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Committee Secretary
Joint Standing Committee on Migration
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By electronic upload

Submissions – Inquiry into Australia's skilled migration program

Thank you for the opportunity to provide submissions addressing the terms of reference for the *Inquiry into Australia's Skilled Migration Program.*

We are pleased to provide these further submissions to this inquiry. If we can assist with policy development in this area in any other way, please do not hesitate to contact me on [redacted]

Yours sincerely

[redacted]

Teresa Liu

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Solicitor

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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 110 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:
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2. INTRODUCTION

Immigration has always been a critical determinant to Australia's economic growth and social cohesion and has become vital in order to promote long-term population growth.

For the skilled migration programs, of critical importance is the need to provide Australian businesses with the ability to attract overseas talent to Australia in the post-pandemic economic recovery phase and provide flexibility to skilled temporary workers to transition to permanent residency, all while supporting the Government's population growth plans by curbing the increasing ageing population growth rate. We submit that greater flexibility and more streamlined, faster pathways from temporary to permanent visas are necessary to ensure Australia remains globally competitive in attracting and retaining global talent, particularly for regional Australia

Our submissions seek to address the following Terms of Reference:

1. The purpose of the skilled migration program and whether it is meeting its intended objectives, including:
    b) If more long-term structural changes are warranted;

3. Skills lists and the extent to which they are meeting the needs of industries and businesses and keeping pace with Australia's job landscape;

4. The administrative requirements for Australian businesses seeking to sponsor skilled migrants, including requirements to prioritise job opportunities for Australians and job creation;

5. The costs of sponsorship to businesses seeking to sponsor skilled migrants;

6. The complexity of Australia's skilled migration program including the number of visa classes under the program and their requirements, safeguards and pathways; and

7. Any other related matters.

3. SUBMISSIONS ADDRESSING THE INQUIRY

As outlined in our earlier submission to this inquiry, Australia's skilled migration programs are currently comprised of:

- Temporary and permanent employer sponsored migration;
- Points-tested General Skilled Migration;
- Specialist skilled migration through the Distinguished Talent visa programs, including the Global Talent Independent visa program; and
- Business skills migration for Investors, business owners and entrepreneurs.

Over the last 20 years, these skilled migration programs have evolved from the entry and stay of a broad spectrum of highly skilled workers with good prospects of successful settlement in Australia, to a system that seeks to directly match prospective entrants to specific skills shortages in the labour market. This is often referred to as a shift from a 'supply-driven' to a 'demand-driven' migration program. In particular, changes to General Skilled Migration and the Employer Nomination Scheme since 2010 have refocused those programs on:

- recruitment of migrants who stand ready to make an immediate contribution to the workforce; and
- ensuring as best as possible that Australian business is not hampered in operating at maximum capacity due to an inability to source the workers it needs.

1. The purpose of the skilled migration program and whether it is meeting its intended objectives, including:
b) If more long-term structural changes are warranted;

We note that the Department of Home Affairs (**Department**) has made significant changes towards a streamlined visa system and application process, including the 'digitisation enhancements', which has been significant in improving the efficiency and accuracy of the skilled migration program.

We propose that simplification of related skilled streamed visas would create further efficiencies but not adversely affect the intended objectives of the program. For example, a business that has already passed through a sponsorship approval process for one visa stream (e.g. Standard Business Sponsor) should not be required to separately seek approval for each other type of sponsorship (e.g. Temporary Activity sponsorship). Access to any and all related streams could be approved though a single application process, with access to additional streams obtained through a simple variation request. That request may provide some further sponsorship information specific to that visa stream.

In addition, most businesses (however new to the Department) are likely to have provided information relevant to sponsorship approval to other state, territory and federal government agencies. The Department's commitment to improve information-sharing with other agencies and governments, and further developments of centralised government portals such as AusKey accounts, should be leveraged to reduce the required documentation and simplify the sponsorship assessment process.

The operation of the United Kingdom's Sponsorship Management System ('SMS') provides a model for a consolidated 'approved business' framework which vets for suitability to employ visa holders[1]. Through a single online application, organisations apply for a license to access the SMS and select the visa streams to which access is sought. The sponsorship application assesses the organisation to ensure that it is:

- genuine, and operating lawfully in the UK;
- honest, dependable and reliable;
- capable of carrying out sponsorship obligations; and
- in a position to offer genuine skilled work or activity positions in relation to the visa streams to which access is sought.

These integrity thresholds are reflective of the current 'core' requirements across the different classes of sponsorship currently available in Australia's skilled migration programs.

The volume of documentation that must accompany a UK SMS licence application is limited. In fact, in the case of public agencies, foreign government agencies and publicly listed companies, no documentation is required at all. This is because all relevant information to address the sponsorship criteria is available publicly and the information has already been vetted and approved by another government agency such as HM Revenue & Customs, Companies House or the London Stock Exchange, or readily available on GOV.UK. Other sponsorship applicants are usually required to provide four documents, depending on the nature of the organisation and the visa stream(s) sought. The number of documents that need to be submitted is periodically reduced as more online verification of information becomes available to the UK Immigration and Visa Office. For example, organisations that are Registered Charities were previously required to provide evidence of that registration, however as registration details can now be checked online, this counts as one of the four pieces of evidence such that the applicant organisation is not required to provide additional separate documentation. Similarly, the UK Immigration and Visa Office accepts as one piece of evidence the fact that an organisation's financial statements are available on its website.[2]

Once an organisation has a SMS licence, it may be later approved for access to additional visa programs, by completing a shortened online application form and providing any mandatory documents that may be needed. For example, an organisation with a licence to sponsor a Skilled Worker visa applications (this has replaced the Tier 2 (General) work visa is and analogous to the Temporary Skill Shortage visa) that later seeks access to sponsor an Intra-Company Worker visa (this has replaced the Tier 2 (Intra-Company Transfer) visa), need only provide evidence of the relationship between the offshore and UK entity.

Simplifying interaction with the Department by relying on data and information already held by government would also allow a holistic approach to the monitoring and regulation of businesses that employ visa holders outside the sponsored visa classes, such as the Working holiday and Student visa programs. It would have the flow on effect of resource saving for the Department. Importantly, it would simplify and make much easier the process for businesses to obtain sponsorship approval, and where those business would otherwise be reluctant to obtain

[1] United Kingdom Immigration and Visa Office, *https://www.gov.uk/government/collections/sponsorship-information-for-employers-and-educators*.

[2] https://www.gov.uk/government/publications/supporting-documents-for-sponsor-applications-appendix-a/appendix-a

sponsorship approval (and approvals against different streams), for example, due to the administrative burden.

3. Skills lists and the extent to which they are meeting the needs of industries and businesses and keeping pace with Australia's job landscape;

As outlined in our submissions in response to the Terms of Reference 1(a) and 2, we have identified the following key issues regarding the various skilled occupation lists and reconciliation with the needs of industries and businesses:

1. the rigidity of the occupation classifications – the current ANZSCO occupations do not reflect roles and occupations within emerging technologies and the rapid development of the same; and
2. the insecurity that comes with frequent changes to the occupation lists, and the impact to businesses ability to attract and retain skilled migrants.

Limitations of ANZSCO & the skilled migration occupation lists

The current Skilled Migration Occupation Lists, which in a pre-COVID environment were updated on a six-monthly basis and overlaid by the labour market testing arrangements, are by their nature retrospective. The metrics used as screening criteria in skilled migration programs have historically been based on information garnered from studies and observations of migration outcomes and other factors such as labour market dynamics. They are unable to accurately predict the occupations where skills shortages will be in the future; and they also fail to consider shortages in occupations which do not yet exist, or which are not adequately catered for by the outdated ANZSCO classification.

The nature of the ANZSCO dictionary is such that quite different roles can be mapped to the same ANZSCO occupation codes, as the occupation category that best fits that range of roles. As a tool primarily designed for the statistical interpretation of data, the ANZSCO dictionary does not allow for granular descriptions of the role being nominated. Despite being categorised in the same ANZSCO code for migration purposes, for the business' perspective the roles may be quite different in terms of the skills set and experience required. This is the case, for example, in ICT roles where a Software Developer or ICT Business Analyst may specialise in a particular technology, the skills for which are highly nuanced and not easily transferable to other roles which may be also categorised in the same ANZSCO occupation.

The need to fit an application to an ANZSCO classification is in itself often a difficult task. It is important that the categorisation of occupations is up to date with the changing nature of the Australian economy and emergence of new industries and skills. This is particularly the case given the transition of the economy to a largely service based economy; the evolution of the type of work in information and communication technology and other cutting edge sectors such as robotics; and the transition of work in service sectors to project-based roles.

The last major review of the ANZSCO dictionary was conducted in 2013, and the rapid change in the types of occupations, particularly at the more highly skilled levels, since that time has made classification of more niche roles challenging. Importantly, it is not just in the field of technology where the nature of business and work activity has changed. As digitisation disrupts each industry, the nature of the 'human element' involved in that activity has changed significantly. For example, the ANZSCO dictionary contains descriptions for more traditional corporate management roles

such as General Corporate Manager and Sales & Marketing Manager; however, these do not always reflect the division of managerial responsibilities in specialised businesses. The advantage of a human component in a role is arguably flexibility, adaptability and ability to evolve, which necessarily extends roles across more traditional occupations.

Regarding the frequency of updates to these Occupation Lists, while Fragomen recognises that government policy is to review the lists on a regular basis to ensure their currency, and allow the regime to target genuine skills shortages, we submit that six monthly changes create a level of uncertainty for business and for the sponsored workers. In our experience, considerations of whether to accept a job offer in Australia is often accompanied by consideration of the future, and in particular the capacity to apply for permanent residence. The potential of the list changing up to six times in the qualifying three-year period required under the Temporary Residence Transition stream of the Employer Nomination subclass 186 visa (catering for Subclass 457 or Temporary Skill Shortage visa holders applying for permanent residency on the basis of their demonstrated work history and ongoing need for the role), generates uncertainty and insecurity, and may lead to the most talented candidates rejecting the offer in favour of a location which is more secure.

The application of multiple Occupation lists (that is, the Short-term Skilled Occupation Lists, Medium to Long Term Strategic Skills Lists and Regional Occupation Lists), the composition of which is inconsistent across the various skilled visa subclasses, also adds unnecessary complexity to the skilled migration programs. For example, the MLTSSL occupations are not necessarily the same for a Temporary Skill Shortage visa as for a Skilled Independent (subclass 189) visa. Adding to this inconsistency is the imposition of caveats for particular occupations which again, only apply to certain skilled visa programs. For example, the occupation of Anaesthetist 253211 is subject to a caveat which under the Temporary Skill Shortage (**TSS**) visa program restricts its usage to positions located in regional Australia, whilst under the Training (subclass 407) visa program, the nominated training position could be located in a metropolitan hospital.

Related to these concerns is a general lack of transparency regarding the composition of skilled occupation lists and effective engagement with business. Fragomen notes that the new National Skills Commission has been tasked with responsibility for regularly reviewing the national skills needs of Australia and producing a Skills Priority List (**SPL**). The National Skills Commission's stated intention[3] is not to engage directly with employers through stakeholder consultation, but rather to 'seek input from employers separately through an employer survey'. Fragomen welcomes any measures to engage with employers who are a critical source of labour market data; we submit that this engagement should be on an on-going basis and must be supported by transparency around the composition of SPL to ensure that it reflects the genuine skill needs of Australian employers.

A further limitation is that the occupation lists seek to analyse labour market data on a national basis and are not able to distinguish between urban, regional and remote future skills needs. As a medium-sized economy, Australia's skilled visa system needs to be part of a holistic approach to create an environment which attracts and supports talented people from around the world to develop, and then work in, innovative and emerging industries so that their talents remain in Australia. Australia's training and education system will not always be able to quickly respond to emerging skill needs. Our visa programs should be agile to adapt to emerging jobs, skills and industries; flexible to identify prospective as well as proven talent.

[3] https://www.nationalskillscommission.gov.au/consultation/skills-priority-list

The 2019 CEDA report *Effects of temporary migration*[4] and more recent 2021 report *A good match: Optimising Australia's permanent skilled migration*[5] also highlight the reliance on rigid categories of occupations that have not been reviewed and updated recently to take account of the impact of changes in technology on the labour market ability to attract the best human capital codes to ensure they align with current and emerging labour trends, particularly the impact of technology. Our occupation based skilled migration programs are underpinned by an outdated occupational classification. We submit that there needs to be a better mechanism for analyzing the skill threshold outside of ANZSCO. We believe there must be a seismic shift as to how occupations vs positions are assessed in Australia's skilled migration program and how we can best align these to sectors of growth.

As outlined in our submissions in response to the Terms of Reference 1(a) and 2, some alternative options to provide greater flexibility to the employer sponsored programs could include:

- Removing the necessity for specific occupational classification and instead focusing on the highly skilled nature of the 'position' by reference to indicia such as minimum skill level, earnings or other attributes. For example, the skill level requirements for the UK 'Tier 2' visa category require a job offer which is at a 'degree level' or higher. Alternatively, for the Canadian 'Intracompany transferee status', the position must either be an executive or senior managerial position or involve specialized knowledge;

- Considering the benefits of removing the reliance on occupation lists entirely if the role and the nominating employer can demonstrate they have completed Labour Market Testing in accordance with the requirements (which includes exemptions on certain grounds, such as where inconsistent with an International Trade Obligation or intra-corporate transfer);

- Overlaying this, we continue to support the view that dedicated intra-corporate transfer (ICT) visa is, particularly in sectors of growth, in recognition of the unique difference of intracorporate transfers from other new entrants to the domestic labour market. These ICT visas are common in a number of key jurisdictions around the world including the US, UK and Singapore. Intra-corporate transferees are generally required in Australia because they have proprietary knowledge and/or experience required to achieve business goals for the Australian operations or to deliver a project or train the Australian arm of the business. Because it is proprietary, this knowledge and experience cannot generally be sourced from the Australian labour market, other than from within the Australian business itself. In addition, many large multinational companies have built global mobility into the career development program for their top talent – and conversely, Australian employees would also have the opportunity to gain international experience through overseas assignments. Measures such as labour market testing, skills assessments, a training levy, and attempts to limit access to occupations based on labour market forecasts, are arguably not relevant to intra-corporate transfer appointments. While we recognise the allowances in providing alternative evidence of Labour Marketing Testing (**LMT**) through a company submission for intra-corporate transfers, the heightened restrictions and the additional processing times they create only serve to frustrate international trade and business. On 1 September

[4] https://www.ceda.com.au/ResearchAndPolicies/Research/Population/Effects-of-temporary-migration
[5] https://www.ceda.com.au/Admin/getmedia/150315bf-cceb-4536-862d-1a3054197cd7/CEDA-Migration-report-26-March-2021-final.pdf

2020, the Government introduced a Priority Migration Skilled Occupation List (PMSOL) based on advice from the National Skills Commission and other Commonwealth departments. The PMSOL prioritises migration for people with critical skills through employer sponsored visa programs and identifies occupations that are considered to be essential for the recovery of the Australian economy from the COVID-19 pandemic. If the NSC labour market analysis has identified that these PMSOL occupations are critical to supplement the skilled workforce needs of sectors that are vital to Australia's economic recovery, then it would be unnecessary to impose additional LMT advertising and/or administrative burdens upon an employer nominating skilled workers in these occupations; and

- Consideration as to industry or occupation specific visa products as a further means of supporting high growth or other key industry sectors. For example, to support development of Singapore's tech ecosystem, in 2020 Singapore launched a new 'Tech.Pass'[6], a targeted program designed for tech entrepreneurs, leaders or technical experts with experience in established or fast-growing tech companies. Another example is Canada, where specific provisional areas and localities have developed strategies to attract and retain migrants, including lower skilled migrants, for specific industry sectors. For example, Alberta has offered a two-year work permit to tradespeople who include welders, equipment mechanics and carpenters, and unlike the federal program, this program does not require preliminary labour market testing for these occupations, and also allows greater movement between employers without the need to apply for a new work permit as long as the workers retain their local certification. Other examples include special immigration routes for engineers in Alberta; farm operators in Manitoba and Saskatchewan; and a range of low-skilled workers in the trucking, hospitality, and food processing sectors in British Columbia. As a further Canadian example and in recognition of the critical importance of caregivers to the overall productivity of Canada's workforce, two occupation specific Home Child Care Provider and Home Support Worker Pilots[7] are currently being run. These five year occupation specific pilot programs offer temporary and permanent residence pathways for qualified caregivers.

In response to term of reference 1(a), we identified several occupations and industries critical to the longer-term and holistic response to the impact of COVID-19. These are industries directly involved in response to the COVID-19 pandemic, such as the healthcare industry; and those other industries which require specialist skills to rebuild or respond to the challenges and economic recovery of the Australian economy. This included engineering roles across Construction, Infrastructure, Mining and Renewable whereby Fragomen's clients in these sectors identified the following occupations as critical to the continued delivery of various local, State/Territory and Federal projects:

- 133211 Engineering Manager
- 233311 Electrical Engineer
- 233211 Civil Engineer
- 233214 Structural Engineer

[6] https://www.edb.gov.sg/en/how-we-help/incentives-and-schemes/tech-pass.html
[7] https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/caregivers/child-care-home-support-worker.html

o 312512 Mechanical Engineering Technician

In particular, a specialist engineering and design client has expressed their continued need for Rail Engineers and Civil Engineers (Structural/Water/Transport) which are essential to the delivery of critical State government infrastructure programs (such as Melbourne Metro, Melbourne Westgate Tunnel, Melbourne Rail Infrastructure Alliance, Melbourne North East Link, Sydney Gateway, Sydney Northern Beaches and Western Sydney Airport) and where demand for workers with specialist rail expertise in particular, exceeds local supply.

Our client notes that it is just not feasible to provide all of the requisite specialist skills locally in the time that these infrastructure programs must be delivered; at an entry level, Engineers will need 4+ years at University and then at least 5 years' industry experience. Added to this is the challenge of having to resource specialist skills across multiple government infrastructure programs, with the same delivery deadlines. The ability to bring in highly specialised workers not only assists in the delivery of these crucial government projects that provide important job opportunities for local workers, but also allows for the transfer of specialist knowledge and technical skills to those local workers. Restricting access to the latest technical skills from overseas, will very likely result in an increase in offshoring of packages of work to low cost locations, to the detriment of the local labour market.

4. The administrative requirements for Australian businesses seeking to sponsor skilled migrants, including requirements to prioritise job opportunities for Australians and job creation

Navigating the current skilled visa program is a challenge for many Australian businesses, and we appreciate the Department's consideration and steps toward reconciling and balancing the need to attract and retain skilled migrants alongside prioritising job opportunities for Australians.

In our experience, the current Labour Market Testing (**LMT**) requirements within the TSS visa program impose unnecessary administrative burdens on business and the highly prescriptive rules of how positions must be advertised do not reflect the realities of how companies now recruit. Some employers have protocols where they will only advertise on specific platforms; for many others, particularly in the case where a role is particularly senior, advertising the role is a very commercially sensitive topic and faces a lot of resistance. For appointments to positions such as Chief Executive Officer, Chairman, and senior operational management roles, it is usually the case that the departure of the incumbent is not publicised until their replacement is announced, because of the harmful effects this may have on the company's stability and/or value on the stock market. Additionally, recruitment into these roles is primarily done through specialist recruiters, headhunting or direct contact with the candidate, because there would generally only be a small cohort of suitable candidates already known to the management team of business.

The complexities of the current LMT advertising or 'alternative evidence' requirements, mean that sponsors can easily make mistakes which have major implications, including the loss of a substantial Skilling Australians Fund levy payment.

Other key limitations in the current LMT process are as follows:.

Incumbents

In its current form, LMT requires an employer to advertise a role prior to lodging a nomination application for an incumbent sponsored employee, regardless of whether that individual is currently working for the sponsoring employer. Although some scenarios are exempt due to international trade obligations, there are many common scenarios where that exemption would not apply. For example:

- The visa holder has been in Australia for less than two years and needs to apply for a further visa as their current visa is expiring. This is a very real prospect for TSS visa holders in occupations on the Short Term Skilled Occupations List, who may take several weeks following grant of their two-year TSS visa to relocate and commence role. It would also affect circumstances where the assignment to Australia was intended to be for less than two years, but the project has run overtime.
- The visa holder was not an intra-corporate transferee at the time they commenced work with the Australian employer and so is not covered by international trade obligations even if they have been in role for more than two years.
- The visa holder has been in Australia in the same occupation for two years but has changed employers.
- A new nomination application is required to effect a change in ANZSCO occupation code for the sponsored employee within the first two years of employment.
- A new nomination application is required to transfer employment and sponsorship to a different entity as part of a corporate restructure, merger or acquisition.

For businesses, running a recruitment campaign can be problematic for reasons including that:

- it is unnecessary administrative work and expense for the business if there is no recruitment outcome;
- it elicits genuine job applications for a position that is already filled;
- it could be seen as false advertising that may be a complication in terms of compliance with trade practices legislation;
- it may expose the business to legal action under employment law; and
- it skews statistics about current job vacancy rates collated and reported by the Department of Education, Skills and Employment based on internet recruitment websites.

Accordingly, consideration should be given to an LMT exemption for all nomination applications in which the nominee is already employed by the sponsor. This would be similar to the exemption provided under the UK's labour market testing regime for visa renewal applications (noting that the UK system does not have the nomination step).

Intra-corporate Transfers

LMT can be considered inappropriate in some circumstances where the person is being assigned to Australia from an office of the same business overseas, as an intra-corporate transferee whereby the current TSS visa framework provides little recognition that international assignments form an important part of career development for many multinational companies. In this scenario the person is already employed by the business and is, in many cases, being brought to Australia to fill a role that requires specialised proprietary knowledge, rather than seeking to enter the Australian labour market. The labour market testing regimes that apply to work visa programs in the UK, Singapore, Canada and elsewhere do not apply to intra-corporate transfers because they are facilitated through a separate, dedicated intra-corporate transfer visa.

Where a position is filled by an intra-corporate transfer, it does not 'take away' a job opportunity for an Australian: the position is being filled by that foreign employee because a local Australian individual simply does not exist. Labour market testing is therefore not relevant in these circumstances.

Whilst we appreciate that alternative LMT evidence may be accepted for 'select occupations and positions' in the case of an intra-corporate transfer, it is our submission that a universal exemption is more appropriate than the current patchwork of exemptions that apply under various international trade obligations, which only extend to senior managers unless a nationality or locality exemption applies to the person and/or business. A TSS stream which facilitates efficient intra-company transfers for multinational businesses is essential to supporting effective international trade and investment as it:

- ensures Australia remains an active player in the global economy, contributing to the economic benefits to Australia and its nationals.
- demonstrates that Australia is "open for business and investment";
- reflects Australia's commitments under various international agreements;
- is consistent with the practice in other developed economies
- creates job opportunities for Australians in Australia;
- creates job opportunities for Australians overseas; and
- contributes to reversing the impact of highly skilled Australians working overseas for extended periods.

By not embracing an intra-company transfer stream, this becomes a further area where Australia is starting to appear to be not as competitive as other jurisdictions in the competition for global talent.

Redundancies

As noted, the nature of the outdated ANZSCO dictionary is such that quite different roles can be mapped to the same ANZSCO occupation codes, as the occupation category that best fits that range of roles. Section 140GBA(4A) of the *Migration Act 1958* ('Act') requires LMT to have been conducted after any redundancy from 'positions in the nominated occupation'. Current Departmental policy extends this further by referring to redundancies in 'the same or similar occupations in the business'. Section 140GBA(3)(b)(ii) of the Act already requires sponsors to accompany a nomination application with information about any redundancies in the nominated occupation.

We submit that if a sponsor provides additional information as to why the redundancy is not relevant to the particular nominated position, this should be sufficient for the Department to accept evidence of prior LMT activity and be satisfied that the labour market has been tested, even though this activity may have been completed before the redundancy of a different role which is also mapped to the same ANZSCO. Given the broad and generalist way in which occupation descriptions are drafted in ANZSCO, further consideration should be given to the unintended consequences of these provisions where a business has a pool of very different roles categorised under the same ANZSCO, and where the redundancy in one role is not relevant to redundancy in another.

The Department can effectively exercise discretion to maintain the integrity of the program while implementing LMT mechanisms that are effective and adaptable to the different circumstances in which the TSS program is envisaged to be utilised. Here, we submit that integrity can be assured

through monitoring of and engagement with sponsors; and nuanced according to the sponsor's accreditation status, risk profile and compliance history.

In addressing other administrative requirements for Australian businesses seeking to sponsor skilled migrants, we also refer to our comments in response to question 1(b) on the streamlined process for obtaining business sponsorship approval, based on the UK 'SMS' model. The value in being able to source, and rely on, essential data and information about a potential sponsoring business reduces the administrative resources required of the business in applying for approval, and for the Department in reviewing extensive documentation such as annual reports, profit and loss statements and payroll details, when instead the Department can rely largely on data already held with the relevant state and federal government departments.

5. The costs of sponsorship to businesses seeking to sponsor skilled migrants;

In our view, the current major financial cost for business under the employer sponsored programs is the Skilling Australians Fund (**SAF**) levy and specifically, lack of payment exemptions for certain Government agencies as well as limited refund provisions. These arrangements do not adequately cater for scenarios where a new nomination is only required to enable the TSS visa holder to continue employment with their sponsoring employer to ensure both parties to remain compliant with the TSS visa conditions and sponsorship obligations framework.

Facilitate exemptions to payment of Skilling Australian Fund payments for prescribed Government entities and other limited scenarios

Under the employer sponsored skilled visa programs, all sponsoring employers, including Commonwealth entities, are currently required to pay the SAF levy at the time of lodging a nomination application. There are no exemptions to payment of the SAF levy except for religious workers sponsored under the labour agreement streams of the TSS visa or ENS visa (consistent with the longstanding exemption from the previous training benchmark requirement for religious organisations who are party to a labour agreements).

However, section 140ZP of the Act[8] states that Commonwealth entities are not liable to pay the SAF:

> *s 140ZP(1) The Commonwealth is not liable to pay nomination training contribution charge that is payable under section 140ZM. However, it is the Parliament's intention that the Commonwealth should be* ***notionally liable*** *to pay such charge.* [our emphasis].

Subsection 140ZP(5) prescribes that 'Commonwealth' includes 'a Commonwealth entity (within the meaning of the *Public Governance, Performance and Accountability Act 2013)* that cannot be made liable to taxation by a Commonwealth Law'.

One of our clients is a prominent Commonwealth agency, meets the definition of 'a Commonwealth entity' and is a regular sponsor under the TSS visa program. Despite s140ZP, since the commencement of the SAF levy payment in August 2018, our client has been required to make upfront payments SAF levy *in its entirety* at the time of lodgement of TSS nominations. Since that time, the Department has also been unable to provide any clarification to our client as to what a

[8] https://www.legislation.gov.au/Details/C2021C00156

'notional' liability for the SAF levy would entail. This is clearly an unsatisfactory outcome for Commonwealth departments and agencies for whom s140ZP suggests should not be required to make an upfront payment of the SAF and who have been compelled to pay the SAF levy in its entirety for the last three years.

Healthcare is one of the fastest-growing sectors of the Australian labour market and the various State and Territory Departments of Health are high users of the employer sponsored visa programs to fill critical shortages in our public hospitals. For public hospitals, the costs of the SAF levy can be prohibitive, particularly for overseas doctors in training who often require multiple TSS nominations to facilitate changes in occupation (for example from a Resident Medical Officer to a medical specialisation) which necessitate payment of the SAF levy for each new nomination. Consideration should be given to extending the application of s140ZP to State and Territory Government entities to impose a 'notional liability' for the SAF levy for the entities.

Consideration should also be given to prescribe exemptions to payment of the SAF levy in circumstances where a new nomination is only required to enable the TSS visa holder to continue employment with their sponsoring employer in circumstances where there has been a:

- Change in occupation;
- Decrease in earnings; or
- Transfer employment and sponsorship to a different entity as part of a corporate restructure, merger or acquisition.

Increasing employers' ability to seek refunds of the Skilling Australian Fund levy payments

Whilst the current SAF refund provisions prescribed in the Migration Regulations do encompass several scenarios, an additional provision should be considered in the scenario where a nomination is lodged and approved, but the visa application is not lodged prior to expiry of the nomination (meaning the TSS nomination has not been utilised). In our view a refund would be appropriate as the business is not getting the benefit of having paid for that levy.

6. The complexity of Australia's skilled migration program including the number of visa classes under the program and their requirements, safeguards and pathways;

In its 2017 *Policy Consultation Paper - Visa Simplification: Transforming Australia's Visa System*[9], the then Department of Immigration and Border Protection referred to Australia's visa system as 'outdated and unnecessarily complex', and expressed concerns as to its possible deterring effect to potential migrants. Fragomen supports the idea that the temporary and permanent skilled migration pathways should be simplified, and we submit that greater flexibility and more streamlined, faster pathways temporary to permanent residence are necessary to ensure Australia remains globally competitive in attracting and retaining global talent, particularly for regional Australia.

In an increasingly competitive race for global talent, acknowledging and understanding the selection by the migrant of which country to make their home is critical to the development of a policy framework for skilled migration for the coming decades. In our view, 'Skills selecting' only those individuals who 'self-select' for migration will no longer suffice: as talented individuals are offered more opportunities at home and become disinclined to emigrate, it is imperative that Australia is

[9] https://immi.homeaffairs.gov.au/immigration-reform-subsite/files/consultation-outcomes-summary.pdf

able to continue to offer advantages from immigration; not only relative to other possible destinations but also to the country of origin.

The likelihood of a migration outcome to be successful increases with a level of familiarity with the destination country. As such, encouraging the permanent settlement of temporary migrants (for example, holders of TSS visas or graduate visas) in our view would arguably enable better outcomes, a greater degree of settlement and integration to Australia. It would also support the implementation of policies whereby temporary migrants are encouraged to settle in regional areas by supporting a transition to regional sponsored permanent migration programs in circumstances where the migrant has already had the opportunity to settle in the regional area.

Providing additional pathways and opportunities for graduates from Australian higher institutions would have the dual effect of enhancing the attractiveness of Australian international education as a product; as Australia's third largest export, and injecting the permanent visa programs with young, educated and talented workforce, who have adapted to life in Australia and who have the prospects of contributing to the economy for perhaps their entire working life.

Over the course of the evolution of the skilled migration program from a 'supply-driven' to a 'demand-driven' program, the Department has, over the last 20 years, sought to 'decouple' temporary visa programs from permanent residency and make a clear distinction between a temporary stay and a pathway to permanent residency. This is, in our view, a barrier to successful migration outcomes and we would support a reconsideration of this position, and to appropriately link skilled temporary to permanent pathways.

In the post-pandemic recovery phase when overseas skilled workers are contemplating global career opportunities, they are not only considering lifestyle and suitability of the receiving country for their families but are now also looking closely at potential pathways to permanent residency and health considerations for their family. In the competition for global talent, having a clear, simpler and more certain pathway from temporary residence to permanent residence will improve Australia's attractiveness. The pathway to permanent residency should be predictable, transparent and reliable - such that the potential migrant has a reasonable degree of certainty as to the ability to gain permanent residence. A three-year period holding a TSS visa with a sponsor/employer, or occupation list changes that impact that permanent pathway, may dissuade skilled talent who seek to reside permanently in Australia.

In September 2020, Fragomen surveyed our client base to form an understanding of the concerns and issues that organisations expect to face in the post-pandemic environment in Australia[10]. Respondents varied across many corporate fields, industry sectors and locations in Australia, including regional areas, and represented a mix of corporates from multinational businesses to local businesses. The survey results clearly showed that employers are seeking a greater link between temporary skilled work in Australia and permanent residence, as well as an increased focus on employer-sponsored permanent residence programs[11].

Further and as it relates to appropriate safeguards within the skilled migration programs, it is

[10] Fragomen Government Relations Practice, 2020, *Immigration and Australia's Road to Recovery Post-Pandemic* [Survey] https://www.fragomen.com/file/immigrationandaustraliasroadtorecoverypost-pandemic-finalpdf?mkt_tok=eyJpIjoiT0RobE9UUTVPREl4TWpkaiIsInQiOiJkODBMZndhRytkcjdhQWJ6eDd3enlBQWhRc2h4dG1HRWdWbUdheVZMcWNhbVBTQk94eFA2V1RNcjlaUjVwSGlpT2NSMlNMNUp6Nmh3WkdTZlpqMGVJS3VXNlhpSnRtZ1k3K1wvaTNhU0pJdjhEaStsRnQ3a3FRbUxteFJEOEFoYUgifQ%3D%3D
[11] Ibid, page 9

arguable that a longer term ongoing reliance on a sponsor, where the temporary worker may feel less able to raise workplace concerns due to the necessary link of their employment with their visa status, has the potential to increase the need for costly workplace protections.

On the other hand, increasing numbers of people choose to be more mobile in terms of their employment, and move for opportunities, rather than choosing a job with the sole or even predominant purpose of permanent settlement. In other words, not everyone chooses to migrate permanently. This is also reflected in the growing trend of global nomads and the growth of the gig economy, where mobile, self-employed talent fluidly moves between projects. The traditional employer-employee relationship is therefore disrupted, and in the immigration context there are limited options that may cater in these circumstances (for example, General Skilled Migration whereby the timing and uncertainty of the SkillSelect 'Expression of Interest' and invitation process can be an impediment for prospective migrants).

Simplifying the skilled visa programs

In our view it is critical that any simplification of the visa framework must promote a system in which:

- the rules for any given visa are easy to identify and prescribed by law;
- policy is clear and consistent with the law; and
- there is little or no scope for arbitrary decision-making.

The Act already provides a mechanism by which the number of subclasses could be reduced simply by grouping more of the existing subclasses into classes. The Act makes no reference to subclasses but deals with visa classes. In this way, a subclass is simply a way of identifying the particular criteria that must be met for a person to obtain a class of visa– an application for any subclass of visa is ultimately an application for a class of visa that the subclass belongs to. By simply grouping a number of subclasses into a class (for which one form and fee is prescribed), the number of visa options would be reduced.

Over time there has, however, been a tendency to separate subclasses into their own classes rather than to consolidate them into fewer classes. This has occurred because of the complexity and confusion that is created when there are too many subclasses within the same class. Such complexity and confusion is also likely occur if the existing criteria for a number of different subclasses are simply collapsed into one subclass but with different streams, thereby making the criteria for the new subclass more complicated.

Australia's skilled program remains complex as we seek to heavily differentiate criteria and codify rules depending on the applicant's particular circumstances and particular short term and long term purpose of entry to Australia. In our opinion, a true consolidation of subclasses that will result in a simpler system can only occur if the criteria for the new consolidated subclass are themselves simplified. Making the rules clear and simple to understand will also enable the Department to pursue increased digitisation and automation in decision-making and lead to better ease and acceptability of the decisions so made.

Fragomen's clients are predominately global and national businesses who require employees on a temporary and permanent basis mainly in managerial, professional and para-professional roles. Whilst our clients mostly utilise employment visa (both temporary and permanent), business visitor visas and more recently, the Global Talent visa programs, the issues raised are common to other temporary and permanent visa subclasses.

The three most important issues for our clients when considering how the skilled visa program can be simplified are that:

1. **There are appropriate visa options to meet the needs of business:**

Our clients use the visa program in three main ways:

- to employ an overseas worker;
- to relocate an existing employee of the business (short or long term), and
- for business meetings and consultations.

The TSS visa program generally provides an appropriate pathway for the employment of overseas workers in long-term positions who are not already employees of the business, whilst the Temporary Work (subclass 400) visa and various Business Visitor visas generally cater for the short term engagements of overseas workers and business visits respectively. In the case of short-term assignees, respondents[12] to Fragomen's 2020 survey also suggested introducing the following to better support economic recovery:

- new 'intermediate' length visa for short term assignments of a duration of up to 1 year and which are not adequately catered for under the current TSS visa program; and
- formal priority processing arrangements for Temporary Work (Short Stay Specialist) visa for 'low risk' proposers (for example, Accredited Sponsors)

Eighty-five percent of survey respondents also identified an "ICT visa" as an important priority for the Australian immigration framework in recognition that the TSS visa does not, , always provide an appropriate pathway for the temporary relocation of existing employees of the business to Australia (i.e. .via an intra-company transfer) because:

- the roles to be filled are not generally available to the open labour market in Australia (as they are internal to the business) or involve knowledge or skills that are not available in Australia;
- there is no real recognition of the fact that global companies have global workforces, including in many cases significant numbers of Australian employees, which they need to deploy around the world quickly and predictably; and
- the visa holder will often spend only short periods of time in Australia and may be required to leave and enter on many occasions.

The majority of respondents strongly agreed[13]:

- That having a separate visa for ICTs would better recognise the prerequisite proprietary knowledge and skills brought by such staff;
- That international assignments for ICTs are part of a career development strategy with reciprocal benefits to Australians;
- That ICTs should be accorded priority processing under existing arrangements; and
- To a policy that provides companies with the ability to access highly skilled people in their internal workforce through the relaxation of requirements for ICTs.

2. **The rules for the visas and any compliance requirements are clearly defined and remain constant.**

Business users of the visa programs require certainty about the circumstances in which they will

[12] Op cit 9 at page 8
[13] Ibid

be able to access overseas workers and the time it will take, especially in an era of globalised workforces and project teams working on multiple projects around the world which require shorter periods of work in a number of countries in any period of time.

Clients regularly express concern and frustration at the frequency of change to the process, but also as to regulation or policy changes that do not recognise the complexity of business and its nuances; and

3. **Processing of visa applications is fast and efficient and decision making by officials is certain and consistent against the legal criteria.**

Simplification of any visa programs must result in improvements in the efficiency with which visa applications are dealt with. Business needs often arise without warning and it is not always possible for businesses to plan their visa requirements with any degree of certainty or with a long lead time.

This is particularly so for companies using intra-company transfers for project work and delivery or as part of a global workforce solution. In this context, it is imperative that any simplification of the system must consider the needs of business to be able to access key staff in the fastest time possible. To do otherwise, places companies in Australia at a disadvantage in securing the expertise for critical stages of project implementation.

7. Any other related matters - Expanding exemptions to age limits for permanent employer sponsor visas

In our view there are a number of circumstances in which it would be appropriate to amend or extend the current age exemptions in the permanent and provisional employer sponsored programs:

- An age exemption should be available for all occupations where the business can successfully demonstrate that the nominee is of 'exceptional benefit' to Australia.
- Senior management roles, which in some professions tend to correlate with lengthy work experience, should be included among the occupations provided with an exemption.
- The age exemptions could support development in regional areas by allowing for an exceptional benefit exemption if the state/ territory body so endorses. This could equally be extended to the Skilled Work Regional (Provisional) (subclass 491) visa program to provide flexibility for the nominating state/territory to attract high value skilled migrants.

Rigidity with an upper age limit can have unintended consequences and harm the economy. Not allowing exemptions in meritorious circumstances means Australia stands to miss out on retaining and attracting talent, particularly as programs in other jurisdictions set their age limit at retirement age. A more nuanced and agile approach to age would allow consideration of whether a person's contribution to Australia outweighs considerations of age. These considerations are discussed further below.

Exceptional Benefit

The existing age exemptions within the permanent Employer Nomination Scheme (ENS) are based on notions that:

- most people would not attain a senior position in such an occupation before the age of 45; and

- the presence of certain older workers presents benefits to Australia beyond merely the number of working years that remain before they reach retirement age.

The cohorts currently afforded an age exemption are good examples of where the benefit to Australia rightfully outweighs considerations of age. We are concerned that, by being overly prescriptive, the exemptions serve to exclude other potential applicants who would be of exceptional benefit. In our view, consideration should be given to the reinstatement of the 'exceptional benefit' age exemption, assessed on a case by case basis, that applied to all occupations in the previous (pre July 2012) subclass 856 visa program. Importantly, the notion of exceptional benefit is different from the idea that the person is 'pre-eminent in the upper echelons of their field', as required by the Global Talent program – not least because by applying through ENS the person already has long-term employment prospects in Australia.

Senior Management Roles

Consideration should be given to extending the age exemption to senior management roles, given the time taken to ascend to such a role, particularly in some industries. The exemption could be limited by factors such as the size of the business' turnover and/or workforce. Some obvious examples might include:

- Chief Executive Officer/ Managing Director (111111)
- Corporate General Manager (111211)
- Specialist Managers (not elsewhere classified) (139999)
- Engineering Manager (133211)
- Chief Information Officer (135111)
- Human Resources Manager (132311)
- Sales and Marketing Manager (131112)
- Finance Manager (132211)
- ICT Account Manager (225211)
- ICT Project Manager (135112)

The lack of age exemptions in these roles also impacts business' ability to attract talent, not just to retain it. Our clients are already encountering recruitment difficulties in these occupations as the best candidates turn down job offers to Australia, because their age precludes the possibility of permanent residency unless the high-income exemption is still available after three years and they qualify for same.