

**Submission 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**

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1. Executive summary

Our submissions seek to address the following Terms of Reference concerning subclass 457 visas:

- their effectiveness in filling areas of identified skill shortages and the extent to which they may result in a decline in Australia's national training effort, with particular reference to apprenticeship commencements;
- their accessibility and the criteria against which applications are assessed, including whether stringent labour market testing can or should be applied to the application process;
- the process of granting such visas and the monitoring of these processes, including the transparency and rigour of the processes;
- the impact of the recent changes announced by the Government on the above points; and
- any related matters.

In our submission, there can be no doubt that the subclass 457 visa system provides significant benefits to Australia and generally works well to deliver the skilled workers Australia needs to remain competitive in the global economy.

Whilst Fragomen and its clients will always support changes to the subclass 457 visa system that deliver on these objectives, any such changes must:

- ensure that employers continue to have access to the global talent pool where that provides them with the best skilled people needed to succeed in business;
- comply with the spirit and letter of the various International Agreements to which Australia is a party by protecting the movement of skilled workers, especially in the context of intra-company transfers;
- be consistent with the approach of other major economies with whom Australia deals and shares talent (and often competes with); and
- provide a mechanism for intending permanent residents to demonstrate their skills and benefit to the Australian economy before being eligible for permanent residence.

2. About Fragomen

Fragomen is one of the world's leading global corporate immigration law firms, providing comprehensive immigration solutions to its clients. Operating from 43 offices in 18 countries, Fragomen provides services in the preparation and processing of applications for visas, work permits and resident permits worldwide and delivers strategic advice to clients on immigration policy and compliance. Fragomen's client base includes a large number of multinational companies in various industry sectors which engage Fragomen to manage their global immigration program as well as large and small companies and organisations across all jurisdictions where the firm operates. With a network of accredited local advisors in countries where we do not have an office, Fragomen is able to provide visa services and immigration advice in over 170 countries around the world.

In Australia, Fragomen is the largest immigration law firm with over 220 professionals and support staff nationally, including qualified Solicitors, Registered Migration Agents, Accredited Specialists in Immigration Law and other immigration professionals. With offices Brisbane, Melbourne, North Ryde, 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. Fragomen in Australia assisted clients with more than 10,400 subclass 457 visa applications last year.

Further information about Fragomen, both in Australia and globally, is available at www.fragomen.com.

3. About our clients

Fragomen acts for a large number of companies, both overseas and locally owned, that operate businesses in; Communication and Information services, Construction, Mining and Professional, Scientific and Technical Services as well as major institutions in finance and Insurance industries.

Fragomen's client base also includes a significant number of small and medium sized companies in various industries as well as Universities, Commonwealth and State Government Departments and Agencies and Not for Profit organisations.

4. Development of the subclass 457 visa program

The introduction of the subclass 457 visa in August 1996 formed part of the Australian government's response to Australia's 1994 GATS undertakings.¹ When first introduced, the subclass 457 visa allowed Australian employers to sponsor skilled workers in line with Australia's specific GATS commitments by providing for:

¹ Commonwealth of Australia, Department of Immigration and Ethnic Affairs, Committee of Inquiry into the Temporary Entry of Business People and Highly Skilled Specialists, *Business Temporary Entry: Future Directions* (August 1995).

- entry for a 4 year period in managerial and ‘specialist’ category occupations;² and
- the entry of ‘specialists’ (but not managers) subject to labour market testing.³

Other skilled workers could be sponsored by employers based in regional Australia subject to labour market testing. This was presumably permitted in order to satisfy domestic considerations (a lack of supply in regional areas), rather than international commitments.

Whilst allowing for international movement of skilled workers, the *Migration Act 1958* and *Migration Regulations 1994* (the Act and Regulations) also contained measures to protect the Australian labour market. These included:

- the requirement that an employer pay minimum salary levels (these varied depending on whether or not the position was in an IT occupation and if the position was in a regional areas)⁴;
- a requirement for sponsoring employers to demonstrate both a satisfactory record of training Australians, and the benefit to Australia of the entry of overseas workers⁵;
- a cap on the number of subclass 457 visa holders an employer could sponsor for a subclass 457 visa during their period of sponsorship approval⁶.

Since 1996, successive Australian governments have made amendments to the subclass 457 visa program to help facilitate the entry of genuine intra-company transferees and, increasingly, other skilled foreign workers. These changes have always reflected or been consistent with Australia’s international trade obligations⁷ and the needs of the Australian economy (and its employers) to have access to the very best global talent on terms which protected Australian terms and conditions of employment. These changes have included:

- the introduction of a more targeted list of managerial, professional and technical occupations, from 2002⁸;
- the removal of labour market testing as a requirement for the entry of specialists, in 2003⁹;

² *Migration Regulations (Amendment) 1996* (Cth), No. 76 of 1996 (hereafter ‘*The 1996 Amendments*’) at [1.20B]; [1.20G (4)].

³ “[T]esting of the Australian labour market to demonstrate that a suitably qualified Australian citizen or Australian permanent resident is not readily available to fill the position”: *The 1996 Amendments* at [1.20B]; [1.20G (4)]; [1.20H (3)]. Labour market testing was not required where the sponsoring employer was party to a pre-approved ‘labour agreement’ with the Minister.

⁴ *Migration Amendment Regulations (No. 5) 2001* (Cth), No. 162 of 2001 (hereafter ‘*The 2001 Amendments*’), Schedule 1 at [20].

⁵ “[T]esting of the Australian labour market to demonstrate that a suitably qualified Australian citizen or Australian permanent resident is not readily available to fill the position”: *The 1996 Amendments*, above, at [1.20B]; [1.20D (2)(a) and (c)].

⁶ *The 1996 Amendments*, above, at [1.20D (3)].

⁷ Discussed in more detail in section 10.

⁸ *The 2001 Amendments*, above, at [29]. Eligible occupations comprised the following levels of the *Australian Standard Classification of Occupations*: Level 1 - Managers and Administrators; Level 2 - Professionals; Level 3 - Associate Professionals; Level 4 – Tradespersons: Australian Bureau of Statistics, 1997, *Australian Standard Classification of Occupations (ASCO) Second Edition* (hereafter ‘*ASCO*’). Use of ASCO was replaced by ANZSCO in July 2010, with eligible occupation levels broadly the same: *Migration Amendment Regulations (No. 6) 2010* (Cth), No. 133 of 2010. Australian Bureau of Statistics, 2006, *Australian and New Zealand Standard Classification of Occupations (ANZSCO) First Edition* (hereafter ‘*ANZSCO*’).

- the removal of sponsorship capping, in 2009¹⁰;
- the introduction of 'floating' salary benchmarking by comparison to prevailing local market rates, with exemptions for highly paid positions, in 2009¹¹;
- the diversion of regional salary and occupation concessions out of the subclass 457 standard sponsorship stream and into region-specific programs and enterprise-specific agreements.¹²

Recent Government announcements have indicated that further changes to the subclass 457 visa system will likely take effect from 1 July 2013. These include:

- requiring employers to demonstrate that they are not nominating positions where a genuine shortage does not exist;
- raising the English language requirements for certain positions;
- strengthening the existing training requirements for businesses sponsors;
- raising the exemption for market salary comparison from \$180 000 to \$250 000;
- restricting the use of subclass 457 visa holder in certain on-hire arrangements;
- increasing compliance and enforcement powers, including the use of the Fair Work Ombudsman; and
- increased stakeholder consultation in the subclass 457 visa system.

Whilst we have no objection to measures that will ensure the integrity of the system is protected, our primary concern is that any changes to the subclass 457 visa process do not adversely impact on the significant benefits that the system has demonstrably delivered to Australia since its inception.

5. Benefits of the subclass 457 visa to Australia

In our submission, there can be no doubt that the subclass 457 visa provides significant benefits to the Australian economy and it would be foolhardy to believe that Australia could compete in a global market without welcoming and encouraging the best global talent to work in Australia.

The subclass 457 visa allows multinational businesses to transfer skills and talent in an efficient and effective manner and Australian business to access a global pool of talent, often with skills and experience not available in the Australian labour market. This results in:

- increased competitiveness and productivity in the Australian economy;
- the ability to introduce new skills, processes and technology and increased employment opportunities for Australians that derive from this;
- skills transfer from overseas trained professionals to the Australian workforce;
- the ability to satisfy short-term labour demands; and

⁹ *Migration Amendment Regulations (No. 3) 2003* (Cth), No. 106 of 2003, Schedule at [2102].

¹⁰ *Migration Amendment Regulations (No. 5) 2009* (Cth), No. 115 of 2009, Schedule 1, at [6].

¹¹ *The 2009 Amendments*, above, at [2.72(1)].

¹² *Migration Amendment Regulations 2009 (No. 5) Amendment Regulations (No. 1) 2009* (Cth), No. 203 of 2009, at [2.72(10)-(11)].

- the ability to manage Australia's permanent migration needs by ensuring that migrants are tried and tested and that they have had the opportunity to properly assess a long-term commitment to life in Australia.

The recent boom (and levelling off) in the resources sector is a good case in point. It seems to us inconceivable how many infrastructure projects recently completed, currently underway or those being proposed could possibly have been undertaken without access to the engineers, IT professionals, contract and project managers and other highly skilled professionals from around the world. Australian companies and staff and the underlying labour market in Australia would simply not be able to undertake this scale of work.

Whilst these projects are hugely significant to the economy, the reality is that this demand for large numbers of professionals in these areas will ebb and flow as projects move through phases and it is unknown whether there will be a long-term demand for many of the positions that currently exist. We are already experiencing a drop in demand for engineering professionals as the resources projects move out of the engineering phase and into construction. Large scale demand for overseas construction workers does not appear to us to be materialising as companies utilise Australian workers where available.

At the same time, the use of overseas workers by Australian companies involved in these resources projects and the connections that this creates has opened opportunities for Australians to work overseas as these companies seek involvement in similar projects in overseas locations. There can be little doubt that companies who utilise overseas workers are more likely to accept relocation and transfer as a way of expanding their business into new markets, whereas those without such experiences are less likely to understand the possibilities that can be created by the clever use of international skills transfer.

This global movement of people is only possible because of programs such as the subclass 457 visa and are necessary not only for the well-being of the Australian, but also for the broader good of the global economy.

6. How our clients utilise the subclass 457 visa program

Given the original purpose for subclass 457 visas and the program's development over time, it is not surprising that our clients use subclass 457 visas in three main circumstances:

1. intra-company transfers of existing employees;
2. short-term assignments, including on-hire; and
3. recruitment of highly skilled specialists into permanent roles (international and local non-Australian).

Intra-company 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. These transfers are often connected with large project wins or the expansion of a company's operations in Australia but can also result from a policy of assigning individuals to different roles in different country operations as part of the normal course of business or normal career progression. Australian employees in these circumstances also have the opportunity to work in the company's overseas operations and develop their careers. Whatever the reason, these transfers result in significant advantage to the Australian economy and workforce.

Intra-company transfers typically reside in Australia for periods between one year and four years and ensure that global companies have the ability to:

- bring in expertise and to transfer skills to Australia;
- bring in world-wide experts to showcase global solutions which assist Australian companies to increase or build their competitiveness both on and offshore;
- enable the company to develop the skills of their global workforce by enabling them to experience working in a mature market and then taking those skills back to other, often emerging markets; or
- fill temporary skills gaps whilst building skills locally using our training and development programs.

Short-term assignments generally occur when a business needs to engage staff for a short period of time because of a sudden upturn in work or reaching a critical phase of a project. Short-term assignments also occur when overseas businesses need to send highly skilled experts to Australia in order to meet contractual obligations to Australian companies, organisations or government departments.

The nature of these positions requires that the business must be able to react quickly to access the best available people in the shortest time-frame. In our experience, because of the costs and time-frames involved in recruiting an overseas worker, these positions will only be filled by overseas workers where the particular skills are not readily available in Australia either because of a shortage of that skill or because the position requires technical or proprietary knowledge not available in Australia. These costs and time considerations act as a sufficient regulator of the labour market in most cases. The current use of highly skilled experts in the subsea projects currently underway in Australia is a good example of this need.

Our clients also use subclass 457 visas to recruit highly skilled specialists into appropriate roles. This occurs most often where local recruitment efforts fail to produce the talent required, or delivers a best in field candidate who is in Australia on another temporary visa (for example a student or working holiday maker) and where a targeted international recruitment drive allows the business to access a much broader and experienced talent pool.

Businesses using the subclass 457 visa program for this purpose are most likely to sponsor employees for permanent residence in the future in order to retain these skills and leverage the investment of time and money they have made in these employees. The subclass 457 visa provides both the employer and employee with an opportunity to trial their suitability for the position (and life in Australia) without making a pre-emptive commitment to permanent residence.

In our experience, the transfer or recruitment of overseas staff in any of these situations involves a considerable cost to the sponsoring company which bears all or most costs of relocation, medical insurance, visa application as well as taking measures to ensure tax equalisation of salary etc. As a result, employers will treat these workers as valuable resources and go to significant lengths to ensure that their stay in Australia is rewarding to both the company and the employee. Our experience, supported from data released by the Department of Immigration and Citizenship (DIAC), is that these workers tend to be well paid, with the result that Australian wages are often pushed up (to maintain parity) rather than dragged down.

7. Enterprise Migration Agreements and Regional Migration Agreements

The announcement of Enterprise Migration Agreement and Regional Migration Agreement in June 2010 was seen by most clients involved in major resources projects as a positive development because it recognised that there may be legitimate commercial reasons to ensure a supply of both skilled and semi-skilled labour on these projects in the event that insufficient Australians could be found to fill the roles. This was seen as a particular concern because of the scale of these projects (often employing more than 5000 people at a time) and the possibility that a number of projects would come into the construction phase simultaneously thereby competing with each other for workers.

The practical reality has been that EMAs and RMAs have been difficult to negotiate and finalise and to our knowledge no agreement has yet been signed into effect and we understand that the original Guidelines for EMAs are under review and that RMA Guidelines are yet to be published.

8. Recent trends and Government policy direction

On 23 February 2013, the Minister for Immigration and Citizenship, Brendan O'Connor MP, announced that changes to the subclass 457 visa program were needed to ensure that "Australians are getting jobs first".¹³ The proposed changes are set out above and are due to commence in July 2013. Precise details of the changes are yet to be announced.

Subsequently Mr O'Connor made a number of comments suggesting employers were abusing the system and repeating the position that the program should not be used to discriminate in favour of foreign workers and that Australian workers should come first.

Statements by other commentators, including those in the union movement have reinforced the view that employers are 'abusing' the subclass 457 visa system if they do not prefer Australians over foreign workers

In response to these announcements, many Fragomen clients have told us that they are in favour of genuine reforms that will ensure that abuses of the program do not occur because they see the integrity of the program as vital to ensuring that it remains available to employers who have a genuine need to transfer staff from their global operations or recruit from the global talent pool.

¹³ Minister's Press Release dated 23 February 2013.

However there is concern among our clients that the Government considers employers to be 'abusing' the subclass 457 visa system if they utilise it to employ a foreign worker without first having tested the Australian labour market, or in preference to an Australian worker who may be less skilled, or where they have certified positions as suitable for sponsorship in circumstances where the Department has a contrary view.

In our submission, the issue of when and how a company might be able to utilise the skills of a foreign worker requires a more sophisticated analysis than a simple 'Australians first' policy. It is essential to recognise that:

- Australia does not yet have the pool of talent that Australian businesses need to compete and prosper in a global economy;
- it is legitimate for global business to use their own highly skilled workers to deliver the best services and products in Australia and this has been recognised by Australia in a number of International Agreements (see below);
- at any time, up to 800,000 Australians are living and working overseas often in highly skilled occupations and this creates gaps in the skill base of the labour market in Australia;
- many companies that operate across a number of jurisdictions consider their workforce, which of course includes numerous Australians, to be a global one available to be deployed where the need is currently or to foster career progression in their organisations; and
- there is a need for Australia to grow its population and that the use of the subclass 457 visa stream to attract and 'test' potential future Australians is both sensible and in accordance with Government policy that this occur.

In our submission, the current system works well to ensure a balance between the need of Australian and global businesses to access the talent that they need to compete in a global environment and the need to ensure that training and employment opportunities for Australians are supported and that working conditions are not undermined.

Whilst there can be no objection to changes that will better ensure the ability of the subclass 457 visa system to deliver these outcomes, in our submission such changes must:

- ensure that employers have continued access the global talent pool where that provides them with the best skilled people available;
- comply with the spirit and letter of the various International Agreements to which Australia is a party;
- be consistent with the approach to other major economies with whom Australia deals and shares talent (and often competes with); and
- provide a mechanism for intending permanent residents to test the Australian labour market and lifestyle before committing to permanent residence.

9. Need to ensure continued access to global talent pool

Many of our clients operate in sectors of the economy that use cutting edge technologies and business practices and require specialists skilled in these areas. Whilst Australia does produce

sufficient such specialists or indeed enough graduates in key disciplines, for example in science and engineering, the available pool of this talent will remain limited. In addition, in some areas the skills are simply not available here at all because the technology has been developed overseas and is subject to proprietary controls, or has simply not previously been required in Australia. Examples of this abound in industries such as Oil and Gas, IT and Pharmaceutical and Medical Research.

In other cases, clients struggle to find Australians willing to take roles because they are in remote locations, or to retain staff able to attract higher remuneration in competing industries.

Obviously there does need to be checks and balances to ensure that Australians are provided with real opportunities for training and equal opportunities for employment. This is adequately provided for under the current system by:

- requiring employers to demonstrate that they have a genuine commitment to employing and training Australians (during the GFC this was used as a way of more closely monitoring the use of overseas labour by companies who were in sectors of oversupply or who had made Australian workers redundant);
- committing employers to a specific training spend (this is to be made a binding obligation under the proposed changes);
- requiring employers to certify that the applicant has the skills for the role and permitting the DIAC officer to assess this independently; and
- requiring employers to pay market salary and meet recruitment costs.

Should the subclass 457 visa process be made more rigorous?

We do not believe that the process needs to be made more rigorous. As outlined above the current system contains many checks and balances and works well in the large majority of cases. In our experience 'rigour' tends to mean increased documentation, process and delays. Given the restrictions to using the subclass 400 visa as a short-term bridge to a subclass 457 visa, it is critical that the subclass 457 visa process does not become so onerous as to result in processing delays which will directly impact on a company's ability to bring workers to Australia for time sensitive project related work or in circumstances where work must begin urgently.

In our experience, even a delay of a few days in a visa being granted can result in loss of production and potential penalties for the employer. In circumstances where project time-tables can shift regularly, it is simply not possible for employers to plan their visa needs with the degree of accuracy that would enable them to allow for processing delays.

Clients have told us that the current process is generally smooth and efficient and offers a competitive advantage for Australia. They are concerned that any changes that would create delays would be detrimental to their business and send a negative message to those skilled workers who may be considering applying for positions in Australia.

Will stringent labour market testing help or hinder?

Whilst we can understand the apparent appeal of labour market testing as a way of demonstrating that there is no Australian who can fill a role, caution would be needed to ensure that any such requirement does not:

- inhibit the ability of employers to employ the person who they believe has the skills and talent necessary to fill the role;
- create unnecessary red tape, expense and delay in circumstances where Government and employers would be looking to ensure that overseas talent is brought to Australia to assist with the introduction of cutting edge technology and process;
- discourage overseas applicants from applying for jobs in Australia in industry sectors or occupations where that is in Australia's interest; or
- put DIAC case officers in the position of having to decide whether one candidate should have been preferred over another.

Past experience with Labour Market testing has demonstrated that it cannot be easily monitored and applied by DIAC to individual cases and that it creates expense and delay for employers.

The decision about whether a particular applicant has the skills required for the role is one that best sits with employers. A DIAC case officer will not be equipped, nor should they be required, to second guess the decisions of employers as to their staffing needs. Except in cases where there is clearly an excess of suitable candidates, how could any case officer be expected to determine whether a decision by a company to reject an Australian candidate was justified or not?

The costs involved in recruiting a candidate from overseas act as a sufficient regulator of the labour market in most cases. In our experience, companies will generally only turn to overseas labour when it is genuinely needed.

10. Need to comply with International Agreements relating to intra-company transfers

Successive Australian government have actively pursued international agreements relating to free trade in services and which impact on the free movement of certain skilled workers. These include:

- General Agreement on Trade in Services
- World Trade Organisation Doha Round
- Free Trade Agreements

It is generally against the intention of these agreements to remove impediments to such movement. While these movements must necessarily be subject to national sovereignty considerations, barriers to such movement which are protectionist of the Australian labour market hinder free trade and go against Australia's international trade position (as reflected in its WTO GATS undertakings) as well as its specific undertakings under international law (as reflected in bilateral and regional Free Trade Agreements).

It is obviously essential that the subclass 457 visa system operates consistently with the commitments made by Australia under these agreements and reflects the principles underpinning free trade amongst countries. It is important to comply not only with the terms of the Agreements, but the spirit and intent behind them.

For example, many of the agreements stipulate that movements not be subject to labour market testing. This term is not defined – certainly the definition of LMT would include a requirement to demonstrate an exhaustive attempt to recruit locally, but might also include an obligation not to:

- require businesses show a demonstrated commitment to employing Australians;
- give preferential treatment to Australians above foreigners or to not ‘discriminate’ in favour of foreigners; or
- cap the number of visas that can be granted to an employer.

a. General Agreement on Trade in Services

The General Agreement on Trade in Services (GATS),¹⁴ agreed by members of the World Trade Organisation (WTO) in 1994, provides a global structure for the regional and bilateral agreements that Australia has since entered with particular states. Within GATS, a ‘framework agreement’ contains universal obligations and concessions, including a commitment to engage in future rounds of negotiation. This framework is supplemented by schedules of specific commitments from the individual signatory states. In this way, GATS is structured to allow signatory states to move towards liberalisation at their own pace, but proscribe rollback of any commitments once made.

Included in GATS are undertakings relating to the movement of persons across national borders for business purposes. As one of the four modes of service supply covered by GATS, the movement of key personnel among a business’ international branches as operational needs require, is recognised as a critical aspect of free trade in services.¹⁵

Australia’s GATS undertakings regarding the movement of persons are found in:

- Annex on the Movement of Natural Persons, which forms part of the framework agreement; and
- Australia’s Schedule of Specific Commitments.

Annex on the Movement of Natural Persons

The provisions of the Annex allow for the unrestricted temporary entry of natural persons into a signatory state for the purposes of supplying a service, in accordance with each state’s specific commitments. The Annex provides that any measures applied to protect state sovereignty and

¹⁴ World Trade Organisation, *General Agreement on Trade in Services* (15 April 1994), Marrakech Agreement Establishing The World Trade Organisation, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183 (hereafter ‘GATS’).

¹⁵ The movement of people as a mode of service is defined as “the supply of a service...by a service supplier of one Member, through the presence of natural persons of a Member of the territory of any other Member”. The three other recognised modes are cross border supply; consumption abroad; and commercial presence (without the presence of persons): GATS, above, Article I (ii).

ensure the orderly movement of persons must not operate so as to nullify the specific commitments made.¹⁶

Australia: Schedule of Specific Commitments

As part of its specific undertakings, Australia committed to the free entry of business people for up to four years in the following cases:

- **executives and managers, as intra-corporate transferees**, performing senior supervisory and directorial roles in the Australian business (no labour market testing required); and
- **specialists** “with trade, technical or professional skills who are responsible for or employed in a particular aspect of a company's operations in Australia. Skills are assessed in terms of the applicant's employment experience, qualifications and suitability for the position” (labour market testing generally required).¹⁷

b. WTO Doha Round

In 2005, members of the WTO commenced the Doha Round of negotiations to further liberalise the four modes of service supply, including the movement of persons. As part of those negotiations, the Howard Government offered a commitment to extend the definition of intra-company transferees to include ‘specialists’, in addition to executives and managers, and thereby remove labour market testing as a requirement for specialist entry to Australia.¹⁸ In support of ongoing negotiation of the Doha Round, the Rudd¹⁹ and Gillard²⁰ Governments have reaffirmed their commitment to Australia’s offer, on the basis that:

- universal free trade is in Australia’s interests, and
- any rollback of Australia’s offer would significantly weaken Australia’s negotiating position within the WTO.

c. Free Trade Agreements currently in operation

To date, Australia has entered into free trade agreements with the following states:²¹ Singapore

¹⁶ GATS, above, ‘Annex on Movement of Natural Persons Supplying Services Under the Agreement’.

¹⁷ GATS, above, ‘Australia: Schedule of Specific Commitments’, GATS/SC/6.

¹⁸ World Trade Organisation, Council for Trade in Services Special Session, *Australia: Revised Services Offer* (26 May 2005) (not yet in force).

¹⁹ “It is important to avoid reforms that could be inconsistent with Australia’s commitments under World Trade Organization/General Agreement on Trade in Services (WTO/GATS) and free trade agreements”: The Government’s Response to the Report of the Joint Standing Committee on Migration, ‘Temporary visas... Permanent benefits: Ensuring the effectiveness, fairness and integrity of the temporary business visa program’ (10 September 2009), p12; Commonwealth of Australia, *Parliamentary Debates (Hansard)*, House of Representatives, 10 September 2009, 9295, (Anthony Albanese, Leader of The House).

²⁰ Commonwealth of Australia, *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity* (April 2011).

²¹ In addition, the 1973 Trans-Tasman Travel Arrangement allows for free movement of labour between Australia and New Zealand, subject only to national security considerations. In effect, that agreement creates a unified Australia-New Zealand labour market and accordingly is not discussed further in these submissions.

(2003)²², Thailand (2005)²³, USA (2005)²⁴, Chile (2008)²⁵, The member states of the Association of Southeast Asian Nations (ASEAN) (2009)²⁶ and Malaysia (2012).²⁷

With the exception of the US FTA (which does not address movement of persons),²⁸ these free trade agreements incorporate commitments regarding intra-company transferees that reflect the offers made by Australia in the Doha Round. They include:

- **the inclusion of ‘specialists’** in the definition of intra-company transferee, in addition to managers and executives.²⁹
- **no labour market testing** as a requirement for the entry of intra-company transferees, including executives, managers and specialists.³⁰ The Thailand FTA extends the proscription of labour market testing to persons with trade, professional or technical skills but who lack the length of service required to be considered an intra-company transferee (instead termed ‘contractual service sellers’).³¹ The later ASEAN and Malaysian FTAs allow for the imposition of labour market testing in the case of entry of contractual service sellers, but not in the case of intra-company transferees.³²
- **A minimum period of service** before which a person can be considered an intra-company transferee. The Singapore FTA specifies a service history of 1 year for all categories of intra-company transferee.³³ Agreements with other ASEAN countries stipulate a service history of two years in the case of specialists,³⁴ with no minimum service period for managerial and executive staff.³⁵ The Chile FTA specifies only that a transferee must already be an employee of the company in their home jurisdiction.³⁶

²² Australia-Singapore Free Trade Agreement (Singapore, 17 February 2003) [2003] ATS 16 (hereafter ‘the Singapore FTA’).

²³ Australia-Thailand Free Trade Agreement (Canberra, 5 July 2004) [2005] ATS 2 (hereafter ‘the Thailand FTA’).

²⁴ Australia-United States Free Trade Agreement (Washington, 18 May 2004) [2005] ATS 1 (hereafter ‘the US FTA’).

²⁵ Australia-Chile Free Trade Agreement (Canberra, 30 July 2008) [2009] ATS 6 (hereafter ‘the Chile FTA’).

²⁶ Agreement establishing the ASEAN-Australia-New Zealand Free Trade Area (Cha-am, Petchaburi, Thailand, 27 February 2009) [2010] ATS 1, ‘Australia’s Schedule of Movement of Natural Persons Commitments’ (hereafter ‘the ASEAN FTA’). Current ASEAN members are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

²⁷ Australia-Malaysia Free Trade Agreement (Kuala Lumpur, 22 May 2012) [2013] ATS 4, ‘Schedule of Movement of Natural Persons Commitments – Schedule of Australia’ (hereafter ‘the Malaysia FTA’).

²⁸ As a consequence of the US FTA, the USA introduced the E-3 category visa, available exclusively to Australian citizens, which allows employer-sponsored work in specialty occupations, without restriction or capping. Australia’s current subclass 457 visa program provides similar work rights in Australia for US citizens.

²⁹ *The ASEAN FTA*, above, Art. 2(A); *The Chile FTA*, above, Art. 13.1 (i); *The Malaysia FTA*, above, Art. 2(A); *The Singapore FTA*, above, Chapter 11, Art. 2 (2)(c); *The Thailand FTA*, above, Art. 1002 (e).

³⁰ *The ASEAN FTA*, above; *The Malaysia FTA*, above; *The Singapore FTA*, above, Chapter 11, Art. 12. The Chile FTA does not address labour market testing, but Chile is a member of GATS.

³¹ *The Thailand FTA*, above, ‘Annex 8: Schedule of Commitments – Australia’.

³² *The ASEAN FTA*, above, Art. 2(D); *The Malaysia FTA*, above, Art. 2(D). The Singapore FTA does not include reference to contractual service sellers but is a member of ASEAN. The Chile FTA allows entry of contractual service sellers, but does not address labour market testing anywhere in the agreement.

³³ *The Singapore FTA*, above, Chapter 11 Art. 2, (2)(c).

³⁴ *The ASEAN FTA*, above, Art. 2(A)(II); *The Malaysia FTA*, above, Art. 2(A)(II).

³⁵ *The ASEAN FTA*, above, Art. 2(A)(I); *The Malaysia FTA*, above, Art. 2(A)(I); The Thailand FTA does not specify a minimum period of service, but Thailand is a member of ASEAN.

³⁶ *The Chile FTA*, above, Art. 13.1 (i).

- A more detailed definition of the ‘specialist’ category of intra-company transferee:

*...[persons] who are employees of an enterprise of another Party operating in Australia, and who possess **knowledge at an advanced level of expertise** and who **possess proprietary knowledge of the enterprise’s service, research, equipment, techniques, or management***³⁷ [emphasis added].

*...[nationals] with **advanced** trade, technical or professional skills...assessed as having the necessary qualifications or alternative credentials accepted as meeting the granting Party’s domestic standards for the relevant occupation*³⁸ [emphasis added].

Australia’s Doha Round offers and its commitments made under Free Trade Agreements can thus be seen to ensure that intra-company transferees:

- are assigned to Australia to fill only highly skilled or senior roles that require significant and specific proprietary knowledge; and
- have been with the company for a reasonable period before being considered a transferee; and
- are not impeded in their entry to Australia by labour market testing.

d. Free Trade Agreements currently under negotiation

Australia is currently in negotiation for Free Trade Agreements with a number of countries and regions. The four modes of trade in service, including the movement of persons, is a subject of negotiation for these agreements. The countries and regions currently engaged are: China, India, Indonesia, Japan, Republic of Korea, APEC³⁹, The Asian Region⁴⁰, The Gulf States⁴¹, The South Pacific region⁴², The Trans-Pacific region.⁴³

e. The existing subclass 457 visa system is consistent with Australia’s commitments

In our submission, the subclass 457 program in its current form accords with Australia’s commitments regarding intra-company transfers made under GATS, the Doha Round, and the FTAs; and finely balances compliance concerns with the facilitation of intra-company transfers.

³⁷ *The ASEAN FTA*, above, Art. 2(A)(II); *The Malaysia FTA*, above, Art. 2(A)(II); *The Singapore FTA*, above, Chapter 11 Art. 2 (2)(c)(iii); *The Thailand FTA*, above, Chapter 10 ‘Movement of Natural Persons’, Art. 1002 (h).

³⁸ *The Chile FTA*, above, Art. 13.1 (i)(ii).

³⁹ Free Trade Area of the Asia Pacific (FTAAP). Current members of Asia-Pacific Economic Cooperation (APEC) are Australia, Brunei, Canada, Chile, China, Hong Kong, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russia, Singapore, Taiwan, Thailand, United States, and Vietnam. See: 2nd APEC Summit, (Yokohama, 14 November 2010), *Leaders’ Declarations: Pathways to FTAAP*.

⁴⁰ Regional Comprehensive Economic Partnership. Negotiating parties are currently the members of ASEAN plus Australia, China, India, Japan, Republic of Korea and New Zealand.

⁴¹ Australia - Gulf Cooperation Council (GCC) FTA. Current GCC members are Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.

⁴² Pacific Agreement on Closer Economic Relations (PACER) Plus. Negotiating parties are currently Australia, Cook Islands, Federated States of Micronesia, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Republic of the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

⁴³ The Trans-Pacific Partnership Agreement. Negotiating parties are currently Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, USA, and Vietnam.

Sponsorship and Duration

The stipulation of employer sponsorship (as opposed to an independent work permit) is appropriate to the context of an intra-company transfer as intended in the various agreements, and a stay of up to four years (with the possibility of renewal) both accords with the agreements and is appropriate to assignments of this nature.

Occupations

The narrowed list of eligible occupations in current use targets managers, professionals and technicians, and has removed most of the occupations in the lower strata of ANZSCO. This accords with the definitions of 'intra-company transferee' in the various agreements, and is appropriate to the nature of intra-company transfers.

Market Salary

Intra-company transferees generally enter Australia to fill managerial and/or highly skilled professional positions, and operate in a global salary market driven by competitive demand for their skills worldwide. Accordingly, the salaries of intra-company transferees are generally at least as favourable as prescribed minimum salary levels and Australian market salary rates.

In large multinational companies, executive, management and specialist roles commonly attract remuneration above the upper limit beyond which market salary benchmarking is not required (currently \$180,000).⁴⁴ In our view this concession for highly paid positions facilitates the entry of genuine intra-company transferees into senior positions that require extensive proprietary knowledge, while not impacting (negatively) on the Australian salary market.

The current requirement for evidence of salary benchmarking can create impediments to entry for positions remunerated below \$180,000. Salary packaging of international transferees is often complex, involving:

- foreign exchange rates
- tax equalisation measures
- hypothetical tax liabilities
- global internal salary banding with country-specific adjustments and ratios
- non-monetary benefits associated with overseas assignment, such as
 - cost of living equalisation allowances
 - accommodation allowances
 - penalty payments for living away from home

These complexities often mean that assignees are receiving above the local market rate when their total remuneration package is taken into account, but this is often difficult to demonstrate by straight comparison. The need to evidence salary benchmarking can often lead to delays in processing of intra-company transfers until an effective salary comparison can be made.

⁴⁴ *Migration Regulations 1994* (Cth), Regulation 2.72 (10AB), read with Commonwealth of Australia, *Specification of Income Threshold and Annual Earnings*, FLA No. F2012L01294. The government has indicated an intention to increase this threshold to \$250,000 on 1 July 2013.

Labour Market Testing

In Australian immigration parlance, 'labour market testing' is generally taken to mean evidence of exhaustive attempts to recruit an Australian in to the position. This reflects the labour market testing requirements that were part of the subclass 457 visa program prior to 2003.

While the GATS and FTAs use the term 'labour market testing', its meaning is not anywhere defined in those agreements. In our view, in addition to the erstwhile 'proof of advertising' requirements, the term could conceivably involve the following:

- A requirement to demonstrate that a business preferentially employs Australians above non-Australians
- Capping the number of positions available to intra-company transferees in a particular business
- Salary benchmarking requirements beyond the measures currently in place.

The current system does not impose such measures on the entry of intra-company transfers. For the following reasons, it is our view that the current system complies with Australia's GATS and FTA commitments not to impede the entry of intra-company transferees:

- Unlike local non-Australian hires and international recruits, intra-company transferees are not seeking entry into the Australian labour market. They are assigned to Australia for a specific temporary position requiring advanced proprietary knowledge. A requirement for the employer to demonstrate attempts to recruit an Australian for the role would not be appropriate to such circumstances.
- Placing caps on the number of intra-company transfers would inhibit the free entry of intra-company transferees in a way could nullify Australia's specific commitments on the movement of service persons.

In our submission, if changes are to be made to the subclass 457 visa system, this should not affect or impact intra-company transfers even if this means the creation of a separate intra-company transfer stream.

The idea of a different rules was mooted by the Joint Standing Committee on Migration which recommended further investigation into the division of the subclass 457 into separate 'highly skilled' and 'semi-skilled' streams, to allow for liberal entry of managers and specialists but better regulate the entry of lower skilled labour.⁴⁵

In our submission, this is an idea worth pursuing and one which would be more in line with the visa rules of many other countries, including Australia's trading partners.

⁴⁵ Parliament of the Commonwealth of Australia, Joint Standing Committee on Migration, *Temporary visas... Permanent benefits: Ensuring the effectiveness, fairness and integrity of the temporary business visa program* (August 2007) at ¶ 2.76 -2.81.

11. Need for consistency with other countries in a global economy

A number of countries including France, Japan, UK and USA have introduced a separate intra-company transfer visa category to allow multinational corporations to transfer highly skilled employees to another branch or subsidiary on temporary basis without unnecessary delay and red tape.

While the eligibility requirements for intra-company transfer visa category vary from jurisdiction to jurisdiction there are a number of common features which include the following:

- the work assignment/transfer must be to a branch office, a subsidiary or an affiliate of an international company (legally linked);
- no labour market testing requirement;
- minimum base salary level for the duration of the assignment (except US);
- a requirement of a degree of proprietary knowledge/specialised skills or managerial/executive level skills and often University or comparable education;
- it must be a temporary assignment which does not lead to permanent residence status being obtained in the host country; the employee must be able to/have an intention to transfer back to the overseas entity following completion of the assignment; the maximum visa validity period varies between 1 year (Luxembourg, but renewable for another 1 year), 2 years (South Africa), 3 years (France, Japan, Germany), 5 years (L-1B visa category in the US), 7 years (L-1A visa category in US) and 9 years (UK, employees paid above a set threshold) depending on the jurisdiction; Certain countries such as Luxembourg and UK have a separate short term intra-company transfer visa category for assignment periods shorter than 12 months;
- minimum employment period within the same group company/sending employer varies from 3 months (France, but 6 months for senior executives) to 1 year (Japan, UK, US) depending on the jurisdiction

The European Union is currently working on a proposal for a *Directive on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer* which aims at harmonising the eligibility criteria for the intra-company transfer permit amongst the European Members States and enabling, to a certain extent, intra-EU mobility with a national intra-company transfer permit. The proposed eligibility requirements for the intra-company transfer visa category are mostly in line with the common features outlined above but it also anticipates a fast-track procedure that may be available for companies which have been recognised for the purpose of intra-company transfer.

Whilst our system is broadly consistent with these approaches, we are concerned that the current debate and proposed changes to the subclass 457 visa system may undermine these essential features that make efficient and cost-effective transfer of critical staff possible under the current subclass 457 visa system.

Although the current subclass 457 visa system Australia could benefit from an additional stream within a subclass 457 visa program or a separate visa category for intra-company transferees to

allow the multi-national companies to transfer employees to work in the Australian branch or an affiliate on a temporary basis.

As outlined above, these employees usually have unique skills and proprietary knowledge of the company's technology, business processes and best practices which may be directly related to and required for the projects in Australia. Intra-company transferees represent a distinct population separate from other forms of overseas workers and therefore, the legal framework should be tailored in recognitions of the specific characteristics of this group.

As the risk of non-compliance in this category of workers is very low, the application process should be more streamlined and without the unnecessary red tape to allow companies to bring expertise fairly quickly where it is needed. Intra-company transferees play a vital role in contributing to and enhancing Australia's economic competitiveness, technology advancement, product development and as a result creating new job opportunities for Australians.

Safeguards such as a minimum employment period with the overseas company prior to assignment in Australia and the temporary nature of this visa could be implemented in line with the requirements that exist in most other jurisdictions where this category of visa exists. Without appropriate arrangements to facilitate entry of intra-company transferees, Australia may find it difficult to compete for global talent with other jurisdictions that provide transparent and simplified procedures for admission of intra-company transferees and be at risk that businesses will take work or projects to where the necessary expertise is available or where the visa process is easier.

12. Permanent pathway

In our submission the subclass 457 visa provides a valuable mechanism for intending permanent residents to test the Australian labour market and lifestyle before committing to permanent residence and for their intending employers to ensure that the individual is someone that they would seek to employ on a permanent long-term basis.

In fact, the subclass 457 visa program has been used for many years as a pathway to permanent residence. This was acknowledged as far back as 2003 when reforms to the permanent Employer Nomination Scheme (ENS) introduced a concession for certain temporary visa holders (including the subclass 457 visa) to obtain permanent residence if they had been with the nominating employer for at least two years.

This pathway has continued to be recognised as a legitimate and preferred method for individuals to seek permanent residence in Australia. Modifications in July 2012 following a departmental review of the program the previous year⁴⁶ were designed to make the process even simpler and easier so as to encourage transition to temporary residence.

The majority of ENS visa applicants are drawn from the pool of subclass 457 visa holders and this pathway has been previously acknowledged as an efficient way of delivering skilled permanent residents. In the words of the former Minister, Chris Bowen: 'We know these workers can do the job

⁴⁶ Migration Amendment Regulations 2012 (No 2) SLI 82

and are ready to make a commitment to Australia, so it makes sense to streamline their pathway to permanent residence.⁴⁷

It is significant that at the same time that amendments were made to the ENS program to streamline the pathway from temporary to permanent residence for skilled employees, the Government also introduced the last of its reforms to the general skilled migration program (GSM) that had been progressively implemented since 2009. These reforms included removing the concessions for former overseas students, significantly restricting the occupational categories that were suitable for independent GSM and introducing an expression of interest system to regulate the number of successful applicants. While these reforms have been successful in ensuring that the aims of the policy objectives of the GSM program are met, it has undoubtedly meant that many of this cohort of temporary residents have turned to the subclass 457 program as providing a (legitimate and lawful) alternative pathway to permanent residence.

Much of the concern about the perceived abuse of the subclass 457 program has arisen following the release of statistical data that indicates that the 'stock' of subclass 457 visa holders has been steadily increasing.⁴⁸ This increase is particularly marked in the hospitality and retail sectors. Interestingly, other statistical data released by DIAC indicates that the number of bridging visa holders in Australia dropped quite significantly in the period December 2011 – 2012 and the number skilled graduate visa holders peaked in September 2012.⁴⁹ It appears to us that this represents the stock of former overseas students that have been long term temporary residents who, in all likelihood, embarked on a course of study with the aspiration of eventually obtaining permanent residence.

Although DIAC has not released data on the number of former overseas students (either as bridging visa or skilled graduate visa holders) converting to subclass 457 visas it would seem to us very possible that the increase use of the subclass 457 program is largely attributable to this group attempting to find another pathway to permanent residence.

The industry sectors most affected by the increase in numbers of subclass 457 visas would lead to this conclusion as hospitality courses were particularly popular as a route to permanent residence under GSM. If this is correct then this group have already been part of the Australian labour market for some time and the trend that we are seeing is as a result of immigration policy decisions made more than a decade ago.

We do not believe that this is an ongoing problem as this cohort was created through delays in processing times for GSM visas resulting in a large number of individuals in the system with full work rights. The excess demand on the student visa program and particularly in the vocational education and training sector has been successfully quelled.

A further explanation for the increased number of subclass 457 visa holders in the system may lie in the backlog of ENS cases that are currently under process. We understand that this was created as a consequence of an unprecedented number of applications lodged in the April – June 2012 quarter

⁴⁷ Ministerial press release 9 March 2012.

⁴⁸ Ministerial press release 29 April 2013

⁴⁹ <http://www.immi.gov.au/media/statistics/pdf/temp-entrants-newzealand-dec12.pdf> figures 22, 29, 30

prior to the legislation changes on 1 July 2012. As these applications are resolved, the number of subclass 457 visa holders should drop.

13. Conclusion

Fragomen supports enforcement of existing compliance measures to identify and deal with behaviour that undermines the integrity of the subclass 457 visa program. This benefits all legitimate users of the subclass 457 visa program for its intended purpose.

There is, however, an important difference between measures designed to ensure the integrity of the subclass 457 visa program and measures amounting to protectionism. In seeking to enhance compliance mechanisms, barriers designed to impede the efficient and effective transfer or recruitment of skilled workers to Australia must be avoided.

In our submission, the subclass 457 visa as it currently operates meets the primary purpose of facilitating the entry of highly skilled workers into Australia where those workers are necessary to Australia's participation in the global marketplace. This includes workers who are essential to global companies with operations in Australia and those essential to Australian companies needing to access the very best of global talent.

Australia benefits from the subclass 457 visa program by increased competitiveness and productivity, and both short and long term skills transfer into the Australian economy and those benefits should not be ignored or underestimated when considering 'tightening' of this program.

Australia has actively sought entry into International Agreements to facilitate this very type of transfer of skills into the Australian economy and should do nothing that would contravene either the letter or the spirit of these Agreements.

The use of the subclass 457 visa system is a legitimate and appropriate pathway to permanent residence which has been promoted and encouraged by Government. This pathway is extremely effective at producing high calibre migrants who are most likely to settle successfully in Australia. This should not be seen as an abuse of the process or something to be discouraged but rather promoted and facilitated for the long-term economic benefit of Australia hence the well-being of the Australian community.

3 May 2013