FRAGOMEN

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Department of Home Affairs

Via online portal

Dear Department

Submissions: Exposure Draft of Migration Amendment (Protecting Migrant Workers) Bill 2021

Thank you for the opportunity to provide submissions on the Exposure Draft of 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 (02) 8224 8518 or by email to **tliu@fragomen.com**.

Yours sincerely

Teresa Liu

Managing Partner- Australia and New Zealand
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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:
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2. RESPONSE TO EXPOSURE DRAFT

Fragomen supports the *Migration Amendment (Protecting Migrant Workers) Bill 2021* ('**the Bill**') and acknowledges the need to further strengthen employer sanction provisions to protect migrant workers against wage underpayment and other exploitative practices by unscrupulous employers.

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

Part	Summary of Amendments	Fragomen comments
Part 1: New Employer Sanctions	• Introduction of new criminal offences and related civil penalty provisions to support Fair Work legislation and strengthen existing protections in the Migration Act for non-citizens working in Australia. • Protection of migration workers against unscrupulous employers, labour hire intermediaries and other parties who might seek to coerce or exert undue influence or pressure migrant workers to accept a work arrangement that jeopardises their immigration status.	We support the expansion of the remit of Australian Border Force (**ABF**) to play a greater role in addressing exploitation of all migrant workers, including those outside of the employer sponsored visa programs. Information made publicly available on Departmental investigations relating to alleged section 245AR, 245AS, 244AD, 245AE, 245AEA and 245AEB contraventions for financial years 2019/20 and 2020/21 has shown one infringement notice issued and no cases proceeding to court action. We therefore support related tools to fully equip and enable the ABF to investigate and enforce these new criminal offences and related civil penalty provisions. We also support 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 the non-citizen's immigration status. Noting this intent, we submit that the provisions in proposed subsection 245AAB(1)(c) needs clarity as to what may constitute an 'arrangement in relation to work'. For example, it would be important to ensure that the provision in 245AAB(1)(c) in particular does not inadvertently penalise employers who are seeking

		changes in relation to work conditions to ensure compliance. For instance, where an employer has discovered a breach of a work related condition- e.g. Student visa holder condition, role/occupation change under a TSS visa nomination, breach arising out of a change from bridging to substantive visa. For additional comment, please see **section 3** below. We also support the increase of civil penalties to bring them in line with Fair Work penalties as an added deterrent for unscrupulous employers.
Part 2: Prohibition on certain employers employing additional non-citizens	• Establishment of framework whereby Minister may declare certain employers to be 'prohibited employers' for a specified period of time. • Affected employers will be prohibited from employing additional non-citizen employers (other than permanent residents) while 'prohibited employer' status remains in effect. • Affected employer to have 28 days to respond to the Minister by way of written submission. • Decision to declare an employer a 'prohibited employer' will be open to merits review by the Administrative Appeals Tribunal. • Publication of details of 'prohibited employers' on Department's website. • When employer's 'prohibited employer 'status ends, employer will be subject to additional reporting requirements for a period of 12 months.	We are supportive of these measures though seek clarity as to the potential reasonable period/s that might be specified in the Declaration. For example, under current policy, if a decision is made to bar a sponsor from making future applications for approval as a work sponsor in relation to one or more classes (section 140M(1)(d) of the *Migration Act 1958*), the bar should usually be for at least three months but no more than five years. We would support similar transparency in policy. We recommend that the Department of Home Affairs (**Department**) removes the information of employers from the Department's public website within 28 days from the employer's prohibited employer status ceasing. We also recommend that the notification period of 14 days in s245AYG(1)(c), be increased to 28 days in line

		with the notification period for work sponsors prescribed in regulation 2.84. For additional comment, please see **section 4** below.
Part 3: Use of computer system to verify immigration status	• Establishment of civil penalty provisions requiring employer to use VEVO to determine whether a non-citizen is lawful and has the necessary permission to work, either when starting to allow a non-citizen to work or referring a non-citizen for work. • VEVO checks to be conducted directly by employer or through reliance on an arrangement with another person for that person to log into VEVO to conduct the check. • 'Required system users' must log into and use VEVO directly to determine whether a non-citizen is lawful and has permission to work. 'Required system users' cannot rely on VEVO checks undertaken by another party. • '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.	We support 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, however submit that flexibility should be retained to allow a person to rely on appropriate evidence of Australian citizenship to verify that the prospective worker is not an unlawful non-citizen. We also recommend flexibility to ensure that this does not create unnecessary burden on sponsors to perform ongoing VEVO checks for employees holding employer sponsored visas under the employer's direct sponsorship given that this cohort already have further protections and the business has additional sponsor obligations. Regarding 'required system users', we submit that former prohibited employers and any other person who is determined by the Minister to be a 'required system user' should be expanded. noting that the onus/responsibility always remains on the employer to determine that a non-citizen is lawful and has permission to work. For additional comment, please see **section 5**.

Part 4: Aligning and increasing penalties for work-related breaches	• Increasing pecuniary penalties across the work-related civil penalty provisions and related offences in the Migration Act, and for approved work sponsors who fail to satisfy a sponsorship obligation under the Sponsorship Obligations Framework in the Migration Act and Regulations. • Increase work-related civil penalty provisions from 90 to 240 penalty units for individuals. • Increase of civil penalty for breaching sponsorship obligations from 60 to 240 penalty units for an approved sponsor. For any other case, penalty remains at 60 penalty units.	We support the increase of pecuniary penalties on the basis that this should significantly increase deterrent capability.
Part 5: Enforceable undertakings for work-related breaches	Establishment of arrangements for the Minister or delegate to enter into an enforceable undertaking with an employer, labour hire intermediary or other party that has not complied with work-related offences and work-related provisions under Migration Act.	We support enforceable undertaking arrangements for work-related breaches.
Part 6: Compliance notices for work-related breaches	• Establishment of powers and framework in Migration Act to enable authorised officer to issue compliance notices (non-punitive mechanism) as an alternative to commencing court proceedings for contraventions of work-related provisions of Migration Act. • A person who complies with compliance notice is not taken to have admitted to contravention or to have been found to have committed the contravention. • Where a person complies with a compliance notice, the Department is unable to commence court proceedings against that person for the particular contraventions that are the subject of the compliance notice.	We support the framework enabling the issuance of compliance notices as an alternative to commencing court proceedings. This non-punitive mechanism will allow employers to work collaboratively with the Department to address any alleged work-related offences or contraventions and implement practical measures to prevent future contraventions.

	• If a person who is given a compliance notice does not comply, a court may impose civil penalty of up to 48 penalty units. • A person may apply to the court to have compliance notice reviewed if they have not committed a contravention set out in the compliance notice, or if the compliance notice does not comply with necessary requirements under Migration Act.	
Part 7: Other amendments	• Updates existing provisions in Migration Act's Sponsorship Framework in line with the new provisions in relation to work-related offences and provisions described in Part 5. • Amendments ensure approach to triggering the Regulatory Powers Act to enter into (and enforce) enforceable undertakings is consistent across the Migration Act.	Supported.

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.

4. PART 2 : PROHIBITION ON CERTAIN EMPLOYERS EMPLOYING ADDITIONAL NON-CITIZENS

Publishing information on prohibited employers

While Fragomen is supportive of the Department's proposal to publish information about prohibited employers on its website as a deterrent to non-complying employers, we are of the view that subsection 245AYF(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 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.

We submit that providing a timeframe of no more than 28 days for the Department to remove the names of any employers that cease to be prohibited employers from the Department's website should be considered and that the 12-month post-prohibition reporting obligations outlined in s245AYG of the Bill will be a sufficient mechanism to deter former prohibited employers from additional contraventions.

Prohibited employers – additional reporting periods

Under proposed s245AYG, 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.

In accordance with proposed subsection 245AYG(1)(b), this reporting obligation does not extend to non-citizens who are permanent residents, and we submit that s245AYG(1)(b) should also exclude other temporary or provisional visas that are not subject to any work conditions, 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.

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

Executive summary of recommendations:

1. Proposed amendments to subsections 245AB(2) and 245AC(2) be modified to remove obligation for approved sponsors to undertake ongoing VEVO system checks for sponsored employees, such as Subclass 482 or 457 visa holders, where directly sponsored by employer;
2. Retain flexibility within subsections 245AB(2)(b), 245AC(2)(b), 245AE(2)(b) and 245AEA(2)(b) to allow a person to rely on appropriate evidence of Australian citizenship to verify that the prospective worker is not an unlawful non-citizen; and
3. Extend ability for 'registered system users', including former prohibited employers, to seek the assistance of other parties (for example a lawyer, migration agent) to conduct VEVO checks on their behalf.

Whilst Fragomen 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, we are concerned that the Bill's reliance on VEVO as the sole method to determine a prospective worker's status may have unintended consequences.

We note that the Bill proposes to repeal subsection 245AB(2) in its entirety such that the only means of verifying that the worker is not an unlawful non-citizen will be by logging into and using the prescribed computer system (VEVO) to source the information, or unless the person is a 'required system user', under an arrangement by which another person logs into and uses the prescribed computer system to source the information. This repeals the existing provision under 245AB(2)(b) which allows a person to verify a prospective worker by 'doing any one or more things prescribed by the regulations'.

Proposed amendments to Subsections 245AC(2), 245AE(2) and 245AEA(2) will repeal similar provisions as it relates to verifying that a lawful non-citizen would not be in breach of a work-related condition and the referral of unlawful non-citizens and lawful non-citizens in breach of work related conditions.

Given that the amendments to 245AB(2) and 245AC(2) 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.

Necessity to retain flexibility to allow alternative methods to verify Australian citizenship

Currently, subregulations 5.19G(2), 5.19H(2),5.19J(2) and 5.19K(2) prescribe the alternative means of verification for the purposes of 245AB(2)(b), 245AC(2)(b), 245AE(2)(b) and 245AEA(2)(b), specifically the inspection of:

(i) a document that appears to be the worker's Australian passport; or

(ii) a document that appears to be the worker's New Zealand passport; or

(iii) a document that appears to be the worker's Australian certificate of citizenship, accompanied by a form of identification featuring a photograph of the worker; or

(iv) a document that appears to be a certificate of evidence of the worker's Australian citizenship, accompanied by a form of identification featuring a photograph of the worker; or

(v) a document that appears to be the worker's Australian birth certificate, accompanied by a form of identification featuring a photograph of the worker; or

(vi) a document that appears to be a Certificate of Evidence of Resident Status for the worker, accompanied by a form of identification featuring a photograph of the worker

(vii) a document that appears to be a Certificate of Status for New Zealand Citizens in Australia for the worker, accompanied by a form of identification featuring a photograph of the worker.

In this way, the regulations allow a person to rely on appropriate evidence of Australian citizenship as a 'reasonable step' to verify that the prospective worker is not an unlawful non-citizen.

We are concerned that by specifying the prescribed system as the sole method for verifying that a prospective worker has necessary permission to work, this will preclude an employer from relying upon appropriate evidence of Australian citizenship as a defence to s245AB and s245AE given that VEVO cannot be utilised to verify Australian citizenship. Given this, we recommend that the provisions under sections 245AB(2)(b) and s245AE(2)(b) (and evidence of Australian citizenship as prescribed in subregulations 5.19G(2) and 5.19J(2)) be retained to mandate the following alternative evidence that a person may inspect to verify that a prospective worker is not an unlawful non-citizen:

- a document that appears to be the worker's Australian passport;
- a document that appears to be the worker's Australian certificate of citizenship, accompanied by a form of identification featuring a photograph of the worker; or a document that appears to be a certificate of evidence of the worker's Australian citizenship, accompanied by a form of identification featuring a photograph of the worker; or

- a document that appears to be the worker's Australian birth certificate, accompanied by a form of identification featuring a photograph of the worker.

Other limitations within the VEVO system is that it is reliant upon the non-citizen having an electronic record with the Department and this impacts a particular cohort of long-term permanent residents who migrated to Australia prior to 1990 and have since not left Australia. For this cohort, it is necessary to apply to the Department to request an electronic record which is problematic where the long-term resident does not hold a valid passport. Under the current employer sanction provisions, a person may take 'reasonable steps' to verify that a long term resident is not an unlawful non-citizen by inspecting "a document that appears to be a Certificate of Evidence of Resident Status for the worker, accompanied by a form of identification featuring a photograph of the worker".

We note that proposed section 245APA(2) allows for certain information to be prescribed in the regulations as an alternative to VEVO where a person is unable to source information 'due to circumstances beyond the reasonable control of the person seeking to log into and use the system'. For such long-term residents, we recommend that inspection of a 'Certificate of Evidence of Resident Status for the worker and photo identification' be prescribed for the purposes of section 245APA(2) in circumstances where the person is unable to source information from VEVO where the non-citizen does not hold an electronic record.

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 that are responsible for recruitment but 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.

The Department's context paper on this Bill indicates that the Minister may also include employers that are recruiting labour directly from overseas to be required system users. We ask that the Department considers this provision in the context of multi-national businesses that rely upon a combination of external overseas hires and intra-corporate transfer arrangements to bring in skilled workers with proprietary knowledge from associated overseas offices into Australia to complete highly specialised work. These organisations tend to have a regular volume of foreign staff and are reliant on external parties to assist with routine VEVO work rights checks. Whether an employer is recruiting labour directly from overseas or not, the method in which they directly or indirectly conduct work rights checks does not change the fact that they remain responsible for ensuring that all non-citizen employees are lawful and have the appropriate work rights.