4 June 2010

Senate Inquiry into: ***Migration Amendment (Visa Capping) Bill 2010***

Submission by: **Russell Marks**

Proposed changes to the *Migration Act*

As I understand it:

- The *Migration Amendment (Visa Capping) Bill* ('the Bill') would amend the *Migration Act* by inserting Subdivision AHA. The new section 91AA would give the Minister the power to "determine the maximum number of visas of a specified class ... that may be granted in a specified financial year to applicants who are included in a specified class".

- The new subsection 91AB(3) would have the effect of voiding any "outstanding applications" in a visa class that has been "capped" by the Minister. Visa applications affected by the cap (made by people who had applied for a visa in a class which was subsequently "capped" by the Minister) are then to be "taken not to have been made".

- The new section 91AC would describe the effects of such a "cap" on applications which are "taken not to have been made". Subsection 91AC(2) would have the effect of automatically voiding the applicant's bridging visa within as little as 28 days from the date of the determination of the "cap". Subsection 91AC(3) would have the effect of automatically voiding the applicant's temporary visa within as little as 28 days.

- The Bill makes clear that these amendments would apply to applications made prior to the date on which the *Migration Act* is amended by the inclusion of Subdivision AHA. In other words, the proposed amendments are to be retrospective in effect.

Background to and justification for the proposed amendments

According to Laurie Ferguson in his Second Reading Speech on 26 May 2010, in late May 2010 there were "147,000 primary and secondary applicants for general skilled migration visas waiting in the pipeline for a visa decision".

This is perceived by the government as a problem: the "problem of large numbers of valid applications that continue to be made by applicants who are not sponsored and who are nominating occupations that are not in demand". Ferguson explained that the "primary policy imperative" behind these amendments is "to allow the Minister to end the ongoing uncertainty faced by general skilled migration applicants whose applications are unlikely to be finalised because their skills are not in demand in Australia". The amendments are claimed to be part of wider changes to Australia's skilled migration program, which would purportedly better align applicants to the skills which are determined to be actually in demand in Australia at any given time.

The amendments appeared in parliament in the wake of recent changes to Australia's skilled migration program, which have reduced the number of *general* places since 2007 (from about 75,000 to 61,500 in 2011) while increasing the number of *employer-nominated* places across the same period (from 27,500 to over 44,000). The amendments also appear in parliament amid recent national conversations about levels of migration and population.

Specific concerns relating to the proposed amendments

I take no major issue with the stated objectives behind the proposed amendments: (1) to resolve the current "backlog" of skilled migration applications "sitting in the pipeline", and the uncertainties this backlog creates for individual applicants, their employers and their families; and (2) to more closely align Australia's skilled migration program with the actual skills needs in the Australian community.

My particular concerns relate to the application of the amendments to existing applicants: people who are currently living and working in Australia under bridging and temporary visa situations.

In particular, I take issue with:

- the effective retrospectivity of the amendments;
- the introduction of additional uncertainty for applicants should the amendments become law;
- the bureaucratic inhumanity of the amendments;
- the hypocrisy of the amendments with respect to "Australian values";

A) The effective retrospectivity of the amendments

It is a fundamental liberal democratic value that changes to the law which detrimentally and significantly affect an individual's life circumstances should not be made retrospective unless the need to do so is overwhelming. I contend that these amendments fail this 'necessity' test. If the amendments are to be made, they should not apply to applicants currently "in the pipeline".

People who are currently living and working in Australia on bridging and temporary visas awaiting permanent visas made their applications in good faith, according to all available information at the time of their applications. People in this situation who are building a life in Australia have often already made significant sacrifices to be living and working in such temporary conditions, sometimes over two or more years. If the proposed amendments are applied effectively retrospectively to applicants who have been living on bridging and temporary visas for a long period of time, the detrimental effects on their wellbeing would be significant.

B) The introduction of additional uncertainty for applicants and others (including employers)

Further to (A) above, if the proposed amendments are applied to existing applicants, the effect in the short-to-medium term would be to *increase* the level of uncertainty under which people on bridging and temporary visas are presently living and working. With little or no notice, people

living and working on bridging visas could be given as little as 28 days to leave the country. This effect would be opposite to the "primary policy objective" as explained by Laurie Ferguson in his Second Reading Speech, namely to *reduce* the levels of uncertainty for such applicants.

For example: Ana received a PhD from an Australian university in 2009. She had been living in Australia since 2006, and was the recipient of two Australian government scholarships throughout her PhD candidature. She applied for a Permanent Residency (PR) Visa in mid-2009, when her Student Visa expired. She is currently on a bridging visa, awaiting the result of her application for PR. Universities are reluctant to employ Ana while she is on a bridging visa. Ana has found paid work with a well-known charitable non-government organisation. Should the proposed amendments become law, the level of uncertainty under which Ana is living and working would increase substantially, as would the level of uncertainty for Ana's current and future employers.

C) <u>The bureaucratic inhumanity of the amendments</u>

The proposed amendments make no allowance for the fact that many people have already made substantial sacrifices in order to live in Australia under bridging and temporary visas while applying for a permanent residency visa. The effects of the "capping" process on people whose applications are "taken not to have been made" – that they can be told to leave the country within 28 days – are cruel and inhumane. It is not enough to simply refund applicants' application fees.

The assumption which underlies the proposed amendments appears to be that people can be treated as mere inputs, whose value is to be measured in terms of the Australian nation's need for the specific skill category under which they make their application. While a skilled migration program must obviously be *based* on Australia's need for particular skills, it does not follow that people who applied in good faith under one set of circumstances should be treated *only* in terms of their deemed instrumental value to the nation.

D) <u>The hypocrisy of the amendments with respect to Australian values</u>

Further to (A), (B) and (C) above, the proposed amendments contradict many of the core values to which Australians aspire.

People who apply to migrate to Australia must read and sign a statement which is taken to demonstrate that they understand that Australian society "values respect for the freedom and dignity of the individual", "commitment to the rule of law", "equality of men and women and a spirit of egalitarianism that embraces mutual respect, tolerance, fair play and compassion".

The proposed amendments directly contradict this statement of values. In providing for a situation in which a person who has sacrificed much time and money to apply for permanent residency in Australia and live and work on a bridging or temporary visa can be given 28 days to leave Australia, the proposed amendments do not value "respect for the freedom and dignity of the individual".

In applying the changes to the *Migration Act* to applicants who had made an application for

Permanent Residency in good faith under different circumstances, and who have been living and working for between 12 and 24 months on a bridging or temporary visa, the proposed amendments violate the principles of the rule of law.

In enhancing the gap between citizens and permanent residents on the one hand, and applicants on the other, the proposed amendments do not value "equality of men and women and a spirit of egalitarianism that embraces mutual respect, tolerance, fair play and compassion".

The Australian government displays an unacceptable air of hypocrisy in requiring visa applicants agree to such a statement of values, and yet reneging on those values when it comes to amending the *Migration Act.*

Conclusions

My specific concerns with the proposed amendments to the *Migration Act* relate to the application of those amendments to people who have already applied for permanent residency visas in good faith and who may have waited many months or years for their application to be processed.

While making an application for permanent residency does not give a person any "right" to have their application processed to her or his satisfaction, I contend that, if the Australian government was true to its stated values (as expressed in the 'statement of values' it requires visa applicants to read and sign), it would at the very least allow applications to be considered on the regulatory and policy basis upon which they were originally made.

I understand that the Australian government is attempting to resolve the problem of a growing "backlog" of skilled migration applications. One alternative – and more humane – solution which would be truer to Australia's core values may be to simply declare a moratorium on *new* visa applications for a period of 6-12 months while the "backlog" is resolved under the framework under which the applications were made. *New* applications could then be received under the new policy framework as outlined in the proposed amendments.