Law Council
OF AUSTRALIA

From the Office of the President

Ms Julie Dennett
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
CANBERRA ACT 2600

Glenn Ferguson
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Dear Secretary,

RE: INQUIRY INTO THE MIGRATION AMENDMENT (VISA CAPPING) BILL 2010

The Law Council of Australia welcomes the opportunity to comment upon the *Migration Amendment (Visa Capping) Bill 2010* (Cth) ("the Bill").

The Law Council opposes the Bill on the following grounds:

1. The Bill will establish arbitrary and unfettered Ministerial discretion, which is anathema to transparency, certainty and procedural fairness;

2. The Bill will have retrospective impact, which is rarely appropriate; and

3. The Bill may have implications for Australia's compliance with its international human rights obligations.

Objectives of the Bill

The Law Council supports the broad objectives behind the Bill. It is noted that the Bill seeks to address a large backlog of visa applications, in circumstances where the present demand for General Skilled Migration (GSM) visas significantly exceeds the number of places that will be offered.

It is further noted that past immigration policies have led to larger than expected demand for GSM visas in certain occupations. It is argued that under existing rules, the GSM program is unable to meet changing demands for skilled labour and has resulted in excessive numbers of migrants in low-demand occupations. The Law Council recognises that it is important that these policies be reviewed and, where necessary, reformed to more appropriately serve with Australia's national interests.

However, the Law Council considers that the ends cannot justify the means. There are serious concerns about the implications of the Bill, which will introduce uncertainty and a lack of the transparency to Australia's migration program, drastically curtail options for review of Ministerial decision-making and may impact on Australia's compliance with international human rights norms.

Unfettered Ministerial discretion

Codification of the Visa System since the 1980's

From the time the *Migration Act 1958* (the Act) commenced operation up until the mid 1980's, Australia's migration system was governed by a relatively short and uncomplicated legislative structure which granted very broad discretions to the Ministers for Immigration and their delegates to allow overseas nationals to travel to, enter and stay in Australia. However, in the mid 1980's a decision was taken by Government to move from a "simple" system with very broad departmental discretion to a codified system.

At the end of this 25 year period there are now over 140 visa subclasses typified by detailed legislative criteria to be satisfied for the grant of the visa, the majority of which are set out in the *Migration Regulations 1994* ("the Regulations").

However the present immigration system does more than codify the criteria to be satisfied prior to the grant of a visa. The Act itself sets up a codified system for the processing of the application itself which leads to a decision to grant or refuse, including:

- criteria to be satisfied for the making of a valid application;
- the methods by which applicants for a visa are to communicate with the Department and vice versa;
- the material that must be considered by the Department prior to making a decision;
- adverse information which must be disclosed to an applicant prior to the Department making a decision on an application;
- when a decision must be made;
- the content of any decision; and
- the methods by which a decision is to be notified to an applicant.

This system also expressly excludes the common law rules of natural justice and replaces them with a codified system of procedural fairness.

It is of note that the provisions of section 65 of the Act requires the Minister to grant a visa in circumstances where the Minister is satisfied that an applicant meets all the criteria set out in the Act and Regulations, and conversely forbids the grant of the visa otherwise.

The end result of this process is a heavily codified system established to create greater certainty for applicants as to their ability to meet the relevant criteria, in the context of a legislative requirement for the Minister to then grant the visa once satisfied that the criteria have been met.

The Bill retains that legislative structure, but adds a new Clause that would effectively allow the Minister at any time to retrospectively decide that a category of applicant (or even conceivably a single applicant) should not be granted the visa, whereas the Minister would otherwise have been legislatively required by section 65 to grant the visa.

The Law Council considers the affect of this new section would be to undermine the relative certainty the existing legislative structure exists to create.

The affect of these changes are thrown into even sharper relief when viewed through the context of a processing time for an application that can be as long as 10-15 years[1]. Certainly processing times of 15-24 months are common to parts of our migration program[2]. The reality is that after a multi-year processing delay a person could then face their application being "taken not to have been made".

Consequences for Merits Review

Deprivation of Merits Review

Under the Act and Regulations, applicants or sponsors whose visas are refused by the Department commonly have a right to seek merits review before the Migration Review Tribunal, the Refugee Review Tribunal or the Administrative Appeals Tribunals. However, such merits review applications are dependent upon the Department refusing the application.

The Bill will establish a new concept enabling the Department to consider a visa application "not to have been made". As such an aggrieved applicant would be deprived of any opportunity to seek merits review which would otherwise have been open if the application had been refused.

Besides the injustice caused by denying a right to merits review, the Bill would then render hollow the merits review provisions in the Act and Regulations, which are also highly codified and which exclude the common law rules of natural justice.

Effect upon Merits Review Applications in Progress

Serious questions also arise as to the effect of cases before the Tribunals if the Minister exercised powers under the Bill.

The Minister's exercise of powers would affect applications before the Department. However, despite the view of the Department that merits review applications would be rendered invalid when an application is taken not to have been made, it is not at all apparent that the decision would have any impact at all on identical visa applications which had already been refused and were before one of the Tribunals, but which would otherwise fall within the Minister's capping decision.

It is considered that, prima facie, the Minister's decision would not have any affect upon the jurisdiction of the review authority, leading to the strange result that a Tribunal might set aside the Minister's decision to refuse an application and remit the application back to the Department to be finalised according to law, with the application then automatically being taken never to have been made.

This would render the entire merits review processes pointless.

[1] Such as for an offshore subclass 103 Parent visa or the onshore subclass 804 Aged Parent visa.
[2] Examples include subclass 143 Contributory Aged Parent visa, business skills visas, and General Skilled Migration visas.

Consequences for Judicial Review

Similar concerns arise with refused visa applications which are before the High Court of Australia, the Federal Court of Australia or the Federal Magistrates Court of Australia at the time the Minister exercised powers under the Bill. As with the merits review Tribunals, we see nothing in the Bill that would affect the Court's jurisdiction or powers to consider the appeal. Instead, either:

- The Minister's legal representatives would then argue that the appeal was futile given that the Department then lacked any ability to reconsider the application on remittal; or

- The effect of the Court's Orders would be rendered nugatory by the reality that the visa application would be taken never to have been made immediately upon the Court setting aside the decision and remitting the case back to the Minister to be reconsidered according to law.

The practical effect of such a power would be to render the Court's decision as being irrelevant and in effect removing the ability to seek judicial review.

Human rights concerns

The broad power to cap and terminate for any reason could include reasons related to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status in breach of Article 2 of the International Covenant on Civil and Political Rights (ICCPR). While age, disability, race and sex are prohibited grounds for discrimination under Commonwealth anti-discrimination legislation, there is limited domestic implementation of other grounds under the ICCPR and action under the capping and terminating power for reasons related to these other grounds that could place Australia in breach of its obligations under the ICCPR.

Further to the matters outlined above with respect to abrogation of merits review and judicial review, the power to terminate may also place Australia in breach of the fair trial right under Article 14 of the ICCPR and the right to equality before the law under Article 26 of the ICCPR. Unlike a visa refusal, it appears that it will not be possible to challenge a visa termination in the Migration Review Tribunal or a court as technically the Minister will not have made a decision on an application but simply terminated it.

In addition, one of the visa sub-classes which it appears will be immediately affected are offshore family sponsored visa applications. Capping and terminating such applications could breach Article 17 of the ICCPR relating to arbitrary interference with family. Family sponsored migration recognises the rights of Australian citizens and permanent residents to family reunion and these rights could be seriously compromised through visa capping and termination.

The Law Council notes and supports the exclusion of protection visas under the Bill. Australia is bound under the UN Refugee Convention by *non-refoulement* obligations, which it would almost certainly breach if attempts were made to arbitrarily cap Australia's refugee intake in the manner proposed by the Bill with respect to other visa sub-classes.

If there are any queries regarding this submission, please contact Nick Parmeter.

Yours sincerely,

Glenn Ferguson

21 June 2010