3

Multiple parties – 'class actions' (section 486B)

The concept

3.1 The *Explanatory Memorandum* indicates that the proposed section 486B

> …bars class, representative or otherwise grouped court actions.[1]

3.2 Grouped actions, in which the outcome affects all those who have elected to be associated with it, include:

- *class action,* which allows

  > …the claims of many individuals against the same defendant, which arise out of the same or similar circumstances, to be conducted by a single representative.[2]

- *representative* action, where

  > …numerous parties to a court proceeding who have the same interest in the proceedings are represented by one of the parties.[3]

- *test case*[4], which is one

  > …selected from a number of similar ones to be tried first, with all persons involved in the other cases agreeing to be bound by the decision.[5]

---

1 *Explanatory Memorandum*, p. 5.

2 Butterworths *Australian Legal Dictionary*, Sydney, 1997, p. 198.

3 Butterworths *Australian Legal Dictionary*, Sydney, 1997, p. 1013.

4 The Committee was advised by the Law Council of Australia that one case (*Lay Kon Tji*), described as a "test case", was a representative action. LCA, Evidence, p. 115.

5 Butterworths, *Australian Legal Dictionary*, Sydney, 1997, p. 1162.

3.3 DIMA advised the Committee that the term "class action" was used

> …to refer to any grouped court actions, however the members may be grouped or joined.[6]

3.4 The Committee was concerned that the Bill specifically referred to "representative or class actions".[7] To the Committee this indicated that, although "class action" may be used generically, it has a legal meaning separate from representative action.

3.5 The Committee noted that in two separate Federal Court judgements, one cited a case as a *representative action*, and the other characterised the same case as a *class action*.[8]

3.6 In view of this, and the Committee's inability to obtain a clear explanation of how the two concepts differed, it has taken the two terms, class and representative actions, to mean the same, with test cases having a distinct and separate meaning.

Background

3.7 The Minister's speech for the second reading of the Bill implied that the way in which class actions were being used by litigants was an abuse of the migration appeal process:

> Class actions have been taken out allowing significant numbers of people to obtain bridging visas to remain in Australia until the courts determined the matter. All 10 of the class actions decided so far…have been dismissed by the courts.[9]

Proposed provisions

3.8 The proposed new sections 486B and 486C of the Act concern multiple parties in migration litigation. The proposed section 486B would not permit:

> joinder of plaintiffs or applicants;

6 DIMA, Submission, p. 48.

7 Para 486B(1)(c).

8 Commonwealth Case Law, (www.scaleplus.law.gov.au); *Siahaan* (1998) and *Fachruddin* (2000), respectively, citing *Kagi v Minister for Immigration and Multicultural Affairs.*

9 Hon P Ruddock MP, Minister for Immigration and Multicultural Affairs, Migration Legislation Amendment Bill (No. 2) 2000, Second Reading Speech, 14 March 2000, *Debates*, p. 14268.

consolidation of the proceedings with any other proceedings;

representative or class actions;

a person in any way being party to the proceeding jointly with, or on behalf of, for the benefit of, or representing, one or more persons, however this is described.[10]

in either the High Court or the Federal Court.

3.9 These changes aim to exclude class and representative actions and prevent the creation of grouped actions.

3.10 Exceptions to the proposed new provisions would be:

- members of the same family (if the regulations provide a definition for the purposes of the paragraph);
- a person performing statutory functions;
- Attorneys-General of the Commonwealth, State, or Territory; and
- any other person described in the regulations.[11]

Arguments for the Bill

3.11 DIMA advanced a number of reasons for restricting access to class actions:

- test cases are better suited to deal with migration decisions which have a common issue in law;[12]
- class actions are inappropriate in migration matters because the court's decision on the issue common to the cases does not resolve the particulars of each case, which must be considered individually;[13]
- class actions are inappropriate in the Federal Court in migration matters because of a tension between the provisions of Part IVA of the *Federal Court Act 1976*, (under which individuals do not have to individually nominate to join a representative action),[14] and the practical requirement that they have to identify themselves in order to obtain a bridging visa;[15]

---

10 Proposed subsection 486B (1)

11 Proposed subsection 486B (4)

12 DIMA, Submission, p. 216.

13 DIMA, Submission, p. 212; Evidence, p. 170, cite the 1993 *Zhang De Yong* case as an example.

14 Section 33 states that the consent of a person to be a group member in a representative proceeding is not generally required.

15 DIMA, Submission, pp. 210-211.

- class actions create specific administrative problems, in particular DIMA encounters problems ascertaining whether or not each member of a class action is in possession of a bridging visa;[16]
- persons are included in class actions who would gain no benefit from a positive outcome;
- people can join class actions despite not having made applications to the Federal Court in relation to their own visa decision within the allowed time (97 per cent in one case);[17]
- appeals have been lodged without the applicant being aware that their name had been added to the class action;[18]
- successive governments, Coalition and Labor, have been concerned about the increasing workload in the Federal Court in the migration jurisdiction[19] and class actions are being used in the migration jurisdiction in numbers not seen before, rising from 401 in 1994/95 to 1139 in 1998/99;[20]
- a significant proportion (in excess of 20 per cent and possibly 40 per cent in one action) of members of class actions move from class action to class action;[21] and
- the fact that participants in class actions are entitled to a bridging visa entitling them to remain in Australia legally is used to encourage people to litigate, eg an advertisement submitted by DIMA announced:

> you may be able to join our class actions… It doesn't matter if you are illegal or that your Ministerial Review has been rejected… You may still qualify for a Bridging Visa and become legal.[22]

3.12 Submissions from Mr Bullen and Mr Dorricott, both given in a private capacity, similarly claimed delay of removal was the motivation for court action.[23]

16 DIMA, Submission, p. 52.

17 In one case one quarter had their last visa decision 3 years prior to joining the class action: DIMA, Submission, pp. 53-54, Evidence, pp. 16-18.

18 DIMA, Submission, p. 52.

19 DIMA, Evidence, p. 14, referring *inter alia* to: Joint Standing Committee on Migration Regulations, *Australia's Refugee and Humanitarian System*, 1992, p. 54; Joint Standing Committee on Migration, *Asylum, Border Control and Detention*, 1994, p. 104.

20 DIMA, Submission, p. 47.

21 DIMA, Evidence, p. 3.

22 DIMA, Submission, pp. 49, 59-61, 66; Evidence, p. 5.

23 Bullen, Submission, p. 2; Dorricott, Submission, p. 5.

Potential benefits of the proposed section 486B

3.13 The key benefit which DIMA expected to flow from restricting access to class actions was that it would remove an abuse of judicial review arrangements by stopping:

> …the use of a ***process*** that is being used merely to extend a person's stay in Australia for lengthy periods of time.[24]

3.14 Limitation of access to class actions, DIMA asserted, might bring "substantial savings" to the Commonwealth because:

- litigation in class actions was lengthy, complex, and therefore expensive (currently the average litigation cost of a class action was $77,000 compared with $10,000 for an individual action);[25]
- there would be less litigation; and
- there would be a reduction in costs currently incurred to establish the migration status details of those who are parties to class actions.[26]

3.15 DIMA, however, observed that cost was not a significant motivating factor.[27]

3.16 DIMA also claimed that test cases were a more efficient use of the courts to decide specific issues. The average time for such a case was about five months compared with 18 months for a class action, and the outcome enabled speedy resolution of other similar cases.[28]

Opposition to the proposed section 486B

3.17 Arguments against the proposed restriction on multiple parties in migration litigation matters focussed on:

- **Flaws in the concept -**
  - ⇒ interference with judicial review;
  - ⇒ conflict with international obligations; and
  - ⇒ lack of conclusive proof of abuse of process.

---

24 DIMA, Submission, p. 209 (emphasis added).

25 DIMA, Submission, p. 218; DIMA, Evidence, p. 188 indicates this includes barristers' and solicitors' fees and the litigation area within DIMA.

26 DIMA, Evidence, pp. 7-8.

27 DIMA, Evidence, p. 178.

28 DIMA, Evidence, pp. 6-7, 16.

- **Flaws in the proposed section -**
  - ⇒ questionable effectiveness;
  - ⇒ unintended consequences; and
  - ⇒ retrospectivity.
- **Implications of the section for -**
  - ⇒ efficiency of the courts;
  - ⇒ affordability of judicial review;
  - ⇒ monitoring the review process;
  - ⇒ Commonwealth costs; and
  - ⇒ equity.

Claimed flaws in the concept

Interference with judicial review

3.18 The Immigration Advice and Rights Centre (IARC) pointed out that, at Federal Court level, procedures for class actions generally were introduced relatively recently (1992) in response to the recommendations of the Australian Law Reform Commission. In view of this, and the Parliament's previous legislation to improve judicial processes, IARC urged that the Parliament should be satisfied that there are sound reasons for reversing existing arrangements which permit class actions in the migration jurisdiction.[29]

3.19 According to the ICJ, the limitations in the proposed subsection 486B(1) could, as written, intrude into the judicial area, because:

> …when other parties were added by the direction of the court, those other parties were said to be added to the proceedings rather than joined…in [some] legislation…the word 'joinder' is used to cover …'addition of parties'. So …paragraph (a) of subsection 1 of clause 486B could be construed as prohibiting the court itself from joining parties once proceedings had started.[30]

3.20 This would prevent the courts from using their established practice of adding parties to proceedings once they have begun, if they felt that this would permit efficient use of judicial resources. The effect, therefore, of section 486B would be to prevent the courts from creating a class action where they felt one was appropriate.[31]

29 IARC, Submission, pp. 104-106.

30 ICJ, Evidence, p. 44.

31 ICJ, Evidence, p. 45.

3.21 The Committee noted that this effect was consistent with the overall aim of the section to bar class, representative or otherwise grouped actions in both High Court and Federal Court proceedings. Further, although the court could not create class actions, it was still open to consider test cases representing individual applications with a common issue of law.

Conflict with international obligations

3.22 More broadly, submissions from Amnesty, LCA, NCCA, and RCA argued that asylum seekers and refugees should have free access to the courts under Article 16 of the 1951 Convention relating to the Status of Refugees.[32] LCA and NCCA also claimed that under the ICCPR all people should be equal before the courts.[33] Further, Amnesty, NCCA, and RCA argue that the Bill's intention to remove one avenue of appeal to the courts runs counter to the ICCPR provisions by treating asylum seekers and refugees differently from other persons.[34]

3.23 The Committee, however, noted that:

- according to HREOC, there is no direct right to class action of itself in the international agreements;[35]
- the ICCPR indicates that one level of judicial review must be available, and Australia has multiple levels;
- fewer than half those in class actions were seeking protection visas as refugees; and
- those seeking review could still apply individually.[36]

3.24 The Committee also noted DIMA's claim that advice from the Attorney-General indicated that the Bill did not break any conventions, but the Committee did not sight this opinion.[37] The Committee did however sight advice provided to DIMA by the Chief General Counsel of the Australian Government Solicitor.[38]

3.25 The Committee considered that the arguments using international agreements as reasons for not restricting class actions were not sufficient by themselves to warrant rejection of the proposed section.

---

32 Amnesty, Submission, p. 23; LCA, Submission, p. 79; NCCA, Submission, p. 111; RCA, Submission, p. 132.

33 LCA, Submission, p. 79; NCCA, Submission, p. 111.

34 Amnesty, Submission, p. 23; NCCA, Submission, p. 111; RCA, Submission, p. 132.

35 HREOC, Evidence, p. 30.

36 DIMA, Evidence, p. 8.

37 DIMA, Evidence, p. 8.

38 DIMA, Submission, pp. 237-238.

Lack of conclusive proof of abuse of process

3.26 A number of submissions challenged the central justification for limiting access to class action; ie that the process was being used merely to extend a person's stay in Australia for lengthy periods of time.

Class actions are not, of themselves, abuse of process

3.27 Submissions from LCA and IARC disputed the implication that the dismissal of class actions by the court meant that the actions were an abuse of process or lacked merit.[39] LCA pointed out that, even where the legal challenge had failed, the courts had conceded the significance of the issues raised.[40]

3.28 LCA, NCCA, and RCA rejected the Government's claim that since October 1997:

> …all 10 of the class actions decided so far – involving about 4000 participants – have been dismissed by the courts.[41]

3.29 They pointed out that the class action *Fazal Din*, begun in February 1997,[42] was upheld by the Federal Court in August 1998.[43] LCA also identified *Lay Kon Tji* as a representative action upheld by the Federal Court.[44]

3.30 The *Fazal Din* case was a Federal Court class action filed in February 1997 disputing whether or not the Special Test of English Proficiency (STEP Test) was properly nominated by the Minister. On 14 August 1998 the Court found that the STEP test had not been properly nominated by the Minister and the class members were allowed to sit an additional English test and have their 816 visa decision reviewed. The class involved 16 members and a further 5 individual Federal Court applications on this issue were set aside by consent.[45]

3.31 The *Lay Kon Tji* case was based on an issue of dispute over whether or not Mr Lay, an East Timorese national, had 'effective nationality' in Portugal (if he did he was not owed protection obligations under the Refugees

---

39 LCA, Submission, p. 76; IARC, Submission, p. 106.

40 LCA, Submission, p. 76.

41 Hon P Ruddock MP, Minister for Immigration and Multicultural Affairs, Migration Legislation Amendment Bill (No. 2) 2000, Second Reading Speech, 14 March 2000, *Debates*, p. 14268.

42 DIMA, Submission, p. 50.

43 NCCA, Submission, p. 115; RCA, Submission, p. 133. LCA, Evidence, p. 119 corrects its Submission (pp. 75, 82) that *Fazal Din* was a "representative" action. DIMA, Submission, p. 53, views it as a class action.

44 LCA, Evidence, p. 119. DIMA, Submission, p. 216, regards *Lay Kon Tji* as an individual test case.

45 DIMA, Submission, p. 222.

Convention). The Chief General Counsel advised that this case was a suitable vehicle for testing further issues associated with this question. In each of the other 28 similar cases, the court, the applicant and the Minister agreed that the cases should be adjourned pending the outcome of *Lay Kon Tji*.[46]

3.32 Mr Lay was successful in the Federal Court and the Minister then appealed to the full Federal Court. However, in November 1999, the Minister agreed to discontinue the appeal due to developments in East Timor. Mr Lay's case was remitted to the RRT.[47]

3.33 The Committee considered that some genuine issues may have been raised in class actions that were unsuccessful, but questioned whether this constituted sufficient justification for continuing to permit access to such broad actions where applicants received no direct benefit.

3.34 The Committee also considered that migration class actions were not, of themselves, an abuse of process. However, the Committee considered that the process itself could be subject to abuse.

Litigants are not necessarily abusing the process

3.35 Some submissions conceded that there might have been some apparent abuse of process by litigants in some class actions. However, they argued that the evidence was equivocal.

3.36 NCCA argued that unmeritorious claims might be evidence of the applicants' lack of competent legal advice, rather than their intention to exploit the review process.[48]

3.37 RILC advised the Committee that cases may be driven by the actions of the service providers, rather than by initiatives of the applicants themselves, eg the migration agents or solicitors may encourage applicants to 'buy' time.[49]

3.38 DIMA's investigations indicated that some individuals were unaware of the process in which they had become participants, and it was unclear what advice they had been given.[50]

3.39 The Committee considered that some individuals wanted to remain in Australia and subsequently joined a class action without necessarily

46 DIMA, Submission, p. 278. According to LCA, however, (Evidence, p. 115) the case "has been looked upon as a representative action. You can call it a test case or whatever you like, but it is a representative action".

47 DIMA, Submission, p. 278.

48 NCCA, Submission, p. 116.

49 RILC, Submission, pp. 40-41.

50 DIMA, Evidence, p. 185.

understanding whether or not it was relevant to their situation, or whether its outcome could benefit them. The Committee believed that this constituted an unwitting abuse of the process by the litigants.

Soliciting participation is not an abuse

3.40 In the case of advertisements encouraging individuals to join class actions[51] the Committee was advised by RCA, Migration Agents Registration Authority (MARA), and NCCA that advertising the existence of class actions assists with ensuring access to justice by providing information of possible relevance to individuals.[52] In addition RCA informed the Committee that:

- the advertisements may be ordered by the courts;[53]and
- it was arguable that the invitation to participate in a class action and consequently receive a bridging visa assisted DIMA in locating persons illegally in the community.[54]

3.41 The Committee's view was that the courts were unlikely to order the type of advertisements which had been drawn to its attention. DIMA generally knew the identity of persons in the country without appropriate authority, and the legal process was not likely to reveal their addresses. Whether or not DIMA might benefit was questionable and could be considered a by-product of the process, not its core rationale.

3.42 The Committee examined advertising which promised, for example, that:

> You still may qualify for a Bridging Visa and become legal;[55] or
>
> Permanent Residence – Australia…Our latest action is easy to join (over 1,200 people have already joined!).[56]

3.43 The Committee was also shown a letter advising the client of an immigration adviser that:

> Your class action has now finished. By law you should depart Australia within 28 days, or else compliance action may take place.
>
> However, you might be able to immediately qualify for our new class action, and to obtain a further Bridging Visa.
>
> It is very easy to join![57]

51 Advertisements are at DIMA, Submission, pp. 59-61, 67.
52 RCA, Evidence, p. 48; NCCA, Evidence, p. 64; MARA, Evidence, p. 135.
53 RCA, Evidence, p. 54.
54 RCA, Evidence, pp. 54-55.
55 DIMA, Submission, p. 59.
56 DIMA, Submission, p. 67.
57 DIMA, Submission, p. 66.

3.44 Clearly the aim of such invitations was to encourage individuals to approach the promoter. Some applicants would be motivated by the apparent promise of at least short-term legal residence in Australia through a bridging visa.

3.45 It was also possible that some, convinced that they had a right to remain in Australia, could be included in a class action which might not have any potential to benefit them in the long term. As the Committee noted previously, this could promote unwitting abuse of the process by the litigants.

3.46 DIMA claimed that the majority of participants in class actions were indeed using class actions solely to delay removal from Australia.

3.47 DIMA's chief evidence was that many participants in class actions:

- would not benefit from the positive outcome of the class action;[58]
- had not sought to challenge decisions within the permitted time;[59] and
- moved between class actions.[60]

3.48 The Committee accepted that it was not possible to estimate the numbers whose motivation for joining a class action was merely to gain a bridging visa. However, the Committee noted that the possible 18 month duration of a class action, compared with approximately five months for an individual Federal Court action,[61] offered a considerable attraction to those wishing to prolong their stay in Australia.

3.49 Overall, the Committee concluded that, although not quantifiable, there was abuse of the class action process and that this abuse should be addressed.

Unwitting inclusion in class actions

3.50 DIMA's concern that individuals had been included in class actions without their knowledge[62] was addressed by LCA and MARA, who pointed out that this could occur legitimately.[63] Under Part IVA of the *Federal Court Act 1976*, individuals do not have to elect to join a representative action.[64]

---

58 DIMA, Submission, p. 53.

59 DIMA, Submission, pp. 53-54, 209-210.

60 DIMA, Submission, p. 54.

61 DIMA, Evidence, p. 16.

62 DIMA, Submission, p. 52.

63 LCA, Evidence, p. 127; MARA, Evidence, p. 149.

64 Section 33 states that [subsection 1] the consent of a person to be a group member in a representative proceeding is not required unless subsection (2) applies to the person, and

3.51 The Committee agreed that the inclusion of persons in proceedings without their knowledge was an outcome of a specific provision of the law.

Claimed flaws in the proposed section

Questionable effectiveness

3.52 Submissions from LCA and RCA queried whether the proposed restriction on multiple parties in migration litigation was an appropriate response to the perceived problem. It was argued that even without access to class actions, individuals could still initiate proceedings, qualify for a bridging visa and remain in Australia. As such, the proposed restriction was not a remedy.[65]

3.53 The Committee believed that this argument neglected to give sufficient weight to the fact that class and representative actions enabled individuals to engage in litigation to qualify for a bridging visa, even when the outcome could not affect them.

3.54 Further, the Committee noted that the ability of litigants to move from one class action to another provided them with the opportunity to gain access to a sequence of associated bridging visas. The Committee considered that this opportunity was less likely to be available in the case of individual actions, where all the applicant's claims might be tested at once, and their case finalised.

Unintended consequences

3.55 The LCA claimed that section 486B is poorly drafted and, in attempting to exclude class actions in the migration area, has the potential to exclude multiple party proceedings other than migration matters (including human rights of detainees, social security matters and criminal law matters).[66]

3.56 LCA also claimed that 486B(1)(d) could preclude test cases. It argued that:

[subsection 2] None of the following persons is a group member in a representative proceeding unless the person gives written consent to being so: (a) the Commonwealth, a State or a Territory; (b) a Minister or a Minister of a State or Territory; (c) a body corporate established for a public purpose by a law of the Commonwealth, of a State or of a Territory, other than an incorporated company or association; or (d) an officer of the Commonwealth, of a State or of a Territory, in his or her capacity as such an officer.

65 LCA, Submission, p. 78; RCA, Submission, p. 133.

66 LCA, Submission, p. 82.

> subsection (1)(d) talks about a person in any other way being a party to the proceeding jointly with, or on behalf of, or for the benefit of, or representing one or more other persons, however this is described. Our submission is that that is way broader than the definitions in the Federal Court rules, for example, of class actions representing. And that is a provision that would well and truly touch a case like Lay [Kon Tji]. It would touch any test case, in the breadth with which it is currently drawn.[67]

3.57 The Committee considered that the question of the status of test cases under the proposed section was significant in view of DIMA's stated position that:

> …migration decisions can be adequately dealt with by way of a test case;[68] and
>
> Test cases will, of course, remain possible if the bill is passed.[69]

3.58 The Committee noted that if class and representative proceedings were to be excluded in the migration area then there would need to be further reassurance that test cases would not be excluded by this legislation.

Retrospectivity

3.59 LCA and the Australian Catholic Bishops Conference (ACBC) expressed concern about the intention to apply the limitation on class actions from 14 March 2000,[70] and the practical implications of that action for the ability to offer sound legal advice.[71]

3.60 The Committee accepted that a cut-off date is necessary to avoid the initiation of more class actions in reaction to the Bill's proposals. Different categories of claimant were an inevitable and predicted outcome, recognised in the Bill's provision for the application of amendments and its transitional provisions.[72]

---

67 LCA, Evidence, p. 116.

68 DIMA, Submission, p. 216.

69 DIMA, Evidence, p. 163.

70 LCA, Submission, p. 83; ACBC, Submission, p. 146.

71 LCA, Submission, p. 83.

72 Migration Legislation Amendment Bill (No. 2) 2000, Schedule 1, Part 2, Items 7-11.

Implications of the section

Efficiency of the courts

3.61 The Ethnic Communities Council of NSW (ECC), RILC, LCA, IARC, NCCA, Mr Bliss, and RCA argued that class actions constituted an efficient use of the courts for judicial review. The court, instead of deliberating on a series of individual cases, is required to consider only one.[73]

3.62 Submissions by IARC, Mr Bliss, RCA, ACBC, and RILC, claimed that restriction of access to class actions would have a negative effect on the court system. They argued that this would occur because the number of cases coming before the courts would proliferate as people previously able to pursue a class action applied for hearings of their individual cases.[74]

3.63 A related claim by NCCA was that the predicted increased costs of pursuing an individual case would mean that individuals would appear before the court possibly poorly advised and/or unrepresented, which would further tie up court resources.[75]

3.64 DIMA argued that in the two cases it had analysed, *Muin* and *Lie,* only one in ten of those listed in the class action had initiated individual actions prior to joining the action.[76] This information suggested that fewer individuals were inclined (for whatever reason) to take individual actions than to pursue class actions.

3.65 The Committee considered that the evidence, although not exhaustive, indicated that individual actions were not pursued because:

- applicants, for whatever reason, had not appealed within the 28-day time period for individual applications; and/or
- applicants lacked grounds, or 'standing', on which to lodge an appeal for judicial review.

3.66 The Committee received evidence from DIMA that most applicants for class actions had already exceeded the time during which they could have appealed as individuals.

---

73 ECC, Submission, p. 28; RILC, Submission, p. 39; LCA, Submission, pp. 77, 81; IARC, Submission, p. 106; NCCA, Submission, p. 114; Bliss, Submission, p. 130; RCA, Submission, p. 132.

74 IARC, Submission, p. 106; Bliss, Submission, p. 130; RCA, Submission, pp. 132-133; ACBC, Submission, p. 146; RILC, Evidence, pp. 30, 37.

75 NCCA, Submission, p. 114, cites Justices Wilcox and Madgwick on the costs of responding to "hopeless cases" and paying judges to decide them.

76 DIMA, Submission, p. 210.

3.67 DIMA's examination of migration matters before the High Court, lodged under original jurisdiction, revealed that 90 per cent of applications were made more than 35 days after the decision being challenged.[77]

3.68 However, the Committee considered that such delays in applying to the High Court reflected the current absence of time limits. The evidence of current delays was not proof that, in future, applicants would be unable to make their appeals within the proposed fixed timeframe.

3.69 In addition, the Committee noted the argument that, because under proposed section 486C they might not have grounds to pursue a case, fewer individuals would initiate individual actions than would have participated in class actions.

3.70 DIMA noted that 11 of the 27 class members initially in the *Fazal Din* action were excluded because they would not benefit from the outcome.[78]

3.71 Issues arising from changes in 'standing' under proposed section 486C of the Bill are discussed in Chapter 4 of this report.

3.72 The Committee viewed the evidence advanced concerning the potential effect of the Bill on the courts as equivocal. It was not proven that the elimination of class actions would lead to the increased demand on court resources which was predicted in some evidence.

3.73 The Committee concluded that the court's administrative caseload could increase because applicants who might previously have been covered by a single class action would now put in individual applications.

3.74 However, the Committee considered that the possible increase in applications would not necessarily significantly increase the number of court hearings. This was because, where multiple applications existed concerning a common issue of law, the hearing of all other applications could be stalled pending the outcome of a test case. Such test cases could permit similar efficiencies in judicial review as were claimed for class actions.

Affordability of judicial review

3.75 A key advantage of class actions cited by HREOC, ECC, RILC, LCA, IARC, and the Fijian-Australian Resource Centre (FAR) was that they reduced the cost to individuals of litigation. Consequently, this opened

77 DIMA, Submission, pp. 209-210 cites specific cases and the overall proportion.

78 DIMA, Submission, p. 53. 1 had not applied for the visa class at issue; 1 had applied but withdrawn his IRT application; 3 had not applied to the IRT for a review of the decision; 4 had not applied for judicial review within 28 days, and 2 had yet to receive a decision for merits review. As these people fell outside of the group affected by the outcome, the court reduced the number of people included in the class action to 16.

up judicial review to more people than would otherwise be able to access it.[79]

3.76 DIMA stated that the Department could not provide information on the costs to an applicant, as costs vary from case to case, depending on the level of representation, complexity, number of hearings and the number of levels of appeal. An applicant's costs will also depend largely on the fees negotiated with the applicant's representative.[80]

3.77 The ECC and LCA pointed out that affordable access to judicial review had become more important since the virtual abolition of legal aid for migration litigation in 1998.[81]

3.78 DIMA confirmed that:

> The Government's changes mean that legal aid is no longer widely available for migration matters… consistent with the Government's policy objective of limiting publicly funded legal assistance to exceptional and deserving cases…[82]

3.79 According to LCA, a further financial incentive for grouped applications was that, in the event of failure, the applicants are liable for the other party's costs, and a class action spreads that liability.[83]

3.80 DIMA claimed that most applicants to the Federal Court for review of migration decisions had their filing fees waived. In addition, according to DIMA, "many" applicants were self-represented and therefore did not incur legal practitioner's fees.[84]

3.81 Against this it was argued that there was a de facto cost barrier because an unsuccessful litigant could be liable for the defendant's costs. The Commonwealth, the defendant in class actions, seldom waives its costs that average approximately $77,000 for each class action. Its average litigation cost per individual case is $10,000. The prospect of bearing the defendant's cost would be more of a deterrent to an individual than to a group.[85]

---

79 HREOC, Submission, p. 13; ECC, Submission, p. 28; RILC, Submission, pp. 39-40; LCA, Submission, p. 76; IARC, Submission, p. 106; FAR, Submission, p. 139.

80 DIMA, Submission, p. 82.

81 ECC, Submission, p. 28; LCA, Submission, p. 75; DIMA, Submission, pp. 215-216 indicates that Legal Aid "continues to be available for matters where there are differences of judicial opinion…or where proceedings seek to challenge the lawfulness of detention".

82 DIMA, Submission, p. 216.

83 LCA, Submission, p. 82.

84 DIMA, Evidence, p. 6.

85 DIMA, Submission, p. 218. LCA, Evidence, p. 117 cites Commonwealth costs ranging upwards from $10,000 for a single action.

3.82 The Committee was unable to reach a firm conclusion in relation to the affordability issues because it could not obtain data on the financial costs to individuals seeking judicial review through a class action. However, the Committee considered that class actions would involve some initial cost to the applicant and even a small expense would deter or preclude some potential applicants. The Committee therefore considered that the cost barrier argument for the retention of class actions was not decisive.

Monitoring of the review process

3.83 LCA argued that, under the Bill:

- generalised administrative actions which might be unlawful would be more difficult to challenge; and
- the knowledge that appeals would have to be launched by individuals would provide less incentive for the administration to remedy shortcomings.[86]

3.84 The Committee noted the concerns of LCA, but also noted that avenues remained open through which to test administrative decisions, namely through individual judicial review and test cases in particular.

Commonwealth costs

3.85 LCA claimed that class actions reduced the Commonwealth's legal costs by reducing the total number of court cases required to be heard and defended.[87]

3.86 DIMA informed the Committee that in the three-year period between January 1997 and December 1999, there were 10 class actions for which the average cost was $77,000.[88] Individual cases cost DIMA an average of $10,000.[89] These figures include the cost of running the DIMA litigation and include fees paid to external solicitors and barristers, and the costs of the Department's litigation case officers (including salary, office, administrative and travel costs).

3.87 DIMA also indicated the most expensive class action could cost fifteen times that of an individual action.[90]

86 LCA, Submission, p. 76.
87 LCA, Submission, p. 77.
88 DIMA, Submission, p. 282.
89 DIMA, Submission, p. 218.
90 DIMA, Submission, p. 218.

3.88 Submissions from IARC, Mr Bliss, and ACBC claimed that the restriction on class actions would increase DIMA costs as individual cases proliferated.[91]

3.89 When considering arguments concerning the effect of the Bill on the efficiency of the courts (see above), the Committee was not convinced that limiting class actions would result in a significant increase in individual actions.

3.90 The Committee, however, found it significant that the Explanatory Memorandum for the Bill was equivocal concerning its financial impact. It said that, depending on what effect the amendments have on applications for judicial review,

> broad costs to the Commonwealth…may be reduced. However…there may be an increase in litigation costs.[92]

3.91 Similarly, DIMA was unable to say categorically whether barring class actions would, or would not, save money.[93]

3.92 The Committee had no basis on which to estimate how many individuals might pursue individual appeals in the absence of class actions. However the Committee used the DIMA data on costs to estimate how many individual actions might have been contested for the total cost of the class actions between January 1997 and December 1999. The total cost of class actions covering 4,458 individuals over that period was approximately $770,000.[94]

3.93 In contrast, the average cost of an individual action was $10,000. At that cost per individual action, the expenditure on contesting 77 individual cases would have been $770,000 (the same as the expenditure on class actions covering 4,458 individuals). This suggested to the Committee that if more than 78 (ie 1.7 per cent) of the participants in class actions had pursued their cases individually, the cost to the Commonwealth would have exceeded the actual expenditure on class actions.

3.94 The Committee therefore considered that there was merit in the argument that retaining class actions would be more economical than restricting them.

3.95 Against this, DIMA claimed that although in class actions:

---

91 IARC, Submission, p. 106; Bliss, Submission, p. 130; ACBC, Submission, p. 146.

92 *Explanatory Memorandum*, p. 2.

93 DIMA, Evidence, pp. 8, 20; Submission, p. 218.

94 DIMA, Submission, p. 282 indicates the average cost for each of ten class actions was approximately $77,000, ie a total cost of $77,000 x 10 = $770,000.

> …there are cheaper costs per individual…However, that is not the only determinant of the public policy issues.[95]

3.96 The Committee drew attention to the potential for the Commonwealth's migration litigation costs to increase as a consequence of restricting access to class actions.

Equity

3.97 HREOC considered that those who would be precluded from class actions by the section and who decided to proceed with individual actions would be disadvantaged because they:

- were unfamiliar with appeal and court procedures; and
- faced a language barrier.[96]

3.98 The Committee believed that these were perennial problems in the justice system. Because they were not issues which would arise uniquely from the removal of access to class actions, they did not provide strong arguments for the retention of class actions.

Alternative proposals

3.99 The Committee also noted suggestions for alternative approaches to perceived abuse of class actions and considered a range of proposals including:

- clear identification of abuses;
- elimination of bridging visas;
- the need for better advice for applicants for judicial review;
- better filtering of cases; and
- increased use of test cases.

Identification of 'abuse'

3.100 RILC and LCA urged that the abuses claimed as justification for the Bill should be clearly identified.[97]

---

95 DIMA, Evidence, p. 174.

96 HREOC, Submission, p. 13.

97 RILC, Submission, p. 33; LCA, Submission, p. 87.

3.101 The Committee noted that the information provided to it by DIMA indicated the use of class actions for purposes other than the pursuit of judicial review. However, it also noted that the DIMA evidence indicated that detailed examination of the individuals in class actions had not been undertaken systematically, apparently because of the volume of applications.[98] This meant that its data were only indicative, rather than conclusive evidence of the scale of apparent abuse.

3.102 The Committee considered that it was unlikely that reliable evidence could be gathered concerning individuals' motivation for joining class actions.

3.103 Nevertheless, the Committee noted that joining a class action gave bridging visas to persons who were in Australia without appropriate authority. This benefit was itself an invitation for some to pursue litigation. Further, the fact that many class action participants had not been subject to the visa decision being appealed and/or had not applied for review in the time allowed, also strongly suggested to the Committee that class actions were being used for purposes other than a resolution of the claimed substantive issue.

Elimination of bridging visas

3.104 One solution to the use of the class action in order to obtain a bridging visa would be to eliminate that visa. The visa was devised in order to permit individuals engaged in litigation to remain in the community, rather than being detained.[99] DIMA pointed out that, if there were no bridging visas, section 189 of the *Migration Act 1958* requires that persons without visas be detained. A practical impediment to taking that action was that Australia lacked facilities to house the estimated 8,000 involved in class actions if their bridging visas were removed.[100]

3.105 The Committee considered that if it was true that some individuals pursued a class action solely to obtain a bridging visa to remain in Australia and work illegally, the attractiveness of pursuing a class action for that purpose would be lessened if the person were in detention.[101] The number of potential detainees might, therefore, not be such as to overload Australia's detention capacity, which is currently being expanded.

98 DIMA, Evidence, pp. 20, 282.

99 DIMA, Submission, p. 49.

100 DIMA, Evidence, p. 19.

101 DIMA, Evidence, p. 5, indicates that an unspecified number want to stay because they want to work.

3.106 However, the Committee considered that removal of the bridging visa was not appropriate. It would increase the numbers of people unlawfully in Australia against whom action would have to be taken, thus increasing Commonwealth costs.

Better advice

3.107 Poor, or poorly prepared, individual cases going forward were seen as contributing to the courts' workload. This was one of the concerns underlying the proposed section 486B. A number of suggestions were made in connection with improving the quality of the advice available to applicants, with the aim of minimising this problem.

3.108 Both RILC and ACBC mentioned closer regulation of the activities of migration agents or solicitors with a view to reducing the apparent exploitation of the migration process.[102] This would be in line with an earlier recommendation by the Committee that the migration agents' registration body:

> be proactive in monitoring the activities of migration agents…including advertising.[103]

3.109 The Committee was disappointed that the MARA representatives giving evidence were apparently unaware of advertisements inviting individuals to join in class actions, such as those cited by DIMA.

3.110 DIMA advised the Committee that:

> There is the concern with the conduct of some members of the legal profession in relation to how they promote class actions…
>
> The Australian Law Reform Commission has made recommendations in relation to the operation… and we are in the process of going to the Attorney-General's Department and notifying it of the outcome of the Law Society's investigation.[104]

3.111 LCA and NCCA suggested the restoration of legal aid funding so that applicants are better advised about the merits of their case, and better represented if they proceed.[105]

3.112 The Committee's view was that this had the potential to greatly increase the costs to the Commonwealth, and did not support it.

---

102 RILC, Submission, p. 40; ACBC, Evidence, p. 100.

103 Joint Standing Committee on Migration, *Protecting the Vulnerable?*, 1995, p. xlii.

104 DIMA, Evidence, p. 184.

105 LCA, Submission, p. 87; NCCA, Submission, pp. 114-116.

Better filtering of cases

Prior to court

3.113 DIMA claimed that some class action members were using class actions to delay removal. It argued that evidence of this was the fact that many class action members had not sought review of decisions affecting them within the allowed time. The overwhelming majority of applicants in class actions had not made an appeal to the High Court within the 28-day time limit applicable to appeals to the Federal Court.[106]

3.114 The Committee examined whether this perceived abuse might be addressed by imposing a time limit on joining class actions, rather than by restricting access to class actions themselves.

3.115 The Committee considered that the current delays by applicants in appealing for High Court judicial review resulted from the lack of a set time limit. Consequently, if a time limit was imposed, the Committee expected that applicants would attempt to meet it.

3.116 The Committee therefore concluded that the imposition of a time limit would not serve to significantly filter the perceived abuses.

By the courts

3.117 RILC and LCA suggested to the Committee that class actions could be kept, and their potential for abuse minimised, by requiring that the court give permission for each action to be brought (a 'special leave' provision). This would enable the court to exercise a closer oversight of the merits of issues involved early in the proceedings.[107]

3.118 DIMA contended that a 'special leave' provision:

> …could effectively double the number of hearings before the Federal Court, thus increasing costs and delay.[108]

3.119 The Committee considered that creating a new avenue of appeal by the courts would be at odds with the overall intent of the Bill, which was to limit the role of judicial review.

More use of test cases

3.120 DIMA emphasised that the proposed changes did not remove access to test cases as a means of deciding numerous similar appeals.[109] DIMA

106 DIMA, Submission, p. 210.

107 RILC, Submission, p. 41; LCA, Submission, p. 87.

108 DIMA, Submission, p. 220.

stated that often the Court will determine that several cases could be delayed pending the outcome of a specific 'test' case. Usually this involves the consent of both the applicant involved and the Department. If the applicant does not agree to have their application stood over pending the outcome of another case, the court can still stand a matter over.[110] The court may also decide that the issue subject to the test case is not the only issue relevant to an applicant's case, and decide not to stall it until the resolution of the test case.

3.121 DIMA stated that it has a vested interest in identifying cases with a common issue so that a larger number of cases can be resolved through one test case. DIMA indicated that it was well placed to identify potential test cases and persons who may be affected by them. DIMA stated that they had:

> …a single litigation centre in the department, if the applications are lodged in different registries of the court, for example—some in Melbourne, some in Sydney, some in Brisbane— registry offices of the court may not be aware that what is happening in Sydney is also happening in Melbourne…whereas, of course, the minister as respondent to the action, with a single centre of legal handling and advice in Canberra, may become aware of what is happening in the various centres.[111]

3.122 The identification of test cases would not reduce the number of applications to the courts, as each person affected by a test case must put in separate and individual applications. As such there might not be a reduction in the initial caseload of the courts. But, as the courts would suspend all related cases pending the outcome of the test case, the Committee considered that this would represent an increased efficiency in handling the courts' workload.

3.123 The Committee observed that test cases did not carry the risk of perceived widespread abuse attached to class actions. There is no joining of common actions in a test case, and each person's case is an individual and discrete application. In order to be covered by a test case, an individual had to have commenced proceedings. They were therefore required to show that the test case was applicable to their individual circumstances,[112] unlike a class action.

---

109 DIMA, Submission, p. 216.

110 DIMA, Submission, p. 277.

111 DIMA, Evidence, p. 172.

112 LCA, Evidence, p. 115.

3.124 Having commenced proceedings they could obtain a bridging visa to permit them to stay to gain any benefit from the outcome, as was the case with the class action.[113]

3.125 In the Committee's view, test cases appeared comparable to class actions in that they may be an effective means of reaching decisions relating to issues which a number of applicants had in common.

Conclusions

3.126 It is clear that the incidence of class actions in the migration jurisdiction is increasing.

3.127 The Committee found that the main arguments against limiting class actions fell into the following areas:

- Australia's international obligations (see Chapter 2);
- enhanced judicial review and the efficient use of court's time; and
- cheaper access to review for applicants.

3.128 The Committee concluded that:

- it had not been convincingly demonstrated that removal of class actions would breach Australia's international obligations (see Chapter 2);
- judicial review of migration matters would be retained under the Bill, as would the ability of individuals to pursue such review;
- financial benefits could exist for some, but not all, possible litigants;
- a significant number of applicants were using the process to extend their stay in Australia and that there was sufficient evidence of abuse of class actions to merit legislative action;
- some migration agents and lawyers were exploiting the procedure;
- some applicants were joining class actions without full awareness of the details of the case;
- class actions gave false hope for genuine applicants unaware that the case would not affect their individual decision; and
- judicial review would still be available to applicants through the lodgement of an individual appeal.

113 One of the criteria for obtaining a bridging visa is that the applicant for the visa is pursuing a court action as an individual. DIMA, Evidence, pp. 170-171.

3.129 Further, the Committee considered test cases were a legitimate way for applicants to pursue a common issue through judicial review.

3.130 However, the Committee was concerned by claims that the Bill may exclude test cases through poor drafting.[114]

Recommendation 1

3.131 **The Committee recommends that restriction of access to class actions in the migration jurisdiction, as set out in the Bill, be enacted.**

Recommendation 2

3.132 **The Committee recommends that, in view of the alleged unintended consequences of section 486B, the section be reviewed to clarify:**

- **that test cases are not precluded; and**
- **multiple party actions in other jurisdictions are not affected by the Bill.**

Recommendation 3

3.133 **The Committee recommends that DIMA:**

- **actively examine judicial appeals to identify issues in common which may be resolved through test cases;**
- **be proactive in seeking resolution of issues through test cases; and**
- **publicise the test cases to maximise the number of applicants to be bound by the outcomes, and thus use the courts efficiently.**

114 LCA, Evidence, p. 116.

Recommendation 4

3.134 **The Committee recommends that the activities of migration agents be brought under closer continuing scrutiny by DIMA and the Migration Agents Registration Authority.**