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By email: Health.Requirement.Review@homeaffairs.gov.au

Submission: Review of Australia's visa Significant Cost Threshold (SCT)

Thank you for the opportunity to provide submissions to the Department of Home Affairs ("the Department").

We are pleased to provide this submission, in response to the Discussion Paper titled "Review of Australia's visa Significant Cost Threshold (SCT)".

If we can assist with policy development in this area in any other way, please do not hesitate to contact me on (02) 8224 8518 or by email to **tliu@fragomen.com**.

Yours sincerely

[redacted]

Teresa Liu

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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 150 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. SUMMARY OF POSITION

Fragomen welcomes the opportunity to make submissions in relation to the review of the Significant Cost Threshold (SCT) outlined in the Migration Health Requirement in Public Interest Criterion 4005 and 4007 in the *Migration Regulations 1994*. As Australia's largest immigration firm, we are well-placed to provide the Department with opinions and solutions in overcoming the limitations of the Migration Health Requirement.

Fragomen agrees with the Department's proposal to review the SCT and to consider the recommendations made by expert health economists to increase and change how the SCT is calculated. However, we make further submissions about key changes that the Department could consider as part of their review of the health requirement.

Fragomen recommends that the Department consider whether the current health requirement is in the country's best interest, given the critical role that migration plays in our economy, nation building and filling critical skill shortages. In *Ashok Kumar Chaudhary v Minister of Immigration and Ethnic Affairs,* the Federal Court noted that there is "*a far wider meaning*"[1] to Australia's interests, more than "*a mere concentration upon economics*"[2]. The wider meaning includes being "*seen as civilized and compassionate; as an advanced nation equipped with an advanced and available medical technology*"[3].

Throughout these submissions, Fragomen seeks to provide suggestions as to how the Department could update and improve the health requirement to ensure more

[1] [1994] FCA 994, [9].
[2] Ibid.
[3] Ibid.

equitable access to the Migration programs, and achieve better migration outcomes. We elaborate further on the following below:

- Abolishing PIC 4005 to allow PIC 4007 to be applied across all skilled visa categories, allowing applicants to access the waiver under PIC 4007;
- The statutory interpretation principle of "specific provisions prevail over general principles" should be applied to the definition of "dependent children" under regulation 1.03;
- The SCT should not be applied to dependent children in visa applications; and
- The "hypothetical person" test should be expanded to include more factors in assessing the SCT.

3. HEALTH WAIVER IN PUBLIC INTEREST CRITERION 4007 TO APPLY TO ALL SKILLED VISAS

Fragomen submits that the health waiver provision in Public Interest Criterion (PIC) 4007 should apply across all skilled visas.

Under current immigration regulations, certain skilled visas, such as the Employer Nomination Scheme (ENS) subclass 186 visa (Direct Entry), Skilled Independent subclass 189 visa, Skilled Nomination subclass 190 visa, and Skilled Work Regional (Provisional) subclass 491 visas are subject to PIC 4005. This means that applicants applying for these specific skilled visas are not able to seek a waiver of the health requirement if they, or any of their dependent family members (whether migrating or non-migrating), presently have a health condition that may be deemed to be of a 'significant cost' or 'prejudice access' to the Australian community. As there is no provision for a health waiver under PIC 4005, factors such as the applicants' ties to Australia, the skills or talents they possess, and the social and economic benefit they currently bring or will bring to the country are immaterial. Consequently, the current settings prevent skilled visa applicants and their family members with health conditions from obtaining permanent resident visas on the basis that the health requirement, which is a "one fails, all fail" criteria, is not met.

As such, Fragomen calls for the health waiver provision available under PIC 4007(2) to be extended across the skilled visa cohort, allowing all skilled visa applicants to have an equal opportunity to apply for and be granted a permanent visa. It is our view that this will encourage the retention of existing migrant talent in the country, as well as assist Australia in remaining competitive against other countries in attracting overseas talent. According to a report by the Grattan Institute[4], Australia has become a less attractive destination for migrants with sought-after skills due to the complexity and processing delays inherent to the immigration process. This is a crucial indicator that measures need to be taken to improve and simplify the current immigration

[4] https://grattan.edu.au/news/towards-smarter-migration-policy/#:~:text=Problems%20with%20the%20system&text=It%20has%20become%20too%20complex,confidence%20in%20migration%20more%20generally.

process, including the health requirement, to make it more accessible to skilled migrants.

To ensure that Australia's immigration system is aligned to the Australian values of integrity, fairness, and inclusion, Fragomen is of the view that PIC 4005 should be removed in its entirety and replaced with PIC 4007. All skilled visa applicants, regardless of what visa type they apply for, should have the opportunity to demonstrate and justify why the health requirement should be waived for their specific circumstance.

Case Study 1:

Fragomen assisted with an ENS subclass 186 (DE) application for an applicant under the occupation of Chef (351311). Nearly a year into processing, a s57 invitation to comment was issued by the Department of Home Affairs, as it was identified that the applicant s wife had a health condition stable rheumatoid arthritis . The Medical Officer of the Commonwealth's (MOC s) estimated total cost for the condition was projected to be over $150,000. Given that the DE pathway under the ENS subclass 186 visa is subject to PIC 4005 (as opposed to PIC 4007), there was no health waiver provision available for the applicant s wife to access. As a result, the application was withdrawn, and the client had no choice but to wait to re apply for the ENS visa via the TRT pathway once they were eligible as PIC 4007 and the health waiver provision only applied to applications made under the TRT pathway.

4. DEPENDENT CHILDREN AND THE SIGNIFICANT COST THRESHOLD

Definition of "dependent children" vs the health requirement

Fragomen submits that the definition of "dependent child" under regulation 1.03 of the Regulations should prevail over the application of the health requirement. The definition of "dependent child" under regulation 1.03 includes a child or step-child who "*has turned 18 and … is incapacitated for work due to the total or partial loss of the child's or step-child's bodily or mental functions*". Simultaneously, these dependent children are assessed under the health requirements in either PIC 4005 or 4007. This leads to inconsistencies within the legislation whereby dependent children can be included in an application due to their incapacity for work, but that same incapacity could result in the denial of a visa as they do not meet the health requirement.

Under general principles of statutory interpretation, where there is a specific provision (i.e. regulation 1.03 relating to the definition of a "dependent child") that conflicts with a general provision (i.e. the health requirements under PIC 4005 and 4007), then the specific provision will prevail over the general provision[5]. As such, this principle of *generalia specialibus non derogant* suggests that where an applicant meets the definition of "dependent child" on the basis of their disability, a decision maker cannot

[5] Dennis C Pearce, *Statutory Interpretation in Australia 9th Edition* (Lexis Nexis Butterworths Australia, 9th ed, 2019) 182.

lawfully refuse an application by using the same evidence of their disability to determine that they do not meet the health requirement.

It is worth noting that the Department's policy also recognises this fundamental inconsistency. *PAM s5G – Relationships and family members – Child-parent relationships* states:

> "*When a child meets clause (b)(ii), a main applicant and any secondary applicants included in the visa application may have difficulty meeting the Schedule 2 "one fails, all fail" criteria that relate to Schedule 4 health requirements.*
>
> *If opportunity arises, officers should counsel parent/s that, should a child fall within this provision, there is a chance that the family's visa application will not be successful. However, under no circumstances are officers to encourage or condone applicants omitting to list children with disabilities on the application form.*"

In addition, policy states that case officers should rely on the assessment by the MOC in determining incapacity to assess whether a dependent child meets the definition under regulation 1.03. As noted above, this approach is contrary to principles of statutory interpretation and should not be applied by case officers.

Removing the significant cost threshold (SCT) for dependent children

Fragomen also submits that the SCT should not be applied to dependent children. The application of the SCT to dependent children is often the barrier that prevents applicants from accessing a visa under the "one fails, all fail" approach, without considering other attributes of the application, such as the skills, qualifications and talent an applicant may bring to Australia.

Case law points to occurrences where applications had been refused on the basis of SCT of a dependent child, but the Tribunal had found the Minister should have exercised their discretion to waive the SCT requirement as the granting of the visa "*would be unlikely to result in undue cost or undue prejudice within the terms of PIC 4007(2)(b)*"[6] [7].

In these cases, the parent applicants have been able to demonstrate that they are capable of supporting the dependent child in their condition, and that they will not place undue cost and pressure on Australia's public health system and community services[8].

Furthermore, the Department's policy for the health requirement states that the purpose of this requirement is "to help control public expenditure on healthcare and community services". Where the delegate has failed to properly consider the actual circumstances of the family and only focusing on the costs, this is contrary to the true purpose and intent of the health requirement.

[6] *1826006* (Migration) [2021] AATA 5464, [40].
[7] Other cases include: *Dang (Migration)* [2021] AATA 3718 and VIDAL (Migration) [2019] AATA 5658.
[8] *1826006* (n 3), [33]-[34], [39]; *Dang (Migration)* (n 4), [45]; *VIDAL (Migration)* (n 4), [36].

The fact that these matters were required to go to the Administrative Appeals Tribunal (AAT) to decide that the Minister ought to have exercised their discretion to waive the requirement contributes to the backlog of matters going to the AAT, when it is clear that 4007(2)(b) should have been applied. This places additional pressure on the AAT's resources and time, and leaves applicants in limbo as their matters are being decided.

Australia's international obligations

The strict application of the SCT and the health requirement, particularly to dependent children, could be argued to be also contrary to Australia's international obligations and, therefore, contrary to Australia's national interest.

Article 3(1) of the Convention states: "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*"

The International Covenant on Civil and Political Rights (ICCPR) also imposes obligations in Australia to consider the best interests of the child, particularly in relation to the family unit. Article 23(1) states: "*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*" Article 24(1) also states: "*Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.*"

Australia's international obligations are relevant in the application of law. It is well-established within Australian common law that "*Parliament, prima facie, intends to give effect to Australia's obligations under international law*"[9] and, as such, Australia's international obligations to the above international conventions should be considered in the application of legislation.

Historically, some of Australia's migration legislation has impacted Australia's ability to remain compliant with international obligations. In their observations of Australia in their 2012 report, the UN Committee on the Rights of the Child raised concerns about the compliance of migration legislation to international conventions, stating the Australia needs to "*ensure that all of the State's party's legislation, including its migration and asylum legislation, does not discriminate against children with disabilities and is in full compliance with its legal obligations under article 23 of the Convention on the Rights of Persons with Disabilities*"[10].

An example of a matter where there was a failure to comply with the above Conventions is the AAT case of *VIDAL (Migration) [2019] AATA 5658*. In this case, the visa application for a Partner (subclass 309) visa was refused because the non-migrating dependent child had significant disabilities, even though the child was to remain in the Philippines with her aunt. The AAT member determined that there was no cost issue as the child would remain in the Philippines and therefore, the matter

[9] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, [287].
[10] https://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf p 15

was remitted back to the Department. However, the parent applicant deliberately excluded the child from the main applicant because of her health issues[11]. If Australia's international obligations to the above Conventions were considered, the parent applicant should not have been placed in a position where she would need to consider separating herself from their child due to the implications of the health condition on their visa application.

5. EXPANSION OF HYPOTHETICAL PERSON TEST

Fragomen submits that, in the assessment of the likely costs involved with an applicant's health condition, the hypothetical person test should be expanded to include other factors, such as the changing nature of the applicant's health condition, the developments in research, treatment, and medication which may lead to a decrease in pharmaceutical costs and medical services, and the applicant's own ability to mitigate the projected costs put forward by the MOC.

The current hypothetical person test is in some aspects too rigid and fails to consider the complex and evolving nature of most health conditions. At present, in deciding whether a visa applicant meets the health requirement, the only factors considered by the MOC are the:

- nature of the health condition;
- severity of the health condition;
- age of the applicant;
- type of visa applied for; and
- visa period.

This prevailing approach is too simplistic and does not holistically consider the evolving nature of diseases and how an applicant's health condition may improve over time with continued medication and treatment; the continuous advancement of medical science in discovering new and improved methods of treatment; and the development and release of biosimilar and generic drugs to the market. A failure to take these additional factors into consideration is unfair to visa applicants, particularly those with stable and managed conditions, as the MOC's costing is not reflective of the 'actual costs' of their specific health condition(s), as it does not factor in for future improvements to the applicant's personal health circumstances, as well as ongoing developments in medical technology.

In addition to the above, it is worth noting that under immigration policy, factors such as the applicant's financial and family circumstances – that is, their current job, savings, their partner's ability to obtain employment, current access to reciprocal health care arrangements, and comprehensive private health insurance – are deemed as not relevant and therefore cannot be used to reduce, or be excluded from, the MOC's costing. The reason these factors are not being taken into account, as policy notes, is because the applicant's "*medical, financial, or family circumstances may*

[11] *VIDAL (Migration)* (n 4), [3]

change, resulting in a reappraisal of their need to use the care or services". While this explanation may seem reasonable, it cannot be regarded as being completely equitable, given the existing hypothetical person test only considers a very limited set of factors and does not consider the entirety of an applicant's current and future position.

Case Study 2:

Fragomen assisted with a health waiver application for a visa applicant with the condition ulcerative colitis (UC). There are various classes of medication used to treat UC, with one being biologics / biosimilar therapies. Examples of biologics include the drugs Infliximab and "Vedolizumab .

Infliximab was approved for the treatment of UC and related conditions, like Crohn's disease, in August 1998 by the US Food and Drug Authority (FDA). The drug was originally manufactured by Jannsen Biotech, Inc. and was sold under the name brand name Remicade . Over the next few years, biosimilar products a product that is almost an identical copy of the original product of the drug were slowly being released in the market, which significantly reduced the price of the medication. To demonstrate the reduction in costs, in Australia the cost of Infliximab in May 2014 was $ 847.19 AUD DPMQ (dispensed price for maximum quantity). As of November 2023, the price of the drug is $ 253.52 AUD DPMQ.

In this scenario, the applicant did not respond to Infliximab , so the physician recommended Vedolizumab" instead. At present, biosimilars for Vedolizumab (sold under the brand name Entyvio) are not yet available, as the patents for the brand name have yet to expire (the patent is due to expire in the next 2 years or so). Biosimilars and / or generics tend to emerge in the market as soon as the patent held by pharmaceutical company who developed the originator / brand name drug expires.

As exhibited by the above case study, the cost of medication evolves and tends to become cheaper over time. If the hypothetical person test continues to disregard a broader set of factors like these in the costing assessment, it would be unfair to visa applicants. Fragomen is of the view that the inflexibility of the current hypothetical person test is concerning, as it is too prohibitive and may result in unintended outcomes.