AUSTRALIAN NATIONAL UNIVERSITY LEGAL WORKSHOP SUBMISSION
SENATE INQUIRY *The Migration Amendment (Visa Capping) Bill 2010 (the Bill).*

18th June 2010

Ms Julie Dennett
Committee Secretary
Senate Legal and Constitutional Committee

Dear Ms Dennett

Thank you for the opportunity to make a submission in relation to *The Migration Amendment (Visa Capping) Bill 2010 (the Bill).*

I write in my capacity as the Sub Dean of the Migration Law program at The Australian National University (ANU).

The ANU is a provider for the prescribed qualifications needed for registration of Migration Agents.

In addition the Migration Law Program runs a pro bono migration advice clinic in conjunction with the Migrant and Refugee Settlement Services of the ACT Inc (MARSS).

I recognise that the Migration Amendment (Visa Capping) Bill 2010 has been introduced to address issues that have arisen in Australia's skilled migration program.

I urge the committee to examine the impact of the Bill carefully to ensure that it meets its objectives and does not have unintended and adverse consequences for current or future migrants and/or visa applicants, or for Australia's international reputation and economy.

Minister's power to effectively manage the migration program

The Government's stated intent in introducing this Bill is to

1. Give the Minister for Immigration and Citizenship greater power to effectively manage the migration program
2. Ensure that skilled migration becomes predominately demand driven (that is employer sponsored)

There is no doubt that the statutory provisions of the Act are complex, however this does not mean that the Migration Act currently prevents the Minister achieving the objectives that have been outlined in the Explanatory Memorandum, Second Reading Speeches and statements to the media.

Section 39 of the Act allows the Minister to cap visas of a Class by legislative instrument. The Minister can determine the number of visas granted in a specified Class or (Subclass) in a program year by inserting a criterion relating to the limitation in the Migration regulations. The perceived limitation of this section is two fold. The cap is made through regulations which are subject to parliamentary scrutiny and the cap can only be made on the entire visa subclass.

Section 51 of the Migration Act allows the Minister to determine applications in the order he or she considers appropriate.

The Bill proposes to replace s39 with s91AA and s91AB. The new sections provide broad and unprecedented powers to the Minister. They allow the Minister to select a cap on applicants with certain characteristics or on applications with certain characteristics. Therefore he/she could determine that applications made on a certain date or for a particular occupation were to be capped and all applications that had not been determined once the cap was reached would no longer be considered valid.

Ensuring that skilled migration becomes predominately demand driven

The lean toward demand driven skilled migration appears to be a result of public pressure surrounding the student visa pathway to a permanent skilled migration outcome. The Minister has targeted occupations such as Cook, Hairdresser and Accountants as those which have been over represented in applications for independent visas.

"CHRIS EVANS: Well what we've seen already is that, as a result of the temporary critical skills list report put in last year, we've already got a lot more doctors, nurses, mechanical engineers coming through the system than previously. Under the Howard government, we had a lot of cooks, a lot of hairdressers coming through, 40 000 accountants in the last five years, but we still had shortages of accountants. That's because they were bringing people who couldn't get jobs as accountants, I think because their skills weren't good enough or their English wasn't good enough. So they weren't meeting our skills needs. So what we've already seen, as a result of the temporary changes we made, more doctors, more nurses, more critical skills. And under these more permanent changes, we'll see us focusing on those skills that are in short supply."

Effects of these provisions

The ability to limit visa applications based on individual characteristics is a dangerous precedent, not least because s91AA is not limited to visa classes that relate to skilled migration. It can be used across all visas categories except Humanitarian, allowing the Minister unfettered power to impose caps in any area of the migration program without any meaningful parliamentary oversight.

The Bill is potentially retrospective, in that it allows the Minister to determine that all valid applications for a specific visa whether made onshore or offshore can taken to have never been lodged, potentially many months or years after they were lodged. Applicants will receive a refund on the application fee but will also be placed in the unenviable position of 'starting again' in the next financial year or looking elsewhere. They certainly will not be able to get any refund on what can be very large amounts of money which they have expended in good faith – and usually to Australia's economic gain – based on the migration rules provided and promoted by the government leading up to and at the time of their application.

Those who have validly applied and who are in Australia on a bridging visa or temporary visa will find these visas terminated and that they have only 28 days to leave Australia, with all review rights removed.

The need to address individual characteristics has been articulated as a response to a queue clogged with accountants, cooks and hairdressers with poor English skills who are preventing doctors, nurses and engineers from being more speedily processed and accepted.

This ignores the fact that s51 currently allows the Minister to deal with applications in any order. Policy instructs officers dealing with s51 decisions that they can take into account variations in workload and process in accordance with policy priorities and individual circumstances, effectively providing the mechanism for a policy decision to process, for example, doctors before accountants.

Consequences of changes

There is no doubt that the Bill is intended to deal with the backlog of skilled migration applications currently in the system in a timely manner. Decision making under s51 may remain slow and ponderous for such a large number of applications.

Capping visa categories and applying a retrospective provision that determines applications are not valid could potentially wipe out close to 150 000 primary and secondary applications. New applicants will need to meet new criteria and will be channelled into Employer Sponsored visa categories.

Some of those on the current pathways have been there for up to seven years. Many have responded to Skills Expos held by the Australian Government in England, India, Ireland and Europe at which they were actively encouraged to migrate to Australia and where thousands of applicants were 'pre screened for skills'. Many have been onshore studying and/or working on a Bridging Visa whilst they wait for their application to be processed.

They may have married, established homes and had children who have only lived in Australia. Others have children who will soon become adults and fall outside of eligibility criteria if they are forced to apply again for a visa. They have been on temporary visas paying very expensive international rates for doctors, medical insurance and schooling whilst awaiting an outcome on their application.

It is not hard to understand the impact of a decision to determine their valid applications to have never been made will have on many of these applicants. The financial and emotional impacts on individuals and families are difficult to overstate.

Market impact

It is hard to see how funnelling applications into visa categories that currently do not address the skills shortage[1] will assist Australia to fill positions in these areas.

The move to block those with specific characteristics in skilled visas and push migrants to employer driven options relies upon employers taking up the challenge of sponsoring applicants.

Pathways currently exist for uncapped entry of workers with often lower skill base than independent migration in large numbers. This suggests the inability of applicants to take up these pathways is due to the reluctance of employers to sponsor them.

The favourite route for sponsored migration is the temporary Subclass 457 visa which underwent legislative amendments following allegations of mistreatment of workers and an adverse impact on Australian employment. Following these amendments applications for subclass 457 visas dropped and although slowly increasing they remain lower than previously.

The number of primary visas granted in March this year for Subclass 457 was down 40 per cent on the same month a year earlier[2], revealing either a large drop in demand for workers and/or reluctance for employers to engage with a pathway that has such a long processing time and increased obligations for sponsorship.

Anecdotal evidence from clients indicates that major hotels, universities, restaurants and businesses who call for a skilled workforce are reluctant to sponsor applicants for temporary or permanent visas through the Employer Nominated pathway. Speculation suggests that part of the reluctance is due to the global economic crisis and the need to contract to provide employment for three years. Other evidence points to the constant changes in migration legislation and skills assessments attached to the visa requirements as a level of complexity employers are reluctant to address.

1 It is interesting therefore to note that Skills Australia's submission to the National Resources Sector Employment Taskforce, April 2010; lists Accountants as a specialised occupation high in demand. Specialised Occupations are those that can have significant impact on the market should the government fail to plan to ensure the skill shortage in these areas are addressed.The submission also includes the need for employees to address the unacceptable low level of 'adult language literacy and numeracy' and recommends training by employers to up skill their workforce in this area. This recommendation is not limited to the training of migrants either permanent or temporary.

2 Subclass 457 Business (Long Stay) State Territory Summary Report 2009-10.

International Students

Universities Australia has expressed concern at the impact of proposed changes to GSM on both the numbers of international students choosing to study in Australia and on the broader economy.

'Research into the reasons international students choose to study at Australian universities tends to reveal that approximately one third of university international students consider the possibility of migration to Australia on graduation'.

The link between study and a migration outcome is beneficial for both student and the Australian community and economy. Universities Australia warns in submissions to the Department of Immigration and Skills Australia that damage to our reputation as a migration destination for students will result in a two fold economic impact.

1. Universities rely upon income from international students to fund domestic students.

2. A drop in income will result in a poor outcome for domestic students and a decrease in the skilled workforce for Australia.

'Without international students, Australian universities would be less able to meet the needs of the Australian economy, community and future skills demand. It would be ironic if migration settings focussed on immediate workforce needs unintentionally undermined the longer-term domestic provision of skills in Australia.' [3]

Migrant and Refugee Settlement Service Clients

MARSS runs a pro bono migration advice clinic in conjunction with an outreach program for the College of Law, Legal Workshop at the Australian National University[4]. Our clients range across all visa categories, however no ongoing cases are taken for initial applications for skilled visas. The result of this policy is that our clients consist solely of those who have been affected adversely by the migration process.

Whilst we do not provide advice for skilled visa applicants the Service does assist those who may have permanent residency and are seeking advice due to reliance on employers who do not meet their obligations or who have been left in a vulnerable position by the refusal or inability of the sponsoring state or employer to ensure they are employed in the position negotiated prior to the grant of their visa.

This can result in people working for reduced pay, made to repay 'loans' from their employers for items such as furniture and housing or in some cases clients who find themselves homeless.

3 ibid
4 Four migration agents and five law students acting as paralegals provide one-off advice to at least nine clients per week. Ongoing cases are taken up on a case to case basis.

Students who have fallen pregnant to Australian citizens and who give birth to Australian citizen children but who are not in a permanent relationship could rely upon the skilled pathway to remain in Australia. Migrants in this situation are not numerous[5] but are now be forced to find an employer to sponsor them whilst they are pregnant or have young children, or to make a valid claim for a visa they are not eligible for in order to be able to subsequently seek ministerial intervention regarding their visa status.

Recent advices to clients regarding the changes to skills assessment have involved clients who have been in Australia for over six years. They have studied, lodged visa applications in 2008/2009 and are still awaiting a decision. These applicants are either currently employed but cannot secure sponsorship for permanent migration or have not been able to work in their area of study due to low pay or the requirement that they hold a permanent visa.

Impact on Migration Agents

As the largest provider of the qualification for registration as a migration agent, Australian National University prepares students to practice in a young growing profession. Migration Agents and lawyers assist clients to prepare and lodge visa applications; they endeavour to ensure that the applications will be dealt with in a timely manner through the correct preparation of 'decision ready applications'.

To date migration agents and lawyers have needed to inform clients of the possibility of a change to legislation which may impact on their visa application. However substantive changes are usually provided with transitional provisions which ensure that 'time of application criteria' in Schedule 1 and Schedule 2 continue to apply at time of decision. Therefore the applicant is not disadvantaged by policy decisions beyond their control.

If clients cannot be assured that meeting all criteria for a valid application will result in a grant of a visa then the pathway to permanent residency becomes a lottery.

It is doubtful any other area of law would present such a challenge and arbitrary outcomes.

Conclusion

Ministerial statements and Second Reading Speeches have stressed that a flexible response to market trends and migration program needs is paramount.

Whilst the Migration Act is the legislative means of controlling the entry, stay and departure of people to Australia, the recognised aim of a migration program is to bring into the country today the people we need for tomorrow.

There is no doubt that the needs of 'tomorrow' are constantly changing; they can be affected by many variables including local and global economics, population and the environment. Inevitably policy surrounding these issues then drives changes to the legislation.

5 We have worked on behalf of three clients in 2009/2010 in this situation; two were students

As law makers the parliament must be mindful to ensure that changes do not have unintended consequences. The impacts of the Bill go beyond the current cohort of applicants awaiting resolution on their applications.

The budget has outlined that the Government will forgo revenue of $263.8 million over five years as a consequence of reform to the General Skilled migration program (GSM). These reforms include the changes the current Bill will introduce as they involve a refund of application fees and will result in a reduced number of GSM applications. These figures demonstrate very starkly that this group of people who are often being portrayed as some sort of 'problem group' are actually generating substantial revenue for the Australian government to the benefit of the wider community.

This budgeted amount does not factor in the loss of future migrants to Australia. Australia competes with countries such as Canada as a migration destination in all areas, particularly skilled migration. The widely acknowledged reality of the aging societies in Australia applies, often to an even greater extent, in most other developed countries, which means international competition for skilled migrants is likely to grow even further. These recent and current changes have been monitored and reported internationally. The concept of engaging Australia's complex visa processes to apply for permanent migration within an environment of such instability will ensure that we do not attract today those we want living and working in Australia tomorrow. Highly skilled and mobile migrants will inevitably choose a timely and reliable solution.

Migration is a serious and well thought out commitment, and there is a mutual obligation on behalf of those who are asking people to make this commitment to ensure that they are not left vulnerable to the whims of future governments.

Recommendations

I would strongly recommend not introducing an amendment to the Migration Act which allowed such arbitrary decision making by a Minister, and urge the Committee to recommend against this Bill being adopted.

However, should the Committee feel that on balance the Bill should be passed to enable the government to deal with current issues at hand, I suggest two amendments which could reduce the dangers associated with the proposed legislation;

1. The insertion of a sunset clause which would means that the legislative changes made by the Bill would cease to apply after a set period – I would suggest of six months. This would allow any perceived current problems to be promptly dealt with, without allowing such extremely broad and essentially unchallengeable powers to remain in law indefinitely for a future Minister or government to potentially misuse.

2. The insertion of the requirement that any decision made by a Minister to terminate a particular group of visa applications be a Regulation subject to parliamentary disallowance, and the Minister's decision not come into force until such time as the possibility for disallowance has expired. This would give Parliament the power to scrutinise any Ministerial decision in this area and overturn it if it was felt to be unfair

or unreasonable.

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