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Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600
By email: legcon.sen@aph.gov.au

Dear Sir/Madam

Migration Amendment (Visa Capping) Bill 2010

Fragomen is an incorporated legal practice that practices exclusively in immigration law. With a focus on corporate migration, it also has a substantial private client practice and provides advice and assistance on all aspects of migration law. Fragomen has offices in Sydney, Melbourne, Brisbane, Canberra and Perth.

Fragomen acknowledges the need for the Commonwealth to establish effective mechanisms for the control of the migration program, and in particular the need to regulate the number of visas issued in a particular program year. However, we are concerned that the bill, if enacted into law in its current form, grants the executive considerable power to dispose of valid visa applications without any parliamentary oversight.

The bill creates a framework so that an otherwise valid visa application is taken never to have been made if an applicant's characteristics fall within a class specified by the Minister in a legislative instrument. Legislative instruments made under the Migration Act 1958 are not disallowable instruments for the purpose of the Legislative Instruments Act 2003 (s44) and therefore the class or classes specified are not then subject to any parliamentary scrutiny.

The explanatory memorandum indicates (at paragraph 30) that the characteristics "may include, but are not limited" to particular occupations. The Minister would have the unfettered power to specify other characteristics, such as age, nationality, ethnicity, English language ability or gender in respect of all visas other than protection visas. It could arguably be used in respect of an individual applicant. In our view the bill as it is currently drafted gives the Minister excessive executive power.

Given that the bill has been drafted in response to an imbalance in the general skilled migration program, we would recommend that the power be limited to specifying occupational categories.

Significantly, section 39 of the Migration Act (the current cap and cease power), is only applicable to visa classes where it is a criterion that the grant of a visa to an applicant would not exceed the cap (see for example Migration Regulations Schedule 2, subclass 200 Refugee Visa cl 200.225). Currently this is a criterion for the grant of visas in the offshore humanitarian, general skilled migration and working holiday visa programs. It is not a criterion for the grant of family, business or temporary or permanent visas based on sponsorship by an employer.

Although Parliament has no say in the exercise of the cap and cease power in relation to those visa subclasses that have this criterion, it does have the power to review and disallow regulations which may attempt to include such a criterion in other visa subclasses, for example partners or parents. In this way, Parliament is able review the appropriateness of the use of the power for particular components of Australia's migration program.

The Migration Act contains a cap and queue power in sections 86 and 87. Applications made by partners or dependent children of Australian citizens or permanent residents are specifically excluded from the exercise of this power. Significantly, the power contained in clause 91AA is not so limited. This has the absurd effect of giving the Minister the power to cap and cease visa applications for these applicants, but not to cap and queue. Using the cap and cease power to dispose of visa applications where there is a close personal or family relationship, would in our view, be inappropriate.

We consider that it would be equally inappropriate to use the power for those visa categories where an employer supports the application, either through formal sponsorship or nomination (for example the existing 457 visa program, employer nomination and regional sponsored migration schemes). The need of a business for an overseas employee is driven by a wide range of factors either particular to that business or more broadly, the Australian labour market. The use of a cap and cease power with respect to these visa categories has the potential to adversely affect Australian business and the Australian economy.

For these reasons, the Bill should be amended such that the Minister cannot cap and cease those visa classes where it is a criterion for the grant that there is a sponsor or nominator.

The management of Australia's program is currently governed by legislation underpinned by fundamental administrative law principles such as fairness, transparency and (with some exceptions) the right to seek merits review of a decision. With limited exceptions there is an entitlement to a visa provided that the criteria specified for that visa are met (see Migration Act s65). These criteria are subject to Parliamentary oversight. With competent advice, a visa applicant is able to have reasonable certainty as to the outcome of an application.

The creation of a system whereby the Minister can, at any time dispose of a number of visa applications based on specified characteristics determined after an application has been lodged, undermines these fundamental principles and creates excessive and unnecessary uncertainty in the migration program.

We would submit that a change of such significance should be preceded by informed and considered public debate, not just about migration policy but also about the legal framework that is the most appropriate mechanism for delivering desired policy outcomes.

We thank the Committee for the opportunity to provide our views on the Bill. If you would like to discuss this matter further, please feel free to contact us directly, either Teresa Liu on telephone ..... or via email at or Jane Goddard on telephone ..... or via email at .

Yours faithfully

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