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20 June 2013

BY ELECTRONIC SUBMISSION

Senate Legal and Constitutional Affairs Committee
Australian Parliament House
Canberra ACT 2600

Dear Sir/Madam

Please find attached our Submission to the Legal and Constitutional Affairs Legislation Committee in response to the Committee's inquiry into the Migration Amendment (Temporary Sponsored Visas) Bill 2013.

Fragomen is pleased to have had the opportunity to provide a submission to the Committee on this important issue. If I can assist the deliberations of the Committee further, please do not hesitate to contact me on or by email

Yours faithfully,

Robert Walsh
Managing Partner, Australia and New Zealand
Fragomen Global LLP

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Senate Legal and Constitutional Affairs Committee
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Dear Sir/Madam

Thank you for inviting Fragomen to make a submission to the Legal and Constitutional Affairs Committee as part of its enquiry into the Migration Amendment (Temporary Sponsored Visas) Bill 2013.

Fragomen does not accept that there is a need for the proposed changes to the *Migration Act 1958* (Cth) (**the Act**) contained in the Migration Amendment (Temporary Sponsored Visas) Bill 2013 (**the Bill**).

For the reasons set out in our submission of 3 May 2013, made to the Senate Legal and Constitutional Affairs Committee Inquiry into the Framework and Operation of subclass 457 visas, Enterprise Migration Agreements and Regional Migration Agreements, our evidence to the Committee on 23 May 2013 and our Response to Questions on Notice dated 31 May 2013, Fragomen believes that the current subclass 457 visa system is effective and meets Australia's national interest, our international free trade obligations and the interests of Australian businesses.

In our submission the Bill is fundamentally flawed because it:

- imposes unreasonable costs and delays on business;
- empowers delegates of the Minister of Immigration and Citizenship (**the Minister**) to veto the hiring decisions of business;
- seeks to alter and redefine the very purpose of the subclass 457 visa;
- empowers the Minister to override Australia's international trade obligations; and
- provides insufficient recognition of the problems for employers in regional Australia.

1. The new s140AA will create uncertainty about the construction and application of the Act and Migration Regulations 1994 (**the Regulations**) in cases relating to the sponsorship of subclass 457 visa holder because it

purports to:

a. restrict the use of subclass 457 visas only to situations of 'genuine skills shortages' when the program has always recognised the importance of ensuring that multi-national companies can transfer essential personnel and skills by way of intra-company transfer in accordance with Australian international trade obligations; and

b. sever or reduce the connection between the subclass 457 visa and the skilled migration program when this has proven to be the most effective way to ensure the permanent migration of skilled overseas workers with Australian work experience (s140AA(b)(ii)).

In our submission the purpose of the subclass 457 visa program should not be narrowed in this way. The reasons for our concerns on this aspect are detailed in the written submission and the oral evidence referred to above.

2. The new s140GBA empowers the Minister to decide which, if any, of Australia's international trade obligations should be complied with. The effect is that the Act will permit (in fact require) a breach of those obligations in any case where the Minister has decided that an obligation should not be included in the Legislative Instrument for this purpose (s140GBA(1)(c) and (2)).

   In our submission and where the international agreement has entered into Australian law, it does not seem to us that the Minister should have the power to decide whether or not an international obligation entered into by Australia should be adhered to or not. This is particularly the case when the reason to override the provision in the relevant agreement would be based on the typically short term vagaries of the Australian and global economies.

3. The new s140GBA(3) will require the refusal of a visa unless the Minister (or a delegate) is satisfied that a suitably qualified and experienced Australian citizen or Australian permanent resident *is not* readily available to fill the nominated position based on evidence of the type specified in s140GBA(5) and (6).

   Under the proposed scheme, a delegate of the Minister will have complete statutory discretion to demand evidence of a particular type and to review and reject the hiring decision of employers (s140GBA(3)(d)). It is not appropriate in our view for any delegate to have the ability to interfere in such an unfettered way in the hiring decisions of employers, irrespective of whether the employer is a large multinational corporation or a small or medium size Australian enterprise.

4. The Bill contains no definition of the term “is not readily available”. Explanation of this term will be required in policy in order to avoid inconsistent decision making. A decision to refuse a subclass 457 visa can affect the interests of Australian businesses and Australia and should not be left to policy.

5. Although certain Government authorities with responsibility for employment matters can express support as one part of the evidence that the delegate must have regard to, the provision does not compel the delegate to accept this support and allows them to effectively ignore it and insist upon other evidence. This has the potential to create a significant amount of red tape and costs for small and medium size employers in regional Australia in circumstances where large projects may be distorting the local employment market and the relevant Government authority would be aware of these issues and be in a better position than the delegate to assess the labour market conditions in that particular regional area of Australia.

6. The exemption to labour market testing (LMT) provided in s140GBB highlights the dangers of legislating in this area. The exemption recognises that the LMT requirements will create red tape and delays for business and so seeks to exempt them in the case of a major disaster. However, there are many other circumstances in which processing delays brought about by the requirement to conduct LMT could have a major detrimental impact on Australian business, business and investment activity and therefore impact on the economic and social interests of Australia.

7. Similarly, the exemptions to LMT for skills and occupations will create an overly bureaucratic process for the assessment of any occupation that is not specified by the Minister as exempt. Clearly, the Bill is designed to empower the Minister with a great deal of discretion to ‘select’ which occupations should be exempt. It has been widely accepted that the now discredited use of mechanisms such as the Migration Occupations in Demand List are not able to respond to changes in the labour market necessary to ensure skills shortages are met in an effective way. The Minister without taking legislated notice of labour market trends should not be able to decide which occupations will be subject to the additional costs and delays that will be created by LMT. This is even more compelling in circumstances where many occupations may be the subject of international trade agreements.

In conclusion it is our considered submission that the current bill entirely misconstrues the role that the subclass 457 visa program currently plays in the Australian economy. This program is vitally important not only to fill labour market shortages in the most efficient way, but equally in allowing the smooth

entry of employees who are being assigned to Australia as intra-company transferees as part of their employment with companies, including Australian owned companies, that operate in multiple jurisdictions. At the very least in our view this legislation should not proceed without the simultaneous introduction of a specific stream in the subclass 457 visa program to accommodate intra-company transferees. In our Response to Questions on Notice dated 31 May 2013, we outlined many of the features of what we believe would be an effective intra-company transfer stream which would enhance Australia's participation in the global economy and at the same time protect the integrity of Australia's immigration rules.

We would be pleased to assist the Committee further in its considerations of this important issue in any way that we can.

Yours faithfully,

Robert Walsh
Managing Partner, Australia and New Zealand
Fragomen Global LLP