



Migration Amendment (Visa Capping) Bill 2010

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Migration Amendment (Visa Capping) Bill 2010

Date introduced: 26 May 2010

House: House of Representatives

Portfolio: Immigration and Citizenship

Commencement: Sections 1 to 3 commence upon Royal Assent. All other provisions commence no later than six months after the day of Royal Assent or earlier by Proclamation.

Links: The [links](#) to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bills page, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The primary purpose of the Migration Amendment (Visa Capping) Bill 2010 (the Bill) is to amend the *Migration Act 1958* (Migration Act) to cap visa grants and cancel or terminate visa applications on the basis of the class or classes of applicant applying for the visa (excluding protection visas).

Background

The introduction of visa capping

When Australia's first immigration department was established in 1945, the focus of the migration program was to boost the Australian population in order to stimulate post-war economic development and increase the numbers of people able to defend the country in the event of another war. Under the 'populate or perish' objectives of the day, families and labourers from the UK and certain parts of Europe were encouraged to migrate—many under assisted passage schemes.¹

While the potential benefits of migration to the economy had always been an important consideration, government immigration policy over the years progressively shifted its

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1. J Phillips, *Australia's migration program*, Research note, Parliamentary Library, 2005, viewed 1 June 2010, <http://www.aph.gov.au/library/pubs/rn/2004-05/05rn48.htm>; J Jupp, *The Australian People: an encyclopedia of the nation, its people and their origins*, Cambridge University Press, Cambridge, 2001, pp. 72–73; Department of Immigration and Citizenship (DIAC), *Key facts in immigration*, Fact sheet no. 2, DIAC web page, viewed 25 May 2010, <http://www.immi.gov.au/media/fact-sheets/02key.htm>

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focus towards a more highly planned program specifically targeting skilled migration while continuing to allow a certain amount of family and humanitarian migration.

Visa ‘capping’, introduced in the late 1980s, was one of a number of measures that enabled the Government to better balance the migration program by limiting the number of visas issued in some categories while increasing the proportion of visas issued in others.²

In 1988 a major report from the Committee to Advise on Australia's Immigration Policies (CAAIP), *Immigration—a commitment to Australia*, called for urgent reform of Australia's immigration policy and recommended a greater economic focus through more skilled and business migration. The report stated that ‘to realise the potential economic benefits to Australia, the immigration program needs a high proportion of skilled, entrepreneurial and youthful immigrants’.³

In response, the Hawke Government introduced several major reforms including the division of the immigration program into three main streams (family, skill and humanitarian); the establishment of the Bureau for Immigration Research; and the introduction of ‘capping’ of program numbers.⁴ Since then, visa ‘capping’ has played a central part in assisting governments in balancing and planning the migration program each year.

Basis of policy commitment

The composition of Australia's Migration Program underwent a fundamental change under the Howard Government, with the balance shifting substantially in favour of skilled migration, with a concomitant reduction in the family migration program. At the same time the overall size of the Migration Program, as well as the migrant intake more broadly, increased significantly, particularly with increases in the numbers of temporary migrants such as long-term temporary business migrants and overseas students.

By 2007–08 approximately 40 per cent of the permanent visas granted in the skilled migration program were granted to migrants who were already in Australia on a long-term temporary basis, primarily, subclass 457 Business Long Stay visa holders, and former overseas students.⁵ The links forged, particularly between the overseas student program

2. M Baker et al, *The rationale for Australia's skilled migration program*, Bureau of Immigration and Population Research, Canberra, 1994, pp. 1–3.

3. Ibid., p. 16.

4. B York, *Australia and refugees 1901–2002: an annotated chronology based on official sources*, Parliamentary Library, 2003, viewed 1 June 2010, http://www.aph.gov.au/library/pubs/online/Refugees_contents.htm

5. C Evans (Minister for Immigration and Citizenship), *Changes to the 2008–09 Skilled Migration Program*, media release, Canberra, 17 December 2008, p. 3, viewed 7 June 2010,

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and the permanent skilled migration program, meant that by 2008 almost half of the independent skilled migration visas under the General Skilled Migration (GSM) Program were granted to former overseas students.⁶ However, research dating back to about 2005 revealed that overseas students were not always achieving employment outcomes that were commensurate with their skills and qualifications, and in later years concerns were raised that despite a concentration of visa grants to applicants with particular occupations, such as accounting, cooking and hairdressing, the skills shortages in these occupations persisted.⁷

The Rudd Government undertook a review of the permanent skilled migration program for 2008–09 in the wake of the economic challenges resulting from the global financial crisis. While the skilled migration program had traditionally been filled by ‘supply driven’ independent skilled migration under the GSM program, where the mix of skills was determined by those applying to migrate, the review identified the need for a shift in the focus of the skilled migration program towards ‘demand driven’ outcomes, in the form of employer and government-sponsored skilled migration, to enable the program to be better targeted on the skills needed in the economy.⁸

The move to a ‘demand driven’ program was made to address unintended outcomes of the skilled migration program, such as the concentration of applicants in particular occupations, which limited the extent to which the skilled migration program was meeting

<http://www.minister.immi.gov.au/media/media-releases/2008/changes-to-2008-09-skilled-migration-program.pdf>

6. Ibid., p. 2. Peter Mares reports that as at 31 March 2010 more than a quarter of the applicants for the GSM program, awaiting the processing of their applications, were former international students; P Mares, *Capping and culling the migration queue*, Inside Story, 3 June 2010, viewed 7 June 2010, <http://inside.org.au/capping-and-culling-the-migration-queue/>
7. A Vanstone (former Minister for Immigration and Multicultural and Indigenous Affairs), *New migrants are entering the workforce faster*, media release, Canberra, 5 November 2005, viewed 7 June 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FGRZH6%22>. See also: B Birrell, L Hawthorne, S Richardson, *Evaluation of the General Skilled Migration categories*, report prepared for the Department of Immigration and Multicultural Affairs (DIMA), Canberra, 2006, viewed 7 June 2010, <http://www.immi.gov.au/media/publications/research/gsm-report/>; P Mares, op. cit., pp. 1 and 4; B Birrell and E Healy, ‘The February 2010 reforms and the international student industry’, *People and Place*, vol. 18, no. 1, 2010, pp. 67–68, viewed 31 May 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2FJXJW6%22>
8. C Evans (Minister for Immigration and Citizenship), *Migration program gives priority to those with skills most needed*, media release, Canberra, 17 December 2008, viewed 7 June 2010, <http://www.minister.immi.gov.au/media/media-releases/2008/ce08123.htm>

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Australia's skills needs.⁹ This shift in policy focus was reflected in a first key set of reforms, effective from 1 January 2009, which enabled skilled migrants with a confirmed job or skills in critical need to be accorded processing priority in their application for a permanent visa to come to Australia.

A second key set of reforms to the skilled migration program were announced in February 2010 to further target the skilled migration program and ensure that it is driven by the demands of Australian industry rather than the supply of independent skilled migrants.¹⁰ The reforms included the cancellation of almost 20 000 GSM visa applications lodged offshore before September 2007, revocation of the Migration Occupations in Demand List (MODL), the phasing out of the Critical Skills List which was introduced last year, and a review of the points test which 'puts an overseas student with a short-term vocational qualification gained in Australia ahead of a Harvard-educated environmental scientist'.¹¹

On 1 July 2010 a new Skilled Occupation List (SOL) came into effect. It contains 181 occupations designed to ensure that the Skilled Migration Program is demand-driven rather than supply-driven. To this end, occupations which have been identified as no longer being in demand, such as cooks and hairdressers, were removed from the list. The SOL is expected to be updated annually.¹²

Notwithstanding these other reforms, the Government is of the view that the amendments proposed in this Bill are necessary to prevent only a handful of occupations dominating the Skilled Migration Program.¹³ It needs to be able to firstly, limit the number of visas to be granted to applicants whose occupations are in oversupply and secondly, cancel the large number of valid applications for such occupations that have already been made.

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9. See B Birrell and E Healy, 'The February 2010 reforms and the international student industry', *People and Place*, vol. 18, no. 1, 2010, pp. 65-80, viewed 7 June 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2FJXJW6%22>
 10. C Evans (Minister for Immigration and Citizenship), *Migration reforms to deliver Australia's skills needs*, media release, Canberra, 8 February 2010, viewed 7 June 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FKNKZV6%22>
 11. Ibid.
 12. C Evans, *New Skilled Occupation List to meet Australia's economic needs*, media release, Canberra, 17 May 2010, viewed 9 July 2010, <http://www.chrisevans.alp.org.au/news/0510/immimediarelease17-01.php?print=on>
 13. C Evans, *Migration reforms to deliver Australia's skills needs*, op. cit.

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Overview of existing visa capping mechanisms

‘Cap and terminate’

There are currently two key provisions in the Migration Act which enable the number of visas that can be granted each year to be limited. The first is section 39 of the Act which is what is colloquially known as the ‘cap and terminate’ provision. Under this mechanism, the Minister can fix by way of legislative instrument the maximum number of visas of a class that may be granted in a specified financial year. It only applies to visas that have capping as a prescribed criterion and it does not apply to protection visas. Once the quota is reached no visas can be granted until the start of the new financial year. No merits review is available to applicants because no decision (approving or refusing the application) has been made—rather, the application is taken or deemed never to have been made. The visa application fee is refunded to the applicant however associated fees that may have been incurred for medical examinations, English language tests and police checks are not refunded.¹⁴

According to the Department of Immigration and Citizenship (DIAC) website, ‘to date this provision has only been used in respect of some elements of the Humanitarian Program’.¹⁵ However, as previously mentioned, in February 2010 the Minister for Immigration and Citizenship announced that offshore GSM visa applications made before 1 September 2007 would be terminated under section 39 of the Act. This Bill proposes to repeal section 39 and replace it with **proposed new Subdivision AHA** which broadly speaking, will enable the Minister to limit the number of visas to be granted to applicants with certain characteristics or whose application has certain characteristics (discussed below).

‘Cap and queue’

The second mechanism is section 85 of the Act (contained in Subdivision AH of Division 3 of Part 2) which is what is colloquially known as the ‘cap and queue provision’. Under this mechanism, the Minister can determine by way of notice in the *Gazette* the maximum number of visas of a class or classes that may be granted in a specified financial year. It operates by placing any undecided applications in a queue once the quota is reached. Though no further visas can be granted in the particular financial year, it does not prevent any other action related to the application being taken. Under this mechanism, the Act prevents a cap being placed on visas for people who are the spouse or dependent child of

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14. DIAC, ‘Changes to offshore General Skilled Migration visa applications received before 1 September 2007’, DIAC website, viewed 7 June 2010, <http://www.immi.gov.au/skilled/general-skilled-migration/pdf/faq-offshore-preseptember.pdf>
 15. DIAC, ‘Fact sheet 21 – Managing the Migration Program’, DIAC website, viewed 9 July 2010, <http://www.immi.gov.au/media/fact-sheets/21managing.htm>

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an Australian citizen or permanent resident.¹⁶ This Bill does *not* propose to repeal Subdivision AH of Division 3 of Part 2 (sections 85 to 91 of the Act) which means that it will operate concurrently with **proposed new Subdivision AHA – Visa capping**.

Committee consideration

Senate Legal and Constitutional Affairs Legislation Committee

On the same day the Bill was introduced into Parliament, it was referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry. Written submissions from interested individuals and organisations were initially required to be made by 4 June 2010, only seven working days after the inquiry commenced so that the Committee could report by 15 June 2010. The date for making submissions was subsequently extended to 15 June and a new reporting date was set for 11 August 2010.

At time of writing the Committee had received over 650 submissions, mainly from interested individuals. Details of the inquiry are at the inquiry [webpage](#).

Senate Committee for the Scrutiny of Bills

On 16 June 2010, the Senate Committee for the Scrutiny of Bills issued an [Alert Digest](#) within which it highlighted two potential problems in respect of what it termed an ‘inappropriate delegation of legislative power’ under **proposed section 91AA**:

First, it is unclear why it is not possible for the Act to specify the general categories of characteristics which may be used to specify which applicants will be subject to the caps.

More generally, although the second reading speech makes it clear that the primary policy objective of the bill is to respond to problems in the General Skilled Migration program, the power given to the Minister in section 91AA reaches more broadly...¹⁷

The Committee has requested clarification from the Minister as to whether the Bill can specify general categories of characteristics which may be used to specify which applicants will be subject to the caps and why the capping system thought appropriate in relation to the skilled migration program needs to also apply to other classes of visa (excluding protection visas).¹⁸

16. Section 87 of the Migration Act.

17. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 6 of 2010*, 16 June 2010, p. 53, viewed 15 July 2010, <http://www.aph.gov.au/senate/committee/scrutiny/alerts/2010/d06.pdf>

18. Ibid.

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Position of significant interest groups/press commentary

The Law Institute of Victoria has expressed serious concerns about the implications of the Bill noting that in their view it:

...undermines the rule of law and introduces uncertainty and a lack of the transparency to Australia's migration program. We object to legislation with retrospective impact, to the unfettered Ministerial discretion permitted under the Bill and to the potential for human rights breaches that may be authorised by the Bill... Furthermore, the provision will be applied retrospectively to validly lodged applications. In addition, we are concerned that the provision could be used to cap any visa category, including under the family migration program.¹⁹

Journalist and prominent commentator on immigration policy, Peter Mares, argues that, while the Government's aims are understandable, the proposed reforms are causing a significant amount of anxiety among overseas students and those with migration applications currently pending determination. Mares also argues that the reforms may have unintended consequences, and the proposed legislative provisions are so broad as to be susceptible to potentially problematic and discriminatory application by future ministers.²⁰

Mares reports that 'news of the proposed amendment has spread rapidly through international student networks and online migration forums, sparking panic, outrage and consternation.'²¹ Citing the views of a migration agent and an anonymous submission to the Senate Committee Inquiry in his article, Mares warns that a mass termination of onshore visa applications could result in dubious applications being made to DIAC as overseas students go to desperate lengths to find ways to remain in Australia. He also notes that the powers being granted are so broad that they enable future ministers to cap visas on questionable criteria, such as an applicant's nationality.²²

The International Education Association of Australia (IEAA) echoes Mares' concerns about the degree of anxiety caused to overseas students by the proposed changes and the powers in the Bill being capable of being used to terminate applications on criteria such as

19. Law Institute of Victoria, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the provisions of the Migration Amendment (Visa Capping) Bill 2010*, 18 June 2010, viewed 15 July 2010, http://www.aph.gov.au/senate/committee/legcon_ctte/migration_amendment_visacapping/submissions.htm

20. P Mares, op. cit. p. 1

21. Ibid.

22. Ibid. For the Immigration Minister, Senator Chris Evans', response to the concern that the proposed powers might be used to cap visas on the basis of an applicant's nationality see 'New immigration powers cause concern', *National Interest*, transcript, Australian Broadcasting Corporation (ABC), 4 June 2010, viewed 16 June 2010, <http://www.abc.net.au/rn/nationalinterest/stories/2010/2918752.htm>

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an applicant's nationality.²³ IEAA criticises the proposed visa capping provisions for having the potential to limit the number of temporary visas granted in a given year, including student visas. The Executive Director of IEAA, Dennis Murray, states that the proposed changes would 'harm Australia's reputation by causing further uncertainty about whether Australia is a country that welcomes international students.' The IEAA also argues the uncertainty created by the provisions in the Bill inhibits the long term planning of both public and private institutions in Australia, and criticises a lack of government consultation with the education industry and lack of adequate time to scrutinise the proposed provisions.²⁴

Other press reports highlight warnings from universities and colleges that proposals to terminate the residency applications of former overseas students or cap overseas student numbers would lead to a significant decline in Australia's international student education industry, while pushing potential students towards competing education markets such as the US and UK.²⁵

Coalition and Greens policy position/commitments

At time of writing, the Coalition had not specifically expressed its position on visa capping, but it is quite likely that it will not oppose the Bill. A recent population policy paper, *Towards a productive and sustainable population growth path for Australia*, sets out the Coalition's population policy framework that focuses on the importance of an 'effective, controlled and targeted' migration program with an emphasis on skilled migration:

The Coalition believes that addressing the skills needs of businesses to sustainably grow our economy is the primary reason for a migration programme. Consequently, economic considerations must be paramount in how our programme is framed and composed ... What is needed from an immigration perspective is a planning

23. International Education Association of Australia (IEAA), *Visa Capping Bill proposals a body blow to students and the education sector*, media release, 10 June 2010, viewed 15 June 2010, <http://www.ieaa.org.au/NewsArticles/NewsArticle.asp?articleNo=63>.

24. Ibid.

25. G Healy, 'Death knell' for overseas students', *The Australian*, 11 June 2010, p. 8, viewed 11 June 2010, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FZAZW6%22>. This sentiment is more broadly echoed by the Australian Council for Private Education and Training (ACPET) in relation to the host of reforms to the skilled migration program recently introduced by the Government: ACPET, *Government to answer for international college collapse: new data warns policy changes will slash 32 000 jobs*, media release, 7 June 2010, viewed 15 June 2010, http://www.acpet.edu.au/sites/default/files/documents/media/2010/100607_Government_To_Answer_for_International_College_Collapse.pdf

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framework that enables intake levels for the short, medium and long term to be determined in the context of an agreed sustainable population growth path. In addition, consideration must also be given to the level of community confidence in the Government of the day's ability to run an effective, controlled and targeted immigration programme that serves Australia's interests.²⁶

While it is possible the Greens may oppose the Bill, there has been no official statement to that effect as yet. However, they reportedly have expressed some concerns about the Bill.²⁷

Financial implications

The Explanatory Memorandum notes that the financial impact of these amendments is expected to be low:

Costs of implementation will be met from within existing resources. Should the Minister decide to use these powers additional costs may be incurred on consolidated revenue where visa application charges for certain visa applications need to be refunded.²⁸

Key issues

The Bill provides that the Minister may cap, by a non-disallowable legislative instrument, the number of visas to be granted in a particular financial year by reference to a class or classes of applicants or in other words, 'to applicants with certain characteristics, or whose application has certain characteristics'. This is significantly broader than the capping power contained in existing subsection 39(1). The current power allows visas to be capped only by reference to the class of visa. The second reading speech to the Bill notes that such characteristics will be consistent with Australia's international obligations, will be objective, and relate to information that is provided in the application, such as the particular occupation nominated by the applicant or the date of the application.²⁹ Since the Bill's introduction, the Minister for Immigration and Citizenship has tried to allay concerns that the proposed new power could be used in an inappropriate or discriminatory manner. For instance, he has reportedly stated that the power would only be used 'very

26. Coalition, *Towards a productive and sustainable population growth path for Australia*, policy paper, April 2010, p. 5, Liberal Party of Australia website, viewed 15 June 2010, <http://www.liberal.org.au/~media/Files/Policies%20and%20Media/National%20Security/100429%20Coalition%20Policy%20Directions%20Paper.ashx>

27. P Mares, op. cit.

28. Explanatory Memorandum, Migration Legislation Amendment Bill (No. 3) 1996, p. 2.

29. L Ferguson (Parliamentary Secretary for Multicultural Affairs and Settlement Services), 'Second reading speech: Migration Amendment (Visa Capping) Bill 2010, House of Representatives, *Debates*, 26 May 2010, p. 4138.

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rarely' and has acknowledged that he has received advice that capping visa applications from a particular country would be discriminatory.³⁰ Notwithstanding, it is significant to note that the Bill contains only two express restrictions on the use of the power. Firstly, the new capping mechanism will *not* apply to protection visas and it will *not* prevent the grant of a capped visa to a family member of the primary or main applicant who has already been granted a capped visa.

Turning to the first of these restrictions, though the proposed new cap and terminate mechanism will not apply to protection visas, that is, visas granted pursuant to section 36 of the Act to refugees *in* Australia, there is nothing in the Bill that prevents it being applied to Refugee and Humanitarian (Class XB) visas, that is people applying for protection (including from persecution) from overseas.³¹ Though the proposed protection visa exemption is consistent with existing subsection 39(1) of the Act, no explicit justification was provided when the exemption was originally inserted into the Migration Act.³² One can only assume that the power might have been perceived as being contrary to Australia's international obligations to refugees. However, if the broader policy objective of this Bill is to give certainty to large numbers of people who are left in a queue or 'pipeline' with no real prospect of ever getting to Australia, then technically, this new enhanced capping mechanism could equally be applied to this caseload.³³ Statistics provided by DIAC (see appendix 1) estimate that there were 116 163 applications for

30. 'New immigration powers cause concern', *op. cit.*

31. The Refugee and Humanitarian (Class XB) visa has five visa subclasses. Namely, 200 (Refugee), 201 (In-country Special Humanitarian), 202 (Global Special Humanitarian), 203 (Emergency Rescue), and 204 (Woman at Risk).

32. *Migration Reform Act 1992*, Act No. 184 of 1992, viewed 21 June 2010, <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/framelodgmentattachments/AC2AF5777E543993CA256F720017E293>. In 1991 the Government foreshadowed that the then proposed cap and terminate provisions (which did not include an express exemption for refugees and only applied to visa classes where use of the power was specifically permitted under the regulations) could in the future be used 'in relation to other humanitarian responses...to respond flexibly to the growing mass movement of peoples throughout the world...': G Hand (then Minister for Immigration, Local Government and Ethnic Affairs), 'Second reading speech: Migration Amendment Bill (No. 2) 1991', House of Representatives, *Debates*, p. 1928. <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F1991-10-15%2F0041%22>

33. This could have broader implications for permanent residents seeking to sponsor (propose) family members under the Special Humanitarian Program (SHP). Statistics provided by DIAC (see appendix 1) estimate that there were 379 472 applications made between the period 2001—2008 for this visa but only 38 247 visas were granted during this period.

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offshore refugee visas made between the period 2001—2008 but only between 3000 and 6000 visas were granted each year during this period.³⁴

The second restriction on the exercise of the power is that the Minister is expressly not prevented from granting a capped visa to a family member of the primary/main applicant who has already been granted a capped visa.³⁵ It appears this exception is only enlivened if the family member has applied for the same visa as the primary applicant on the basis that they are their family member—not if they have applied for a different or the same visa in their own right.

On the issue of existing restrictions on the exercise of the Minister's capping powers, it is noteworthy that some visas within the family stream are excluded from the operation of existing section 85 of the Migration Act (the cap and queue provision). These include Partner (subclasses 309/100 and 820/801) visas, and Child (subclasses 101 and 802) visas, Dependant Child (subclass 445) visas, Orphan Relative (subclasses 117 and 837) visas and Adoption (subclass 102) visas.³⁶ The proposed new capping mechanism could potentially apply to *all* visa classes, subclasses or streams within a subclass (excluding protection visas), not just general skilled migration visas, though that has been identified as the 'primary policy imperative' for the Bill.³⁷ Though these family visas are not currently exempt from the operation of the existing cap and terminate provision, there is nothing in the Bill that preserves the exclusion of these visas from the wider operation of the new enhanced power.

Due to the inherently contentious nature of capping powers, it is not all that surprising that section 39 of the Act has remained substantially unchanged for nearly twenty years.³⁸ That is not to say that previous attempts have not been made to expand the power. For example, in 1996 the then Coalition government introduced the Migration Legislation

34. DIAC advice supplied to the Parliamentary Library in June 2009.

35. **Proposed subsection 91AB(5)**. Subsection 5(1) of the Act defines 'member of the family unit' to have the meaning given by the Regulations (namely, regulation 1.12 of the Migration Regulations 1994) unless there is a contrary intention. This may include a partner (spouse or de facto partner), a dependent child (of the main applicant or their partner), another relative who does not have a partner (spouse or de facto partner) and is usually resident in the main applicant's household, and is wholly or substantially reliant on the main applicant for financial, psychological or physical support.

36. DIAC, Fact sheet 21, op. cit.; Existing section 87 of the Migration Act.

37. L Ferguson, second reading speech, op. cit., p. 4138.

38. See subsections 23(3A) and (3B) of *Migration Amendment Act (No. 2) 1991*, No. 196 of 1991, Comlaw website, viewed 28 June 2010, <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/frameLodgmentAttachments/09FC139B51A6173BCA256F720017B7A8>

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Amendment Bill (No. 3) 1996. Schedule 2 of this Bill sought to (amongst other things) repeal then subsection 39(1) and substitute provisions which would:

...remove the link to a prescribed criterion...and ensure that the Minister may place limits on the grant of visas of a specified class, or in specified classes. This limit may be numerical, or may take the form of a date after which no visas of the specified class or specified classes, may be granted. The limit may also be in the form which combines both a numerical limit and a date after which no visas of a specified class, or specified classes, may be granted.³⁹

It also sought to repeal then section 87 which amounted to an exemption from the cap and queue provision for people whose visa application was made on the grounds that they were a spouse, dependant, child or aged parent of a citizen or lawful permanent resident of Australia.⁴⁰ In response to these proposed amendments six ALP Senators including the Hon. Nick Bolkus and Robert Ray along with two Senators from the former Australian Democrats issued a minority report to the Senate Legal and Constitutional Legislation Committee strongly opposing the proposed amendments and recommending that Schedule 2 be omitted from the Bill.⁴¹ In the end, the then Coalition Government was not able to secure passage of these amendments through Parliament.⁴²

The second reading speech to the current Bill emphasises that the ‘primary policy imperative of the proposed amendments is to allow the Minister to end the ongoing uncertainty faced by General Skilled Migration applicants whose applications are unlikely to be finalised because their skills are not in demand in Australia’.⁴³ However, the amendments proposed in this Bill in turn potentially create new uncertainties for visa applicants. For instance, visa applicants currently rely on, and presumably take great comfort in the fact that if they submit a valid visa application, satisfy the relevant visa criteria, the health criteria etc, and pay the visa application charge, then the Minister has a

39. Explanatory Memorandum, op. cit., p. 10. See also: P Ruddock (then Minister for Immigration and Multicultural Affairs), ‘Second reading speech: Migration Legislation Amendment Bill (No. 3) 1996’, House of Representatives, *Debates*, 16 October 1996, pp. 5590–5593, viewed 28 June 2010; E Perdikogiannis, Migration Legislation Amendment Bill (No. 3) 1996, *Bills Digest*, No. 53, 1996-97, Canberra, 12 November 1996, viewed 25 June 2010, <http://www.aph.gov.au/library/pubs/bd/1996-97/97bd053.htm>

40. Ibid., p. 13.

41. Australian Labor Party and Australian Democrats Senators, Minority report, ‘Migration Legislation Amendment Bill (No. 3) 1996’, Senate Legal and Constitutional Legislation Committee: *Migration Legislation Amendment Bill (No. 3) 1996*, The Senate, Canberra, December 1996, pp. 45–48.

42. Schedule 2 of *Migration Legislation Amendment Act (No. 1) 1997* ultimately only removed references to ‘aged parent’ in subsections 5(1), 84(3) and 87(1).

43. L Ferguson, second reading speech, op. cit., p. 4138.

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statutory obligation to grant them the visa.⁴⁴ There are currently less than 20 visa subclasses that contain a criterion which effectively puts the applicant ‘on notice’ that they will not be granted a visa if the grant would result in the number of visas of that particular subclass or visas of particular classes (including the subclass that has been applied for) exceeding the maximum number that may be granted in that financial year as determined by the Minister.⁴⁵ The new capping power, in effect, will put *all* applicants ‘on notice’ that even if they satisfy all the prescribed visa criteria, their application may subsequently, through circumstances beyond their control, be rendered void. This decision is not reviewable. The retrospective application of these amendments to some existing bridging and temporary visa holders whose outstanding applications may be rendered void will also undoubtedly add to their sense of uncertainty.

Advice previously provided by DIAC states that an applicant who has received an adverse decision on their visa application and lodged an application for review with the Migration Review Tribunal (MRT) (which remains undecided at the time the cap is reached) will have their visa application fee refunded by DIAC. If this occurs, they advise that the applicant ‘will no longer have an application awaiting review’.⁴⁶ However, this sits uneasily with section 348 of the Act which places a statutory obligation on the MRT to review an ‘MRT reviewable decision’ if an application for review is properly made.⁴⁷ Similarly, it is not entirely clear what legal effect MRT decisions that set aside the primary decision will have once returned to the Department. The same arguably applies to orders made in judicial review proceedings.

Main provisions

Item 1 repeals existing section 39 of the Act which provides that a 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

44. Section 65 of the Migration Act.

45. Schedule 2 of the Migration Regulations 1994.

46. DIAC, ‘Changes to offshore General Skilled Migration visa applications received before 1 September 2007’, op. cit. It is also not clear whether the MRT’s application fee of \$1400 payable upon lodgement would automatically be refunded. The limited circumstances in which the MRT’s application fee can be refunded are set in regulation 4.14 of the Migration Regulations 1994.

47. As at 30 June 2009, the MRT had 6295 cases on hand of which 1746 were skilled visa refusals. The average time taken to review such cases was 293 days (approximately 10 months): Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT), ‘Annual Report 2008—09’, pp. 32—36, MRT and RRT website, viewed 15 June 2010, <http://www.mrt-rrt.gov.au/Publications/default.aspx>

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number of such visas that may be granted in that year. Existing section 39 is no longer needed as it will be replaced by **proposed sections 91AA and 91AB** (see **item 8**).

Item 8 inserts new ‘Subdivision AHA – Visa capping’ containing **proposed sections 91AA, 91AB and 91AC**. **Proposed section 91AA** provides that the Minister may, by legislative instrument⁴⁸, determine the maximum number of visas of a specified class or classes⁴⁹ (other than protection visas) that can be granted in a particular financial year to applicants who are included in a specified class or classes, of applicants.

Proposed section 91AB outlines the effect of a visa cap when the Minister makes a determination under section 91AA. **Proposed subsection 91AB(2)** provides that the Minister is expressly prevented from granting a visa if the maximum number of capped visas has been reached. Not only is the Minister prevented from granting a visa to an ‘affected applicant’ (that is, applicants that are included in a specified class or classes of applicants) but also to members of their family that also lodge an application. Any undecided applications for a capped visa made by such people are taken not to have been made and no new applications can be lodged in that particular financial year. Significantly, a capped visa can nonetheless be granted to a family member of a person who has already been granted a capped visa. According to the Explanatory Memorandum, ‘this will ensure that families are not split in situations where a primary applicant has been granted a visa before the cap is reached, but all members of the family unit of that primary applicant are not granted a visa before the cap is reached’.⁵⁰

Proposed section 91AC will apply if a person’s undecided visa application is deemed not to have been made under subsection 91AB(3). If the visa applicant had been granted a bridging visa as a result of having applied for the capped visa, then it will cease to be in effect 28 days or such longer period prescribed by the regulations after either:

- the day on which a prescribed event occurs (if any), or
- the day they are notified that their application is taken not to have been made.⁵¹

Similarly, if the visa applicant had been granted a temporary visa that would cease to be in effect upon notification of the decision relating to the capped visa, then the temporary visa instead ceases to be in effect 28 days after either of the instances outlined immediately above.

48. Such legislative instruments are not disallowable: see subsection 44(2) of the *Legislative Instruments Act 2003*.

49. Existing section 31 of the *Migration Act 1958* provides that there are to be prescribed classes of visas and a visa is a visa of a particular class if this Act or the regulations specify that it is a visa of that class.

50. Explanatory Memorandum, *op. cit.*, p. 9.

51. Proposed subsection 91AC(2).

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Item 9 provides that **proposed subsections 91AC(2) and (3)** relating to the cessation of certain bridging visas and temporary visas, respectfully, will apply to such visas granted before *or* after the commencement of this item. According to the Explanatory Memorandum, in the case of bridging visas this will ‘avoid a situation where a bridging visa granted in relation to a substantive visa application that is taken not to have been made, never ceases to be in effect’.⁵² The same rationale applies with respect to temporary visas granted in relation to a permanent visa application.

Concluding comments

The ability to limit the number of visas to be granted and treat applications as never having been made is a power which has existed in the Migration Act for over twenty years. However, it only applied to visa applicants that had effectively been ‘put on notice’ and did not enable capping to occur on the basis of the personal characteristics of applicants, such as their occupation. Consequently, prior to 2010 this power had very rarely been used and had not ever been used as a tool to control the non-humanitarian Migration Program. Instead, successive governments relied on other mechanisms to manage the changing demands of the Migration Program.

The immediate policy imperative of this Bill is to limit the number of GSM visas to be granted to applicants whose occupations are no longer needed or are in oversupply in Australia and to enable the substantial backlog of such applications to be removed. However, this Bill has the potential to do far more. It proposes bold amendments that will equip the Government with a potentially far reaching power to unilaterally and retrospectively change the composition of all aspects of the Migration Program ‘as the need arises’.

52. Explanatory Memorandum, op. cit., p. 11.

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Appendix 1

Total Number of Offshore Humanitarian Applications by Category

Category	Total Applications	2001-02	2002-03	2003-04	2004-05	2006-07	2007-08
ALL	495635	53753	63073	78971	90539	80286	47331
Refugee*	116163	14733	17513	18996	19994	19957	12880
Special Humanitarian	379472	39020	45560	59975	70545	60329	34451

* the number of refugee applications provided by UNHCR is based on the number of Refugee places available, it is not reflective of global need.

Total Number of Offshore Humanitarian Grants by Category

Category	Total Grants	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08
ALL	74457	4160	11656	11802	12096	12758	11186	10799
Refugee	36210	4160	4376	4134	5511	6022	6003	6004
Special Humanitarian	38247	4298*	7280	7668	6585	6736	5183	4795

* includes 40 visas granted under Special Assistance Category

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