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FRAGOMEN
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1 February 2007

The Committee Secretary
Joint Standing Committee on Migration
Department of House of Representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600
AUSTRALIA

email: jscm@aph.gov.au

Dear Sir/Madam,

Joint Standing Committee on Migration: Inquiry into temporary business visas

Enclosed please find a submission to the Joint Standing Committee on Migration addressing the Terms of Reference for the inquiry into temporary business visas. The submission primarily centres on issues relating to the existing law and processes related to subclass 457 visas. It also provides comments on proposals currently being considered by the Commonwealth that would affect businesses sponsoring people to enter Australia as holders of subclass 457 visas.

We would be pleased to respond to any questions arising out of the submission and/or to attend a hearing of the committee to discuss its contents. Please direct any correspondence to David Crawford at the address above or via email to: dcrawford@fragomen.com.au.

Yours faithfully,

Robert Walsh
Managing Partner

Dr David Crawford
Partner

Submission to the Joint Standing Committee on Migration:

Enquiry Into Temporary Business Visas

This submission is submitted by Fragomen Australia and addresses the Terms of Reference adopted by the Joint Standing Committee on Migration on 6 December 2006. The submission centres mainly on the operation of the Temporary Business Entry (Long Stay) subclass 457 visa, in terms of law, process, compliance and importance to business. It makes several recommendations for further consideration. The authors would be available to attend hearings if requested by the Committee.

Fragomen Australia

Fragomen Australian is an immigration practice with offices in Sydney, Melbourne, Brisbane, Canberra and Perth. It currently has some 90 members of staff throughout the country. It assists clients with visa and citizenship enquiries, with most client work related to businesses wanting to employ staff on Temporary Business Entry (Long-Stay) subclass 457 visas or nominate them to obtain permanent resident status. We also advise businesses on related issues, including the appropriate use of business visitor visas, reporting requirements, risk management issues and related areas.

In addition, the practice includes specialists who assist with private client work; US consular matters; and, the Asia-Pac Coordination Centre in the Sydney office assists clients sending staff to jurisdictions in the Asia-Pacific region, where Fragomen Global has no office.

Fragomen Australia is part of the Fragomen Global network, which has some 26 offices worldwide. Our colleagues in other jurisdictions also specialise primarily in assisting businesses that employ staff requiring visas.

The comments in this submission are based on our experience in this area of work and on discussions with clients.

Background

In 1994-95 the Australian Government decided to examine the means of entry for temporary workers in an effort to assess the merits and desirable processes needed to facilitate the entry of skilled people, whose employment would assist the development and operation of the Australian economy.[1]

Neville Roach chaired the review and the ensuing report, titled *Business Temporary Entry – Future Directions*, was released in 1995. Many of its recommendations were implemented in 1996. The report was consciously radical in trying to help to invigorate the economy and the committee recognised that its proposals constituted a "wide ranging and substantial shift in policy direction and process".

[1] *Business temporary entry : future directions: report by the Committee of Inquiry into the Temporary Entry of Business People and Highly Skilled Specialists*. (Canberra, 1995)

In adopting many of the report's recommendations the government took a step ahead of many competitors in adjusting immigration rules to ensure that the economy remained open to the skills sets needed in a rapidly changing world economy. The rapid development and penetration of new technologies, reductions in tariff and other trade barriers, deregulation of financial markets and the growth of multinational enterprises all featured in the Commonwealth's desire to improve the country's ability to position itself to attract skills for Australia's benefit. These policy changes were also formulated at a time when research of the Bureau of Immigration Research (and later the Bureau of Immigration and Population Research) consistently signalled that the net impact of attracting skilled people was, overall, favourable in its effect on the operation of the economy.[2]

The decision to allow spouses full work rights, the recognition of common law (or de facto marital) spouse relationships and the ability to allow limitless visa extensions (subject to criteria for the visa being met) were all radical changes and compared favourably with all other jurisdictions in the world. The visa process was also relatively uncomplicated, notably no labour market testing was required and medical screening processes were simplified.

The new policy in the 1990s bore fruit quickly. The number of people entering as temporary entrants by the mid-1990s was relatively modest, with slightly over 12,000 in total of whom just over 8,000 were "specialists".[3] The holders of subclass 457 visas, which were introduced under the new arrangements, exceeded 22,000 by 1996-97 and by 2005-06 the number exceeded 73,000 (these numbers including dependants).

The system was novel because it imposed obligations on business to assume risk in accepting people into the economy, whereas previously systems had an implied risk being borne by the Commonwealth. Employers accepted ultimate responsibility for covering debts to the Commonwealth and/or the medical system that the employee was unable or unprepared to cover. There needed to be a demonstrable benefit to Australia in a business establishing a right to admit temporary residents, the business was also obliged to demonstrate a commitment to training its Australian staff or introduce new technologies and to argue that the visa holders would fill key roles within their business.

For its part, the Commonwealth aimed at a "light touch" for processing individual visa applications, to facilitate the speedy entry of people coming to fill jobs in Australia.

In his media release of 6 September 1996, Senator Bolkus, who was Minister for Immigration and Multicultural Affairs, stated that people entering Australia on subclass 457 visas "will have skill sets not readily available in Australia, and there will be safeguards in the system to ensure that the employment rights of Australians will be protected." The issue of protection of local employment rights has remained the abiding and central controversial issue associated with the subclass 457 visa.

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[2] Cf. Khoo, S-E & McDonald, P., "Temporary Skilled Migration to Australia: Employers' Perspectives." *Australian Population Association*, Conference Paper, September 2004. p.3
[3] Kinnaird, pp.2-3

At the time of the report, Neville Roach conceded that the system relied heavily upon business being compliant and to some extent regulating the system itself. This assumption was based on the premise that the costs of importing labour would be considerable and less desirable than using locally employed staff members. But the recommendations clearly stated that an adequate monitoring and review mechanism must exist and that the government should review the adequacy of the system to ensure the visa category delivered. The recommendations included a recommendation for penalties to be available to the department.[4]

From an early point there was some opposition to the subclass 457 visa. The discovery of Indian temple workers in 1999-2000, whose employment conditions and remuneration breached visa requirements was a *cause celebre*. But most alleged cases of non-compliance of that time were really examples where conditions on business or tourist visa were being breached. We are unaware of systematic abuse the 457 visa system at the beginning of this decade.

The Illegal Workers Bill in 1999, which was intended to empower the Commonwealth to penalise employers unlawfully employing people, was withdrawn. The scope of the Bill went beyond subclass 457 non-compliance and covered other areas of visa abuse. In doing so it provided significant penalties.

Despite the withdrawal of the Bill, from 2000 onwards the Commonwealth made a series of changes to visa rules related to 457 visas with a view to increasing compliance. Measures were introduced to allow the government to monitor the activities and compliance of sponsoring employers, the power to cancel business sponsorships was strengthened, the occupation groups to be filled by subclass 457 visa-holders was more narrowly defined and assessments looked more closely at the positions to be filled and the credentials of visa applicants. In particular, minimum salary thresholds were introduced to ensure that local workers were not disadvantaged.

Since 2000 a number of measures has been introduced which were designed to strengthen compliance. There has been little change to the overall structure of the visa category. Apart from the recognition of same sex partners for 457 visa holders, as qualifying for a 457 visa as a dependant there were few changes unrelated to compliance. The introduction of an electronic lodgement system has had mixed success.

Despite the emphasis in recent years on compliance measures, we believe that the monitoring and audit process that was introduced failed to have the profile and resources needed.

There have been other indicators that the system is not as effective now as it could be. For almost ten years visa processing was relatively speedy and Australian policy was internationally competitive. This was consistent with the Roach Committee recommendations. In our view this is no longer the case; the policy is being challenged by those of other countries, processing and legal requirements in Australia are likely to become more complicated and processing delays are now the norm.

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[4] *Business temporary entry: future directions. op.cit.*, recommendations 16 and 18.

Fragomen Australia and its Client Experience

During 2006, criticisms of abuses related to subclass 457 visas attracted considerable media attention and a number of stories featured in the print and electronic media. We are not in a position to offer a comment on the scale of alleged abuses but the body of companies we represent have not, to our knowledge, been involved in or linked with scurrilous activity. The allegations of irregularities by sponsoring businesses and assignees regarding 457 visas known to us appear to relate primarily to the manufacturing, building, and hospitality industries.

The client base of Fragomen Australia is extensive – businesses engaged in mining, engineering, health care, financial markets, ICT, manufacturing, retail, motor vehicles and parts, publishing houses and other industry sectors are represented. The categories of employees are essentially concentrated in higher skill levels that fit within the Australian Standard Classification of Occupations (ASCO) at levels 1 to 2. Rarely would they be lower than ASCO 4. None of our offices have learned of any serious compliance activity against any one of our clients. Where there is a problem it might relate to a minor administrative error, such as a failure of the business to notify the Department of Immigration that a sponsored employee had resigned and left the country.

The level of criticism has thus thrown a blanket of unfavourable comment upon a client base that in our experience has been making every effort to comply with existing law. In the face of criticism, the Department of Immigration and Citizenship (DIAC) has tried hard to identify weaknesses in existing systems to prevent abuses and blunt attacks of the government. Our view, however, is that the government is considering proposals for change that we believe run the risk of being excessive and counter-productive for the economy.

Looking for Remedies

In the second half of 2006, DIAC undertook a project whereby it worked with state governments to address problems in the operation and administration of the subclass 457 system.[5] At this time there were, apparently, consultations with industry groups.

We were subsequently made aware, through discussions with DIAC National Office, that several changes to immigration law were being considered. Examples of proposed change included:

- Assignees of subclass 457 visas would need to be placed on the Australian payroll and paid in Australian dollars for the duration of their period in Australia;
- Payment of staff should be made each fortnight;
- Minimum language requirements would be checked, primarily on OH&S grounds; and,
- The schooling costs of dependants on 457 visas would be borne by the employer.

[5] A copy of the COAG communiqué of July 2006 can be found on the Internet at: http://www.coag.gov.au/meetings/140706/index.htm#temporary

These recommendations seem intent on fixing some perceived problems in certain industries but they potentially create enormous problems for many existing businesses. By way of example, we will offer the following comments:

Payment on Australian Payroll

It is routinely the case that senior staff members, on an intra-company transfer from Europe, the US and elsewhere, remain on the payroll in their home country. This ensures that they retain their pension entitlements in their home country. Placing these people on the local payroll would undermine their pension entitlements and/or present major logistical challenges for businesses.

It is clearly a major disincentive for staff to compromise their pension rights by coming to Australia. This runs counter to July 2006 taxation changes that were apparently introduced to entice executives from other countries to accept positions in Australia on a temporary basis.

In addition, there are people who enter Australia on short-term assignments from 3-6 months and the value of placing them on local payrolls would be minimal. Finally, there are significant businesses that have global payrolls. A change in their systems would constitute a major logistical problem, which would be very costly. We question the sense of the overall change if audit checks were effective.

Fortnightly Pay

We understand that this recommendation was to ensure that lower paid staff members were able to cover their living expenses if paid monthly. We are not aware of the background to this view as most of our clients have payrolls for each month. It may be that some reports of staff not managing their personal budgets surfaced. Those clients with whom we have spoken have been surprised that the Commonwealth would contemplate such a major change to their payroll systems for a relatively small number of their employee population.

Those clients that have staff covered by industrial awards are, of course, in any case required to be compliant. It remains unclear why visa rules would co-exist with industrial relations rules so specifically. Potentially changes in industrial relations requirements would potentially mean that visa rules would be out of step. We would argue that general provisions linking compliance with relevant industrial relations law would be appropriate and sufficient.

Language/OH&S Concerns

At the time of writing we await details on what language tests are planned and how they will affect visa application processing. If language tests are required prior to entry it will presumably be based on the passport country of the prospective assignee as well as a risk profile. We would strongly argue against an approach for testing all people who may come from a country where the first language is not English. In such a case, a passport holder from the UK for example may not require a test but an applicant from France would, unless certain evidence of English language proficiency could be provided. There are many senior executives and specialists working today who come from countries or backgrounds where English is not their first language.

Already IELTS testing centres are heavily subscribed and the waiting times for get a test can be lengthy. In other words the language assessment could considerably extend already lengthening application rates.

The principal concern to impose language testing relates to OH&S compliance, which we understand. Our concern is that many businesses with whom we work have much lower risks of OH&S problems than others. In addition, the businesses are unlikely to sponsor senior executives or specialists into their businesses without being satisfied that they can perform their roles effectively while in Australia. There are CEOs and other senior professionals in Australia who do not come from countries where English is the first language. Our presumption is that this proposed change was to address concerns in some industries, but the impact of the changes is to affect applicants in all industries. The impact will be to delay processing times, which runs counter to the "light touch" principle when the 457 visa was introduced.

Improving Monitoring

The tendency of the department has been to rely upon introducing new regulations to add to the complexities of the visa system. Perhaps this was unavoidable but we believe that a strong monitoring mechanism with the power to impose penalties would have been better. This approach was envisaged in the 1996 Roach Committee report and we believe it offers the most sensible approach.

We do not claim to know the details and extent of abuses currently being identified by officials but we believe that a strong audit system with penalties that are imposed can help to deter errant behaviour as long as the audit methodology is sufficiently good and includes an investigative capability. It is impracticable to aim for total eradication of non-compliance by sponsors but if the power to impose penalties for non-compliance are used and investigations are competent, the risks become greater for sponsors and those whom they sponsor.

Unlike investigations by the Australian Taxation Office, where discovery of non-compliance commonly results in increased receipts for the Commonwealth, existing provisions result in no additional resources for DIAC. This means that devoting additional resources to compliance activity is a net drain on limited funding. We would strongly argue that fines resulting from investigations of businesses be allowed, either in part or in total, to be directed back to the business compliance activities of DIAC: this could be in the form of an arrangement under section 35 of *The Audit Act* or similar arrangement. This potential return to the department will thus assist senior DIAC officials in allocating resources to this important area of work.

If our recommendation were accepted, the allocation of resources to compliance activities would not affect limited resources available to process applications. In this way the vast majority of compliant businesses would not be penalised by the small number of non-compliant businesses.

Changing the 457 Visa Criteria

The pattern of the changes being considered by DIAC suggests to us that too much is being asked of the subclass 457 visa. Where a temporary resident is needed to enter Australia on assignment, in almost all cases it is the one visa option available, regardless of their background or potential risk to the labour market. This visa category therefore aims to meet the needs of senior executives of multi national organisations as well as for people who recently finished an apprenticeship in a trade.

The emphasis of recent policy changes has been to target problems at areas of the market where the occupations are trades-related or at lower skill levels, where OH&S issues are important and/or where the scope for employer misfeasance is considered high.

At least two alternative options exist to combat problems, without having the negative effect of the current proposals. The first is to have separate sets of rules for employment categories. This means that one visa category or set of criteria could exist for people from certain "higher" ASCO occupations and another category or set of criteria for "lower" ASCO codes. In this way, the occupations that have attracted the greatest media attention and compliance activity could be asked to fit into the criteria the current proposals would seek to impose.

The second option would be to allow slightly streamlined rules for intra-company transfers, where the employee has been with the one employer (or its off-shore affiliate or parent) for at least 12 months. The US has such a system. The screening of the business at the time of sponsorship would be used to identify if the employer was of sufficient standing to allow the streamlined processing that this separate stream could offer. Both suggestions could be implemented.

Education Costs

We understand that the Commonwealth is contemplating the imposition of schooling charges on employers whose staff members on 457 visas have dependants at school. We understand that this is based on the fact that in some States/Territories a charge by the local education authority adds considerably to the cost of taking an assignment in Australia.

If the Commonwealth imposed this requirement it would add not only the cost of education but also would presumably result in an FBT liability for the employer. On that basis the costs for employers of bringing people to Australia would potentially become prohibitive. More broadly, the Commonwealth would be intervening in negotiations over an assignment in Australia. In our experience businesses seeking to attract assignees to Australia negotiate an arrangement that is mutually acceptable. To impose additional regulatory processes on top of those negotiations both complicates negotiations and could skew normal recruitment processes in the labour market.

At a practice level, we do not know how the Commonwealth would structure such a requirement. For example, if the Commonwealth is considering that the schooling costs would only be paid by people on a certain income and also upon the number of children they have, any formula could be very complicated and subject to frequent change. The impact of such an approach would make the planning and recruitment of businesses seeking people from overseas more complicated.

Ultimately we believe it is inappropriate for the Commonwealth to insert such a requirement. We understand that it is concerned about people struggling but such an approach is more likely to create problems than to solve them.

Other Problems

Processing Times

Over the last year DIAC Business Centres in almost all States and Territories have been facing increasing application rates. A result has been that processing times have steadily extended in each office. The service level target set for 457 visas, set in 1998-99, is six weeks but it is increasingly difficult for officials to meet that target. Given the demands of the economy, we expect that the application rate will remain strong.[6]

It is in the interest of the economy that adequate resources be supplied to the Business Centres to allow them to improve their processing time-frames and thus improve service standards. Our experience is that officials are consistently working long hours to try to keep up with their workloads and we are conscious that this situation is creating additional pressure for their supervisors, who are trying to juggle many priorities.

If additional resources are not available there is a consequential effect on business. In some industries, such as mining and the financial sector, we have clients who are struggling to find suitable candidates to recruit to Australia. In some cases the candidates will consider offers from employers in different countries and the individual may make a decision to work in Australia at the last moment. This means that the lead-time from accepting an offer to when the business wants the recruit working in Australia can be limited. Lengthy processing times impose a real cost on business and additional stress for Business Centres as requests for some expedited processing increase.

We would encourage the government to ensure that sufficient resources are available to allow processing of applications to be as fast as possible. Processing officials have mentioned to us that they are under pressure and would welcome us approaching Canberra in an effort to improve their staffing levels. We are conscious that supervising staff members in processing centres are working hard to provide a good service in a difficult environment.

Labour Agreements

DIAC is increasingly interested in using Labour Agreements as a way to screen employers or industry bodies as sponsors of 457 visas. These agreements have the ability to allow government to ensure that all affected parties are consulted to minimise unforeseen and undesirable consequences of businesses sponsoring people into Australia.

[6] Khoo and McDonald, *op.cit.*, p.4: in 2003 employers regarding processing times of 3-4 weeks as being slow. The current quotations of 8-12 weeks are considerably slower and a time of increasing skilled shortages in certain industries

Here again there have been considerable delays in finalising agreements. We understand that workload pressures have reduced the ability of DICA and the Department of Employment & Workplace Relations (DEWR) to respond to requests within previously articulated timeframes. It makes little sense to encourage businesses to enter Labour Agreements unless sufficient resources are allocated to DIAC National Office and DEWR to facilitate negotiations. We would also hope that officials experienced in these agreements are available to assist colleagues not previously involved in their formulation and monitoring.

The Use of the subclass 456/Business – the Business Visit

For a very lengthy period there has been doubt about the appropriate use of a business visit visa (Business ETA, subclass 456/459) but our advice to clients is that this visa is not a work visa – any work undertaken on such visas should be undertaken in very limited circumstances. Our view is informed by discussions with officials in Canberra, tightening in 2005-06 of policy guidelines on the use of business visit visas and anecdotal reports that officials were taking an increasing interest in business visitors at entry points.

At a time of slower processing times for 457 visas, businesses could be tempted to bring staff into Australia on business visits. They can then await here while the 457 visa is processed. The potential risk of visa non-compliance is real and likely to increase as processing of 457 visas continues to be relatively slow. We would recommend that faster processing of the 457 visa caseload would thus help to reduce the risk of non-compliance in this area.

We should stress the impact of delays in 457 visa processing. In some cases businesses keen to remain compliant but who often have urgent needs are considering sponsoring people in case they will be needed in Australia – thus before it is clear that the assignment in Australia will be needed. This approach is a cost to the business and uses departmental resources that need not be used if, in reality, some people do not need to enter Australia.

A New Visa for Short-Term Assignments

There are situations where businesses will require specialists to enter Australia for a short-term to undertake work and return to their own country. The period of visit may be less than 3 months. Increasingly the tendency of the department under existing policy would be to state that any work would require the use of a 457 visa. This can present a major problem where the workers may be contractors or employed by off-shore entitles, and who could thus not become employers of the Australian entity, as required under 457 rules.

This issue was touched upon in *Business Entry in a Global Economy*, which was a report by the Business Advisory Panel appointed by Mr Ruddock, who was the responsible Minister at the time. The report was published in 1999. It recommended a visa that allowed for a six month period of stay and allowed work. The visa would be available for "key" personnel only and would involve a number of checks.

On the other hand the visa processing period would be streamlined and facilitate movement. In this way it would be possible to clarify the use of the business visitor visa (in its different forms) and also ensure that the use of the 457 was in order.[7] We recommend that this option be revisited.

Consultation

We are not aware of the extent of consultations DICA has undertaken with business groups in the recent past. We see great value in the department reviving the idea of a Business Advisory Panel that would form a group of advisors who could offer business perspectives that would inform policy making and policy review processes. We are not aware of any similar mechanism that has existed over the last few years, at a time when the role and significance of the 457 visa category and related issues have become increasingly important in the business environment.

General Message

We agree that there need to be changes to the existing 457 system to protect the local labour market and the integrity of the visa system. We have several concerns about the recommendations being considered by the Commonwealth, which are outlined above. At a general level, we believe that the attention being received by the visa could discourage business investment in Australia. If there is a perception that visa pathways are overly regulated or subject to change, businesses can choose to direct investment to other jurisdictions. This does not mean that we state that all investment is desirable but we do suggest that this issue should form part of government thinking.

We do not know the level of discussion between many government agencies about the proposals currently being considered by DIAC, but based on our discussions with significant businesses, we are concerned that there will be a cost to the economy. We would be available to speak to these points to the committee.

Dr David Crawford
Partner

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[7] *Business Entry in a Global Economy: Maximising the Benefits.* (Canberra, 1999) p. 50