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FRAGOMEN
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Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600 By email: legcon.sen@aph.gov.au
Australia

Dear Sir/Madam

Fragomen thanks the Committee for the opportunity to make a submission in relation to the *Migration Legislation Amendment (Worker Protection) Bill 2008* ("the Bill").

By way of background, Fragomen is Australia's largest immigration law firm. We represent a large number of Australian and multi-national employers who employ people on subclass 457 visas both as a result of their assignment of overseas employees to their Australian operations and as a result of recruitment of individuals from overseas to fill skill shortages. These businesses range from large users of the subclass 457 visa program to those with minimal requirement for people holding this visa. Fragomen employs around 80 registered migration agents, many of whom are also legal practitioners and has offices in Sydney, Melbourne, Brisbane, Canberra and Perth. We are part of the Fragomen Global organisation, which is the world's largest provider of immigration and visa advice to corporate clients with over 30 offices and in excess of 1500 employees globally.

Fragomen is concerned to ensure that the subclass 457 visa program is fair and equitable for both its employer and employee clients. Fragomen supports measures that will improve the integrity

of the subclass 457 visa program, including the imposition of penalties on employers who exploit their foreign employees by intentionally breaching their obligations towards them and changes to make it easier for the recovery of amounts required to be paid under those obligations. However Fragomen is respectfully concerned that the Bill in its current form is likely to operate unfairly and that significant parts of the Bill have not been drafted with sufficient clarity and should be reviewed.

These concerns are outlined below.

The civil penalty provisions

The Bill seeks to create a number of civil penalty provisions in the *Migration Act 1958*.

- Section 140Q (1) creates civil penalties for a person (individual or corporate) who contravenes a sponsorship obligation in the prescribed manner or with the prescribed period.
- Section 140(2) extends this penalty provision to contraventions of obligations specified in work agreements.
- Section 140ZC extends the civil penalty provision to partners in a partnership (even after the partnership ceases to exist[1]).
- Section 140ZF extends the civil penalty provisions to the members of the committee of management of an unincorporated association (even after the unincorporated association ceases to exist[2]).
- Section 486S created a civil penalty for any person who aids, abets, counsels, procures, induces a contravention of a civil penalty or conspires to contravene a civil penalty.

Section 140Q provides for a maximum penalty of $6600 for an individual or $33,000 for a corporation for *each contravention* of a civil penalty. There is no upper limit to the total penalty that can be imposed for multiple breaches.[3] Section 486S provides for the same penalty for any

[1] Section 140ZD continues the obligations on those partners who were in the partnership immediately before its cessation.
[2] Section 140ZG
[3] Section 486ZA provides that the total penalty imposed where multiple breaches are being dealt with together cannot be more than the combined amount of the total number of contraventions, but the *Bill* does not set any limit as to the maximum of this amount.

person involved in contravening a civil penalty. Without an upper limit, an employer, or an involved individual (for example the pay-roll clerk), could face possible penalties in the hundreds of thousands of dollars.

In the case of partnership and unincorporated associations the maximum penalty for each breach is limited to $6600 per 'wrongdoing' partner or committee member but with no maximum limit being set for the partnership or unincorporated association as a whole. This seems extremely unfair because it has the potential to increase the maximum applicable penalty on a partnership or unincorporated association for any one contravention to a level far in excess of that could be imposed on a corporation for exactly the same contravention. For example if 20 partners were found to be collectively responsible for a contravention then the maximum penalty would be $132,000 (20 x 1/5 of $33,000). A corporation would only be liable to a maximum penalty of $33,000 for an identical contravention.

The potential for such large financial penalties makes it essential that the civil penalty provision are used and framed in a way that ensures that only a willful contravention of a clearly defined obligation is punished.

The principles for the appropriate use and framing of civil penalties are well established, see: *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers February 2004* ('the Guide') issued by the Minister for Justice and Customs[4] and also the report of the Australian Law Reform Commission: *Principled Regulation- Federal Civil and Administrative Penalties in Australia* ('ALRC 95') which was tabled in federal Parliament on 19 March 2003 and incorporated into the Guide. In our respectful submission, the Bill fails to comply with these established principles in several significant ways.

The civil penalty provisions are not sufficiently clear

The first principle identified by the Guide is that civil penalties should be 'stand alone' provisions.

[4] The importance of framing the provisions in accordance with the Guide and the interim Guide issued in February 2008 by the Criminal Law Branch of the Attorney-General's Department is recognized in the Explanatory Memorandum to the Bill at paragraphs 194 and 253.

They should clearly set out the elements that constitute the civil penalty contravention and should be structured in the same way as a criminal offence.[5]

Section 140Q does not clearly set out the elements that constitute the civil penalty contravention. Whilst s140Q intends to create a contravention where a person 'fails to satisfy' a sponsorship obligation, the term 'fails to satisfy' is not defined and is capable of more than one meaning. The New Oxford dictionary states that 'satisfy' can mean to 'adequately meet or comply with'. What does it mean to 'adequately meet' an undertaking? Is that the same as 'not meeting' or 'breaching' an undertaking?

Further, the section does not:

(i) set out the terms of each obligation to be 'satisfied';

(ii) set out the manner in which each obligation is to be satisfied; and.

(iii) set out the time in within which the obligation is to be satisfied.

Rather these essential elements are to be left to future prescription by way of regulation[6]. As such the parliament is not in a position to know what conduct will be made unlawful. This is of particular concern given the 'examples' of the types of undertaking that can be prescribed under the proposed s140H. One example of the kind of undertaking that might be prescribed is an obligation to "pay the costs of the departure from Australia of a visa holder sponsored by the approved sponsor". It is difficult to know what the limits of such an undertaking would be. For example, would it include the obligation to pay the departure costs of the person to any country or only their home country? What about the costs of transporting the person's furniture or pet? Would the costs of departure be the actual costs or a fair amount? What, for example, would be the situation if the person chose to fly first class – the amount of that ticket would in fact be the cost of departure?

[5] See page 58 of the Guide

[6] This is of particular concern given that paragraph 466 of the Explanatory Memorandum states that the nature of the sponsorship obligations which will be prescribed 'will not be significantly different from the existing undertakings'. Given the significant uncertainty that already exists as to the scope and limits of the existing undertakings, such an assurance should only heighten rather than lessen the concerns about the drafting of the terms of the 'new obligations'.

The failure to clearly specify the obligations in the Bill not only means that the Parliament cannot scrutinise the provisions in primary legislation before creating the civil penalty, the intention appears to be that new sponsorship obligations may be prescribed from time to time and that these may be imposed upon all sponsors also without an amendment to the Act.[7]

The Bill also appears to provide no method by which the physical or fault element needed to make out a civil penalty is to be attributed to a body corporate.[8]By way of comparison see s140ZC(4) and (5) and s140ZF(4) in relation to partnerships and unincorporated associations.

For these reasons it is respectfully submitted that s140Q has not been drafted with the degree of precision required of such a serious penalty provision.

Should there be an element of fault?

Section 140Q also fails to satisfy the second principle of the Guide[9] because it does not state in clear terms whether fault is required before a contravention is made out. For example, it does not use the words 'knowingly, intentionally or recklessly'. It is unclear whether the proposed s140Q intends to exclude fault because the section itself is silent in relation to the issue. The 'manner' in which a person must satisfy the undertaking is to be prescribed by regulation so it is not possible to know whether the penalty provision may require or exclude fault in relation to any or all obligations.

An application of Chapter 2 of the Criminal Code, as suggested by the third principle of the Guide[10], would require a reading in of both intention and recklessness as the fault element for a contravention under s140Q. If this is the intention of the Bill then it should be clearly stated. Certainly there are good reasons why s140Q should be understood as containing a fault element given the potential size of the penalties where multiple breaches may be involved; see s486ZA. For example, why should a small business who has genuinely made an honest effort to comply

[7] See paragraphs 114 and 115 of the Explanatory Memorandum
[8] This is not needed in relation to criminal offences because of the operation of clause 12.2 of Chapter 2 of the Criminal Code but this has not application to civil penalties.
[9] See page 58 of the Guide
[10] See page 59 of the Guide. The authors understand that the Criminal Code does not apply to civil penalties.

with the obligations and has not deliberately beached them, be found to be liable for a civil penalty of up to $33,000 for each honest mistake?

On the other hand, if the intention is that a contravention involves no element of fault, then the *Bill* should provide some form of statutory defence[11]. For example, the Bill could provide a statutory defence where the person has acted honestly but made a genuine mistake or there is a legitimate reason why they have not complied with the obligation. This is different to the 'relief provision' currently contained in s486R that vests discretion in a Court not to impose a penalty or to reduce the penalty in certain circumstances after the Court is satisfied that a contravention has occurred.

An example of how unfairly s140Q might work without a fault element or statutory defence is provided by the example given at paragraph 111 of the Explanatory Memorandum. That example states that an employer who did not keep records electronically or did not provide them to the Department within 14 days would 'not satisfy' an obligation that required this to be done. Without a fault element or statutory defence, an employer would presumably be liable for a civil penalty for that contravention (it could in fact be two contraventions) even if it was unreasonable for that employer to keep electronic records, or if there was a legitimate reason for not being able to send them to the Department within 14 days. This seems, in our view, inflexible, harsh and unfair.

A further worrying example of how a failure to impose a fault element in s140Q might work in a very unfair way relates to the actions of third persons. Section 140J (3) of the Bill deems there to be a failure to satisfy an obligation by a sponsor if a visa holder (or former visa holder) reimburses the sponsor *or another person* for all or part of the amount payable under an obligation. Section 486R(1) of the Bill allows the Minister six years after a contravention to bring an action for a civil penalty.

The combined effect of these provisions appears to be that a sponsor may have satisfied all of the obligations in relation to the visa holder, but nevertheless be deemed not to have not satisfied

[11] The Guide paragraph 7.4 at page 62 item 14 and 15

them if at some later time, possible even after return to their home country, the visa applicant 'reimburses' another person (not the sponsor) for any of the amount paid under the obligations. In other words, a sponsor could be deemed to be in breach even if they knew nothing of the repayment or the arrangements between the visa applicant and the third person. A practical example might be where a foreign recruitment company has entered into an arrangement with the visa holder that the visa holder will 'reimburse' the foreign recruiter a percentage of their salary. This arrangement may be completely unknown to the sponsor and even contrary to the specific understanding of the sponsor about the existence of any such arrangements. If the former visa holder subsequently advised the Minister of this arrangement and reimbursement the sponsor would be deemed to have failed to satisfy the undertaking and be liable to a civil penalty for up to six years after the reimbursement.

The potential for unfairness, or even abuse, is made, in our view, worse because of the combined effect of s140Q and s140R. If a contravention of the penalty provision is taken to occur regardless of intention, the genuineness of the efforts to comply, or the availability of a proper excuse then an alleged wrongdoer would effectively have no defence to an alleged breach and may well feel compelled to accept any offer of lesser penalty by way of infringement notice under s140R rather than risk more serious penalties and the costs involved in seeking to persuade a Court not to impose a penalty under s486R. This is particularly unfair given the fact that the undertakings will be prescribed in regulations and are likely to be changed from time to time. Small employers will be particularly vulnerable to the possibility of unintentional breaches and, without a fault element or statutory defence to rely upon might feel compelled to accept an infringement penalty. The Department would be in a stronger position to offer a 'quick settlement' and the allegations made against an employer might never be properly tested.

Should partnerships or unincorporated associations be collectively responsible to the extent provided in the Bill?

The Guide makes it clear that collective responsibility should only be relied upon to found a civil penalty where there is strong justification[12] for the abrogation of the usual assumption that one person will not be 'guilty' for the actions of another.

[12] Page 60 of the Guide

The provisions in the Bill relating to partnerships and unincorporated associations further confuse the issue of fault. For example, in the case of a partnership the obligations are imposed on each partner individually, although they may be discharged by any one partner.[13] But, pursuant to s140ZC(2)(a), any partner 'engaged in the conduct' constituting a contravention will contravene the civil penalty provision. 'The conduct' constituting the contravention is 'failing to satisfy' a sponsorship obligation. Unless an element of fault read into s140Q, each partner of a partnership would contravene s140ZC(2) each time an obligation was not satisfied regardless of whether that partner had any knowledge of the failure or was in any way directly responsible for it. This does not appear to be what was intended[14] but appears to be the effect of the proposed sections. This may be another reason to read an element of fault into s140Q as without it s140ZC(2)(b) and (c) would be irrelevant because all partners would always be liable for any failure by the partnership to satisfy the obligations.

This obviously also has serious ramifications for the penalty provisions in relation to both partnerships and unincorporated associations (in relation to which the Bill works much the same way) because the total possible penalty on the partnership or association would only be limited by the total number of partners or committee members. For example, if our construction of the provisions is correct, a partnership of a hundred partners would be liable for penalties of up to $660,000 for each contravention (100 x 1/5 of $33,000).

The criminal penalty provisions

Section 140Z of the Bill creates a criminal offence punishable by up to six months in prison for any person who contravenes the requirement to produce a document or thing to an inspector by a specified time (not less than 7 days). Although a fault element would probably be read into the offence provision pursuant to Chapter 2 of the Criminal Code, there should be a statutory defence to this offence otherwise it could act unfairly on 'innocent' wrongdoers.

[13] Section 140ZB(3)

[14] See paragraph 314 of the Explanatory Memorandum which claims that the effect of the provision is that only partners who did or were involved in the relevant act constituting the contravention are liable.

For example, the owner of a small business might be required by the inspector to produce tax records within 7 days but cannot do so because his accountant is overseas. Nothing in s140X(2)(c) would permit the inspector to extend the time to provide the document and an offence would be committed on the eight day when no document was produced. No defence of reasonable excuse would be available. Similarly a human resources manager may be unable to produce the document for some operational reason but be guilty of an offence. This cannot be what is intended but appears to be the result.

By way of passing we note that there appears to be nothing to enforce the inspector's powers under s140X(2)(b).

Whilst there can be no objection to empowering inspectors to enter a sponsor's premises in order to investigate a suspected breach of an obligation, s140X permits the inspector to enter and do any of the things in s140X(2)(b) merely if he or she 'has reasonable cause to believe that there is information, documents or any other thing relevant' to determining whether an obligation *has been complied with*. Presumably this means that an inspector will always have the power to enter and do these things because in all cases a sponsor will have information or other things relevant to sponsorship obligations. In our submission, the inspectors' powers should be limited to cases in which there is reasonable grounds to suspect a breach of an undertaking, not merely to determine whether or not there has been compliance. This can be ascertained by means other than through an inspector, for example simple monitoring request by the Department as occurs now.

We further note that there appears to be no 'reasonable cause' requirement in relation to the issuing of a notice to produce under s140X(2)(c).

In line with s486U(3), there should be a prohibition on an inspector entering a law firm (and possible possibly migration agent firm) or demanding any documents from a lawyer in relation to any alleged wrongdoer for whom the lawyer is or has acted.

Section 486U creates an offence punishable by fine where a person fails to give assistance as required by the Secretary in writing where the Secretary believes 'on reasonable grounds' that the person has information relevant to a contravention of a civil penalty. The Secretary may require a person to give 'all reasonable assistance' in connection with an application or proposed application for a civil penalty. The term, 'reasonable grounds' and 'reasonable assistance' are not defined. Although the provision appears to contemplate that a Court might refuse to order compliance with such a request[15], the offence is committed at the point of non-compliance with the Secretary's request, which require no judicial scrutiny. A person would seemingly commit an offence even if a Court subsequently refused to order the person to comply with the request in the terms that it was originally made; s486U.

There are no notice provisions as to how or what manner the Secretary must make the request. There are no time provisions as to how long the person has to comply. Again there is no statutory defence of reasonableness or inability to comply.

Although the Secretary may not ask a lawyer to provide assistance, there is no similar provision for migration agents who also are under a duty not to breach the confidence of their client[16]. This appears to act unfairly on migration agents who are not lawyers.

The mandatory sanction provision

The new section 140L(2) creates a requirement for the Minister to cancel or bar a sponsor where the Minister is 'reasonably satisfied' that the sponsor has failed to comply with a prescribed sponsorship obligation. The explanatory memorandum provides no guidance as to the type of obligations, which may attract these mandatory penalties.

Experience in the area of student visa cancellation has shown that mandatory sanctions of this type do not work because they are inflexible and so can create extremely harsh and unfair results. Similar mandatory provisions under s116(3) of the Act were amended because of the resulting unfairness.

[15] Section 486U(4)
[16] See Code of Conduct, schedule 2 to the Migration Agents Regulations 1998

Mandatory provisions of this type have a tendency to increase litigation because that is the only option open to an alleged wrongdoer in circumstances where they feel that they have been unfairly sanctioned. The issue of the Minister's 'reasonable satisfaction' and how it was derived would be one area that would no doubt be open to considerable inquiry and challenge.

Any of the examples referred to above in relation to the harshness of the civil penalty provisions would be equally apt in relation to a mandatory sanction. For the same reasons a mandatory sanction will operate unfairly where a breach was unintentional or there was reasonable excuse.

The retrospective effect of the changes

Sections 45(5) and (6) of the Bill have the effect of imposing the new obligations and sanctioning regime on existing sponsors. The Explanatory Memorandum[17] seeks to justify this 'retrospectivity' by stating, amongst other things, that:

> *"existing subclass 457 visa sponsors will have sufficient notice to terminate the sponsorship of their Subclass 457 (Business (Long Stay)) visa holders if they are not prepared to satisfy the new sponsorship obligations in relation to those visa holders."*

This appears to treat subclass 457 visa holders as disposable and places little value on the important role that subclass 457 visa holders play in the Australian economy or the fact that genuine sponsors treat such workers (many of whom may be part of their global workforces) with respect and dignity. This approach seems inconsistent with a concern to avoid abuse of subclass 457 visa holders.

Because the new obligations are not set out in the Bill and will depend on recommendations made by Ms Barbara Deegan and the Skilled Migration Consultative Panel it is impossible to know whether those new obligations will be substantially different from the existing undertakings. Although the Explanatory Memorandum states that this is not expected to be the

[17] Paragraph 466 of the Explanatory Memorandum

case, presumably much will depend on the recommendations of Ms Deegan and the Panel and the changes could conceivably be quite substantial.

Other than issues of the inherent unfairness of retrospective changes and the potential hardship that could be caused to subclass 457 visa holders if a significant number of sponsors choose the option of ending their sponsorship, there may be a question as to whether all or part of the future regulations may be invalid because they contravene s51 (xxxi.) of the Australian Constitution. No detailed analysis of this issue has been able to be undertaken in the very short time available for making these submissions but the questions is a complex one which depends upon whether approval of a sponsorship creates a proprietary right akin to a license and whether any of the new obligations created by future regulations amount to an 'acquisition' of that property. Certainly the right to sponsor subclass 457 workers is granted after payment of a fee and satisfaction of certain criteria much like a license. It is also a valuable right which can in certain circumstances be transferred. More consideration would need to be given to this before any formal submission could be made, but the matter is raised for the consideration of the Committee.

We would welcome the opportunity to provide further elaboration of our views to the Committee. If we can assist the Committee further in its consideration of the Bill, please do not hesitate to contact the writers on (02) 8224 8595 or by email: rwalsh@fragomen.com or (02) 8224 or by email: rkessels@fragomen.com, respectively.

Yours faithfully

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