FRAGOMEN
WORLDWIDE

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The Director, Skills and Innovation Policy Section

Migration Planning and Visa Policy Branch

Department of Home Affairs

By email:

Dear Sir/Madam

Re: Business Innovation and Investment Program Consultation

Thank you for your invitation to participate in consultations in response to the consultation paper *Business Innovation and Investment Program: Getting a better deal for Australians*.

We are pleased to provide these submissions to this review. If we can assist with policy development in this area in any other way, please do not hesitate to us.

Kind Regards,



Teresa Liu
Managing Partner Australia & New Zealand
MARN 9896488

1. ABOUT FRAGOMEN

1.1. Fragomen is one of the world's leading global immigration law firms, providing comprehensive immigration solutions to our clients. Operating from over 40 offices in 19 countries (with capabilities in more than 160 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.

1.2. In Australia, Fragomen is the largest immigration law firm with over 130professionals and support staff nationally, including Migration Agents, legal practitioners, Accredited Specialists in Immigration Law 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

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

2. RESPONSES TO QUESTIONS:

Q1. How can the investment thresholds be increased to provide the best outcome for Australia?

1. In our view consideration, should be made to shorten the pathway to permanent residency by increasing the investment amounts. For example, the UK Tier 1 Investor program leads to permanent residence after 5 years if the applicant invests GBP 2 million into loan or share capital in active and trading UK registered companies. However, this period to permanent residence can be shortened to:
    - 3 years if the applicant invests GBP 5 million; or
    - 2 years if the applicant invests GBP 10 million.

2. Under the current permanent Business Innovation and Investment (Subclass 888) visa criteria, the minimum period that a Subclass 188 Investor or Significant Investor visa stream holder may apply for the permanent visa is after having held the relevant investment for at least 3 years and 11 months (where subclass 188 visa was granted prior to 1 July 2015) or 4 years (for visa granted on or after that date). A similar approach to the UK Tier 1 Investor program could be adopted for either or both Investor and Significant Investor streams for example to allow the applicant to apply for permanent residence after 2 years if:
    - Investor – the applicant invests at least $3 million; or
    - Significant Investor – the applicant invests at least $10 million.

3. Linked with the objective of encouraging higher levels of investment activity and migration into regional Australia, consideration could also be given to reducing the investment thresholds for migrants proposing to reside in regional areas.

Q 2. How could we achieve better outcomes for the Australian economy through the composition of designated investments for the Investor and Significant Investor visas?

4. In our view the investments required of applications in the Business Innovation and Investment program (**BIIP**) are generally not selected by investors based on their prospects of return of investment or associated risk. They are viewed by investor visa applicants primarily as the means by which they qualify for a BIIP visa, and thereby create a pathway to Australian permanent residency and citizenship for them and their family. The investment portfolio, and its performance over the period during which the investment is required, is a secondary consideration. Typically, investor applicants hold additional funds which are then separately managed for specific higher level return. This characteristic of the investments made through the BIIP program is perhaps reflected in the undertaking required of BIIP visa applicants, releasing the Commonwealth from liabilities arising from any loss relating to their BIIP program investment portfolio.

5. That being the case, in our view there are several principles that should guide policy settings in the BIIP program:
   - The settings governing the type of permissible investment should maximise the benefit to Australia of those investments and ensure as best as possible that investment funds do flow to the intended segments of the economy.
   - The program should be complemented by a facilitated pathway to citizenship.

Maximising the benefit to Australia

6. As a starting point, if it is desirable to adjust the proportion of different types of investments in the complying investment framework (**CIF**) of the Significant Investor visa (**SIV**) stream, current settings should be grandfathered so that they continue to apply to current subclass 188 holders for the purposes of compliance and eligibility for the subclass 188 extension streams and subclass 888.

7. We support any adjustments to the CIF which ensure that funding is reaching the intended targets under the BIIP program. For example, adjustments made to limit the Emerging Companies component to ensure as best as possible that the ultimate beneficiaries are emerging companies. In our view, there is scope for expanding the prescribed components of the to reduce the proportion of Balancing Investment and increase those components designed to inject funding into innovative sectors of the Australian economy. We also support simplification in the CIF itself, particularly in the SIV area, given the current complexity of the framework and industry that has grown around this framework.

Issues with the current designated investment framework

8. The following funds are prescribed as *designated investments* for the purposes of the Investor visa programs:
   - Government Bonds of Victoria as issued by Treasury Corporation of Victoria
   - NSW Treasury Bonds and Waratah Bonds as issued by New South Wales Treasury Corporation

- Queensland Bonds as issued by Queensland Treasury Corporation (or Queensland Industry Bonds as issued by Queensland Industry Development Corporation before 1 December 1996)
- TASCORP Inscribed Stock as issued by Tasmanian Public Finance Corporation
- Territory Bonds as issued by Northern Territory Treasury Corporation
- Western Australian State Bonds as issued by Western Australian Treasury Corporation
- South Australian Government Financing Authority Bonds as issued by South Australian Government Financing Authority.[1]

9. Due to United States securities law, most US citizens are excluded from accessing the Investor visa under the current *designated investment* framework. The reason for this is that the approved securities in the current legislative instrument have not been registered under the *United States of America Securities Act of 1993* (**Securities Act**) or the securities laws of any State in the USA.[2] Because of this limitation, the State/Territory bonds may not be offered, sold or resold within the United States; nor to, or for the account or benefit of, US Persons[3] unless in accordance with an appropriate exemption under US law. The effect is that no US national can participate in the Investor program.

10. This is an unsatisfactory outcome for any prospective US citizen Investor visa applicant. It also has broader implications for the BIIP program given that bonds issued by a government of a State or Territory are currently approved as complying premium investments for the Premium Investor stream of the subclass 188 and 888 visas.[4]

11. Excluding US citizens from the investor stream programs in this way cannot be the intended outcome for the BIIP, particularly given the Government's focus on investment and innovation under the National Innovation and Science Agenda, and that the USA is the largest source country of foreign direct investment into Australia. Reform of this aspect is needed to ensure that the Investor and Investor retirement streams are available to US nationals, by ensuring that *designated investments* are duly registered in the United States.

Further issue with NSW Treasury Bonds under current policy

12. There are two securities issued by the New South Wales Treasury Corporation (T Corp) that are prescribed under the current legislative instrument: NSW Treasury Bonds (now known as T Corp Bonds) and Waratah Bonds. Purchase of T Corp Bonds by a prospective Investor or Investor Retirement visa application is problematic by virtue of the fact that it is not currently issued as primary stock by T Corp but rather issued via a third party. Whilst the legislative instrument does not specify that the securities must be in primary stock, current Departmental policy states:

    The current legislative instrument specifies government securities:
    - ***in primary stock***
    - *with maturity of not less than 4 years*
    - *with repayment of principal explicitly guaranteed on maturity and*

[1] *Migration Regulations* 1994, Reg. 5.19A(1); IMMI 12/106 (F2012L02220).
[2] *Securities Act* 1933, *15 USC § 77a et seq*; Regulation S *17 CFR § 230.901 - 230.905* and Preliminary Notes.
[3] Regulation S s902(k)(1) provides a specific definition of US Person
[4] *Migration Regulations* 1994, Reg. 5.19D; IMMI 15/100 (F2015L01012).

- *that do not expose the Commonwealth Government to any financial liability.*[5] [emphasis added]

13. Due to the current policy position that the securities must be issued in primary stock, the purchase of T Corp Bonds cannot be relied upon by any Investor visa applicant, regardless of nationality. This will also be problematic for securities issued in other State/Territories under the current instrument where they are not issued as primary stock.

Alternative investment options for Investor stream

14. Investment in State/Territory Bonds has been a feature of the BIIP and its predecessor, the Business Skills program for many years. Recognising that from a Government perspective, investment in such securities may be viewed as a more passive investment than some of the higher risk investments within the CIF, in our experience visa applicants are often attracted to the less risky investment option of Government Bonds.

15. To feed higher usage into the Investor visa pathway and therefore investment levels, consideration could be made as to maintaining the Government Bond option as a proportion of the prescribed investment (noting our above concerns regarding the current limitation for prospective US citizen Investor visa applicants) and mandating investments in other growth assets, for example, Corporate Bonds or shares in actively trading ASIC registered companies. Further parameters could be set to direct the investment into priority sectors/industries (for example renewable energy or new technologies).

Pathway to Australian Citizenship

16. Given the competitive international market for foreign investment and participation in investment-based migration, the time taken to acquire citizenship provides broader context for applicant interest and participation in the BIIP program.

17. Businesspeople and investors are also concerned about the likelihood of being able to accrue the necessary periods of physical presence in Australia while engaged in business or investment activity which – by virtue of their initial entry to Australia under the business and investment programs – is international in scope and nature. The disqualification from citizenship of people who spend significant time outside Australia for business reasons was recognised as an unintended consequence of the general residency requirements by the introduction of special residency requirements in 2009. As a result of that reform, the *Citizenship Act* currently allows for a reduced residency requirement where individuals:
    - are engaged in activities which are of benefit to Australia; or
    - are engaged in work requiring regular travel outside Australia.[6]

18. The particular activities and work that attract the reduced requirement is determined by an instrument made by the Minister and currently includes:
    - Chief Executive Officer of an S&P/ASX All Australian 200 listed company; or
    - Executive Manager of an S&P/ASX All Australian 200 listed company; or

[5] Department of Home Affairs, *Procedures Advice Manual*, 'Sch2Visa188 - Business Innovation and Investment (Provisional)', *Designated Investment Criteria*.
[6] *Citizenship Act* 2007 ss22-23.

- A writer or visual or performing artist who is the holder of, or has held, a Distinguished Talent Visa.[7]

19. When introducing the special residence requirement, the Minister stated that:

> *what we are dealing with now are some unintended consequences…and the impact of moving to the higher residency requirement. I do not think any of the changes run counter to the intent of the legislation of 2007.*
>
> *Many people in this category have partners who are Australian citizens and children who are Australian citizens and attend Australian schools and it is simply because of their professional travel commitments that they have not become Australian citizens. Their partner and their kids may be Australian citizens, but they are prevented from qualifying. This effectively excludes a cohort of permanent residents who are 100 per cent committed to Australia. We do not believe that the general residency requirement as applied to this group is fair. We think it is an artificial barrier that ought to be fixed.*
>
> *The fundamental approach and principles behind this bill are to ensure there are pathways for genuine applicants for Australian citizenship, that all those who make a genuine commitment to Australia and are of good character can find a pathway to citizenship and can fully participate in our society. It is not in the nation's interests to exclude people who would otherwise be good citizens.*[8]

20. It is our view consideration should be given to elaborating and expanding the special residence requirements to include holders of BIIP permanent residency visas, on the basis that the contribution such visas holders make is not just the funding injected into the Australian economy, but the enduring international business and trade links established because of their migration into Australia. Such an amendment would, in our view, mitigate the harsh operation of the residency requirements for an important cohort of migrants with demonstrated 'value-add' and who want to make a genuine commitment to Australia and participate fully in Australian society.

[7] IMMI 13/056 - Special residence requirement (s22C) [F2013L01123].
[8] Commonwealth of Australia, Hansard, Senate, 15/09/2009, 6540 (Sen, Chris Evans).

Q 3. How could a simplified BIIP framework make the program more efficient and effective in maximizing benefit to Australia?

21. The BIIP should be further simplified to reduce the number of eligibility streams, whilst retaining the direct to permanent residence option for high calibre business owners. We have outlined below some key areas where we believe the existing program may benefit from further reform.

Entrepreneurs

22. Prior to the introduction of the Entrepreneur stream in September 2016, we made submissions regarding the design elements which in our view would meet the policy objectives of encouraging entrepreneurship. The primary focus of our submissions was to offer recommendations which maximized the ability to appropriately capture prospective talent, particularly to commercialise research and development activity and encourage innovative business ideas that are in the nascent stages of development.

23. While the definition of *complying entrepreneurial activity* is designed to attract such business,[9] we remain concerned by the $200,000 in capital funding by a third party that an applicant needs to have attracted to qualify for the subclass 188 visa. Requiring applicants to meet a high threshold of capital funding places a barrier on attracting prospective talent and start-up enterprises.

24. Our submissions provided as a comparative example the Graduate Entrepreneur visa in the United Kingdom, which *provides* seed funding as part of the incubator program to which successful applicants are given access. Another comparative example is Canada, which has successfully implemented a competitive entrepreneur program through its Start-up Visa (SUV) Program with the following financial requirements:
    a. If investment comes from a designated VC fund: minimum investment of C$200,000
    b. If it comes from a designated Canadian angel investor group: minimum investment of C$75,000
    c. If accepted into a business incubator program: no investment requirement

25. Further, a similar approach could be adopted within an Entrepreneur stream to expand funding sources to prescribed Australian angel investment groups or alternatively, providing an endorsement pathway for proposals in a priority industry sector. This could be, for example, where endorsed by a relevant Department of Industry, Innovation and Science Industry Growth Centre.

Significant Investor stream

26. Unlike the Investor stream, applicants under the SIV stream are not required to have accumulated their funds for investment in Australia through investment or business activities. This allows for gifted or inherited monies to be used for investment, provided that such funds have been lawfully acquired and are unencumbered. Further, the SIV stream is also not subject to the Schedule 7A Business Innovation and Investment points test.

[9] *Migration Regulations,* Reg. 5.19E.

27. Where the future intent of the program is to both ensure immediate investment funds into the Australian economy and also to attract individuals longer term to further invest and/or undertake business in Australia of benefit to the economy, then the current settings should be amended.

Review settings of Venture Capital stream under the 132 visa

28. We are also of the view that the settings of the Venture Capital stream of the subclass 132 visa should be reviewed. Given the extremely low grant rate in this category, consideration should be given as to its removal.

29. While the Business Talent stream of the 132 visa prevents use of a business engaging in passive investments, the definition of *eligible investment* used in the Venture Capital stream may leave it open to the possibility of investment in a business which then practically engages in management of passive investments as determined by the venture capital firm.[10] Based on what we understand the policy intention of the Business Talent Venture Capital stream are, the settings of this stream should be tightened to ensure that only the subclass 188 visa allows migration on the basis of passive investments, and only if the criteria for the investor streams of that visa are met.

30. There are also other ways that the integrity of Venture Capital stream of the 132 visa could be further strengthened, such as to ensure that the venture capitalist making the investment has not practically been provided with the funding by the visa applicant through separate arrangements.

[10] *Migration Regulations* Sched 2 Reg. 132. 22 & 132.23.

Q 4. How can the points test be adapted to encourage investments above the minimum threshold?

31. The points test could be recalibrated to include a points factor for additional approved investment. This could be, for example, for Investor visa applicants who elect to make a higher investment as a faster pathway to permanent residence as per our suggestion in paragraph 2. Complimenting this, the 'Financial assets' factor could be amended to include points for financial assets of 'Not less than AUD3 million', for example, 35 points.

32. Additional points could also be awarded under the existing 'Special endorsement' factor for those business migrants who are willing to reside and/or establish a business in regional Australia.

33. As noted in the consultation paper, while the points test seeks to rank migrants per their potential contribution, visa processing occurs on a first come first serve basis, regardless of their points score or investment amount. As a further incentive to 'cherry pick' higher value business migrants, encourage higher investment as well as business innovation in regional Australia, formal priority processing arrangements could be introduced to 'rank' points tested migrants per set priorities pursuant to a s499 Ministerial Direction. This could, for example, allocate the highest priority to prospective migrants who will be investing/establishing a business and residing in regional Australia.

Q 5. How can incentives be provided to encourage prospective migrants to operate a business in regional Australia?

34. As noted above and like the existing processing arrangements for other skilled visas, priority processing arrangements should be provided to regional migrants.

35. Similar to the arrangements under the pre-2012 Business Skills program, other incentives could include lower financial threshold criteria/investment requirements where establishing a business or investing in regional Australia.

Q 6 What factors should be considered in introducing any changes, including phasing in changes over time?

36. Current policy settings should be grandfathered so that they continue to apply to current subclass 188 holders for the purposes of compliance and eligibility for the subclass 188 extension streams and subclass 888 visas.

3. OTHER COMMENTS:

37. One aspect of the practical workings of the SIV stream is the industry that has arisen that offers complying investment portfolio products and the governance of those products. While in our experience, applicants more often than not choose the complying investment product or portfolio due to ease in the immigration process and application, we would consider a review of the relevant industry and its governance would assist in ensuring the integrity of the program overall is maintained. The review may be through other Government Departments

38. Another aspect of the BIIP pathway which clouds the integrity of the program has been the proliferation of business advisers who charge exorbitant fees for assistance with a BIIP visa application. This is particularly the case with agents or business advisors who are located outside Australia. Anecdotally, we have heard of charges of $50,000 for a consultation in addition to payment of referral fees (particularly from complying investment companies) and other kickbacks. Where the visa applicant also seeks assistance finding accommodation or other settlement support such as purchasing a car, the total consultancy fees can add up to over $200,000.

39. While Australian law is limited in its capacity to regulate conduct that occurs overseas, consideration should be given to limiting assistance with BIIP applications to certain types of agents who are subject to regulation in Australia by legal, immigration (i.e. OMARA[11]) or financial (i.e. ASIC or APRA[12]) regulatory bodies. Unscrupulous and exorbitant fees could perhaps also be discouraged by the publication of guidelines as to what a reasonable professional fee for assistance and/ or requiring disclosure in the BIIP application of the professional fee paid for assistance.

[11] The Office of the Migration Agents Regulation Authority; or the respective legal regulatory bodies of the Australian states and territories.
[12] Australian Securities and Investments Commission; Australian Prudential Regulatory Authority; or accounting professional bodies such as CPA Australia, Chartered Accountants, or the Institute of Public Accountants.