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Committee Secretary
Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By electronic upload

Submissions: Inquiry into the Migration Amendment (Protecting Migrant Workers) Bill 2021

Thank you for the opportunity to provide submissions on the *Migration Amendment (Protecting Migrant Workers) Bill 2021.*

We are pleased to provide these brief submissions. If we can assist with policy development in this area in any other way, please do not hesitate to contact me on or by email to

Yours sincerely

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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: **www.fragomen.com**.

2. RESPONSE TO THE PROVISIONS

Fragomen supports the *Migration Amendment (Protecting Migrant Workers) Bill 2021* ('**the Bill**'). As outlined in by our earlier submissions responding to the exposure draft, Fragomen acknowledges the the need to further strengthen employer sanction provisions to protect migrant workers against wage underpayment and other exploitative practices by unscrupulous employers.

Fragomen welcomes key amendments to the Bill following the exposure draft. We support the increase to the proposed period in which a former prohibited employer must provide to the Department of Home Affairs ('**Department'**) information regarding non-citizens which it allows to begin work in the 12 months following the end of a prohibited employer status, from 14 to 28 days per s245AYJ(1)(c). Fragomen also welcomes the expansion of subsections 245AB, 245AC, 245AE and 245AEA, allowing employers to obtain alternative evidence of a prospective employee's work rights, such as evidence of an Australian passport, without the need to undertake VEVO checks. We consider that these amendments support the Bill's objective to provide greater protection to migrant workers, taking into consideration the need to minimise any unnecessary administrative burden for employers.

In considering the Bill, Fragomen recommends further clarity as to what may constitute 'an arrangement in relation to work' under s245AAB, so as to avoid inadvertently penalising employers who seek to vary an employment arrangement to ensure compliance with visa conditions, in circumstances where the non-citizen may be reluctant to accept the arrangement; for example, to request that an employee work from a different location or otherwise cease working to ensure compliance with condition 8547 while holding a subclass 417 visa.

Fragomen also supports amendments to s245AYI(6), to ensure that information published on the Department's website in relation to prohibited employers does not result in the employer being subjected to additional penalties after their period of prohibition, for example by way of reputational damage.

Further, Fragomen recommends amendments to Part 3, including to subsections 245AB(2) and 245AC(2), to remove the requirement for employers to undertake ongoing VEVO checks for non-citizens holding visas sponsored by the employer, noting that sponsors would already have measures in place to manage these employees in compliance with sponsorship obligations. We also support updates to Part 3 so as to allow 'registered system users' to seek the assistance of other parties, such as lawyers or migration agents, to conduct VEVO checks, noting that while the onus will ultimately remain on the employer to ensure the non-citizen's right to work, that the use of an immigration provider in relation to work rights checks can serve as an educational tool for employers, particularly for former prohibited employers working to improve their immigration compliance.

We have made further comments against each of the Parts of the Bill, noting we have only addressed selected items within each Part.

3. PART 1: NEW EMPLOYER SANCTIONS

Coercing etc. a non-citizen by using migration rules

Fragomen supports the intent of the new offences and related civil penalty provisions to protect migrant workers against unscrupulous employers, labour hire intermediaries and other parties who might seek to coerce or exert undue influence on non-citizens to accept a work arrangement that jeopardises their immigration status or to agree to a work arrangement to avoid an adverse effect on that status. However, to properly effect this, we submit that the provisions in proposed subsection 245AAB(1)(c) in particular, needs clarity as to what may constitute an 'arrangement in relation to work'.

Here, it is important to ensure that the provision in 245AAB(1)(c) not inadvertently penalise employers who are seeking to vary an employment arrangement to ensure compliance with visa conditions and in circumstances where the non-citizen may be reluctant to accept the arrangement. This could arise in the following scenarios:

- An employer requests a non-citizen to temporarily stand down from their employment arrangements where the employer has discovered a breach of a work-related condition. This could arise where a non-citizen's visa status has changed, for example from bridging visa to a student visa within the 3 months that a Visa Entitlement Verification Online check had been undertaken. In this scenario, it may be necessary to temporarily stand down a student visa holder's employment until which time that the student's course of study has commenced in compliance with condition 8105 to 'avoid an adverse effect on the non-citizen's immigration status'.
- An employer identifies that a sponsored subclass 482 /457 visa holder has taken on additional duties resulting in the visa holder working outside the approved ANZSCO that they were nominated under occupation. The employer amends the non-citizen's duties to ensure that the position conditions to align with the approved ANZSCO and the non-citizen alleges that the employer exercised undue influence in requiring them to move to that arrangement.
- An employer identifies that a non-citizen holding a subclass 417 visa is nearing 6 months of employment with the employer. To ensure that the non-citizen is not in breach of condition 8547, the employer requests that the employee work at a different location, or that they otherwise cease employment.

In these circumstances, the wording of s245AAB(c) could expose employers to civil liability, despite the employer actively working to comply with migration laws. The significant penalties which apply for contravention of these provisions could therefore result in a reluctance by

employers to make genuine requests of a non-citizen with regards to a work-related arrangement, even where such a request would allow both the employer and the non-citizen to remain compliant with migration laws.

4. PART 2: PROHIBITION ON CERTAIN EMPLOYERS ALLOW ADDITIONAL NON-CITIZENS TO BEGIN WORK

Prohibited employers – additional reporting periods

Under proposed s245AYJ, when a person's 'prohibited employer' status ends, that person will be subject to additional reporting requirements for a period of 12 months afterwards. Specifically, during that 12-month period the person will be required to provide to the Department certain information in relation to any new non-citizen employees. This will include:

- The name of the non-citizen
- Description of the work for which the non-citizen is employed
- If the non-citizen holds a visa that is subject to a work-related condition – details of the conditions, and
- Any other information prescribed by regulations.

Fragomen welcomes updates to the prescribed period in which a former prohibited employer will be required to provide the above information to the Department, with the period increased from 14 to 28 days, per s 245AYJ(1)(c). This additional period balances the need to ensure employers with a known history of non-compliance are providing the required information to the Department in a timely manner, whilst ensuring the employer is allowed a reasonable period in which to do so.

Fragomen also supports the introduction of s245AYJ(2), excluding non-citizens performing work which is incidental to the business of the employer from the notification requirements outlined above. This will ensure that former prohibited employers do not incidentally or unknowingly contravene s245AYJ(1). Fragomen support similar updates to s245AYH.

We note that under the proposed subsection 245AYJ(1)(b), the above reporting obligation does not extend to non-citizens who are permanent residents. We submit that s245AYJ(1)(b) should be expanded so as to exclude other temporary or provisional visas which are not subject to any work conditions from the notification requirements in 245AYJ(1), for example Special Category (subclass 444) visa holders, given that this cohort do not have the same level of vulnerability to be coerced into alternative work arrangements.

Publishing information on prohibited employers

Fragomen is broadly supportive of the Department's proposal to publish information about prohibited employers on its website, as prescribed by s 245AYI.

Fragomen is supportive of the updates to s245AYI which expand the information to be published on the Department's website in relation to prohibited employers to include a brief summary of the migrant worker sanction which is that is the basis of that declaration as a prohibited employer, even where the employer is not an approved work sponsor. This will allow for increased transparency of the Bill's enforcement.

While Fragomen is supportive of the publication of accessible and transparent information as a deterrent to non-complying employers, we are of the view that subsection 245AYI(6) of the

Bill needs to be amended to ensure that prohibited employers are not subjected to additional penalties after they have completed the specified period of prohibition. The proposed subsection currently states that the Minister is not required to arrange for the removal of information about the employer when the employer stops being a prohibited employer. The application of this subsection may result in additional reputational damage and inability to attract prospective workers for former prohibited employers.

While we note that explanatory memorandum indicates that the published details will be removed as soon as reasonably practicable, we submit that a timeframe of no more than 28 days should be specified, for the Department to remove from its website the names of any employers that cease to be prohibited employers. We consider that the 12-month post-prohibition reporting obligations outlined in s245AYJ of the Bill will be a sufficient mechanism to deter former prohibited employers from additional contraventions.

5. PART 3: USE OF COMPUTER SYSTEMS TO VERIFY IMMIGRATION STATUS

Fragomen broadly supports the establishment of civil penalty provisions to require a person to use the Visa Entitlement Verification Online (VEVO) system to determine whether a non-citizen is lawful and has the necessary permission to work.

Fragomen welcomes the addition of subsections 245AB(2)(c), 245AC(2)(c), 245AE(2)(c) and 245AEA(2)(c), which allow a person to rely on appropriate evidence of Australian citizenship to verify that that the prospective worker is not an unlawful non-citizen. These updates are consistent with current practices, in which an employer need only undertake VEVO system checks where a prospective employee is not able to otherwise evidence a right to work, for example by providing evidence of current Australian citizenship.

Notwithstanding the above, Fragomen recommends two amendments to Part 3, as detailed below.

Necessity to avoid administrative burden for non-citizens sponsored by the employer

Fragomen recommends that proposed amendments to subsections 245AB(2) and 245AC(2) be modified so as not to impose administrative burden upon employers in relation to sponsored non-citizens, where they are directly sponsored by an employer.

Given that the proposed subsections require a person to be and 'continues to be, reasonably satisfied' that the worker is not an unlawful non-citizen or not in breach of the work-related condition 'on the basis of information obtained by logging into and using the prescribed computer system', these amendments will impose a positive obligation upon employers to undertake ongoing VEVO checks for all temporary visa holders, including those the employer has directly sponsored through the employer sponsored visa programs.

We submit that this will impose an unnecessary additional administrative burden upon employers to undertake ongoing VEVO checks for sponsored employees, where sponsors would, by virtue of specific sponsorship obligations, already have measures in place to fully identify and manage this cohort and compliance to work conditions.

Restrictions on 'required systems users' relying on VEVO checks undertaken by third parties

While the Bill allows for compliance with this provision through an employer logging into VEVO directly to conduct the check or reliance on a third party to conduct the check on their behalf, it is intended that 'required system users' must log into VEVO directly to conduct such checks. Required system users cannot rely on VEVO checks undertaken by another party.

A required system user includes:

- a former prohibited employer (for a period of 12 months after their prohibited employer status ends);
- a person who is determined by the Minister to be a required system user; or
- a class of persons specified by the Minister in a legislative instrument.

In relation to a former prohibited employer, we submit that flexibility should be provided to this cohort to seek the assistance of other parties, such as that of a lawyer or migration agent to conduct VEVO checks on their behalf. For instance, the services provided by lawyers and migration agents would include checking of work rights for prospective and current foreign workers through VEVO, but could also include related immigration advice regarding specific work conditions and best practice which would assist in the overall management of an employer's workforce. For former prohibited employers in particular, use of an immigration provider in relation to work rights checks can serve as an educational tool for staff members who are responsible for recruitment, and can also prevent misinterpretation of information on work rights and restrictions. Ultimately, the onus will always remain on the employer to determine, on the basis of a VEVO check, that a non-citizen is lawful and has permission to work, regardless of the direct or indirect methods use to conduct the VEVO check.