CLOTHIER ANDERSON & ASSOCIATES

BARRISTERS & SOLICITORS

Partners

Michael J. Clothier LL.B.
Accredited Specialist in Immigration Law
(Registered Migration Agent No.74433)

Karyn Anderson BA., LL.B., LL.M. (Hons)
Accredited Specialist in Immigration Law
(Registered Migration Agent No. 85990)

Senior Associate

Don Lucas B.A., LL.B.
Accredited Specialist in Immigration Law
(Registered Migration Agent No. 9501008)

29 Argyle Place South, Carlton 3053
PO Box 227, South Carlton 3053
Telephone: (03) 9347 4022
Facsimile: (03) 9347 5066

E-mail: info@clothieranderson.com.au
ABN No: 76 463 833 253

Our Ref:
Your Ref:

4 June 2010

Committee Secretary
Senate Standing Committee on
Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir / Madam

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

This submission comments on the *Migration Amendment (Visa Capping) Bill 2010* ("the Bill") which proposes to amend the *Migration Act 1958* ("the Act"). Specifically the Bill seeks to grant the Minister for Immigration and Citizenship ("the Minister") the power to cap the number of visas which may be granted within a particular financial year by reference to the class or subclass of visa, as well as "characteristics" of the applicant themselves.

From the outset, this firm wishes to make its opposition to the Bill quite clear. As experienced legal practitioners within the field of immigration law, we understand and accept the public policy reasons behind the government's desire to exercise ever more control over Australia's migration program. However our experience has taught us to be wary of any attempt by the executive to centralize power within the hands of the Minister – with such centralisation often leading to unanticipated and, frequently, undesirable results.

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The Bill in its current form will dramatically alter the law in this area, by allowing the Minister the power to discriminate against non-citizens on the basis of "characteristics" of visa applicants, and also by applying retrospectively. Whilst the Minister has previously had the power under s. 39 of the *Act* to cap the amount of visas "of a particular class", the power to pick and choose applicants based on their "characteristics" is unprecedented in this country. The Minister has heretofore been unable to distinguish between applicants other than a case-by-case consideration of their circumstances *against the prescribed visa criteria*.

The history of this Bill can be traced back to the codification of Australia's migration program in the 1980's, ostensibly as a means of making immigration to Australia fairer by making outcomes more predictable. The 'predictability' of visa outcomes is derived from the reference to Australia's voluminous *Migration Regulations 1994*, as well as the increasing amount of Departmental policy which seeks to regulate the entry and residence in Australia of non-citizens. As many commentators have noted, the *Regulations* and delegated legislation governing Australia's migration program have now become so complex that even the Department itself can often be wrong-footed by the laws which it is apparently implementing.

Whatever criticisms may be made of the codification of Australia's migration laws, the fact remains that the current law provides a degree of transparency for applicants who can assess themselves against the requirements of a visa class before deciding to make an application. The proposed Bill, however, will remove this transparency. Applicants who may be confident of satisfying the requirements of one or other visas will be unable to know whether or not the Minister will eventually dictate that their application be *terminated*, despite apparently satisfying all the requirements. The lack of transparency in this proposed change also further undermines the codification of Australia's migration laws. By vesting the Minister with the power to unilaterally terminate visa applications which nonetheless satisfy the requirements of that visa, merely because of the "characteristics" of the visa applicant, the Bill dangerously adds a further personal discretion to the Minister where one had not existed previously.

The rationale which is often cited for the ever-increasing amount of rules and regulations governing this country's migration program is the "national interest" contained in section 4 of the *Act*. In our submission, the vague and illusory notion of the "national interest" has too often been hijacked by governments with a short sighted view of Australia's migration program – a view which is coloured by skewed perspectives of what benefits Australia can *receive* from our migration program, rather than the benefits we can give to others.

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In this firm's view, there is indeed a "national interest" in ensuring that the *processes* by which non-citizens apply to lawfully enter and remain in this country are fair and transparent. In our submission, there is nothing fair or transparent about the proposed Bill, which seeks to cherry-pick visa applicants based solely on their (undefined) "suitability" for Australia's current needs, rather than any objective or compassionate assessment of their claims. In this sense, it is noted that the Bill is expressed as being intended to allow the government "flexibility" in specifically managing Australia's skilled migration program (at least for the moment). However, as the second reading speech notes, the amendments proposed by the Bill *"are broad enough to allow other classes of visas to be capped."* We are reminded once again of the dangers of centralizing power within the executive where no compelling case has been made for doing so.

Furthermore, it should be pointed out that the effect of this Bill will be retrospective – in that applications which have already been made will be able to be terminated. For reasons of fairness, most amendments to Australia's migration program do not have retrospective effect because it is understood that this will disadvantage thousands of applicants who have applied in good faith under a certain set of laws. The current Bill therefore clearly undermines this commonly understood prohibition on retrospectivity, as contained in Article 15 of the *International Covenant on Civil and Political Rights*, as well as potentially the Constitutional doctrine of the separation of powers.

We note that the Bill seeks to exclude "protection visas" from the proposed cap and feel it is important to distinguish between *onshore* and *offshore* protection visas. Whilst the Bill in its current form will not allow the Minister to cap the number of onshore applicants applying for Australia's protection, it will nonetheless allow the Minister to unilaterally treat offshore applicants for Refugee visas, Global Special Humanitarian visas, and a host of other visa subclasses, as if their applications had never been made. Such a power would drastically and irrevocably alter Australia's humanitarian program and, in the view of this firm, is clearly contrary to the "national interest" that the Bill purports to uphold.

The notion that the Minister can himself determine the outcome of thousands of applications based on the subclass of visa applied for is quite clearly contrary to the notions of equality and procedural fairness on which our democracy is founded. The effect of this Bill is also highly discriminatory, in that applications can potentially be struck out immediately based on the "characteristics" of visa applicants – leading to the remarkable situation where the Minister can unilaterally determine that too many visa applicants from this country or that country are clogging up our migration program, and therefore *all* applicants from a designated country are taken to have never made an application, regardless of the merits of their individual case.

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Indeed, one of the few avenues of redress left for visa applicants in this country, independent merits review, threatens to be completely undermined by the Bill. As a result of the proposed changes, thousands of visa applicants lawfully in Australia can be rendered unlawful at the whim of the Minister. No right of merits review is available as their applications, which were valid at the time they were made, are suddenly terminated. The outcome is that many of the thousands of people in this country on bridging visas awaiting the outcome of their application can be instantly refused visas for reasons entirely unknown to them, and to which they have no right of response.

The distinction that the Bill attempts to draw between "refusal" of applications and "termination" is also entirely artificial. The effect of the Bill is such that whilst the government may claim that no applicant affected by termination of their visa application has been refused, the *de facto* impact of the Bill is just that. In the current Bill, there exist no limits on the Minister's power to decide which visa classes or "characteristics" will make an application subject to termination. The result is that whole visa categories can be done away with by stealth. For example, the prospect that Australia's valuable family migration stream could be capped because the Minister did not foresee that so many Australian citizens would marry foreigners in any one year is truly disturbing.

Whilst there is ample reason to reject this Bill based on the concerns outlined above, there is an equally compelling financial reason to suggest that visa capping is not in the "national interest". Specifically, we note that the Explanatory Memorandum to the Bill states:

> *The financial impact of these amendments is low.*

In our submission, nothing could be further from the truth. Whilst the termination of applications will necessarily result in the refunding of thousands of application fees by the Commonwealth (a quite significant revenue stream for the government), it will also result in crippling financial costs for applicants who have funded these applications. Over and above visa application fees, dealing with Australia's complex and labyrinthine migration laws can incur significant costs for applicants in funding migration agents, collecting the necessary documents to accompany applications, sitting English tests, and so on. The Bill makes no provision for the financial compensation of these costs for applicants whose applications are summarily dismissed. Of course, it is no defence for the government to claim that such costs have been voluntarily borne by the applicant. By codifying this country's migration program, by continually second-guessing applicants through amendment and

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manipulation of the legislation governing Australia's migration program, and by insisting on numerous expensive requirements merely for an application to be valid, the government has tacitly authorised these 'hidden costs' inherent in migrating to Australia. For the government to then claim it can dismiss applications without proper consideration, and bear no responsibility for the costs of these applications beggars belief.

The recent termination ("ceasing") of some twenty thousand bona fide migration applications by the Minister was a fundamental blow to those of us who work within the migration system. It sent a message that Australia was not to be trusted when it says you should "wait in the queue" if you want to migrate to Australia.

This is just a small summary of the many faults in the proposed Bill. However, given the clear potential for abuse of the power which this Bill seeks to grant, it is strongly submitted that the members of this Committee recommend against the Bill's passage.

Yours faithfully,

Michael Clothier
Clothier Anderson & Associates
Encl.