

‘Standing’ (section 486C)

The concept

- 4.1 ‘Standing’ is the entitlement of a person or organisation to bring a judicial review action to challenge administrative action which is justiciable or to bring a merits appeal.¹

Background

- 4.2 Currently, any person can apply to the Federal Court for a review of a migration decision or of a failure to make a decision. This means that it is possible for individuals to commence actions on issues which do not necessarily have a bearing on their own circumstances. DIMA cited the *Fazal Din* and *Capistrano* cases as examples of class actions in which many participants would not benefit from the outcome (although they could qualify for a bridging visa while they were parties to the case).²
- 4.3 The Bill, through the proposed section 486C, intends to close off this style of appeal by limiting the ‘standing’ of persons commencing or continuing actions in the Federal Court in migration cases. The aim of the section is, in brief, to limit access to judicial review to those who stand to benefit from the outcome of the review.

1 *Butterworths Encyclopaedic Australian Legal Dictionary* (<http://online.butterworths.com.au>).

2 DIMA, Submission, p. 53.

Proposed provisions

- 4.4 The person's 'standing' is to be assessed against two requirements:
- the interest of the person in the proceedings; and
 - the issue involved.
- 4.5 The Bill's definition of those who come within the proposed new section 486C is detailed. In effect, to bring an action concerning a particular issue, the applicant has to be the subject of that issue.³
- 4.6 A further limitation of the proposed arrangements pertaining to 'standing' is that the person must have a 'relevant issue' to raise with the court.
- 4.7 Subsection 486C(1) requires the person's proceedings (in the Federal Court only) to raise a 'relevant issue', defined as an issue:
- in connection with -
 - ⇒ visas (including if a visa has been not granted or cancelled);
 - ⇒ deportation; or
 - ⇒ removal of unlawful non-citizens
 - and which relates to -
 - ⇒ the validity;
 - ⇒ interpretation; or
 - ⇒ effectof a provision of the Act or regulations.

Concerns

- 4.8 The proposed changes to the 'standing' of persons attracted limited comment, which related to:
- uncertainty about status of proceedings;
 - lack of justification; and
 - exclusion of legitimate claims.

3 DIMA, Submission, p. 54.

Uncertainty

- 4.9 LCA argued that the proposed changes to the arrangements relating to 'standing' would create three separate types of litigants because of the imposition of a cut-off date of 14 March 2000. There would be those who:
- were covered by existing rules because they commenced proceedings before that date;
 - those who receive a substantive hearing before the new rules are proclaimed; and
 - those who commenced proceedings after 14 March 2000.
- 4.10 LCA's view was that such a variety of arrangements would make it difficult to advise applicants during the transition from the old to the new rules, a situation exacerbated by the need to clarify what constituted a 'substantive hearing'.⁴
- 4.11 The Committee considered that these issues were not unique to the Bill and were not significantly different from issues which could be expected to arise whenever legislation encompassed a transition stage.

Justification

- 4.12 LCA commented that no justification was advanced for the imposition of the limited range of 'relevant issues' under subsection 486C(1),⁵ but did not comment further on this issue.
- 4.13 In its submission, DIMA explained that the intention was to ensure that all legal challenges in migration matters conformed to the existing section 479 of the *Migration Act 1958*, whereby, only people who may benefit from the ultimate outcome of the matter may bring a challenge in the Federal Court.⁶

Exclusion

- 4.14 Both ECC and LCA informed the Committee that the proposed provisions relating to 'standing' would prevent applications on that person's behalf by Australian friends or relatives.⁷ In evidence, the LCA also pointed out that solicitors, too, might be precluded from lodging a claim for a person held *incommunicado*.⁸

4 LCA, Submission, p. 83.

5 LCA, Submission, p. 82.

6 DIMA, Submission, p. 54.

7 ECC, Submission, p. 28; LCA, Submission, p. 79.

8 LCA, Evidence, pp. 122-123.

- 4.15 An example provided in the submission from RILC suggested other circumstances where an application on behalf of a person might be crucial. RILC cited the case of an asylum seeker transferred to a detention facility in preparation for his removal. An injunction by the High Court prevented their removal, and they were subsequently determined to have refugee status.⁹
- 4.16 DIMA assured the Committee that it was not their policy to remove an applicant whilst they have proceedings before the Federal or High Court.¹⁰
- 4.17 The evidence provided to the Committee about this case indicated that the person in question already had access to legal assistance, so the proposed changes to ‘standing’ would have had no effect on the case.
- 4.18 LCA identified two concerns:
- persons... being held incommunicado at airports and who face immediate turn-around would have no access to the Courts... [to] challenge their visa cancellation and detention;
- and
- there have been a number of cases...where applications lodged on behalf of people detained at point of entry have prevented the removal of people who were found subsequently to be genuine refugees.¹¹
- 4.19 Under the proposed ‘standing’ arrangements, such persons could apply for judicial review, but no application could be made on their behalf unless the person had specifically authorised someone to do so.
- 4.20 DIMA confirmed that the ‘standing’ provisions would prevent applications from:
- people who are not representing an individual...but doing it of their own volition...it has to be a person who is directly affected.¹²
- 4.21 In relation to arranging the necessary representation while in custody, DIMA advised the Committee that if an individual asks to see a lawyer, DIMA is obliged to facilitate access to legal representation or advice.¹³ The proposed ‘standing’ provisions therefore would not prevent applications by those directly representing a person in custody.¹⁴

9 RILC, Submission, pp. 38-39, more details are cited in Chapter 7.

10 DIMA, Submission, p. 217.

11 LCA, Submission, p. 79.

12 DIMA, Evidence, p. 24.

13 DIMA, Evidence, p. 23.

14 DIMA, Evidence, p. 24.

Conclusions

- 4.22 The Committee noted the concern that the proposed changes to 'standing' might possibly adversely affect a small number of persons with potentially valid claims to refugee status who are being held incommunicado, and those refused entry.
- 4.23 The Committee noted that those claiming refugee status on arrival were not refused entry without a test of their bona fides. The Committee also noted that access to legal advice, which could enable action on a person's behalf, could be achieved by asking.
- 4.24 In view of those arrangements, the Committee considered that the issues raised related more to the question of the level of assistance which should be provided to those wishing to come to Australia, rather than to the proposed 'standing' changes. That question is outside the scope of this review.
- 4.25 The Committee supported the aim of the proposed changes to 'standing', which is to ensure that only those who may benefit from the ultimate outcome may bring a challenge in the Federal Court.

Recommendation 5

- 4.26 **The Committee recommends that the 'standing' arrangements in the proposed section 486C be proceeded with.**

