

2008-2009-2010

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION AMENDMENT (VISA CAPPING) BILL 2010

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration and Citizenship,
Senator the Hon. Chris Evans)

MIGRATION AMENDMENT (VISA CAPPING) BILL 2010

OUTLINE

The Migration Amendment (Visa Capping) Bill 2010 (the “Bill”) amends the *Migration Act 1958* (the “Act”) to enable the Minister for Immigration and Citizenship (the “Minister”) to cap visa grants and terminate visa applications based on the class or classes of applicant applying for the visa.

In particular, the Bill will enable the Minister to make a legislative instrument to determine the maximum number of visas of a specified class or classes that may be granted in a financial year to visa applicants with specified characteristics, and treat outstanding applications for the capped visa as never having been made.

The proposed amendments are intended to address issues relating to the General Skilled Migration (GSM) visa program. A shift in Australia’s skilled migration program from demand-driven to supply-driven has created a situation where there is greater demand for GSM visas than there are places available in the program. There has also been a noticeable skew of GSM applicants who nominate certain occupations, making it increasingly difficult for the GSM program to deliver the broad range of skills the Australian economy requires. The proposed amendments will address these issues by allowing for effective and targeted management of the GSM program.

In addition, a large number of GSM visa applications (approximately 146 000), including applications made by both primary and secondary applicants, remain unfinalised. In some cases, the number of applicants for a GSM visa significantly exceeds the number of places available in the migration program each financial year. The number of places available in the migration program are set by government. To ensure that applicants are not waiting for long periods of time for their application to be finalised, the proposed amendments will allow visa applications to be terminated and the relevant visa application charge to be refunded to the applicant.

While the proposed amendments will address issues that have arisen in relation to the GSM visa program, the mechanism for capping and terminating visa applications and ceasing visas that is introduced by the proposed amendments could apply to all visa classes, subclasses or streams within a subclass. The purpose of providing a mechanism which is not limited to GSM is to provide the government with a tool for the targeted management of all aspects of the migration program which will be available as the need arises.

The Bill also includes consequential amendments to ensure that, where a bridging visa or a temporary visa would have ceased when a related substantive visa application has been either granted or refused, a bridging visa or temporary visa will also cease to be in effect if a substantive visa application is taken not to have been made due to a cap on visas.

FINANCIAL IMPACT STATEMENT

The financial impact of these amendments is 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.

MIGRATION AMENDMENT (VISA CAPPING) BILL 2010**NOTES ON INDIVIDUAL CLAUSES****Clause 1 Short title**

1. Clause 1 provides that the short title by which this Act may be cited is the *Migration Amendment (Visa Capping) Act 2010*.

Clause 2 Commencement

2. Subclause 2(1) provides that each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

3. Table item 1 provides that sections 1 to 3 and anything in this Act not elsewhere covered by this table will commence on the day this Act receives the Royal Assent.

4. Table item 2 provides that Schedule 1 to this Act commences on a single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.

5. An explanatory note is included at the end of this table to assist the reader. It advises that the table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It advises that the table will not be expanded to deal with provisions inserted in this Act after assent.

6. Subclause 2(2) provides that column 3 of the table contains additional information that is not part of this Act. It also specifies that information in this column may be added to or edited in any published version of this Act.

Clause 3 Schedule(s)

7. Clause 3 provides each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

SCHEDULE 1 – Amendments

Migration Act 1958

Item 1 Section 39

1. This item repeals section 39 of Division 3 of Part 2 of the Act.
2. Subsection 39(1) of the Act currently provides broadly that 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 the maximum number of such visas fixed by the Minister in a legislative instrument. Subsection 39(2) provides broadly that where the grant of a visa is prevented by such a prescribed criterion, any outstanding applications in that year for visas of that class are taken not to have been made.
3. Section 39 of the Act is repealed because it is replaced by new section 91AA and new section 91AB inserted by item 8 of this Schedule.

Item 2 Paragraph 46(1)(d)

4. This item inserts “91AB (effect of visa cap),” after “protection visa),” in paragraph 46(1)(d) of Division 3 of Part 2 of the Act.
5. Subsection 46(1) provides for the circumstances in which an application for a visa will be valid. Paragraph 46(1)(d) provides that an application for a visa will be valid only if it is not prevented by various provisions of the Act listed in that paragraph. The effect of this amendment is to provide that an application for a visa will be valid only if it is not prevented by new section 91AB (effect of visa cap), which is inserted by item 8 of this Schedule.
6. This item makes it clear that the effect of new subsection 91AB(4), which prevents applications for a visa where the maximum number of those visas that can be granted in a financial year has been reached, is that an application that is prevented by that subsection is invalid.

Item 3 Paragraph 47(2)(c)

7. This item omits “section 39 (limiting number of visas) or 84 (suspension of consideration)” from paragraph 47(2)(c) of Division 3 of Part 2 of the Act and substitutes “section 84 (suspension of consideration) or 91AB (effect of visa cap)”.
8. Subsection 47(2) currently provides that the requirement to consider a valid application for a visa at subsection 47(1) of the Act continues until the application is withdrawn, or the Minister grants or refuses to grant the visa, or the further consideration is prevented by section 39 (limiting number of visas) or 84 (suspension of consideration).
9. This item removes the reference to section 39 of the Act because this section is repealed by item 1 of this Schedule.

10. This item also inserts a reference to new section 91AB (effect of visa cap) which is inserted by item 8 of this Schedule and, together with new section 91AA inserted by the same item, replaces section 39 of the Act. The effect of this item is that the requirement to consider a valid application for a visa continues until the further consideration is prevented by new section 91AB.

Item 4 Subsection 63(1)

11. This item omits “39 (criterion limiting number of visas),” from subsection 63(1) of Division 3 of Part 2 of the Act.

12. Subsection 63(1) currently provides that subject to a number of provisions, including section 39 (criterion limiting number of visas), the Minister may grant or refuse to grant a visa at any time after the application has been made.

13. The purpose of this item is to remove the reference to section 39 of the Act because this section is repealed by item 1 of this Schedule.

Item 5 Subsection 63(1)

14. This item inserts “, 91AB (effect of visa cap)” after “on visas)” in subsection 63(1) of Division 3 of Part 2 of the Act.

15. Subsection 63(1) currently provides that subject to a number of provisions, including section 39 (criterion limiting number of visas), the Minister may grant or refuse to grant a visa at any time after the application has been made.

16. The purpose of this item is to insert a reference to new section 91AB (effect of visa cap) which is inserted by item 8 of this Schedule and, together with new section 91AA inserted by the same item, replaces section 39 of the Act. The effect of this item is that new section 91AB of the Act limits the ability of the Minister to grant or refuse to grant a visa at any time after the application has been made.

Item 6 Subsection 82(9)

17. This item inserts “91AC,” after “sections” in subsection 82(9) of Division 3 of Part 2 of the Act.

18. Section 82 provides the circumstances in which visas cease to be in effect. Subsection 82(9) currently provides that section 82 does not affect the operation of other provisions of the Act under which a visa ceases to be in effect.

19. The purpose of this item is to add new section 91AC, which is inserted by item 8 of this Schedule, as an example of a section which is not affected by section 82. New section 91AC provides broadly for the ceasing of a bridging visa or a temporary visa where the person’s application for a visa is taken not to have been made because they had applied for a visa of a class that has been capped.

Item 7 Paragraph 86(a)

20. This item inserts “under section 85” after “determination” in paragraph 86(a) of Division 3 of Part 2 of the Act.

21. Section 86 currently provides that if there is a determination of the maximum number of visas of a class or classes that may be granted in a financial year, and the number of visas of the class or classes granted in the year reaches that maximum number, no more visas of the class or classes may be granted in the year. Section 86, together with section 85 of the Act, provides for the number of visas of a specified class or classes that may be granted in a financial year to be capped, with outstanding applications queued until the next financial year.

22. The purpose of this amendment is to clarify that section 86 relates only to a determination made under section 85 of the Act. It does not apply to a determination made under new section 91AA of the Act, which is inserted by item 8 of this Schedule.

Item 8 After Subdivision AH of Division 3 of Part 2

23. This item inserts new Subdivision AHA “Visa capping” after Subdivision AH of Division 3 of Part 2 of the Act.

24. The purpose of new Subdivision AHA is to allow for the Minister to cap the number of visas of a specified class or specified classes that may be granted in a financial year to a specified class or specified classes of applicants, with the consequence that outstanding applications made by applicants who are affected by the cap are taken not to have been made. In addition, certain bridging visas and temporary visas held by those applicants would cease to be in effect.

25. New Subdivision AHA includes new sections 91AA, 91AB and 91AC.

Section 91AA – Capping the number of visas that may be granted in a financial year

26. New section 91AA introduces the power for the Minister to cap the number of visas that may be granted in a financial year.

27. New subsection 91AA(1) provides that the Minister may, by legislative instrument, determine the maximum number of visas of a specified class or specified classes that may be granted in a specified financial year to applicants who are included in a specified class, or specified classes, of applicants.

28. New subsection 91AA(2) provides that new subsection 91AA(1) does not apply to protection visas.

29. New section 91AA, together with new section 91AB, replaces subsection 39(1) of the Act, which is repealed by item 1 of this Schedule. New section 91AA differs from current subsection 39(1) of the Act in that it allows the Minister to cap the number of visas that may be granted in a financial year by reference both to the class or classes of visas and the class or classes of applicants. Current subsection 39(1) of the Act

only allows the Minister to cap the number of visas that may be granted in a financial year by reference to the class of visa.

30. The intention of new section 91AA is that the Minister may cap the number of visas of a particular visa class, a visa subclass, or a stream within a visa subclass, that may be granted in a financial year. The Minister may, by legislative instrument, determine that the cap applies only to applicants with certain characteristics, or whose application has certain characteristics. These characteristics may include, but are not limited to, the occupation nominated by the applicant who seeks to satisfy the primary criteria for the grant of the visa, or the date of the application (which may include a date in the past). The characteristics will be objective and will relate to information that is provided to the Department when an application for a visa is made.

31. It is intended that the Minister may use a combination of characteristics when setting the maximum number of visas that may be granted in a financial year. For example, the Minister may determine the maximum number of visas of a certain class that may be granted in a financial year on the basis of the skilled occupation nominated by the applicant, the period during which the applicant made the application, and the subclass for which the applicant is seeking to satisfy the primary criteria.

32. The purpose of this provision, together with new section 91AB, is to provide maximum flexibility to enable the government to effectively target and manage the migration program.

33. Both current subsection 39(1) and new subsection 91AA(2) provide that the Minister cannot cap the number of protection visas that may be granted in a financial year.

Section 91AB – Effect of visa cap

34. New section 91AB provides for the effect of a visa cap where a determination has been made under new section 91AA.

35. New section 91AB, together with new section 91AA, replaces subsection 39(1) of the Act, which is repealed by item 1 of this Schedule. New section 91AB differs from current subsection 39(1) of the Act in that it prevents the grant of a visa if the Minister determines, by legislative instrument, the maximum number of visas of a specified class or classes that may be granted in a financial year to particular applicants. By contrast, current subsection 39(1) of the Act does not prevent the grant of a visa unless a criterion relating to the maximum number of visas that may be granted is prescribed in the regulations for that visa.

36. New subsection 91AB(1) provides that section 91AB applies if:

- a determination has been made under new section 91AA of the maximum number of visas of a particular class (the “capped visa”) that may be granted in a financial year to applicants (the “affected applicants”) who are included in a specified class, or specified classes, of applicants; and

- the number of capped visas that have been granted in the financial year to affected applicants reaches that maximum number.

37. New subsection 91AB(2) provides that no more capped visas may be granted in the financial year to an “affected applicant” or to any person who applied for the capped visa on the ground that the person is a member of the family unit of an “affected applicant”.

38. New subsection 91AB(2) also ensures that applications for a class of visa that have been capped are only prevented if they are made by an “affected applicant”, or a person who applies for the visa on the ground that they are the member of the family unit of an “affected applicant”.

39. The intention is that new subsection 91AB(2) will prevent the grant of a visa to an applicant only if:

- the applicant is an “affected applicant” or a person who has applied for the visa on the ground that they are the member of the family unit of an “affected applicant”; and
- the applicant can satisfy the criteria for the visa only on the basis of the capped visa class, subclass, or stream within that subclass (where the cap is imposed in relation to a visa subclass or stream rather than the visa class).

40. New subsection 91AB(3) provides that any outstanding applications for a capped visa made by an “affected applicant”, or any person who applied for the capped visa on the ground that the person is a member of the family unit of an “affected applicant”, are taken not to have been made.

41. New subsection 91AB(3) replaces part of current subsection 39(2) of the Act, which is repealed by item 1 of this Schedule. New subsection 91AB(3) is substantially the same as current subsection 39(2), except that it ensures that outstanding applications for a class of visa that has been capped are taken not to have been made only if made by an “affected applicant”, or a person who applies for a visa on the ground that they are the member of the family unit of an “affected applicant”.

42. A person who applies for a visa on the ground that they are the member of the family unit of a person seeking to satisfy the primary criteria for a visa (the “primary applicant”) cannot be granted a visa unless the primary applicant is granted the visa. Therefore, the intention is that where an application made by an “affected applicant” is taken not to have been made, any application made by a person who applied for the same visa on the ground that they are the member of the family unit of the “affected applicant” is also taken not to have been made. This is the case regardless of whether the application is made by the member of the family unit at the same time as the “affected applicant”, or at a later point in time. This avoids the need to refuse the application made by the member of the family unit, which would not be appropriate.

43. New subsection 91AB(4) provides that no more applications for a capped visa may be made in the financial year by:

- a person who would be included in the specified class, or specified classes, of applicants if the person were an applicant for the capped visa; or
- a person who applies for the capped visa on the ground that the person is a member of the family unit of such a person.

44. The purpose of this provision is to prevent applications that would be futile because the maximum number of visas of a certain class granted to applicants with certain characteristics has already been reached in the financial year. It would be illogical to allow a person to make a valid application for a visa (including paying the relevant visa application charge) in that financial year in those circumstances.

45. New subsection 91AB(5) provides that new section 91AB does not prevent the grant of a capped visa to a person who applies for the visa on the ground that the person is a member of the family unit of the holder of a capped visa.

46. The purpose of this provision is to ensure that, if the primary applicant has been granted a capped visa, any person who applies for the same visa on the ground that they are the member of the family unit of the primary applicant may also be granted the visa, regardless of the cap. 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.

Section 91AC – Consequences if a person’s visa application is taken not to have been made

47. New section 91AC provides for the consequences if a person’s visa application is taken not to have been made under new subsection 91AB(3) of the Act.

48. New subsection 91AC(1) provides that section 91AC applies if a person’s application for a visa (the “capped visa”) is taken not to have been made under new subsection 91AB(3).

49. New subsection 91AC(2) provides that if the person holds a bridging visa because the person had applied for the capped visa, the bridging visa ceases to be in effect 28 days, or such longer period prescribed by the regulations, after:

- if the regulations prescribe an event for the purposes of paragraph 91AC(2)(a) – the day on which the event occurs; or
- otherwise – the day on which the person is notified that the person’s application is taken not to have been made.

50. The purpose of this provision is to ensure that a bridging visa that has been granted to provide lawful status to a person who has applied for a substantive visa, will cease to be in effect if the person’s substantive visa application is taken not to have been made because a cap has been imposed. This provision is necessary because

there is currently no provision in the Act or the *Migration Regulations 1994* (the Regulations) which provides for a bridging visa to cease to be in effect when an application is taken not to have been made. It is not possible to amend the Regulations to include a further ceasing event for a bridging visa that has already been granted.

51. The 28 day period for ceasing a bridging visa is consistent with the timeframe in relation to existing bridging visa ceasing events (the majority of which are set out in the Regulations). However, flexibility is retained to prescribe a longer period of time, or different ceasing event, in the Regulations if appropriate in the future, for example, to maintain consistency across the bridging visa regime if the Regulations are amended to provide for a different timeframe for existing bridging visa ceasing events.

52. New subsection 91AC(3) provides that if:

- the person holds a temporary visa; and
- assuming that the application for the capped visa had been decided, the temporary visa would, apart from this subsection, have ceased to be in effect when the person was notified of that decision;

the temporary visa ceases to be in effect 28 days, or such longer period prescribed by the regulations, after:

- if the regulations prescribe an event for the purposes of paragraph 91AC(3)(c) – the day on which the event occurs; or
- otherwise – the day on which the person is notified that the person’s application is taken not to have been made.

53. The purpose of this provision is to ensure that a temporary visa that has been granted to the applicant while their permanent visa application is being processed, will cease to be in effect if the person’s permanent visa application is taken not to have been made because a cap has been imposed. This will only apply in relation to a temporary visa that has a ceasing event linked to the grant or refusal of the permanent visa application. This provision is necessary because there is currently no provision in the Act or the Regulations which provides for such a temporary visa to cease to be in effect when an application for the linked permanent visa is taken not to have been made. It is not possible to amend the Regulations to include a further ceasing event for a temporary visa that has already been granted.

54. The 28 day period for ceasing such a temporary visa is consistent with the timeframe for similar situations such as the ceasing of bridging visas. However, flexibility is retained to prescribe a longer period of time, or different ceasing event, in the Regulations if appropriate in the future.

Item 9 Application – subsections 91AC(2) and (3) of the *Migration Act 1958*

55. This item provides for the application of subsections 91AC(2) and 91AC(3) of the Act as inserted by this Schedule.

56. Subitem 9(1) provides that subsection 91AC(2) of the Act, as inserted by this Schedule, applies in relation to a bridging visa that was granted before or after the commencement of this item.

57. This application provision ensures that new subsection 91AC(2), which provides for a bridging visa to cease to be in effect a certain period of time after an application for a substantive visa is taken not to have been made, applies to bridging visas granted before or after the commencement of this item. The reason for applying the provision to bridging visas granted before commencement is to 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. This is contrary to the purpose of a bridging visa, which is to provide lawful status to a person while they await the outcome of a substantive visa application.

58. Subitem 9(2) provides that subsection 91AC(3) of the Act, as inserted by this Schedule, applies in relation to a temporary visa that was granted before or after the commencement of this item.

59. This application provision ensures that new subsection 91AC(3), which provides for certain temporary visas to cease to be in effect a certain period of time after an application for a linked permanent visa is taken not to have been made, applies to temporary visas granted before or after the commencement of this item. The reason for applying the provision to temporary visas granted before commencement is to avoid a situation where a temporary visa granted in relation to a permanent visa application that is taken not to have been made, never ceases to be in effect. This is contrary to the purpose of such a temporary visa, which is to provide a basis for the person to stay in Australia on that visa only while they await the outcome of a substantive visa application.