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Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Submission to the Senate Committee Inquiry

Migration Amendment (Visa Capping) Bill 2010

Introduction

I wish to contribute to the Senate Committee Inquiry in relation to the Migration Amendment (Visa Capping) Bill 2010.

I am a Law Institute of Victoria Accredited Specialist in Immigration Law, an Australian Lawyer and registered migration agent. I am also currently the chairperson of the Law Institute of Victoria Immigration Committee and a member of the Law Institute of Victoria Accredited Specialisation Committee for Immigration Law. I run an Immigration law practice, Carina Ford Immigration Lawyers and have a number of clients affected by this Bill if it is passed. The aim of my submission is to express my concern about the effect of this Bill if passed could have on visa applicants (current and future), Australian citizens and permanent residents who sponsor family members, Australia's international reputation in regard to running a fair and just migration program and the economy as well as the general panic this Bill is causing amongst students and pending onshore visa applicants.

Summary

The capping and ceasing of visa applications under the proposed amendments to the Migration Act gives the Australian Government an exceptionally broad and far reaching power to drastically affect the skilled migration program and those people who are applying for residency in Australia. The changes, if enacted, mean that the Government will effectively be able to retrospectively apply unjust and discriminatory law to the detriment of visa applicants, Australian employers and the Australian community as a whole. People with families, dreams and aspirations of making a new life in Australia have put their lives on hold in order to apply to migrate to Australia based on legislative requirements stipulated by the Department of Immigration and Citizenship ('DIAC') at the time of lodgment; and I submit that it therefore constitutes a gross and unconscionable breach of procedural fairness and human rights for their lives to be placed at the mercy of such a broad power, which has been arbitrarily and retrospectively applied.

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Applications lodged prior to 30 September 2007

The immediate function of the capping and ceasing provisions as set down by DIAC in February 2009 is intended to affect offshore visa applications lodged prior to 1 September 2007. There was a sharp increase in offshore applications lodged prior to this deadline date, as the legislation was amended after this date to raise the English language requirement for offshore applications. All applicants who were able to lodge prior to this date were encouraged to lodge on the basis that they would be assessed under the pre September 2007 requirements as the previous Government announced the changes to come into affect well in advance of the changes taking place.

Clearly, the current law seeks to apply retrospectively to applicants who had been guided by DIAC that the lodgment of their applications prior to this date meant they would not be affected by the post 1 September 2007 legislative changes. Applicants relied upon this advice and the requirements at the time of lodgment; however, the capping and ceasing amendments not only seek to apply the provisions retrospectively to these applicants (which contradicts the overarching legal principle that legislation should not be applied retrospectively), but also effectively punishes visa applicants for following the advice given by DIAC that their application would be considered if it was lodged before this date.

Following lodgment, applications lodged before 1 September 2009 were then affected by the Priority Processing guidelines announced in March 2009, which effectively ceased processing of all applications lodged at this time which did not have an occupation on the Critical Skills List.

A particularly poignant picture of the extent to which the arbitrary changes to DIAC policy and legislation affects visa applicants is reflected in the unjust application of the priority processing arrangements. As an accountant with a number of years of work experience and Bachelor and Masters qualifications in her field from overseas, one particular client of ours had her application commence processing around 2 years after lodging the application. However, after lodging the application, the Applicant fell pregnant with the couple's first child, and therefore was unable to complete the required medical examinations, which were requested once the application commenced processing. After the birth of their first child, the Applicants commenced gathering the documents for the child, as well as the Applicant's renewed medical examinations. All the remaining documents in respect of the Applicants' daughter were provided on 30 March 2009; however, on this very same day, the priority processing arrangements were introduced, which immediately halted the processing of the Applicants' visa application, despite the fact that the final documents of the Dependent Applicant had been provided that day, and all other documentation had been provided to DIAC.

Such an exceptionally unjust and inhumane application of DIAC policy and legislation will not be the exception if the amendment bill is passed through the Senate, and many people will be affected by this legislation to the point where it heavily impacts upon their lives and their chances for prosperity. The return of their visa application charge will be little comfort to the Applicants in the example given above; and it is likely that similar situations will become commonplace if the capping and ceasing provisions are introduced.

No appeal rights where a visa is terminated under the capping and ceasing provisions

The fact that there will be a lack of appeal rights for applicants affected by the proposed capping and ceasing provisions constitutes a deeply concerning lack of procedural fairness, and directly contradicts the underlying principles of procedural fairness and appeal rights which are embodied under the Migration Act.

There is no substantive difference between the refusal of a visa application and the 'termination' of a visa application under the proposed amendments; and therefore the fundamental right of appeal is being abolished in favour of arbitrary termination through no fault of the visa applicant. This blatant disregard for one of the most fundamental legal rights underpinning Australian society is deeply concerning; and the Government's assurance that the application fee will be returned to visa applicants hardly shows a cognisance of this fundamental legal right or the impact that the capping and ceasing of applications will have upon the lives of people who have already been through so much in order to lodge applications to migrate to Australia.

Misleading information provided by DIAC in relation to the current changes and previous changes to the skilled migration program

As noted above, DIAC gave the impression in their previous media releases in relation to the capping and ceasing provisions that the power to cap and cease applications lodged prior to September 2007 existed under the Act; however, this is clearly not the case.

In addition, the information provided to applicants seeking to lodge their applications prior to the changes to the legislation in September 2007 was on the basis that the new legislation would not apply to their visa applications if their applications were lodged before the deadline. The current changes propose to not only apply legislation retrospectively, but also mean that applicants who have lodged applications on the previous advice by DIAC that their applications would be considered have been totally misled.

Furthermore, at recent presentations by DIAC, representations have been made that letters in relation to the pre 1 September 2007 capping and ceasing provisions, will be sent out shortly. This is before the above Bill has even passed which is a complete disregard for Australia's legislative review process.

Effect of visa capping bill in conjunction with the new Skilled Occupation List (SOL) announced 17 May 2010

The drastic cuts made by DIAC to the Skilled Occupation List (SOL) together with the current amendment proposals have created tangible panic amongst students, migrants and Australian citizens and permanent residents who have family outside Australia who were previously awaiting the results of visa applications. The stated rationale for the proposed amendments is that the Australian Government needs to be able to flexibly apply the legislation to meet the 'broad range of skills required' to meet our needs. The changes made to the SOL, however, directly contradict this statement, as the number of occupations on this list was slashed severely, and essentially limited skills sets to those of engineers, IT occupations and medical occupations, together with a handful of trades.

This not only severely limits the available skill sets from which future Australian migrants can come, but also impacts severely on the many thousands of current students, and Australian temporary residents who were encouraged to apply for a student visa under the previous system with the lure of Australian permanent residency at the end of their studies. Whilst I appreciate this system was set up by the previous Government it has also been in place, for nearly 3 years under the current Government. For all the cooks and hairdressers, who currently have a pending skilled migration application onshore, the Second Reading Speech presented to the House of Representatives in relation to this Bill clearly indicates that they are in a perilous position if this Bill is passed and if these occupations are capped and ceased the 17,594 pending visa Applicants and family members would need to depart Australia within 28 days of the capping provisions being enacted. (See 91AC) (2) of the proposed Bill. The Second Reading Speech does not highlight whether this will be used on only offshore applicants nor does it allow for any transitional arrangements.

The proposed bill gives people 28 days from the date of the event or notification of the capped visa being taken to be made to pack up their lives (many who have lived in Australia for a number of years), for children to be removed from schools, for employers to find new staff to fill positions filled by these people and for people to be able to find flights, sell personal items and in affect have to re-build their lives from scratch again. Whilst I appreciate there is a pipeline of applications, this pipeline is made up of people, who Australians owe a duty of care to, who have contributed to our economy and deserve to be treated fairly and compassionately and should not be the ones to suffer due to Regulations which allowed them to apply in the first place. This Bill is not what should be called part of a package of reforms to the Skilled Migration Program, but is rather simply an easy way out in dealing with the backlog of applications, the length of time it has taken to amend the Skilled Occupation List (nearly 3 years) and assumes that the people within in the backlog can offer no value to Australia, which is completely not the case.

S 91AA (1) allows for discrimination under the Migration Act

The broad nature of the power under the proposed section 91AA(1) will effectively allow DIAC to discriminate against applicants on the basis of a number of different attributes. The new powers proposed give the Government's an unlimited ability to cap applications, no matter what the circumstances of the visa applicants themselves, which means that applications could potentially be capped on the basis of nominated occupation, age, nationality or any other attribute. The current processing moratorium on Afghani and Sri Lankan protection visa applications is clear evidence of the government's willingness to discriminate on the basis of nationality.

The ability of the Australian Government to effectively discriminate against applicants on this basis fundamentally contradicts current Australian discrimination and human rights legislation, as well as the global image of Australia as a tolerant and multicultural society. The scope of the power under this legislation is frighteningly broad in this sense, and not only allows DIAC to arbitrarily impact the lives of visa applicants, but also allows it to do so on an arguably discriminatory basis.

91AC(3) – Ceasing of 'temporary visas'

This section appears to state that the visa of applicants who hold a temporary visa which is still valid would also cease to be in effect if the permanent residency or other application was capped in accordance with the proposed changes.

This is clearly a matter of concern, given the high number of visa applicants who currently hold 485 visas or who have validly lodged 485 visa applications. The transitional arrangements announced by the Australian Government effectively encourage visa applicants to continue to lodge 485 visa applications under the current SOL up until 31 December 2010. If this section seeks to cease temporary applications, this will affect a huge number of visa applicants who have lodged the 485 temporary visa, and completely discourages visa applicants from lodging any type of visa application to come to Australia. This will have a significant economic impact on Australia, where significant revenue is obtained through international students as well as completely destroy our international reputation as treating students fairly and with compassion.

In addition, the contribution of temporary workers to the Australian labour market is vital to our economy, and the ceasing and capping of these visas will lead to a shortage of labour in a number of crucial sectors particularly in the service and hospitality industry, aged care, transports services and the retail industry.

Furthermore, this section completely contradicts other sections within the Migration Act and Regulations such as the term of the visa, and will not doubt if enacted by Parliament will be the subject of judicial review.

Family separation and the impact on Australian permanent residents and citizens

The current changes will also result in the permanent separation of families, and deprive Australian citizens and permanent residents of the opportunity to be reunited with their family in Australia. The subclasses which are set to be immediately affected by the capping and ceasing provisions (ie those lodged before September 2007) are offshore, predominantly family sponsored visa applicants who, despite having lodged valid applications, will be prevented from joining their family who are already settled in Australia.

Family Sponsored skilled migration continues to decline despite the fact that there has been very little research undertaken as to how family sponsored migrants settle in Australia and that the Assurance of Support criteria was removed over two years ago indicating that family sponsored migrants have not proven to be an economic burden to Australia.

Many of the offshore visa applicants who applied under Family Sponsored Skilled Migration scheme have 50 or 40 point occupations are not necessarily under skilled and include occupations such mathematicians, accountants and advertising specialists. Furthermore, if their English is not at the required level, they are required to pay for English classes to be undertaken in Australia on their arrival. Many of the applications proposed to be capped are also provisional visas which therefore means that they must meet certain criteria before applying for permanent residency. Family Sponsored skilled Migration recognises the right of Australian citizens and permanent residents to bring family over and the importance of family reunion programs. The capping and ceasing provisions intended to be introduced will in affect halt this part of the program.

From my own experience, it is often family sponsored applicants who settle into their life in Australia most effectively, as they are applicants who not only have family here to assist them, but are also qualified in their field and have relevant work experience, making them ideal candidates for what the Australian Government has touted as the ideal visa applicant. The fact that these people are those who are most affected contradicts the rationale behind the current changes and also fails to show a balance between a compassionate skilled migration program and a simply economic driven one.

Detriment to Australian employers

Australian employers will be significantly disadvantaged by the changes, which will result in employees whose visas are terminated or whose future in Australia is uncertain to either be forced to return home or leave to consider their options for migration elsewhere. Migrants make valuable contributions to the Australian workforce, and the changes are set to make futures so uncertain that it is likely that employers will see valued employees unable to continue working in Australia as a result, many of whom will not necessarily have options under Business Sponsorship visas (particularly in semi-skilled or unskilled employment). This is particularly evident given that the priority processing arrangements have meant visa applicants who will be affected by the capping and ceasing provisions have already been living in Australia for a number of years, and have settled in Australia and become valuable within their employment and the community generally.

Policy imperative to 'end ongoing uncertainty' among visa applicants

The proposed amendments to the legislation create more uncertainty and panic amongst visa applicants who have already lodged visa applications, as well as those who are as yet unable to lodge. It also contradicts the current grandfathering provisions proposed for 1 July 2010 in relation to overseas students currently studying in Australia and recommended in the *Baird Final Report – Stronger, Simpler, Smarter ESOS : Supporting International Students" – 9 March 2010.*

Today alone we have taken numerous calls from current onshore visa applicants and students believing that this Bill has already been passed and that their Bridging Visas and temporary visas are to be cancelled. A chain text message has been circulating through many overseas students stating the following:

"Open www.aph.gov.au then click parlinfo search insert or type Australian migration this is a new bill passed the Australian parliament to send back all overseas students even who filed TR/PR or have TR/ Bridging Visa. According to this, everything is finished now for all of us."

Applicants who have lodged valid visa applications in accordance with the regulations, legislation and policy set down at the time the application was lodged currently face uncertainty under the priority processing arrangements. If the amendments are passed, they will face further uncertainty and anguish over the possibility that their applications, although validly lodged, may be terminated on the basis of any attribute chosen by the Minister.

Therefore, not only do the amendments propose to deprive applicants of procedural fairness, basic legal rights and promote discrimination, they also will not achieve the policy objectives they are supposedly addressing.

Policy imperative to limit applications whose occupations are in 'oversupply'

Similarly, the aim to limit applicants whose occupation are in 'oversupply' will not be achieved through introducing the capping and ceasing provisions. The program is exceedingly reactive in nature, and therefore is not equipped to deliver occupations which are considered 'required' at any given point in time. More importantly, the panic and uncertainty that the proposed amendments will inject into the skilled migration program not only significantly impacts on the lives of those applicants who have already applied, but is also likely to dissuade prospective applicants from applying or for that matter studying in Australia. The changes do not reflect the human side of migration, and the recognition that the existence of such broad powers under the Act makes the economic and emotional cost of applying to migrate to Australia unattractive.

When considering this legislation the Parliament should take into account that it is dealing with people with the intention of improving their lives, and by so doing improving the country to which they have chosen to migrate. The much-vaunted notion of the Australian 'fair go' appears to have fallen completely by the wayside with the proposed introduction of this legislation.

I am happy to discuss this submission further or provide any further information should the Senate Committee require me to do so.