FRAGOMEN

Teresa Liu
Managing Partner

Fragomen (Australia) Pty Ltd.
Level 7
179 Elizabeth Street
Sydney, NSW 2000, Australia

O + 61 2 8224 8555
F + 61 2 8224 8500
sydneyinfo@fragomen.com

www.fragomen.com

21 July 2023

By electronic upload

Submission: Migration Amendment (Strengthening Employer Compliance) Bill 2023 [Provisions]

Thank you for the opportunity to provide submissions on the *Migration Amendment (Strengthening Employer Compliance) Bill 2023* ("the 2023 Bill").

We are pleased to provide this submission.

Yours sincerely

Teresa Liu

Managing Partner- Australia and New Zealand
Solicitor

1. ABOUT FRAGOMEN

Fragomen is one of the world's leading global immigration law firms, providing comprehensive immigration solutions to our clients. Operating from over 50 offices in 29 countries (with capabilities in more than 170 countries), Fragomen provides services in the preparation and processing of applications for visas, work, and resident permits worldwide and delivers strategic advice to clients on immigration policy and compliance.

In Australia, Fragomen is the largest immigration law firm with over 130 professionals and support staff nationally, including Accredited Specialists in Immigration Law, legal practitioners, Migration Agents, and other immigration professionals. With offices in Brisbane, Melbourne, Perth, and Sydney, Fragomen assists clients with a broad range of Australian immigration services from corporate visa assistance, immigration legal advice, audit and compliance services, litigation and individual migration and citizenship applications.

Further information about Fragomen, both in Australia and globally, is available at: www.fragomen.com

2. SUMMARY OF POSITION

Fragomen continues to support the Australian Government's initiatives to strengthen employer's compliance to prevent the exploitation of migrant workers and penalise employers who continuously breach and contravene these laws. Fragomen has previously made submissions to the Department of Home Affairs ("the Department") with regards to the 2021 amending bill, *Migration Amendment (Protecting Migrant Workers) Bill 2021* ("the 2021 Bill").

In line with our previous submissions, we have made comments against each part of the 2023 Bill, addressing select items within each Part.

We have also concluded with further considerations to be made by the Department as part of this consultation.

Part	Summary of Amendments	Fragomen's Comments
Part 1 – New employer sanctions	• Introduction of criminal offences and related civil penalty provisions to penalise employers who coerce, or exert undue influence or pressure, onto a non-citizen to accept or agree to a work arrangement. • Unlike the 2021 Bill, the 2023 Bill (in section 245AAB(1)(d)) directly links the unlawful non-citizen's belief about the adverse effect on their continued presence in Australia resulting in the unlawful work to the coercion / undue influence / pressure exerted by the employer.	Fragomen notes that similar provisions were introduced in the 2021 Bill. Key differences include more description outlining the physical elements of the offence and the distinction between lawful and unlawful non-citizens. As noted in our previous submissions, Fragomen supports the strengthening of existing protections in the Migration Act for non-citizens working in Australia, particularly against employers who are found to be coercive or exerting undue influence or pressure on non-citizen employees. The 2023 Bill clarifies that the non-citizen employee's belief that they must accept or agree to the arrangement to work despite breaching work conditions on their visa or unlawful status in Australia must be linked directly to the coercion / undue influence / pressure exerted by the employer. By doing so, this removes the concern that employers who inadvertently contravene the section by making changes in relation to work conditions to ensure compliance are not punished unfairly. Fragomen also supports the alignment of the definitions of coercion, undue influence, and undue pressure with the interpretations under the general law. This ensures that the interpretation of coercion and undue influence/pressure under the Migration Act is mirrored with principles in the Fair Work Act and general case law and avoids further confusion.

Part 2 – Prohibited employers	• Establishment of a new framework to prohibit certain employers from allowing certain non-citizens to begin work for a specified period with associated offence and civil penalty provisions for non-compliance. • Introduction of a new mechanism that enlivens the Minister's power to make a 'prohibited employer' declaration where a court has found the employer to have contravened certain provisions under the Migration Act, the Criminal Code and the Fair Work Act. • Before the Minister declares an employer to be 'prohibited', the employer will have 28 days to respond by written submission. • A person is subject to a 'migrant worker sanction' under the Fair Work provisions if the contravention related, wholly or partly, to an employee, prospective employee or former employee, who, at the time of contravention, was a non-citizen (other than the holder of a permanent visa). • It is an offence for employers to allow additional non-citizens to begin work while their 'prohibited employer' status is in effect. The offence further expands the prohibition to a person who has a material	Fragomen is supportive of these measures, particularly the addition of convictions under the Criminal Code and Fair Work Act to enable the Minister to make a prohibited employer declaration. We understand that the Minister has the ability to declare an employer to be prohibited within five (5) years from being subject to a migrant worker sanction. It is our view that this 5-year period is quite a lengthy period, during which employers will not know if and/or when they will be declared a prohibited employer. In addition, we would like to seek clarity on the specified period in which the Department can declare an employer as prohibited, particularly for sponsored employers. Under section 140M(2), a sponsored employer can be barred from making future applications for approval as a work sponsor for a "specified period" of time. The period is not defined in either Regulations or Policy. Fragomen is of the view that the "prohibited employer" declaration period and the period which the sponsor is barred should be aligned. For example, if a sponsored employer is barred from sponsorship for a period of two (2) years, then they should be declared a "prohibited employer" for a period that does not exceed the period of the bar. Furthermore, Fragomen recommends that the Department removes the information of employers from the Department's public website within 28 days

	role in a decision made by a body corporate to allow a non-citizen to work. • Mandatory publication of certain information about 'prohibited employers' on the Department's website. However, the published information must not contain personal information about any individual, other than prohibited employer. • Upon the expiration of an employer's 'prohibited employer' status, the employer will be subject to additional reporting obligations for a period of 12 months starting on the day after the prohibition period ends.	from the employer's prohibited status ceasing. Please refer to section 4 below for further information.
Part 3 – Aligning and increasing penalties for work-related breaches	• Introduction of higher penalty units for work sponsors who fail to satisfy a sponsorship obligation under the Sponsorship Obligations Framework in the Migration Act and Regulations. • Increase of work-related civil penalty provisions for breaching sponsorship obligations from 60 to 240 penalty units for both individuals and approved work sponsors.	Fragomen supports the increased pecuniary penalty for work-related breaches on the basis that these are intended to deter non-compliance of both the sponsorship obligations and the employer sanctions provisions as set out in the Migration Act. The increased penalty for sponsors is also proportionate to the seriousness of failing to meet sponsorship obligations as an approved work sponsor.
Part 4 – Enforceable undertakings for work-related breaches	• Establishment of arrangements for the Minister or delegate to enter enforceable undertaking(s) with employers in relation to work-related offences and work-related provisions of the Migration Act.	Fragomen supports enforceable undertaking arrangements for work-related breaches as a tool to address non-compliance by encouraging cooperative and collaborative compliance, and as an alternative to court proceedings. This provides willing employers the

		opportunity to address identified issues and work towards improving internal processes and correcting future behaviour to prevent further instances of non-compliance and contravention.
Part 5 – Compliance notices for work-related breaches	• Establishment of powers and framework in the Migration Act to allow an authorised officer to issue compliance notices for conduct constituting a work-related offence or contraventions of work-related provisions of the Migration Act. • A person who complies with a compliance notice is not taken to have admitted to the contravention in relation to which the notice is given. • Where a person has complied with a compliance notice, the Department cannot commence court proceedings against that person for the contravention(s) that are the subject of the compliance notice. In addition, where an employer has already agreed to an undertaking, or where an undertaking is on foot, a compliance notice cannot be issued.	Fragomen supports the introduction of compliance notices as an added compliance tool to manage work-related contraventions as an alternative to court proceedings. This non-punitive process will encourage greater compliance among employers and allow them to collaboratively work with the Department to address alleged offence(s) and contravention(s). Please refer to **section 3** for further details.
Part 6 – Other amendments	• Establishment of considerations required to be made by the Minister in deciding whether to cancel a visa by referring to the Regulations. • Removal of sections 235 and 245AA(4) of the Act, which punished visa holders for	Fragomen supports the removal of unnecessary punishment on the visa holder for forced breaches of their work conditions as well as addition of further considerations for the Minister before cancelling a visa based on these contraventions. However, we are concerned about the lack of incentives for employees

	contravening work conditions attached to their visa by imposing a strict liability offence for any contraventions. • Ensuring the application of relevant workplace laws for all non-citizens regardless of lawful status.	to report their employers. Please refer to **section 5** of this submission. Fragomen also supports the application of other relevant laws, especially workplace relations laws, regardless of the non-citizen's visa status.

3. PART 5: COMPLIANCE NOTICES FOR WORK-RELATED BREACHES

We recognise that Part 5 of the 2023 Bill includes the addition of section 140RB which allows an authorised officer to give a person a compliance notice. The compliance notice outlined in section 140RB is an appropriate alternative to immediate sanctioning or barring of employers, particularly if the breach was unintentional and only recently drawn to the employer's attention. Whilst we support increased penalties against non-complying employers, Fragomen is of the view that compliance notices are a proportional response to the discovery of a breach and should be the first action taken by the Department.

Where a compliance notice has been issued erroneously and the employer can prove that no breach has occurred, Fragomen is supportive of the addition of a provision which allows the withdrawal of the compliance notice.

4. PART 2: PROHIBITED EMPLOYERS

Fragomen welcomes the Department's proposal to publish certain information about prohibited employers on the Department's website. However, as raised in previous submissions relating to the 2021 Bill, we are concerned that employers may be subject to further penalties after being declared as prohibited within 5 years of being subject to migrant worker sanctions.

Section 245AYM(5) of the 2023 Bills states that the Minister is not required to remove the published information about the prohibited employer from the Department's website, even if the specified period of prohibition has ceased. We note that the information to be published includes the effecting period of the declaration. However, the mere fact that an employer's information is published stating that they are a "prohibited employer" for being subject to a migrant worker sanction is further unnecessary punishment on the employer. Given that once the "prohibited employer" is no longer prohibited, they are no longer subject to migrant worker sanctions. As such, this information should be removed from the website within a reasonable time.

As outlined in our previous submissions, Fragomen submits that there should be an inclusion of a timeframe of no more than 28 days for the Department to remove the published information of employers that cease to be prohibited employers from the Department's website. We note that the 12-month post-prohibition reporting obligations as outlined in section 245AYN is sufficient to ensure ongoing compliance by employers and deter them from additional contraventions in the future.

5. WHISTLE-BLOWER PROVISIONS

The 2019 Australian Government report on migrant worker exploitation detailed the complex nature of migrant worker exploitation in workplaces across Australia[1]. Reasons for non-reporting and silence are multi-faceted and varied, including

[1] Commonwealth of Australia, *Report of the Migrant Workers' Taskforce*, March 2019, page 13.

migrants' fears that if they come forward, they will lose their jobs, put their visa at risk, jeopardise a future visa, or risk possible detention or removal from Australia[2].

We support the repeal of section 235 in the 2023 Bill, which punished visa holders for contravening work conditions attached to their visa. Whilst Fragomen agrees with the Government's action to strengthen the legislative framework in the Migration Act to improve employer compliance and protect temporary migrant workers from exploitation, we are of the view that the Bill requires additional sections that are designed to assist and protect migrants who come forward and report exploitation i.e., "whistle-blower provisions".

In its current form, the 2023 Bill does not have measures that protect or incentivise workers who wish to report migrant worker exploitation, nor does it present a pathway or alternative visa option(s) for these workers to be able to leave exploitative employers. Instead, employees will likely be punished by being placed "in limbo" for reporting their employers.

Additionally, the 2023 Bill places the onus on the employee to undergo the onerous process of reporting their exploitative employer to other bodies such as the Fair Work Ombudsman ("FWO") before the employer is found liable for contravening these new relevant laws. For example, section 245AYG of the 2023 Bill states that an employer could be subject to a migrant worker sanction if a civil penalty order is made against the employer. Whilst Fragomen acknowledges that it is critical for employers not to be casually accused of migrant worker exploitation, there is a concern that the fact that an employee must obtain a further order for the employer to be sanctioned could discourage employees from reporting.

As outlined in Part 6 of the 2023 Bill, section 116(1A) will require the Minister to consider more factors to be outlined in the Regulations before making the decision to cancel a person's visa based on non-compliance to work conditions. The Explanatory Memorandum states that this amendment will allow measures such as the "Assurance Protocol" between the Department and the FWO to be codified in the regulations.

Under the Assurance Protocol, the Department have committed not to cancel a migrant's visa even if they have breached work-related visa conditions because of workplace exploitation so long as they have sought advice or support from the FWO, have no other reason for their visa to be cancelled (e.g. national security, character, health or fraud reasons), and have committed to complying with visa conditions in the future. However, since its inception in 2017, this initiative has been largely ineffective having been used by 76 migrant workers in the last 5 years[3].

It is worth noting that the Assurance Protocol is, at present, not enshrined in either law or policy, which has prevented both lawyers and migration agents from being aware of the initiative's existence in the first place. Further, this Assurance Protocol relies on the vulnerable employee to initiate proceedings with the FWO to determine the future of their own visa status as well as to have their exploitative employer sanctioned.

[2] Ibid.
[3] Migrant Justice Institute, *Breaking the Silence – A proposal for whistleblower protections to enable migrant workers to address exploitation,* page 5.

Without information about employer non-compliance, government regulators and Federal and State authorities are not able to bring action against these unscrupulous employers, as they heavily rely upon self-reporting to obtain intelligence and identify cases of migrant exploitation. As such, until mechanisms are put in place to protect migrant workers who come forward with workplace complaints, we are of the view that the issue of non-reporting will continue to remain.

Under the current migration settings, there is no visa available to workers who wish to make a complaint against their employer. Fragomen welcomes the Government's commitment to co-design a "Workplace Justice Visa" with the Department, as well as provide a permissible increase of the current 60-day period, under the Condition 8607 of the Temporary Skills Shortage (subclass 482) visa, during which employees are required to seek another employer or apply for another visa, to 6 months. These concessions need to be balanced against sponsorship obligations to provide certainty for sponsored employers. Fragomen suggests that in such situations, certain obligations, such as the obligation to provide information to the Department when certain events occur, should cease from the date that employment ends. Other obligations such as paying for travel costs if requested and keeping records should remain.

These initiatives would encourage a greater number of migrant workers to speak up, report exploitation, and escape ongoing exploitation without fear of visa cancellation. More importantly, it will allow the Government to identify and hold to account employers who are engaged in conduct that is excessive, unfair, or exploitative, which in turn will change employer behaviour in the fear that their exploitative practices will come to light.

Fragomen supports the need for strong, express protections against future visa cancellations and adverse consequences on employees who are being exploited by their employers before enacting a Bill that will sanction non-compliant employers. We are of the view that without these protections, the full intention and goal of the 2023 Bill will not be realised as exploitative employers will not likely be sanctioned as employees are not incentivised to report without an alternative visa product available to them, like the Workplace Justice Visa.