Australian Government
Department of Immigration and Citizenship

SECRETARY

24 June 2010

Senator Trish Crossin
Chair
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600

Dear Senator

Submission in relation to the Migration Amendment (Visa Capping) Bill 2010

Thank you for inviting the Department of Immigration and Citizenship to make a submission to the inquiry into the Migration Amendment (Visa Capping) Bill 2010.

I am pleased to present you with the attached submission. I would welcome an opportunity for the Department to appear at any public hearings in relation to the inquiry into the Bill.

Should you wish to discuss the submission or arrangements for the hearing, the departmental contact officer is Ms Sanaz Mirzabegian, Assistant Secretary of Legal Framework Branch. She can be contacted on , or by email at

Once again, thank you for the opportunity to provide input into this inquiry.

Yours sincerely

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Australian Government
Department of Immigration and Citizenship

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS INQUIRY INTO THE MIGRATION AMENDMENT (VISA CAPPING) BILL 2010

Submission made by the Department of Immigration and Citizenship June 2010

Introduction

On 28 May 2010 the Senate referred the Migration Amendment (Visa Capping) Bill 2010 (the "Bill") to the Committee for inquiry and report. The Bill seeks to amend the *Migration Act 1958* (the "Act") to give the Minister for Immigration and Citizenship a more precise tool to effectively manage the migration program through the ability to limit the number of visas that can be granted to applicants on the basis of certain skills or other specified characteristics.

The Act has for many years contained a power for the Minister to cap an entire visa class or subclass. However this has proven to be a blunt tool which results in a whole visa class or subclass ceasing to operate. The primary policy imperative for the Bill is to provide the Government with a more precise means to manage the complex environment in which the migration program operates, and to ensure greater certainty for visa applicants whose applications are given low priority for processing and would otherwise remain in the pipeline.

The need for the Bill has resulted, amongst other things, from an increasingly globalised population and workforce, coupled with a greater number of available migration pathways, including temporary to permanent onshore pathways. To effectively manage these complexities, more sophisticated tools than currently available are required to ensure the Government is able to respond promptly and strategically to the changing demands of Australia, including the Australian labour market and economy.

To this end, the Bill provides for:

- the Minister to make a legislative instrument to limit the number of visas of a certain class or of certain classes (other than a protection visa) that can be granted to applicants on the basis of certain skills or other specified characteristics; and

- additional amendments applicable when a cap has been reached:
    - outstanding applications for a capped visa are taken not to have been made (with the result that any visa application charge paid in connection with the terminated application will be returned);

    - further applications for the capped visa are prevented in the financial year;

- where an application by a primary applicant is taken not to have been made, an application made by a member of the family unit of the primary applicant is also taken not to have been made;

- to ensure families are not split, where the primary applicant has been granted a capped visa, any person who applies for the same visa on the basis that they are a member of the family unit may also be granted the visa regardless of the cap having been reached;

- to ensure there is a ceasing event for bridging visas granted in connection with a capped visa, a bridging visa granted on the basis that the applicant made a valid application for a capped visa that has been taken not to have been made, will cease to be in effect:
  - 28 days after the applicant is notified that their substantive visa application is taken not to have been made (or after a different ceasing event prescribed by the regulations); or
  - such longer period as prescribed by the regulations; and

- to ensure there is a ceasing event for substantive temporary visas granted in connection with a capped visa, a temporary substantive visa that would otherwise have ceased to be in effect when the person was notified of the decision on the permanent visa application, will cease to be in effect:
  - 28 days after the applicant is notified that their permanent visa application is taken not to have been made (or after a different ceasing event prescribed by the regulations); or
  - such longer period as prescribed by the regulations.

Current power to cap and terminate

The Minister currently has a power to "cap and terminate" visa applications under section 39 of the Act set out below. The current section 39 was introduced into the Act by the *Migration Amendment Act (No. 2) 1991.*

Section 39. Criterion limiting number of visas

39. **(1)** In spite of section 14 of the *Legislative Instruments Act 2003*, a prescribed criterion for visas of a class, other than protection visas, may be the criterion that the grant of the visa would not cause the number of visas of that class granted in a particular financial year to exceed whatever number is fixed by the Minister, by legislative instrument, as the maximum number of such visas that may be granted in that year (however the criterion is expressed).

(2) For the purposes of this Act, when a criterion allowed by subsection (1) prevents the grant in a financial year of any more visas of a particular class, any outstanding applications for the grant in that year of visas of that class are taken not to have been made.

Section 39 of the Act allows the regulations to prescribe that a class or subclass of visa may be subject to a cap on the number of visas that may be granted in a financial year. The cap is fixed by legislative instrument stating the number of visas of that class or subclass that can be granted in that financial year, and a visa cannot be granted to an applicant if the grant would cause the number of visas of that class or subclass to exceed the cap. Outstanding visa applications which exceed the maximum number of visas that may be granted in the financial year are taken not to have been made.

Currently, a number of visa subclasses able to be applied for include a criterion that allows a cap on visas to be imposed, including General Skilled Migration and Refugee and Humanitarian visas, and a Working Holiday visa. These visas are listed at Attachment A. This means that at present, the Minister could make a non-disallowable legislative instrument to set a cap for any of these subclasses of visa without the need to amend the *Migration Regulations 1994* (the "Regulations").

However section 39 of the Act is limited in that it does not allow differentiation between visa applications within a class or subclass on any basis. Currently, if a cap is set it must be applied to all applicants in the specified class, irrespective of whether they have skills or other characteristics that are in demand. This makes the current legislative power for capping and terminating visa applications a blunt instrument, which lacks the flexibility and precision required to be responsive to Australia's needs. It certainly is not an adequate tool to provide a sound basis to strategically manage Australia's migration program.

Legislative instruments made under this part of the Act

The legislative instruments made under this part of the Act are not disallowable under the *Legislative Instruments Act 2003* (the "LIA").

The specific exemptions to disallowance for migration and all other legislation are in Item 26 of the table in subsection 44(2) of the LIA. They are not limited to the migration legislation and cover a number of areas ranging from customs to environmental protection and biodiversity and higher education funding.

The relevant migration exemptions were included in the LIA, pursuant to a request in 1996 by the former Minister for Immigration and Multicultural Affairs to the then Attorney-General and Prime Minister, to ensure the Government has appropriate operational control of the complex and constantly changing migration program.

As mentioned, a legislative instrument made under the proposed power to "cap and terminate" would not be disallowable. Unlike current section 39 of the Act, the proposed amendments to "cap and terminate" do not include a requirement that the Regulations prescribe the class or subclass of visa which may be subject to a cap on visas. Rather, the proposed amendments would allow the Minister to make a legislative instrument for a certain class or of certain classes (other than a protection visa) that can be granted to applicants on the basis of certain skills or other specified characteristics without the need to first amend the Regulations. This is to ensure that the power provides the Government with an effective tool to respond promptly to manage Australia's needs in relation to migration.

Accordingly, the measures proposed in the Bill will enhance the tools currently available to the Government for the management of Australia's migration. They will better enable the Government to adapt the settings of migration in line with changing priorities and public expectations in a more flexible and timely manner.

Current status of the General Skilled Migration (GSM) program

A relevant area of migration that has been found as requiring management in Australia's current economic environment is the GSM program. In 2009, the Department of Immigration and Citizenship (the "Department") undertook a review of the Migration Occupations in Demand List (MODL) jointly with the Department of Education, Employment and Workplace Relations (DEEWR). Two issues papers were publicly released for comment, each attracting around 50 submissions from a range of interested stakeholders. Consultations were also held with the Commonwealth-State Working Party on Skilled Migration, the Skilled Migration Consultative Panel and Skills Australia.

The review focussed on the best means of targeting the GSM program towards Australia's medium to long-term skills needs. One of the findings of the review was that the settings of GSM were having an impact on the study choices of international students and were distorting the overall occupational profile of the GSM program.

The review found that many international students seeking a permanent residence outcome have had a tendency to undertake courses they perceive to be 'easy' pathways to migration. To meet this demand many education providers offered courses in a narrow range of fields.

This had resulted in the GSM program becoming a supply rather than demand driven program, dominated by applicants nominating a narrow range of occupations as shown below, which did not necessarily meet the needs of the Australian economy.

The following table identifies the total number of primary visa applications on hand as at 30 April 2010 (77,605), and the extent to which the GSM pipeline is dominated by primary applicants nominating the ten most commonly nominated occupations:

Nominated occupation	Number of primary applications on hand	Percentage of total primary applications
Cook	12,094	15.6%
Accountant	11,132	14.3%
Computing Professionals not elsewhere classified	6,488	8.4%
Hairdresser	3,639	4.7%
Business & Information Professionals not elsewhere classified	1,650	2.1%
Pastry cook	1,643	2.1%
Marketing Specialist	1,608	2.1%
Motor Mechanic	1,414	1.8%
Welfare Worker	1,327	1.7%

General Electrician	1,177	1.5%
Total	**42,172**	**54.3%**

While the Skilled Occupation List (SOL) effective until 30 June 2010, includes over 400 occupations, of the 77 605 primary applications currently in the pipeline, 33 353 or 43 per cent have nominated the four most commonly nominated occupations; cooks, accountants, computing professionals and hairdressers.

The lack of flexibility in the current legislation framework means that the Government can only take a "take it all" or "leave it all" approach to the GSM program. This has created difficulties for the GSM Program comprising both onshore and offshore applicants, to deliver a balanced and broad range of skills needed in the Australian economy and labour market.

The uneven distribution is being addressed through the Minister's Priority Processing arrangements. The Minister has the power under section 499 of the Act to give written directions to a person or body having functions or powers under the Act about the performance of those functions or the exercise of those powers.

Currently the GSM Program has a section 499 direction in place (Direction 45) which directs the order in which applications for GSM visas are to be considered and establishes the 'Critical Skills List'. Under Direction 45, an applicant who is sponsored by an employer or a State or Territory Government will have their application considered ahead of an applicant who does not have a sponsor. Also, under Direction 45 an applicant who nominates an occupation that is on the Critical Skills List will have their application considered before an applicant who nominates an occupation which is not on the Critical Skills List.

However, whilst the current Direction prioritises GSM applications which will deliver skills in critical demand, it does not provide a long term solution as it does not deal with the growing number of applications in the pipeline which nominate the same occupation.

Amendments proposed by the Bill

The proposed Bill provides the Government with enhanced legislative tools to ensure the composition of the migration program reflects the evolving needs of Australia, including the Australian labour market and economy.

Amendments to the Act are required to enable the Minister, by legislative instrument, to determine the maximum number of visas of a specified class or specified classes that may be granted in a specified financial year to applicants who are included in a *specified class, or specified classes,* of applicants.

Specified class or classes of applicants refer to applicants who possess certain characteristics that may be specified in the legislative instrument. The characteristics will be objective and will relate to information that is provided to the Department when an application for a visa is made. It is also intended that the Minister may use a combination of characteristics when setting the maximum number of visas that may be granted in a financial year.

The Department appreciates that migration is a major life decision and can be emotionally and financially stressful for applicants. The enhanced capping provision will ensure that applications likely not to be granted are not able to be made. The Bill aims to reduce the ongoing uncertainty and anxiety that can arise when an application remains unfinalised for long periods of time.

Where a cap is in place, a visa application is taken to not have been made, and so additional provisions are also required to provide for the consequences of this, including, where relevant, the ceasing of any associated bridging visas or relevant temporary visas. In certain circumstances a person applying for a permanent visa, or their family member, might also, in the meantime, hold a substantive temporary visa. Where a cap is placed on the permanent visa, in most cases, the substantive temporary visa would continue to be in effect. Notably, student visas and the temporary Subclass 485 (Skilled Graduate) visa would not be affected by the ceasing provision relating to substantive temporary visas.

Finally, any legislative instrument made under the proposed power to "cap and terminate" would be subject to the *Racial Discrimination Act 1975*, other applicable Commonwealth laws and Australia's international obligations. The Department will consult with the Office of International Law in the Attorney-General's Department and the Department of Foreign Affairs and Trade in relation to any proposed legislative instrument to ensure that it is consistent with Australia's international obligations, including those relating to discrimination. The Department will also consult with the Human Rights Branch in the Attorney-General's Department to ensure that any proposed legislative instrument complies with Australian anti-discrimination laws.

Amendments in the context of GSM

On 8 February 2010, the Minister announced the outcomes of the review of the MODL in the context of a broader set of initiatives to reform the skilled migration program. One of these initiatives was that amendments to the Act would be introduced in 2010 to allow the Minister to set the maximum number of visas that may be granted to applicants, where appropriate, nominating any one occupation. The main reason was to ensure that the GSM program is not dominated by a limited number of occupations.

In the GSM context, the proposed amendments mean that:

- the objective characteristics may include the occupation nominated by the applicant who seeks to satisfy the primary criteria for the grant of the visa and their English language proficiency;

- the Minister may determine the maximum number of visas of a certain class that may be granted in a financial year on more than one characteristic, including the basis of the skilled occupation nominated by the applicant, the English language ability of the applicant and the subclass for which the applicant is seeking to satisfy the primary criteria;

- where the nominated occupation is overrepresented amongst other applicants in a particular financial year, further applications cannot be made where there is a cap in place. This will prevent the sometimes lengthy delays that occur when applications are given lower priority for processing, for example, where the applicant's attributes are no longer in demand or are in oversupply; and

- visa applicants will benefit by limiting the number of GSM visas able to be granted to applicants whose occupations are in oversupply, allowing applicants whose occupation is in demand to apply.

Conclusion

The proposed amendments are a positive step in the maturing migration environment in Australia, by creating a fairer, more flexible framework to manage the complex migration program. They will better enable the Government to adapt visa settings in line with changing priorities, and consistent with public expectations, to have a controlled and well-managed migration to Australia. It goes without saying that before any cap is put in place, due consideration will be given, and appropriate consultation made in relation to Australia's anti-discrimination and other relevant Commonwealth laws or international obligations.

While in the past, the legislative tools available were more basic, blunt instruments that impacted on every applicant within a class or subclass, the proposed amendment would allow the government to target particular objective characteristics without affecting all of the other visa applicants in a class or subclass.

ATTACHMENT A

The following visa subclasses currently include a criterion that allows a cap on visas to be imposed:

Subclass 175 – Skilled – Independent (offshore)
Subclass 176 – Skilled – Sponsored (offshore)
Subclass 200 – Refugee
Subclass 201 – In-country Special Humanitarian
Subclass 202 – Global Special Humanitarian
Subclass 203 – Emergency Rescue
Subclass 204 – Woman at risk
Subclass 417 – Working Holiday
Subclass 448 – Kosovar Safe Haven (Temporary)
Subclass 449 – Humanitarian Stay (Temporary)
Subclass 475 – Skilled – Regional Sponsored (offshore)
Subclass 476 – Skilled – Recognised Graduate (offshore)
Subclass 485 – Skilled – Graduate (onshore)
Subclass 487 – Skilled – Regional Sponsored (onshore)
Subclass 885 – Skilled – Independent (onshore)
Subclass 886 – Skilled – Sponsored (onshore)
Subclass 887 – Skilled – Regional (onshore)

* Note this list does not include visa subclasses for which applications may no longer be made.