1 July 2010

Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia
By Email: legcon.sen@aph.gov.au

Dear Secretary

Ref: Inquiry into the Migration Amendment (visa capping) Bill 2010

Further to my telephone conversation on 25 June 2010 with Mr Powell I would like to thank the Committee for allowing me an extension of time to present this submission. As a solicitor and registered migration agent that specialises in assisting applicants in skilled, employer sponsored and business visas applications, I follow closely the proposed (and past) changes to Australia immigration program.

This submission aims to bring to the attention of the Committee potential unintended consequences that may arise as a consequence of the proposed bill. It is my humble view that the proposed visa capping bill may have the following adverse consequences:

1. lead to an increase of unlawful non-citizens residing in Australia
2. deter potential migrants and temporary residents from considering Australia as a potential country of residence
3. Adversely affect Australia's reputation as a fair country where certainty of the rule of law and natural justice are established legal principles

Lead to an increase of unlawful citizens residing in Australia

The Department of Immigration recently published the Population Flow 2008- 2009 statistics. The statistics provided in this report indicate that as 30-06-2009 there were 48,700 unlawful non-citizens. Of those 48,700 unlawful non-citizens the percentage of persons that overstayed their visa class is stated as follows:

Students	9%
Visitors	82%
Temporary Residents	5%
Other	4%

The publication Boat Arrival since 1976 currently displayed at the Parliamentary library: www.aph.gov.au/library/pub/bn/sp/Boatarrivals.htm discusses issues surrounding Mandatory Detention (since October 2008 mandatory detention has been subject to new policy directions which mandates that detention is to be used as a "last resort" measure) and states "*for much of the past two decades people in immigration detention have been predominantly visa overstayers, unauthorised air arrivals and those whose visa has been cancelled, rather than those who have arrived unauthorised by boat"* (according to this publication during 2008-2009, 1033 people arrived in Australia by boat)

The above documents explains the terms of "asylum seekers", "unauthorised arrivals" and "unlawful non–citizen" and states : "*an unlawful non citizen is a national from another country who does not have the right to be in Australia; that is they do not hold a valid visa. The majority of unlawful non – citizens in Australia at any given time have either overstayed the visa issued to them or are people who have had their visa cancelled. Some unlawful non-citizens will have entered Australia without a visa".*

On the basis of the statistics and publications it is clear that a great percentage of unlawful non-citizens are persons that previously held some other kind of visa in Australia.

Section 91AC (2) (3) of the Proposed visa capping bill states:

(2)"If the person holds a bridging visa because the person had applied for the capped visa, the bridging visa ceases to be in effect 28 days, or such a longer period prescribed by the regulations, after
(a) if the regulations prescribed an event for the purpose of this paragraph- the day on which that event occurs; or
(b) otherwise – the day on which the person is notified of the matter referred to in subsection (1)

(3) If:
(a)the person holds a temporary visa; and
(b)Assuming that the application for the capped visa had been decided, the temporary visa would, apart form this subsection, have ceased to be in effect when the person was notified of that decision;
the temporary visa ceases to be in effect 28 days, or such longer period prescribed by the regulation, after:
(c) if the regulations prescribed an event for the purpose of this paragraph- the day on which that event occurs; or
(d) otherwise – the day on which the person is notified of the matter referred to in subsection (1)

Consequently, if section 91AC were to operate as proposed, it is my modest view that applicants for a capped visa that had followed the process and respected the rule of law by applying for a visa class they believed they qualify may feel tempt to disregard the rule of law and decide to stay in Australia regardless of their status.

Given that bridging visas and temporary visas will cease either within 28 days or some other specify time; there is a real possibility that some applicants, that feel adversely affected and who may also believe have suffered economic loss (as many expenses incurred by applicants will not be refunded), may loose respect and faith in the Australian legal system and become unlawful non- citizens.

For example, if a portion of the current 17,594 valid visa applications made by applicants nominating the occupation of cook of hairdresser which have not yet been finalised (as stated in the second reading speech of 26 May 2010) were to be subject to section 91AC, onshore applicants currently on bridging visas or other temporary visa, may not depart Australia once their bridging visa or temporary visa expires. As the statistics and reports above quoted indicate, a great proportion of unlawful non-citizens are former visa holders that overstayed their visas.

If the number of unlawful non-citizens were to increase substantial additional government expenditure will be require to increase the number of compliance teams, officers, compliance strategies and resources. In my opinion, an increase of unlawful non-citizens numbers would be a highly undesirable outcome as it is not beneficial for Australia and the person that may become an unlawful non-citizen.

Deter highly needed migrants and temporary residents from considering Australia as a potential country of residence

As an immigration professional that specialises in working with skilled and employer sponsored applicants, it is my experience that these applicants expect to receive efficient and precise advice in respect of their eligibility to qualify for visa, processing times, their obligations and the overall process. If these applicants were to be inform that at any point in time during the processing of their application there is a possibility they may not longer qualify for the visa they are applying due to capping and cessing provisions which can not be predicted at the time of lodging their visa application, I believe many of these applicants will choose not to proceed.

Once again the statistics contained in DIAC's report Populations Flows 2008- 2009 published this last May are an important piece of information to demonstrate the real need for migrants and the fact that Australia and other countries such as Canada will certainly need to rely on migrant labour force to maintain acceptable levels of labour force participation as their population aged.

The following statistics contained in the report above mentioned are of particular interest:

World fertility Rate	2005 -2010 =2.55%
Australia Fertility Rate	2005- 2010 =1.83%
Canada Fertility Rate	2005 -2010 =1.57%

Percentage of people aged 65 or more:

Canada		Australia	
1950	6.6%	1950	7.00%
2005	13.1	2005	12.9%
2020	18.1 (projected)	2020	17.3 (projected)

The report indicates that by 2056 the Australia population will be around 31 to 43 million of which:

5%	to	7%	people aged over 85
23%	to	25%	people aged over 65

The report indicates that in 2009 the percentage of the Australian population aged over 65 was:

1.9%	people aged over 85
13.3	people aged over 65

These statistics demonstrates that a high proportion of Australians (17.3%) and Canadians (18.1%) will be aged 65 of more by 2020, as fertility rates remain below replacement levels in both countries; it is only natural that competition between both countries to attract migrants will only increase. It is my very humble view that in order to maintain Australia's ability to compete and attract much needed migrants certainty in the rule of law is a paramount consideration. Applicants for a visa to Australia need to be certain that if they satisfy all the requirements of the legislation, they will be granted their visa. The uncertainty that the proposed visa capping bill will create would, in my modest view, end up discouraging applicants from considering Australia as potential country of residence.

<u>Adversely affect Australia's reputation as a fair country where certainty of the rule of law and natural justice are established legal principles</u>

One of the key legal principles that underpin many legal systems is the prospective application of the rule of law as retrospective operation of the rule of law creates uncertainty and may affect rights of individuals.

The second reading speech of this proposed bill indicates "*To terminate a visa application is different to a decision to refuse a visa application. When an application is terminated it is taken not to have been made. Applicants who are affected by the cap will have their visa application charged refunded to them. Further a visa application which has been terminated is not subject to merit review*" and also states "*the amendments proposed in this bill not only provide power to cap general skilled migration visas and terminate general skilled migration visa applications but are broad enough to allow other classes of visas to be capped"*.

It is my respectful submission that the powers conferred by the proposed bill are too uncertain and broad. As the criteria to cap and terminate visas will be determined at some point in time in the future and in accordance with unknown factors or characteristics the proposed bill appears to be affected by considerable uncertainty.

I appreciate the opportunity to explain the concerns I have in respect of the proposed bill and thank the Committee for the consideration it may give to the arguments raised.

Yours faithfully,

Giovana Arrarte