

**IMMIGRATION ADVICE AND RIGHTS CENTRE INC**

**SUBMISSION TO THE JOINT STANDING COMMITTEE**

**ON MIGRATION**

**Migration Legislation Amendment Bill (No. 2) 2000**

About Immigration Advice and Rights Centre

The Immigration Advice and Rights Centre (IARC) is a community legal centre specialising in the provision of advice, assistance, education, training, and law and policy reform in immigration law. We provide free and independent advice to almost 4,000 people each year and a further 1,000 people attend our education seminars annually. We also produce "The Immigration Kit", a practical guide for immigration advisers. Our clients for whom we provide on-going assistance are low or nil income earners, frequently with other disadvantages including low level English language skills.

IARC was established in 1986 and since that time we have developed a high level of specialist expertise in the area of immigration law. We have also gained considerable experience of the administrative processes, and the review processes, applicable to persons making applications under Australia's immigration law. Since 1986 IARC has used its expertise to make contributions to legal and policy discussion and reform concerning migration issues.

1. Introduction

For the reasons following, IARC considers that the proposed prohibition on grouped actions in migration matters is counter to the principles underpinning judicial review of administrative decisions, is unwarranted, and would produce undesirable consequences in terms of cost, efficiency in administration of justice, and access to justice. We also submit that the proposed amendments to section 501A are undesirable in that they entrench and enhance Ministerial powers which are already beyond the rules of natural justice. We therefore urge the Standing Committee to recommend to the Parliament that it not support the Bill under review.

2. Schedule 1 - multiple parties in migration litigation

2.1 What are class actions?

Procedures for representative (or class) actions were introduced into the Federal Court of Australia Act on 5 March 1992. Procedures for

representative proceedings have been included in the High Court Rules since 1953. The representative actions procedures introduced into the Federal Court (Part IVA) were based on the recommendations of the Australian Law Reform Commission set out in its comprehensive report on grouped proceedings in Australia.

The procedures allow a group of people (at least 7) who have a claim against the same person arising out of similar factual circumstances and involving at least one substantial issue of fact or law in common to be represented by just one of their number in one application to the Court.

## 2.2 Policy reasons for class action procedures

Formal class action procedures achieve important policy gains, most importantly improving access to justice for persons who could not as individuals access the courts to enforce their legal rights, and also to provide cost and administrative efficiency in the process. The one legal issue, affecting numerous people, is determined in the one proceeding rather than in a multitude of similar proceedings. It is efficient in this regard and ensures fairness and consistency of result for all the persons with the same claim.

The Minister for Immigration desires to eliminate all forms of grouped or joined proceedings in the Federal and High Courts in relation to most aspects of migration law, and this is the effect of Schedule 1, Part 2 of the Bill. Indeed, as all Members of Parliament will be aware, the Minister for Immigration desires to eliminate judicial review, in any form, of most migration decisions (see the Migration Legislation Amendment (Judicial Review) Bill 1998). It is important therefore to give consideration to this Bill in the light of the Government's expressed "policy objective to restrict access to judicial review in all but exceptional circumstances".

We submit that, for the Parliament to choose to override its previously legislated intention to improve judicial processes and enhance access to justice through formalising representative actions, it would need to be thoroughly satisfied that the sound policy reasons for its earlier legislation now warrant being reversed.

## 2.3 Adequate safeguards against abuse of class actions procedures

The main reasons that the Minister gives to justify the proposed legislation is that people who are involved in class action litigation are able to stay in Australia lawfully until their case has been finally dealt with by the court. This is portrayed as an unwarranted situation on the assumption that there is no legitimate basis for seeking judicial review in the first place.

It is important to bear in mind how representative actions procedures work. Not just anyone can join a class action. Representative actions are available for members of an identifiable group of persons who must have a claim against the same person, arising out of similar fact situations, and must have a substantial issue of law or fact in common. By definition, any

member of the class has the same or similar claim as the representative and could therefore make an application individually.

The representative litigant, in whose name the action is brought, must make out a cause of action to the Court. The respondent can apply to have unfounded applications dismissed and the court can dismiss vexatious or frivolous litigation. In addition, the Federal Court has powers, on its own volition, or on the application of the respondent, to order that representative proceedings be discontinued where it is "satisfied that it is in the interests of justice to do so". The possible grounds for stopping a representative action from continuing in that form include:

"section 33N(1)

- (a) the costs that would be incurred if the proceeding were to continue as a representative proceeding are likely to exceed the costs that would be incurred if each group member conducted a separate proceedings; or
- (b) all the relief sought can be obtained by means of a proceeding other than a representative proceeding...; or
- (c) the representative proceeding will not provide an efficient and effective means of dealing with the claims of group members; or
- (d) it is otherwise inappropriate that the claims be pursued by means of a representative proceedings."

As can be seen, the legislation governing representative actions, plus the general powers of the courts to regulate matters before them, provides adequate safeguards against systematic abuse of these procedures.

In the Bill's second reading speech, the Minister argues that it is through litigation that people extend their lawful stay in Australia. In light of the above facts on representative actions, we submit that it is actually through having a legal cause of action (which prima facie has merit), a ground to appeal an unlawful administrative decision, that people extend their lawful stay in Australia.

For completeness, it is worth noting that whether a person seeks redress as a member of a class or by filing their own application, they are entitled under the regulations to a bridging visa to stay in Australia for the length of the proceedings. In neither case are they given permission to work.

#### 2.4 Access to justice, and efficiency

The fact that hundreds or even thousands of people apply to have their claims dealt with together is usually a very efficient and cost effective way of administering justice. With legal aid virtually eliminated for refugee and migration matters, there are many disadvantaged people who could never afford the enormous expense of being legally represented at the Federal Court to enforce their claim individually. As it is, many judicial review applicants are unrepresented in the Federal Court. If class actions were abolished, hundreds or thousands more individual actions may be filed by unrepresented appellants with potentially disastrous results for the courts. This would also, of course,

have huge cost consequences for the Department of Immigration's budget in responding to this blow-out in cases.

### 3. Schedule 2, Part 1 - Character Test

Section 501A, which was put into the Migration Act by Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998, gives power to the Minister to overturn a decision of the Administrative Appeals Tribunal and proceed to refuse a visa or cancel a visa.

IARC submits that the amendments contained in items 2 and 3 of Schedule 2 of the Bill should not be supported by the Parliament. They go beyond mere "technical amendments", as described, and actually entrench and expand the Minister's powers under s501A.

These powers are already extraordinary and unique to the jurisdiction of immigration law. Under the strengthened powers of the Minister for Immigration under the so-called "character provisions" of the Act, access to merits review is greatly restricted. In the limited cases where a person affected by an adverse decision can apply to the AAT for merits review, it is a travesty of the principles of administrative review that a minister of the executive government can single-handedly set aside a decision reviewing the merits, according to law, of an administrative decision. It is particularly disturbing that a decision of the Administrative Appeals Tribunal, which is required to operate according to the rules of natural justice, can be overturned by executive decision with no regard to the rules of natural justice. If, having investigated all the available evidence, the AAT finds that a person does in fact satisfy the character test, it is unjustifiable that the Minister should have power to, nevertheless, refuse a visa or cancel a visa that has been granted. This is the intended effect of item 2, and one which we strongly oppose.

The explanation for the amendment contained in item 3 of Schedule 2 is that it puts "beyond doubt that the Minister has the power to intervene at any point after a non-adverse decision under subsection 501(1) has been made by a delegate or the AAT whether intervention occurs immediately or after a decision to grant has been made." (Explanatory Memorandum)

The powers of the Minister in the circumstances covered by s501A are almost limitless. The proposed amendment would remove virtually the last remaining limit, that as to time. The action of the Minister, to refuse or to cancel a visa, can, according to this amendment, happen at any time, including at any time after a decision of the AAT and a subsequent granting of a visa by the Department. Without having to have regard to the rules of natural justice or the code of procedure set out in the Act, and contrary to all accepted notions of administrative procedure, fairness, and review, a decision of the Minister to cancel a person's visa, can fall on them, at any time, like a bolt from the blue. This, we submit, is an unacceptable and unwarranted power. The usual process where it is considered that the AAT has made an error of law is for the aggrieved party to appeal the decision to the Federal Court. This process

remains open to the Minister when he is dissatisfied with a decision of the AAT. The proposed amendment removes certainty from the review process. It erodes in an unprecedented way the precious principles of administrative law and natural justice.

## IMMIGRATION ADVICE AND RIGHTS CENTRE

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