Julie DennettCommittee SecretarySenate Standing Committee on Legal and Constitutional Affairs
Parliament House
Canberra

3 June 2010

Inquiry into the Migration Amendment (Visa Capping) Bill 2010
I refer to your letter of 27 May 2010 to Professor Kate Warner seeking submissions in relation to the above mentioned inquiry. I note that only six working days were given to prepare a submission; and a mere six days are allowed for your Committee to consider those submissions and make written recommendations. This is inadequate parliamentary scrutiny.
While not having had the time to fully consider the issues I wish to make the following submissions. The proposed amendment is problematic because it would:

allow the Minister to retrospectively annul any visa applications,
have harsh impacts on 147 000 individuals currently residing in Australia,
be fundamentally unfair because visa applicants would have no certainty that the rules will not be retrospectively changed,
be a grave departure from the rule of law, and
damage Australia's international relations.

Former Commonwealth Attorney General, Daryl Williams, sought to defend retrospective aspects in the Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002 on the basis they did "not retrospectively abrogate a legitimate right or entitlement". (Letter to Chair of Senate Standing Committee for the Scrutiny of Bills dated 8 March 2002). The Visa Capping Bill does precisely that: it would allow the Minister to take away a legitimate right or entitlement to have a visa application processed.

The existing provision in the Migration Act to which the Minister refers in his Second Reading Speech (s 39) has an important restriction: it confines ministerial capping to those visas where the possibility of capping is foreshadowed by a criterion in the visa regulation itself, thus putting applicants on notice of the risk of capping prior to applying.

This Bill would allow the minister to cap any visa (except protection visas) without the requirement that such capping be foreshadowed by a criterion in the visa regulations.

The amendments, if they became law, would allow existing visa applications (including the 147 000 onshore applications for a subclass 885 visa) to be annulled and the applicants' temporary visas terminated. These applicants would be deported even though they have been living legally in Australia for an extended period and applied for their visas with the legitimate expectation that these would be processed in accordance with the rules laid down in the relevant regulations.

The proposed amendments are not confined to these 147 000 visa applicants. They will affect equally anyone who at any time applies for any visa. This means that no person applying for a visa for Australia would be able to rely on the regulations in force at the time they apply.

The power to retrospectively annul any visa application for any reason is a grave departure from the rule of law on which Australians pride themselves. For this reason retrospective legislation is almost unprecedented. Retrospective aspects of legislation to curb 'bottom-of-the-harbour' tax evasion schemes were justified on the basis that these schemes undermined the Australian tax system by manipulating the rules – no such accusation can be made in relation to genuine visa applicants.

This Bill, if it is to become law, will damage Australia's international reputation as well as damage the rule of law in Australia.

Bad law is no remedy for failed policy.

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