section 487A in Division 1 of Part 8E of the Act, and substitutes a new definition.

156. The effect of this amendment is to extend the meaning of “related provision” in Part 8E of the Act to include a sponsorship-related offence and a sponsorship-related provision, in addition to a work-related offence and a work-related provision.

157. Definitions of “sponsorship-related offence” and “sponsorship-related provision” are inserted in section 487A by item 12 inserted by this Schedule.

**Item 12           Section 487A**

158. This item inserts two new definitions in section 487A of Division 1 of Part 8E of the Act, to define the meanings of the terms “sponsorship-related offence” and “sponsorship-related provision” for the purposes of Part 8E of the Act.

159. “Sponsorship-related offence” means:
- an offence against new Subdivision D in Division 12 of Part 2 of the Act; or
  - an offence against section 6 of the Crimes Act that relates to an offence against new Subdivision D; or
  - an ancillary offence (within the meaning of the Criminal Code) that is, or relates to an offence against new Subdivision D.
160. “Sponsorship-related provision” means a civil penalty provision in new Subdivision D of Division 12 of Part 2 of the Act.

**Item 13 Paragraphs 487B(1)(a) and (b)**

161. This item repeals paragraphs 487B(1)(a) and (b) in Division 2 of Part 8E of the Act, and substitutes new paragraphs 487B(1)(a), (b), (c) and (d), to include references to a possible sponsorship-related offence and a possible contravention of a sponsorship-related provision in addition to the existing references to a possible work-related offence and a possible contravention of a work-related provision.
162. The effect of this amendment is that under section 487B, the Secretary of the Department of Immigration and Border Protection or the Australian Border Force Commissioner may require a person to give information or to produce a document if there is reason to believe that the person has information that is relevant to a possible sponsorship-related offence or a possible contravention of a sponsorship-related provision.

**Item 14 Paragraph 487C(2)(d)**

163. This item amends paragraph 487C(2)(d) in Division 2 of Part 8E of the Act by inserting “or D” after the words “Subdivision C”.
164. The effect of this amendment is that information or a document required to be given by a person under section 487B may be used in criminal proceedings against the person in relation to a sponsorship-related offence under new Subdivision D of Division 12 of Part 2 of the Act, but is not admissible evidence against the person in any other criminal proceedings.
165. The purpose of the investigation powers in Part 8E of the Act is to enable evidence to be collected in relation to suspected sponsorship-related offences and breaches of sponsorship-related civil penalty provisions. In many instances, evidence of asking for, receiving or offering payment in return for the occurrence of a sponsorship-related event will only be held by the people concerned. The powers in Part 8E are therefore necessary to facilitate the collection of evidence, subject to the provisions of Part 8E, to enable the effective enforcement of the sponsorship-related sanctions.

**Item 15 Paragraph 487C(2)(e)**

166. This item amends paragraph 487C(2)(e) in Division 2 of Part 8E of the Act by inserting the words “sponsorship-related provision or a” before the words “work-related provision”.

167. The effect of this amendment is that information or a document required to be given by a person under section 487B may be used in civil proceedings against the person in relation to an alleged contravention of a sponsorship-related provision under new Subdivision D of Division 12 of Part 2 of the Act, but is not admissible evidence against the person in any other civil proceedings.

**Item 16 Subparagraphs 487Z(3)(a)(i) and (ii)**

168. This item repeals subparagraphs 487Z(3)(a)(i) and (ii) in Division 3 of Part 8E of the Act, and substitutes new subparagraphs 487Z(3)(a)(i), (ii), (iii) and (iv). The new subparagraphs include references to sponsorship-related offences and sponsorship-related provisions, in addition to the references to work-related offences and work-related provisions, with the effect that paragraph 487ZC(3)(a) refers to whether:

- a sponsorship-related offence has been committed; or
- a sponsorship-related provision has been contravened; or
- a work-related offence has been committed; or
- a work-related provision has been contravened.

169. Section 487Z deals with power to retain evidence that has been seized by an authorised officer under Division 3 of Part 8E of the Act. Subsection 487Z(3) empowers an issuing officer to order that evidence seized may continue to be retained if the issuing officer is satisfied that retention is necessary for the purposes of investigating a matter specified in paragraph 487ZC(3)(a), that is, whether a sponsorship-related offence has been committed, whether a sponsorship-related provision has been contravened, whether a work-related offence has been committed, or whether a work-related provision has been contravened.

170. “Issuing officer” is defined in section 487A to mean a magistrate, a Judge of the Federal Circuit Court, or a Judge of the Federal Court.

**Item 17 Paragraph 487ZC(4)(a)**

171. This item repeals paragraph 487ZC(4)(a) in Division 3 of Part 8E of the Act, and substitutes a new paragraph 487ZC(4)(a).

172. Section 487ZC provides that an issuing officer may issue a search warrant, under certain circumstances, if the issuing officer is satisfied that there are reasonable grounds for suspecting that there is, or may be within the next 72 hours, evidential material on the premises. New paragraph 487ZC(4)(a) provides that the search warrant must state:

- the sponsorship-related offences or offences; or
- the sponsorship-related provision or provisions; or
- the work-related offence or offences; or
- the work-related provision or provisions;

to which the search warrant relates.

173. The effect of this amendment is to add references to sponsorship-related offences and sponsorship-related provisions in paragraph 487ZC(4)(a), in addition to the references to work-related offences and work-related provisions. This amendment is consequential to the amendments made by items 9 and 10 inserted by this Schedule, which extend the definition of “evidential material” in section 487A in Division 1 of Part 8E of the Act to include material relevant to sponsorship-related offences and sponsorship-related provisions.

**Item 18      Application – subsections 116(1AC) and (1AD) of the *Migration Act 1958***

174. This item provides that new subsections 116(1AC) and (1AD) of the Act, inserted by item 1 of this Schedule, apply in relation to a visa granted before or after commencement if the benefit referred to in subsection 116(1AC) was asked for, received, offered or provided after commencement.
175. New subsections 116(1AC) and (1AD) inserted by item 1 provide for a new discretionary power for the Minister to consider cancellation of a visa where a benefit was asked for, received by, offered or provided by a person, or on behalf of the person, in return for the occurrence of a sponsorship-related event. The new cancellation ground applies whether or not the visa holder held the current visa or any previous visa at the time the benefit was asked for, received, offered or provided; whether or not the sponsorship-related event relates to the current visa or any previous visa that the visa holder held; and whether or not the sponsorship-related event occurred.
176. The new visa cancellation ground applies to visas that may have been granted before commencement of the provision. However, the ‘payment for visas’ conduct must have occurred after commencement of the provision.

## **Attachment A**

### **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

#### **Migration Amendment (Charging for a Migration Outcome) Bill 2015**

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Bill**

The Department of Immigration and Border Protection regularly receives allegations about persons offering or receiving a benefit in return for a sponsorship-related event, to be referred to as ‘payment for visas’ activity. This behaviour undermines Australia’s migration programme integrity, however is not currently unlawful. The need for legislative change to address ‘payment for visas’ activity was identified in the Independent Review into Integrity in the Subclass 457 Programme in recommendation 10.7 that ‘*it be made unlawful for a sponsor to be paid by visa applicants for a migration outcome, and that this be reinforced by a robust penalty and conviction framework*’. The Bill implements this recommendation and expands the application beyond the 457 visa programme to other temporary and permanent work visas.

The key measures in the Bill include:

- the introduction of a criminal and civil offence for a person to ask for or receive a benefit in relation to a sponsorship-related event;
- the introduction of a civil penalty framework where a benefit was offered or provided by or on behalf of the visa holder in return for a sponsorship-related event; and
- the introduction of criminal and civil liability for executive officers of a body corporate;
- the introduction of a new discretionary visa cancellation ground to allow cancellation of a temporary or permanent visa where a visa holder has asked for, received, offered or provided a benefit in return for the occurrence of a sponsorship-related event; and
- the cancellation of a sponsored visa may occur regardless of whether or not the visa holder held the current visa or any previous visa at the time the benefit was asked for, received, offered or provided and whether or not the sponsorship-related event relates to the current visa or any previous visa that the visa holder held and whether or not the sponsorship-related event occurred.

#### **Human rights implications**

The proposed Bill has been assessed against the seven core international human rights treaties and it positively engages the right to work as per Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and Article 8 of the International Covenant on Civil and Political Rights (ICCPR).

Articles 6.1 and 6.2 of the ICESCR provide that:

*“1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*”

*2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”*

Australia owes a ‘right to work’ under Article 6.1 to Australians and certain visa holders who have been granted permission to work, and correspondingly the obligations under Article 6.2 are engaged. Ensuring that temporary sponsored work visas and permanent employer nomination or skilled visas, being visas to which this Bill is intended to apply, are used in a justified and reasonable way in line with their policy intent is an effective mechanism to comply with this obligation.

Article 7 of the ICESCR provides that:

*“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:*

*(a) Remuneration which provides all workers, as a minimum, with:*

- (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;*
- (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant... ”*

Furthermore, Article 8 of the ICCPR provides that:

- “1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.*
- 2. No one shall be held in servitude.*
- 3.(a) No one shall be required to perform forced or compulsory labour; ... ”*

Two independent reports undertaken for the Government have highlighted the activities of some employers who seek to take advantage of the fact that a person is an unlawful non-citizen or a lawful non-citizen who holds a visa which is subject to a condition restricting or prohibiting their work rights in Australia to exploit the worker under the threat of bringing the individual to the attention of the Department (resulting in cancellation of their visa for breach of a work-related visa condition, detention and removal from Australia).<sup>1</sup>

The introduction of penalties for asking for or receiving a benefit for a sponsorship-related event positively engages these Articles because the Bill reduces the risk that a person will accept payment to sponsor or nominate a person for a visa. Persons who have paid for sponsorship or nomination may be more vulnerable to exploitation and extortion such as unfavourable/unsafe/unhealthy working conditions, unfair pay, slavery/servitude/forced labour due to the risk of having their visa cancelled if their employment ceases.

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<sup>1</sup> See Howells 2010 *Review of the Migration Amendment (Employer Sanctions) Act 2007* and Knight *Review of the Student Visa Program*. Available at [www.border.gov.au](http://www.border.gov.au).

To the extent that the proposed amendments seek to provide a disincentive for employers to exploit and keep non-citizens in conditions of slavery and forced labour, they are consistent with Article 7 of the ICESCR and Articles 8(1), 8(2) and 8(3)(a) of the ICCPR.

The proposed Bill also engages Article 14 of the ICCPR. Proposed subsection 245AR(5) sets out a civil penalty where a person contravenes subsection 245AR(1) (which is contravened by a person who asks for, or receives, a benefit from another person in return for the occurrence of a sponsorship-related event). Similarly proposed subsection 245AS(1) sets out a civil penalty where a person offers to provide or provides a benefit to another person for the occurrence of a sponsorship-related event. Whilst these may be regarded as civil penalties under Australian domestic law, they may also be considered 'criminal' for the purposes of assessing the human rights implications of this Bill.

This is because these penalties seek to deter behaviours, the penalties applied can be considered serious and the penalty applies to the public in general rather than being restricted to people in a specific regulatory or disciplinary context.

Article 14 of the ICCPR provides that:

*1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*

*2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*

*3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*

*(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;*

*(c) To be tried without undue delay;*

*(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*

*(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*

*(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;*

*(g) Not to be compelled to testify against himself or to confess guilt.*

*4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.*

*5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*

*6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.*

*7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”*

#### *Strict Liability*

The Proposed Bill engages the protection under Article 14(2) of the ICCPR which provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The proposed sections 245AR(5) and 245AS(1), create civil penalties in the proposed Bill which will be strict liability penalties due to the operation of section 486ZF of the Migration Act, that is it will not be necessary to prove for these penalties:

- (a) the person’s intention; or
- (b) the person’s knowledge; or
- (c) the person’s recklessness; or
- (d) the person’s negligence; or
- (e) any other state of mind of the person.

The imposition of these strict liability penalties does limit the presumption of innocence, however these penalties are reasonable, necessary and proportionate to the legitimate objective of preventing and deterring the practice of “payment for visas” which has a number of detrimental outcomes including undermining the integrity and distorting the function and operation of Australia’s migration programme, and the exploitation vulnerable people. It is necessary to introduce these penalties as there is currently no clear or direct avenue for addressing “payment for visas” through the legal system and these provisions create in the

direct legal consequences for engaging in this behaviour. Given the serious, detrimental effects that can occur from the practice of “payment for visas”, including:

- making vulnerable non-citizens liable to exploitation;
- reducing employment opportunities in Australia for permanent residents;
- negative repercussions for Australian wages and conditions;
- the potential for persons who receive payment in return for sponsorship to inappropriately make significant financial gains; and
- adversely affecting the integrity of Australia’s migration programme,

a strong response is required to ensure that this practice does not continue. Additionally, the Department’s investigations into this practice often reveal elaborate fraud which would more appropriately merit criminal prosecution. As such to the extent that the proposed Bill creates strict liability penalties, these can be considered consistent with the protection set out in Article 14(2) of the ICCPR.

#### *Placing the evidentiary burden on the defendant*

Article 14(2) is further engaged because proposed subsection 245AR(6) and subsection 245AS(4) place the evidentiary burden on the defendant in relation to proving that ‘the benefit’ is a payment of a reasonable amount for a professional service. The placement of the evidentiary burden on defendants is justifiable in that these proposed subsections act as a defence to the contravention of subsection 245AR(1) and 245AS(1) in the civil penalty context and as such it is appropriate for the defendant to prove the defence is available to them, just as they must in a criminal proceeding and is the standard default position under s13.3(3) of the Criminal Code. Further, information proving this matter would be uniquely within the knowledge of the defendant.

In most cases, professional services would not constitute conduct of the kind described in subsection 245AR(1) because the benefit would not be received “in return for the occurrence of a sponsorship-related event”. This defence has been included as a safety net to cover unusual circumstances that might arise in the course of work legitimately undertaken by migration agents or recruitment agents that might inadvertently constitute conduct of the kind described in subsection 245AR(1).

As such, in as far as these provisions place the evidentiary burden on the defendant they are a necessary, reasonable and proportionate limitation on the protection in Article 14(2) of the ICCPR.

#### *Civil Standard of proof*

Finally, Article 14(2) of the ICCPR is engaged because the civil penalty provisions may be considered ‘criminal’ in nature and yet still apply the lower civil standard of proof, that is, requiring proof on the balance of probabilities which may allow for reasonable doubt.

The civil penalties sought to be introduced by this proposed Bill may be considered as serious. This is in order to appropriately address the severity of the consequences for the practice of ‘payment for visas’. A strong civil penalty is required to ensure that persons who provide or offer to provide a benefit in relation to the occurrence of a sponsorship related event face a penalty that is proportionate to the behaviour which undermines the integrity of Australia’s migration programme. It is appropriate that people who have knowingly engaged in the practice of “payment for visas” face significant penalties in the line with the level of benefit that has changed hands in order to secure a migration outcome.

Whilst a strong response to the practice of ‘payment for visas’ is clear, it should also be noted that criminal sanctions alone are not necessarily as effective as by implementing enforceable graduated responses which can include employer education and awareness and can escalate to administrative warnings and to courts through the non-fault based civil penalties scheme and the criminal penalties available to address the most serious cases (as discussed in Howells 2010 Review of the Migration Amendment (Employer Sanctions) Act 2007). In this proposed Bill the use of civil and criminal penalties allows for offences and civil penalties allows an enforceable graduated response to the practice of “payment for visas” allowing flexibility to discern whether a civil penalty which does not attract the same consequences as a criminal penalty (i.e. a conviction) is more appropriate in a case than using the criminal offence. For example a first-time offender may only merit a civil penalty; however, person who has repeatedly engaged in this behaviour may more appropriately attract the consequences of a criminal offence. Further, civil penalties can have a remedial impact on some types of behaviour. As such, whilst a strong response is needed to deter the practice of “payment for visas” there needs to be a penalty that carries lesser consequences than a criminal offence and requiring a lesser standard of proof consistent with a graduated response. It should also be noted that due to proposed sections 245AR(6) and subsection 245AS(4), the defendant will also have the benefit of a lower standard of proof in terms of the defence that the benefit was a payment of a reasonable amount for a professional service.

As such, in as far as these provisions place a lower standard of proof on penalties that may be considered ‘criminal’ in nature for the purposes of assessing the human rights implications of the Bill, they are a necessary, reasonable and proportionate limitation on the protection in Article 14(2) of the ICCPR.

*The right not to be compelled to testify against oneself or to confess guilt*

The proposed Bill engages the protection from self-incrimination. Article 14(3)(g) of the ICCPR provides that in relation to a criminal charge, a person is not to be compelled to testify against himself or to confess guilt. In Australia, the privilege against self-incrimination has long been recognised by the common law and applies unless expressly abrogated by statute. As part of that privilege, an accused may choose not to give evidence at trial, and no adverse inference is to be taken from the accused’s refusal.

The proposed Bill seeks to amend section 487C(2)(d) in Division 2 of Part 8E of the Act by inserting “or D” after the words “Subdivision C”. The effect of this amendment is that information or a document required to be given by a person under section 487B may be used in criminal proceedings against the person in relation to a sponsorship-related offence under new Subdivision D of Division 12 of Part 2 of the Act, but is not admissible evidence against the person in any other criminal proceedings.

Similarly, the proposed Bill also seeks to amend paragraph 487C(2)(e) in Division 2 of Part 8E of the Act by inserting the words “sponsorship-related provision or a” before the words “work-related provision”. The effect of this amendment is that information or a document required to be given by a person under section 487B may be used in civil proceedings against the person in relation to an alleged contravention of a sponsorship-related provision under new Subdivision D of Division 12 of Part 2 of the Act, but is not admissible evidence against the person in any other civil proceedings.

The purpose of the investigations powers in the proposed Bill is to enable the Department to identify and gather evidence in relation to ‘payment for visas’ conduct. The only persons

who possess critical information and documents relevant to “payment for visas” conduct are the individual who offers/provides a benefit, or who receives/requests a benefit, or a third party (where involved). Allowing information obtained from such persons, to be admissible in evidence in “payment for visas” civil penalty proceedings will enable the Department to effectively enforce this sanction.

This approach is a departure from standard practice in relation to handling of self-incrimination, however is similar to provisions already in place for work-related civil penalty proceedings. The privilege against self-incrimination is only being removed in relation to proceedings for the criminal and civil penalties for an alleged contravention of a ‘payment for visas’ matter and the protection will still remain in relation to all other civil penalty and criminal proceedings. To the extent that the relevant provisions in the proposed Bill do not permit documents or information collected under sections 487C to be used in other civil penalty and criminal proceedings (ie those that do not involve a sponsorship-related offence or sponsorship-related provision), this is consistent with Australia’s obligations under Article 14(3)(g) of the ICCPR.

The Bill is consistent with Articles 6 and 7 of the ICESCR, and Article 8 and 14 of the ICCPR.

### **Conclusion**

This Bill is compatible with human rights because it protects the rights of non-citizen workers.

**Senator the Hon. Michaelia Cash, Assistant Minister for Immigration and Border Protection**