Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Migration Amendment (Visa Capping) Bill 2010

Joint submission from the
Council of Australian Postgraduate Associations (CAPA)
and the National Union of Students (NUS)

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Compiled with the assistance of the staff and office bearers of the Council of Australian Postgraduate Associations (CAPA), The National Union of Students (NUS).

Prepared by Nigel Palmer and Adrian Wong, June 2010.

National Union of Students (NUS)
Suite 64 Trades Hall, 54 Victoria Street, Carlton South, Victoria 3053
www.unistudent.com.au

Council of Australian Postgraduate Associations (CAPA)
Level 3, Trades Hall, 2 Lygon St, Carlton South, VIC, 3053
(03) 9650 7666 or 0425 823 144
www.capa.edu.au

Table of contents

Table of contents ii

1 Introduction 3

Summary of recommendations 3

2 Issues raised by measures proposed in the Bill 4

2.1 Provisions for capping by visa type 4
2.2 Provisions for capping by applicant characteristic 5
2.3 Family unit exceptions 6
2.4 Retrospective effect of proposed changes 6
2.5 Changes to immigration policy and fair disclosure responsibilities 7

3 Summary 8

References 10

1 Introduction

The *Migration Amendment (Visa Capping) Bill 2010* (the Bill) aims to provide "maximum flexibility to enable the government to effectively target and manage the migration program".[1] While we welcome efforts to fine-tune existing programs, the targeted management of specific elements of the migration program outlined in this Bill prompt a range of concerns about the ongoing fairness, equity and transparency of Australia's migration program.

The so-called shift from a "demand" to "supply" driven skilled migration program represents in effect a move toward a selective "quota" system for Australia's migration program. While a quota system per se may not itself be problematic, the means of achieving this, as outlined in this Bill, gives significant cause for concern.

The changes proposed in this Bill appear unnecessarily punitive for current visa holders and at odds with the Federal Government's broader objectives, including that Australia remain a preferred destination for international students.

CAPA and NUS call on senators to reject this Bill in its current form. Other recommendations are included in this submission on the relevant issues raised.

Summary of recommendations

Recommendation 1: The Bill in its current form should be opposed. 9

Recommendation 2: The Bill should not apply to onshore international student visas. 9

Recommendation 3: The Bill should not apply to *any* temporary visa categories..9

Recommendation 4: If the proposed Bill is passed, measures in this Bill should only apply to visa applications lodged after its passage...9

Recommendation 5: That "grandfathering" provisions, comparable to those in place for recent changes to the SOL, apply in regard to changes following from this Bill (if passed) for all current visa holders, including both student and graduate visas and related temporary visas.................9

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[1] Senator the Hon. Chris Evans (2010). *Explanatory Memorandum: Migration Amendment (Visa Capping) Bill 2010*. Canberra, ACT, House of Representatives. (p.7).

2 Issues raised by measures proposed in the Bill

2.1 Provisions for capping by visa type

> *39 Criterion limiting number of visas*
>
> *(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.*

The existing Section 39 of the *Migration Act 1958*.

Section 39 of the Migration Act 1958 already provides the Minister for Immigration and Citizenship (the Minister) the ability to "cap" the number of visas granted in a financial year, by setting a total number available for any given visa class. Undecided applications for that class of visa are regarded as invalid when the "cap" on visa approvals is reached. These are "are taken not to have been made" (sometimes referred to as "ceased").[2]

> *The purpose of new Subdivision AHA is to allow for the Minister to cap the number of visas of a specified class or specified classes that may be granted in a financial year to a specified class or specified classes of applicants, with the consequence that outstanding applications made by applicants who are affected by the cap are taken not to have been made. In addition, certain bridging visas and temporary visas held by those applicants would cease to be in effect.*

New measures proposed, as outlined in *Explanatory Memorandum: Migration Amendment (Visa Capping) Bill 2010* (p.6).

The stated aim of the current Bill is to allow "maximum flexibility to enable the government to effectively target and manage the migration program".[3] The Bill currently under consideration in a sense formalises the current "capping" and "ceasing" arrangements, but goes further. It allows far greater discretion in capping and ceasing un-processed visa applications which would apply across all visa classes and sub-classes.

[2] *Migration Act 1958* (Cwlth). Available at http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/8540EC358EE970B5CA25773B002435D0?OpenDocument. (p.50).

[3] Senator the Hon. Chris Evans (2010). *Explanatory Memorandum: Migration Amendment (Visa Capping) Bill 2010*. Canberra, ACT, House of Representatives. (p.7).

> *The intention of new section 91AA is that the Minister may cap the number of visas of a particular visa class, a visa subclass, or a stream within a visa subclass, that may be granted in a financial year.*

Explanatory Memorandum: Migration Amendment (Visa Capping) Bill 2010 (p.7) (emphasis added).

The proposed capping provisions allow for what is in effect a “quota” to be set for visa approvals for specific visa sub-classes, or even a stream within a sub-class, in a given financial year. Applications in a visa category deemed to have been capped (i.e. where the number of approved visas in a particular sub-class have exceeded their “quota”) are deemed “not to have been made” – or are “ceased”.[4]

From the applicants’ perspective, the prospects for their application based on provisions in this Bill would be largely determined by:

1) Their ability to meet the specified eligibility criteria; and
2) The prospects that a determination be made in regard to their application prior to the “quota” for approvals in that visa class is reached.

Applicants whose application is “taken not to have been made” face cessation of any temporary or bridging visas they may have[5], and must file a new application if they wish to be in consideration for the same or any other visa sub-class.

2.2 Provisions for capping by applicant characteristic

> *The Minister may, by legislative instrument, determine that the cap applies only to applicants with certain characteristics, or whose application has certain characteristics... The characteristics will be objective and will relate to information that is provided to the Department when an application for a visa is made…*
>
> *These characteristics may include, but are not limited to, the occupation nominated by the applicant who seeks to satisfy the primary criteria for the grant of the visa... For example, the Minister may determine the maximum number of visas of a certain class that may be granted in a financial year on the basis of the skilled occupation nominated by the applicant, the period during which the applicant made the application, and the subclass for which the applicant is seeking to satisfy the primary criteria.*

Explanatory Memorandum: Migration Amendment (Visa Capping) Bill 2010 (p.7).

The proposed new capping measures also provide for capping by applicant characteristic, in addition to visa class and sub-class. On the terms outlined in the Bill, any selective capping of visas by applicant characteristic would first need to be “classified” through legislative instrument. The kinds of applicant characteristics that are likely to receive a classification for capping is unclear at this stage.

[4] Ibid. (p.9).
[5] Excluding temporary protection visas – see Ibid. (p.6).

Any such “specified characteristics” could extend to criteria like level of English language proficiency, prior qualifications or even country of origin, depending on what the Minister was prepared to set out via legislative instrument. Discriminating by country of origin in particular opens the way for additional concerns about the justification for this sort of selectivity. These concerns already exist in regard to the existing visa application assessment levels.[6] NUS and CAPA would have serious concerns if this were also to be extended to the capping and ceasing of visa applications.

2.3 Family unit exceptions

We welcome the exception outlined in part 5 of section 91AB of the Bill. As we understand it, the effect of this exception, in line with sub-parts (a) and (b) of parts 1 through 4 of the same section, is to ensure families are not separated, and that family applicants are not directly disadvantaged in the course of grants made within a “capped” visa framework. This exception is also very much in line with existing provisions within the Migration Act, and we recommend these aspects of the Bill remain unchanged.

2.4 Retrospective effect of proposed changes

The proposed measures in this bill would apply to new visa applicants where a cap has been determined by the Minister (again, by means of legislative instrument). Significantly, these measures would also apply to visa applications that have already been made, many of which have been awaiting consideration for a significant period of time.[7] This Bill then may have a significant retrospective effect for a large number of visa applicants (across all visa classes), who would have the legitimate expectation that their application would be given due consideration.

DIAC currently has an obligation to give each application due consideration. The proposed Bill denies affected visa applicants procedural fairness through varying the terms of visa assessment *after* their application has been made (and notice of receipt sent by the Department in return). Applicants would have a reasonable expectation that their case would be given due consideration on the terms made available *at the time of application*.

There is certainly scope for more flexible transitional arrangements. Those already studying onshore in particular should be allowed special consideration, given they have already embarked on a course of study with a considerable investment of time and money based on the assumptions about Australia’s visa arrangements available at the time.

One possible solution to the problems presented in this Bill is to extend “grandfathering” provisions for all current visa holders. In the case of current student and graduate visa holders in particular, an opportunity exists to extend grandfathering for provisions in this Bill to 31 December 2012, in the same

[6] See Palmer and Pechenkina (2009). *Submission to the Senate Inquiry into International Student Welfare*. Carlton South, VIC, Council of Australian Postgraduate Associations (CAPA). (p.20).

[7] Mares (2010). *New immigration powers cause concern.* National Interest, ABC Radio National. Melbourne, Vic.

manner as the proposed transitional arrangements for changes to the Skilled Occupation List (SOL).[8] The comparable measures for the SOL changes stand out as an excellent example of the responsible management of changes to provisions in Australia's migration program, for which both the Minister and the Department should be commended. Such measures could also be easily applied for those affected by this Bill, in particular current holders of both student and graduate visas, and related temporary visas.

2.5 Changes to immigration policy and fair disclosure responsibilities

It is absolutely vital that policy changes in this area are communicated clearly and effectively, in simple language.

Changes that are poorly communicated or inadequately accounted for are prone to misinterpretation and miscommunication. In the present case this is evidenced in the "viral" sms messages which have created tremendous anxiety among the international student community, through conveying information that is both sensationalist and incorrect.[9] This is an area of legislation where many will infer sinister intent where inadequate information provided.

Given the stated aims of the migration program and related priorities for the Federal Government (such as ensuring Australia remains a preferred destination for international students), the Minister and the Department have a specific obligation to ensure that any changes in this area are adequately justified and effectively communicated. The Minister and the Department cannot assume the burden of responsibility to make sense of such changes lies solely with parties that may be effected.

These responsibilities form part of the duty of care obligations that apply in particular in the case of international students studying in Australia. It is recommended that due care be taken in this regard for any future changes to Australia's migration program.

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[8] Department of Immigration and Citizenship (2010). Fact Sheet: The New Skilled Occupation List (SOL). Department of Immigration and Citizenship. Accessed June 6th, 2010: http://www.immi.gov.au/skilled/general-skilled-migration/pdf/factsheet-new-sol.pdf.
[9] Australian Federation of International Students (AFIS) (2010). Student welfare at risk – Visa capping bill rumours Australian Federation of International Students (AFIS). Accessed June 10th, 2010: http://internationalstudents.org.au/content/view/109/1/.

3 Summary

Information on the Bill provided by the Department of Innovation and Citizenship (DIAC) points out that the Bill "is not currently operative and no actual cap is being considered at present. This Bill seeks only to give the Minister the power to implement a cap in future if necessary".[10] Measures proposed in the Bill would enable the Minister to both "cap" and "cease" applications by visa class as well as by "specified characteristics" (including for example the occupation specified in a GSM visa application).[11] The open-ended nature of these provisions leave too much scope for concerns about appropriate checks and balances on those powers, and the kind of justification normally required for this kind of legislation.

While the current Minister assures that the proposed changes will only be employed to better manage the current back-log of outstanding visa applications, there is no assurance at all that current or future Ministers may not adopt a less enlightened approach to managing Australia's migration program using measures provided in this Bill. Capping and ceasing visa applications based on country of origin stand out as a particular area of concern.

On the proposed Bill, visa applicants who might otherwise have had a reasonable expectation for a successful outcome may now find their application has been dismissed without consideration. In each case this would not only come at the expense of individual aspirations; it would also represent a waste of the significant investment of both time and money that applicants often invest in the hopes that their application would meet the required guidelines.

Problems occur when change is managed and communicated poorly, as appears to be the case with this Bill. In the present case, what the proposed changes have managed to do is to communicate a certain dis-regard for individual visa applicants, in particular through the retrospective nature of the effects of this Bill. In this alone this Bill threatens to compromise efforts to maintain Australia as a preferred destination for students internationally.

We thank the Senate Standing Committee on Legal and Constitutional Affairs for the opportunity to contribute this submission to the current inquiry, and have included the following recommendations for the Committee's consideration:

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[10] Department of Immigration and Citizenship (DIAC) (2010). Migration Amendment (Visa Capping) Bill 2010. Department of Immigration and Citizenship (DIAC). Accessed June 6, 2010: http://www.immi.gov.au/skilled/migration-amendment.htm.
[11] Senator the Hon. Chris Evans (2010). *Explanatory Memorandum: Migration Amendment (Visa Capping) Bill 2010*. Canberra, ACT, House of Representatives. (p.7).

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Recommendation 5:	That “grandfathering” provisions, comparable to those in place for recent changes to the SOL, apply in regard to changes following from this Bill (if passed) for all current visa holders, including both student and graduate visas and related temporary visas.

References

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Senator the Hon. Chris Evans (2010). *Explanatory Memorandum: Migration Amendment (Visa Capping) Bill 2010*. Canberra, ACT, House of Representatives. http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22legislation/billhome/r4364%22.