Dissenting Report: Opposition and Democrat Members of the Committee

Introduction

Opposition Members and the Democrat Member of the Committee welcomed the Inquiry into the Migration Legislation Amendment Bill (No. 2) 2000 ('the Bill') and the opportunity it provided to test, in the public arena, a number of theories that have been promoted about how the System of Judicial review, in particular 'class and / or representative actions' was being abused and being used to simply delay a person's departure from Australia. Evidence to support or prove the theories was not presented to the Inquiry and it is for these reasons that the Opposition and Democrat Members of the Committee dissent from the recommendation (No. 1) that the restriction of access to class actions in the migration jurisdiction be enacted.

Class actions are an important avenue through which migration decisions can be challenged. They offer equity and efficiency. Equity comes from low costs to individuals which permits access to the courts by those who might otherwise be deterred by cost. The courts are used efficiently because they are able to resolve multiple claims at one hearing, rather than being required to make many individual judgements. Therefore restriction of access to class actions, as proposed in the Bill, should only be contemplated if there are compelling arguments for such restrictions.

If those compelling arguments exist (we note that they were not provided to this Inquiry), Opposition and Democrat Members are prepared to further examine them. We further note that even the Government Members of the Committee accept that compelling evidence is not available.

The Government Members state at 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.*

The Government Member's conclusion at 3.49 is telling:

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

Government Members further concluded at 3.101:

> *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. This meant that its data were only indicative, rather than conclusive evidence of the scale of apparent abuse.*

The Government Members concluded that class actions were not an abuse of the system, that the process could be abused and that the level of abuse was not quantified. They accept that inadequate research had been done which produced indicative figures. Yet they recommend that the Parliament remove an efficient, low cost and equitable avenue of review from the statute books. If the system is being abused surely it is possible, with all the resources available to Government, for that abuse to be quantified or measured. In this circumstance it is irresponsible for Government Members to recommend that the Bill be passed, when they recognise for themselves that the evidence of abuse is just not available.

In arriving at our conclusions, we were mindful that the Migration Legislation Amendment (Judicial Review) Bill 1998 is listed on the Senate Notice Paper. This Bill seeks to further restrict access to judicial review in migration matters by inserting a Privative clause in the Migration Act. This Bill was first introduced to the Parliament in 1997, as the Migration Legislation Amendment Bill (No. 5) 1997, but it lapsed when the Parliament was prorogued for the 1998 Election. The Bill was reintroduced, early in the life of the new Parliament (December 1998)[1], where it was the subject of an Inquiry by the Senate Legal and Constitutional Legislation Committee. The Senate Committee reported in April 1999.[2]

The grounds for our dissent from the recommendation that access to class actions be restricted are outlined below; and then discussed in more detail.

---

1 See "Passage History" in Department of the Parliamentary Library, *Bills Digest* No. 90 1998-99, Migration Legislation Amendment (Judicial review) Bill 1998.

2 Senate Legal and Constitutional Legislation Committee, *Report on the Consideration of the Migration Legislation Amendment (Judicial Review) Bill, 1998*, April 1999.

Basis of dissent

The basis for dissent is that the evidence presented to the Committee did not categorically support restrictions on access to class actions in migration matters. Specifically:

- the key rationale advanced for the class action provisions of the Bill could not be sustained;
- there was no firm evidence of the claimed abuse of the process which is the rationale for restricting access;
- there was no indication that alternatives to the proposed legislative solution had even been considered;
- other options might be pursued if there is indeed abuse of process;
- the potential impact of the changes on the courts was not sufficiently addressed; and
- there was conflicting evidence about the cost implications of the proposed change.

Key rationale not sustained

The key argument for restriction of access to class actions was made in Minister Ruddock's second reading of the Bill:

> The changes in this Bill are necessary to combat the recent use of class actions…for people with no lawful authority to remain in Australia to prolong their stay and frustrate removal action.

The evidence cited was that:

> 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.

This implied that the primary motivation for the class actions was to obtain a bridging visa.

The Minister further claimed that:

> all 10 of the class actions decided so far…have been dismissed by the courts.[3]

3 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.

This implied that class actions had been shown to have no merit, and that their purpose was simply being used to obtain a bridging visa to remain in the country, rather than to resolve a point of law.

However, contrary to the claim that no class actions had succeeded, the Law Council of Australia (LCA), the National Council of Churches of Australia (NCCA), and the Refugee Council of Australia (RCA) identified *Fazal Din* and *Lay Kon Tji* as actions upheld by the Federal Court.[4] In addition LCA pointed out that the courts had conceded the significance of the issues raised in class actions which had not succeeded.[5]

The NCCA argued that the failure of a case could not be taken as proof of abuse. It could simply reflect poor legal advice rather than a lack of intrinsic merit in the case.[6]

The Refugee and Immigration Legal Centre (RILC), the Immigration Advice and Rights Centre (IARC), NCCA, and the International Commission of Jurists (ICJ) noted that the courts already have mechanisms for filtering and dismissing abusive or vexatious applications,[7] and LCA commented that the courts had not described any of the unsuccessful class actions as abusive.[8]

This evidence is telling, and is sufficient to cast doubt on the central arguments advanced by the Minister for restricting access to class actions as proposed by the Bill.

Abuse of process not proven

The Department of Immigration and Multicultural Affairs (DIMA) offered supplementary arguments to support the need to restrict access to class actions. It argued that abuse of the system existed because:

- some of those involved in class actions would gain no benefit from a positive outcome;[9]
- people had not made applications to the Federal Court in relation to their own visa decision within the time permitted;[10]
- some applicants were unaware that they were part of the class action;[11]

4 NCCA, Submission, p. 115; RCA, Submission, p. 133; LCA, Submission, p. 76.

5 LCA, Submission, p. 76.

6 NCCA, Submission, p. 116.

7 RILC, Submission, p. 40; IARC, Submission, p. 105; NCCA, Submission, p. 114; ICJ, Submission, p. 164.

8 LCA, Submission, p. 76.

9 DIMA, Submission, p. 53.

10 In a 50% sample of *Macabenta* participants, one quarter had their last visa decision 3 years prior to joining the class action: DIMA, Submission, p. 54.

- a number of members of class actions move from class action to class action;[12] and
- press advertisements indicated the potential for abuse through the claims that -

> 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.[13]

This evidence indicated a potential for exploitation of the class action process. However, it did not prove that there was such widespread abuse as to require the legislative action proposed in the Bill.

Lack of alternatives to the Bill

DIMA offered the above as evidence to the Committee that there was a variety of potential ways that the class action process could be abused. However, they offered only one remedy to address the problem, the classic sledgehammer to crack a nut solution, that of restricting everybody's access to class actions.

If other remedies were considered and rejected, these were not brought to the Committee's notice. Yet the variety of alleged abuses identified indicates that there could be a range of more focussed approaches to the problems, rather than the blanket restriction of access proposed in the Bill.

Alternate remedies

The Bill's proposal to restrict access to class actions is aimed at the applicants, that is, those most likely to be seeking redress through the courts. This may not be the most appropriate solution, or even an appropriate solution.

More accessible legal advice

As NCCA pointed out, the lack of merit in some actions may reflect an absence of legal advice, rather than a decision to exploit the review process.[14] In such cases, it could be argued, better access to early legal advice could prove a more appropriate response than the Bill's aim of restricting access to class actions.

Better access to lawyers and ethical migration agents would enable applicants for judicial review to obtain professional advice on the avenues of appeal and the prospects of their particular case.

---

11 DIMA, Submission, p. 52.

12 DIMA, Evidence, p. 3.

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

14 NCCA, Submission, p. 116.

Better access to professional advice would also address the existing concern of the court about:

> paying the Minister's solicitor and counsel to respond to hopeless applications and paying the judge to decide them.[15]

Improved legal advice

However, the Committee was told that the advice provided was not always appropriate. According to DIMA, some individuals involved in class actions were unaware of the process in which they had become participants, and it was unclear what advice they had been given.[16]

RILC commented on this issue, indicating 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.[17]

In this context, it should be noted that the press advertisements that were presented to the Committee by DIMA demonstrated that not all those offering to assist with litigation appear to focus on the merits of individual's cases.

The Committee received submissions and heard evidence from two relevant peak bodies, the Law Council of Australia (LCA),[18] and the Migration Agents Registration Authority (MARA) which has statutory responsibility for certain aspects of the regulation of the migration advice industry.[19]

Whilst both bodies commented on the advertisements, MARA initially indicated to the Committee that they were not aware of them. In evidence, LCA stated that:

> …there are other mechanisms by which the practitioners that are involved in that kind of behaviour could be advised that they ought to tone it down or they ought to desist in that kind of behaviour. The proper reaction is to deal with those matters on a case-by-case basis, not to obliterate the access to that kind of litigation… there exists such things as migration agents' codes of conduct and committees that are set up to supervise the activities

15 Quoted in: NCCA Submission, p. 114.

16 DIMA, Evidence, p. 185.

17 RILC, Submission, pp. 40-41.

18 LCA is concerned with the legal profession as a whole, not limited to practitioners or advisers in migration law. It aims to (a) represent the legal profession at the national level; (b) promote the administration of justice, access to justice and general improvement of the law; and (c) advise governments, courts and other federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. (LCA website: www.lawcouncil.asn.au)

19 Including (a) monitoring the conduct of registered agents in their provision of immigration assistance and of lawyers in their provision of immigration legal assistance; and (b) investigating complaints about registered agents in relation to their provision of immigration assistance. MARA, Submission, p. 234.

> of migration agents, and the bodies that regulate the legal profession… recourse is currently available to regulate those kinds of activities.[20]

The performance of MARA, the body that is responsible for monitoring the conduct of registered agents, should be of grave concern to Government and the migration advice industry in general. Their representatives were unaware, at the public hearings on 30th May 2000, of the advertisements that had been referred to it in October 1999 by DIMA.[21] In a supplementary written submission to the Committee,[22] following its appearance before both this Committee and the Senate Legal and Constitutional Affairs Committee in Estimates hearings,[23] MARA admitted that the advertising material had in fact been previously referred to it by the Department.

The Committee, at 3.109, has recorded its disappointment with MARA in this regard. Opposition Members of the Committee agree, and we look forward to some announcement, in the near future, by Minister Ruddock on the performance and operational abilities of this regulatory body.

Improved oversight of practitioners

Rather than restrict access to class actions to correct perceived abuses, NCCA argued that:

> an examination of the practices of some agents and practitioners, and the ability of asylum-seekers to obtain good quality legal advice and assistance would improve the quality of cases appearing in the Federal Court.[24]

RILC reached a similar conclusion that:

> the obvious way for the Government to deal with what it considers to be abusive applications, is to make complaints against the practitioners who encourage people to join class actions which have no argument or merit…the answer is not to abolish right of applicants, the answer is to put resources into professional bodies that are able to more effectively monitor and regulate the ethics of the legal and migration agent professions.[25]

These suggested remedies to perceived abuses indicate that there are alternatives to the Bill's proposal to restrict access to class actions.

---

20 LCA, Evidence, p. 126.

21 MARA, Evidence, p. 136; Submission, pp. 201-202.

22 MARA, Submission, pp. 246-247.

23 Senate Legal and Constitutional Legislation Committee, Consideration of Budget Estimates, Canberra, Wednesday 31 May 2000.

24 NCCA, Submission, p. 114.

25 RILC, Submission, pp. 40-41.

It is quite clear that something more needs to be done to monitor and regulate the migration advice industry. During the course of this Inquiry, MARA has proved itself to be lacking and not up to reasonable expectations.

Effect on the courts

Numerous submissions argued that restriction of access to class actions would have a negative effect on the court system. IARC, Mr Bliss, RCA, RILC and the Australian Catholic Migration and Refugee Office (ACMRO) claimed that 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.[26]

DIMA contested this interpretation. It argued that:

- fewer individuals were inclined to take individual actions than to pursue class actions;[27] and
- most applicants for class actions had already exceeded the time during which they could have appealed as individuals, and consequently would not be eligible to pursue their case individually.[28]

The DIMA evidence relates to the actions of applicants when they have the possibility of using a class action. It is, therefore, not necessarily an adequate predictor of what they might do if the passage of the Bill restricted access to class actions. More applicants might pursue actions as individuals than do currently, and in a more timely fashion. If this occurred there would be an increased caseload for the courts, with a consequent negative effect on their operations.

Cost implications

The uncertainty about the possible effect of the Bill on the courts' workload has produced a similar lack of clarity about the financial cost and savings to Government of the proposed restriction of access to class actions. The *Explanatory Memorandum* for the Bill stated that:

> broad costs to the Commonwealth…may be reduced.
> However…there may be an increase in litigation costs.[29]

DIMA representatives were confused on the issue and could not say whether or not there would be any savings as a result of the passage of the Bill.[30]

---

26 IARC, Submission, p. 106; Bliss, Submission, p. 130; RCA, Submission, pp. 132-133; RILC, Evidence, pp. 30, 37; ACMRO, Submission, p. 146. (ACMRO is referred to as ACBC in the Report)

27 DIMA, Submission, p. 210.

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

29 *Explanatory Memorandum*, p. 2.

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

However, Mr John Matthews, Assistant Secretary of the Legal Services and Litigation Branch of DIMA told the Committee at its first public hearing:

> I think there would probably be substantial savings for the Government. Class actions tend by their very nature to be far more complex beasts to manage and to run because of the special provisions that apply to them. There are notices and opting out and the general management of them. They take longer and they are more complex. With litigation, the longer something is on foot and the more steps and processes involved, the more expensive it is.[31]

At the same hearing, the Assistant Secretary of the Visa Framework Branch of the Department, Mr Doug Walker said:

> When we were analysing this proposal, we felt there would be overall probably fairly minor savings, if any savings at all.[32]

IARC, Mr Bliss, and ACMRO argued that Commonwealth costs would increase as individual cases proliferated.[33] DIMA, in response, stated that cost:

> …is not the only determinant of the public policy issues.[34]

It is noted that the Committee concluded at 3.94:

> *that there was merit in the argument that retaining class actions would be more economical than restricting them.*

At 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.*

The Committee was unable to reach firm conclusions on the affordability issues because it could not obtain data on the financial costs to individuals seeking judicial review through a class action.[35] Amazingly the majority still recommends that the right to engage in a class action in a migration matter be removed.

Conclusion

Opposition and Democrat Members of the Committee maintain that access to class actions should be retained because they are an equitable, economic and efficient

31 DIMA, Evidence, p. 7.

32 DIMA, Evidence, p. 12.

33 IARC, Submission, p. 106; Bliss, Submission, p. 130; ACMRO, Submission, p. 146.

34 DIMA, Evidence, p. 174.

35 See above, para 3.82.

avenue through which migration decisions can be challenged. Access to class actions should therefore not be restricted without good and convincing reasons.

Opposition and Democrat Members of the Committee have examined the arguments and evidence advanced for restricting access to class actions and have not found them convincing. We are prepared to examine any evidence of abuse and we will always act to curb or stop abuse when it is proven to be happening. The evidence was not presented on this occasion.

We are also very concerned that alternatives to the restriction of access to class actions have apparently not been canvassed.

We are concerned that the likely effects on the courts and on Commonwealth expenditure were not fully examined before the Bill was introduced.

We are supporting some of the Government's initiatives in this Bill but for all of the above reasons we dissent from the Government Members' recommendation (No. 1) that access to class actions be restricted.

Opposition and Democrat Members of the Committee concur with the finding that section 486B be clarified to ensure that test cases are not inadvertently excluded by the passage of this Bill. We agree that all Members of the Committee should be suspicious of the Government's initiatives in this area.

Dick Adams MP (ALP)	Julia Irwin MP (ALP)	Bernie Ripoll MP (ALP)
Member for Lyons	Member for Fowler	Member for Oxley

Senator Jim McKiernan	Senator Andrew Bartlett
Labor Senator for Western Australia	Democrat Senator for Queensland