# Migration Amendment (Visa Capping) Bill 2010

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**Submission to the Public Inquiry**
**Legal & Constitutional Affairs Committee**
**Australian Senate**

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## Introduction

I write in my (purely informal and unpaid) capacity as "Gollywobbler," one of the Moderators of the Poms in Oz internet forum, a link to which is below:

http://www.pomsinoz.com/forum/migration-issues/

Joining Poms in Oz costs nothing. None of the contributors to Poms in Oz get paid anything for our own time and effort. People ask questions or raise concerns and the rest of us answer the questions or address the concerns as best we can.

I have no personal axes to grind in this matter. My younger sister moved to Australia from the UK in 1979 and is now an Australian Citizen. My mother is a Permanent Resident of Australia and has been since 2006, when she obtained a Contributory Parent sc 143 visa. Several other members of my mother's family have also settled in Australia permanently. As far as I know, nobody else in my family wishes to emigrate to Australia apart from those who have already done so.

I am a qualified solicitor in England & Wales. Because of my own family and professional backgrounds I have had many opportunities to stroll into Australia and to stroll into solicitors' practices in Australia over the years. However, I have never wanted to do it so I have never investigated the details involved. I have visited Australia fairly regularly ever since I was a teenager but living in Australia long-term isn't everyone's cup of tea and it isn't mine.

## Summary

I believe that the Inquiry Committee should recommend that the Australian Parliament should reject the proposed Migration Amendment (Visa Capping) Bill 2010. If a Minister for Immigration wishes to propose a different new Bill on a future occasion, which identifies its objectives clearly and in detail, and which contains proper proposals for safeguarding and protecting those who have made valid visa applications or wish to do so, there is no reason why the Parliament of Australia should not consider a future Bill at that time. However I believe firmly that the present Bill should be rejected in its entirety.

## Detailed Reasons

When I read the proposed Visa Capping Bill, I was shocked to learn that nothing but scraps have been provided for the Australian Parliament to consider. The Bill really is that bad, in my view.

I find that the proposals for the new Visa Capping Bill contain the following deficiencies:

- There has been no discussion about why the new Bill is wanted. The aim of it is to replace Section 39 of the Migration Act 1958 but the Minister has been astonishingly coy about why he considers that replacement is necessary;
- The potential scope of the Bill is unlimited;
- The Bill would enable the Minister to re-write the Law retroactively, in ways which would cause a retroactive effect, at his sole discretion alone;
- The Bill purports to treat visa applicants, prospective visa applicants, their sponsors (and other members of their families in Australia) and the Australian Parliament with equal contempt.

***Section 39:***

The Minister says that he does not imagine using his proposed new powers except very rarely. In that case, he can use the powers already contained in Section 39 of the Migration Act 1958, can't he?

Section 39 says:

***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.*

Section 39 seems to be perfectly adequate to me for the very sparing uses that the Minister claims to envisage. So if it ain't broke, why fix it?

On 25th May 2010, DIAC published a revised version of Fact Sheet 21:

http://www.immi.gov.au/media/fact-sheets/21managing.htm

Referring to Section 39, Fact Sheet 21 says:

***Cap and terminate***
*The Act also contains a 'cap and terminate' provision, though to date this provision has been used only in respect of some elements of the Humanitarian Program.*

*The provision means that when a cap has been reached for a particular visa class, work on all applications which have not been processed to decision stops and the files are closed. These applications are treated as if not submitted.*

*The minister has indicated that this provision would only be used in exceptional circumstances.*

I suggest that the real truth is that the Minister never intends to use the existing Section 39 because 24 hours later he had introduced the new Visa Capping Bill, which proposes the total repeal of Section 39.

I understand that S39 has only ever been used once. The migration agent who told me this said that DIAC are mistaken about its earlier use. He says that from his memory, its solo earlier use was to cap & terminate applications for Working Holiday visas during the early 1990s. He was working for the Australian Department of Immigration at the time.

Does the Committee know anything about the background to Section 39, please? What were the relevant debates about it in Parliament before it was introduced? When was it introduced? Was it part of the Migration Act 1958 right from the time of the original draft of that Act or was it introduced later? It seems to me that it is very unwise to agree to repeal a

provision in a statute unless you know why the provision was included in the statute in the first place.

I submit that the real truth of this new Bill is that when the Minister ordered DIAC's lawyers to use Section 39 in order to get rid of 20,000 people in the GSM pipeline, as announced by the Minister on 8th February 2010, the Minister discovered that for a host of different reasons, if he were to try to use Section 39 in accordance with his sweeping announcement about it, he would run into so many legal difficulties that he would be sued in the courts in Australia, where he would lose the litigation. I believe that the new Bill is an attempt to circumvent those legal problems and nothing else.

Section 39 envisages that no visa application can be terminated unless the relevant Class or Subclass of visa has first been Capped by a legislative Instrument. That has not happened since 8th February 2010.

However in his radio interview with Peter Mares on 4th June 2010, the Minister claimed that he has already killed off all of the applications for offshore skilled GSM visas which were received by his Department prior to 1st September 2007.

http://www.abc.net.au/rn/nationalinterest/stories/2010/2918752.htm#transcript

The Minister told Mr Mares:
*As you know, we did that earlier with a group of people who were offshore who had lodged pre-September 2007. They had no chance of becoming migrants to this country, and we used that power then to ensure they got their refund and knew where they stood.*

So when did the Minister sign the legislative Instrument that caused the alleged capping to happen and the alleged refunds to be made? Surely the Minister would remember signing the legislative Instrument or Instruments? Surely DIAC would remember the machinery for organising the repayments and signing the cheques? Was the Minister dreaming about these events which have not happened or was he trying to be disingenuous, one asks?

A new thread about this has been started on Poms in Oz today:

http://www.pomsinoz.com/forum/migration-issues/87922-pre-september-applicants-let-us-count-how-many-us.html

Most of the contributors to the thread have been waiting for the axe to fall on their heads ever since 8th February 2010. Are they the sole survivors of an alleged holocaust? As I understand it, legislative Instruments have to be published in ComLaw, in the Gazette or somewhere. Where is the apparently missing but highly relevant Instrument?

I do not know about the other subclasses in the relevant group but I understand that subclass 496 cannot be Capped & Terminated by Section 39 of the 1958 Act. I have not investigated the details myself but I am told that the relevant legislation for subclass 496 omitted to include the necessary powers to invoke Section 39 of the Act. The migration agent who told me about this did not know why the necessary powers were not included but apparently they were not.

If I were the Inquiry Committee, my own suspicions would be turning to the possibility of rats running cheese shops and I would be investigating the real truth behind the new Bill. I would also insist on investigating the whole of the truth, not just the bits that the present Government would like me to see. The Senate cannot make a balanced and intelligent decision about the new Bill unless the whole of the real truth is described in the Inquiry Committee's Report, I suggest.

***Unlimited Scope:***

Again, I suspect that the present Government is not telling the whole of the truth and only the truth.

It does not take genius to work out that the Minister has a huge problem with the size of the present GSM visa pipeline. I gather that DIAC are sitting on a total of about 147,000 valid applications for GSM visas. I gather that the Minister only wants to grant about 36,500 GSM visas to the main applicants for them during 2010-2011. I gather that about 39,000 of the applications in hand are applications for the range of onshore GSM visas. I do not know how many out of the total of 147,000 or so main applicants are people who have been studying in Australia, though.

If I were the Australian Parliament, I would be demanding that the present Government provides the exact figures with a detailed breakdown of them. The Minister wants to rush his present Visa Capping Bill into the Law of Australia, therefore the Minister would have no problem with ordering DIAC to work overtime so that the figures can be produced to Parliament without any unnecessary delay, I suggest.

If we accept that there is a problem with the size of the GSM pipeline, why does the present Bill envisage that elderly and vulnerable Parents could easily be dragged into similar pipeline problems later on? The backlog of applications for offshore Parent subclass 103 visas totals about 15,500 applications, I think. I believe that there are about 5,500 pending applications for the onshore Aged Parent subclass 804 visa. A phone call to the current Manager of the Parents Visa Centre in Perth would soon discover the actual numbers, I suggest.

The sc 103 and the sc 804 visas are the two non-contributory Parent visas. During the present Minister's first year in office, he decided to double the quota for non-contributory Parent and Aged Parent visas. The total quota had been only 1,000 visas a year, with a split of 700/300 between the two groups.

The waiting times had blown out to about 17 years for both of these groups because of the lengthy Queues for them against the tiny quota allowed. However these applications have been and continue to be Capped & Queued rather than Capped & Terminated under Section 39 or its successor.

For 2008-2009, the present Minister doubled the quota to 2,000 non-contributory Parent and Aged Parent visas a year, halving the waiting times for them. I felt that Minister Evans had acted very humanely, sympathetically, sensitively and wisely on that occasion.

For the Migration Program Year 2009-2010, the Minister held the revised quota of 2,000 visas for these two groups.

However for the 2010-2011 Program Year, he has suddenly halved the quota again, back down to a total of 1,000 visas a year. The Minister has offered no explanations to anyone about why he has done this.

His new Bill does not preclude the culling of these two subclasses in exactly the same ways as the Bill proposes for GSM visas. Why are there no safeguards and protections to ensure that vulnerable and often elderly Parents will never have their own hopes shattered? The Parents Visa Centre have confirmed recently that they expect that somebody who submits an offshore Parent subclass 103 visa today can expect a wait of about 22 years before the visa is granted. This, of course, assumes that the Parent applicant will not die from old age in the meantime.

Since 70% of the new Quota of 1,000 visas has been earmarked for applicants for the offshore sc 103 visa, it envisages that the likely wait for the onshore sc 804 Aged Parent visa will not be much less than 20 years.

When the Parent has applied for the onshore sc 804 Aged Parent visa, s/he is living in Australia on a Bridging Visa in the meantime. The new Bill envisages that if the subclass is ever Capped & Terminated, the Bridging Visa will come to an end as well after 28 days. Therefore a Parent whose only life has become his/her life in Australia with his/her child or children could be turfed out of Australia at very short notice. There would be no right to appeal to the Migration Review Tribunal, therefore there would be no right to appeal direct to the Minister under Section 351 of the Migration Act either.

It would be totally unconscionable to treat this group in this way but the Bill contains no safeguards at all to ensure that the present Minister or one of his successors would never behave in such a disgraceful fashion. Therefore the relevant Parent or Aged Parent applicants and their children in Australia and elsewhere are now worrying themselves stupid about the possible fate of their visa applications. Suggesting that they might receive an interest-free refund of the application fees that they might have paid several years ago seems to be in particularly poor taste to me, frankly. What would these refunds pay for? Their coffins?

***Retroactivity:***

I believe that acquiring a reputation for being fond of introducing legislation that works retroactively would result in Australia scoring an Own Goal for itself on the international stage.

I believe that Australia's currently good reputation as a country to do business with would be tarnished immeasurably for at least the next 20 years. A country that can treat its foreign visa applicants so unfairly, retroactively and badly won't have any scruples about behaving equally badly towards its international trading partners next, it seems to me. Perhaps this is the reason why Canada has not risked dealing with its own backlog of visa applications in the same draconian manner as this new Australian Bill would permit?

It is legal and social anathema for a supposedly civilised country to have anything to do with introducing any sort of legislation that is intended to have a retroactive effect, I suggest.

***Contempt:***

I submit that the present Government has not made any meaningful attempt to explain to Parliament why the present Bill might be desirable. The only document on record is a vague, scrappy and short Second Reading Speech from Mr Laurie Ferguson in which he vaguely says that he vaguely thinks that the new Bill might be a vaguely good idea.

Doesn't the Parliament of Australia demand better than this from its Government, or is the Parliament inured to putting up with such total contempt?

Delivering the Second Reading Speech would not have taken more than about 30 seconds. That counts as "dialogue" between the present Government and the Parliament of Australia, does it?

Admittedly, 30 seconds of 'dialogue' with Parliament is considerably longer than the period for which the Government's attempts at 'dialogue' with the visa applicants who might be affected by this proposed Bill have lasted! There has been zero dialogue with them so far except via this current Senate Inquiry.

Almost everything else that the Minister is intent on with his “reforms” has been written out in various discussion papers for somebody called “the stakeholders” to comment upon, but nary a word about this Bill, it would seem.

There has been zero dialogue between the Government and the Sponsors of the visa applicants either, despite the fact that all of the Sponsors are Permanent Residents of Australia and many of them are Citizens of Australia. Does a good Government regularly fail to exchange a word with the people whom it purports to govern, one asks?

**Conclusion**

If I were the Legal & Constitutional Affairs Committee of the Australian Senate, I would not recommend anything in my Report except that the present Bill should be chucked out of Parliament in its entirety.

I would not recommend bothering to waste my own time on re-drafting the thing so as turn it into something approaching a proposed piece of good Law. I would simply recommend that it be thrown out completely, with instructions to the present Minister that if he or his successors might ever want me to consider anything similar in the future, they can get rid of all of the present deficiencies in their proposals first and then they can bring me a properly conceived, properly drafted document to consider at some future date.

It remains only for me to thank the Inquiry Committee for taking the time and trouble to read and consider the contents of my submission.

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