



## Implementation of the Migration Legislation Amendment (Worker Protection) Act 2008 and associated regulations

### 'ADVERSE INFORMATION'

September 2009

### Background

The overall package of Worker Protection reforms are intended to address many of the integrity issues associated with the Subclass 457 visa program highlighted by the business-led External Reference Group, the Subclass 457 Integrity Review conducted by Ms Barbara Deegan, and by the Skilled Migration Consultative Panel.

One of the ways in which the reforms deal with integrity issues is by establishing a scheme whereby the conduct of an approved sponsor, or would-be sponsor, that is relevant to the person or business's suitability as a sponsor can be taken into account by the department when it is making decisions about the sponsorship. The legislation supports this by defining the 'adverse information' that can be taken into account.

The department may take into account the existence of 'adverse information' whenever it is making particular decisions about sponsors. This includes while the person or business is an applicant for approval as a sponsor, and after the person or business has already been approved as a sponsor and is seeking vary the term of their approval, or to nominate an overseas worker to fill a nominated occupation, or when the nominated person is applying for a Subclass 457 visa.

Adverse information about a person or business who is an approved sponsor may also become known to the department during the monitoring process or as a result of information sharing with other government agencies, such as the Australian Taxation Office. Depending on the circumstances and the nature of the adverse information, the existence of the adverse information may result in refusal of the application in question, and/or administrative sanctions against the person and business if they are already an approved sponsor.

### How is 'adverse information' relevant to the assessment of sponsorship, variation of sponsorship, nomination and visa applications?

Whilst sponsorship, variation of sponsorship, nomination, and visa applications under the Subclass 457 visa program all have their own distinct criteria for approval, they have one criterion in common. That is, there must be no adverse information known about the sponsor (or would-be sponsor) or a person associated with the sponsor (or would-be sponsor), unless it is reasonable to disregard the adverse information.

## So what does 'adverse information' actually mean?

The Migration Regulations 1994 describe 'adverse information' as meaning any adverse information relevant to a person's suitability as an approved sponsor.

It includes information that the person, or a person associated with the person:

- (i) has been found guilty by a court of an offence under a Commonwealth, State or Territory law; or
- (ii) has, to the satisfaction of a competent authority, acted in contravention of a Commonwealth, State or Territory law; or
- (iii) has been the subject of administrative action (including being issued with a warning), by a competent authority, for a possible contravention of a Commonwealth, State or Territory law; or
- (iv) is under investigation, subject to disciplinary action or subject to legal proceedings in relation to an alleged contravention of a Commonwealth, State or Territory law; or
- (v) has become insolvent within the meaning of subsections 5(2) and (3) of the Bankruptcy Act 1966 and section 95A of the Corporations Act 2001.

However there are limits to the extent of adverse information that is relevant to the person or business's suitability as an approved sponsor. For example, the Commonwealth, State or Territory law mentioned in (i) to (iv) must relate to one or more of the following matters:

- discrimination;
- immigration;
- industrial relations;
- occupational health and safety;
- people smuggling and related offences;
- slavery, sexual servitude and deceptive recruiting;
- taxation;
- terrorism; or
- trafficking in persons and debt bondage.

In addition the conviction, finding of non-compliance, administrative action, investigation, legal proceedings or insolvency must have occurred within the previous three years.

Finally, it remains possible for a decision-maker to disregard adverse information where it is reasonable to do so.

## What does this mean in practice?

First, there is no legal requirement for a prospective sponsor or an approved sponsor to provide 'adverse information' to the department. There is nothing to prevent a prospective or approved sponsor from providing this information if they choose, but they are not required to by law.

Sponsors may wish to provide the department with any adverse information relating to their suitability to sponsor overseas workers. The decision-maker will exercise judgement in determining whether circumstances exist in which it may be reasonable to disregard the adverse information. Factors which may be taken account in deciding whether it is reasonable

to disregard the information may include the nature of the adverse information, and how the adverse information came to the department's attention.

Second, for adverse information to become a relevant consideration, it must be 'known' to the department. The practical effect of this is that a decision-maker does not need to positively satisfy him or herself that no adverse information exists, other than by reviewing the department's own records.

In most circumstances the decision-maker will not be searching outside of departmental records or contacting other government agencies to see whether there is adverse information available about the prospective or approved sponsor, or a person associated with the prospective or approved sponsor. Some exceptions to this might be where allegations have been made to the department, or where particular events have received media coverage which suggests that adverse information may exist.

However prospective and approved sponsors should also be aware that the department has arrangements in place that would facilitate the exchange of information with other government agencies, and that this exchange of information may result in adverse information being known to the department for the purposes of assessing a sponsorship, nomination or visa application, or for the purposes of monitoring an approved sponsor's compliance with sponsorship obligations.

Third, the legislative scheme provides a fairly clear relevance test. Convictions or finding of non-compliance for matters completely unrelated to the prospective or approved sponsor's suitability as an approved sponsor will not be taken into account.

For example information that a company has received a fine for having an unregistered vehicle on a public road is most unlikely to meet the relevance test. On the other hand information that the managing director of a company was being investigated for people trafficking offences would clearly be relevant.

Finally, the legislation provides that the adverse information must be about matters that are reasonably current – the conviction, adverse finding etc must not be more than three years old.

In summary, for adverse information to be taken into account it must be:

- known to the department,
- clearly relevant to the suitability of the business or person as an approved sponsor, and
- current.

#### ***Disclaimer***

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