

Date: 17 June 2010

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

Dear Sir/Madam,

Re: Inquiry on the Migration Amendment (Visa Capping) Bill 2010

With respect to the proposed Migration Amendments Visa Capping Bill 2010 ('the Bill'), we, Lin Tang & Co Lawyers, respectfully submit the following:

We believe that skilled migration should, and does, add to the strength of our nation, both socially and economically. Australia must foster and attract the best and brightest the world has to offer. To do this it is of the highest importance that we provide certainty and clarity for those who wish to become a part of our society. However, it is believed that the proposed Bill does not serve to achieve the purpose; rather it is bound to create enormous uncertainty, inequality and be in effect an administrative nightmare.

1. Retrospective laws are unjust

We strongly oppose the passage of the Bill because, first and foremost, the proposed Visa Capping Bill is in essence retrospective, it purports to operate upon visa applications made before the passage of the Act.

Certainty and predictability is one of the most fundamental pillars that underpin our legal system and our society. When a person wishes to migrate to Australia they must be able to rely on applicable laws and proper advice as to the best path to take. Retrospective legislation such as the proposed Bill will destroy the certainty of our immigration laws; it is arbitrary, unfair and undermines the rule of law.

2. Adverse impact on current visa applicants

The proposed Bill is estimated to affect approximately 147,000 people who applied, in good faith, with an understanding of how the system worked. Thousands of them, with a reasonable expectation, have fully planned their lives on eventually being granted Australian permanent residency. This is especially so for onshore applicants, who are faced with prolonged difficulty in securing employment due to their uncertain immigration status; and as a result have faced interruption and damage to

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their career. Many of these applicants have even forgone migration opportunities elsewhere and better job offers in their home country. 147,000 people complied with all the rules set by the Government, they are in many cases living in Australia, working and establishing positive relationships. This Bill would mean that no applicant could have any certainty about meeting the published criteria, because the Minister could change the rules at any time after they have lodged their application. We submit that a retrospective change will cause significant hardship and inequity for many people.

3. The boundary of the Minister's power can not be easily defined

The Bill purports to empower the Minister for Immigration and Citizenship with unprecedented power to cap numbers of visas by virtually any category (except protection visas); this means that the Minister can make policy which might have the effect of by-passing criteria prescribed by the legislation. Current Minister, Senator Evans, has on different occasions expressed that he would use this power with extreme caution. That shows that Mr. Evans understands the gravity and danger of this power. We submit that the proper use of power can not depend on promises made by any one particular Government, rather, it must depend on limitations, checks and balances set out by the law. We submit that such general category of characteristics can only be specified by Migration Act. Also, while the intention of introduction of the Bill, as stated in the second reading speech, was to respond to problems in GSM program, the Bill would catch other classes of visas with an effect which may not be contemplated by the legislature or may even be contrary to the legislature's intention.

4. No right of appeal causes further injustice

It is purported that those visa applications that are subject to capping will be returned as having never been made and appeal rights are explicitly precluded. There will be effectively no need to make sure whether laws and policies are appropriately applied and followed by the departmental officers. Mistakes made by individual public servants will not be able to be corrected. It will lead to a culture of returning applications without consideration of the government's own criteria. While it may be cheaper and more efficient for the Government to ignore applications it is clearly unfair and unjust.

6. Negative perception of Australia and the Australian Government

The current chaos with GSM program is a result of a combination of bad policies and poor administration in the last few years. MODL, CSL and priority processing have all played a part. Now, the Government has attributed the failure of the current GSM program to thousands of applicants 'nominating a limited number of occupations'; we submit that it is not the GSM visa applicants' fault to legitimately take on the opportunities provided by Government's immigration policies, the fault

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lies with those who had the power to monitor and correct the situation and failed to do so.

Also, the Government has started to state that there is no link between study in Australia and permanent residency, which is a marked departure from previous policy announcements that migration candidates relied upon when choosing to study in Australia; we submit that this is both irresponsible and disingenuous.

While we agree that the policy should be closely monitored and adjusted to reflect Australia's needs, this must be done swiftly and fairly in acknowledgement that people who have relied upon these policies would not be affected. Any backlog of applicants deserved to be fairly processed and the solution cannot be retrospective.

We submit that the passage of the Bill is in no way serves Australia's national interest. To say the least, it will severely tarnish our national image and fundamentally damage our national reputation. It can be simply horrifying that the rule makers in a civilized country do not necessarily need to play fair. The Bill provides no mechanism in legislation which affords visa applicants any basic rights; in fact, the Bill does not intend to treat them with dignity, compassion and fairness. There are numerous incidents in our relatively short history where immigration laws have been notoriously used to against minority groups. It is adverse to Australia's interests to be viewed in the international community as returning to those xenophobic immigration policies.

7. Resentment in society

The constant delay in processing GSM visas has resulted in a large number of people on Bridging visas for several years. On a Bridging visa they are unable to obtain satisfying work or advance their careers and this untenable situation can naturally lead to frustration and resentment. Being held in such a limbo without a definitive time frame is contrary to the notions of fairness and opportunity that Australia espouses. This introduction to Australian society is unacceptable and leads to marginalization that if left to fester it could lead to social unrest.

8. Inability to attract high quality migrants

Moreover, we cannot expect to attract the best if the proverbial sword of Damocles' is to dangle over an applicant's head and that at anytime the government may retrospectively "change the goalpost". It is believed that the Bill, if become law, will become a considerable deterrent for highly skilled, highly desired migrants who would have better chances of migrating elsewhere.

9. Uncertainty in terms of immigration advice

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It is vital that our migration experts are able to honestly and accurately assess an applicant's likelihood of being granted a visa to Australia. The role of migration agents and lawyers is not to hinder the government in selecting the best applicants for Australia but to ensure that the government's selection criteria are strictly followed. That one can knowingly apply to become a permanent resident in this country without fear that their application will be arbitrarily rejected on a whim or change of policy is vital to Australia's future.

Finally, while we understand and agree that migrating to Australia is a privilege, not a right and therefore it is the Government's prerogative to choose skilled migrants who will best add to our country's strength, we submit that it shouldn't be a gamble or wild luck; and while the government needs to be able to respond to Australia's changing needs it is not in the country's interests to change the goalposts halfway through.

Sincerely Yours,

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