Migration Institute of Australia

Submission to the Inquiry into the *Migration Amendment (Visa Capping) Bill 2010*

1. Current Cap and Cease arrangements

1.1 Pursuant to section 39 of the *Migration Act 1958* the Minister for Immigration and Citizenship *currently has the power to set a total number of visas of a* particular class that may be granted in a financial year ("Cap"). Any remaining undecided applications for that class of visa are regarded as invalid, and as never having been lodged ("Ceased"). It will be at the Minister's discretion to refund visa application charges to affected applicants.

1.2 The intention to use this Ministerial power was announced on 8 February 2010, when the Minister announced that the offshore General Skilled Migration (GSM) applications received before 1 September 2007 would be Capped and Ceased, and that any undecided applications would be regarded as not having been made, and the visa application charge would be refunded.

1.3 The Government's reasoning for this Capping and Ceasing decision was:

a) The Skilled Migration Program should be demand rather than supply driven;

b) The demand for GSM places exceeds the available supply; and

c) "To end the ongoing uncertainty for offshore GSM visa applicants who applied prior to 1 September 2007".

1.4 Although the Capping and Ceasing of these categories of visas has, of 18 June 2010, not yet occurred, the Department of Immigration and Citizenship (DIAC) has advised it is imminent.

2. Proposed amendments to Cap and Cease arrangements

2.1 The passing of the *Migration Amendment (Visa Capping) Bill 2010* would empower the Minister for Immigration and Citizenship, through a legislative instrument, to Cap and Cease applications by visa class as well as by "specified characteristics".

These specified characteristics could be, according to government statements, the occupation applicants have nominated for a GSM application, but could also be, among other things, an applicant's level of English or the date of the visa application.

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The government has not stated what other characteristics might form the basis for Capping and Ceasing. When asked on ABC Radio's *In the Public Interest* program on 4 June 2008 whether nationality could be a characteristic used to Cap and Cease, the Minister stated that anti-discrimination legislation would most likely prevent that possibility.

2.2 Any outstanding applications for those Capped visas would be treated as never having been made. Any onshore applicants whose application was Capped and Ceased would be given 28 days (or perhaps slightly longer) from the date of the Capping and Ceasing (or perhaps 28 days from the notification of the Capping and Ceasing) to depart Australia.

2.3 The Minister's powers to Cap and Cease could be applied to not only GSM visa classes, but to all visa classes, subclasses or streams within a subclass.

2.4 The Bill also includes amendments to enable and ensure that where a bridging visa or a temporary visa would have Ceased upon the granting or refusal of an application for a substantive visa, a bridging visa or temporary visa will also cease where a substantive visa application is deemed not to have been made due to a cap on visas.

Consequently, holders of affected bridging or temporary visas would have 28 days (or slightly longer) from notification of the Capping and Ceasing to leave Australia.

This can have far reaching adverse effects. An example is if permanent partner visa applications were Capped and Ceased, an applicant's temporary partner visa would be ineffective, thus requiring the applicant to depart Australia.

3. The Minister's reasons for the proposed amendments

3.1 The stated reasons for the Minister requiring this power is to address issues such as:

a) The excess of current applications (approximately 146,000), which significantly exceeds the number of places available annually in the migration program;

b) The excess of applications nominating a limited range of occupations, thus preventing the GSM program from delivering the broader range of skills the economy requires;

c) "To ensure that applicants are not waiting for long periods of time for their application to be finalised"; and

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d) To "provide the government with a tool for the targeted management of all aspects of the migration program which will be available as the need arises".

4. Criticism of proposed amendments

A. Unfettered Ministerial powers

4.1 The proposed amendments are a challenge to our law-making system; giving expansive, unfettered powers to the Minister for Immigration to make retrospective changes based on arbitrary criteria with no parliamentary oversight is both dangerous and undemocratic. If this Bill were to be passed, the Government would be effectively granting any Minister, not just within this portfolio, the power to remove rights and interests of persons without consultation and without recognition of the relevant Minister's established obligations.

B. Legitimate Expectations

4.2 The proposed Bill breaches administrative law, by which the Minister and his Department are bound, by failing to afford affected visa applicants procedural fairness and allowing the Minister's delegates to make decisions inconsistent with the legitimate expectations created by the acceptance of visa applications in the first instance.

4.3 Persons who lodged a visa application with the Department of Immigration would have received confirmation that their applications were to be considered in due course. The Department's actions in sending this letter to applicants created a legitimate expectation that the relevant visa application would be considered in accordance with the legislation and policy applicable at the time the application was made.

4.4 In light of the principles espoused in *Minister for Immigration and Ethnic Affairs v Teoh (1995)* ("Teoh") 183 CLR 273 applicants who have lodged visa applications hold a legitimate expectation that their case will be assessed in accordance with established and applicable law. The proposed Bill will remove this legitimate expectation and prevent applicants from receiving appropriate consideration of their cases.

4.5 The Department of Immigration is therefore under an obligation, not only pursuant to established principles of administrative law, but further, due to the Department's governing legislation and policy, to duly consider each application that has been lodged. Affected applicants hold a legitimate expectation created by the actions of the Department of Immigration, and implementation of this Bill will remove this expectation.

C. Impact on Rights and Interests of Applicants

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4.6 In Teoh, Mason CJ and Deane J provided that "procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course." The Bill will not allow applicants to present a case to the Department where the Minister's delegate in implementing the Bill, takes actions to their detriment. The Migration Institute of Australia (MIA) therefore impresses upon the Senate Standing Committee that it provide genuine consideration to all submissions made with respect to this Bill in light of the absence of a voice of affected applicants.

D. Possible non-compliance with Office of Best Practice Regulation Requirements

4.7 The proposed Bill carries potential adverse financial and social impacts and there is no indication that a Best Practice Regulatory Impact Analysis has been conducted in accordance with the guidelines of the Office of Best Practice.

4.8 The Government has stated in the Financial Impact Statement in the Explanatory Memorandum for the proposed Bill that "the financial impact of these amendments is low. Costs of implementation will be met from within existing resources. Should the Minister decide to use these powers, additional costs may be incurred on consolidated revenue [whereby] visa application charges for certain visa applications need to be refunded."

Given that, in many cases, the Government has retained visa application charges for several years, the interest that is likely to have accrued with respect to those funds should mitigate the cost of refunds. The interest accrued could also be an incentive for the government to, at the very least, provide a refund of the Visa Application Charge (VAC) to affected applicants with interest.

4.9 However, the Government's Financial Impact Statement ignores the effect the proposed Bill may have on:

i. Visa applicants;

ii. Australia; and

iii. Registered Migration Agents (RMAs).

i. Visa Applicants

4.9.1 The process of preparing for a visa application is a costly exercise. Apart from the visa application charge, there are considerable costs involved in obtaining

skills assessments, health checks, police clearances, International English Language Testing System (IELTS) tests and migration agent fees.

4.9.2 Many applicants who had a reasonable hope of a successful migration outcome will now have achieved no positive migration outcome, and a considerable financial loss.

If this Bill were to be passed, it would demonstrate the Government's ability to pass legislation and grant itself powers that are inherently unfair and unjust so as to affect not only Australians, but also persons looking to come to Australia to contribute to our economy and make this country their home.

An example of the detriment suffered by applicants would be that of an Industrial Engineer who lodged before 1 September 2007, and subsequently experienced a suspension of processing due to the retrospective application of Processing Priorities. This person's skills, still considered valuable to the Australia economy, will no longer be available to Australia because the visa application will be Capped and Ceased. In order to gain entry to Australia, this person will need to meet the current points test and satisfy all other criteria, and they will be required to pay a higher application fee, engage another agent for assistance and reobtain medical and police clearances.

Overseas Students

4.9.3 For overseas students in Australia, who had expected to avail themselves of the legitimate pathway of the GSM program to apply for Permanent Residence (PR) after completing their studies, there has been the additional burdensome cost of their education in Australia.

There are likely tens of thousands of overseas students who are currently studying in Australia because of the opportunity the GSM pathway offered them to gain a better life. These students have, on the basis of the migration programs the Australian Government had in place, spent considerable money on education and living in Australia. Many have also legally worked in Australia and paid taxes.

4.9.4 The Government's claim that the Student Visa program and the GSM program are separate is less than candid. The Australian Government and other Australian institutions have long promoted Australia as a desirable place to study and as a desirable migration destination. The GSM pathway for students has been quite clearly flagged, not only by the establishment of the onshore

GSM visa subclasses for which overseas students are eligible, but in DIAC's own policy, which states:

> *80.5 Intention to remain in Australia*
>
> *An established migration pathway allows students to transition to General Skilled Migration onshore, so officers should not draw an adverse inference should an applicant express an intention to apply for skilled migration in Australia or be seeking to take a course of study for the purpose of applying for skilled migration. Therefore, not withstanding section 80.4 Incentives to remain in Australia an intention to apply for skilled migration upon completion of studies is not a reason to doubt the genuineness of a student visa applicant if the proposed course is consistent with the skilled migration program requirements.*
>
> *As part of the initiatives to encourage access to Skilled Migration visas, under Regulation 2.05(5A) the "no further stay" condition 8534 is waived where the visa applicant has applied for an onshore General Skilled Migration visa. (PAM3 Migration regulations – GenGuideG – Student visas – Visa application & related procedures- Student visa assessment – assessing genuineness – Schedule 2 "other relevant matters")*

ii. Australia

4.9.5 The proposed amendments are the final straw in a slow process of piecemeal change that has resulted in wide-spread lack of faith in the Australian Government's ability to act with fairness and consistency. There is already a discernable impact on overseas student applications and GSM applications. The negative impact can intensify as skilled workers or foreign investors become increasingly unwilling to make applications to a country where there is such unabashed arbitrariness, uncertainty and unfairness with the migration program. . Individuals are to be regarded as acceptable casualties in draconian attempts to resolve issues caused by years of abject neglect and incompetence.

4.9.6 It is noteworthy that Canadian Educational Institutions are focusing their advertising campaigns on foreign students in Australia, using the Australian Government's "back flip" on the implied promises made to foreign students

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regarding the GSM pathways that would be available to them upon completion of study.

4.9.7 Overseas migration agents are now advertising in Australia to promote and contrast the better migration options offered by other countries such as Canada.

This is plainly embarrassing to all Australians in the international arena. Already potential skilled migrants to Australia are looking at other countries treat migration applicants with fairness and who value their potential contribution to their economies.

4.9.8 It is a sad irony that, in attempting to find solutions to long-standing and neglected problems, the Australian Government is paying scant regard to the values espoused in its own Australian Values Statement, contained in every visa application form, which states:

> *Australian society values respect for the freedom and dignity of the individual, freedom of religion, commitment to the rule of law, Parliamentary democracy, equality of men and women and a spirit of egalitarianism that embraces mutual respect, tolerance, fair play and compassion for those in need and pursuit of the public good;*

4.9.9 The effect for Australians and the Australian economy will also be disastrous as we will have a Government sending a message to our major trading partners in our region, whose growing economies are insulating us from the on-going global economic disasters of the United States and European economies, that we continue to afford little or no rights to their nationals but have been happy to accept their tuition fees, skills assessment fees, IELTS fees, medical fees, police check fees, migration agent fees and income taxes but will now return their visa fee and cancel their visa application and send them home in 28 days.

International students contribute approximately $17 billion to the Australian economy each year.

4.9.10 Concerns with the permanent residency pathway for trade occupations such as cooks and hairdressers were raised with the Department of Education, Employment and Workplace Relations (DEEWR) prior to the Rudd Government coming to power in 2007. A recommendation to change skills assessment criteria by Trades Recognition Australia (TRA) was due to be implemented by 31 August 2007. It was delayed and the incoming Rudd government ignored

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the demands for reform when the student pipeline was manageable. The decision-making processes within DEEWR in late 2007 and throughout 2008 should be the subject of official enquiry. A significant conflict of interest has occurred since the Rudd Government merged Department of Education with the Department of Employment and Workplace Relations (of which TRA is a department). Department of Education priorities to expand international student numbers for the export value conflict with the role TRA plays in assessing suitably qualified tradespersons. The mushrooming Vocational Education and Training (VET) sector industry almost doubled in enrolments from between 2007 and 2009. An effective reform of TRA assessment criteria in 2007 would have stymied this growth.

The opportunity by the current government to break this cycle before it became unmanageable was clearly identified and subsequently ignored in its first three years of government.

The short-sighted solution to now, retrospectively, cap and cease visa applicants who qualified under established government regulations and government administered skills assessments will have long-term adverse effects on Australia.

4.9.11 In the short term we may find that the governments of India and China simply instruct their Reserve Banks to disallow remittance of foreign exchange to Australia for the purpose of new enrolments into our education sector and direct their students to the United States, Canada, the United Kingdom and New Zealand as punishment for the appalling treatment of their nationals. Other governments with significant numbers of affected nationals, such as Korea, Indonesia, Malaysia and Thailand, may do similar.

The Overseas Indian Affairs Minister Vayalar Ravi is currently visiting Australia and has conveyed the Indian government's concerns in regard retrospective application of this law.

4.9.12 In 30 years, when Australia faces its greatest skills shortage in history, there will be massive competition for skilled workers by the United States, Canada, the United Kingdom and other major western economies due to their declining ageing populations.

The long-term fallout with be in lost opportunities to further solidify trade, political and cultural relationships with the next generation of business and

political leadership that can develop in the major economies of our Asian neighbourhood.

Not only is this proposed amendment grossly unfair to those visa applicants already in the system, it has the enormous ability to directly and negatively affect Australia's international reputation for years to come. All Australians need to be acutely aware of this.

iii. Registered Migration Agents

4.9.13 RMAs have no more clarity about visa options and likely changes to the migration program than do their clients. This lack of clarity puts the registered, lawful and reputable migration advice profession in jeopardy. RMAs can no longer work with any confidence in Government legislation and policy.

4.9.14 Many members of the MIA have advised of the severe impact the Government's changes have had on their once viable business. This flies in the face of statements by DIAC officers at the recent liaison meeting (4 June 2010) that the migration advice profession is important to the work of DIAC.

4.9.15 The impact of such continuous and unjust changes by the Government will eventually result in the decline of the immigration profession. The economic impact of these changes will make the provision of immigration advice for a fee unsustainable and redundant, which will result in unemployment and business closures.

C. Social costs

4.9.16 The long, drawn out changes to the GSM program, the uncertainty about future changes, and the proposed Cap and Cease legislation are causing huge anxiety, frustration and stress to hundreds of thousands of people. The hopes of current applicants and current students, and of their families who may have made huge financial sacrifices to give their children better opportunities in life, are being dashed.

4.9.17 When thousands of visa applicants in Australia find themselves in a situation where uncertainty may be replaced with despair the proposed changes, which are manifestly unfair have the potential of causing social disharmony between ethnic and cultural groups and the greater Australian community

Migration Institute of Australia

4.9.18 Should such disharmony occur, it would be against everything we understand about living in a country of tolerance and fair play, but it could never be regarded as an unforeseen consequence of the draconian nature of the proposed amendments.

D. The retrospective nature of these amendments

4.9.19 The proposed Capping and Ceasing powers will potentially apply to current undecided GSM in the current “pipeline” of applications.

4.9.20 This is an abrogation by the Government of the rules of procedural fairness and the rights to natural justice and due process for which this country is renowned.

4.9.21 Visa applicants, while not guaranteed their application will be successful, have an expectation that applications will be judged on the rules applicable when lodged. The proposed amendment does not merely shift the goalposts; it removes the playing field entirely.

4.9.22 Retrospective changes such as these do not satisfy basic standards of fair play and decency. A visa applicant, who has expended considerable time, money, and perhaps anxiety, planning for a life-changing event such as emigration, should have the reasonable expectation that their application would be processed according to the rules at the time of their application.

4.9.23 The public information provided by DIAC about possible changes to the migration program quite clearly obfuscates the serious and detrimental effects of the amendments:

> *The Australian Government decides who should be granted a visa. Your application will be decided on the basis of the information you give and generally, the law at the time you apply.*
> *Note: The government may change the criteria for awarding points, the pass mark, or the pool mark at any time and this may affect your application. (Booklet 6 – General Skilled Migration – 1119 Nov 2009)*

4.9.24 The obvious lack of concern for those affected by the Government’s desperate patchwork of increasingly radical and drastic solutions to problems with the migration program is alarming and goes against everything Australia stands for.

E. A solution too late

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4.9.25 The problems that these amendments, and the patchwork of other changes the Government has introduced to the GSM program in recent years, are trying to address should have been addressed long ago, before the Minister contemplates such drastic solutions which will have irreversible and adverse affects on potentially huge numbers of people.

4.9.26 Failure to address the glut of GSM applications and an excess of applications in very narrow ranges of occupations is outrageous and should be the subject of an official enquiry

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5. Conclusion

5.1 The features of the present Government's migration program, with its constant drastic and often retrospective changes is putting people's lives "on hold" for years, and are shameful and disrespectful. They are destroying people's legitimate plans for their future, damaging Australia's reputation, costing people money and making the Australian migration advice profession unsustainable, with little certainty being able to be afforded to clients and prospective clients.

5.2 It would be a disgrace if these less than attractive features were to continue as the Government moves toward its "final reform destination" [Senator Evans, Radio National, 4/6/2010]: a "selection model" for migration, whereby people will be "selected" and invited to make a visa application. This would be the ultimate in arrogance causing other countries to shun our attitude towards migrants.

5.3 It is clear that the Minister has said the Government does not want a system over which it has not control. If it is true that the system is out of control, the Government has had several years to find solutions that both cater for the tenets of natural justice and fairness delivering at the same time the levels of control required by any migration program.

5.4 However, fairness and compassion do not seem to be features of that control. It is difficult to believe that the resources of the Australian Government and the Australian Public Service have not been able to properly monitor Australia's migration program, or to implement non-draconian measures to solve problems which have previously escaped attention without the need to turn to the types of solutions sought to be implemented should the Bill be passed.

5.5 The Minister's claim that the Government's harsh measures "will give some people certainty" would be laughable if it were not so insulting and disrespectful to so many visa applicants and potential applicants.

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6. Recommendations

6.1 The Bill, in its current form, gives the Minister unfettered power and should be opposed.

6.2 Capping and ceasing should be used only as a last resort, after all other options have been considered.

6.3 If the proposed Bill is passed, Capping and Ceasing should only apply to visa applications lodged after the Bill is passed.

6.4 Capping and ceasing should apply only to the GSM program

6.5 Capping and ceasing should not apply to temporary visa holders. To do so could prevent harsh and unjust consequences to many visa categories including employer nominated visas to name one. It is neither fair nor reasonable practice to cease (ie cancel) temporary visas which been granted.

6.6 Where capping and ceasing affects temporary visa holders, they should be given other options for permanent residence.

6.7 A public enquiry into how the GSM program was allowed to get this far out of control should be held.

6.8 Though not strictly related to the capping and ceasing issue, the new Skilled Occupation List (SOL) to come into effect on 1 July 2010 should not apply to current overseas students in Australia.

6.9 The Government should admit that reforms to the GSM program are long overdue, however, as an act of good faith, current overseas students will not be affected by changes as they came here in good faith, often with an intention and legitimate expectation of using the GSM pathway to permanent residence.

6.10 It should be mandatory that the Minister (and the DIAC) consult all stakeholders in their consideration of changes to the migration program. The lack of consultation with the migration advice profession during the consideration of these most recent changes is a highly regrettable lost opportunity to consider the opinions of those closest to the Department's clients and potential clients.

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